

## **Construction regardless of the consequences?**

### ***Background information regarding the ECCHR's criminal complaint against Lahmeyer<sup>1</sup>***

On May 3<sup>rd</sup> 2010, the ECCHR filed a criminal complaint against two executive employees of the engineering company Lahmeyer International GmbH at the department of public prosecution in Frankfurt am Main. The two employees were instrumental in constructing and commissioning the Merowe Dam Project. In the criminal complaint, the defendants are charged with displacing over 4,700 families and destroying their livelihoods.

#### ***1. The Merowe Dam project and its down sides***

The Merowe Dam construction is presently the biggest hydropower project on the African continent. The dam is situated at the river Nile, approximately 800 km north (downstream) of the Sudanese capital Khartoum. The project covers an area of 6364 km<sup>2</sup>. The dam is designed as a multi-purpose/ general-purpose facility, which provides the area with electricity-- 2,300 m<sup>3</sup>/s 6,000-gigawatt hours (GWh) on average-- and helps irrigate 400,000 ha of land according to official statements.

The project is financed by the Sudanese government, the China Import Export Bank and several Arabic countries. A consortium of several Chinese companies and Sudanese sub-contractors are involved in the construction. In addition, the French company Alstom provides the electro-mechanical facilities and the Swiss company ABB supplies transmission stations.

#### ***Between 38,000 and 78,000 people affected***

Thousands of people must be resettled for the Merowe Project. According to Lahmeyer as well as independent estimates, the project affects between 38,000 and 78,000 people. Until now, the peasant farmers this project affects have cultivated fruit and grain using traditional techniques; they use the areas on the banks of river Nile as crop and farmlands. These cultivated areas are flooded annually during the summer months and are consequently particularly fertile during the other months of the year.

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<sup>1</sup> In this article we relinquish the naming of all the evidence and materials available to the ECCHR. Just like questions about judicial details of the criminal offense these can be read and downloaded from: [www.ecchr.eu](http://www.ecchr.eu). The ECCHR homepage also provides you with maps and explanations about the dam.

### *Problems of resettlement*

By 2002, a presidential decree expropriated an area of 6364 km<sup>2</sup> for the reservoir. The resettlement negotiations that followed were unsuccessful. The Amri, an ethnic group that lives approximately 35 to 55 km from the dam were supposed to be resettled in Wadi Al Mugadam in Bayouda, a desert area. However, its soil conditions were unsuitable for agriculture and livestock farming and thus could not provide them with the minimum means of subsistence. The Manasir, an ethnic group that live further upstream, initially negotiated a settlement deal with the government to move to an area that was in the immediate proximity of the future reservoir. However, the authorities responsible for their resettlement ignored this agreement. The Manasir were then supposed to resettle in an infertile area just like the Amri. In April 2006, the press reported the public protests of the Amri during which security forces forcibly interfered and three of the peaceful protesters were killed. As a result, neither the Amri nor the Manasir were resettled.

## **2. The Role of Lahmeyer**

The joint criminal complaint of the ECCHR and one of the claimants assumes the employees of Lahmeyer are criminally responsible for the flooding because there is convincing evidence that suggests they controlled the building project at every stage. By 2001, Lahmeyer received the first order for the project from the Sudanese government; the company was to be responsible for the project planning, construction supervision and commissioning of the entire plant. Lahmeyer also conducted the preparatory surveys, technical calculations and international tendering. The dispossession took place in 2002 and was followed by resettlement negotiations. In April 2002, Lahmeyer published an Environmental Assessment Report in which the consultants observed that a resettlement plan did not exist even 6 months prior to the planned start of the construction.

From this time onwards, the responsible employees of the Lahmeyer Company knew about the problems concerning resettlement. As a company with many years of international experience in dam construction, the Lahmeyer Company must have been aware of the fact that, according to international standards, the construction of a dam must not be carried out without the consent of the population affected by resettlement measures. In spite of this, the company initiated the building measures. In response, organizations like Corner House, the International Rivers Network or the Society for Threatened Peoples warned of the danger of forcible displacement of the communities affected by the dam in 2004 and 2005.

