Before the Norwegian NCP Complaint against Aker BP

Expert Opinion on the Impact of Failing to Remediate a Harm

Dr Tara Van Ho

1. My name is Tara Van Ho. I submit the following opinion as an independent expert with over 15 years of experience in the field of Business and Human Rights. I volunteered to write this opinion and am not receiving any compensation, financial or otherwise, for this submission. I have not been provided with any confidential filings from this case and write from the information provided in the public domain about the sale of Lundin assets to Aker BP.

2. I seek to assist the NCP by addressing the following three questions: (1) Does a business breach its responsibility to respect human rights when it causes or contributes to the denial of remedies by another actor? (2) Can this breach occur even if the party has not caused or contributed to the denial of another human right? (3) Can a business contribute to the denial of remedies through the acquisition of another business?

3. In short, the answers to all three questions are yes. Businesses can cause or contribute to the denial of an adequate and effective remedy in a variety of ways, including through the acquisition of another business. This is true whether the business was responsible for the initial infringement of human rights or not. It is simply impossible for a business to meet its responsibility to respect under the OECD Guidelines for Multinational Corporations, 2011 ("2011 Guidelines") when that business is involved in the denial of remedies for victims.

5. All legal instruments I refer to in this intervention were publicly available before December 2021, when Aker BP's purchase of Lund Energy assets was announced.

6. Out of respect for the NCP's time, I attempt to make this intervention as brief as possible while still providing enough details on the underpinning assumptions and standards so that I can address the nuances of the central questions. For the benefit of the NCP, I set out my credentials in paragraphs 7-10.

In paragraphs 11-18, I briefly outline the right to an adequate and effective remedy under International Human Rights Law ("IHRL").

In paragraphs 19-33, I explain how the ongoing denial of a remedy is itself an "adverse human rights impact," as that term is meant to apply under the 2011 Edition of the OECD Guidelines for Multinational Enterprises by examining the independent obligations stemming from ICCPR Article 2(3).

In paragraphs 34-39, I explain the inability of a business to meet its human rights responsibility when it causes or contributes to the ongoing denial of a right to remedy.

Links to all the primary sources utilised are provided in the List of Authorities beginning on page 8.

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My credentials

7. I am the Co-Director of the Essex Business and Human Rights Project, based at the University of Essex (U.K.). The Essex Business and Human Rights Project uses academic knowledge to further law and practice in the context of Business and Human Rights and at the intersection of international economic law and human rights. Individually and together with other scholars in the Essex Business and Human Rights Project, I have provided advice to the OSCE, OECD, UNCTAD, and the United Nations Working Group on Business and Human Rights, parliamentarians in three countries, ministers in two countries, and the social media company Twitter (before Elon Musk's purchase of the platform now known as X). Some of the guidance has been turned into academic articles or into reports that are publicly available. Other guidance remains confidential.

8. I have written 20 academic journal articles or book chapters in addition to a large number of shorter articles, commentaries, opinion pieces, editorial notes, and peer-reviewed blog posts. Many of these pieces are available on my university website (https://www.essex.ac.uk/people/v/t/vanho61805). I serve on the editorial board of the *Business and Human Rights Journal* and have been asked to provide peer review on Business and Human Rights by a range of prestigious journals including the *European Journal of International Law*, *American Journal of International Law*, and *Human Rights Quarterly*. I was also co-President of the 500-member strong Global Business and Human Rights Scholars Association from 2019-2023.

9. My academic works have been cited in several reports by the United Nations (UN) Working Group on Business and Human Rights and the UN Special Rapporteur on Human Rights and the Environment. I was a paid senior legal advisor for the United Nations Working Group on Business and Human Rights for the development of its report on reparations, "Implementing the third pillar: lessons from transitional justice guidance" (A/HRC/50/40/Add.4). I have also been routinely invited to speak on official events and side panels at the UN Forum on Business and Human Rights. In 2021, I was invited to speak as part of the Forum's closing plenary.

