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COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

**THE RIGHT TO DEVELOPMENT IN TRANSBOUNDARY
WATER CONTEXT: THE CASE OF GERD**

BY

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**A Thesis Submitted in Partial Fulfillment of the Requirements for
Master of Laws Degree in Human Rights Law at the School of Law,
College of Law and Governance of Addis Ababa University**

Advisor: Girmachew Alemu (PhD, Associate Professor)

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Addis Ababa, Ethiopia

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DECLARATION

I, Halifet Ayemohammed Yusuf, hereby declare that the thesis entitled "*The Right to Development in Transboundary Water Context: The Case of GERD*" is my original work and that it has not been submitted for any degree or examination in any other university. I also pledge that all sources in any form are duly acknowledged.

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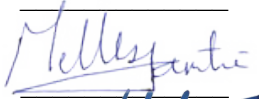
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DEDICATION

This thesis is dedicated to the memory of my father, Ayemohammed Yusuf Siraj, whose teachings and memories I will always treasure. It is also dedicated to the former GERD project manager Eng Simengew Bekele. May your legacy live on in our lives.

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Right
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social, and Cultural Rights
CFA	Cooperative Framework Agreement
CRC	Convention on the Rights of the Child
DoP	Declaration of Principles
GA	General Assembly
GC	General Comment
HRBA	Human Rights-Based Approach
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IHA	International Hydropower Association
ICJ	International Court of Justice
LDCs	Least Developed Countries
NBI	Nile Basin Initiative
RtD	Right to Development
UDHR	Universal Declaration of Human Rights
UN	United Nations
OHCHR	United Nations Office of the High Commissioner
OMVS/R	Organization for the Development of the Senegal/Gambia River
UNCTAD	United Nations Conference on Trade and Development
UNDRD	United Nations Declaration on the Right to Development
UNECE	United Nations Economic Commission for Europe
UNHRC	United Nations Human Rights Committee
UN Watercourses	Convention on the Law of Non-Navigational Uses of International Watercourses

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ABSTRACT

The GERD is Africa's largest hydroelectric developmental project, which has been under construction for the past decade in Ethiopia. With the potential to generate over 6000 megawatts of power, this dam has the potential to significantly improve the quality of life in Ethiopia and other countries in the region. It also presents a significant opportunity for regional cooperation and development in the Nile basin. However, this project has been fraught with tension between Ethiopia and its neighbors as it affects their access to water resources. Another important reason is the distribution of the Nile water share under the colonial legal regime governing the Nile watercourse, which has ignited tension.

Although there are a lot of contributions on the Nile River and GERD in the literature, there are few from the human rights perspective. Hence focusing on the RtD of the upper riparian countries, this paper considers the human rights ramifications of the legal agreements regarding restricting upper-stream countries from utilizing the Nile water as a critical component for the Nile basin development. The paper uses qualitative analysis to highlight the importance of presenting the human rights discourse when evaluating such projects. It also aims to contribute to the African jurisprudence of the RtD to empower people's rights and the quest for development using their natural resources. The finding demonstrates that the Nile River's utilization is directly related to and critical to the RtD. Further, it indicates that the colonial legal regime remains a key obstacle for the Nile basin countries to access the Nile water for protecting, promoting, and realizing the RtD.

Keywords: Nile, Watercourse, Human Rights, Right to Development, GERD.

CHAPTER ONE

INTRODUCTION

1.1. Background

The Right to Development (RtD) concept was first articulated by Kéba Mbaye, a former Human Rights Commission chairman, during its 33rd session at the International Institute of Human Rights in Strasbourg.¹ In response to this phenomenon, the UN Declaration on the Right to Development (UNDRD) was adopted in 1986. It was later reinforced by the Vienna Declaration and Program of Action by the World Conference on Human Rights.² Moreover, many elements of the RtD are reflected in the human rights instrument's provisions and jurisprudence, emphasizing the multifaceted, multidimensional, and complex nature of development processes and the need for "inclusive, equitable, and sustainable development."³

For example, Article 1 UNDRD provides that "every person has the right to participate in, contribute to, and enjoy economic, social, cultural, and political development in which all human rights and fundamental freedoms can be fully realized." More importantly, the RtD guarantees that people and communities have access to the opportunities and resources they need to realize their full potential, as stated in Article 2 of the declaration, which "... implies the full realization of peoples right to self-determination, including the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."

Transboundary rivers, to be specific, often provide vital resources for the communities that live along their basin, including water for drinking, irrigation, hydropower, and industry, as well as fish and other aquatic resources for food. However, developing these resources can also lead to conflicts between the countries that share the river. This is peculiarly the case of the Grand Ethiopian Renaissance Dam (GERD), a large hydroelectric dam built on the Blue Nile River in Ethiopia.

¹ Teshome, R. G. (2022). The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right? *Human Rights Law Review*, 22(2).

² Islam, M. R. (2002). Development as a human right: an economic analysis from the third world perspective. In *Human rights and development*. pp. 1-16. Empowerment through the law of the common people (ELCOP).

³ UN Human Rights Council. (2019). Contribution of development to the enjoyment of human rights: Study of the Human Rights Council Advisory Committee. A/HRC/41/50. para. 3.

In the context of the GERD, Ethiopia has the right to develop its water resources and pursue economic development by constructing the dam. Nonetheless, the project has been controversial among the countries that share the Nile River, particularly Egypt, and Sudan, which are concerned about the dam's potential impact on their water supply, particularly during drought. To ensure that all countries benefit from the project, Ethiopia has engaged in negotiations with Egypt and Sudan with the African Union as a facilitator to reach a mutually acceptable agreement on the operation and filling of the dam, which considers all stakeholders' needs and interests. Still, they have not come to an agreement yet. However, these concerns must be addressed through a cooperative approach to resource management that considers all stakeholders' needs and interests.

The RtD can help address these conflicts by ensuring that countries can work together to manage and develop shared resources to promote peace, cooperation, and mutual benefit. For example, they can implement joint management and sharing arrangements for the resources of the river, which can help to avoid over-exploitation and promote equitable access. They can also collaborate on projects such as hydropower development, providing clean energy for all communities while minimizing negative environmental impacts, as evidenced by the Mekong River case.

Hence, the RtD is particularly important in transboundary contexts and especially relevant to the GERD because it asserts Ethiopia's right to pursue economic development through dam construction. Nevertheless, implementing this right in transboundary river contexts can be challenging, as it involves balancing the interests of different countries and stakeholders. According to Collins, what makes the Nile distinct is "not its volume but its rich and colorful history, its profound role in shaping human civilization in Africa, and the absolute dependency on the river and its vagaries of those who live in its basin."⁴ As a shared resource, the Nile River is vital for energy production and a delimiting factor for food production, economic development, and poverty reduction in the Nile basin, which has more than 370 million inhabitants.⁵

⁴ Collins, Robert O. (2002). "The Nile." p. 11.

⁵ Abdelhady, Dalia, et al. (2015), "The Nile and the Grand Ethiopian Renaissance Dam: Is there a meeting point between nationalism and hydrosolidarity?" *Journal of Water Research & Education* 155. No. 1. p. 74.

Hence, it plays a crucial role in riparian states' economics, politics, and cultural life and its people, whose population growth rates in the region are projected to soar.⁶ However, the main characteristics of the basin are an uneven distribution of water resources, high climate variability and diversity, low rainfall, high potential evapotranspiration (PET), and increased vulnerability to droughts.⁷ The struggle for an agreement on the Nile waters disputes has lasted for more than 50 years to ensure equitable utilization of the river, in which the riparian nations have launched several shared initiatives. Despite this breakthrough, an agreement on the Nile waters dispute still needs to be achieved.⁸

One main challenge underlying the Nile initiative's development is the need to move beyond bilateralism to achieve future agreements on legal principles while not starting a complete renegotiation of existing treaties.⁹ This is because the bilateral agreements grant Egypt veto power over projects on the Nile in other riparian states.¹⁰ It has also effectively divided the entirety of the Nile waters between two lower riparian states, Egypt and Sudan, based on an assumed annual average discharge measured at Aswan of 84 billion cubic meters (bcm).¹¹

Consequently, the water quotas enshrined in the legal agreements have revived the disputes over the Nile legal agreements. Which rules are viewed to be valid and that applies is frequently contested by those who operate with opposing interests and power, notably when a large hydropower project, such as the GERD, is built.¹² However, the RtD is concerned with ensuring the fair distribution of the benefits of economic growth and providing opportunities for individuals to partake in and appreciate the fruits of such development.

⁶ MA, Salman. (2013). "The Nile basin cooperative framework agreement: A peacefully unfolding African spring?" *Water International* 38, no. 1. pp. 17-29.

⁷ Nile Basin Initiative (NBI). (2012). *State of the River Nile Basin Report: Entebbe, Uganda*, p. 24.

⁸ Mekonnen, D. Zeleke. (2013). "The Quest for Equitable Resolution of the Nile Waters Dispute: Wandering in the Wilderness?" *International Journal of Ethiopian Studies* 7, no. 1 & 2. p. 77.

⁹ Nicol, Alan, and Mamdouh Shahin. (2003). *The Nile: moving beyond cooperation*. UNESCO, p. 17.

¹⁰ MA, Salman. (2016). "The Grand Ethiopian Renaissance Dam: the road to the declaration of principles and the Khartoum document." *Water International* 41, no. 4. p. 512-513.

¹¹ *Ibid.* The division – 55.5 bcm to Egypt and 18.5 bcm to Sudan – considered anticipated losses to evaporation in Lake Nasser/Nubia of some ten bcm per annum.

¹² Middleton, Carl. "Arenas of Water Justice on Transboundary Rivers: A Human Rights-Based Approach to the Food-Water-Energy Nexus in Southeast Asia." p. 5.

This concept encompasses three crucial elements: access to resources, self-determination,¹³ and fully realizing all human rights and fundamental freedoms. As a result, in the realm of transboundary river basin management, the RtD holds significant relevance, given that the development of one riparian state, be it an upper or lower stream country, often positively or even negatively impacts the development of other riparian states. Hence, this research contributes a distinct perspective by examining the RtD in transboundary water and utilizing GERD as a case study. Accordingly, this research provides a deeper insight into the role of the human rights-based approach (HRBA) in promoting equitable and reasonable utilization of the Nile and realizing the RtD through accessing natural resources.

1.2. Statement of Problem

The RtD is a fundamental right that enables people to access resources and opportunities necessary for their growth and well-being. It encompasses various aspects, such as economic, social, cultural, and political rights. It is crucial in promoting development, reducing poverty, and ensuring social justice, essential to ensuring that every individual can lead a dignified life. However, implementing RtD in the context of transboundary rivers has been a contentious global issue in international politics, especially regarding human rights costs.

GERD has been a prime example of this issue. The human rights perspective on the utilization of transboundary rivers is multifaceted. The right to water is a fundamental right, which means that all people can access clean and safe water for drinking, sanitation, and other purposes.¹⁴ However, this right can be affected by the construction of dams and other water infrastructures, mainly when located on transboundary rivers.

The human rights perspectives on using transboundary rivers also extend to the RtD, which is the central theme of this research. In the case of the GERD, Egypt has raised concerns about its impact on the flow of the Nile River, its primary water source. Egypt relies on the Nile for its agriculture, industry, and domestic use, and any reduction in its flows could have consequences for its people. Sudan, another downstream country, has also expressed concerns about the impact of the GERD on its water resources.

¹³ Schrijver, N. (2013). Self-determination of peoples and sovereignty over natural wealth and resources. pp. 95-102

¹⁴ UNCESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11.

For Ethiopia, the GERD is a significant development project which aims to generate electricity and support its economic growth. However, Egypt and Sudan fear the dam will reduce their water shares. The situation is further complicated by the absence of a comprehensive legal agreement on using the Nile River, except for the colonial treaties, and the lack of trust between the parties. Nonetheless, developing countries like Ethiopia must often harness their available natural resources, including water, to achieve their developmental goals without causing significant harm.

