

# EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



ECCHR ZOSSENER STR. 55-58 10961 BERLIN GERMANY

**Department of Public Prosecution Frankfurt am Main**

**Konrad-Adenauer-Str. 20**

**60313 Frankfurt**

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EUROPEAN CENTER FOR  
CONSTITUTIONAL AND  
HUMAN RIGHTS e.V.

—  
ZOSSENER STR. 55-58  
AUFGANG D  
10961 BERLIN, GERMANY

—  
PHONE +49. (0) 30. 40 04 85 90  
FAX +49. (0) 30. 40 04 85 92  
MAIL INFO@ECCHR.EU  
WEB WWW.ECCHR.EU

***THIS IS A TRANSLATION OF THE ORIGINAL COMPLAINT WRITTEN IN GERMAN.***

***THE AUTHORITATIVE VERSION IS THE GERMAN ONE ONLY.***

## **Criminal Complaint**

**Due to**

**Flooding, Coercion, Abandonment, etc.**

—  
AMTSGERICHT  
BERLIN-CHARLOTTENBURG  
VR 26608

—  
VORSTAND:  
CHRISTIAN BOMMARIUS  
DIETER HUMMEL  
LOTTE LEICHT  
MICHAEL RATNER

—  
GENERALSEKRETÄR:  
WOLFGANG KALECK

In the name and mandate of the human rights organization European Center for Constitutional and Human Rights (ECCHR) incorporated association, represented by its associate partner, attorney-at-law Wolfgang Kaleck, and in the name and mandate of the aggrieved Sudanese citizen Ali Khaliefa Askouri

I herewith report a

**criminal complaint**

concerning all considered elements of the offence, esp. concerning § 313, par.1, par.2 in connection with § 308 par.5, § 305 par.1, § 303

par.1, § 240 par.1, § 221 par.1 no.1 German Criminal Code and § 17  
no.1 Animal Protection Act

against the German citizens

1. Dr. Henning Nothdurft, executive director, Lahmeyer International GmbH, Friedberger Str. 173, 61118 Bad Vilbel
2. Egon Failer, division manager Engineering and Consulting Services, Lahmeyer International GmbH, Friedberger Str. 173, 61118 Bad Vilbel
3. Other members of staff at Lahmeyer International GmbH, Friedberger Str. 173, 61118 Bad Vilbel involved in the criminal offence.

I ask for the confirmation of receipt of this letter, information about the reference number and the name of the responsible prosecutor in charge at the department of public prosecution Frankfurt am Main, as additional information might have to be supplemented.

The ECCHR is a non-profit legal human rights organization, registered in the register of associations of the district court Berlin-Charlottenburg. It initiates, conducts and supports exemplary legal proceedings to hold governmental and non-governmental agents responsible for human rights violations committed by them.

The plaintiff himself, Mr. Ali Askouri, is the aggrieved party and concurrently represents the Office of the Hamadab Affected People (LOHAP) in London as its president. For more than 10 years people affected by the Merowe Dam Project (also known as Hamadab Dam Project), which is at the center of this complaint, have united in this association to defend their rights.

The defendants are accused of being liable to prosecution in two independent instances concerning the criminal offences of flooding in coincidence with abandonment, coercion, criminal damage of property, destruction of buildings and killing of vertebrate animals (according to the Animal Protection Act).

In summary, the following sets of facts underlie the complaint: the defendants were responsible for the planning, the entire construction supervision and the commissioning of the Merowe Dam Project in north Sudan in the company Lahmeyer International GmbH - in the following referred to as "Lahmeyer". Firstly, in the course of the construction work in December 2005, following the instructions by the defendants, the main arm of the river Nile was closed off and the river was redirected through a narrower tributary causing the flooding of the settlement area of the tribe of the Amri. The Amri were supposed to be resettled prior to this; however, it was well-known to the defendants that at the time of the flooding this

resettlement had not taken place. Due to the flooding more than 2,740 families had to abandon their homes and their property from August 7 to 23, 2006.

In relation to the second set of facts the defendants are accused to be responsible for the swelling of the impounding reservoir and the gradual increase of the water level up to the settlements of the Manasir people through ordering or authorizing the closure of the dam walls and the taking into operation of the dam on April 16, 2008. The Manasir had not been resettled at this point so that approximately 2,000 families of the Manasir had to abandon their homes without warning and on the spur of the moment in the months between end of July 2008 and January 2009. Consequently, they lost all their possessions without substitution.

## I. The facts

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1.4. Criminal Liability according to § 305, par.1, German Criminal Code

1.5. Criminal Liability according to § 240, par.1, German Criminal Code

1.6. Criminal Liability according to § 303, par.1, German Criminal Code

1.7. Criminal liability according to § 17, No.1 Animal Protection Act

### 2. Flooding of the settlement areas of the Manasir in 2008 and 2009

2.1. Criminal liability according to § 313, par.1, German Criminal Code

- 2.2. Criminal liability according to § 313, par.2 in connection with § 308, par.5, German Criminal Code
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## I. The facts

Firstly, the Merowe Dam Project and the resettlement negotiations preceding the reported events and deeds will be described in order to allow for an appropriate evaluation of the events relevant for the criminal prosecution in this context (I.1.). Hereafter, the progression of events will be described in detail, first, the flooding of the Amri settlement area in 2005/2006 and secondly the flooding of the Manasir settlement area in 2008/2009.

### 1. The Merowe Dam Project

#### 1.1. General Project Description

The Merowe dam is at present the largest hydropower project on the African continent. It is located at the river Nile, approximately 800 km north (downstream) of the Sudanese capital Khartoum. At this location the river consists of two arms which are separated by an island.

The Merowe dam was planned as a multi-purpose construction which produces energy in a 1,250 mega watt (MG) hydropower plant, provides irrigation for agricultural purposes and flood water protection in the northern part of the Sudan. The area affected by this project covers 6,364 km<sup>2</sup>, the total length of the dam is 9,280 meters and the height of the dam crest is 67 meters. The plan is to create electricity of 6,000 giga watt hours at an average outflow of 2,300m<sup>3</sup>/s and to irrigate circa 400,000 hectares of land with the water reservoir. According to the plans, the reservoir covers an area of circa 800 km<sup>2</sup> (see satellite pictures and map).

#### annexure 1.1-9.

The realization of the project is planned for a period of 13 years (2000-2013)<sup>1</sup>. The authority responsible, "Dam Implementation Unit" (DIU), directly reports to president Al-Bashir<sup>2</sup>. Not only does it have its own security personnel, but it is also granted immunity, also under the Interim-constitution of 2005, see the Executive Committee of the Manasir Community People Affected by Merowe Dam: An Emergency Appeal for Urgent Relief to the Manasir, Victims of

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<sup>1</sup> <http://merowedam.gov.sd/org-structure.html>;  
<http://www.lahmeyer.de/de/projekte/detailansicht/project/298/>; EAWAG-report 2006,p16; Lahmeyer International: Environmental Assessment Report for Merowe Dam Project, 2002, p2-1, copy enclosed as attachment)

<sup>2</sup> <http://merowedam.gov.sd/en/org-structure.html>

Flooding by Merowe Dam, August 2008, <http://hi-in.facebook.com/topic.php?uid=75911475088&topic=5458>

## **annexure 2.**

The project is financed by the governments of the Sudan and several other Arabic countries as well as the China Import Export Bank. A consortium of several Chinese companies and Sudanese subcontractors are involved in the construction as well as the French company Alstom (electro-mechanical plants) and the Swiss company ABB (supply with transmission stations), see Bosshard/Hildyard, A Critical Juncture for Peace, Democracy, and the Environment: Sudan and the Merowe/Hamadab Dam Project 22 February-1 March 2005, May 2005 (<http://www.internationalrivers.org/files/050428merowe.pdf>),

## **annexure 3.**

### **1.2. Resettlements**

Further information about the resettlements is relevant because their negative development in connection with the construction works ultimately led to the reported criminal offences which the defendants have been accused of. In short, the necessary resettlements did not take place in due time before the commencement of the construction and damming measures. Although this was known to the defendants, they proceeded with the construction irrespective of that, resulting in the flooding of the families that had not been relocated up to that point.

#### **1.2.1. Population affected**

The estimates about the number of people affected by the resettlement measures in the course of this project vary. According to the feasibility study by the Lahmeyer company (Lahmeyer Environmental Assessment Report 2002, p.i-6, 3-12f, 3-16),

## **annexure 4,**

members of three different ethnic groups are affected, namely 560 families of the Hamadab, 2,500 families of the Amri settling further upstream and 4,500 families of the Manasir, living

even further upstream. This results in an estimated total number of circa 38,000 people affected (Environmental Assessment Report, pp.3-13, 3-16). According to other reports between 50,000 and 78,000 people were affected (see for example: Nicholas Hildyard, Neutral? Against What? Bystanders and Human Rights Abuses: The case of Merowe Dam in Sudan Studies, No.37, April 2008,

**annexure 5).**

The technical article about the Merowe Dam Project by Failer/Mutaz/El Tayeb, Merowe: the largest water resources project under construction in Africa, Hydropower & Dams 2006, p.69 ff., p.73,

**annexure 6,**

talks about circa 70,000 people affected. Until the flooding the majority of them practiced agriculture on a small scale in the immediate proximity of the Nile, intensively irrigating the seasonally flooded land (so-called "gerouf"-land) and cultivating it mainly with staple foods. The sales product of the region is dates.

**1.2.2. Resettlement Negotiations**

As of 17 Sept. 2002 an area of 6364 km<sup>2</sup> in the federal states North State (settlement area of the Amri and Hamadab) and Nile State (settlement area of the Manasir) were expropriated by presidential decree no.353. Whether or not this expropriation was lawful is not crucial for the question of the unlawfulness of the reported progression of events because they cannot be considered lawful, even if the expropriation were lawful.

The resettlement negotiations with the two groups affected, the Amri (flooding in 2006, 1<sup>st</sup> set of facts) and the Manasir (flooding in 2008/2009, 2<sup>nd</sup> set of facts) following the expropriation, were conducted with a lot of conflicts and not successfully. As a result, resettlement of the population had not taken place until the respective time of the flooding, for the Amri in August 2006 and for the Manasir from July 2008 until January 2009.

The resettlement of the Amri to Wadi Al Mugadam in Bayouda, situated in the desert, was planned for December 2005. However, it could not be carried out as the housing area had not been completed by the end of August 2006. Furthermore, the offered land did not meet the legal criteria. (see: The Amri Committee: Complaint to UN Special Rapporteur on Adequate Housing, 29.08.2006, item 2.9

**annexure 7).**



This was also evident from public sources as early as Nov. 2005, when conflicts preventing the resettlement were reported in the article “Hamadab dam – Row over water wells between Chinese, residents” of 28 November 2005 in the newspaper Sudan Tribune,

**annexure 8,**

as well as in a public report of the organizations International Rivers Network and The Corner House under the title “Urgent Call for a Negotiated Agreement To End The Violence In The Merowe/Hamadab Dam-Affected Areas November 30, 2005” (<http://www.internationalrivers.org/files/051130appeal.pdf>),

**annexure 9.**

The Manasir are the biggest of the three affected ethnic groups. The Resettlement Act of 2002 considers their resettlement in the vicinity of the developing reservoir as one of two resettlement options. This option was confirmed in negotiations with the government but not considered by the DIU, which wanted to undertake a resettlement into the unsuitable desert areas north of Abu Hamad. A conflict ensued. (see: Emergency Appeal for Urgent Relief, **annexure 2**).

After violent demeanor of DIU representatives the responsibility for the resettlement was transferred to the federal states Northern State and Nile State (see: Emergency Appeal for Urgent Relief, **annexure 2**). According to the statement of the aggrieved Askouri, the national dam authorities have refused up to this date, to conduct negotiations about compensations with the democratically elected representatives of the Manasir; they negotiate with people not authorized by the ethnic group. (see: statement of the complainant Askouri of 1 October 2009,

**annexure 10).**

The resettlement of the Manasir as requested was agreed upon indeed on 1 June 2006 with the responsible governor of the Nile State and confirmed by a decree of the president (No. 70/2006) and in May 2007 again by the federal government. However, no further steps were taken towards the implementation of the resettlement (See: Emergency Appeal for Urgent Relief, **annexure 2**, p.2). Thus, the Manasir were not resettled and remained in their ancestral settlement area; this situation continued when the dam was closed on 30 December 2008 and consequently the settlement area of the Manasir was flooded.