### **3. The concrete events in 2006/2008-9**

#### ***Flooding of the settlement area of the Amri in August 2006***

In December 2005, the river's major channel was closed and the water was redirected through a smaller tributary. In April 2006, the resettlement of the Amri still had not taken place and the security forces reacted to the public protests with violent assaults. The organization International Rivers Network confronted the Lahmeyer Company with these events on April 27<sup>th</sup>, 2006. In August of 2006, the annual flooding of the area flooded during the summer months but this time the water could not drain away because the major distributary was closed. The settlement area of the Amri was flooded and more than 2,740 families had to flee their houses in the spur of the moment. They were forced to leave behind their herds, their stores and their belongings – they had neither been evacuated nor warned in advance. 700 houses in 12 villages were destroyed, 380 additional houses were severely damaged and were uninhabitable, the entire crop and agricultural and pasture land was flooded in a perimeter of 12 villages, 12,000 cattle were killed and in the weeks thereafter their cadavers were floating in the water, which massively increased the dangers of infections. The organization of claimants, "The Amri Committee," estimates the extent of damages at a total of 6.2 million US dollars.

#### **How did it happen?**

Every year in the months of July and August, the banks of the river Nile are flooded and used as particularly fertile agricultural and pasture land during the rest of the year. When one of the two tributaries of the river Nile at the Merowe dam was closed in December 2005, it dammed the waters to the altitude of the settlement areas the following summer because the seasonal high waters could not be discharged in the same capacity as before. It is noteworthy that a water amount of 11.000 m<sup>3</sup>/s was measured in the summer of 2006 while the accused engineer of the Lahmeyer company claims in a professional article that the dam facility was capable of managing a maximum flow capacities of 19,900 m<sup>3</sup>/s.

The UN Rapporteur for Adequate Housing, Miloon Kothari, examined these events and asked Lahmeyer in to stop all construction work due to the danger of displacement due to flooding in August 2007.

### **Flooding of the settlement area of the Manasir in 2008-9**

Despite this request, Lahmeyer continued the building measures until April 2008, when the dam was closed and commissioned. Gradually, the reservoir was dammed. It reached the first houses of the Manasir in July 2008 and the waters continued to rise until January of 2009. According to estimations of the victims more than 15,000 people were affected and the houses of at least 22 villages were damaged or destroyed, as were the surrounding fields, plantations and pastures. The claimants estimate that at least 170,000 sheep, goats, donkeys and cattle drowned and, addition to the private houses, 18 elementary and two high schools, 20 institutions for medical treatment and numerous mosques were destroyed. Similarly, public administration buildings and water supply facilities were destroyed.

### **4. Political Background – precarious Human Rights Situation in Sudan**

This is the result of the cooperation of a German company which prizes a lucrative deal above the welfare of thousands of affected people, and a government which undemocratically suppresses the rights of the people affected.

According to the established opinion of acknowledged human rights organizations like Amnesty International or Human Rights Watch, and according to governmental statements like the US State International Human Rights Report, the Sudan is not a constitutional state. Human rights and civil rights are violated there with regularity. In March 2009, the International Criminal Court in Den Haag issued an arrest warrant against the Sudanese president Al-Bashir alleging his involvement in crimes against humanity and war crimes. He is accused of being responsible for killings, rape, torture, depredation and displacement of civilians on a large scale in the province Darfur in South Sudan. He is accused of planning and coordinating these actions in the years 2003-2008. Although the freedom of opinion and the right to hold demonstrations is granted in articles 39 and 40 of the constitution of 2005, journalists, human rights activists and protesters in particular are intimidated by security forces, are arbitrarily taken into custody and tortured. During a peaceful demonstration against the Merowe dam in April 2006 security forces of the government also killed three people and imprisoned and injured many additional protesters. Civilians cannot rely on judicial protection. The authorities responsible for the Merowe dam, the “Dam Implementation Unit” (DIU), reports directly to President Al-Bashir. Not only is it equipped with its own security force, the DIU it is also granted immunity.