On that account, the GERD's construction raises essential questions about Ethiopia's right to use its natural resources for development. The country has long faced challenges in meeting its energy needs, and the dam is a crucial solution to this problem. However, this right must be balanced with the rights of downstream countries by equitably sharing the Nile. In this context, the RtD needs to be interpreted and applied to consider the interests and needs of all parties involved.

Hence, this research focuses on the human rights aspect of the broader tension between states to recognize rightful claims, foster cooperation, and find mutually beneficial solutions. Notwithstanding, to address these complex issues, recognition of the rights of all the basin countries to the Nile and access as well as benefit from the shared water resources is required to carefully balance the competing interest and rights of all communities. Accordingly, this research aims to explore how the usage of the transboundary river is related as a critical component and essential to the RtD.

1.3. Literature Review

Water is recognized as a crucial natural resource because it is the sole global resource with no economic alternative.¹⁵ In addition, it remains the backbone of most global economic development and is essential to human livelihoods.¹⁶ Nevertheless, an evaluation of previous conflicts related to water reveals that water shortage, the construction of dams, the obstruction of

¹⁵ Llamas, M. Ramón, et al. (2009). Water ethics: Marcelino Botin water forum 2007. CRC Press.

¹⁶ *Ibid.*

water, chronic and accidental water pollution by industry, and disregard or non-acceptance of current treaty provisions frequently serve as the underlying causes of water tensions.¹⁷

Unfortunately, the number of works of literature that apply human rights law in transboundary water disputes, in general, is very few. Hence, the researcher has relied on works done on the human rights perspective of the Nile and GERD case, specifically. In his article, Takele Bulto (2011) analyzes the immediate implementation problems triggered by a declaration of the right to water given the shared nature of scarce water resources of international rivers in Africa.¹⁸ It further explores the imperatives of extraterritorial application of the human right to water and correlative state obligations with the manner and scope of the state's uses of waters from shared international river basins. The author demonstrates that realizing the right to water in one African state highly depends on third states' conduct.

On the other hand, Fasil Mulatu Gessesse (2008), in his LLM thesis submitted to the Centre for Human Rights, University of Pretoria, adopts a human rights approach to consider conflicts concerning using transboundary rivers.¹⁹ His study reveals that when countries try to solve the problems related to water use, they employ various means but fail to consider the rights and best interests of the people. According to him, the human rights of the people that live in the basin are not tabled during negotiations. Concerning the Nile, he provides that the agreements made on the river are incompatible with international human rights norms and principles.

In his LLM thesis, Dagne Gurmessa Merso (2022)²⁰ tried to demonstrate the role of GERD, as a source of electricity and energy, in realizing human rights in Ethiopia by building human rights-based arguments that justify the construction and filling of the dam. Although the thesis tried to demonstrate GERD as a human rights issue and its essentiality for the realization of human rights in Ethiopia, it has tended to focus on access to energy rather than linking it with access to natural resources, the Nile, in this case.

¹⁷ UN Water. (2008). *Transboundary Waters: Sharing Benefits, Sharing Responsibilities*. Thematic Paper. 2.

¹⁸ Bulto, Takele Soboka. (2011). "Towards rights-duties congruence: Extraterritorial application of the human right to water in the African Human Rights System." *Netherlands Quarterly of Human Rights* 29, no. 4.

¹⁹ Gessesse, Fasil Mulatu. (2008). "A human rights approach to solving water conflicts over the use of transboundary rivers: focus on the Nile Basin." LLM diss., University of Pretoria.

²⁰ Merso, Dagne Gurmessa. (2022). "Grand Ethiopian Renaissance Dam (GERD) as a Human Rights Issue: The Case of Right to Clean Electricity." Unpublished Manuscript. LLM diss., Bule Hora University.

The current research will differ from the previous works because it assesses the GERD and Nile River's legal regime and employs an interdisciplinary approach to benefit from other disciplines, i.e., international water and human rights law. More importantly, although GERD is a developmental project, from the literature review presented, it has not been addressed particularly from the RtD perspective. Further, the Nile River, being an existential matter for all the Nile basin states, generally, the human rights standpoint, particularly the right to freely dispose of natural wealth, has not been dealt with in most essential works on the Nile River legal regime, which should be the essence of any discourse that is related to sovereign rights and self-determination over natural resource. Accordingly, one can understand that they have failed to provide an in-depth assessment and analysis of the legal regime of the Nile and the GERD construction from a human rights-based perspective.

1.4. Research Objectives

1.4.1. General Objective

The research's general objective is to study the relevance of human rights law, particularly the RtD, in transboundary water disputes and the ramifications of the Nile legal agreements on Ethiopia's efforts toward realizing the RtD by utilizing the Nile River.

1.4.2. Specific Objectives

1. To discuss and analyze the concept of RtD and appraise its importance in resolving access to natural resource-related controversy within the context of transboundary rivers.
2. To evaluate critical concerns of the Nile legal agreements and propose the appropriate steps to be considered and employed for better basin-wide cooperation and management of GERD.
3. To assess challenges and opportunities the GERD generally provides from a human rights-based perspective.

1.5. Research Questions

Central Question:

What are the challenges faced by Ethiopia in realizing the RtD through utilizing the Nile River, and how do the Nile legal agreements affect Ethiopia's efforts toward realizing the RtD?

Sub questions:

1. What is the role of RtD in resolving access to natural resource-related controversy within the context of the transboundary river?
2. What are the critical concerns of the Nile legal agreements, and what appropriate steps should be taken to improve basin-wide cooperation and GERD management?
3. What challenges and opportunities does GERD generally pose from a human rights-based perspective?

1.6. Research Method

The research predominantly utilized doctrinal and analytical methods due to the theoretical tools drawn from pre-existing legal agreements and human rights literature. This method is highly suitable for collecting and analyzing pertinent data, thereby enabling the accomplishment of the research objective of evaluating legal agreements. Because the research considers the human rights ramifications of the Nile legal agreements on Ethiopia's RtD through legal analyses, this method is appropriate for gathering and analyzing pertinent data for addressing research questions while strengthening the validity of the results.

Available primary and secondary sources have been used to address the questions raised by the research. Primary data like international laws, treaties, and other relevant UN resolutions related to the topic have been accessed from official sources. Moreover, the Nile River's legal instruments were collected from the Nile Basin Initiative (NBI) official website to obtain authentic, reliable, and recent information on the Nile basin. A wide range of academic literature pertinent to the case, such as articles, books, journals, and reports of governments, and regional and international organizations, was used as the secondary source.

The legal agreements regulating the allocation of the Nile, i.e., the 1929 & 1959 agreements, have been assessed in line with human rights law principles. The purpose of the inclusion of different lenses of human rights (development, water, and energy) is to clarify the compatibility of the legal agreements with these specifically mentioned human rights areas.

Accordingly, the research assesses whether the legal agreements play a role as an impediment in advancing Ethiopia's human rights status, particularly in the Nile basin countries. Following this, GERD was analyzed from a human rights-based approach. In doing so, measuring the harm and benefits of the project has helped evaluate whether the project and the agreements align with the human rights framework.

1.7. Scope of the Research

The research does not examine all the questions revolving around the Nile basin. It is limited in assessing the effect of Nile agreements on Ethiopia's efforts toward realizing the RtD through utilizing the Nile River. In that, it tries to appraise the importance of RtD in resolving access to natural resource-related controversy within the context of the transboundary river. Further, considering the effects of GERD construction, the research concentrates on three countries, Egypt, Sudan, and Ethiopia, now regarded as central actors in the Nile issues.

1.8. Organization of the Research

The research is organized into five chapters to appropriately respond to the research questions and meet the objectives. The first chapter deals with the background of the study, statements of the problem, literature review, research question, and research method. While the second chapter deals with the general overview of the RtD, its legal and theoretical foundations, and its link with access to natural resources, the third chapter deals with the interplay between the RtD and international water law in a transboundary context, water as a critical natural resource for development, and the realization of the RtD and the obligation of states towards the right. It also assesses the Nile legal Agreements and their human rights ramifications on the Nile basin. The fourth chapter addresses the GERD as a developmental project and its role as a hydroelectric dam to fulfill fundamental human rights in Ethiopia and Africa. It focuses on a critical analysis of GERD and how the developmental project contributes to or affects the realization of the RtD of Ethiopians, mainly, and the Nile basin generally. Lastly, chapter five has a summarized conclusion.

CHAPTER TWO

CONCEPTUAL FRAMEWORK ON THE RtD AND ITS LINK TO NATURAL RESOURCES

2.1. Introduction

Development has been regarded as an economic process that involves the growth of a country's Gross Domestic Product (GDP) and is the basis of the global economic model.²¹ Moreover, due to the varying understandings of the terms "RtD" and "development," the implementation of this right has been delayed.²² Furthermore, the benefits of economic growth in the second half of the 20th century were spread differently in an inequitable manner among all nations, peoples, and individuals.²³ As a result, development is increasingly being debated, criticized, and has been the source of social unrest. However, the RtD is necessary more than ever due to escalating poverty, widening disparities, and unprecedented economic, social, cultural, political, environmental, and climate catastrophes.

The World Conference on Human Rights in 1993 reaffirmed that the RtD aims "to address human needs and is an integral part of all human rights." Moreover, many elements of RtD, such as "self-determination; fair distribution of resources; equality and non-discrimination; accountability and transparency; substantive rights relating to an adequate standard of living, including food, water, and sanitation, housing, health services, education, employment and enjoyment of culture; and international assistance and cooperation; are contained in the provisions and jurisprudence of the human rights instruments, and can be used to monitor progress toward the realization of the RtD by employing appropriate indicators."²⁴ Hence, a more balanced strategy can be provided through the RtD, which places people at the center of economic, social, cultural, and political action.

²¹ UNOHCHR, *Frequently Asked Questions on the Right to Development*, 2016, Fact Sheet No. 37. p. 1.

²² *Ibid.*

²³ *Ibid.*

²⁴ *supra note 3*, UN Human Rights Council. para. 4.

2.2. The Normative Content of the RtD: A Human Rights to Development

The concept of human rights to development is essential in ensuring everyone can lead a dignified life. It is a fundamental right that enables people to access resources and opportunities necessary for their growth and well-being. Accordingly, the RtD encompasses various aspects, such as economic, social, cultural, and political rights. Hence, it is crucial in promoting development, reducing poverty, and ensuring social justice. Through implementing the RtD, providing people access to education, healthcare, clean water, and other necessities of life can contribute positively to fully realizing human rights.

Unfortunately, many people worldwide are denied this right due to various factors such as discrimination, inequality, and lack of resources. Moreover, there is still debate about the normative content of this right. Some argue that it should focus on economic growth and material well-being, while others say it should include social and political rights. Those who advocate for an emphasis on economic growth argue that development is primarily about improving people's standard of living. They believe that economic growth is necessary to achieve this goal, and therefore the RtD should prioritize policies that promote economic growth.

On the other hand, those who advocate for a broader understanding of the RtD argue that it should also include social and political rights. They believe actual results cannot be achieved without addressing poverty, inequality, discrimination, and political repression. However, a comprehensive understanding of the RtD is necessary. Economic growth alone cannot ensure human development if social and political rights are not respected. Therefore, policies promoting economic growth must also address poverty reduction, gender equality, access to education and healthcare, freedom of expression, and association. Only then can meaningful human development be indeed achieved for all individuals worldwide.

2.3. Legal Frameworks on the RtD

2.3.1. International and Regional Human Rights Instruments

Numerous international human rights treaties, declarations, and resolutions are the foundation for the RtD. Human rights instruments provide fundamental normative principles and

standards that direct the development process, including non-discrimination and equality, participation, accountability, and the interdependence and indivisibility of human rights.