### **1.3. Assignment of the Lahmeyer Company in the Merowe Dam Project**

According a press release on 13 May 2009

**annexure 11,**

the Merowe dam was taken into operation on 3 March 2009. According to this press release the Lahmeyer Company realised for this infrastructure project of a value of 1.5 billion Euros “all studies, drafts and international requests for proposals and provided the complete planning work for the project. During the realization of the project (2003-2010) Lahmeyer International is responsible for the quality management, construction management, contract management and the commissioning”.<sup>3</sup>

The Lahmeyer company was also significantly involved in several stages of the dam project. In April 2002 it completed a feasibility study with the title “Environmental Assessment Report” which does not only inquire into the environmental but also the social and economic impact of the dam construction project and which contains suggestions for the mitigation of damages (“mitigation plan”) (see: Lahmeyer, Environmental Assessment Report for Merowe Dam Project, April 2002, **annexure 4**). In the company’s publication “Information of the Lahmeyer International Group, No.47, December 2003,

**annexure 12,**

p12f. the defendant Egon Failer, engineer and division manager of “Water and hydropower” at Lahmeyer writes about the assignments the company received in connection with the Merowe Dam Project. According to that, an engineering contract was issued in December 2001 which contains the following:

- Drawing up of tendering for the entire project (twelve batches), the realization of public tendering, evaluation of proposals and offers and the management of contract negotiations

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<sup>3</sup> Since the beginning of the project there have repeatedly been tensions between the DIU and the Manasir. Critics of the dam were arrested, demonstrations were shattered using arms and villages were partly destroyed by police (press release of International Rivers on 22 April 2006 <http://www.internationalrivers.org/en/africa/merowe-dam-sudan/sudan-government-massacres-merowe-dam-affected-people> (accessed on 1 December 2009), and Emergency Appeal for Urgent Relief, August 2008, <http://hi-in.facebook.com/topic.php?uid=75911475088&topic=5458>, (accessed on 11 December 2009)). On 22 April 2006 three dam critics and an additional person were killed by militia hired to guard the construction site during an assembly and in the presence of police officers; another 50 people were injured (Society for Threatened Peoples: Construction of the Merowe-dam in Sudan, 22 June 2006; press release by International Rivers of 10 August 2006.)

- The planning until ready for building, the evaluation and approval of drafts for the electromechanical facilities
- The construction management and supervision of all operations and works (complete with quality management)
- Contract management
- Final inspection and approval of the entire facility as well as the consultation and stipulated supervision during the commissioning and the warranty period.

See the website of the Lahmeyer company,

[http://www.lahmeyer.de/de/projekte/detailansicht/browse/0/project/264/lng/10.546875/lat/19.1340999342/country/0/spectrum/0/mode/1/show/showGMView/lngt/40.869140625/lngf/-19.775390625/latt/5.17848208852/latf/32.0267062933/?tx\\_dkdprojects\[tx\\_dkdprojects\\_departments\]\[0\]=2&cHash=8985f22569](http://www.lahmeyer.de/de/projekte/detailansicht/browse/0/project/264/lng/10.546875/lat/19.1340999342/country/0/spectrum/0/mode/1/show/showGMView/lngt/40.869140625/lngf/-19.775390625/latt/5.17848208852/latf/32.0267062933/?tx_dkdprojects[tx_dkdprojects_departments][0]=2&cHash=8985f22569),

### **annexure 13.**

The President of Sudan and the Dam Implementation Unit DIU are mentioned as contractee. Furthermore, the DIU has commissioned Lahmeyer with surveying and cartographic works, namely

- Bathymetric works i.e. topographic measuring and mapping of the riverbed of the river Nile over a length of 600 kilometers (see: **annexure 11**, p12f);
- The creation of orthophotographic maps on the scale 1:20,000 and 1:5,000 including aerial flights of approximately 60,000 km<sup>2</sup>,
- The creation of digital geological models for the area around the Merowe dam, the reservoir area and the irrigation region;

as well as consulting services for the Merowe irrigation project:

- Regional surveys with immediate participation of the farmers and
- the planning of the development of agriculture and livestock breeding

(period of realization from 2003 until 2007), (see: website Lahmeyer International,

<http://www.lahmeyer.de/de/projekte/detailansicht/browse/0/project/109/Inq/27.24609375/lat/16.97274102/country/0/spectrum/0/mode/1/show/showGMView/Ingt/42.4072265625/Inqf/12.0849609375/latt/10.0121295579/lattf/23.6847741669/> ,

**annexure 14).**

The scale of the orthophotographic maps of 1 cm : 50 m allows for a very detailed perception of the proximity of the dam, so that these photographic maps allow for a precisely accurate localization of settlements in the vicinity of 60,000km<sup>2</sup>. The flooded settlements which are reported here, are located in the scheduled area subject to flooding. (see: map **Annexure 1.7**) The photographic maps are meant to serve as a basis for a geographic information system and for environmental, soil and land use.

Thus, the direct contact with farmers in the course of the planning of the irrigation project was a component of the contractual package. The question of resettlement, more specifically the question of who is supposed to be resettled where and when, is also part of the planning of the irrigation project. Consequently, the defendant Nothdurft – executive director at Lahmeyer – declared in a written reply to the office of the UN Special Rapporteur on Adequate Housing, Annabel Short, on 19 September 2007,

**annexure 15,**

that the engineers in charge of the project at the Lahmeyer company were at all times promptly informed of the development in the resettlement areas. Egon Failer, division manager of the area “Water and Hydropower” was one of the engineers in charge. His detailed knowledge of the Merowe Dam Project is apparent as he is the co-author of the technical article by Failer/Mutaz/El Tayeb, “Merowe: the largest water resources project under construction in Africa”, published in Hydropower & Dams 6/2006, enclosed/ attached as **annexure 6**.

**2. The events in detail**

## **2.1. First set of facts: Flooding of the settlement area of the Amri in August 2006**

### **2.2.**

#### **2.2.1. Actual events**

On August 7, 2006 100 families of the ethnic group of the Amri had to flee from the village Shankoura and from the Nile island Kouk, because the water level of the Nile had risen far beyond normal dimensions. (See: complaint of 29 August 2006 to the UN Special Rapporteur on Adequate Housing, Miloon Kothari: The Amri Committee, Forced Evictions due to Flooding, Merowe Dam, Sudan: p.4, **annexure 7**.) No warning was issued concerning the rising flood, neither from government authorities nor from the Lahmeyer company or the defendants, so that the people affected could not be evacuated in time and in an organized fashion. In fact, they had to flee in such haste that they had to leave behind all their belongings. In the following weeks up to 23 August 2006 the water rose to such a high level that more than 2,740 people of 12 villages were forced to leave their homes and belongings (see: **annexure 7**). Approximately 700 houses were destroyed in the villages of Shikora, Al Bana, Um Haza, El Batareen, Um Kouk, El Khezian, and Gerf El Doud, Al Aragoub, Al Ghanaiem, Um Daras, Um Sarif and Al Galieha, all of them in the settlement area of the Amri ca. 35-50 km upstream from the dam site. Another 380 houses in areas of a higher altitude were damaged to such extent that they were liable to collapse. Grazing fields and crops were destroyed by the rising water and about 12,000 livestock were killed. The cadavers of the animals were floating in the water still weeks after the flooding which increased the danger of infectious diseases. The organization of the people affected, "The Amri Committee" estimates the amount of damages concerning the livestock at 1.2 million dollars and further damages due to the loss of agricultural terrain and crop at a total of about 5 million US dollars (see: **annexure 7**). In the period that followed the water did not recede as it does in the usual water-level fluctuations in October (2006). Most of the villages and the areas used for agriculture by the Amri remained flooded.

This flooding was caused by the defendants as follows:

At the location of the Merowe dam, the river Nile separates into two arms of the river, in flow direction on the left side is the broader major distributary, on the right there is the smaller tributary stream. According to the information provided by the defendant Failer, the major distributary of the river was closed on 30 December 2005 and the water was redirected into the narrower right tributary equipped with a spillway (see: **annexure 6**). Subsequently, construction work on the closed major distributary could be continued. The closure of the

major distributary reduced the water discharge capacity of the river. While this did not immediately lead to the flooding, it did months later.

In August 2006, the water level of the Nile rose to 11,000m<sup>3</sup>/s after the seasonally typical precipitation, see: Failer/Mutaz/El Tayeb, **annexure 6**, p.70. In this context it is helpful to describe the natural annual course of the seasonal precipitation and flooding briefly, as they occur every year which allows for prognostic calculations of the quantity of flood water according to degrees of probability. According to the calculations of Lahmeyer the water quantity of 11,000 m<sup>3</sup>/s in August remained within the foreseeable range because it is known that the seasonal fluctuations of the river Nile's water level deviate strongly, up to eightfold in the course of the year. The riverbanks are flooded by the annual flood waters. The high-water season lasts from the end of July until October. The defendant Failer remarks in his technical article that Lahmeyer – meaning himself as the responsible division manager – has geared its project development on the maximum water discharge of 19,000m<sup>3</sup>/s taking as the basis the following maximum discharges:

-13,200 m<sup>3</sup>/s in case of a high tide of the century

-14,800 m<sup>3</sup>/s in case of a once-in-a-millennium high tide

-16,200 m<sup>3</sup>/s in case of a 10,000-year-flood, see: **annexure 6**, p.69

The regularly flooded areas are used for agriculture after the flooding as they are particularly fertile. They are called “gerouf lands” (Lahmeyer Environmental Assessment Report 2002, p.3-2.3-6, **annexure 4**; see also EAWAG, Independent Review of the Environmental Impact Assessment for the Merowe Dam Project, 2006,

#### **annexure 16).**

This annual cycle is described in detail by the aggrieved Ali Askouri in his statement of 1 October 2009, **annexure 10**:

„The farmland (No1) (gerouf) is normally completely flooded in August and the water reaches up to the date-trees. The water stays there for 2 to 3 weeks. In the beginning of September the water starts to recede until October. Following the receding water, women of the community start to work on the land (No. 1) (gerouf) and cultivate it, knowing that the water will not come back until the next summer. In April the land (No. 1) (gerouf) starts to dry out and the area is then used for animal fodder. After that, sometimes beginning already in April,

and later in May and June, the land is being worked on by the men of the village to produce sorghum (the main staple crop). They pump the water up in small water canals all across the land (No.1) (gerouf) and they cultivate Sorghum. The land is very small but extremely fertile. Then in July, the water starts to rise and the circle begins again”.

The water quantity of circa 11,000 m<sup>3</sup>/s in August 2006, thus, was within the normal range of expected water levels around this time of year and what the dam had been constructed for. The defendant Failer also evaluates this in his article accordingly. In spite of this, water levels continually rose more than usual from August 2006 onwards, so that inhabited settlements were flooded. This can be attributed to the reduced water discharge due to the closure of the major distributary, maybe because the spillway had either been erected defectively or because it did not function properly or the spillway had not been opened sufficiently or not at all.

Concerning the involvement of the defendants in this closure, it has been verified that Lahmeyer monitored and controlled the entire building project and ultimately decided on every single building measure. The relevant piece of evidence, that contains a corresponding statement of a DIU official, will be presented as **Annexure 45** shortly. Within the Lahmeyer company this task was incumbent on the defendant Failer as (responsible) project manager and the defendant Nothdurft as executive director. Detailed observations about the conduct of both defendants cannot be made at this point, they shall be subject to further investigations by the prosecution. However, the presented evidence indicates that as responsible engineer and division manager Failer was responsible for the diverting of the river by means of closure of the major distributary until 31 December 2005 (as scheduled). The order for the closure of the dam gates was - so it can be presumed – either issued by Failer himself or by a junior member of staff who acted with Failer’s approval or was given orders by Failer. As division manager and due to the technical diligence incumbent on him he had to ensure that such an essential measure in the construction of a dam would not be carried out without his consent. Otherwise, he has to be held responsible for the misdemeanor of his members of staff due to insufficient supervision. The defendant Nothdurft had been involved in the immediate communication of several non-governmental organizations about the resettlement and other problems of the Merowe Dam Project since 2005. He himself commented on them in emails resp. letters, for example in an email to International Rivers/ Corner House on 23 May 2005,

**annexure 17,**

or in several letters to Annabel Short of the office of the UN Rapporteur on Adequate Housing, for example of 3 September 2007,

**annexure 18,**

a letter of 19 September 2007, **annexure 15,**

and of 17 October 2007

**annexure 19.**

Thus, he was sufficiently informed and consequently jointly responsible for the coordination of the construction and resettlement measures. The fact that the resettlement took place in spite of missing resettlement measures having been carried out indicates that Nothdurft had approved of them or is guilty of remaining passive instead of interfering to prevent the flooding.