## **5. Symptomatic Case of the Endangerment of Human Rights in Infrastructural Projects.**

It is the opinion of the ECCHR that this case is symptomatic of the dangers for human rights resulting from big infrastructural projects. Such projects are supposed to serve the development of the respective country and consequently, the local population should benefit from it. However, authoritarian regimes like the Sudanese under President Al-Bashir rarely take into consideration the social and ecological effects for the population affected. The Lahmeyer Company and the people responsible cannot refer to the Sudanese government as the ones responsible for the resettlement and claim that Lahmeyer merely acted by order of and with the permission of the government. For prosecution purposes this is not a matter of common risks that are inherent in large-scale projects and possible have to be accepted, but it is a matter of avoidable damage done to specific legally protected interests which the Lahmeyer employees are directly responsible for. In countries with precarious human rights situations like the Sudan, companies cannot solely rely on the fulfillment of their contracts. The criminal complaint illustrates that companies have to do an extensive human rights risk assessment to see whether their actions violate the rights of others at any stage of their project. Projects in cooperation with a regime that violates human rights risk violating human rights themselves and make especially high demands on the risk assessment.

### **The Violation of Human Rights**

Numerous fundamental human rights have been massively violated in this case.

The **Right to Food** – as the core of the right to an adequate living standard – art. 25 of the Universal Declaration of Human Rights (UDHR), art.11, para.1,2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) includes on the one hand the availability and on the other hand the access to food/ nourishment. The restrictive covenants contain respecting the private access to nourishment in order to guarantee availability and prevent the destruction of existing nourishments/ foods or food infrastructures. Flooding and rendering the arable land useless thus violates the Right to Nourishment.

The **Right to Adequate Housing**, art. 25 UDHR, art 11 ICESCR, art. 17 International Covenant on Civil and Political Rights (ICCPR) includes the availability of a habitable accommodation which offers safety, access to energy sources, drinking water and which is culturally acceptable. Restrictive covenants result from this, which prohibit eviction or displacement.

The **Right of Children to Education, Protection from Violence and Development aiding adequate living standards** (art. 26 UDHR, art. 13 ICESCR, art. 19,27, 28 UN- Convention for the Right of a Child) have been violated, because numerous children have become homeless and thus defenseless and unprotected. Their schools have also been destroyed. Furthermore, the **Right to Unrestricted Mobility** and the free choice of residence (art.13 UDHR, art. 12, para.1 ICCPR) and the Right to Property (art.17 UDHR, art.11 ICESCR and art.27 ICCPR) have been violated.

For thousands of people the flooding and displacement resulted in the loss of their former basis of existence. This contains violations of the **Right to Security** of a person (art.3 UDHR, art.9 para. 1 ICCPR), the **Right to Work** (art.23, UDHR, art.6 ICESCR), the **Right to unimpeded personal and family life** and infrangible habitation (art.12 UDHR, art.17, para.1, ICCPR). The destruction of medical facilities violates the **Right to Health** and appropriate medical supplies (art.25, UDHR, art. 12 para.1, ICESCR), because this contains the accessibility of the healthcare system and prohibits the destruction of the healthcare infrastructure.

## **6. Responsibility of Germany- jurisdiction of German Criminal Prosecution Authorities**

The Federal Republic of Germany ratified the named convention and is thus obliged to enforce the included rights (compare, for example, art.2, ICCPR, art.2 ICESCR, art.4 children's rights convention). The so-called state protective duty contains an effective legal protection and the obligation for penologic avengement of human rights violations as the European Court for Human Rights has established.<sup>2</sup>

### **Liability of companies for human rights?**

The legal discussion about the question whether and in how far companies and their representatives are bound by international human rights is afoot. In countries with weak national economies and hardly functioning democratic institutions, companies often have great political and economic power. In light of the actual scope of influence on social and

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<sup>2</sup> See: *Opuz v. Turkey*, ECHR, 9 June 2009, § 128., *L.C.B. v. the United Kingdom*, ECHR, 9 June 1998, § 36, *Reports 1998-III*, *Osman v. the United Kingdom*, ECHR, 28 October 1998, § 115, *Reports 1998-VIII*, *Papamichalopoulos v. Greece* 1996 330-B EGMR, S. 36.

