The India-Bangladesh Treaty of 1996: sharing waters at Farakka An international water law perspective

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Abstract: This paper examines the 1996 Treaty between the Republic of India and the Government of the People's Republic of Bangladesh on sharing of the Ganga waters at Farakka, by putting it in relation and in comparison with the three main principles of international water law: the principle of limited territorial sovereignty, the principle of prevention of significant harm and the duty to cooperate in sharing international watercourses. Hence, the considerations will focus on whether the 1996 India-Bangladesh Treaty reflects the developments of international water law and its principles and what an assessment of the treaty in the light of these principles can reveal, not only on its compliance with international law, but also on its efficacy and long-term perspectives. The analysis will singularly tackle each of the three principles and their correspondences - or lack thereof- in the 1996 Treaty.

Keywords: International water law; Equitable and reasonable utilizations; Prevention of significant harm; Duty to cooperate; GMB; India-Bangladesh

1. Introduction

The main subject of this study is the 1996 Treaty on the sharing of the Ganga Waters at Farakka (hereinafter "1996 Treaty"). The treaty was the final act of a long series of events which presented India and Bangladesh with the necessity to agree on a formal document in order to manage their shared waters. The first of such events was the building, in the 1960s, of a much-contested barrage in Farakka - nearby the Bangladeshi border - aimed at diverting the Ganga's waters to save Kolkata's port from slit[1]. When, in 1974, the Indian barrage's exacerbation of water scarcity and climate change effects in the downstream state of Bangladesh became evident[2], so did the necessity of concluding an agreement addressing the sharing of the waters. After a series of attempts[3], the 1996 Treaty was signed to the end of settling the matter for a period of thirty years[4].

This study explores whether the 1996 India-Bangladesh Treaty reflects the developments of international water law and its principles and what an assessment of the treaty in the light of these principles can reveal, not only on its compliance with international law, but also

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1. See Mark Hect, *Will the Ganges River Be a Source of Regional Conflict Between India and Bangladesh?* in M.Troy Burnett (ed.), *Natural Resource Conflicts: From Blood Diamonds to Rainforest Destruction* 383, 384 (ABC-CLIO 1st ed. 2016).

2. See generally Climate Diplomacy, *India and Bangladesh Conflict Over the Ganges River*, available at https://climate-diplomacy.org/case-studies/india-and-bangladesh-conflict-over-ganges-river (last visited September 30, 2021).

3. See generally ibid.

4. See Article 12, *Agreement on sharing of the Ganges waters at Farakka* 1977, 1066 UNTS 3, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201066/v1066.pdf (last visited November 21, 2021).

on its efficacy and long-term perspectives. The analysis will singularly tackle each of the three principles and their correspondences - or lack thereof - in the 1996 Treaty. To this end, Chapter I introduces the principles and gives a general background on the Ganges' case study, to then analyze the extent to which the single principles are included in the 1996 Treaty in Chapters II, III and IV. Chapter V resumes the previous instances and provides some points of reflection for future scenarios.

2. The River and the Treaty: an International Water Law Perspective

At the core of the 1996 Treaty is the Ganga: sacred, polluted and transboundary, it flows for 2,525 kilometers, from the Himalayas in Nepal to India and Bangladesh, where it becomes River Padma, united with the Brahmaputra - the lower part of which is renamed *Jamuna* - and River Meghna[5]. These rivers form the GMB (Ganga-Meghna-Brahmaputra) basin, which supports approximately 10% of the world population as it crosses Bangladesh, Bhutan, China, India and Nepal[6]. Even though all these countries play a significant role in the life cycle of this river, the scope of this paper will be limited to the factors relevant to the relationship between India and Bangladesh, as the two countries whose management has the most controversial and direct effects on the river itself, and to their efforts towards bilateral cooperation in sharing their most important common natural resource.

It is important to point out that a long set of events precedes the 1996 Treaty at the center of this analysis, thus constituting the pillars for the India and Bangladesh's current relationship. Although these historical events are not the main subject of our inquiry, they still play a relevant role in the hearts and minds of those drafting, signing and implementing the document at issue, on both sides of the river[7]. As a

5. Nafis Ahmad and Deryck Lodrick, *Ganges River* in *Encyclopedia Britannica* (January 28, 2021) available at https://www.britannica.com/place/Ganges-River (last visited September 30, 2021).

6. See Golaum Rasul, *Why Eastern Himalayan countries should cooperate in transboundary water resource* management, 16 Water Policy 19, 20 (2014).

7. See Edward Jackiewicz, *Ganges river as the source of regional conflict between India and Bangladesh* in M. Troy Burnett (ed.), *Natural Resource Conflicts* 383, 386

matter of fact, not only was the treaty arranged in a regional context that presents various inherent challenges[8], but its conclusion temporally coincided with a broader tendency, namely the crystallization of the key principles of international water law through the drafting of the two main conventions in this field: the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes[9] of 1992 and the UN Convention on the Law of Non-Navigational Uses of International Watercourses[10] of 1997. It should be noted that, even though neither India nor Bangladesh are parts of the UNECE Water Convention[11] and the UN Watercourses Convention[12], the principles have gained general acceptance at the international law level[13] and are therefore to be taken into strong consideration within the field. Indeed, the two conventions present the three main substantive and procedural rules of international water law: the principle of limited territorial sovereignty, the principle of prevention of significant harm, and the duty to cooperate in cases of transboundary watercourses[14], principles which – as it's this paper's aim – will be analyzed in subsequent paragraphs with particular reference to the 1996 Treaty.

(cited in note 1).

8. See Nitya Nanda, Abu Saleh Khan and Krishna Dwivedi, *Hydro-Politics in GBM Basin: The Case of Bangladesh-India Water Relations* at 7 (The Energy and Resources Institute 1st ed. 2015).

9. See generally *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* 1992, 1936 UNTS 269, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201936/v1936.pdf.(last visited November 21, 2021).

10. See the *Convention on the Law of the Non–Navigational Uses of International Watercourses* 1997, 2999 UNTS 77, available at https://treaties.un.org/doc/Publication/UNTS/Volume%202999/v2999.pdf (last visited November 21, 2021).

11. The list of the signing parties is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no
=XXVII-5&chapter=27&clang=_en (last visited November 21, 2021).

12. The list of the signing parties is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-12&chapter=27&clang=_en (last visited November 21, 2021).

13. See Attila Tanzi, *The inter-relationship between no harm, equitable and reasonable utilisation and cooperation under international water law,* 20 International Environmental Agreements: Politics, Law and Economics 619, 620 (2020).

14. See Owen McIntyre, *Substantive Rules of International Law*, in Alistair Rieu-Clarke, Andrew Allan and Sarah Hendry (eds.), *Routledge Handbook of Water Law and Policy* 234, 235 (Taylor & Francis Group 1st ed. 2017).