It still has to be investigated whether the criminal conduct occurred in Germany or abroad. The defendants administer the dam construction project from Germany. The company is based there and the defendants work in Germany. This can be seen on the company's homepage, according to which the defendants can be contacted by phone in Germany, see: website of the Lahmeyer International GmbH (limited liability company),

<http://www.lahmeyer.de/de/unternehmen/management/management/>,

**annexure 20.**

and <http://www.lahmeyer.de/de/unternehmen/management/wasser-und-wasserkraft/>,

**annexure 21.**



Because both defendants are directly responsible for the realization of the project and because the decision for the closure of the major distributary was an intermediate step of great significance, it is most likely that the defendant Failer and possibly the defendant Nothdurft were at the construction site in Sudan at the time in question and authorized the order in question.

Even when the redirecting of the river had taken place and the seasonal increase in the water level was imminent, the defendants did not initiate any measures to counteract the rising of the water levels and prevent the flooding of the Amri settlements although they knew about the flooding risk for the settlements affected. As executive directors of the project planning they had notice of the detailed surveying work by Lahmeyer and of the calculations of the future size of the reservoir lake which they describe in their feasibility study with 800 km<sup>2</sup> stretching 200 km upstream. (Environmental Assessment Report, p.i-3, **annexure 4**). They also knew that these Amri villages were situated in the flooding area because they were responsible for the issuing of orthophotographic maps. For these aerial flights of circa 60,000km<sup>2</sup> had been conducted which covered the entire flooding and settlement areas, that is the settlement area of the Amri.

They also knew that the Amri affected had not been resettled by April. Lahmeyer had already remarked in the “Environmental Assessment Report” (see: **annexure 4**) the lack of a resettlement plan and that the settlement areas were inadequate or had not been sufficiently developed. Members of the project management of Lahmeyer were present at a meeting of the DIU and persons affected at which no conclusion could be reached (see: **annexure** concerning the answer to International Rivers/ Corner House, 23 May 2005,

**annexure 17a).**

Due to his position as division manager “water and hydropower” the defendant Failer was responsible for the project management.

Finally, the defendant Failer declared in a letter in the name of Lahmeyer on 3 May 2006,

**annexure 22,**

to the organization Business & Human Rights Resource Centre that Lahmeyer had conducted surveys among the population of the Amri due to which the resettlement was particularly controversial among the Amri and had not taken place at that time.

In their reply to the statement of the UN Special Rapporteur on Adequate Housing concerning the human rights impact of the Merowe dam, signed by the defendants Nothdurft and Failer, **annexure 18**, the defendants admit indeed that resettlement had not yet taken place in the summer of 2007. However, they try to explain the flooding with an unusually high natural water level. The Amri declared in their complaint to the UN Special Rapporteur that the destroyed houses had never been flooded before (see: The Amri Committee: Complaint to UN Special Rapporteur on Adequate Housing, **annexure 7**). There is no evidence that precipitation in the year 2006 exceeded the normal amount of precipitation of other years.

Concerning the question of the defendants' knowledge of the concrete high risk situation - more precisely the fact that the Amri had not been resettled shortly before the expected annual high waters – it has to be considered that several internet media reported about the violent excesses of the police against protesters of the Amri between April 22<sup>nd</sup> and 24<sup>th</sup> 2006. In the course of these excesses which were brought about by protests against resettlement measures several deaths occurred. See: “Three killed in Sudan protest over Nile dam”, AFP, 23 April 2006, <http://www.terraily.com/2006/060423102947.sxn7mwoj.html>,

**annexure 23,**

“Sudanese militia kill three people in Merowe dam area”, Ali Askouri, Sudan Tribune, 22 April 2006, [http://www.sudantribune.com/article.php3?id\\_article=15209](http://www.sudantribune.com/article.php3?id_article=15209),

**annexure 24,**

“SHRO [Sudan Human Rights Organization] condemns murderous attacks on citizens of Merowe Dam”, 24 April 2006, [http://www.sudantribune.com/article.php3?id\\_article=15235](http://www.sudantribune.com/article.php3?id_article=15235)),

**annexure 25.**

The organization International Rivers Network confronted the Lahmeyer company on 27 April 2006 with these events. Hereupon, the defendant Failer remarked in detail upon the continuing obstacles concerning the resettlement in a written reply on 3 May 2006. (See: **annexure 22**). Thus, the defendants knew that resettlement had not taken place in April and would most probably not happen until the seasonal rains in August. However, they did not adopt any protective measures to avert the flooding.

### **2.3. Second set of facts: Flooding of the settlement area of the Manasir, July 2008 until January 2009**

#### **2.3.1. Previous events in 2007**

The settlement area of the Manasir is situated in an extensive area between approximately 55km (flooded village Berti) and 110 km (flooded village Sherri) upstream from the Merowe dam site, beyond the flooded Amri-villages. The floodings of the latter attracted attention internationally in the months following August 2006 and also made the defendants aware of the problem. The elected representatives of the Amri filed a complaint on 29 August 2006 with the UN Rapporteur on Adequate Housing, Miloon Kothari, with the request for examination of the circumstances of the flooding in August 2006 (see: complaint of 29 August 2006, **annexure 7**). The UN Special Rapporteur was asked in particular to clarify the responsibility for the flooding and to espouse appropriate compensation for the people affected.

The UN Special Rapporteur published a statement concerning the events surrounding the dam project in Merowe on 27 August 2007, see

#### **annexure 26.**

In this comment he stated that the situation had deteriorated over the previous two years. He was alarmed about the information that the eviction was imminent. He confirmed the knowledge of reports that the water level was rising continuously, leading to the destruction of dozens of houses within a few weeks and that further damages were to be expected. Furthermore, he states explicitly that the continuance of the project against the opposition of the population affected would lead to violence and to forced evictions on a large scale. Along

with the other companies involved, he asks the Lahmeyer company to stop all construction works immediately until further studies evaluate the effects for the population. Furthermore, he urges the German government to ensure that German companies will not be involved in human rights violations connected to the Merowe Dam Project. Kothari warns that further flooding might occur because the water level is still rising. It is being admonished again that the suspension of the dam project take place until an evaluating mission of UN observers has been arranged and reported on human rights effects.

### **2.3.2. The flooding in 2008**

Despite a request by the UN Special Rapporteur to stop construction work immediately, the defendants continued the construction work. On 16 April 2008 the third and final redirection of the course of the river was completed and the last spillgate was closed, see: DIU press release of 16 April 2008,

#### **annexure 27.**

Consequently, the dam was put into operation and the river Nile was retained until the reservoir lake with the planned total surface of circa 800km<sup>2</sup> was formed. No statements can be made at this point about the conduct of the defendants during the closure of the spillgate. The investigation of the prosecution will probably bring new insights. The information available, particularly about the areas of responsibility of the defendant Failer as division manager and the defendant Nothdurft as executive director, indicates that both ordered or at least authorized the closure of the dam on 16 April 2008. Due to their responsibility for this project within the Lahmeyer company they had the opportunity and it was their duty to control whether the beginning of the damming measures by closing all gates could take place without any risk for people and property within the range of the future dam. As has been explained before, they had the necessary knowledge of the extent of the planned damming measures, respectively the flooding of the area.

They knew furthermore that their decision to close the dam might result in the flooding of people who had not been resettled. This was to be expected because of the seasonal rainfalls and the high water starting at the end of July. They had knowledge of the location of the affected houses of the Manasir and that their resettlement had not taken place. (See especially: The Corner House, "The Merowe/Hamadab Dam Project Sudan, Compliance

Review - Assessment against International Standards and Obligations, Jan 2006/ March 2008, unpublished, will be presented shortly as

**annexure 28.**

And, indeed, the water levels rose due to the seasonal rainfall. But since the dam had been closed the water could not discharge as in previous years and accumulated to a much greater extent than normal. Consequently, this was the first year in which water levels reached the altitude where the houses of the affected Manasir are situated. There is no indication that this flooding was brought about by unusually high floods and independent of the closed dam. In fact, Ali Askouri explains in his report that the houses of the Manasir had never been flooded before (Ali Askouri, The Flooding of the Manasir lands Merowe Dam, northern Sudan Report of November 2, 2008,

**annexure 29.**

On 24 July 2008 the first houses were flooded. On 28 July 2008 already 7 villages and 205 families had been flooded due to rising waters in the reservoir, (see: Emergency appeal for Urgent Relief, **annexure 2**). The water level rose rapidly so that three days later, on 31 July, 600 families were affected, see: press release of International Rivers network of 31 July 2008,

**annexure 30.**

In the following months the water continued to rise until January 2009. The total amount of damaged houses and people has not been determined yet; however, Ali Askouri states in his report of November 2008, when he visited the area and undertook an assessment of damages that at least 15,000 persons had been affected until that time, that is, they had lost their houses, fields, cattle and other belongings (Ali Askouri, The Flooding of the Manasir lands Merowe Dam, northern Sudan Report of November 2, 2008, **annexure 29**). This damage report also states that an area of about 90 km upstream along the riverbanks had been affected by the flooding. He describes how the waters rose up to his village Kabna – situated on the left riverbank of the Nile in the settlement area of the Manasir:

„Since August 2008 the reservoir water started to rise and did not stop at its usual maximum level. The Nile water started to flood the villages and all of the agricultural land in the area. It first started in the area more close to the Dam. By January 2009 the rising water reached my village. The land No. 1 and the Date-trees are covered by water. The water also covered the land No. 2 and the water even flooded part of my villages, the houses that are closer to the farming land. Those people had to move to upper lands.” (Statement of the complainant Ali Askouri of 1 October 2009, **annexure 10**).

From July until November 2008 the following villages were flooded according to the report of Ali Askouri, **annexure 29**:

- |                          |                                |
|--------------------------|--------------------------------|
| 1. Berti West            | 12. Sur (Island)               |
| 2. Al Firseeb            | 13. Al Karareer                |
| 3. Dirbi                 | 14. Housh Faraneeb             |
| 4. Araj (Island)         | 15. Sharari (Island)           |
| 5. Dumaj (Island)        | 16. Sherri (Island)            |
| 6. Jabal Musa – Kirbikan | 17. Sherri East                |
| 7. Ous (Island)          | 18. Al Sifiaha                 |
| 8. Al Ashamin            | 19. Al Amarin                  |
| 9. Boni (Island)         | 20. Asma                       |
| 10. Jabal Minai          | 21. Al Salam villages          |
| 11. Al Salimia           | 22. Kabna (partially affected) |

Witnesses report the following,

**annexures 31.1-31.6:**

“During morning prayers on 3 August 2008 water levels suddenly rose strongly and the water flooded my house consisting of 5 rooms and a storage room although it was situated on a higher area. There was a lot of water. The water levels rose so quickly that I could not rescue anything from the floods, neither the livestock nor the furniture or other household effects in the rooms. I was forced to flee to the mountains together with my 90-year-old grandmother and other family members in order to escape the waters. My mother and my children have

since suffered from illnesses due to the shock, the spreading of diseases and the bad diet. There was nothing left for me to do to provide for them, except for begging. I lost everything: my agricultural business with which I provided for my family and which covered an area of 3 Feddan was flooded just like my palm trees. The other agricultural products such as Sorghum, wheat, clover and the cattle are lost or have died of malnutrition and diseases. (...)" (witness report 2)

"On the evening of 5 August 2008 parts of my house including barns for the cattle and the poultry were flooded without warning. I tried to rescue the 70 or more animals (1 word not legible) and goats, but I did not manage to do so because of the quickly rising floods which flooded the courtyard of the house and the rooms. Nobody could help me because all the houses of the village were flooded at the same time. Everybody tried to rescue their own house and their belongings. I could rescue neither my cattle nor my belongings. All rooms and walls collapsed onto the household effects. I had 7 rooms and a storage room. I lost my complete harvest and my saplings, date palm trees, mango trees, lemon and guave trees. I had several hundred, some of them planted by my father, some planted by my grandfather, some by myself. Now my family of 9 and I live in a tent. (...) We received very little aid by the People's Committee but that covers only a quarter of our demand of provisions. These consist of a type of (1 word illegible) that we are not used to eating." (witness report 3).