10. I hold a Juris Doctorate from the University of Cincinnati in the U.S., an LL.M. in IHRL from the University of Essex in the U.K., and a Ph.D. in Law from the University of Essex. After serving as a post-doctoral researcher and Assistant Professor at Aarhus University in Denmark, I returned to the University of Essex in 2018 and now serve as a Senior Lecturer/Associate Professor. I teach a post-graduate module on Business and Human Rights at the University of Essex and teach or have taught specialised classes at or for the Geneva Academy, Åbo Akademi, the Indian Law Institute, West Virginia University, Aarhus University, and the Italian summer school on Business and Human Rights.

The failure to account for the right to an effective remedy is a breach of the responsibility to respect

11. When undertaking human rights due diligence, the 2011 Guidelines call on businesses to reference, at a minimum, the standards in the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR"), the International

Covenant on Economic, Social and Cultural Rights, and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work (Commentary on Human Rights at para 39). Additionally, "[d]epending on circumstances, enterprises may need to consider additional standards" where international human rights have been elaborated or where additional international standards are relevant (ibid at para 40). This is particularly relevant in situations of armed conflict, where the rules of International Humanitarian Law ("IHL") help define when a human right has been breached (ibid; International Court of Justice, *Palestinian Wall Advisory Opinion*, para 106).

12. While the right to an effective remedy must be claimed for the protection of another legal right, this does not mean that the right to an effective is devoid of its own content. The right to an adequate and effective remedy has independent recognition and content in UDHR Article 8 and ICCPR Article 2(3).

13. UDHR Article 8 states that "Everyone has the right to an effective remedy" for violations of fundamental rights. This reflects a general principle of public international law—of which IHRL is a subfield—in which "any breach" of an international undertaking "involves an obligation to make reparation … reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself." (*Factory at Chorzów Case (Germany v Poland)* (Jurisdiction) at 29).

14. ICCPR Article 2(3) establishes that "any person whose rights or freedoms as herein recognized are violated shall have an effective remedy." As with the other obligations in Article 2, paragraph (3) has distinct content that attaches to all other rights within the Covenant. In other words, the failure to ensure adequate remedies is a breach of Article 2(3) as well as other rights to which it attaches.

The Human Rights Committee—the expert treaty body entrusted with overseeing the implementation of the ICCPR—has made it clear that Article 2(3) demands both (a) a process capable of responding to misconduct and awarding (b) the substantive measures necessary to redress the harm a victim complains of, and that are aimed at preventing a reoccurrence of the harm (General Comment 31, paras 15-20). According to the Human Rights Committee, the substantive measures will generally include "appropriate compensation" and may also include investigations, restitution, rehabilitation, satisfaction, and guarantees of non-repetition (ibid, paras 16-18).

The failure to provide either an adequate process or the necessary measures will constitute an independent breach of Article 2(3) (see, ibid, paras 15-20).

15. When considering additional relevant instruments, the right to an effective remedy is an independent right in the 1981 African Charter on Human and Peoples' Rights, Article 7. Sudan ratified the African Charter on Human and Peoples' Rights in 1986. The 1950 European Convention on Human Rights recognises the right to an effective remedy in Article 13. Norway and Sweden both ratified the European Convention in 1952.

16. The right to a remedy also appears in the 1977 Additional Protocol I to the Geneva Conventions of 1949 (Article 91) and the 1998 Rome Statute of the International Criminal

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Court (articles 75 and 8), both of which identify the right to remedy for victims of war crimes. This is relevant to the present case, which relates to claims for remedy and reparation stemming from war crimes.

17. The right to a remedy and reparation is elaborated in the UN Basic Principles and Guidelines on the right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The Basic Principles—like the 2011 Guidelines—recognise that the responsibility to provide remedies is intrinsic to meeting the responsibility to respect human rights (Principle 3(d)).

18. Given the numerous relevant references to the right to a remedy in relevant human rights and humanitarian law instruments, businesses should account for the right to remedy during due diligence and take steps to mitigate the denial of remedies.

The Ongoing Absence of a Remedy Constitutes a Human Rights Violation in and of Itself

19. The ongoing absence of a remedy can constitute a negative impact on human rights in and of itself.

20. Given the centrality of the ICCPR to human rights due diligence, I focus in this section only on the independent content of ICCPR Article 2(3). Yet, the repetitive recognition of the right to an effective remedy in IHRL and IHL establishes the significance of this right and its independent content.