Putting chronologically, achieving international cooperation to solve global problems of economic, social, cultural, or humanitarian character and promoting and encouraging respect for human rights and fundamental freedoms for all is one of the purposes of the UN, articulated in Article 1(3) of the UN Charter.²⁵ Additionally, under Articles 2, 55, and 56 of the UN Charter, "all Member States bear certain obligations to be carried out individually and collectively in promoting peace, human rights, and development," the organization's three pillars.

Article 25 of the UDHR also states: "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food [...]". Article 28 of the Declaration also entitles everyone to a "social and international order in which "all human rights and fundamental freedoms can be realized." The ICESCR likewise recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food [...]" (Article 11(1)); and "the fundamental right of everyone to be free from hunger" (Article 11(2)). Therefore, the roots of the problems of hunger and malnutrition are not lack of food but lack of access to available food, inter alia because of poverty."²⁶

Following, the UNDRD, which exclusively deals with the RtD, provides per Article 1.1 that "The RtD is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realized." Further, Article 2.1 provides that "The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of Human Rights Covenants, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources." The RtD also embodies "the human rights principles of equality, non-discrimination, participation, transparency, accountability, and international cooperation."²⁷

²⁵ UNOHCHR. The Right to Development and International Cooperation.

²⁶ UNCESCR, *General Comment (GC) No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999.

²⁷ UNOHCHR. (2011). UN Declaration on the Right to Development at 25.

Accordingly, from the definition posited in Article 1 of the UNDRD, as propounded by Arjun Sengupta, the former UN Independent Expert on the RtD, the following three cardinal principles can be adduced: "(i) the right to development is a fundamental human right; (ii) there is a specific process of economic, social, cultural and political development that is favorable to the recognition of human rights; and (iii) everyone is entitled to participate, contribute and enjoy the specific process of development."²⁸

Additionally, the CRC recognizes "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development" per Article 21(1). The CRC requires states to combat child malnutrition (Article 24(2)(c)); and to "take appropriate measures" to assist parents in fulfilling their primary responsibility to implement children's right to an adequate standard of living, particularly concerning nutrition" (Art. 27(3)). CEDAW as well requires from states to ensure that women have "adequate nutrition during pregnancy and lactation" (Article 12(2)); and to "take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular [...], to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport, and communications" (Article 14(2)(h)).

Further, the RtD is recognized in the African Charter on Human and Peoples Rights (ACHPR) (Article 22) and the Arab Charter on Human Rights (Article 37) as binding while reaffirmed in several instruments, including the 1992 Rio Declaration on Environment and Development, the 1993 Vienna Declaration and Programme of Action, the Millennium Declaration, the 2002 Monterrey Consensus, the 2005 World Summit Outcome Document and the 2007 Declaration on the Rights of Indigenous Peoples.²⁹ Articles 20, 21, and 24 of the ACHPR, as elaborated by the 2011 Tunis Reporting Guidelines and the 2010 Nairobi Implementation Guidelines on Economic, Social, and Cultural Rights, enshrines the right "to freely dispose of their natural resources in the exclusive interest of the people; and to a generally satisfactory environment."

https://www.ohchr.org/sites/default/files/Documents/Issues/Development/Infonote_RtD-25Feb_212011.pdf

²⁸ Sengupta, A. (2002). On the Theory and Practice of the Right to Development. *Hum. Rts. Q.*, 24, 837.

²⁹ UNOHCHR. (2011). Information Note: The Right to Development at a glance.

https://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf

Principle 2 of the 1992 Rio Declaration on Environment and Development establishes State sovereignty over natural resources, while Principle 1 states that "human beings are entitled to a healthy and productive life in harmony with nature." In addition, Principle 22 provides that "local communities have a vital role in environmental management and development and, as a result, their identity, culture, and interests must be protected."

2.3.2. Subject and Object of RtD: An Individual and Collective Right

The RtD is both an individual and collective right according to the UNDRD under (Article 1 (1)) and (Article 2 (3)) which provides that the RtD belongs to "all peoples" and the "entire population." The human person is the central development subject and should be the active participant and beneficiary of the RtD (Article 2 (1) of UNDRD). This means that development policies and programs must be centered on human beings and aimed at their benefit and constantly improving their well-being.³⁰ The RtD as an individual and collective right is also found in the core human rights instruments discussed above.

On that account, the RtD imposes duties on States and the international community and on all those whose actions/omissions impact the RtD. States are primarily responsible for respecting, protecting, and creating a national and international enabling environment to realize the RtD per Article 3 (1) of UNDRD. According to Article 2 (3), States must also formulate appropriate national development policies to improve the well-being of the entire population and all individuals. Additionally, States also "have the duty to cooperate with each other in ensuring development and eliminating obstacles to development, based on sovereign equality, interdependence, mutual interest, and cooperation..." (Article 3 (3)).

States thus have obligations at three levels: (a) internally, through the formulation of national development policies and programs affecting persons within their jurisdictions (Article 2 of UNDRD); (b) internationally, through the adoption and implementation of policies extending beyond their jurisdictions (Article 4); and (c) collectively, through global and regional partnerships (Article 3).³¹ Finally, all human beings have a duty to develop, individually and

³⁰ UNHCR. (2016). Fact Sheet No. 37, Frequently Asked Questions on the Right to Development, UN New York and Geneva, p.8.

³¹ *Ibid*, UNHRC. (2010). Report of the High-Level Task Force on the Implementation of the Right to Development on its 6th session. Geneva.

collectively (Article 2(2)). Private sector and non-State actors also must contribute to creating conditions favorable to realizing the RtD.³² However, unlike binding human rights instruments, the declaration does not per se create any legal obligations.³³ Nevertheless, it is a legitimate reference to hold governments at least politically accountable as the international norm crystallizes into law.³⁴

2.4. Constitutional Protection of the RtD

The RtD is a fundamental human right for any nation's growth and prosperity. In Ethiopia, the FDRE Constitution under Article 90 recognizes the RtD impliedly as a basic human right and subject to the availability of resources. It aims to provide all Ethiopians access to public health, education, clean water, housing, food, and social security. It also recognizes and guarantees socio-economic rights under Article 43. The concept of the RtD under the Constitution comprises substantive and procedural rights³⁵ and can be precisely articulated by extracting four primary elements from Article 43.³⁶

These elements encompass: "(i) the right to improved living standards; (ii) the right to sustainable development; (iii) the right to participate in the national development decision making; and (iv) that development should boost the capacity of citizens and meet their basic needs."³⁷ Article 89 (2)(6)(7), on the other side, provides that the realization of democratic and development objectives is conditioned on the full respect of human rights and fundamental freedoms of individuals and groups and the principles of equality and non-discrimination. Thus, protecting this right ensures that government policies are designed to promote development and reduce poverty levels in Ethiopia.

2.5. Linkages between the RtD and Access to Natural Resource

The inter-relationship between RtD and access to natural resources is clearly established under Article 1(2) of UNDRD, which provides that the RtD recognizes peoples' right to self-

³² *supra* note 30, UNHCR.

³³ *supra* note 3, UN Human Rights Council. para. 11.

³⁴ *Ibid.*

³⁵ Ali, A. J. (2015). The Right to Development in Ethiopia. In Human Rights and Development. Brill Nijhoff.

³⁶ Mekonnen, S. D. (2021). The right to sustainable development in article 43 (3) of the Ethiopian Constitution. African Human Rights Law Journal, 21(2), 1009-1035.

³⁷ *Ibid.*

determination and full sovereignty over all their natural wealth and resources. Further, Article 2 and 8 of the Declaration clearly affirms that the RtD requires the fair distribution of development benefits, including income and equal opportunity in access to primary resources and services (preamble, Articles 2 and 8).

While examining the RtD, the African Commission, in *Center for Minority Rights Development V. Kenya*, found that how the Endorois, an indigenous community in Kenya, had been dispossessed of their traditional lands and denied access to resources constituted a violation of their rights, including the RtD under Article 22 of the ACHPR.³⁸ As part of socio-economic rights, the realization of the RtD could be achieved through progressive realization, which requires consistent implementation of reasonable and measurable plans, including setting achievable benchmarks and timeframes, towards fully realizing economic, social, and cultural rights, by all appropriate means, within the maximum available resources.³⁹

In this regard, the African Commission in the Southern Cameroon case held that a "state is under obligation to invest its resources in the best way possible to attain the progressive realization of the RtD, and other economic, social and cultural rights."⁴⁰ A similar understanding is held in almost all core human rights instruments, declarations, and cases of the African Commission, the ICESCR (Article 2(1)), ACHPR (Articles 3 and 22), the Pretoria Declaration,⁴¹ and the African Commission in *Purohit and Another v The Gambia* case.⁴² Moreover, the UNHRC, in its resolution 41/19 adopted in 2019, recognizes that development and human rights are "interdependent and mutually reinforcing" and affirms that "meeting the aspiration of the people for a better life is the priority of each State." This further means that achieving sufficient development is the precondition of fully protecting human rights.

The realization of development in all three dimensions (i.e., economic, social, and environmental) contributes to promoting and protecting human rights for all. Further, the

³⁸ *Centre for Minority Rights Development & Minority Rights Group International (MRG) on behalf of the Endorois Community v. The Republic of Kenya*, 276/2003.

³⁹ Mbaye, Kéba, CAB/LEG/67/1, reproduced in *Human Rights Law in Africa 1999* 65 - 77 (Christof Heyns ed., 2002).

⁴⁰ *Mgwanga Gunme v Cameroon*. Communication No. 266/2003. [2009] ACHPR 99; (27 May 2009).

⁴¹ Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004), para. 2.

⁴² *Purohit and Another v The Gambia*, Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII. para 84.

UNHRC, in its resolution 35/21 in 2017, calls upon all States to "spare no effort to promote sustainable development...as it is conducive to the overall enjoyment of human rights".

In this regard, access to natural resources is vital as it creates enabling environments that promote the realization of RtD. However, if not appropriately managed, natural resource-based development can negatively impact human rights. Exploiting natural resources can lead to environmental degradation and cause significant harm to other countries, especially in the case of transboundary resources. Thus, while access to natural resources is essential for creating an enabling environment for realizing the RtD, it must be pursued with caution and consideration for the well-being of all stakeholders involved.

On that account, the RtD should not be seen as a zero-sum game, where one country's development comes at the expense of another's. Instead, it should be understood as a collective and inclusive process that respects the rights and dignity of all individuals and communities. Regarding transboundary river contexts, the RtD requires a holistic and balanced approach that considers the interests and needs of all parties involved. Hence, projects like the GERD on the transboundary river can be subject to rigorous environmental and social impact assessments and transparent and participatory decision-making processes involving relevant stakeholders. Although the case of GERD illustrates the complexity and challenges of implementing this right in practice, it is possible to find mutually beneficial solutions that respect the rights and dignity of all individuals and communities by adopting a human rights-based approach in line with international water law principles.

CHAPTER THREE

THE RtD AND WATER RIGHTS: BALANCING INTERESTS IN THE NILE BASIN

3.1. Introduction

Since water is a scarce natural resource essential to human existence and well-being, the human right to water is crucial for living with dignity and fulfilling all other human rights.⁴³ Beyond personal and domestic needs, water is necessary for various purposes, including the realization of numerous human rights, including the RtD. Hence, when allocating water resources, priority should be given to the water resources needed to meet the basic needs of each core human right.⁴⁴ Unfortunately, poverty is worsened by continued tainting, dwindling supplies, and unequal water distribution.⁴⁵ This has been the case in the Nile.

The Nile Basin countries face a critical challenge regarding their development status. Despite being home to some of the world's most significant natural resources, these countries grapple with high poverty levels, inequality, and underdevelopment. According to the United Nations Conference on Trade and Development (UNCTAD) list of Least Developed Countries (LDCs), based on their per capita income, weak human assets, and economic vulnerability, 32 out of the 46 LDCs are African countries.⁴⁶ All the Nile riparian countries except Egypt are categorized as LDC. To change this condition, investing in development is essential for economic growth and social progress.