"On the evening of 6 November 2008 water flooded our house without prior warning by the officials. The walls collapsed on all sides of the building while family members were sleeping in the house. This forced us to flee into the open while we tried to rescue the old and the children. In the morning light I saw the houses of the neighbors collapse and the inhabitants run into the open and escape to the mountains. We could not take any of our belongings from the house with us, neither food nor other things. We could only save ourselves with the help of others. Our house which covered an area of approximately 1500 m<sup>2</sup> and had several rooms (6 rooms, a barn and a storage room) was engulfed in the floods. We lost all our belongings, our cattle and the entire furnishings of our apartment in addition to the agricultural business which (1 word illegible) of our life. (...)" (witness report 1)

"On 27 June 2008 suddenly water flooded the courtyard of our house which was spacious and covered an area of more than 5000m<sup>2</sup>(...). We panicked and (2 words illegible) into all directions. We could not do anything in light of the rising waters. The house had more than 17 rooms, one parlor for guests, kitchens, a storage shed and a barn. Although none of us slept that night we were only able to take insignificant property with us. The rooms collapsed and buried whatever was in them. We lost our supplies of sorghum, wheat, onions and dates.

Furthermore, most of the animals drowned and the rest starved because of the lack of food. (...) Nobody had informed us that the houses, the plantations, the date palm trees and everything we owned would be flooded.” (...) (witness report 4)

The quality of the damage is comparable to the one the Amri suffered, even though the quantity of the people and property affected is considerably higher in the latter case. According to the report of the complainant Askouri the following property damage was caused by November 2008 (see: Ali Askouri, Report of November 2, 2008, **annexure 29**):

- Agriculturally used area of at least 22 villages. Tree plantations with mango, grapefruit and guave trees (circa 950,000-1,500,000 trees) and traditionally cultivated types of grains (wheat, sorghum, millet), vegetables and forage crop were destroyed.
- Furthermore livestock drowned in the rising floods. The numbers of the animals killed have been estimated by the complainant Askouri as follows: 150,000 sheep and goats, 20,000 donkeys, cattle herds.
- Apart from private homes of the families in the villages mentioned above, the following public buildings were destroyed:
  1. Education administration unit (Sherri)
  2. Local government unit (Sherri)
  3. Teacher guest house (Sherri)
  4. Youths center (Sherri)
  5. General guest house (Sherri)
  6. Agricultural bank’s rest house (Sherri)
  7. Police station (Sherri)
  8. Great mosque (Sherri)
  9. 20 clinics and dispensaries (different villages)
  10. Berti hospital
  11. 25 mosques in different villages
  12. The entire water supply facilities in the villages mentioned
  13. Elementary and secondary schools:



- |                               |                                          |
|-------------------------------|------------------------------------------|
| 1. Berti west primary school  | 12. Al Nikhiara primary school           |
| 2. Al Firseeb primary school  | 13. Sour primary school                  |
| 3. Diribi primary school      | 14. Al Karareer primary school           |
| 4. Araj primary school        | 15. Hosh Faranaib primary school         |
| 5. Jabal Musa primary school  | 16. Sharari primary school               |
| 6. Ous primary school         | 17. Sherri primary school (boys)         |
| 7. Al Ashamin primary school  | 18. Sherri primary school ( girls)       |
| 8. Al salmia primary school   | 19. Sherri High Secondary School (boys)  |
| 9. Al Dakin primary school    | 20. Sherri High Secondary School (girls) |
| 10. Khor Rabah primary school |                                          |
| 11. Ras Boni primary school   |                                          |

The government refused access of humanitarian organizations, the UN and the press. They neither supplied aid measures nor did they allow humanitarian aid from outside the state into the affected area. (Emergency Appeal for Urgent Relief to the Manasir, p.2 f., **annexure 2**).

The defendants, in particular Nothdurft and Failer, knew of these circumstances which spoke against a closure of the spillgate. This results from the fact that they were responsible for all measuring of the premises and therefore knew the course the rising water would take, either because they had calculated it themselves or had it calculated by someone else. The flooding potential was known to the defendant Failer as can be seen in his specialized publication on the topic (Failer/Mutaz/El Tayeb, **annexure 6**). Even the members of staff of the DIU had foreseen that the damming measures would reach the houses of the Manasir weeks before the closure of the dam in mid-April 2008. According to the Emergency Appeal of the Executive Committee of the Manasir affected, **annexure 2**, members of the DIU threatened the inhabitants with the flooding, seemingly to speed up the resettlement negotiations. It can be concluded from this that the defendants who as project planners had

much more detailed knowledge of the measuring and technical details and plans than the DIU, knowingly provoked the flooding of the Manasir settlement.

Since 28 December 2008 the dam has gradually been commissioned.<sup>4</sup> The victims of the described flooding still live under predominantly impoverished living conditions and without access to adequate compensation.

### **3. Contextualization and Evaluation of the Events**

Hereafter, the events shall be presented in context with recognized international standards of the dam building industry and the background knowledge of the defendants shall be elucidated to render possible an encompassing evaluation of their penal responsibility. From their extensive specific experience in the area of hydropower plants abroad it must be concluded that the defendants had knowledge of the typical risk factors like the illegal forced eviction of thousands of people. Eventually, these potential risks became reality. Consequently, they could and should have taken precautionary steps to control these risks even if this had led to a postponement of the completion of the plant. However, they decided not to take these provisions and, thus, acted against internationally recognized standards and neglected their professional duties.

#### **3.1. International standards for the construction of dams**

The conduct of the defendants prior to construction measures, during the planning and the execution of the construction work violates internationally recognized standards concerning the resettlement of people and against international standards for dam projects. The defendants acting in the name of the construction planning and construction supervision company Lahmeyer, had specific obligations which they had to know of as experienced specialists in the dam construction industry.

The Involuntary Resettlement Sourcebook (2004) of the World Bank contains non-binding guidelines and recommendations for governmental and non-governmental agents directly or indirectly involved in infrastructural projects. These are meant to guarantee that infrastructural projects that often make necessary involuntary resettlements agree with World

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<sup>4</sup> Press release Lahmeyer of 01/12/2008.

Bank standards for resettlement projects, the so-called Operational Policy on Involuntary Resettlement (OP 4.12). According to these, the population to be resettled specifically is to be included into the resettlement process and their living conditions are supposed to improve effectively. The prospective areas for resettlement are supposed to be discussed with the population affected and they shall be included in the selection of an area; furthermore, these areas should be as close as possible to their original settlement site and provide the population with appropriate soil. Additionally, according to the guidelines of the World Bank an appropriate compensation shall be paid before the beginning of the construction work. Moreover, the prospective resettlement areas have to be fully developed (see: The World Bank: Involuntary Resettlement Sourcebook- Planning and Implementation in Development Projects, 2004, p.260, see extract attached as

**annexure 32).**

These specifications do not amount to the status of enforceable law; however, they do represent internationally generally recognized standards in the industry. That means that the fulfillment of these standards be part of the professional diligence of all stakeholders in projects which make resettlement procedures necessary. Wherever they are neglected without justification a violation of diligence has to be assumed which indicates a correlative default. Although the defendants, put in charge by the Lahmeyer company, were not assigned the resettlement explicitly, however conditions and requirements for resettlement are mentioned in the feasibility study by Lahmeyer, the Environmental Assessment Report, **annexure 4**. However, herein, international standards were not fully taken into consideration. Consequently, the risk increased that these standards might not be observed. The defendants have to take the responsibility for that because as project manager (Failer) and executive director (Nothdurft) they were not only informed about the contents of this report but they are to be held responsible for its content and the liability risk which resulted from its deficiencies.

The World Commission on Dams (WCD) is an independent commission of experts, institutionalized by the World Bank in 1997 which published international guidelines for the planning, construction and surveillance of dam projects in the year 2000. These have since been considered the international standard and thus result in a due diligence for engineers like the defendants named here and other participants in dam projects. For the construction of dams they anticipate that all institutions or people involved in the construction –

governments, sponsors, contractors etc. – have to guarantee that agreements about resettlement and financial compensation are negotiated, that all involved in the project agree to it and that arbitration agreements are examined by an independent party, see: extract of the guidelines of the WCD, chapter 7, p.228ff,

### **annexure 33.**

In the construction of the Merowe dam at least four of the seven criteria of an exemplary project planning and execution introduced by the WCD have been violated:

- No effort was made to include the interests of the population affected and to gain the approval of the project.
- No comprehensive study was made about the different project options and their social and ecological effects.
- Compensation claims and claims for a participation in the profits by the population affected were not considered.
- Furthermore, World Bank guidelines about environmental testing, natural habitats and about the protection of cultural assets were not taken into account (see: Nicholas Hildyard, Neutral? Against What? Bystanders and Human Rights Abuses: The case of Merowe Dam in Sudan Studies, No.37, April 2008, **annexure 5**).

In the feasibility study (Environmental Assessment Report, **annexure 4**) no alternative project options were examined and the necessary consideration for the rights and interests of the people affected was not pointed to explicitly. It was solely hinted at the fact that “severe negative economic, social and ecological consequences” could result from “improperly” conducted resettlement measures (see **annexure 4**, p.5-7ff). These defects of the study brought about the danger of inappropriately conducted resettlement measures in connection with the violation of human rights. Eventually, this really happened. Therefore, the defendants Failer and Nothdurft are co-responsible for the lack of fulfillment of the standards introduced by the World Commission on Dams.

### **3.2. Experiences of the defendants**

The defendants Failer and Nothdurft can be considered experts in the field of dam construction who are familiar with the internationally recognized dam construction measures

as the ones described above. Both defendants knew about the effects of their actions due to their education, experience and the respective area of responsibility. Furthermore, there are no signs that the two tried to prevent the flooding.

Dr.-Ing. Henning Nothdurft has a Ph.D. in engineering and according to their website he is a member of the German Association of Consulting Engineers ([http://www.vbi.de/planer-und-berater/db.html?user\\_db\\_pi1\[type\]=LFO&user\\_db\\_pi1\[lv\]=4&user\\_db\\_pi1\[fg\]=VU-AA&user\\_db\\_pi1\[page\]=1&user\\_db\\_pi1\[detail\]=1005630&cHash=854a39ad17](http://www.vbi.de/planer-und-berater/db.html?user_db_pi1[type]=LFO&user_db_pi1[lv]=4&user_db_pi1[fg]=VU-AA&user_db_pi1[page]=1&user_db_pi1[detail]=1005630&cHash=854a39ad17)),

#### **annexure 34.**

As executive director of the company Nothdurft was informed and jointly responsible for the proper implementation and the risk management of major orders as in the building contract for Merowe. As general manager the management of the company is incumbent on him as is the fiduciary attending to the pecuniary interests of the association and the preoccupation with the unobstructed operating procedure. In doing so, he has to monitor the business with an eye toward possible liability risks of the association.

The defendant Failer has been working with hydropower plants since 1978 and has been responsible for projects abroad for more than 19 years. His overall control in the Merowe Dam Project becomes apparent in an article about the project in the magazine Hydropower & Dams which he was the co-author of (see: Failer/Mutaz/El Tayeb, „Merowe: the largest water resources project under construction in Africa“, in Hydropower & Dams 6/2006, p. 68-73, attached as **annexure 6**.) Therein, he appears as a specialist engineer and “Executive Director with overall responsibility for the Hydropower and Water Resources Division”, meaning he was the manager with the overall responsibility in the field of water energy and water resources in the Lahmeyer company. As the company was commissioned the project design, project planning, construction management and construction supervision of the Merowe Dam Project, it results that within the company it was Failer who was personally responsible for the building design, the execution of construction work and the construction control.

Even the Lahmeyer company itself looks back on a history of years of experience in dam construction, partly the defendants were involved in this, too. From the past history of the Lahmeyer company and the defendants explicit experience in the field of big hydropower plants, it becomes clear that the named defendants knew about the typical possible dangers

of such a project which became a reality in this case: namely, the illegal forced expulsion of thousands of people. Therefore, they could and should have taken precautionary measures and taken remedial action. However, as described above, they did not.

The Lahmeyer International GmbH founded in 1966, has several international branches and has extensive experience in the field of dam and hydropower plant construction.<sup>5</sup>The following information results from a report of the International Rivers Network “Dams Inc 2: Lahmeyer International” of 28 Feb 2003 (p.4-16 with numerous further references),

### annexure 35,

which contains facts until the end of February 2003. This survey shows that in numerous projects of the defendants’ company the population affected was resettled under use of force, were not compensated or forced into poverty in the long term. Thus, the defendants knew of the typical risks in the Merowe case. However, they did not make sure that international standards to prevent the risks were kept and consequently, acted contrary to duty.

- In the project **Yacyretá (Argentina, Paraguay)** Lahmeyer was involved decisively in the consortium CIDY. The Inter-American Development Bank reports about social upheaval, protests and traffic blockades due to compensation claims by the population affected; the World Bank evaluates the technically faulty execution of the project as “unsatisfactory”.
- Lahmeyer drew up a feasibility study for the dam **Ta Sarng (Burma)** while the International Labour Organisation (ILO) simultaneously (and again in 2000) reported that the military regime used forced labour in its infrastructural projects. Since 1996 more than 300,000 people from 1,400 villages were resettled forcibly and without compensation.
- Even in the **Ertan-Project (China)** in which Lahmeyer functioned as a consultant, complications were brought about by the forced resettlement of 35,000 people.