Establishing an independent breach of Article 2(3)

21. The Human Rights Committee has been clear that while Article 2(3) must be used to enforce another right, there can be a breach of Article 2(3) even if a violation of another right is not proven.

22. In *Gunaratna v. Sri Lanka*, the Human Rights Committee faced a situation in which the State's Supreme Court had already found violations of the rights to freedom from torture and to liberty and security of person, but the Supreme Court had delayed its findings for six years after the victim's arrest. The complainant argued that the delay constituted a denial of effective remedies and a breach of Article 2(3). The Committee agreed. While it could not find a separate violation of ICCPR articles 7 and 9 because of the Supreme Court's intervention, the Committee concluded that the delay was still a breach of Article 2(3) read together with those other rights. Of note for the current instance is this language:

> The Committee is of the view that the State party cannot avoid its responsibility under the Covenant by putting forward the argument that the domestic authorities have already dealt or are still dealing with the matter, when it is clear that the remedies provided by the State party have been unduly prolonged without any valid reason or justification, indicating failure to implement these remedies (para 8.3).

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In other words, an undue delay to a remedy is itself a breach of the Covenant and must be appropriately addressed.

23. The Human Rights Committee's jurisprudence on the distinct content and demands of Article 2(3) began with the 2003 decision in *George Kazantzis v. Cyprus* (para 6.6), when the Committee found that article 2(3) would be meaningless if a victim needed to prove the violation of another right before they had a right to an effective remedy:

> …article 2, paragraph 3(b) … would be void if it were not available where a violation had not yet been established. While a State party cannot be reasonably required, on the basis of article 2, paragraph 3(b), to make such procedures available no matter how unmeritorious such claims may be, article 2, paragraph 3, provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant.

In other words, the failure to provide and ensure a remedy can be a distinct breach of the ICCPR.

While the claimant in that case did not have even a reasonable argument, the Committee's conclusion led to a further development of Article 2(3) in subsequent cases.

24. In its 2005 decision *Faure v Australia*, the Committee found a breach of Article 2(3) without any additional violation of a Covenant right. In that case, the claimant alleged a violation of Article 8 and Article 2(3) because there was no domestic mechanism for challenging their treatment. After discussing the content of Article 8, the Committee found the state had not breached that right. Yet, it upheld the complaint under Article 2(3).

After reiterating its language from *Kazantzis v. Cyprus*, the Committee found that the claim of a breach of Article 8 was "sufficiently well-founded to be arguable" and therefore the State had a responsibility to secure an appropriate remedy (para 7.4). Yet, under the State's legal system, there was "no remedy … available to challenge the substantive scheme for those who are by law subject to it" (para 7.3). According to the Committee:

> It follows, therefore, that the absence of a remedy available to test an arguable claim under article 8 of the Covenant such as the present amounts to a violation of article 2, paragraph 3, read together with article 8, of the Covenant.

25. In light of the Committee's jurisprudence, the ongoing absence of a remedy is itself a breach of human rights even where a party does not have responsibility for another violation.

26. It should be noted that the European Court of Human Rights has likewise found that the right to an effective remedy under Article 13—which is also limited to the enforcement of other treaty rights—arises when there is an "arguable claim" even if that claim is not ultimately proven (*Hatton and Others v. United Kingdom*, paras 137-142; *Costello-Roberts v. United Kingdom*, para 39; Nowak at page 37).

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Article 2(3) also contains substantive standards for remediation

27. As the Human Rights Committee has made clear in its General Comment 31, Article 2(3) contains an obligation on States to provide both a procedural avenue for redressing wrong-doing as well as the substantive responses necessary to ensure the right to remediation is meaningfulness and redresses the victim's harms.

28. The independent content of Article 2(3) is particularly clear in cases of serious or gross violations of human rights. In these cases, such as breaches of the right to life stemming from war crimes, the Committee requires States to investigate, and where appropriate prosecute and punish, those responsible for the violations. The failure to provide this form of remediation—a form of the guarantee of non-recurrence and a form of satisfaction and justice—is itself a violation of the Covenant. In General Comment 31, the Committee highlighted this, noting that:

> As with the failure to investigate, the failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. (para 18).