Hence, the Nile Basin countries must prioritize development to improve the quality of life for their citizens. Doing so can unlock their full potential and contribute to regional stability and prosperity. Moreover, addressing the development challenges in the Nile Basin countries requires a coordinated effort from all stakeholders, and improving the human development status of the Nile Basin countries is not only a moral imperative but also a survival necessity.

⁴³ GC 15, para. 1.

⁴⁴ World Summit on Sustainable Development, Plan of Implementation 2002, paragraph 25 (c).

⁴⁵ GC 15.

⁴⁶ <https://www.un.org/en/conferences/least-developed-countries>

3.2. Development in Transboundary Water Resource: The Path to Balancing Interests

Transboundary rivers play an important role in developing a region because water is an essential natural resource for realizing RtD and other basic human rights. Utilizing transboundary rivers is an integral part of development because it is a crucial resource for food, energy, and water, which are necessary to realize human rights. It also provides a platform for cooperation between countries to share resources and ensure development.

Transboundary rivers provide access to water resources that can be used for drinking, irrigation, and other purposes such as navigation and transporting goods and people. Moreover, transboundary water cooperation plays a vital role in fostering development and ensuring progress in human rights realization by:⁴⁷

- Generating benefits (economic, social, environmental, political) which promote growth and stabilize societies,
- Preventing conflicts and consolidating peace in post-conflict situations,
- Making adaptation more efficient and avoiding negative impacts from unilateral measures,
- Reducing sectoral trade-offs and disputes,
- Building regional organizations that reinforce regional stability and integration.

As such, transboundary river proper utilization can have a positive effect on development. Further, using transboundary rivers is often associated with economic growth and improved living standards. It is also linked to increased access to electricity, better sanitation facilities, improved agricultural productivity, and better health outcomes. Hence, as access to these resources is essential for economic growth and poverty reduction, countries must work together to ensure equitable and reasonable utilization of transboundary rivers and take advantage of these resources to maximize their potential for development.

3.3. The Right to Water: A Crucial Component of Development in the Nile Basin

While the right to water is recognized "implicitly" in the ICESCR under Articles 11 and 12, water is explicitly provided for in Articles 14 and 24 of the CRC and CEDAW. However,

⁴⁷ Bernardini, F. The Water Convention: an instrument to promote development and stability.

neither the ACHPR nor the UNDRD explicitly incorporates the word "water" to contribute to realizing the RtD. This is, however, implied in the UNDRD under Article 8 (1), which provides that: "States should undertake, at the national level, all necessary measures for the realisation of the RtD and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income." Moreover, the GC on the Right to Water in 2002⁴⁸ emphasizes that "international cooperation requires states parties to refrain from actions that interfere with the enjoyment of the right to water in other countries."⁴⁹

The conceptualization of development as a multifaceted phenomenon encircles the imperative and modalities for providing enhanced living standards and the indispensable element of economic growth. In addition, it includes human development, which is achieved by catering to the fundamental needs of health, nutrition, education, and a sustainable environment. Therefore, development is extensive and encompasses an array of domains, including social, economic, political, and human development, that can be realized by utilizing water as a vital resource and is comprehensively elucidated under the auspices of the ACHPR and UNDRD.⁵⁰

Besides, the right to water includes both freedoms and entitlements, including freedom from interference, the freedom from arbitrary disconnections or tainted water supplies, and the right to keep access to water supplies, which are fundamental to the right.⁵¹ In contrast, the entitlements cover the right to a water supply and management system that allows everyone to enjoy their water right.⁵² Nonetheless, as the amount of available water is reduced to meet expanding needs, competition among water users grows, resulting in undesired disputes. Hence, while providing access to clean water and promoting economic growth is essential, protecting human rights and ensuring equitable resource distribution are equally important. Therefore, it can be challenging to cooperate between riparian countries due to political tensions and conflicting interests.

⁴⁸ <https://www.unwatercoursesconvention.org/the-convention/part-ii-general-principles/article-10-relationship-between-different-kinds-of-uses/10-1-2-the-human-right-to-water/>

⁴⁹ GC 15, para 31.

⁵⁰ Abegaz, S. T. (2020). Displacement from land as a limit to the realisation of the right to development in Ethiopia. *Journal for Juridical Science*, 45(1).

⁵¹ GC 15, para. 10.

⁵² *Ibid.*

However, it is crucial to prioritize human rights in these negotiations. More importantly, precedents have shown that the need to negotiate for a legal water-sharing framework can spark unexpected collaboration in many cases. For this to happen, transboundary water must be managed per the recognized international rules of transboundary water, which are intrinsically connected to several human rights principles.

3.4. Legal Framework Governing Transboundary Water Resource Allocation

For the RtD to be consistent with, and promote, the purpose of human rights, it must ensure sufficient access to water for all riparian countries to preserve their water availability for both present and future generations while attaining vital human needs. Thus, the following subsections will provide the international and human rights law's basic guiding principles to regulate the use and allocation of transboundary water resources.

3.4.1. International Water Law Principles

The Nile River is a vital water source for millions in Africa. However, allocating this precious resource has been a contentious issue for decades. It is imperative that international water law principles, i.e., equitable and reasonable utilization, no significant harm, and cooperation, govern the Nile River. Only then can be an assurance that all individuals have access to the fundamental right to the Nile.

3.4.1.1. Overview of Resource Allocation Theories

Before the 1950s, when customary international law governing international watercourses started to take shape, two opposing perspectives reflected States' claims and objections over the distribution of transboundary resources.⁵³ These two approaches are the Harmon Doctrine, or doctrine of absolute territorial sovereignty, and the notion of absolute territorial integrity. However, although four allocation theories have been put out, only certain aspects of the community of interests and territorial sovereignty are recognized under international law.⁵⁴

⁵³ Rieu-Clarke, A., et al. (2012). *UN Watercourses Convention: user's guide*. IHP-HELP Centre for Water Law, Policy and Science (under the auspices of UNESCO).

⁵⁴ *Ibid.*

i. *Absolute Territorial Sovereignty*

The "absolute territorial sovereignty" doctrine promotes upstream countries by authorizing the unrestricted use of a transboundary watercourse's waters within their borders, regardless of any potential ramifications for downstream countries.⁵⁵ Essentially, it demands that the upstream country have total discretion over its actions.

ii. *Absolute Territorial Integrity*

In contrast, the "absolute territorial integrity" theory prioritizes the downstream countries and wants to forbid any development in the upstream country that would obstruct the natural flow of such a river.⁵⁶ It could also grant downstream riparians the power to veto developments made upstream.

Absolute territorial sovereignty and integrity are the first two theories' legal significance in which *"Both doctrines are, in essence, factually myopic and legally 'anarchic': they ignore other states' need for and reliance on the waters of an international watercourse, and they deny that sovereignty entails duties as well as rights."*⁵⁷

iii. *Limited Territorial Sovereignty*

The more acceptable doctrine of "limited territorial sovereignty" has come to be acknowledged as the foundation upon which the general norms and principles of international watercourses have developed and which are incorporated in the UN Watercourses Convention. The doctrine states that each riparian country must respect the sovereignty and legitimate rights granted to other countries and that all stream countries have an equal right to use a shared resource.⁵⁸

⁵⁵<https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-10-Theories-of-Resource-Allocation.pdf>

⁵⁶ Judson Harmon, US Attorney General, (*US v Mexico*) 1895 "The fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions on the USA which would hamper the development of the latter's territory or deprive its inhabitants of an advantage with which nature had endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that USA exercises full sovereignty over its national territory".

⁵⁷ McCaffrey, S. (2001). The contribution of the UN Convention on the law of the non-navigational uses of international watercourses. *International Journal of Global Environmental Issues*, 1(3-4). pp. 250-263.

⁵⁸ The River Meuse Dispute (*Holland v Belgium*, 1856), "The Meuse being a river common both to Holland and to Belgium, it goes without saying that both parties are entitled to make the natural use of the stream, but at the same time, following general principles of law, each is bound to abstain from any action which might cause damage

It is also profoundly articulated through the principle of equitable and reasonable utilization of different instruments.⁵⁹ Furthermore, this approach simultaneously accepts the rights of upstream and downstream countries while maintaining sovereignty.

iv. *Community Interest*

The "community of interest" theory refers to the general trend and future course that the law and practice regarding this topic appear to be taking.⁶⁰ It is based on the premise that the watercourse's natural, physical, and social unity creates a community of interest in the water.⁶¹ Hence, by its very nature, water is a communal resource that society should share.

When applied for transboundary allocation, this latest theory necessitates that co-riparian States have a mutual understanding of the shared water resource management and distribution regulations and guidelines.⁶² In turn, everyone involved is well aware of their shared interests and the advantages of cooperation, and ultimately, cooperation ought to be simple to maintain.⁶³ The parties are then obligated to cooperate with a focus on shared interests rather than sovereign entitlements, which challenges traditional State sovereignty.⁶⁴ However, all parties in this approach share interests and profits, risks, costs, and environmental responsibilities.⁶⁵

to the other. In other words, they cannot be allowed to make themselves masters of the water by diverting it to serve their own needs, whether for purpose or navigation or of irrigation."

⁵⁹ Rio Declaration on Environment and Development, 1992, "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of natural jurisdiction."

⁶⁰ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, "Modern development of international law has strengthened this principle [community of interest] for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly" (para 85).

⁶¹ *River Oder Case (UK v Poland)*, 1929, "This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others" (para 74).

⁶² UN Environment Programme. (2022). *Handbook on Water Allocation in a Transboundary Context*. p. 98.

⁶³ Howden, Julie Gjörtz. (2015). "Aspects of sovereignty and the evolving regimes of transboundary water management", *Nordic Environmental Law Journal*, No. 1. p. 56.

⁶⁴ Howden, Julie Gjörtz. (2016). "Communities of interest in the Nordic management of international watercourses", *Nordic Journal of International Law*, vol. 85, No. 4. p. 351.

⁶⁵ *Ibid*, p. 56.

3.4.1.2. Core Principles for Guiding Transboundary Water Allocation

Although Ethiopia, Egypt, and Sudan are not a party to the UN Watercourses Convention, it is maintained that the treaty's foundational principles constitute customary international law and serve as a valuable framework to direct negotiations from an international water law standpoint. Accordingly, the three widely recognized principles of international water law concerning water allocation in the UN Watercourses Convention are the following:⁶⁶

i. *Equitable and Reasonable Utilization*

The principle of equitable and reasonable utilization is a central pillar of transboundary water allocation⁶⁷, and it is regarded as part of customary international law.⁶⁸ The principle implies equal rights and limited territorial sovereignty of States over transboundary water resources.⁶⁹ In the case concerning the *Gabčíkovo–Nagymaros* Project on the Danube River, the ICJ referenced a State's "basic right to an equitable and reasonable sharing of the resources of an international watercourse" (paras. 78, 85).⁷⁰

Further, the UN Watercourses Convention lays the foundation for the equitable and reasonable utilization of shared watercourses. It dictates that "Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. An international watercourse shall be used and developed by watercourse States with a view to attaining optimal and utilization thereof and benefits therefrom, considering the interests of the watercourse States concerned, consistent with adequate protection of the watercourse" (Article 5).⁷¹ Accordingly, Article 6 provides a list of the following non-exhaustive factors to determine what constitutes an equitable and reasonable utilization:

- a. "Geographic, hydrographic, hydrological, climatic, ecological, and other factors of a natural character;

⁶⁶ Attila M. Tanzi. (2020). "The inter-relationship between no harm, equitable and reasonable utilisation and cooperation under international water law", *International Environmental Agreements: Politics, Law and Economics*, vol. 20, No. 4. pp. 619–629.

⁶⁷ *supra* note 62, UN Environment Programme, p. 85.

⁶⁸ *Ibid.*

⁶⁹ *supra* note 53, Rieu-Clarke, A., et al. pp. 100-110.

⁷⁰ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, pp. 54–56.

⁷¹ Tanzi, Attila, and Arcari, Maurizio. (2001). *The United Nations Convention on the Law of International Watercourses: A Framework for Sharing*. The Hague: Kluwer Law International. pp. 95-117.