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<sup>5</sup> - vgl. <http://www.lahmeyer.de/en/company/about-us/>;  
<http://www.lahmeyer.de/en/company/lahmeyer-world-wide/>; Dams Inc 2: Lahmeyer International, 28 Feb.2003, pp. 3, 17, 18, 20

- The same happened during the construction of the **Xiaolangdi-dam (China)** in which Lahmeyer was involved and during which 170,000 people were displaced.
- In **Awash III (Ethiopia)** 150,000 members of the Afar tribe were deprived of grazing grounds necessary for their livelihood.
- For the dam construction project **Chixoy (Guatemala)** 3,400 members of indigenous groups were displaced and hundreds of people living in the reservoir area were killed by paramilitary death squads. The feasibility study of the consortium LAMI conducted by Lahmeyer claims that the areas concerned are almost uninhabited.
- In the **Lesotho Highlands Water Development Project**, for which Lahmeyer provided the Environmental Assessment Report, the company (together with others) was found guilty of the payment of bribes.
- In the case of the construction of a dam in **Foum-Gleita (Mauretania)** in which Lahmeyer was involved as advisory engineers, an analysis by the World Bank revealed that only 200 of the 881 families concerned lived in the newly constructed houses; the others had to eke out a miserable existence in extreme poverty for years.
- Lahmeyer drew up a feasibility study for the **Arun-III-Dam (Nepal)** and subsequently accepted the tender for the construction surveillance although the World Bank had withdrawn its financial support as a reaction to the reservations of the local population and non-governmental organizations.
- Together with Norplan (Norway) Lahmeyer developed the product design for the **Bujagali-Dam (Uganda)**. Unsolved claims of corruption led the World Bank to adjourn their decision on financial support indefinitely (state of 2003). The World Bank Inspection Panel Report of December 2008 expresses serious concern about the ecological and economical implications of the project<sup>6</sup>. The fear was expressed that thousands of people would lose access to water and soil which is the basis of their livelihood.

The inclination towards risks in the business methods of Lahmeyer has been confirmed in the decision of the World Bank to exclude Lahmeyer from the granting of loans for seven years, starting on 3 Nov. 2006 due to proven corruption in the case of the Lesotho-

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<sup>6</sup> download under: <http://www.internationalrivers.org/en/node/3569> ; see also the press release of WEED, <http://www.weed-online.org/suchen/1999969.html?searchshow=bujagali>.

project.<sup>7</sup> Furthermore, the European Bank for Reconstruction and Development has excluded Lahmeyer from further loans in accordance with art. 2.9 (d) of their Procurement Policies and Rules with effect from 8. Feb. 2007 until the establishment of a sufficient company-internal anti corruption system.<sup>8</sup> The reintroduction into the circle of possible candidates for the allocation of orders on 3 March 2008 was effected under the condition of the actual implementation of the system suggested by Lahmeyer which had to be made until 1 March 2009<sup>9</sup> (the current status of the procedure is unknown to me).

### **III.3 Knowledge of the defendants about obstacles in connection with the resettlement of the Amri (flooding in 2006, 1st set of facts) and Manasir (flooding in 2008/9, 2nd set of facts)**

As the responsible project and company managers the defendants Nothdurft and Failer had knowledge of the specific risks of continuing the dam construction project without a timely resettlement. However, the construction measures were conducted by them despite these risks. In each case the defendants had knowledge of the effective state of the negotiations and the delay of the resettlement. Thus, they explained in their Environmental Assessment Report 2002, p.i-3, i-5, **annexure 4**, that in April 2002, six months before the planned beginning of the construction work at the end of 2002, no resettlement plan existed for the Amri, Manasir and Hamadab. Furthermore, they explained in this report that some of the distant designated areas, like the El Multaga area (130 km downstream of the dam) were infertile and unsuitable even if irrigated artificially due to bad soil conditions (p.i-3, 3-3). The study did not include an integrated production schedule. However, it says that “if improperly planned and executed, involuntary settlement gives rise to severe negative economic, social and environmental consequences“ (p.5-7ff.). The document “The Merowe Dam in the Sudan - Lahmeyer International Involvement and Assistance”, **annexure 17a**,

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<http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984>;

<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21116129~pagePK:64257043~piPK:437376~theSitePK:4607,00.html>

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European Bank for Reconstruction and Development , Procurement, Fraud and Corruption, News update: anti-corruption ruling, 25 March 2008, Declaration of ineligibility on the basis of paragraph 2.9 (d) Procurement Policies and Rules, <http://www.ebrd.com/oppo/procure/guide/fraud.htm>

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<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21116129~pagePK:64257043~piPK:437376~theSitePK:4607,00.html>; <http://www.ebrd.com/oppo/procure/guide/fraud.htm>



which the defendant Nothdurft sent out to the International Rivers Network via email on 23 May 2005 states that the Lahmeyer company acted as advisors concerning questions of resettlement measures. It explains furthermore that the “project management” participated in a meeting between representatives of the MDPIU (later named DIU) and people concerned in 2003 in which the question of resettlement measures was discussed. From the document it cannot be concluded with which group of the population affected they communicated but it becomes clear that the project management was present in the negotiations and had contemporary knowledge of them. In his position as division head “water and hydropower” the defendant Failer was responsible for the project management.

Prior to the flooding of the Amri settlement area in July and August 2006 the following information was accessible publicly. The defendants are regarded as part of the interested public that will be reached by this information:

- [Sudan dam will drown cultural treasures, destroy Nile communities](#), Ali Askouri in World Rivers Review, reprinted in Sudan Tribune [based in France], Apr 2004 **(annexure 36)**
- Forced Migration Review # 21, The Merowe Dam: controversy and displacement in Sudan by Ali K Askouri, September 2004 **(annexure 37)**
- Bosshard/ Hildyard, [A Critical Juncture for Peace, Democracy, and the Environment: Sudan and the Merowe/Hamadab Dam Project - Report from a Visit to Sudan and a Fact-Finding Mission to the Merowe Dam Project 22 February – 1 March 2005](#), May 2005 (<http://www.internationalrivers.org/files/050428merowe.pdf>) **(annexure 3)**; according to International Rivers Network the report was sent to Lahmeyer International already on 28 April 2005. (see update of 6 July 2005 **(annexure 38)**; the reply letter of the defendant Nothdurft on 23 May 2005 refers to this report.)
- International Rivers Network, The Corner House, Update on the Merowe/Hamadab Dam Project, Sudan, 6. July 2005 **(annexure 38)**
- The Observer, “Villagers in Sudan fight dam dictators”, 24. July 2005 **(annexure 39)**
- International Rivers Network, The Corner House: Urgent Call for a Negotiated Agreement To End the Violence in the Merowe/Hamadab Dam-Affected Areas, 30 November 2005 (<http://www.internationalrivers.org/files/051130appeal.pdf>) **(Annexure 9)**

- Society for Threatened Peoples, Construction of the Merowe-Dam in Sudan – German companies are partly responsible for human rights violations, 22 June 2006 **(annexure 40)**

After the flooding of the Amri settlement areas and before the flooding of the Manasir settlement areas:

- .....
- Statement of the UN Special Rapporteur Miloon Kothari of 27 August 2007 **(annexure 25)**

The following immediate communication should also be mentioned:

- Report of the International Rivers network “Dams Inc 2: Lahmeyer International, 28 January 2003”, which was sent – according to its introduction - to the Lahmeyer International GmbH for information purposes and for comments. **(annexure 35)**
- Petition of International Rivers to Dr. Henning Nothdurft as executive director of the Lahmeyer International GmbH, Petition against Lahmeyer Involvement in Hamadab Dam Project/ Sudan, 8.4.2004, (<http://www.internationalrivers.org/en/petition-against-lahmeyer-involvement-hamadab-dam-project-sudan>) **(annexure 41)**, signed online by 191 people and sent to Nothdurft **(annexure 41a)**
- Email by Peter Bosshard, International Rivers Network, & Nicholas Hildyard, Corner House to Henning Nothdurft of 21 June 2005 **(annexure 42)**

Furthermore, the defendants Failer and Nothdurft themselves appeared as persons in charge in their correspondence. Concerning the claims Failer appeared as signatory for Lahmeyer, for example, in Lahmeyer International’s reply to International Rivers Network & Corner House update on Merowe Dam Project of 15 July 2005,

**annexure 43,**

and in the email of 3 May 2006 to the Organisation Business & Human Rights which published this reply in their Internet Resourced Centre (<http://www.business-humanrights.org/Home>), **annexure 22.**

As mentioned before, the defendant Dr. Nothdurft acted as executive director in Lahmeyer's correspondence concerning the Merowe Dam Project (see: i.e. the email of Lahmeyer to International Rivers/ Corner House of 23 May 2005, **annexure 17**). Together with the defendant Failer he represents the company before Annabel Short of the office of the UN Special Rapporteur on Adequate Housing, as in the letter of 3 September 2007, **annexure 18**, and in further emails, also addressed to Annabel Short, of 19 September 2007, **annexure 15**, and of 17 October 2007, **annexure 19**.

Both Failer's technical article (**annexure 6**) and the mentioned letters resp. emails (**annexures 15, 17, 17a, 18, 22 and 43**) show that both were informed about the project and the process of the resettlement in detail. Both make detailed statements in their written communication about the resettlement situation. Nothdurft explains that the responsible Lahmeyer engineers – this includes Egon Failer as division head “water and hydropower” - were always informed promptly about the development in the resettlement areas. Thus, they knew that the Amri had not been resettled when the water levels rose in the summer months of 2006. Nothdurft admits in his letter of 3 September 2007 that he knew that not all necessary resettlement measures – without further specification – had been completed. This letter is dated 3 September 2007, months after the Amri had been displaced and seven months before the dam was completed and the last spillgate closed. Consequently, it was foreseeable that the entire resettlement could not be conducted in such a short time.

Moreover, their responsibility for the events results from the scale of the assignment that Lahmeyer obtained from the Sudanese government, respectively the DIU, and from the fact that the two defendants were primarily responsible for its realization. The fact that they had this responsibility can be concluded from their respective positions in the company as executive director and division head “water and hydropower”.

## **II. Legal Evaluation**

### **1. About the flooding of the Amri settlement areas in August 2006**

#### **1.1. Criminal Liability according to § 313 par.1 German Criminal Code**

The defendants are guilty of joint causing of a flooding according to §§ 313 par.1, 25 par.2 German Criminal Code by ordering or authorizing the closure of the main distributary in

December 2005, respectively by refraining from (forbearance) giving the order to open the overflow spillway (explanations about the criminal action, see below, 1.1.3)

### **1.1.1. The flooding**

In the present case a flooding of huge dimensions was caused as the water outflow was obstructed by the closure of the major distributary so that a extensive flooding was the result. This flooding was not predicted and endangered people and possession. As a result of the closure of the distributary, in August 2006 the water of the Nile rose to much higher levels than during usual seasonal high waters and approximately 700 houses in the villages of the Amri were destroyed, 380 were damaged and 2,740 families lost all their belongings.

### **1.1.2 Concrete danger**

The flooding caused a concrete threat to health and life: there was no advance notice so that the population could not seek shelter preventively. The fact that on one single day, on 7 August 2006, 100 families suddenly had to flee shows that the rising waters caught them off guard. Furthermore, thousands of animal cadavers were floating in the water in the weeks following the flooding. On the one hand, this suggests that the Amri had no time to evacuate their livestock, but had to put the rescue of their most fundamental commodities, namely their health and life, above all. This reveals that they were in concrete and immediate danger. On the other hand, the floating animal cadavers significantly increased the danger of communicable diseases. It was pure chance that people were not injured or infected in the process.

Moreover, a concrete danger for property of substantial value was caused, which manifested itself in the damaging of these goods. As mentioned above, massive damages of houses, means of production (trees, livestock, agricultural implements etc.) and other moveable belongings of 2,740 families of the Amri occurred. The substantial value of property lost and damaged is revealed by the estimates of the people affected who claim the damage to amount to a total of 6.2 million US dollars and also by the fact that the losses encompass the entire livelihood and their basis of income.

### **1.1.3 Criminal action: Act or Omission**

The criminal offence was committed alternatively through the following variant of actions:

- On 30 December 2005 by order respectively authorization of the closure of the left tributary and the redirection of the river through the narrower right tributary with its overflow spillway.