3. The Principle of Limited Territorial Sovereignty and Equitable and Reasonable Utilization

As previously mentioned, limited territorial sovereignty is one of the main principles of contemporary international water law and it is traditionally said to derive from a trade-off between the theory of absolute territorial sovereignty and the theory of absolute territorial integrity[15]. The former theory stems from the so-called "Harmon Doctrine", originating at the end of the 19th century from the dispute between the United States and Mexico over the management of the Rio Grande, shared between the two countries[16]. Since then, the theory was adopted by upstream states and essentially expresses the idea that "a co-basin state may freely utilize waters within its territory"[17]. By contrast, the theory of absolute territorial integrity was adopted by downstream states, who demanded the "continuation of the full flow of waters of natural quality from another (upper) co-basin state"[18]. These two doctrines, which clearly saw downstream and upstream states at completely opposite poles, were mediated to reach the limited territorial sovereignty approach, according to which one state's territory must not be used to significantly harm co-basin states[19]. Our specific case study is particularly related to this doctrine and its development: India, as an upstream state, and Bangladesh, as a downstream state, reflect the power struggle that often derives from sharing international watercourses. But fully applying such a doctrine means to put an accent on its sub-principles and, as McIntyre affirms, "this approach is usually articulated in normative terms as the principle of ''equitable and reasonable utilization'', which entitles each co-basin state to an equitable and reasonable use of transboundary waters flowing through its territory"[20]. In this perspective, the doctrine bases itself on two main concepts, which contribute to its normative formulation:

15. See McIntyre, *Substantive Rules of International Law* at 236 (cited in note 11).
16. See Stephen C. McCaffrey, *The harmon doctrine one hundred years later: Buried, not praise,* 36 Natural Resources Journal 965, 966 (1996), available at https://digitalrepository.unm.edu/nrj/vol36/iss4/13 (last visited November 18, 2021).
17. See McIntyre, *Substantive Rules of International Law* at 236 (cited in note 11).
18. See ibid.
19. See ibid.
20. See id at 237.

first, it derives from the evident fact that sovereignty is not absolute and has always been limited by rules of international law and, secondly, it does not only confine itself to the implied rule of not causing harm to other states, but it also includes issues related to quantitative allocation[21]. With regards to the normative formulation of the principle, the 1996 Treaty includes the principles of equitable and reasonable utilization and thus the theory of limited territorial sovereignty, mainly in its Articles 9 and 10[22].

The next question to address is how the Treaty exactly does so. Article 9 provides for "the principles of equity, fairness and no harm to either party"[23] to be respected when concluding agreements between the two countries in the future, and Article 10 states that the same principles must be respected when reviewing the 1996 Treaty[24]. Such a formulation corresponds to the one of the doctrine previously described, even though it may be stated that some of its further "more operational" features are missing. Indeed, although a certain normative indeterminacy and flexibility pertain to the principle of equitable and reasonable utilization[25], it does nevertheless have a certain substantive content that enables the principle itself to be put into operation. For an account of the content at issue, we may refer to Articles 5 and 6 of the UN Watercourses Convention, as they both contribute to determining what factors and circumstances have to be taken into account when deciding what counts as equitable and reasonable use. Article 5(1), with reference to international watercourses "optimal and sustainable utilization thereof and benefits therefrom", where, according to Calfish and his analysis of the Travaux Préparatoires of the Convention, "optimal utilization and benefits [...] does mean attaining maximum possible benefits for all watercourse states and achieving the greatest possible satisfaction of all their needs, while minimizing

21. See Stephen McCaffrey, *The Law of International Watercourses* at 126 (Oxford University Press 3rd ed. 2019) [2001].

22. See Muhammad Mizanur Rahaman, *Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis,* 25 Water Resources Development 159, 167 (2009), available at https://www.internationalwaterlaw.org/bibliography/articles/general/Rahaman-Ganges-Water_Res_Devel.pdf (last visited November 11, 2021).

23. See ibid.

24. See ibid.

25. See McIntyre, *Substantive Rules of International Law* at 237 (cited in note 11).

the detriment to, or unmet needs of, each"[26]. Thus, the substantial meaning of the equitable and reasonable utilization principle in light of Article 5 of the Convention seems to be strongly related to the second principle of international water law initially mentioned in this analysis: the prevention of significant harm. However, before going through the characteristics of the latter principle, it is fundamental to remind that Article 6 of the UN Convention lists "factors relevant to equitable and reasonable utilization"[27] in an attempt to further contribute to the operationalization of the principle. With regards to said factors, Article 10 clarifies that none of them enjoys inherent priority, although, in the event of conflicts, special regard shall be paid to vital human needs[28]. The 1996 Treaty does not mention such a priority, which is probably one of its most significant shortcomings, together with a certain degree of indeterminacy on what equitable and reasonable uses consist of.

In this regard, the discourse on water flow is a central one, as "practical application of the equitable and reasonable utilization principle to resolve a water allocation dispute is a significant challenge"[29] and the Ganga's situation is not exempt from these difficulties. Indeed, even though the 1996 Treaty establishes water allocation between Bangladesh and India in its Article 2 by adopting indicative schedules on water flow shares included in Annex I and Annex II, this system of water allocation presents two main drawbacks. First of all, the 1996 Treaty does not provide for a clear account of India's commitments to Bangladesh in case of a substantial reduction of flow from upstream and, even though Article 2(2) states that "every effort would be made by the upper riparian to protect flows of water at Farakka", it does not further expand on the concept of "every effort", a concept which is

26. See Lucius Caflisch, *Equitable and Reasonable Utilization and Factors Relevant to Determining Such Utilization (Articles 5 and 6)* in Boisson de Chazournes et al. (eds.), *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: A Commentary* 77, 83 *(*Oxford 1st ed 2018).

27. See Article 6, *Convention on the Law of the Non–Navigational Uses of International Watercourses* (cited in note 10).

28. See *id.* at Article 10.

29. See Abby Muricho Onencan, Bartel Van de Walle, *Equitable and Reasonable Utilization: Reconstructing the Nile Basin Water Allocation Dialogue,* 10 Water 707, 708 (2018), available at https://doi.org/10.3390/w10060707 (last visited November 18, 2021).

instead decisive[30]. Secondly, the 1996 Treaty does not provide for any allocation shares in the event that the flow falls below 50 000 cusecs in any 10-day period, and Article 2(3) only mentions immediate consultations between the two countries if such water scarcity occurs, without specifying any precise time frame for these talks and their eventual outcome[31]. Such an omission cannot be completely addressed through a constructive interpretation of the relevant 1996 Treaty's provisions mentioned above in light of the principles of limited territorial sovereignty and equitable and reasonable utilization, but would require more extensive amendments to the 1996 Treaty itself. Nevertheless, on a positive note regarding the same issue of water flow protection, Article 3 states that "waters released to Bangladesh at Farakka [...] shall not be reduced below Farakka except for reasonable uses of waters, not exceeding 200 cusecs" and thus, even though it does not expand on the concept of reasonable uses, it nevertheless establishes a quantitative limit to the water consumption of these uses.

4. The Principle of Prevention of Significant Harm

As examined in the previous paragraph, the principle of equitable and reasonable utilization, derived from limited territorial sovereignty, is, to a great extent, linked with the principle of prevention of significant harm. Therefore, it is important to analyze how such principles are interconnected. According to Tanzi's account, the two principles should work together within the "community of interests" framework[32] meaning that, just as downstream states do not have any veto rights over potentially damaging activities of upstream states, in the light of equitable and reasonable utilization, upstream states have the duty to consider their neighbors when planning for measures that

30. See Muhammad Mizanur Rahaman, *The Ganges Water Conflict: a comparative analysis of 1977 Agreement and 1996 Treaty,* 1 Asteriskos: Journal of International and Peace Studies 195, 205 (2006), available at https://www.internationalwaterlaw.org/bibliography/articles/general/Rahaman-Ganges-Asteriskos.pdf (last visited November 18, 2021).

31. See *ibid.*

32. See Tanzi, *The inter-relationship between no harm, equitable and reasonable utilisation and cooperation under international water law* at 621 (cited in note 14).

may have adverse effects on other states[33]. The principle does not consist of an obligation not to harm but of a due diligence obligation[34] to "take all appropriate measures to prevent the causing of significant harm"[35].