- b. the social and economic needs of the watercourse States concerned;
- c. the population dependent on the watercourse in each State;
- d. the effects of the use or uses of the watercourses in one watercourse State on other watercourses States;
- e. existing and potential uses of the watercourse;
- f. conservation, protection, development, and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
- g. the availability of alternatives, of comparative value, to a particular planned or existing use."

The factors enumerated in Article 6 address the legitimate requirements and concerns of each co-riparian State and facilitate their reasonable and equitable apportionment through careful consideration and evaluation.⁷² Moreover, it generates the corresponding duty of refraining from denying other nations their rights to utilize transboundary water. It emphasizes the equitable allocation of benefits in the utilization and dispersal of mutual aqueous reserves.⁷³

ii. *No Significant Harm*

The expression of the necessity to prevent, control, and decrease transboundary impacts is indicative of the no significant harm principle, an established principle of customary international law and one of the principal normative foundations of the UN Watercourses Convention.⁷⁴ The UN Watercourses Convention stipulates that "watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourses States" (Article 7).⁷⁵ Per the convention, in cases where a State has implemented all necessary measures, but there is still a considerable amount of damage caused, it is incumbent upon that State to make every effort to cease or alleviate the said damage through consultations with the State that has been affected while considering the principle of equitable and reasonable utilization.

⁷² UNECE. (2013). Guide to Implementing the Water Convention. pp. 22–25.

⁷³ *supra* note 57, McCaffrey, S., pp. 95–135.

⁷⁴ UNECE. (2018). Progress on Transboundary Water Cooperation under the Water Convention: Report on Implementation of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, pp. 15, 19; Tanzi, Attila and Kolliopoulos, Alexandros. (2015). "The no-harm rule", in The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes: Its Contribution to International Water Cooperation, Tanzi and others, eds.

⁷⁵ *supra* note 71, Tanzi and Arcari, pp. 142–179.

Additionally, states may be obliged to endure specific transboundary impacts, provided that all appropriate measures have been implemented to avert, manage, and mitigate them. These impacts can be established as "equitable and reasonable."⁷⁶

iii. *Duty to Cooperate*

The obligation of a State to cooperate is a fundamental principle established as customary international law.⁷⁷ In the Lake Lanoux arbitral award (*Spain v. France*) 1957, the tribunal declared that international practice obliges "States to seek, by preliminary negotiations, terms for an agreement."⁷⁸ The UN Watercourses Convention further stresses that "watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit, and good faith." However, to achieve efficacy, cooperation must be predicated upon mutual trust. To establish trust, it is necessary to engage in extensive dialogue amongst or between the riparian States, which may very well span numerous years or even decades, as evidenced by the Nile case.⁷⁹

Most transboundary aquifers suffer from a dearth of cooperative arrangements.⁸⁰ Notwithstanding, the Senegal River Basin Development Organization (OMVS) (1972) and the Gambia River Development Organization (OMVG) (1978) have been leading by example in Africa when it comes to cooperative management of transboundary water resources. Mbengue, in explaining the role of OMVS, provides that,

"One of the main aspects to ensure that cooperation over the Senegal River would be based on an 'inclusive framework' – that is, all riparian States must be involved in the development of the river. For that purpose, it was essential that Guinea – as the upstream State – would become an OMVS member State after 30 years of absence. Other African river basin organizations have followed the steps of the OMVS by adopting their own water charters. This is the case for the Niger Basin Authority, which adopted the Niger Basin Water Charter in 2008, and the Lake Chad Basin Commission, which adopted a water charter in 2012."⁸¹

⁷⁶ *supra* note 74, UNECE, pp. 10–12, 19–20.

⁷⁷ *supra* note 62, UN Environment Programme.

⁷⁸ Lake Lanoux Arbitration (*France v. Spain*), 16 November 1957, reproduced in Reports of International Arbitral Awards, vol. XII (1957); *supra* note 74, UNECE, p. 33.

⁷⁹ *supra* note 74, UNECE, p. 33.

⁸⁰ *Ibid.* pp. 19–24.

⁸¹ Moïse Mbengue, Makane. (2014). "A model for African shared water resources: the Senegal River legal system", RECIEL: Review of European Community and International Environmental Law, vol. 23, No. 1. pp. 59–66.

3.4.2. Human Rights Law Principles

In addition to the water law principles, other aspects of international law, such as the human rights principles listed below, can also have rules that can guide water allocation.

3.4.2.1. Rights to Water

As a human right declared by the UN,⁸² everyone can access "sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic use."⁸³ This right "entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use."⁸⁴ Among the vital components of the definition are the emphasis on ensuring adequate quantities and quality of water, reliable access to it, affordability, and timely delivery.⁸⁵

This right impacts an adequate standard of living, life, health, housing, and other human rights. Moreover, SDG goals, specifically SDG 6, "Clean water and sanitation for all," reaffirm the increasingly recognized human right to water globally and the priority of vital human water needs in realizing the SDGs.⁸⁶ Additionally, it has been acknowledged that transboundary water management and cooperation play a significant role in achieving the SDGs.⁸⁷

The human right to water is particularly relevant in the transboundary context due to the hydrological interdependence between States and transboundary impacts on shared water resources.⁸⁸ According to the UNCESCR, "States have to respect the enjoyment of the right to water also in other countries and not interfere with that directly or indirectly. Any activities undertaken within one State's jurisdiction should not deprive another State of the ability to realize the right to water in its jurisdiction."⁸⁹

⁸² UNGA. The human right to water and sanitation. (A/RES/64/292).

⁸³ www.unwater.org/water-facts/human-rights/.

⁸⁴ UNGA. The human rights to safe drinking water and sanitation (A/RES/70/169).

⁸⁵ Winkler, Inga T. (2019). "The human right to water", in Research Handbook on International Water Law, McCaffrey, Leb and Denoon, eds. pp. 244–245.

⁸⁶ *Ibid.*

⁸⁷ UN and UNESCO. (2018). Progress on Transboundary Water Cooperation: Global Baseline for SDG Indicator 6.5.2. p. 14.

⁸⁸ *supra note* 62, UN Environment Programme, pp. 95-96.

⁸⁹ GC 15, para 31; UNGA, Report of the Special Rapporteur on the human rights to water and sanitation (A/74/197).

In this context, the equitable and reasonable utilization principle and the no-significant harm rule at a transboundary distribution uphold international water law principles and protect the human right to water. This means that the human right to water has an international dimension, as the quantity and quality of water resources can be affected by actions in other countries. Thus, implementing the human right to water is not limited to each State but must also be addressed in a transboundary context.

For instance, the construction of a dam in one country can lead to a temporary reduction of water availability downstream in another country, thereby adversely affecting the right to water of individuals living in the lower riparian country if they have no alternative water resource. However, it is essential to note that the human right to water is not an absolute right guaranteed without limitations or restrictions, and no one has the right to unlimited water.

3.4.2.2. Public Participation

Recently, there has been a growing reliance on human rights arguments in international water law and transboundary water cooperation.⁹⁰ The human right to water is not the only human rights principle applicable to transboundary water allocation. The right to public participation is crucial to implementing a human rights approach in a transboundary setting, including allocation frameworks.⁹¹

Having affected people influence transboundary water allocation arrangements fulfills their participatory rights and more substantive human rights related to water, such as the right to a decent standard of living. Hence, water-related human rights can be addressed besides fulfilling their participatory rights. Thus, participation rights are crucial to realizing a human rights approach in a transboundary and development context.

⁹⁰ Bourquain, Knut. (2008). Freshwater Access from a Human Rights Perspective: A Challenge to International Water and Human Rights Law, *International Studies in Human Rights*, vol. 97; Bulto, Takele Soboka. (2014). *The Extraterritorial Application of the Human Right to Water in Africa* (Cambridge, United Kingdom, Cambridge University Press); Chavarro, Jimena Murillo. (2015). *The Human Right to Water: A Legal Comparative Perspective at the International, Regional and Domestic Level* (Cambridge, United Kingdom, Intersentia).

⁹¹ *supra* note 62, UN Environment Programme, p. 95.

3.4.2.3.Right to Self-determination

The right to self-determination, recognized in Article 20 of the ACHPR and Common Article 1 of the ICESCR and ICCPR, places particular emphasis on the relationship between people and the state and can, as a result, guide a water conflict resolution technique that goes beyond state-centrism.⁹² The UNHRC emphasizes how closely related the rights to self-determination, participation in public life, and voting are to one another.⁹³ In this way, Common Article 1(1) is strengthened by referring to economic self-determination, which in Article 1(2) mandates that people be able to 'freely dispose' of natural resources like water 'for their own end,' setting a responsibility on the state to exploit natural resources for the benefit of the people.⁹⁴

3.4.2.4.Right to Freely Dispose of Natural Resources

The right to freely dispose of natural wealth and resources has been recognized under international human rights law as a people's right⁹⁵ and affirmed in the ICCPR and the ICESCR.⁹⁶ The right to participate in and benefit from exploiting natural resources is also considered a collective right.⁹⁷ It is a critical component of the right to self-determination and strongly relates to the right of a people not to be denied their means of subsistence.⁹⁸ It is also associated with the principle of permanent sovereignty over natural resources, stated in UNGA Resolution 1803 of 1962⁹⁹ and the 1974 Charter of Economic Rights and Duties of States.¹⁰⁰

⁹² Funnemark, A. (2020). Water Resources and Inter-state Conflict: Legal Principles and the Grand Ethiopian Renaissance Dam (GERD). *PSRP Reports*, pp. 15-16.

⁹³ *Ibid*, UNHRC. GC No. 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples (adopted 13 March 1984).

⁹⁴ *Ibid*, Daniëlla Dam-de Jong, *International law, and governance of natural resources in conflict and post-conflict situations* (Cambridge, United Kingdom: Cambridge University Press 2015), p. 80.

⁹⁵ Claey's, P. (2015). Rights to Sovereignty Over Natural Resources, Development and Food Sovereignty. *FIAN International Briefing*.

⁹⁶ Article 1 of both Covenants affirms the right of all peoples to self-determination and states: "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

⁹⁷ Özden, M., Golay, C., & Özden, M. (2010). *The Right of Peoples to Self-Determination and to Permanent Sovereignty over their Natural Resources Seen from a Human Rights Perspective*. Europe-Third World Centre (CETIM).

⁹⁸ *Ibid*.

⁹⁹ UNGA Resolution 1803 of 1962 on Permanent Sovereignty of States over Natural Resources. Article 1 of the Resolution reads: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."

Regionally, the right of people to freely dispose of their natural resources has been further developed in Article 21 of the ACHPR.¹⁰¹ Whereas sub-articles (1) and (2) of Article 21 relate to "peoples," sub-article (4) describes this right being right exercised by "states parties." Conversely, the 1974 Charter of Economic Rights and Duties of States refers to "every state," whereas GA Resolution 1803 speaks of the permanent sovereignty of "peoples."

Furthermore, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo protocol) provides an interesting provision under Article 26 (2) which provides that "state parties are obligated to adopt all necessary measures, which include budgetary and other resources, for the full and effective implementation of the right therein recognized." However, like the right to resist that the next sub-right will provide, Lize-Mari Doubell states that this article "... is severely underutilized and/or incorrectly applied by state parties."¹⁰²

3.4.2.5.Right to Resist

From a human rights perspective, ensuring that water allocation policies are equitable and reasonable is essential. Water allocation should prioritize the basic needs of individuals and communities and should not be allocated based on economic or political power but on the principle of equity. Furthermore, it must consider the impact on vulnerable populations such as women, children, and indigenous communities who may be disproportionately affected by water scarcity. On this point, Article 20(2) of the ACHPR states that "colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community."¹⁰³ This provision continues to have a special place under international human rights since it's the only express right of resistance to "oppression" and/or "colonization."