29. The strength of the obligation to provide this specific remedy has led the Human Rights Committee to find that laws that deny the remedy breach the Covenant. The Committee in *Hugo Rodriguez v. Uruguay* stated that amnesty laws are

> incompatible with the obligation of the State … the adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses (emphasis mine).

30. The Human Rights Committee extended its decision in *Hugo Rodriguez v. Uruguay* in *Bautista v. Colombia* (para 8.2) and *Arhuaco v. Colombia* (para 5.3), finding that an administrative or disciplinary penalty is not an appropriate remedy for serious human rights violations, such as a violation of the right to life, and cannot meet the standards of Article 2(3).

31. It is particularly noteworthy that the Human Rights Committee has found a breach of Article 2(3)(a) when a state failed to prosecute criminally a corporation for criminal environmental damage. Criminal investigations are one form of remediation, and the demand for investigations into serious violations of rights stems from Article 2(3) (see, General Comment 31, para 15). In *Poma Poma v. Peru*, the complainant had appealed to the Senior Prosecutor to criminally prosecute the company. Following the recusal of a judge married to the company's legal advisor, the case was assigned to another criminal court. That second court refused to open the case because the Prosecutor's submission allegedly did not include a report from a relevant State authority, a procedural requirement for such cases. The Committee concluded that the State's failings led a denial of an effective remedy as the failure to investigate and prosecute the corporation was a violation of Article 2(3).

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In other words, the State was responsible for failing to remedy the conduct of a business.

32. In other words, the right to a remedy not only contains a procedural element but also substantive standards of redress.

Remedies must not only be available but must also be enforceable

33. The right to a remedy in Article 2(3) is not just about providing an avenue for remediation but subparagraph (c) also requires that remedies be enforced. The failure to enforce that remedy remains a violation until the remedy is provided in practice. In *Baritussio v. Uruguay*, the complainant had been detained even after an enforceable remedial order granted her release. However, the prison authorities refused to comply with the order and she was left in detention. The period of detention started before Uruguay was a party to the Optional Protocol that granted the Committee jurisdiction and the detention continued for years afterwards. The Committee concluded that the failure to enforce the remedy was a breach of Article 2(3)(c) and the absence of that remediation gave rise to a violation once Uruguay became a party to the Optional Protocol.

Businesses can Contribute to, or Inherit, the Denial of a Right to Remedy through Mergers and Acquisitions

34. As with all other human rights, a business can cause or contribute to a breach of the right to an adequate remedy.

35. I must note here that this case law is appropriately covered in treatises on the ICCPR, including Joseph and Castan's *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (pages 867-882), and Nowak's *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (pages 28-75). Businesses should be making use of such commentary when they are in doubt about the standard of a right. Doing so would have allowed the business in this instance to understand their responsibility to account for an ongoing absence of the right to a remedy.

36. The independent content of the right to an effective remedy can be adversely impacted by a business even where it is not responsible for the initial harm. Similar to the Human Rights Committee's finding in *Poma Poma v. Peru*, interfering with the realisation of the right to an effective remedy can be a distinct breach of a victim's human rights.

37. A business can cause an adverse impact by denying access to a non-judicial remedy, denying access to information necessary to secure a remedy, or by refusing to abide by a legitimate order for reparations. A business can also contribute to the denial of a right to an adequate remedy. An obvious example of this is if a business paying a bribe to a judge.

38. Yet, it is not only in the context of bribery that a business can contribute to the denial of a right to a remedy. In the commentary to Principle 17, the United Nations Guiding Principles—with which the 2011 Guidelines are intended to align—explicitly recognise that adverse human rights impacts "<u>may be inherited through mergers or acquisitions</u>" (emphasis mine).

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39. If a business undertakes a merger or acquisition in a manner that effectively prevents victims from accessing an effective remedy—either through the denial of process or the effective denial of substantive reparations—the business has contributed to the denial of the right to an effective remedy in line with Article 2(3) of the ICCPR. Businesses should account for this in the process of their due diligence and the failure to do so, and to mitigate the impact of their conduct on the realisation of the right to an effective remedy, is a failure to respect human rights.

Respectfully yours

Tara Van Ho

List of Authorities

Treaties and U.N. Declarations or Authoritative Texts

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