It is important to state that an interpretation of the no-harm principle of such kind makes it highly dependent on the next principle at issue, that is the states' duty to cooperate when sharing transboundary watercourses. Just as the principle of equitable and reasonable utilization, the prevention of significant harm is included in Articles 9 and 10 of the 1996 Treaty in relation to future agreements and reviews of the treaty. However, the document does not provide for any further clarification on how to interpret the concept of "no-harm", and leaves out several issues that are often related to the principle itself, such as prevention of harmful effects, the protection of water quality, and the application of clean technologies[36] which are instead included in other international law agreements of a similar nature (such as the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin of the 5th of April 1995[37], the 1996 Mahakali Treaty between India and Nepal and others[38]). It immediately becomes clear after a brief analysis that the 1996 Treaty's focus is on water quantity rather than water quality, even though the latter is one of the most pressing issues that the population - and especially those living downstream of the Ganga - face. In this regard, Nitya Nanda states that "owing to its location at the mouth of a 1560 miles (2510 km) river basin settled by over 350 million people, Bangladesh has surface water

33. See id at 622.

34. See McIntyre, *Substantive Rules of International Law* at 241(cited in note 11).

35. See Article 7, *Convention on the Law of the Non–Navigational Uses of International Watercourses* (cited in note 10).

36. See Owen McIntyre, *Environmental Protection of International Watercourses under International Law* at 88 (Taylor & Francis 1st ed 2007).

37. See Article 3, *Agreement on the cooperation for the sustainable development of the Mekong River Basin* 1995, 2069 UNTS 3, available at https://treaties.un.org/doc/Publication/UNTS/Volume%202069/v2069.pdf (last visited November 21, 2021).

38. See Kazi Saidur Rahman,et al., *A critical review of the Ganges Water Sharing arrangement*, 21 Water Policy 259, 273 (2019), available at https://iwaponline.com/wp/article/21/2/259/66094/A-critical-review-of-the-Ganges-Water-Sharing?searchresult=1 (last visited November 17, 2021).

that is teeming with harmful microorganisms and other pollutants"[39]. Moreover, besides there being no agreement in the Treaty with regards to the effects of scarce water quality on human uses, the text does also not include any regard to environmental protection of the river, its fauna and its ecosystem. In international water law, however, this is not unusual[40] as opinions vary on whether environmental harm should be considered a particular kind of harm, to be differently balanced on the scale of the due diligence obligation of the no-harm principle and inherently unreasonable and inequitable, or whether it simply is, as any other harm, permitted under certain conditions[41].

5. The Duty to cooperate

Besides water allocation, one of the main achievements of the 1996 Treaty may be considered its establishment of a stable bilateral cooperation channel between the two countries, headed by the Joint Committee. The Committee includes "representatives of both member states in equal numbers"[42] and decides its own method of operating[43]. Moreover, it has data-sharing functions since it is responsible for the setting up of teams to "observe and record" daily flow at the river's crucial points[44] and for submitting all the collected data in a yearly report to their respective governments[45]. It is also important to note that the Joint Committee adds up to the pre-existing structure of the Joint Rivers Commission which, since 1972, leads the "differing interests

39. See Nanda, Khan and Dwivedi, *Hydro-Politics in GBM Basin* at 13 (cited in note 8).

40. See Rahman, et al., *A critical review of the Ganges Water Sharing arrangement* at 273 (cited in note 38).

41. See McIntyre, *Environmental Protection of International Watercourses under International Law* at 359 (cited in note 36).

42. See Article 4, *Agreement on sharing of the Ganges waters at Farakka* (cited in note 4).

43. See *id.* at Article 5.

44. See *id.* at Article 4.

45. See *id.* at Article 6.

and strategies for the development of the Ganges water resources"[46] of the two countries.

However, despite being added to an already functioning landscape of cooperation instruments such as the Commission and diplomacy, it is arguable that the Joint Committee's presence does not extensively strengthen the Treaty in its scope of enforcing the protection of water flow, as it does not provide for a particularly structured dispute-resolution mechanism[47]. In this regard, Article 7 states that every dispute arising from matters related to the Farakka Barrage shall be first referred to the Joint Committee which, if it does not manage to solve the dispute itself, then shall bring it before the Joint River Commission and, as the last instance, may convene meetings between the two governments[48]. Not even in this instance, a specific time framework is provided for these meetings despite them being defined as 'urgent' by Article 7. With regards to effectiveness, it is also important to point out that the Treaty leaves a consistent amount of procedural freedom to the Joint Committee which, as already mentioned, can decide upon its own procedure and method of functioning.

However, if it is true that disputes may always arise, it is also fair to say that the duty to cooperate and therefore share information and notify of possible planned measures is, in international water law, aimed at avoiding those disputes through a preventive process of continuous confrontation and exchange[49] which seems to be provided for by the 1996 Treaty through the Joint Committee. This process of mutual exchange might improve the bilateral relationship between the two states, but such strong cooperation is not fully achieved at the present

46. See Ishtiaq Hossain, *Bangladesh-India Relations: The Ganges Water-Sharing Treaty and Beyond,* 25 Asian Affairs: An American Review 131, 134 (1998).

47. See Rahaman, *The Ganges Water Conflict* at 205 (cited in note 30).

48. See Article 7, *Agreement on sharing of the Ganges waters at Farakka* (cited in note 4).

49. See generally *Case Concerning the Pulp Mills on the River Uruguay (Argentina v. Uruguay)* 2010 ICJ 14 for an example of such a "participative process" that involves the principle of equitable and reasonable utilisation, the duty of prevention of transboundary harm and the duty to cooperate, as reported by Owen McIntyre, *The World Court's Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay,* 4 Water Alternatives 124, 143 (2011).

time, as "river data are a classified subject in India"[50] and, therefore, public perception of such a cooperation is still limited and not fully transparent. Moreover, the lack of a properly structured enforcement method led India, in the past, to often take unilateral initiatives regarding projects of water management (such as the Farakka Barrage itself[51]) in its territory, without any prior notification to Bangladesh[52]. In more recent times, however, the emergence of a positive trend of cooperation, - which the two countries committed to in Article 9[53] of the 1996 Treaty - has been noticed[54]. In particular, cooperation has interestingly evolved through channels such as the Water Resources Management Joint Working Group (JWG), set up in 2013 to enhance cooperation between Bangladesh, Bhutan, India, and Nepal[55] and recent news confirm that further cooperation under the Joint Rivers Commission to conclude an agreement on the Tista River is on the way[56].

6. Conclusions and Future Scenarios

Throughout this paper, the three cardinal principles of international water law and their correspondences and operation in the 1996 Treaty between India and Bangladesh on the sharing of the Ganga's waters have been analyzed. From what has been explained in previous

50. See Punam Pandey, *Bangladesh, India, and Fifteen Years of Peace: Future Directions of the Ganges Treaty,* 54 Asian Survey 651, 656 (2014).

51. See Muhammad Mizanur Rahaman, *Principles of Transboundary Water Resources Management and Ganges Treaties* at 169 (cited in note 22).

52. See Lei Xie, Muhammad Mizanur Rahaman and Wei Shen, *When do institutions work? A comparison of two water disputes over the Ganges, Brahmaputra and Meghna river basins,* 20 Water Policy 308, 316 (2018).