- Omission of the order for the opening of the overflow spillway in August 2006 at the latest

### **(1) Variant of action 1, Order/Authorization**

At the moment it is not known when and to whom the defendants Failer and Nothdurft gave the order, resp. authorization mentioned above. However, it is suspected that they did give the order resp. authorization, as mentioned above, because they were responsible for the construction supervision and the control; according to the information provided by a DIU-employee (Annexure 45) will be handed in later) Lahmeyer signed and, thus, validated every step in the construction process. This active role of the defendants is confirmed by the circumstance that the defendant Failer emphasizes in his technical article (Failer/Mutaz/El Tayeb, **annexure 6**) that the left tributary was closed on 30 December – one day before the date stipulated in the contract. That he highlights this specific detail only makes sense against the background of the fact that the punctual accomplishment lay in the field of responsibility of the Lahmeyer company which consequently had a personal interest in avoiding additional costs and claims of compensation. Thus it would be remote from everyday life to assume that the defendant Failer as the person responsible for the project and the defendant Nothdurft as executive director did not determine the development of the project significantly: By issuing a concrete order or authorization at which exact time to close the left tributary and when to begin the redirecting of the river through the right tributary.

It remains to be investigated whether the defendants acted at least partly from within German territory when they issued the order resp. authorization.

### **(2) Variant of action 2, Omission in spite of guarantor's obligation**

Even if it is assumed that the consequences of the damming were not foreseeable at the time of the redirection of the river and closure of the major distributary, the defendants still bear full responsibility: Because they did not take any action to prevent or stop the flooding even later, when the water level started to increase. They forebore an order to open the overflow spillway on both tributaries although their guarantor's obligation to protect others obligated them to act in order to prevent harm at the latest when the flooding started with the beginning of the seasonal precipitation. They were obliged to ensure that the dammed water be redirected through the spillway or the major distributary. Such obligation to act results from their knowledge, from their factual and technical control of the cause of risk, the dam, and from their responsibility for having produced a source of danger. This assessment results from the evaluation of their obligation to act in relation to the coverage and extent of the assignment to the company concerning the Merowe-Dam Project and from their position

in the Lahmeyer company as well as from the evaluation of the actual events – as far as they can be attributed to the defendants - and their causal relation with the resulting flooding.

### **(2.1.) Guarantor's position of Failer**

The defendant Failer had an affirmative obligation to act in order to protect others as “surveilling guarantor” due to previous endangering behavior. This previous endangering behavior consisted of his order or authorization of the closure of the major distributary in December 2005 which diminished the outflow capacities of the Nile River and thus, created a concrete risk of flooding. This risk materialized with the arrival of the seasonal high waters seven months later. This was a high risk situation because the Amri residing in the flooding area had not been resettled at the time of the closure and would not be resettled in the foreseeable future.

Moreover, Failer knew of the particular high risk situation which he had caused himself when he gave the construction order for the redirection of the river on 30 December 2005 in spite of the fact that groups of people at risk had not been resettled. He knew from public news coverage (see: The Observer, “Villagers in Sudan fight dam dictators”, 24 July 2005, **annexure 39**), from public appeals by several non-governmental organizations (see: International Rivers Network, The Corner House: Urgent Call for a Negotiated Agreement To End the Violence in the Merowe/Hamadab Dam Affected Areas, 30 November 2005, **annexure 9**), from written communications with the Lahmeyer company as presented above (his letters of 15 July 2005, **annexure 43** and of 3 May 2006, **annexure 22**) that the resettlement of the Amri had not taken place and would not take place in the foreseeable future. He was informed of the state of the resettlement negotiations and the resettlements themselves continuously, see: reply letter of the defendant Nothdurft to Annabel Short of 19 September 2007, **annexure 15**. Furthermore, he knew the exact location of the settlements in the prospective reservoir area due to exact aerial flights above the area, measurements and cartographic exploratory works by Lahmeyer and due to the feasibility study (**annexure 4**), which also dealt with the topic of resettlement.

As an experienced engineer for many years in the field of hydro power Failer knew the international standards of the World Bank and the World Commission of Dams. As a long-term top-ranking employee of Lahmeyer International he shared the experiences of his company in numerous dam construction projects worldwide in the years prior to the commencement of the construction work in Merowe in 2002. Thus, he knew from his own practical experience of the typical risks and difficulties particularly in the field of resettlement during the construction of dams.

## **(2.2.) Guarantor`s obligation of Failer**

Due to his responsibility for the creation of a high risk situation and his de facto capacities to influence the course of the construction as project manager Failer had the guarantor's obligation to prevent the flooding. It was part of the construction management and responsibility of the defendant Failer to give the necessary orders in August 2006 which might have prevented the flooding, e.g. by opening the spillway at the tributary or by opening both arms of the river. He did not comply with this obligation; he refrained from taking the necessary measures. The redirection of the flood waters would have been technically possible. According to the information provided by the defendant Failer in his technical article (see: **annexure 6**) the overflow spillway was constructed in such a way that it could manage more than a flood of a century. In fact, it has – according to the article - been constructed for a water throughput of 19,900 m<sup>3</sup>/s while a flood of a century has a water throughput of 13,200 m<sup>3</sup>/s and the maximum water throughput ever measured in the year 2006 was 11,000 m<sup>3</sup>/s.

## **(2.3.) Guarantor's position of Nothdurft**

Nothdurft was executive director and Failer's superior and, thus, also had a position as a "surveillance guarantor" due to previous endangering behavior. As mentioned above, the evidence indicates that he was actively involved in such decisions as the redirection of the river on 30 December 2005 or remained quiescent in violation of his duty to actively prevent harm.

Nothdurft also knew about the special high risk situation which he caused together with Failer. He knew from previous publications and letters about the problems concerning the resettlement of the Amri in detail, particularly from the petition directed at him by the International Rivers Network on 8 April 2008 which was signed online and sent out by 191 petitioners (**annexures 41 and 41a**), also from the email to him by Peter Bosshard (International Rivers Network) and Nick Hildyard (The Corner House) on 21 June 2005 (**annexure 42**) and the report by P.Bosshard and N. Hildyard "A Critical Juncture for Peace, Democracy, and the Environment" (**annexure 3**), which – according to the update of 6 July 2005 (**annexure 38**) – was sent to Lahmeyer International on 28 April 2005 and to which Henning Nothdurft responded personally on 23 May 2005. He also shared the mentioned previous experience of Failer in other dam construction projects of Lahmeyer and as a long-term specialist in the area of dam constructions he knew the international standards of the World Bank concerning resettlement and of the World Commission of Dams for dam construction projects.

## **(2.4.) Guarantor's obligation of Nothdurft**

Due to his position as a guarantor, the constituting facts of which he knew of, it was Nothdurft's duty to guarantee that the population, which had not been resettled and was therefore in danger, would not suffer any harm from the high risk situation he had caused. He should have made sure - through ensuring that respective orders be put in place - that either the redirection of the river would not be ordered as early as December 2005 or, at least, that in light of the rising water levels an order for flood water deduction would be given on time before the first flooding in August 2006. In any case he should have ensured the safety of the people affected. However, considering that the water level was continuously rising, which eventually led to flooding, it is presumed that both defendants refrained from taking the necessary measures to prevent that.

### **1.1.4 Perpetration**

The defendants acted as indirect perpetrators, not as accomplices. Perpetration is constituted by any action that contributes to causing the flooding.<sup>10</sup> At the moment there are no certain insights that show whether third parties involved in the construction works carried out the orders concerning the redirection of the river and by this fulfilled all objective and subjective elements of the crime, in particular whether they acted with intent concerning the endangering of the Amri. In any case, the defendants acted as indirect perpetrators independent of that:

According to jurisdiction, indirect perpetration can be assumed in certain cases in which the (normally not punishable) "mediator of the crime" exceptionally does fulfill all elements that make the crime punishable.<sup>11</sup> If the employees ("mediators of the crime") of third construction companies did not act with intent, the control of the criminal actions, that is necessary to constitute perpetration, results from the control through superior knowledge of the defendants associated with this case.<sup>12</sup> Their control through superior knowledge thus led to their authority of action as they could assume that the construction workers would carry out their instructions "unsuspectingly". Even if the construction workers had had knowledge of the danger for the Amri, the defendants acted as the "perpetrator behind the perpetrator".<sup>13</sup>

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<sup>10</sup> An explosion is caused by someone who sets it off himself or as a remote party. Whoever incites someone to commit that crime, "does not cause it" (Fischer, German Criminal Code, 56th ed. 2009, §308, Rdn.5 and §313, Rn.2.).

<sup>11</sup> BGH (Federal Supreme Court) 40, 316, 236 f.; NJW 2003, 525.

<sup>12</sup> Cramer/Heine a.a.O. § 25 RN 15.

<sup>13</sup> BGH (Federal Supreme Court) 40, 316, 236 f.; NJW 2003, 525.



Concerning commercial enterprises the jurisdiction acknowledges “authority of action by virtue of organizational authority” (in German: “*Tatherrschaft kraft Organisationsherrschaft*”) for management personnel if specific conditions by virtue of organizational structures within the enterprise are used to commit the crime.<sup>14</sup> The German Federal Supreme Court calls this “different types of command hierarchies”<sup>15</sup> and requires that the perpetrator creates “certain conditions through organizational structures” in order to commit the crime.<sup>16</sup> In several cases the German Federal Supreme Court convicted even executive managers and leading employees as perpetrator, without invoking the criteria of “authority of action” by virtue of the organizational apparatus of power. The court bases its interpretation upon a “normative-social point of view”.<sup>17</sup>

In the present case, an organizational authority in the sense of the German Federal Supreme Court jurisdiction can be established although the relevant organizational structures exceed the structure of Lahmeyer. The companies conducting the construction and their employees do not belong to this company. However, due to Lahmeyer’s central position in the construction management in comparison to the involved construction companies, hierarchies similar to company-internal ones have been created. The construction companies and their employees are bound by contract and are subject to the orders of Lahmeyer and particularly of the defendants in the same degree as are employees of Lahmeyer. In fact, the project management of Lahmeyer – including the defendant Failer – has assumed this role of authority and requested the submission of each construction phase for approval. Because of the economic situation in construction industry one can assume that every single construction company could be replaced without problem if it opposes any orders (Fungibility).

Within the Lahmeyer company the relevant orders – both the faulty order for the redirection of the river and the omitted order for the opening of the spillway – were under the responsibility of the defendant Failer, as mentioned above. They were also incumbent on the executive director and defendant Nothdurft due to his actual involvement in the project. Both were in such positions that they could determine the course of the construction measures in

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<sup>14</sup> Cramer/Heine a.a.O. § 25 Rn. 25.

<sup>15</sup> BGH (Federal Supreme Court) in NJW 2003, 522 (525)

<sup>16</sup> BGH (Federal Supreme Court) in JR 2006, 245, (246)

<sup>17</sup> – BGHSt (Federal Supreme Court in Criminal Cases) 37, 106 ff. („Ledersprayfall“= „leather spray case“); BGHSt (Federal Supreme Court in Criminal Cases) 43, 219 ff. („Abfallbeseitigungsfall“ =“garbage disposal case“); BGH (Federal Supreme Court) in NJW (Neue Juristische Wochenschrift) 1995, 293 ff. („Weinverschnittentscheidung“= „wine blending decision“).

detail. Both of them had the necessary decision-making power and the necessary knowledge to control the construction measures in detail.

The defendants acted as perpetrators not as accomplices to the DIU which commissioned the dam construction. The defendants wanted the action as their own. They personally had the final responsibility (quality control) within the Lahmeyer company for the project, for the construction and the start of operation of the dam. Due to Lahmeyer's position as construction manager in the entire project and due to the defendants' own position within the Lahmeyer company they had the opportunity indeed to influence the individual construction phases. It was their personal responsibility and it was in their self-interest to avert additional costs and possible regress claims in case of construction deceleration. If they had waited with the redirection of the river until the resettlement of the Amri, this delay might have led to economic loss. This was known to the defendants.

The importance of the actions of the defendants within the entirety of the offence shows that they acted as perpetrators, because given their extensive control of the dam construction and the responsibility for all planning and construction areas the order resp. authorization of the closure of the left arm of the river was as decisive for the criminal action as was the later omission of an order to take measures against the flood waters.