environmental conditions in these countries, the liability of companies and their representatives for international human rights standards is required.<sup>3</sup>

The UN Special Representative on Transnational Corporations and Human Rights, John Ruggie created the “protect, respect and remedy-framework”. The overwhelming international appreciation of this system of tasks provides it with the status of international standards.<sup>4</sup> In this document the responsibility of the companies for the regard of human rights is combined with the stately obligation, to enforce the regard for human rights and to grant legal protection for the victims.<sup>5</sup>

### **The problem of “extraterritorial jurisdiction”**

Does a company also have to adhere to human rights in a foreign country? Should Germany prosecute the criminal actions of Germans committed in foreign countries? These questions describe the problem of the so-called extraterritorial jurisdiction. The corresponding discussion of rights is quite lively; there is a wide agreement that criminal law is applicable to crimes that occurred extraterritorially if there is sufficient connection to the jurisdiction concerned.<sup>6</sup> German criminal law (§7 German Criminal Code) provides for the prosecution of

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<sup>3</sup> Compare the scientific/academic discussion, for example, Nowrot, Karsten, *Nu sag‘ wie hat du’s mit den Global Players? Fragen an die Völkerrechtsgemeinschaft zur internationalen Rechtsstellung transnationaler Unternehmen*, (Now say, what do you think of global players? Questions directed at the international law community about the international legal position of transnational corporations) Friedenswarte 79, 1-2/2004, p. 140, oder Teubner, Gunther, und Fischer-Lescano, Andreas, *Wandel der Rolle des Rechts in Zeiten der Globalisierung: Fragmentierung, Konstitutionalisierung und Vernetzung globaler Rechtsregimes (Change of the role of the law in times of globalization: fragmentation, constitutionalization and networking of global rights regimes (?))*, in: Junichi Murakami, Marutschke and Riesenhuber (Eds.), *Globalisierung und Recht (Globalization and Law)*, Berlin/New York 2007, p. 3-56. In the field of jurisdiction the developments particularly in the practice of several supreme courts are important within the scope of jurisdiction and the Alien Tort Claims Act.

<sup>4</sup> This framework obtained (broad) approval and by now is taken as a basis for further steps towards the implementation into national law by numerous governments; compare, for example, the Norwegian „White paper on Corporate responsibility“, the hearings of the joint parliamentary committee in Great Britain, the petition of the South African human rights commission in the context of the national inspection of bilateral investment contracts. Sweden dedicated its EU Council Presidency to the implementation of this framework, in a OECD lawsuit the government of Great Britain referred to this structure/ framework, as did the UN Special Rapporteur for the detrimental impact of toxic mediums on human rights (Human Rights and the Illicit Movement of Toxic Waste), Okechukwu Ibeanu, in the context of his conclusions about the infamous case of ocean dumping of toxic waste Trafigura. (Opening Remarks by Professor John G. Ruggie, to the Consultation on operationalizing the framework for business and human rights presented by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Palais des Nations, Geneva 5-6 October 2009, <http://www.business-humanrights.org/Documents/Ruggie-speech-to-Geneva-consultation-Oct-2009.pdf> )

<sup>5</sup> A/HRC/11/13, para. 56ff

<sup>6</sup> Miriam Saage-Maaß, *Human Rights and Transnational Corporations – do the existing human rights concept and legal remedies do justice to reality?*, in: Sandkühler (Ed.), *Thinking Human Rights into the Future*, series of the Center for European Legal Policy (Schriftenreihe des Zentrums für europäische Rechtspolitik), Vol. 56, Baden-Baden 2009, p. 159, 178

actions that were committed in foreign countries when the accused is a German citizen and the prosecution is in the German public interest.