53. See Article 9, *Agreement on sharing of the Ganges waters at Farakka* (cited in note 4).

54. See Xie, Rahaman and Shen, *When do institutions work?* at 317 (cited in note 53).

55. See ibid.

56. Dipanjan Roy Chaudhury, *India & Bangladesh agree to expand co-operation in water resources* (The Economic Times March 17, 2021), available online at https://economictimes.indiatimes.com/news/politics-and-nation/india-assures-bangladesh-of-its-commitment-to-teesta-water-sharing-deal/articleshow/81536944.cms?from=mdr (last visited September 30, 2021).

paragraphs, we are now able to state that all three principles are included in the 1996 Treaty and that this is certainly symptomatic of their importance and reach as customary international water law. However, we may also draw the conclusion that these principles are most often included as vague complements to the text, rather than as fully-fledged guiding doctrines. This last point may be considered as the *fil rouge* connecting the dots of our analysis from principle to principle, through the main drawbacks of the 1996 Treaty itself. For instance, with regards to the theory of limited territorial sovereignty and its link to equitable and reasonable utilization, it has been observed that the 1996 Treaty leaves the issue of what constitutes reasonable and equitable use completely open, even though it quantitatively limits the amount of water these uses can have access to. This has significant impacts on how the issue of water flow is dealt with and is reflected in India's open commitment to make "every effort [...] to protect flows of water at Farakka"[57]. Looking at prevention of significant harm, we find the same uncertainty regarding the scope and meaning of the concept of 'harm' itself, even though it is arguable that the principle is here conceived - in correspondence with international water law - as a due diligence obligation and not as an absolute prohibition. This may be confirmed by what has been described in the previous paragraphs as an absence of any provision further operationalizing the no-harm principle, especially in terms of environmental protection. Intertwined with the two former principles, the duty to cooperate is the one which is most extensively included in the 1996 Treaty and entrusted to the operation of the Joint Committee. However, from the elements we have briefly provided such as the Committee's extensive procedural freedom, it seems that the latter does not establish a fully-fledged forum for cooperation as in a union of (different) interests, but only an initial stage to what is instead a confrontation between two governments "on opposite sides of the table".

As it often happens in international law, the lack of clarity we have just observed in regards to these principles is inherent to a treaty that represents a compromise, one that has, as some affirm[58], provided for

57. Article 2(2), *Agreement on sharing of the Ganges waters at Farakka* (cited in note 4).

58. See Pandey, *Bangladesh, India, and Fifteen Years of Peace* at 651 (cited in note 51).

several years of peace between two countries. On the other hand, it is also arguable that the importance of compromises lies in the foundations they manage to build and that, when referring to the sharing of vital resources such as water, these foundations have to be firm. The question, therefore, at the end of this brief analysis, is whether these foundations are strong enough to take this compromise further, after the 1996 Treaty expires five years from now. In these merits, the above paragraphs describe how, at the present moment and in a future perspective, there are challenging points that need to be addressed within the Treaty framework, and that a closer look at the fundamental principles of international water law and their operationalization may be of help in addressing these challenges and in bringing the treaty closer to the rapidly evolving practice in this field. Moreover, in light of the principle of cooperation, one of the possible paths for a way forward consists in a whole-basin approach that was suggested - but not achieved - during negotiations for the 1996 Treaty[59]. In this sense, the inclusion of Nepal, as advocated for instance by Bangladesh[60], would perhaps favor a more interlocutory dynamic that could provide for a new take on the power struggle on resources between the two countries.

Such an interlocutory approach together with a strengthening of the treaty's enforcement[61] would be beneficial in what will surely be a long process constituted by a delicate balancing of the states' interests in human rights, sustainable development and the protection of the river *per se,* a river that is so fundamental for all of the parties concerned, to the point that courts have previously recognized it as a "living entity" in virtue of its fundamental ecosystem services[62].

59. See Nanda, Khan and Dwivedi, *Hydro-Politics in GBM Basin* at 11 (cited in note 8).

60. See ibid.

61. See, for example, Rahaman, *The Ganges Water Conflict* at 207 (cited in note 30).

62. See *Mohammed Salim v State of Uttarakhand*, WPPIL 126/2014 11, 18 (High Court of Uttarakhand 2017) cited in Erin L. O'Donnel, *At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India*, 30 Journal of Environmental Law 135, 135 (2018).

The Exploitation of Children in the Orinoco Mining Arc as a Testimony of the Violation of Human Rights and International Commitments Signed by Venezuela

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Abstract: This article addresses the problem of the exploitation of children in the Orinoco Mining Arc, a mining area located in the Bolivarian Republic of Venezuela. The article is prepared under a documentary research scheme – which is based on both legal texts and journalistic sources – and with a qualitative approach. In particular, this research explores whether it is possible to attribute responsibility for the occurrence of the events of the Orinoco Mining Arc to the Government of Venezuela, especially, taking into account the international commitments for the protection of human rights which Venezuela has undertaken. The analysis reveals that the government of Venezuela can be found guilty – both for its action and omission – for the violation of children's rights in the Orinoco Mining Arc. Venezuela has indeed failed to guarantee the respect of fundamental human rights, such as the right to life and to physical and mental integrity, and this way it has violated it has contravened the obligations of international documents such as the Universal Declaration of Human Rights. For this reason, Venezuela must develop new public policies to tackle the serious violations of fundamental human rights and restore its national respect for fellowship among people.

Keywords: Exploitation; Children; Mining; Venezuela; Human Rights.

Table of contents: 1. Methodology. – 2. Introduction. – 3. The Situation of Children in the Orinoco Mining Arc. – 4. About Children's Human Rights. – 5. Results and Discussion. – 6. Conclusions.

1. Methodology

This study was structured as a qualitative investigation, which "is based on evidence that is more oriented towards a deep description of the phenomenon in order to understand and explain it"[1]. The information collected was based on the investigation and examination of the situation of exploitation of children within the Orinoco Mining Arc and its consequences on their human rights.

To achieve the objective of this analysis, a documentary study based on texts from different databases was carried out. In this sense, journalistic information in recognized and verified media, articles from scientific journals, books, web pages, and legal texts, among others, were used. The information was analysed using hermeneutics as a form of exegesis of law, critical analysis and analytical summary. Some techniques were also applied to breakdown documentary information sources such as in-depth reading, preparation of summaries and underlining. Hence, the research has been carried out on the basis of three different focus areas: on contextualizing facts involving of the Orinoco Mining Arc, on Child protection referring to some legal texts, which support the protection of children, on State responsibility,

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1. See Fabio Sánchez, *Epistemic Fundamentals of Qualitative and Quantitative Research: Consensus and Dissensus (Fundamentos Epistémicos de la Investigación Cualitativa y Cuantitativa: Consensos y Disensos),* in *Revista Digital Investigación y Docencia,* 13(1), 2019, available at https://tinyurl.com/y3chvtby (last visited November 20, 2021).

considering implications of the State's duties in terms of the protection of human rights in accordance with its commitments.

Subsequently, the above-mentioned categories supported the construction of the scheme for this investigation. Finally, the conclusions were reached after the discussion on the compiled material.

2. *Introduction*

The Orinoco Mining Arc constitutes a geographical area within the Bolivian Republic of Venezuela, which has been delimited by the Venezuelan government since 2016 to alleviate the reduction in oil rent, encompassing Amazonian territories within its competence. Since the implementation of the delimitation, there have been reports of uncontrolled exploitation of minerals, forced mobilization of 198 indigenous groups, mercurial contamination of river bodies, deforestation in the range of 1,058 kilometres, the rise of organized crime and the promotion of illegal mining, alteration of the ecosystem and emergence of different diseases such as malaria[2].