¹⁰⁰ Article 2(1) of the 1974 Charter of Economic Rights and Duties of States reads: "Every State has and shall freely exercise full permanent sovereignty [...] over all its wealth, natural resources and economic activities."

¹⁰¹ Article 21 of the ACHPR states: "1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. 2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. [...]"

¹⁰² Doubell, L. M. (2020). *The allocation of resources for the realisation of women's rights: an analysis of article 26 (2) of the Maputo Protocol* (Doctoral dissertation, Stellenbosch: Stellenbosch University).

¹⁰³ Article 20(2) ACHPR.

Although the right to resist was recognized initially in the ACHPR over thirty years ago, making it the first international human rights treaty to do so¹⁰⁴, and, despite one of the leading authorities in the field describing the right as the "supreme" human right,¹⁰⁵ Shannonbrooke Murphy states that experts have typically overlooked Article 20(2). As a result, its interpretation is still problematic because there needs to be a clear framework for evaluating its application, especially to apply it to the Nile legal agreements imposed by the colonial power. However, if adequately developed, Article 20 (2) can offer an effective remedy for Africa's most vulnerable people by employing an empowerment model to complement and contribute to regulating the rising doctrine and practice of "responsibility to protect."¹⁰⁶

Regardless, GC 15 powerfully demonstrates that "existing legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the right to water and should be repealed, amended or changed if inconsistent with Covenant requirements" (para. 45). Overall, the human rights mentioned earlier, taken collectively, might assist in demonstrating the various manners in which the use of transboundary watercourses affects the lives and livelihoods of those people and communities that depend on these watercourses. Therefore, the need to move beyond a state-centered approach in transboundary watercourse negotiations and employ a human rights approach as well as made evident by prioritizing the needs and rights of all people beyond the state because it enables riparian countries to acknowledge the necessity for cooperation and the potential for shared benefits in such collaboration.¹⁰⁷

3.4.3. Role of International Water Law in Promoting RtD

International water law promotes development by ensuring equitable, reasonable, and sustainable use of transboundary water resources. Since water is a finite resource, its scarcity can lead to conflicts between nations. Therefore, international water law provides a framework for cooperation, negotiation, and dispute resolution among riparian states.

¹⁰⁴ Murphy, S. (2011). Unique in international human rights law: Article 20 (2) and the right to resist in the African Charter on Human and Peoples' Rights. *African Human Rights Law Journal*, 11(2), pp. 465-494.

¹⁰⁵ H Lauterpacht *International law and human rights* (1950) 116.

¹⁰⁶ *supra* note 104, Murphy, S.

¹⁰⁷ *supra* note 92, Funnemark, A.

The equitable distribution of water resources is essential for economic development, poverty reduction, and environmental sustainability. Further, international water law promotes the principle of "benefit-sharing," which requires riparian states to share the benefits of transboundary waters fairly. This principle encourages cooperation and collaboration among neighboring countries.

Accordingly, international water law provides legal certainty for investment in infrastructure projects such as dams, irrigation systems, and hydropower plants. These projects can contribute significantly to economic growth by providing energy security, improving agricultural productivity, and creating employment opportunities. Therefore, international water law is vital in promoting development by ensuring equitable access and can foster regional cooperation and contribute to SDGs globally in the long run.

3.4.4. The Interplay Between Access to Transboundary River and RtD

Access to transboundary rivers and the RtD is a crucial issue that needs urgent attention. Transboundary rivers are vital water sources for millions of people worldwide, and their sustainable use is essential for economic development, poverty reduction, and environmental protection. However, the lack of access to these resources can lead to conflicts and hinder the realization of human rights. Hence, access to transboundary rivers must be ensured through equitable sharing mechanisms that consider the needs of all riparian states. This will promote cooperation, reduce tensions, and foster sustainable regional development.

By promoting development while safeguarding the human right to water, access to transboundary water empowers the world's vulnerable to achieve their development needs. It appropriates them to create favorable conditions and equal opportunities for their enjoyment. Moreover, although it is essential to recognize that access to water must be protected at all costs, ensuring access to transboundary rivers while respecting human rights is a complex challenge that requires collaboration between governments and relevant international institutions.

3.5. Realizing the RtD through Equitable Access to the Nile River

Transboundary rivers are an indispensable source, and their management should prioritize the needs of all stakeholders. Equitable access to transboundary rivers can promote

economic development by providing a reliable water source for agriculture and industry. It can also improve social well-being by ensuring access to clean drinking water and sanitation facilities. However, equitable access to transboundary rivers is often hindered by political conflicts between neighboring countries.

For example, 59 transboundary river basins dot the African continent, covering 62 percent of its land area.¹⁰⁸ Among these transboundary river basins, 16 are covered by basin-wide agreements, 3 are partially covered by agreements, and 40 do not have basin-specific agreements.¹⁰⁹ In the case of the Nile, the enhancement of living conditions in Ethiopia is a prerequisite for its economic development, necessitating optimal utilization of the hydroelectric and irrigation capabilities of the Nile. At the same time, Egypt, a country heavily reliant on the Nile as its sole water source, officially declared that it would not relinquish its allocation of the river's waters.¹¹⁰ This highlights the condition in the Nile basin and the need for international cooperation in managing these shared resources.

However, the Nile River is a valuable asset and vital for energy production and a delimiting factor for food production, economic development, and poverty reduction in the Nile basin.¹¹¹ It is an essential resource in the economic, social, and cultural development of the countries it flows through. Consequently, equitable access to the Nile will increase the region's agricultural productivity and food security. This will improve the economic well-being of communities that depend on agriculture for their livelihoods. Additionally, equitable access will provide opportunities for hydropower generation and industrial development. Socially, equitable access to the Nile will ensure that all communities have access to clean water for drinking and sanitation purposes. This will improve health outcomes and reduce poverty in the region. Culturally, equitable access to the Nile will allow communities to preserve their traditional practices and customs tied to this critical resource.

¹⁰⁸ Wolf, A. T., Natharius, et al. (1999). International river basins of the world. *International Journal of Water Resources Development*, 15(4), pp. 387-427.

¹⁰⁹ UN Environment Programme and others, Atlas of International Freshwater Agreements, pp. 27-50. Available at <http://www.transboundarywaters.orst.edu/publications/atlas/>

¹¹⁰ *supra* note 5, Abdelhady, et al.

¹¹¹ *Ibid*, p. 74.

Therefore, realizing economic, social, and cultural development through equitable access to transboundary rivers is crucial for growth, and ensuring all stakeholders access these vital resources equitably is mandatory. Hence, the Nile water is critical to its eleven riparian states' economics, politics, and cultural life, with more than 370 million inhabitants.¹¹² However, access to this resource is not equitable, with some countries having more control over their waters than others. As a result, the Nile Basins people and individuals lack access to water needed to realize the right to an adequate standard of living due to the lower riparian countries' inequitable overuse of the Nile, which negatively continues to affect the upper riparian countries' rights. Nonetheless, equitable access and sharing are essential preconditions for the development of the basin.

The greatest challenge of transboundary watercourses is the adverse effects of their management, particularly in terms of riparian governments' usage and exploitation of shared waters. Unilateral action by one riparian state on shared water sources may harm other riparian states. It may affect how readily accessible and available water resources are directly related to neighboring nations' populations. Furthermore, varied water consumption and unequal distribution of water resources have resulted in tensions and controversies among governments. The fundamental obstacle regarding the nonuse of available natural resources in the basin causes discrimination in the allocation of the Nile. Consequently, it has affected the basin's sustainable development. Accordingly, the next section will discuss the impacts of the relevant legal agreements concerned with the Nile water share, 1902, 1929, and 1959 treaties for better context.

3.6. Assessing the Human Rights Ramifications of the Nile Legal Agreements on the RtD

Transboundary water governance is regulated by the law that operates in the basin. In the Nile River, the primary rhetorical concern is framed within the context of colonial laws as the root cause for no developmental projects to achieve the development that seeks to eradicate poverty, improve quality of life, equalize opportunities, and maximize general human welfare. Hence, the colonial legal agreements in the Nile basin serve as an example of how the lower riparian countries can cause significant harm to the upper riparian countries and impede their economic, social, and cultural development.

¹¹² *supra* note 5, Abdelhady, Dalia, et al, p. 73.

Access to transboundary rivers is a fundamental human right that is often overlooked. The relationship between access to these rivers and human rights progress cannot be overstated. Transboundary rivers are essential water sources for millions of people, and their proper management can significantly improve the lives of those who depend on them. People with access to clean water can better maintain their health and hygiene. This leads to a reduction in the spread of waterborne diseases, which can be deadly.

Until the lower riparian countries manage their use of the Nile River in a way that is considerate to all those who enjoy the bounty of the shared river, the international law principle of equitable and reasonable utilization is unattainable. As a result, per the obligation to respect, all co-riparian States are responsible for their actions that infringe on water rights in all co-riparian States' territories since it prevents the realization of their human right to water. Additionally, access to transboundary rivers can provide economic opportunities for communities living along their basins. Fishing, agriculture, and tourism are just a few examples of industries that can benefit from these resources.

However, when access to transboundary rivers is restricted or denied, it can lead to severe human rights violations. People may be forced to rely on contaminated water sources or face economic hardship due to a lack of access. It also seems bizarre for a continent like Africa, with the necessary natural resources for development, to remain underdeveloped. Hence, it is vital to identify and understand the root cause of this challenge and its human rights ramifications and for the Nile basin countries to work together towards a shared vision of a prosperous future where everyone benefits from this valuable resource.

Regarding the root cause, the Nile River's existing transboundary water regime has been a fundamental reason for the unequal allocation of the Nile water resources.¹¹³ One main challenge is the need to move beyond bilateralism to achieve future agreements on legal principles while not starting a complete renegotiation of existing treaties.¹¹⁴ This is because the bilateral agreements grant Egypt veto power over projects on the Nile in other riparian states.¹¹⁵

¹¹³ Ahmad, Intikhab. (2018). "The New Hydro-Political Situation in Africa." *World Affairs: The Journal of International Issues* 22, no. 4: 60.

¹¹⁴ Nicol, Alan, and Mamdouh Shahin. (2003). *The Nile: moving beyond cooperation*. UNESCO. 17.

¹¹⁵ *supra note* 10, MA, Salman. pp. 512-513.

It has also effectively divided the entirety of the Nile waters between the two lower riparian states, based on an assumed annual average discharge measured at Aswan of 84 billion cubic meters (bcm).¹¹⁶ The 1929 and 1959 agreements have served as legal measures to restrict the realization of the RtD in the Nile basin countries by allocating zero shares for the upper riparian countries.

The upper-stream countries have long challenged the validity of these two treaties and have campaigned to abrogate the colonial agreements imposed by the colonial power at that time, i.e., the UK, without them being parties to the treaties. On the other side, Egypt and Sudan recognize the validity of the previous agreements. Hence, they do not want their share to be undermined. Simultaneously, the upper riparian countries objected to the validity of these treaties because colonial power signed them during colonization. As a result, historical patterns of usage took precedence, in effect, over the future need of other upstream states.¹¹⁷

The upper riparian countries have also argued it excludes most riparian states.¹¹⁸ This point has raised another critical challenge in the Nile River's water governance regarding the status of a colonial agreement restricting the upper riparian state's right to use its shared resources. Accordingly, the colonial agreements need to be reexamined because it was signed unilaterally between Egypt and Sudan, granting them the right to choose who could and could not utilize the river and decide accordingly without involving any other Nile state in the negotiation even though it is a shared common river.

To change the water allocation that reflected the power relations in the basin, the NBI was established in 1999 to enhance cooperation on the common utilization of the Nile River. In 2010, the Nile basin countries formally introduced a new inclusive legal agreement called the CFA to govern the Nile River. Unfortunately, the upper and the lower riparian countries did not agree on the word of Article 14 (b) of the CFA, which provides that "*The Nile Basin States, therefore, agree, in spirit of cooperation: ... (b) not to significantly affect the water security of any other Nile Basin State.*"

¹¹⁶ *supra* note 10, MA, Salman. The division – 55.5 bcm to Egypt and 18.5 bcm to Sudan – considered anticipated losses to evaporation in Lake Nasser/Nubia of some ten bcm per annum.