The UN Special Rapporteur John Ruggie confirmed this interpretation of extraterritorial jurisdiction and explains that the question of a conflict of sovereignty does not arise here, because it naturally is one of the rights and duties of a state to prosecute criminal actions of its citizens. Ruggie furthermore explains why extraterritorial jurisdiction is vital – particularly for cases in those states in which public institutions do not offer effective legal protection:

*“What message should home countries send the victims of corporate-related human rights abuses in those situations? Sorry? Good luck? Or that, at a minimum, we will work harder to ensure that companies based in our jurisdictions do not contribute to the human rights abuses that so often accompany such conflicts, and to help remedy them when they do occur? Surely the last is preferable. (...) And so we have the oddity of home states promoting investments abroad—extra-territorially, if you will—often in conflict affected regions where bad things are known to happen, but not requiring adequate due diligence from companies because doing so may be perceived as exercising extra-territorial jurisdiction. This status quo does no favors to victims of corporate-related human rights abuse; to host governments that may lack the capacity for dealing with the consequences; to companies that may face operational disruptions or find themselves in an Alien Tort Statute suit for the next decade; or to the home country itself, whose own reputation is on the line.”<sup>7</sup>*

Olivier de Schutter, the UN Rapporteur for the Right to Nourishment, declares the necessity of extraterritorial jurisdiction to make companies acting on a transnational scale liable in their home countries. This is necessary in at least all those cases in which the host countries are not willing or not able to offer effective protection of rights and quick relief for the victims of human rights violations caused by corporations.<sup>8</sup> He is right to point out the OECD guidelines for multinational companies which have by now achieved practical authority and exemplary function for the interpretation of what can be described as the area and range of accountability of transnational corporations. In the chapter about concepts and principles he describes explicitly: *“Since the operations of multinational enterprises extend throughout the world,*

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<sup>7</sup> <http://www.reports-and-materials.org/Ruggie-presentation-Stockholm-10-Nov-2009.pdf>

<sup>8</sup> Olivier de Schutter, Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations, December 2006, <http://198.170.85.29/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf>

*international cooperation in this field should extend to all countries. Governments adhering to the Guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country.”<sup>9</sup>*

## **7. Conclusion**

### **Punishment/ Avengement of Punishable Injustice**

In view of the considerable severity, the extent of the human rights violations, and the resulting damage, the actions reported here require criminal investigations. Prosecution has to be conducted by German authorities because a lawful investigation seems entirely unrealistic in the procedural and political parameters in Sudan: The government of president Al-Bashir is accused of numerous human rights violations, it has declared the Merowe dam project its priority and granted the commissioning authorities immunity. Furthermore, critics of the project were silenced through violent assaults and illegal imprisonment.

### **Interests of German development policy and export business assistance**

From the point of view of the new German government coalition human rights occupy a central position in Germany’s foreign relations. “Germany’s credibility is associated directly with a consequential advocacy for human rights in its foreign and development policy.” (p.125 of the coalition contract 2009). ‘And foreign trade policy’, one might want to add, because according to statements of secretary Niebel the latter is shall be linked or integrated more strongly with development policy.

According to the Federal Ministry for Economic Cooperation and Development’s internet presentation, the German Federal Government is obliged to implement social standards in so-called developing countries.<sup>10</sup> However, social standards are nothing more than internationally acknowledged (economic and social) human rights. Furthermore, it says: German companies shall do justice to their societal responsibility even in foreign countries through their own responsible business management.<sup>11</sup> If the German government does not want to contradict itself, it has to acknowledge that the most direct contribution to implement social standards in third world countries is the commitment of German companies to the observation of human rights. Prosecution in case of offense is part of this. Accordingly, the

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<sup>9</sup> Concepts and principles, para. 2

<sup>10</sup> <http://www.bmz.de/de/themen/wirtschaft/sozialstandards/index.html>

<sup>11</sup> <http://www.bmz.de/de/themen/wirtschaft/sozialstandards/unternehmensfuehrung/index.html>

Federal Ministry for Economic Cooperation and Development says: Justice and solidarity are the core values of human existence: Nobody may turn a blind eye if inhumane conditions exist in another country – we are not only responsible for the things we do but also for the things we do not do.”<sup>12</sup> This also applies to German prosecution authorities because nobody can look away when German companies are complicit in human rights violations.

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<sup>12</sup> <http://www.bmz.de/de/ziele/grundsaeetze/index.html>