The Orinoco Mining Arc is located in southern Venezuela, specifically in the Bolivar State, and covers approximately 114,000 km[3]. Thus, precisely because of this wide territorial extension, it is not surprising to witness such a colossal environmental catastrophe which also has consequences on humans.

The exploitation of different minerals takes place within the area of the Orinoco Mining Arc as a natural consequence of it being strategically located south of the Orinoco River, in the extreme north of the Bolivar State, and southern part of the Delta Amacuro State, which is why it has four (4) mining areas and a special block for the use of iron, diamonds, coltan, gold, bauxite and copper. It is also necessary to

2. See Gladys Velásquez, Maritza Padrón-Nieves, Elizabeth Piña, Isis Nézer de Landaeta, Pedro Lizarraga, Sylvia Silva and María Antonia Lombardi, *Venezuela Case: Reflections from Bioethics*, in *Revista Latinoamericana de Bioética*, 19(37-2), 2019, available at https://doi.org/10.18359/rlbi.4705 (last visited November 20, 2021).

3. See *What you should know about the Mining Arc of the Orinoco in Venezuela (Lo que Debe Saber del Arco Minero del Orinoco en Venezuela)*, 26 August 2021, available at https://www.telesurtv.net/telesuragenda/Arco-Minero-del-Orinoco-en-Venezuela-20160826-0056.html (last visited November 20, 2021).

highlight that the arch areas under special administration regime (forest reserves, national parks, natural monuments) were compromised, and the same fate has befallen on indigenous communities (such as Warao, Sanema, Akawaio, E´ñapa, Pumé, Kariña, Pemón, Piaroa, Arawak, Ye´kwana, Yoti, Jiviy), freshwater bodies and a diversity of Venezuelan flora and fauna[4]. However, on the basis of the rise of the gold rush that can be found within this territory, there have been different phenomena with legal implications on environmental, economic and other fundamental rights.

It is widely documented that up to 85% of the illegal mining points in the Amazon could be found within the Orinoco Mining Arc, and almost 1,781 mining points have been established as a consequence of the worldwide increase in the price of gold, caused by the rivalry between the United States and the People's Republic of China as well as by the Venezuelan economic debacle. The situation is so serious that almost 80 points of illegal mineral extraction have been reported within national parks, especially in Canaima, Yacapama, at the head of the Caura River and in the Upper Orinoco-Casiquiare Biosphere Reserve (a *tepuy*[5] 1300 meters high)[6]. Such seriousness is connected with the already mentioned locations, because they represent a vast territory full of ecological resources, and those resources are being destroyed due to the mining activities. Thus, several documents report that:

> The region, located south of the Orinoco River, is reportedly rich with the world's most wanted ores, but is also plagued by conflict, fueled by the military, local armed gangs and Colombian guerrilla groups — all seeking control of an estimated, but uncertified, $100 billion in hidden minerals [...] President Maduro's Arco Minero decree not only violates the

4. See Julimar Mora and Fidel Rodríguez, *The Amazon in Dispute: Political Agencies and Indigenous Organizations of the Venezuelan Amazon against the Orinoco Mining Arc*, in *Polis Revista Latinoamericana*, 52, 2019, available at https://dx.doi.org/10.32735/s0718-6568/2019-n52-1367 (last visited November 20, 2021).

5. A "tepuy" is a mountainous formation of the area with a flattened top.

6. See Florantonia Signer, *La Fiebre del Oro Arrasa la Amazonia Venezolana*, 9 September 2019, available at https://elpais.com/internacional/2019/09/01/actualidad/1567289913_017377.html (last visited November 20, 2021).

> country's constitution, but also other national legislation and international regulations designed to protect the environment and indigenous peoples[7].

However, the aforementioned is only an indication of facts that can be studied from different legal points of view. This article privileges the lenses of human rights law to study the events in question.

Already in 2020, the United Nations High Commissioner for Human Rights, Michelle Bachelet, revealed the explosion of violence and labour abuse among workers in the mines. These workers are the victims of the State inaction, specifically, State's ineffectiveness regarding investigations of violations of fundamental rights, although the area has a large presence of public security forces. And these statements are worrying considering that the people living in the region are often poisoned with mercury, apart from suffering deficiencies of fresh water or electricity, and another group of people is also the victim of sexual exploitation. Ms. Bachelet considered that "authorities should take immediate steps to end labour and sexual exploitation, child labour and human trafficking, and should dismantle criminal groups controlling mining activities"[8]. The High Commissioner informed that 149 human beings have died as a result of the violence and documented abuses[9]. This research shows how the government's

7. See Bram Ebus, *Militarization and Mining a Dangerous Mix in Venezuelan Amazon,* 7 December 2017, available at https://news.mongabay.com/2017/12/militarization-and-mining-a-dangerous-mix-in-venezuelan-amazon/ (last visited November 20, 2021).

8. See United Nations High Commissioner for Human Rights, *Venezuela: UN Releases Report on Criminal Control of Mining Area and Wider Justice Issues,* 15 July 2020, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26096&LangID=E (last visited November 20, 2021); United Nations, *Report Highlights Criminal Control of Mining Area, and Wider Justice Concerns,* 15 July 2020, available at https://news.un.org/en/story/2020/07/1068391 (last visited November 20, 2021).

9. See *UN on Alert: Bachelet Denounces Exploitation and Abuses in the Venezuelan Mining Arc (ONU En Alerta: Bachelet Denuncia Explotación y Abusos en el Arco Minero de Venezuela)*, 15 July 2020, available at https://www.elmostrador.cl/dia/2020/07/15/onu-en-alerta-bachelet-denuncia-explotacion-y-abusos-en-el-arco-minero-de-venezuela/ (last visited November 20, 2021).

negligence in the events of the Orinoco Mining Arc represents an example of State responsibility for the execution of structural violence[10].

In this context, the previous information shows that one of the groups whose rights have been violated by the exposed situation is that of children, who are considered to be legally weak par excellence at the international level[11]. This is affirmed because different entities (for example, the Centre of Human Rights of the Andrés Bello Catholic University) have publicly pointed out that in the Orinoco Mining Arc child exploitation is evident, not only based on the employment rate on children in the mines, but also because girls up to 12 years of age who reach the Bolivar State are associated with slavery and human rights violations, including sexual abuses and prostitution. Regarding the latter, Mayerlin Vergara, an activist for children's rights in the Renacer Foundation, reports listening to little girls saying that they don't want to live anymore, they don't want to open their eyes in the morning because their life is senseless as a consequence of the abuses they suffered; such feelings detonate suicide attempts, posttraumatic stress and depression[12]. All of this occur in the face of what is a picture of complicity with the Venezuelan State, given that, to reach the area, there are at least 17 points of control with security agents, who in many cases are silent about the irregular groups that operate in the area[13].

From the legal point of view, it is, therefore, relevant to study the situation regarding the inadequate treatment of children in the Orinoco Mining Arc and the failure of the Venezuelan State to comply

10. For these purposes, structural violence will be taken as a notion referring to ways of doing harm through the State's operating apparatus in terms of the lack of fulfilment of its duties to guarantee the common good of the population, which is considered as one of the supreme state goals. See generally Reinaldo Chalbaud Zerpa, *Estado y Política*, Universidad de Los Andes, Consejo de Publicaciones, Facultad de Derecho, Centro de Investigaciones Jurídicas, 1978.