#### **1.1.5. Factual Causality**

**(1)** The relevant order (s.a., variant of action 1) was causal for the flooding. If ignored its success would have been absent as well: the flooding. The seasonal flood waters alone would not have led to a flooding of the houses. The flood waters of 11,000m<sup>3</sup>/s did not surpass the average amount of the decade. And thus, they would not have reached the houses which had purposely been built above the flood water limits if the outflow of the waters had not been hindered by means of closure of the major distributary. Even according to measurements and calculations of Lahmeyer, described by the defendant Failer in his technical article, **annexure 6**, a volume of water of up to 13,200m<sup>3</sup>/s had to be expected. The affected communities also confirm that the settlement area of the Amri had never been flooded before, however high the water level of the Nile might have been (see: The Amri Committee: Complaint to UN Special Rapporteur on Adequate Housing, **annexure 7**).

Even if - in addition to the closure of the left tributary - large amounts of precipitation should have been partly responsible for the flooding, this does not impede the causality of the criminal action. The presence of cumulative causality<sup>18</sup> is sufficient.

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<sup>18</sup> *ibid*, Rn 32.

(2) Also the second variant of action, the omission of an order for the opening of the spillway, is causal for the success: the flooding. When the water level rose and it became foreseeable that the water was not redirected unrestrictedly and threatened the population which had not been resettled, the water would have drained off and the flooding could have been prevented if the spillways had been opened sufficiently. In his technical article, **annexure 6**, Failer himself explains that the flood spillway could manage a water outflow of 13,200 m<sup>2</sup>/s. Thus, technically it would have been possible to discharge the smaller amount of outflow of 11,000m<sup>3</sup>/s.

#### **1.1.6 Normative Causality**

The defendants can be accounted for the success normatively as well. The danger of the flooding of settlements and cultivated land became reality as a consequence of the order (variant of action 1) resp. of the omission (variant of action 2) and is legally disapproved of in the statutory offence of § 313 German Criminal Code, This section aims at the sanctioning of endangerment of humans and property in cases as difficult to control as this one.

The defendants cannot invoke that they pointed out the dangers in their Environmental Impact Assessment of April 2002 and thus had served their responsibility sufficiently. This feasibility study does not exonerate them of their responsibility for the construction supervision. The argument that they were entrusted with the construction management of the major distributary at the time in question and thus not responsible for what happened at the other tributary, does not exonerate the defendants either. Even if no construction had been done on the tributary at the time, the construction on the major distributary in the immediate vicinity cannot be meaningfully separated from that: in order not to endanger the main construction they had to supervise the redirecting of the river through the tributary simultaneously.

This also is no case of an autonomous self-endangerment of the defendants, just because they did not yield to the resettlement offers which were inappropriate. Not the people affected caused the risk of flooding by staying resp. not evacuating their property, but the risk was created by the order for the closure of the left tributary/resp. the omission of the order for the opening of the flood spillway. The population affected also did not omit to prevent their flooding contrary to duty. From their perspective the flooding was not foreseeable, they had not been warned and as the resettlement negotiations were not finished, they did not have to expect the flooding of their settlement area.

### 1.1.7 Intent

Subjectively the defendants acted at least with conditional intent concerning both the flooding and the implied concrete danger because they considered - in terms of the German Supreme Court jurisdiction<sup>19</sup> - possible - i.e. not completely improbable - and accepted the consequences.

**Variant of action 1:** At the time of the offence on 30 December 2005 the defendants knew that the redirection of the river would lead to a reduction of the water outflow capacities. It was foreseeable to them that together with the arrival of seasonal flood waters this would lead to a swelling of water levels which could surpass considerably the normal annual high water levels. That they knew this, is suggested by the technical article of the defendant Failer (**annexure 6**) which deals with the parameters of the dam construction in detail, e.g. the height of the dam walls and particularly the predictions about the water emergence after seasonal precipitation which Failer had calculated himself. These predictions must have been made prior to the redirection of the river and consequently and inevitably had to be known to the defendants on 30 December 2005.

At this time they also had knowledge of the fact that the settlements of the Amri that had to be resettled were situated in flood plains. They had this knowledge from the results of their preparatory cartographic work and prior consultation with the affected farmers in connection with the irrigation project. Admittedly, they were not themselves entrusted with the resettlement. However, they had conducted a feasibility study (**annexure 4**) prior to the beginning of the construction work and had done the entire preparatory work of measuring including the aerial flights (**annexures 12-14**) and thus, had detailed knowledge about the area. On the other hand they had been involved in the resettlement negotiations as advisors (see: attachment to the letter by Dr. Henning Nothdurft of 23 May 2005, **annexure 17a**), and thus knew of the difficulties in detail. It was known to them that the Amri living in the flooding area had not been resettled and would consequently be endangered acutely by the impending flooding; see: in particular the reply letter by Egon Failer to the internet platform Business & Human Rights of 3 May 2006 (**annexure 22**). From the point of view of the defendants the possibility of a concrete danger for health and life and for possessions of considerable value resulted from this.

The fact that the defendants acted in spite of their knowledge about this, without taking any precautionary measures to avoid danger and damages shows that they accepted this

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<sup>19</sup> BGH NSTZ 1999, 507, 508.

possibility approvingly. Even if a specific success which constitutes a crime is not desired but the perpetrator acts anyway for the sake of further objective, intent has to be assumed.<sup>20</sup> If the defendants had wished to avoid success they could have acted accordingly and could have prevented it. They could have stopped or not initiated the redirection of the river in the first place. However, they intentionally omitted to do this. As can be read in the defendant Failer's technical article (**annexure 6**) it was to the fore that the construction phase including the redirection of the river had to be finished on schedule; thus financial disadvantages through delays could be avoided.

**Variant of action2:** Even if a later time in August 2006 - when the water levels were already beginning to rise - is considered to be the penally relevant moment facts, i.e. , the omission of water outflow measures , we can assume at least conditional intent of both defendants in this case. As shown above, they knew about the expected amount of water and the possibility of flooding due to a redirection of the river. And they could even observe the course of events until August 2006 as the risk of a flooding materialized with the daily rising flood waters. As the responsible construction manager Egon Failer must have continuously informed himself about the water levels. If he had not done that, that would have been a penallyrelevant omission due to his guarantor's obligation. As mentioned above, the defendant Nothdurft was already involved in the communication process with non-governmental organizations at that time. Consequently, it can be assumed that he was also effectively informed about the situation on site, even if he was not on site at that time.

Concerning the resettlement question the defendants were also effectively informed at the time of the offence according to this variant, namely in August 2006; see: in particular the reply letter of Egon Failer to the internet platform Business & Human Rights of 3 May 2006 (**annexure 22**). The defendants knew that the resettlement had not taken place in May and that in April 2006 violent riots had been taking place. Consequently, it was clear to them that the resettlement would not realistically take place within the following weeks until August, the month of the annual high waters.

Despite their knowledge of the consequences of their inactivity the defendants did not do anything when water levels rose threateningly in August 2006. They hence consciously accepted the dangers and damages. Had they wanted to avoid them, they could have taken appropriate measures, more specifically, they could have given orders to adjust the flood spillway in such a way that it would have drained enough water to avoid any harm for the Amri. However, they deliberately did not do this.

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<sup>20</sup> Fischer, StGB, 56. Aufl. 2009, §. 15 Rz. 9b.

### **1.1.8 Unlawfulness and Guilt**

The unlawfulness is indicated by both German and Sudanese law. The Amri did not consent to the flooding. As explained above, the resettlement negotiations were still taking place. Also no justification can be found in public authorization, as there is no indication that such legal authorization would have been issued by Sudanese authorities. Even in case of a justified expropriation the damming measure of closing the major distributary and redirecting the river into the narrower arm of the river, which leads to flooding and forcible dispossession is not a legitimate enforcement measure.

As to guilt, there are no apparent reasons that speak against the guilt of the defendants.

## **1.2. Criminal liability by § 313, par.2, in connection with § 308, par.5 German Criminal Code**

The defendants are guilty of joint induction of a flooding, intentionally or negligently causing a concrete danger for health and life and of damages to possessions in accordance with § 313, par.2, in connection with § 308 par.5, § 25 par.2 German Criminal Code. They did this by ordering or authorizing the closure of the left arm of the river in December 2005, respectively by refraining from an order to open the flood spillway in August 2006.

### **1.2.1. Factual element, Causality, intent, Unlawfulness and Guilt**

Concerning these points we refer to II.1.1 above, which apply here respectively.

### **1.2.2. Negligence concerning a concrete danger**

Concerning the causation of concrete danger for health and life of the people affected as well as damages to possessions of considerable value it has been established above that these actually have materialized. Should conditional intent not be considered applicable here because one assumed that the defendants had in fact wanted to avoid the success of the project, (however, there are no indicators for that at this point) negligence is a given even then because the defendants objectively trespassed against due diligence and could foresee and could have avoided the imminent dangers and damages due to their subjective knowledge and abilities. The violation of due diligence results from the fact that they gave the order or issued the authorization of the redirection of the river, respectively avoided taking any measures to fight the flooding (in case of the variant of action 2) although this conduct caused foreseeable dangers. It was the defendants' duty to act in such a way as not to create any danger for others and for other people's possession. The predictability of the

dangers and damages for the defendants results subjectively from their knowledge of the concrete situation in particular the resettlement situation and from their technical knowledge. Furthermore, it results from their experience concerning foreseeable difficulties of resettlement in dam construction projects and about how to act in light of the recommendations of international standards to prevent dangers and damages. As engineers who are highly experienced in dam construction and who had the power of decision in every step in the construction they were also subjectively capable of avoiding dangers and damages. However, they deliberately did not do this.

### **1.3 Criminal liability according to § 221, par 1 no.1 German Criminal Code**

The defendants are liable for prosecution for abandonment in accordance with § 221 par.1 no.1 German Criminal Code as they gave orders, resp. issued authorizations for the closure of the major distributary and the redirection of the waters through the narrower right tributary.

#### **1.3.1 Factual elements of the offence**

More than 2,740 families of the Amri were put into a helpless situation in August 2006 due to the flooding of their villages, houses and their land, as they were exposed to an abstract danger (in the sense of a typically occurring situation of danger) of death or a severe health damage without any possibility of help neither by themselves nor by outsiders.<sup>21</sup> Furthermore, the concrete danger of death or severe health damages actually became reality in this case.

It has been described above, under item II.1.1.2, that the same events represented a concrete danger for the health and life of the population. I hereby refer to these remarks. There was no possibility of outside help at the time of the flooding of the living quarters considering the extent of the flooding, the large number of people affected and the urgency of the situation. There was no self-endangering situation by mutual consent, see: the remarks above under item I.1.1.6. The expropriation, even if it was lawful, does not eradicate the helpless situation of the Amri as a result of the flooding.

The defendants were the ones responsible for putting the Amri into this situation. The Amri were in a safe position before the flooding: the seasonal flood waters had never threatened their settlements. The defendants brought about a new helpless situation for the affected families. The causation of a helpless situation does not require to bring the victims to a different location. Concerning the causality I refer to the remarks above, according to §313, 1 German Criminal Code, items II.1.1.5 and 1.1.6 which apply here correspondingly.

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<sup>21</sup> Fischer, StGB(German Criminal Code) , 56. Aufl. 2009, Vor § 221, Rn. 7 und 9.

**1.3.2** Concerning the questions of perpetratorship, causality, intent, unlawfulness and guilt the above said under II.1.1.3 to II.1.1.8 as related to § 313 par 1 German Criminal Code applies analogously.

#### **1.4. Criminal liability in accordance with § 305 par.1 German Criminal Code**

Moreover, the defendants are guilty of the destruction of buildings in accordance with § 305 par.1 German Criminal Code, as they ordered or authorized the closure of the major distributary and respectively neglected giving the order for the opening of the flood spillway. Consequently, they caused the flooding and the destruction of approximately 700 houses and the severe damage of about 380 houses which were destroyed or rendered unusable. Concerning the questions of perpetration, causality, intent, unlawfulness and guilt the above said as related to § 313, par.1 German Criminal Code under II.1.1.3 to II.1.1.8 applies analogously.

#### **1.5 Criminal liability by § 240 par.1 German Criminal Code**

The defendants are guilty of coercion in accordance with §240 par.1 German Criminal Code because they gave the order or issued the authorization of the closure of the major distributary and for the redirection of the river and, respectively, failed to give the order for the opening of the flood spillway. Thus, when the flooding took place they forced the 2,740 Amri families to leave their land and leave behind all their belongings. The coercive effect of this conduct materialized with the actual flight of the these families.

Concerning the questions of perpetration, causality and intent the aforesaid as related to § 313 par 1 German Criminal Coder under II.1.1.3 to II.1.1.7 applies analogously.

The additional element of damnability, which is required for coercion, is established here because the defendants disregarded the priority of state coercive measures (if these had been applicable at all due to legal expropriation) and presumed the substitution of the state with measures of coercion.<sup>22</sup> There are no reasons which might hint at the absence of guilt of the defendants.