¹¹⁷ *Ibid.*

¹¹⁸ Kimenyi, M., & Mbaku, J. (2015). *Governing the Nile River basin: The search for a new legal regime*. Brookings Institution Press.

Egypt and Sudan proposed the following modification with additional wording, "*(b) not to significantly affect the water security and current uses and rights of any other Nile Basin State.*" Nevertheless, the additional phrase was rejected by the upper riparian states. They argued that the "current use and rights" that refer to the 1929 & 1959 legal agreements contradict the principle of equitable and reasonable utilization of the Nile River.¹¹⁹ Consequently, Egypt and Sudan immediately announced that they would not sign the CFA agreement because it does not recognize or protect their "present acquired rights."

Following the CFA, on April 2, 2011, Ethiopia laid the foundation for constructing the GERD, a developmental project which is the largest hydroelectric power dam in Africa. Later, Ethiopia, Egypt, and Sudan signed the DoP in March 2015 to cooperate on the GERD case. Nevertheless, the water quotas enshrined in the legal agreements have raised the moral & legal question of justice in the Nile basin concerning distributing a shared resource and revived the disputes over the Nile legal agreements. Consequently, the Nile legal agreements and the position of Egypt, Ethiopia, and Sudan toward the GERD raise many human rights dimensions.

The lack of access to the Nile water for a long time due to the colonial agreements has contributed to the basin and Ethiopia's food insecurity and poverty, threatening millions' right to life and security. The colonial treaties have played a role in preventing riparian countries from fulfilling their people's request for an adequate standard of living by pursuing developmental projects.

Hence, the Nile treaties' applications and impacts on blocking their right to utilize the Nile have hindered development, resulting in failure to ensure the protection, promotion, and respect of the Nile basin's human rights progress. Consequently, a restriction on transboundary water violates people's RtD because water is central to development. Ethiopia, however, has ushered a wave of decolonization and counter-hegemony in the basin by building the GERD.

¹¹⁹ *supra* note 118, Kimenyi, M., & Mbaku, J.

CHAPTER FOUR

DAM-BASED DEVELOPMENT IN THE NILE BASIN: THE CASE OF GERD

4.1. Introduction

Dam-based development in the transboundary river context is a complex issue that involves water resource allocation, market environmentalism, and the provision of essential water supplies. While dam development can provide much-needed water resources, it can also negatively impact downstream communities. Many countries struggle to provide essential water supplies to their citizens due to limited resources. With the population increasing, urbanization expanding, and economic development progressing, more significant water demand is necessary to sustain agricultural, municipal, and industrial activities.¹²⁰

Consequently, the accompanying risks associated with water usage have become more pronounced and significant. As a result, the politics of human rights concerns often arise in transboundary water resources, especially when it relates to dam construction and planning for regional needs. Moreover, dam-based development raises significant concerns about water governance and human rights. The right to water is essential in ensuring adequate water is available to all, irrespective of their social or economic status. However, transboundary issues, such as dam construction, have led to conflicts over the use of resources.

The GERD is currently the largest hydropower infrastructure project in Africa. The project on the Blue Nile is expected to provide Ethiopia with the much-needed power to drive its growing economy. At the same time, the GERD is seen by many as a potential source of tension between Ethiopia and downstream countries, particularly Egypt, which relies heavily on the Nile for its water needs. Despite the strategic importance of GERD, there are growing concerns about the potential human rights implications of the project. On one side, the project poses a momentous prospect for substantial economic advancement in Ethiopia, a nation plagued by high poverty and food insecurity.¹²¹

¹²⁰ https://www.un.org/waterforlifedecade/water_cooperation_2013/water_cooperation_challenges.shtml

¹²¹ *supra* note 92, Funnemark, Anne. p. 4.

Conversely, the construction of GERD and any form of intervention with the Nile is deemed a fundamental matter of national security by Egypt.¹²² The dam structure presents a potential risk of decreasing the river Nile's downstream flow volume.¹²³ This is because a significant proportion of the Blue Nile's flow, precisely 82 percent, is derived from Ethiopia. Despite this challenge, there is a legal obligation to protect human rights in dam-based development by balancing economic growth and water protection while respecting human rights. Accordingly, dam-based development and human rights in transboundary river contexts are two interconnected issues that require a holistic approach. This chapter examines the GERD and highlights the need for a more comprehensive approach considering economic development goals and human rights concerns when building hydropower dams in transboundary rivers.

4.2. Access to Energy and the RtD in the Nile Basin

According to the recent Energy Progress Report of 2022, access to electricity on a global scale has experienced a notable improvement since 2010. However, despite such progress, regional disparities persist and remain extensive (figure 1). From 2010 to 2020, it was evident that there was a notable and uniform advancement in the provision of electricity across all regions within the developing world.¹²⁴ Nevertheless, in 2020, Africa remained the most underdeveloped regarding electricity access. Notably, out of the populace lacking access to electricity, approximately 77 percent, or about 568 million individuals, were residing in Sub-Saharan.¹²⁵

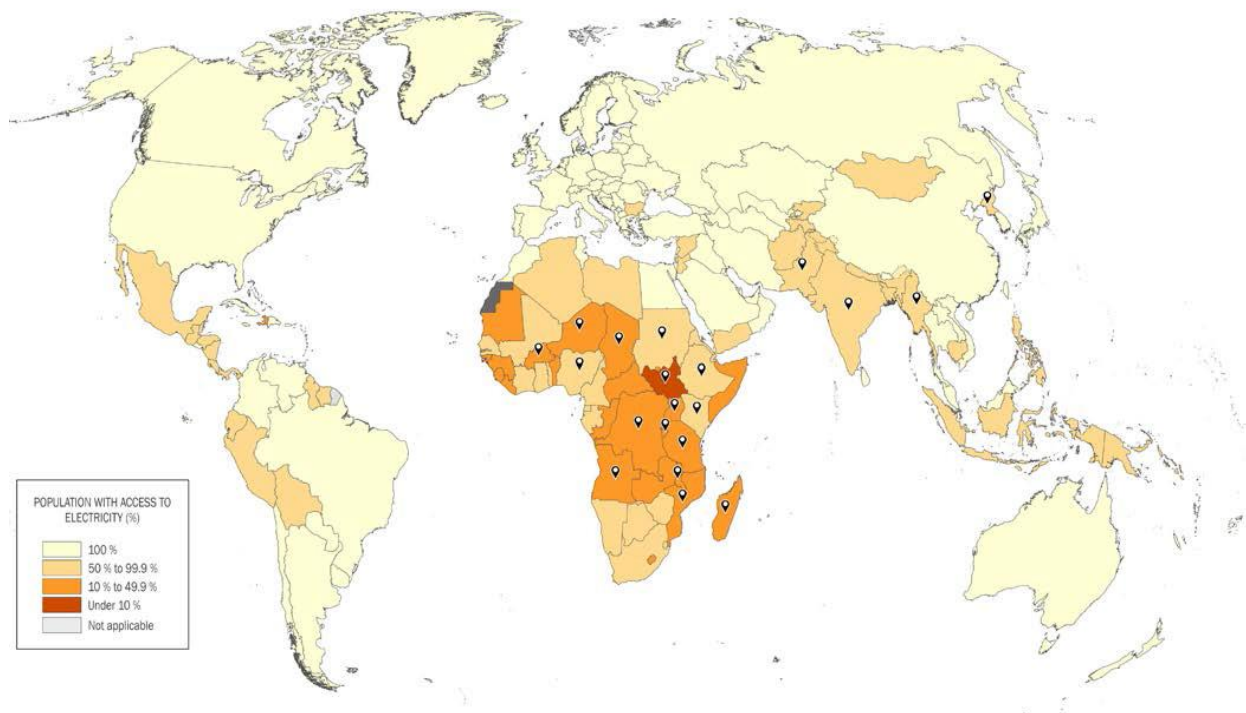
Figure 1: Share of the population who have access to electricity.

¹²² Abdulrahman, Salam Abdulqadir. (2019). "The River Nile and Ethiopia's grand renaissance dam: challenges to Egypt's security approach." *International Journal of Environmental Studies* 76, no. 1: 137.

¹²³ Abtew, W., and Shimelis Dessu. (2019). "Grand Ethiopian Renaissance Dam Operation and Upstream-Downstream Water Rights." In *The Grand Ethiopian Renaissance Dam on the Blue Nile*, Springer, Cham.

¹²⁴ IEA, IRENA, UNSD, World Bank, WHO. (2022). *Tracking SDG 7: The Energy Progress Report*. World Bank, Washington DC.

¹²⁵ *Ibid.*



Source: World Bank 2020.

The share of the population with access to electricity is an essential indicator of a country's development, and the three countries with the most significant populations lacking access to energy are Nigeria, the Democratic Republic of Congo, and Ethiopia, with 92 million, 72 million, and 56 million people, respectively. The absence of sustainable and clean energy affects individuals across different dimensions, including economic, social, health, and security.¹²⁶ In particular, the lack of access to renewable and clean energy may lead to adverse human rights impacts, especially for women and girls in rural areas of developing nations.¹²⁷

Furthermore, the impact of the COVID-19 pandemic on household incomes has resulted in the unaffordability of essential energy services for approximately 90 million individuals in Africa and Asia.¹²⁸ The projected exacerbation of the worldwide disparities in access to reliable energy and health care due to the pandemic crisis, extreme weather events, and climate change

¹²⁶ UNOHCHR. Renewable Energy and The Right to Development: Realizing Human Rights For Sustainable Development.

¹²⁷ *Ibid.*

¹²⁸ *supra* note 124, IEA, IRENA, UNSD, World Bank, WHO.

has emphasized the significance of expanding access to clean and efficient energy to aid the populace in mitigating the consequences of environmental and health crises.¹²⁹

Renewable energy has the potential to play a crucial role in advancing the RtD, particularly by enhancing the capabilities of impoverished rural and local communities through the provision of energy services and the expansion of manufacturing capacity.¹³⁰ Renewable initiatives, such as the GERD, support small and medium enterprises and rural women, thereby ensuring their involvement in the renewable energy market prospects in rural places.¹³¹ Moreover, countries with high levels of electricity access tend to have better economic, social, and environmental outcomes.

Since modern energy access and development are directly tied, promoting growth in Africa is hindered by the continent's inability to tap its resources. Over half a million people in the Nile basin remain without access to energy and rely on traditional biomass and coal as their primary fuel sources. Therefore, increasing access to electricity is a critical goal for many countries, particularly in the developing world, where access is often limited. However, depending on Articles 22 and 24 of the ACHPR, African countries can assert the right to socio-economic and cultural development and respond to the challenge of energy poverty that has persisted and continues in Africa for a long time.

4.3. GERD's Role in the Realization of Human Rights

The supply of electricity was described by the UN as a strategy for achieving "development first" since it enhances the economic condition of people who reside in rural areas by boosting productivity and human welfare.¹³² Energy generation and consumption comprise a significant portion of the global emissions of greenhouse gases, comprising approximately two-thirds of the total.¹³³ Even so, the transition of the energy sector to a renewable energy-based one

¹²⁹ IEA. (2021). World Energy Outlook 2021.

¹³⁰ Huish, Robert. Operationalizing the Right to Development for Realizing Sustainable Development: Eliminating Poverty, Hunger, and Inequality. <https://www.ohchr.org/sites/default/files/Documents/Issues/Development/chapter-4-robert-huish-rtd-and-poverty-hunger-and-inequality.pdf>

¹³¹ *Ibid.*

¹³² Sovacool, B. K. (2012). The political economy of energy poverty: A review of key challenges. *Energy for Sustainable Development*, 16(3), p. 275.