11. See José Francisco Juárez Pérez, *La Familia Formadora de Ciudadanos: VII Jornadas de Educación en Valores,* Universidad Católica Andrés Bello, 2008.

12. See Centro de Derechos Humanos of the Universidad Católica Andrés Bello, *Formas Contemporáneas de Esclavitud en el Estado Bolívar: una Perspectiva de G*énero *Sensitiva*, 2020, available at https://drive.google.com/file/d/1bl3iECgTE3qELtem-S3tHNFZEr6SjqrWp/view?usp=sharing (last visited November 20, 2021).

13. See Rosiris Urbaneja, *Arco Minero del Orinoco Es una Bomba de Violencia contra la Mujer*, 20 May 2021, available at http://guayanaweb.ucab.edu.ve/noticias-reader-guayana-actual/items/arco-minero-del-orinoco-es-una-bomba-de-violencia-contra-la-mujer-1949.html (last visited November 20, 2021).

with its obligations on this matter, deriving not only from its Constitution but also from the commitments undertaken through the ratification of several instruments of International Human Rights Law. For this reason, this article aims at analysing the violations of human rights and, in particular, children's rights, committed by Venezuela as a consequence of their exploitation within the Orinoco Mining Arc.

For this purpose, Section 3 of this Article describes the situation of the children in the Orinoco Mining Arc. Then, Section 4 explains the framework of the children's human rights and Section 5 presents and discusses the results of the analysis. Finally, Section 6 provides the necessary conclusions.

3. The Situation of Children in the Orinoco Mining Arc

There is ample evidence of numerous incidents resulting from the extraction of minerals in the Orinoco Mining Arc. A Human Rights Watch's report describes the following irregularities in that territorial space[14]:

a) Control of armed groups irregularly supervising the area without being stopped or detained by the government. Among them, there are Venezuelan organizations called "trade unions" and the Colombian National Liberation Army, apart from at least one group made up of dissidents from the Revolutionary Armed Forces of Colombia (FARC) who operate in Venezuelan territory;
b) Strong exercise of control of the population by the unions. The trade unions establish terrible working conditions and disproportionately punish those accused of theft. Punishments go as far as publicly dismembering and murdering workers who, according to the union, violate the rules (using chainsaws, machetes, or axes), amputating the hands of persons accused of theft. In particular, there is a specific testimony of gunshots on the hands of

14. See Human Rights Watch, *Venezuela: Violent Abuses in Illegal Gold Mines: Credible Allegations of Government Involvement, Acquiescence*, 4 February 2020, available at: https://www.hrw.org/news/2020/02/04/venezuela-violent-abuses-illegal-gold-mines (last visited November 20, 2021).

a 17-year-old boy accused of robbery (this was apparently done by one of the members of a trade union);
c) Exposure of workers to conditions of poor sanitation that leads to diseases such as malaria, apart from high contamination with mercury;
d) Evidence about the presence of the Venezuelan authorities in the area in question. This indicates that national authorities are aware of the situation. However, officials are reported to solicit bribes at the mining sites;
e) Degeneration and toxicity of the immune, digestive and nervous system, lungs, eyes, skin and kidneys due to exposure to mercury in women and children;
f) Children up to ten years of age working with adults in the mines, with working shifts up to twelve hours[15];
g) Lack of medical care for malaria patients as a consequence of the collapse of Venezuelan health facilities;
h) Lack of public information about investigations against government officials to determine their criminal responsibility for these human rights violations;
i) Trafficking of gold through smuggling;
j) Very high homicide rates that made El Callao (Venezuela's mining capital), In 2018, El Callao was the municipality with the most violence, with a rate of 620 homicides per 100,000 inhabitants;
k) Testimonies of confrontations between state agents and trade unions or with Colombian armed groups to control the area. Dozens of people were reported killed or wounded in such clashes, including women and children;
l) Disappearance of persons.

These are just some examples of the situations to which people who live in the Orinoco Mining Arc are subjected. As noted, there are children who have been victims of various illegal situations. That is why in 2021 different complaints have been made about the exploitation of children in that area. In this sense, Venezuelan deputies have

15. In Venezuela, the maximum (and normal) number of working hours per day is eight. Article 173, *Ley Orgánica del Trabajo, los Trabajadores y las Trabajadoras* (*Organic Labour Law for Male and Female Workers*), no. 6.076, 7 May 2012.

reported that children and women are subjected to forced labour inside the Venezuelan mines being compelled by members of the armed groups that operate in the area which offer their protection in exchange for this form of slavery. The former Venezuelan Deputy, Miguel Pizarro, has revealed that the majority of these victims belong to indigenous groups[16].

In addition, it is highlighted in documents signed by the UN High Commissioner for Human Rights, Michelle Bachelet, that since 2016 there has been an increase in female prostitution in the area[17]. This phenomenon exposes females to the risk of contracting sexually transmitted infections. Indeed, contraceptives are not allowed during sexual intercourses in such a context. Further, if a woman is infected with HIV, she is punished by being quartered, according to testimonies collected by a report prepared by the Andrés Bello Catholic University[18]. Ms. Bachelet confirms that children, even under ten years of age, are working in the mines, and this can be observed in places like La Culebra, a gold mine in El Callao[19].

A report by the Andrés Bello Catholic University named "From Labor to Sexuality" also argues that girls belonging to indigenous people have been victims of sale for sexual use, quoting testimonies about children up to 12 years of age having been exchanged for a few grams of gold. The report also affirms that children and adolescents are used

16. See *Oposición Venezolana Denuncia que Niños Son Forzados a Trabajar en la Minería*, 16 April 2021, available at https://www.swissinfo.ch/spa/venezuela-esclavitud-infantil_oposici%C3%B3n-venezolana-denuncia-que-ni%C3%B1os-son-forzados-a-trabajar-en-la-miner%C3%ADa/46541320 (last visited November 20, 2021).

17. See United Nations High Commissioner for Human Rights, *Venezuela: UN Releases Report on Criminal Control of Mining Area and Wider Justice Issues* (cited in note 8); United Nations, *Report Highlights Criminal Control of Mining Area, and Wider Justice Concerns* (cited in note 8).

18. See Centro de Derechos Humanos of the Universidad Católica Andrés Bello, *Formas Contemporáneas de Esclavitud en el Estado Bolívar: una Perspectiva de Género Sensitiva* (cited in note 12).

19. See United Nations High Commissioner for Human Rights, *Venezuela: UN Releases Report on Criminal Control of Mining Area and Wider Justice Issues* (cited in note 8); United Nations, *Report Highlights Criminal Control of Mining Area, and Wider Justice Concerns* (cited in note 8); *La ONU Denuncia Explotación y Abusos en el Arco Minero de Venezuela*, 15 July 2020, available at https://www.dw.com/es/la-onu-denuncia-explotación-y-abusos-en-el-arco-minero-de-venezuela/a-54185782 (last visited November 20, 2021).

for heavy and dangerous work. For example, they are tasked with supporting excavators of the routes to access the gold; exercising this task, children descend to several meters below the surface without the necessary security measures and equipment. Children are also used to operate extractors of gold, gases and electric hammers that are set in motion with makeshift electrical connections. Therefore, the Andrés Bello Catholic University generically indicates that the state must implement public policies to prevent these new forms of slavery in the country, including training public officials to fight these practices[20].

The events described above are evidently harmful for human integrity. Since children are as well heavily relied upon in the mining activities, it is appropriate to give an overview of the scope of the legal protection afforded to children's fundamental rights.