#### **1.6 Criminal liability in accordance with § 303 par. 1 German Criminal Code**

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<sup>22</sup> Compare with Fischers description of the case, Fischer StGB, 56. Auflage 2009, §§ 240 Rn 41.



The defendants are guilty of criminal damage of the property of the Amri in accordance with § 303 par 1 German Criminal Code because they gave the order or issued the authorization of the closure of the major distributary and for the redirection of the river and failed to open the flood spillway on time.

There was no request for criminal prosecution within the time stipulated as required by law; however, there is a special public interest in the criminal prosecution (§ 303 lit.c. German Criminal Code) because the deed disturbs law and order considerably, not only because of the big amount of people affected, namely 2,740 families. The evaluation of the overall context also justifies this interest. The property damages are not to be seen as an isolated case but as a complexity of actions which damaged the local population massively after they had not deferred to the resettlement plans of the DIU. The actions were carried out forcibly without prior notification or advance warning; people were forcibly displaced by flooding and all their belongings were washed away.

Even if a lawful expropriation of land has taken place, the animals and moveable belongings of the Amri do not fall within that, they were property not belonging to the defendants and were in accordance with § 303 German Criminal Code destroyed or washed away and thus became completely useless.

Concerning the questions of perpetration, causality, intent, unlawfulness and guilt the aforesaid relative to § 313 par.1 German Criminal Code under II.1.1.3 to II.1.1.8 applies correspondingly.

### **1.7 Criminal liability in accordance with § 17 no.1 Animal Protection Act**

According to the § 17 par.1 Animal Protection Act, the defendants are guilty of ordering and authorizing the closure of the major distributary of the river and the redirection of the river and of failing to open the flood spillway on time.

Approximately 12,000 livestock of the Amri were killed by the flooding without sensible reason, all of them vertebrates. In the case at hand the animals should have been resettled in time together with the humans or the flooding should have been postponed until the resettlement. The dam construction did not necessarily require the killing of the animals. Consequently, there is no necessity to search for a fair balance between legally protected interests, between the interest in the dam construction and the protection interests covered by §17 Animal Protection Act, i.e. the ethical order between humans and animals. Even if a

weighing of interests was undertaken, it would not justify the killing of the animals because the damage would have been avoidable.

Concerning the perpetration, causality, intent, unlawfulness and guilt the aforesaid in relation to § 313 par.1 German Criminal Code under II.1.1.3 to II.1.1.8 applies analogously.

## **2. The floodings of the Manasir areas 2008 and 2009**

### **2.1. Criminal liability in accordance with § 303 par. 1 German Criminal Code**

The defendants are guilty of joint causing of a flooding according to §§ 313 par.1, 25 par.2 German Criminal Code by ordering or authorizing the closure of the dam and the last spillgate on 16 April 2008. I refer to aforementioned legal explanations under II.1. (flooding of the Amri areas in August 2006), which apply here correspondingly with exception of the following differences that should be highlighted:

#### **2.1.1 Factual elements of the offence**

The facts to be examined here concerning the flooding which took place from the end of July 2008 until at least January 2009 have been described above under item I.2.2. These events fulfill the elements of the offence of flooding; in particular this flooding was not predicted, the circa 2000 affected families of the Manasir did not agree to the flooding. It surpassed the annual floods which regularly and predictably flood a part of the land of the Manasir by far. The resumption of resettlement negotiations alone or the completion of a resettlement agreement with the government does not imply consent and approval by the affected because the resettlement itself had not taken place.

The flooding produced a concrete danger for the health and life of the people affected and concrete damages of possession, buildings and structures, household means, livestock and plantations. The statements presented by different people concerned show how water ingressed into the living quarters in the evening and at night without forewarning and made the walls collapse while some of the families living there were still asleep. The people were forced to flee immediately without any time to evacuate the animals or pack and take along their belongings and their stored food; neighbours could not help, because their houses were collapsing as well.

#### **2.1.2 Perpetration**

The criminal offence consisted of the order, respectively the authorization by the defendants to close the last spillway on 16 April 2008 which led to the immediate successive damming of the reservoir.

The defendants acted as indirect perpetrators in this case as well. Concerning the constitution elements and the distinction to aiding and abetting we refer to the aforesaid, item II.1.1.3 and II.1.1.4. Correspondingly, the authority of action of the defendants Failer and Nothdurft also ensues for the second set of facts. The two defendants had the same responsibility and authority concerning the dam construction project at the second time of offence as they did in the first. Hence, the relevant orders for the closure of the last spillway on 16 April 2008 were incumbent on the Lahmeyer company and within the company in the hands of the defendants Failer and Nothdurft, in the form of orders or authorizations.

### **2.1.3 Factual and normative causality**

The order, respectively the authorization by the defendants to close the last spillway was causal for the closure of the dam and the beginning of the damming of the reservoir. With the seasonal flood water at the end of July the water levels rose so high that the houses of the Manasir were flooded. The flood water alone – without the closed dam – could not have caused this flooding; experience from previous years shows this as the flood waters had never reached these houses. There are no indicators which show that the flood waters in the year 2008 were unusually high, they still were within the limits of the expected under normal circumstances. The closure of the dam which had taken place months before, in April, prevented the flood waters from draining off as usual, however. The order for the closure of the dam was thus causal for the flooding of the houses and land of the Manasir.

Furthermore, the floodings realized those very concrete dangers that are legally condemned by § 313 German Criminal Code. I therefore refer to the aforementioned explanations under item II.1.1.6 correspondingly.

### **2.1.4. Intent**

Compare first the remarks concerning the Amri (1<sup>st</sup> set of facts), which can be applied here accordingly.

Concerning the endangerment of legally protected interests it has to be added that the defendants knew about the events surrounding the flooding of the Amri settlements in August 2006. They knew, in particular, the report of the UN Special Rapporteur Miloon Kothari of 24 August 2007 in which he urgently warns of the continuation of the construction and appeals to the Lahmeyer company directly in that regard to stop construction work temporarily. They

were also aware of the fact that the Manasir had not been resettled at the time of the actions in April 2008 and that a resettlement of the 2000 families affected here was not to be expected realistically in the short time until the expected seasonal high waters in July and August. Apparently, DIU employees had foreseen the imminent flooding of the Manasir settlements a few weeks prior to this (see: **annexure 2**). Then, this danger must have been even more obvious to the defendants. They consequently knew in April 2008 that they were causing a concrete danger of flooding for the Manasir people. If the defendants had wanted to avoid the inflicted dangers for the population and the damages to their houses, their moveable possession and herds, they could have done so. They could even have forborne the actions; they could have attempted a timely evacuation and compensation, at the very least they could have warned the people affected of the approaching flood. However, they did none of this. This indicates that although they might not have wanted any dangers or harm for the population and their property, they accepted this eventuality for the sake of achieving their ultimate goal, the timely completion of the dam.

#### **2.1.5 Unlawfulness and guilt**

Nothing indicates the consent of the Manasir to the flooding which would have made it lawful. The agreements of 1 June 2006 and of May 2007 between the governor of the Nile State and the Manasir had not been implemented; the resettlement measures had not started and the Manasir remained in their houses until the flooding.

There are no reasons which speak against the guilt of the defendants.

### **2.2. Criminal liability by § 131 par 2, in connection with § 308 par.5 German Criminal Code**

The defendants are guilty of the joint causation of a flooding by negligently (if not intentionally) causing a concrete threat to health and life and to damages to possession in accordance with § 313 par 2 in connection with § 308 par.5, §25 par.2 German Criminal Code. They did so on 16 April 2008 by ordering or authorizing the closure of the last spillgate in preparation for the dam reservoir.

#### **2.2.1 Factual elements of the offence, Causality, Intent, Unlawfulness and Guilt**

Concerning the mentioned aspects, we refer to the aforementioned, II.2.1. The remarks there apply to this case, too.

### **2.2.2. Negligence in regard to a concrete danger**

In regard to the causation of a concrete threat to health and life of the people affected as well as damages to property of considerable value it has been established above that these were, in fact, created. Even if one assumed that conditional intent were not established because one assumed that the defendants, in fact, wanted to prevent the success of their actions – although nothing hints at this – negligence would have to be assumed because the defendants objectively violated their duty of care (due diligence). They could have foreseen and prevented the dangers and damages due to their subjective abilities and knowledge. The violation of due diligence results from the fact that they issued the order or authorization for the closure of the last spillgate although foreseeable dangers resulted from it. The defendants were obligated to act in such a way as to avoid endangerment of people or possessions. The predictability of the dangers and damages results subjectively for the defendants from their knowledge of the concrete situation, in particular the resettlement situation. In addition, it results from their professional and experiential knowledge of the foreseeable difficulties concerning resettlement in dam construction projects and their knowledge about how to act in accordance with recommendations of international standards. As highly experienced engineers in dam construction who had the power of decision in every phase of the construction works, they were subjectively capable of avoiding dangers and damages. However they knowingly refrained from fulfilling their duties.

### **2.3. Further relevant offences**

With reference to further offences according to § 221 par 1, no.1 German Criminal Code, § 305 par.1 German Criminal Code, § 240 par.1, §303 par.1 German Criminal Code and § 17 No.1 Animal Protection Act that have also been committed here, I refer to the respective remarks at items II.1.3. to II.1.7 above that apply correspondingly.

### **3. Criminal liability under German law**

German Criminal Law is applicable here. There are no certain insights yet as to whether the criminal actions, respectively the orders or authorizations occurred in Germany or in Sudan or - in the case of the second variant of action of the first set of facts (omission, item II.1.1.3) – should have occurred in Germany or Sudan (§ 9, par 1.2. Alt. German Criminal Code). This remains to be investigated. However, in the case of omission applies that the relevant location of the criminal offence is in all those locations where the omitted action should have

taken place. Normally, this is the location where the defendant stayed at the time of the offence or where he could have acted to avoid criminal omission.<sup>23</sup>

For either set of facts is valid, that if the respective actions were - or in the case of the omission should have been - committed in Germany – which remains to be investigated - the applicability of the German criminal law results from §§ 3,9 German Criminal Code.

Even if further investigations should show that one or more actions were committed on foreign territory, i.e. in Sudan, German criminal law is still applicable in accordance with § 7, par.2, no.1 German Criminal Code. The conditions for that are established, namely “double” criminal liability, i.e. in Sudan and Germany and the fact that both defendants are – judging from their names and professional rootedness in Germany – German citizens.

The criminal actions of both sets of facts are liable to prosecution in Sudan under the Sudanese Criminal Code: Sections 216ff - public nuisance; section 229 - Negligent Conduct Causing Danger to Person or Property ; section 230 - Negligent Conduct with Respect to Animals; chapter 20 on Cruelty to Animals; Section 287- Wrongful Restraint; Sections 294ff; - Criminal Force; Sections 364ff – Mischief, esp. Section 370 - Mischief by Causing Inundation or Obstruction to Public Drainage (**annexure 44**). Also omission contrary to duty is liable to prosecution under Sudanese law (sec.3 (1), 25 Penal Code, see: **annexure 44**).

### III. Conclusion

Following all this, criminal investigations have to be initiated. Numerous concrete investigative starting points have been pointed out. I would respectfully recommend to interview the aggrieved party and president of the Leadership Office of Hamadab Affected People (LOHAP, London), Mr. Ali Khaliefa Askouri and Mr. Nick Hildyard of the organization The Corner House, Station Road, Sturminster Newton, Dorset DT10 1YJ, England. Mr Askouri himself owned land in the area flooded in 2008-2009 and travels to his family in the affected region several times a year. He represents the interests of the people affected as president of the named institution. Mr Hildyard – an expert in dam projects and their social and ecological impacts with over 20 years of experience - visited the affected region in February 2005 and in June 2006 and has accompanied the organized affected population like the LOHAP or the Executive Committee of the Manasir Community People Affected by Merowe Dam at least since 2004. Both witnesses have detailed knowledge about the course

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<sup>23</sup>

See: Fischer German Criminal Code, 56. Auflage 2009, § 9 Rn. 9

of the dam construction project, the situation of the affected population groups, details of the damages caused, the resettlement process, the public relations and communications with public authorities and the Lahmeyer company. Both witnesses are prepared to follow writ of summons for the examination of witnesses to Germany.

I explicitly ask to be informed of the file reference and to be given the opportunity for a complementary statement and for the submission of documents and expert reports, should the prosecutor's office consider to not open an investigation procedure or to dispense due to different jurisdiction or to terminate investigations without accusation. Prior to a conclusive decision the signatory requests

**access to the records**

and asks the documents to be sent to his office address.

Wolfgang Kaleck  
Attorney-at-law