¹³³ *supra* note 126, UNOHCHR.

must be the central focus of endeavors to mitigate the effects of climate change.¹³⁴ Therefore, it can be argued that the advantages of utilizing sustainable energy sources significantly exceed the expenses incurred.¹³⁵ Furthermore, it is imperative to note that upholding human rights does not inherently preclude undertaking significant infrastructure development initiatives like the GERD. Instead, it necessitates the implementation of specific conditions and procedural boundaries to ensure the well-being of all involved parties.¹³⁶

Two decades prior, the World Commission on Dams suggested that adopting HRBA would help balance significant infrastructure projects' positive and negative impacts.¹³⁷ It is a people-centered process for planning, programming, overseeing development initiatives, and anticipating and averting conflict by guaranteeing participation and transparency in decision-making processes. Hence, HRBA provides human rights standards that can guide when assessing and implementing large infrastructure projects because it offers a step-by-step method for identifying rightful claims, freedoms, and entitlements.¹³⁸

4.3.1. Identifications of Opportunities and Challenges of GERD

The GERD is expected to generate about 6,000 megawatts of electricity, equivalent to about 40% of Ethiopia's current electricity needs. The project is also expected to provide a reliable water source for irrigation and other uses in Ethiopia. In addition, the GERD will likely contribute to regional integration and cooperation by providing power to neighboring countries such as Sudan and Kenya. Further, the GERD as a hydroelectric dam has the potential to realize the right to an adequate standard of living, education, children's welfare, women's rights to development, access to good health care, socio-economic rights, access to water right, food security, economic development, and present investment opportunities. Additionally, the GERD's renewable energy, equitable distribution, and affordable access can contribute to achieving several goals and targets of the 2030 SDG and realizing the RtD.¹³⁹

¹³⁴ *supra* note 126, UNOHCHR.

¹³⁵ *Ibid.*

¹³⁶ Grönwall, J. (2020). Applying a Human Rights-Based Approach to Transboundary Infrastructure Projects. *Stockholm International Water Institute (SIWI)*. p. 1.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *supra* note 126, UNOHCHR.

Through the GERD, Ethiopia is providing affordable and clean Energy (SDG7) as a means to eradicate poverty (SDG1) and hunger (SDG2), provide clean water and sanitation (SDG6), industrialize the country (SDG8), protect people's health and well-being (SDG3), reduce inequality (SDG10), and support sustainable cities and consumption (SDG11).¹⁴⁰ Likewise, to combat climate change (SDG 13), clean energy must be available because it will significantly reduce the need for biomass and lower greenhouse gas emissions.¹⁴¹ In addition, the dam will promote peace and justice (SDG16) and lay the groundwork for cooperation among basin nations in pursuit of universal goals (SDG17).¹⁴²

Accordingly, the GERD project displays excellent potential in facilitating the development of clean and renewable energy, as it presents a significant opportunity for 65 million individuals who currently lack access to electricity. Furthermore, the project, constructed through direct contribution and bond acquisitions by the Ethiopian populace, is set to provide a significantly substantial interconnection with neighboring countries. The correlation between the availability of energy services and the development progression has been extensively acknowledged.¹⁴³ Moreover, the deficiency of access to modern energy sources poses a significant obstacle to advancing development in Africa.¹⁴⁴

The ramifications of energy poverty in Africa on development are decisive and present a considerable obstacle to the complete fulfillment of human rights. This is since access to energy is a fundamental economic and social entitlement that is a necessary component of human dignity.¹⁴⁵ However, the GERD has not been without controversy, particularly regarding its potential impact on downstream countries such as Egypt and Sudan. Since the Nile River is a source of water and livelihood and a symbol of cultural and religious identity for millions of people in the region, any infrastructure project that affects the Nile River is likely to be perceived as a threat to social and cultural values, particularly by downstream countries.

¹⁴⁰ Messay, M. (2020). Hypocrisy or blind ignorance: the GERD, SDGs and current stance of international actors. Available at: <https://thereportermagazines.com/70/>

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Barnard, M., & Scholtz, W. (2013). Fiat Lux! Deriving a right to energy from the African charter on human and peoples' rights. *South African Yearbook of International Law*, 38(1), p. 49.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, p. 60.

This can create a sense of grievance and animosity that can negatively affect the region's human rights and social stability. For example, the GERD might temporarily reduce water flow to these countries during the filling time, although the water will continue to flow once it has completed the filling. Regardless, as stated by the former Minister of the Ministry of Water and Irrigation of Ethiopia, Dr. Eng. Seleshi Bekele, the initiation of GERD's operations, in line with the DoP, provided evidence that it could effectively produce power while maintaining the water flow to downstream areas without any reduction.¹⁴⁶

In addition, there are concerns about the potential for sedimentation and erosion downstream of the dam, which could negatively affect the productivity of agricultural lands in downstream countries. Mitigating sediment yield through land use change necessitates a substantial and prolonged endeavor, potentially involving myriad small-scale agriculturalists.¹⁴⁷ Hydropower producers have the potential to significantly contribute to this process through the allocation of their available funds towards the development and demonstration of feasible technology packages, as well as the provision of continued support at demonstration sites.¹⁴⁸

Therefore, although opposed dams like the GERD have raised human rights concerns, water resources must and can be harnessed responsibly, considering the needs of all those who rely on the river system, including upper-stream countries. If not, failure to ensure access to adequate water can constitute a human rights violation, leading to tensions and geo-political difficulties.

As Egypt, Ethiopia, and Sudan have never concluded on managing the Nile as per international law principles, the human right to water of people living in the river basin could be adversely affected. This situation underscores the necessity of adopting a holistic approach that considers economic development objectives and human rights issues in constructing hydroelectric power projects across transboundary rivers. Though hydropower projects will inevitably include trade-offs, upholding human rights standards to share benefits and distribute risks while elevating these issues is important.

¹⁴⁶ <https://www.energyvoice.com/renewables-energy-transition/hydro/388929/ethiopia-gerd-power-egypt/>

¹⁴⁷ <https://www.hydropower.org/sediment-management-case-studies/ethiopia-grand-ethiopian-renaissance-dam-gerd>

¹⁴⁸ <https://www.hydropower.org/sediment-management-case-studies/ethiopia-grand-ethiopian-renaissance-dam-gerd>

Consequently, it's crucial to balance GERD's beneficial and adverse consequences using a human rights framework. Accordingly, several measures can be taken, including conducting a human rights impact assessment of the project, consulting with local communities and other stakeholders, and providing adequate compensation for any loss of land or livelihoods. Several international and regional laws and guidelines apply to infrastructure projects, including the instruments provided in the third chapter. These laws and procedures provide a framework for ensuring that human rights are respected in infrastructure projects.

Thus, the application of HRBA to the development of natural resources presents prospects for a more sustainable and peaceful process through the provision of a systematic methodology to reinforce the respect for the rule of law and human rights,¹⁴⁹ in addition to availing the advantages of clean and sustainable energy, opportunities for irrigation, and a lowered probability of catastrophic floods serve as the bedrock for thriving development and investments for both the current and forthcoming generations.¹⁵⁰

¹⁴⁹ Grönwall, J. (2020). Large dams and human rights obligations: The case of the Pancheshwar Multipurpose Project on the border between India and Nepal. Stockholm: International Centre for Water Cooperation, *Stockholm International Water Institute*. Available:

https://www.siw.org/wpcontent/uploads/2020/07/Report_ICWC_HRBA_2020_WEB.pdf.

¹⁵⁰ *Ibid.*

CHAPTER FIVE

CONCLUSION

The Nile River has been a source of life and livelihood for millions of people in Egypt, Sudan, and Ethiopia for thousands of years. However, the allocation of water resources has been a contentious issue between these countries, particularly since the early 20th century, when Egypt and Sudan were granted exclusive rights to the use of the Nile water under a series of colonial-era agreements. For many Ethiopians and other upper riparian countries, this was seen as a historical injustice that must be corrected. The GERD, therefore, has not just become an engineering feat but also a symbol of Ethiopia's quest for economic and political independence.

Using RtD as an example, this thesis identifies the practical implications and added value of the human rights perspective on the GERD case. The primary purpose of this thesis was to determine the effect of the legal agreements in influencing the upper riparian countries' right to utilize the Nile and the GERD's role in reclaiming Ethiopia's RtD from a human rights perspective. Hence, this thesis provides the obligations of States to ensure that basic developmental needs are met and the right of countries to claim their right to utilize natural resources as means to realize their human rights needs progressively.

While the second chapter delves into the theoretical and legal structures that govern the RtD and its link with access to natural resources to provide a contextual foundation, the main result of the third chapter identifies the underlying reasons for the lack of significant developmental projects on the Nile River as the colonial agreements. To address this issue, respecting and adhering to international water law principles by accepting that all riparian countries have the right to utilize the Nile water resources is a requisite. The most prominent finding is that using the Nile as a right for all Nile basin countries without exclusion is imperative for their development. Hence, growth in the Nile basin using natural resources cannot be attained without assuring all the basin countries' equitable and reasonable rights to the Nile. Accordingly, the Nile basin has a great chance to develop if the CFA, as a robust framework for cooperation, is adopted to ensure both transboundary cooperation and the respect of human rights obligations by the riparian countries.

Learning from the experience of shared resources communities in Africa, such as the Gambia and Senegal river basins, is equally important to review, assess, and implement their mechanisms. The other most striking finding to emerge from this research is the importance of mapping human rights for the Nile community and using a people-centered approach to identify rightful claims and legitimate entitlements as well as violations and the corresponding duties of the governments in rectifying the issues for better human welfare.

The Nile is of utmost significance because it passes through 11 nations and provides fresh water to over 500 million people. Because of the large population, the Nile has practically come to represent transboundary water disputes in a region affected by low rain, severe droughts, and elevated threats from climate change. Conversely, the Nile was a vital lifeline and source of development that gave Egypt life. Over the years, there has been a strong correlation between economic and social growth, human development, and access to and availability of water. As such, Egypt has retained the hegemonic rule of the Nile through contested treaties agreed upon by the UK. However, the construction of the GERD has the power to change Egypt's hegemonic control of the Nile Basin to Ethiopia's and the basin's advantage.

Additionally, the upstream nations' fast population expansion has increased their need for energy and development, putting higher demands on the Nile. As a result, the Nile basin has been a source of transboundary water conflict rather than cooperation due to the rising demand for water resources. That being said, applying a human rights approach into practice is challenging unless political commitment and willingness are in place. The next chapter, therefore, discusses that despite being a limited resource, the Nile is a source of power generation, water, food, and life, critical to the well-being of people and development.

For example, as a development project, the GERD significantly contributes to Ethiopia and the basin's socio-economic growth, comparable to Egypt's. However, building the GERD has sparked controversy. Despite this controversy, the GERD is crucial to Ethiopia's economic development. It will increase the country's electricity production capacity by 6,000 MW and provide a stable energy source for industries and households. This will boost economic growth by attracting foreign investment and creating job opportunities.

Further, through interconnection projects, the GERD will enable Ethiopia to export electricity to neighboring countries. This will generate revenue for the country and contribute to regional integration. Thus, the Nile River and GERD are essential to Ethiopia's and the region's economic development. Nonetheless, the Ethiopian government must ensure that they are managed sustainably while addressing concerns from neighboring countries through diplomatic channels. But as the population of the Nile Basin overgrows, there is also a need for more cooperation in managing the basin's water resources to ensure sustainable and effective utilization of the Nile in the long term.

Overall, the GERD project has significant strategic and economic importance for Ethiopia and the region. However, ensuring the project does not come at the expense of human rights or social stability is essential. The HRBA can promote development in Ethiopia while protecting the rights of those who might be affected by conducting careful planning and consultation with all stakeholders, including communities and neighboring countries that could be potentially affected. Henceforth, human rights principles should be integrated into human development, and RtD principles must be implemented throughout all conception, development, and implementation phases of transboundary water projects. Doing so will assist in maximizing the benefits of transboundary cooperation on projects such as GERD while distributing the associated risks and expenses.

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