4. About Children's Human Rights

Regarding the recognition of human rights, children enjoy the same general prerogatives of this fundamental nature as adults. However, as the child population is especially vulnerable to abuse, a legal catalogue called *children's rights* was created. In relation to these rights, the *Convention on the Rights of the Child*[21] is the international legal instrument that guards their rights. The United Nations Children's Fund (UNICEF) indeed affirms that:

> The Convention on the Rights of the Child establishes the rights that must be turned into reality so that children can develop their full potential.

20. See Daniel Gómez, *Esclavitud, Trata Sexual y Explotación Infantil: Así Es el Infierno de los Venezolanos en el Arco Minero del Orinoco*, 10 February 2021, available at https://alnavio.es/esclavitud-trata-sexual-y-explotacion-infantil-asi-es-el-infierno-de-los-venezolanos-en-el-arco-minero-del-orinoco/ (last visited November 20, 2021).

21. See Article 1, United Nations General Assembly ("GA"), Res. 44/25, *Convention on the Rights of the Child*, 20 November 1989.

> The Convention offers a vision of the child as an individual and as a member of a family and a community, with rights and responsibilities appropriate to their age and stage of development. By recognizing the rights of the child in this way, the Convention conceives the child as an integral being.

> The Convention recognizes the fundamental human dignity of all children and the urgent need to ensure their well-being and development. It makes clear the idea that all children should have the right to a basic quality of life, instead of being a privilege that few enjoy[22].

In other words, the Convention assumes that the child is an individual who has special needs since, being in a developmental stage, he or she requires special attention. However, this does not mean that children cease to enjoy the benefits of other human rights instruments of universal or regional nature[23] such as the Universal Declaration of Human Rights[24], the International Covenant on Civil and Political Rights[25], the International Covenant on Economic, Social and Cultural Rights[26]. Girls also enjoy the protection of the Convention on the Elimination of all Forms of Discrimination Against Women[27]. Regarding international agreements of a regional nature, in the case of Venezuela, infants also enjoy the protection granted by the American

22. See UNICEF, *Child Rights and Why They Matter,* 2021, available at https://www.unicef.org/child-rights-convention/child-rights-why-they-matter (last visited November 20, 2021).

23. See Valentín Bou Franch, *Derechos Humanos: Selección B*ásica *de Textos Internacionales*, Tirant Lo Blanch, 2003.

24. See GA, Res. 217 A (III), *Universal Declaration of Human Rights,* 10 December 1948.

25. See GA, Res. 2200 A (XXI), *International Covenant on Civil and Political Rights,* 16 December 1966.

26. See GA, Res. 2200 A (XXI), *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966.

27. See GA, Res. 34/180, *Convention on the Elimination of All Forms of Discrimination against Women,* 18 December 1979.

Declaration of the Rights and Duties of Man[28] and the American Convention on Human Rights[29].

Article 2 of the Convention on the Rights of the Child reads as follows:

> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members[30].

Within the framework of the Convention of the Rights of the Child, human beings under the age of eighteen are considered children, in accordance with its article 1 which states: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"[31]. Because of this, the UNICEF explains that there are several aspects that should be highlighted when talking about children's rights[32]. Among them, the most relevant are the following:

28. See Inter-American Commission on Human Rights ("IACHR"), *American Declaration of the Rights and Duties of Man*, 1948.

29. See Organization of American States ("OAS"), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 1969.

30. See Art. 49, *Convention on the Rights of the Child* (cited in note 21).

31. See *id.*

32. See UNICEF, *Child Rights and Why They Matter* (cited in note 22).

a) Children are people and that is why they do not constitute an asset of others; they cannot be considered as adults in formation, and they are equal to the other members of humanity.
b) Children are dependent on adults, and therefore they must be given the care they require, so when an adult cannot provide it, it is the responsibility of the state to guarantee the best interests of the child;
c) The lack of protective measures for children by governments affects them especially because the action of the state is involved in all the processes of their development;
d) The opinion of children must be heard, even to build political processes where they do not participate or vote;
e) Elements such as family structure, globalization, climate change, digitization, migration, employment rules and the weakening of social welfare networks, have a considerable and usually negative impact on children;
f) The positive and healthy development of children is essential for social evolution, so an optimal quality of life must be ensured to them, including, and especially, adequate services and permanent care;
g) Social research has determined that early experiences affect the future of children, so any failure to support them has negative consequences for communities.

Based on this, it can be claimed that in the Mining Arc of the Orinoco there has been a series of violations of the human rights of children. Taking note of that series of violations, it must be discussed the scope of the lack of compliance with the duty of protection towards these people.

5. Results and Discussion

As a result of the information gathering process carried out, there is sufficient evidence to affirm that there is still a violation of children's rights in the area under study. In fact, we found that in the Orinoco Mining Arc, sexual and labor exploitation and structural violence factors involving children are manifested. On the one hand,

the structural violence emerges from the lack of adequate services for the population such as potable water, electricity or security, and on the other hand, it is related to the government's inaction to improve these shortcomings. Notwithstanding this inaction, it must be noted that there are international legal instruments that establish a special protection for children, particularly because any injury to them has significant negative consequences for the society as a whole. Indeed, there are sufficient hard law provisions that oblige Venezuela to structure public policies aimed at the protection of children, so it cannot be genuinely supported that said that the state is not required to fulfil its international and national commitments on this matter.

In the reports analyzed above, a framework of responsibility can be observed in connection with both action and omission of the state in the fulfilment of the duty to protect the best interests of children. This is due to the complicity of some of its officials in the human rights violations or due to the silence in front of these atrocities. The responsibility under international law of the Venezuelan state for those facts can be also affirmed pursuant to the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts. Draft Article 2 indeed states: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State"[33]. In the case at hand, the failure by Venezuela to meet its obligations under international law is evident[34], and that is why the situation of the Orinoco Mining Arc was studied formally by Ms. Michelle Bachelet according to the information in this investigation. It was also found that the violation of human rights in the Orinoco Mining Arc also includes children of indigenous peoples.

Now, the responsibility of Venezuela for the breach of its duties to protect children derives from the thesis that the responsibility of the State for violation of fundamental rights may stem also from its failure to draft norms that restrict or suppress human rights, and from

33. See United Nations International Law Commission ("ILC"), *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Report of the International Law Commission on the Work of Its Fifty-four Session*, Supplement No. 10, at 43, 2001, UN Doc. A/56/10, 2001.

34. See *supra*, notes 26-30.

it acting in violation of the Constitution[35]. The breach of the obligation to protect children is especially noteworthy because, as shown by several reports concerning the situation at hands, the government's inaction is serious. Indeed, these reports constitute a notorious proof of Venezuela's breach of its international and domestic obligations to protect fundamental human rights. Further, as acknowledged by Venezuelan jurisprudence, a "notorious proof" exists when: a) it concerns a fact and not an opinion or testimony, b) it's widespread as a result of its dissemination through various channels of written, radio or audiovisual communication, c) there is no doubt about the fact, nor can it is subject to rectification or presumption of falsehood and d) the fact is contemporary with the execution, process or communication of the decision[36]. In the situation of the Orinoco Mining Arc, the exploitation of children has been repeatedly disclosed by the media, scientific reports, and reports by the United Nations, and, according to the journalistic investigations carried out, continues to arise in 2021.

The responsibility of the State can also be claimed because the government itself has repeatedly failed to meet the standard of minimum protection established by the Universal Declaration of Human Rights for the rights to life; to economic satisfaction, social and cultural rights; to a dignified life with a guarantee of well-being and health; to education (because children are forced to work, missing their studies). In addition, the right to establish a social order is violated even though the Declaration guarantees it[37].

With respect to the International Covenant on Civil and Political Rights, the infringement of the following rights can be argued: right to life, to family protection, protection of children, protection for equality before the law and without discrimination, and non-submission to inhuman treatments[38]. These rights, according to the scholarly

35. See Patricio Maraniello, *Los Derechos Humanos y la Responsabilidad del Estado*, Criterio Jurídico, 13(127), 2014, available at https://dialnet.unirioja.es/servlet/articulo?codigo=7294613 (last visited November 20, 2021).

36. See Tribunal Supremo de Justicia, *Coronel O.S.H. v. Tribunal Instructor de la Corte Marcial*, 2000, available at http://historico.tsj.gob.ve/decisiones/scon/marzo/98-150300-0146.HTM.

37. See Art. 3, 22, 23, 25, 26.1 and 28, GA, *Universal Declaration of Human Rights* (cited in note 24).

38. See Art. 6.1, 23, 24, 26 and 27, GA, *International Covenant on Civil and Political Rights* (cited in note 25).

writings, are those that have repercussions against the nature of humanity, its dignity, and its integrity[39]. These rights are also those affected by the exploitation of children. It should also be mentioned that in the situation under investigation there is as well a violation of the government duty to maintain high standards of mental and physical health for its people, ensuring measures to prevent diseases; a duty that is included in the International Covenant on Economic, Social and Cultural Rights[40].

In addition, Venezuela's responsibility expands to the violations of several relevant provisions included in regional human rights instruments. This holds true in particular with reference to rights such as: life, health maintenance and health systems, among others[41] and even to physical, moral and mental integrity, which is eroded when the necessary care is not provided to those who require it[42].

In a more specific context, it is necessary to mention that the Convention on the Rights of the Child stipulates at Article 6 the right of children to life. The same convention, at its Article 11, also establishes that the illegal trafficking of children is prohibited. Accordingly, it is terrible that these human beings are subjected to the living conditions reported within the Orinoco Mining Arc and children are even used for the purposes of sexual exploitation and sale in exchange for gold, for which there is also a liability for non-compliance in the safeguarding of the best interests of the child established in the convention[43]. It is also stipulated in the Convention on the Elimination of all Forms of Discrimination Against Women, that women should not be subjected to practices that in any way are capable of reducing their possibility to exercise their rights, and, above all, it establishes the duty of States to guarantee measures to prevent their trafficking and prostitution,

39. See Narciso Martínez, *Trato Inhumano o Degradante, in Enciclopedia de Bioderecho y Bioética,* 2011, available at https://tinyurl.com/y3cx8qmy (last visited November 20, 2021).

40. See Art. 12.2 and 13, GA, *International Covenant on Economic, Social and Cultural Rights* (cited in note 26).

41. See Art. 1 and 11, IACHR, *American Declaration of the Rights and Duties of Man* (cited in note 28).

42. See Art. 4 and 5, OAS, *American Convention on Human Rights, "Pact of San Jose", Costa Rica* (cited in note 29).

43. See GA, *Convention on the Rights of the Child* (cited in note 21).

which is why it is inadmissible to allow the sexual exploitation and sale of girls and adolescents in the Venezuelan area[44].

All these standards of protection are, at least formally, also contemplated in the Constitution of the Bolivarian Republic of Venezuela when it develops its section dedicated to human rights, which includes some articles dedicated to the safeguard of indigenous peoples (who are also affected when their children are injured in any way)[45]. The Organic Act for the Protection of Children and Adolescents is another domestic legal instrument relevant for the protection of children[46]. However, domestic provisions seem to be a dead letter regarding this daunting problem.

For what has already been said, state responsibility is generated by both action and omission. Hopefully, in the future there will be the possibility of activating the internal and external legal remedies that are relevant to address the situation described, such as the constitutional protection (*amparo constitucional*). The normative documents mentioned are not exclusive, but rather represent examples of rules and commitments that are not fully complied with and that may be concatenated with other provisions to make the fight against child exploitation more efficient in the area of the Venezuelan Amazon.

6. Conclusions

According to the investigation carried out, it can be concluded that part of the Venezuelan child population – the one living in the Orinoco Mining Arc – experiences a situation of serious vulnerability as regards to the exercise of its fundamental human rights. Also, there are various internal and external legal instruments that could be used

44. See GA, *Convention on the Elimination of All Forms of Discrimination against Women* (cited in note 27).

45. See Title III, *Constitución de la República Bolivariana de Venezuela*, no. 5.453, 24 March 2000. Title III focuses on human rights and their guarantees and on the correspondent duties because there is a framework protecting civil, political, social and familiar, environmental, cultural, educational, economic and indigenous rights. Article 78 states that children must be protected by the law and the judicial branches of the country, providing absolute care and an integral protective system. Art. 78, *id*.

46. See *Ley Orgánica para la Protección de Niños, Niñas y Adolescentes,* no. 6.185, 8 June 2015.

to protect this vulnerable population, so it shall be for the social actors to try to promote them in order to eradicate this social plague.

The Venezuelan State is directly responsible for the breach of the international commitments it has signed to protect children, so it must take the appropriate measures to resolve this situation that at present seems uncontrollable. This is the reason why it is necessary to prepare more reports to make this situation visible. This way, it will be guaranteed that the issue will not be forgotten and will be, instead, considered fundamental for the development of the Venezuelan society.

Following this line of action, more scientific studies could be carried out aimed at gathering statistics on the effects of exploitation on children in the Orinoco Mining Arc, with the purpose of generating proposals to structure public policies that are appropriate for this case. Studies could also be conducted on specific categories of children, such as those belonging to indigenous peoples who are affected by the situation as well.

Although it may seem a *cliché*, the phrase "children are the future" is not far from reality, so it is necessary to provide them with a protection framework that really guarantees them, at least, a decent life so that they can progressively participate actively in society. Within the Orinoco Mining Arc, economic interests seem to prevail over human ones, but it is the duty of the government and of the society as a whole to stop this scourge and to advance a spirit of brotherhood in the development of the nation.

Furthermore, if a state does not comply with its international legal commitments, it also means that it is at enormous risk of being considered a failed state. Taking into account that "failed states are usually defined as those that are unable effectively to control their territory and comply with their international obligations"[47], one may argue that this is exactly the situation of Venezuela. This emerges from the consideration of the facts occurring at the Orinoco Mining Arc as described in this article, including the control of the irregular groups in the area, the lack of capacity to protect and cover the needs of the citizens, and the fact that the gold obtained (in part because of

47. See Derek Fraser, *Failed States: Why They Matter and What We Should do About Them,* in *Journal of Conflict Studies*, 28, 2008, available at https://journals.lib.unb.ca/index.php/jcs/article/view/11243/13412 (last visited November 20, 2021).

the exploitation of children) is used to maintain the *status quo* of the government through the corruption of the whole military system in the country[48].

Finally, it should be noted that if the integrity of children is not preserved, little will remain for humanity, since it must be remembered that children will be the men and women who in the future will lead our society and will perpetuate good practices at the service of the constitution of fair and balanced communities.

48. See Vasco Cotovio, Isa Soares and William Bonnet, *A Trail of "Bloody Gold" Leads to Venezuela's Government* (CNN, 23 August 2019), available at https://edition.cnn.com/2019/08/20/americas/venezuela-gold-mining-intl/index.html (last visited November 20, 2021).