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The Influence of Extractive Companies on Police Intervention in the Context of Socio-Environmental Conflicts in Peru

Analysis and Legal Contributions from the Cases Concerning Xstrata and Yanacocha Companies in the Period 2011-2012

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THE INFLUENCE OF EXTRACTIVE COMPANIES ON
POLICE INTERVENTION IN THE CONTEXT OF SOCIO-
ENVIRONMENTAL CONFLICTS IN PERU.
ANALYSIS AND LEGAL CONTRIBUTIONS FROM THE CASES
CONCERNING XSTRATA AND YANACOCOA COMPANIES IN
THE PERIOD 2011-2012

FOREWORD

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This publication includes the thesis *The Influence of Extractive Companies on Police Intervention in the Context of Socio-Environmental Conflicts in Peru: Analysis and Legal Contributions from the Cases Concerning Xstrata and Yanacocha Companies in the Period 2011-2012*, written by Sally Sumico Ccotarma Tito and supervised by Clara María Minaverry, Universidad de Buenos Aires.

BIOGRAPHY

Mujer, indígena, abogada, magister en Derechos Humanos. Laboró en diversas ONGs que abordan el tema indígena, extractivo y de criminalización social. Además fue abogada de la Procuraduría de Corrupción de Funcionarios y fiscal en el Ministerio Público en casos de lavado de activos en el Perú.

Sally Sumico Ccotarma Tito is a woman, an indigenous, a lawyer and holds a Master in Human Rights. She worked in various NGOs that address the indigenous people, extractive and social criminalisation issues. She was also a lawyer for the Office dealing with cases of Corruption of Officials and a prosecutor in the Public Ministry in cases of money laundering in Peru.

ABSTRACT

This research analyses the influence that extractive companies have on police intervention through extraordinary services in socio-environmental conflicts, in the Peruvian regions of Cusco and Cajamarca between 2011-2012. In this context, we developed a legal analysis of regulations in connection with this activity, the subscribed agreements signed by the State and by the companies, and other judicial and police documents, were identified as evidence which might allow or suppose the existence of unconstitutionality, the degree of influence exercised by these companies, possible human rights infringements, the responsibility of companies and the rationale for such a police-based approach.

Keywords: Police intervention, extractive companies, socio-environmental conflicts

*“manan hayk`aqpas qonqankichu maymanta
hamunki sanakikunamantapas yachanaykipaq
mayman rinaykita”*

*“nunca olvides de dónde vienes, ni de tus
raíces para que sepas hacia dónde vas”*

*“never forget where you are from or your roots,
so you know where you are headed.”*

A mi familia por enseñarme que existen otras formas de
comprender el mundo y cambiarlo

To my family for teaching me there are other ways
of understanding the world and changing it.

TABLE OF ABBREVIATIONS

CC	Civil Code
CP	Criminal Code
CPE	Constitución Política del Estado (Political Constitution of the State)
CPP	Código Procesal Penal (Code of Criminal Procedure)
DLeg	Legislative Decree
DS	Supreme Decree
DINOES	División de Operaciones Especiales (Special Operations Division)
DIREOP	Dirección Ejecutiva de Operaciones Policiales Especiales (Executive Directorate of Special Police Operations)
DIROES	Dirección de Operaciones Especiales (Direction of Special Operations)
DIVINCRI	División Nacional de Criminalística (National Division of Criminalistics)
DP	Defensoría del Pueblo del Perú (Office of the Ombudsman of Peru or Public Defender's Office)
EU	European Union
FIDH	Federación Internacional de Derechos Humanos (International Federation for Human Rights)
FUDIE	Frente de Defensa de los Intereses de Espinar (Front for the Defence of Espinar's Interests)

GDP	Gross Domestic Product
GP	United Nations Guiding Principles on Business and Human Rights
GRUFIDES	Grupo de Formación e Intervención para el Desarrollo Sostenible (Training and Intervention Group for Sustainable Development)
IACHR	Inter-American Commission on Human Rights
ICRC	International Committee of the Red Cross
ILO	International Labour Organization
MR	Ministerial Resolution
OCMAL	Observatorio de Conflictos Mineros de América Latina (Observatory of Mining Conflicts in Latin America)
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PNP	Peruvian National Police
PSE	Prestación de Servicio Extraordinario policial (Extraordinary Police Service Provision)
SR	Supreme Resolution
SER	Asociación Servicios Educativos Rurales (Rural Educational Services Association)
SERVINDI	Servicios de Comunicación Intercultural (Intercultural Communication Services)
TC	Constitutional Court of Peru
UIT	Unidad Impositiva Tributaria (Tax Unit)
UN	United Nations
USE	Unidad de Servicios Especiales (Special Services Unit)
VP	Voluntary Principles on Security and Human Rights
VS	Vicariate of Solidarity of the Prelature of Sicuani

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INTRODUCTION

En nombre del futuro nos desplazaron los terroristas de Sendero, en nombre del “desarrollo” nos quiere desplazar nuestro propio gobierno... ¿En qué se parecen? Ninguno de los dos nos ha preguntado.... ¿Por qué siempre los mismos debemos pagar los costos del progreso?. Nos han tratado siempre como peruanos de segunda y nos piden sacrificios de primera...

Ruth Buen Día – Presidenta de la Central Ashaninka del río Ene (CARE)

In the name of the future we were displaced by the Sendero terrorists, in the name of “development” our own government wants to displace us... How are they similar? Neither of them has bothered to ask us..... Why is it that we are expected to pay for the cost of progress? They have always treated us like second class Peruvians, while asking us for first class sacrifices...

Ruth Buen Día – President of Central Ashaninka del río Ene (CARE)

Since the internal armed conflict and the return of democracy in 2001, Peru has sustained an uninterrupted process of democratic governments at the political level and, at the economic level, a sustained growth in Gross Domestic Product- GDP driven mainly by private investment which in 2017 represented 20% of GDP, becoming among the first countries in the region to achieve economic growth. Its policy of promoting private investment has primarily captured mining investment, becoming the third largest producer of copper and silver in the world, with metal mining exports representing 50% of total national exports in some years, with the State, to-date, committing 13.61% of the national territory for the development of this extractive activity.¹

¹ ProInversión, “¿Por qué invertir en el Perú?” (s.f.), <<https://fundacaoaip.pt/wp-content/uploads/2017/01/por-que-invertir-en-Peru-2016.pdf>> accessed July 2018.

Nevertheless, the establishment of this mining investment in the national territory also brought with it an increase in the social conflicts of the country, so much that the Ombudsman's Office of Peru² has indicated that this social phenomenon has increased, extended and intensified, as it represents a large part of the conflicts related to extractive projects. In addition, the Working Group on Human Rights and Transnational Corporations and Other United Nations Business Enterprises³ stated that between 2004 and 2017 the country's national institutions recorded an average of 200 conflicts per year, ranking it as the fourth country in the world for numbers of environmental activist murdered (24Horas, 29/05/2012). An example that summarizes this scenario is the report of April 2018 that reports the existence of 196 social conflicts that cover 22 of the 24 regions of the country, being 64.8% of the socio-environmental conflicts.⁴

Against this backdrop, the various governments in office have implemented a series of legal measures to solve this social problem and preserve internal order in these areas. One of these measures was the enactment in 2009 of Supreme Decree No. 004-2009-IN which regulates the "Provision of Extraordinary Services Complementary to Police Function", which allowed the signing of institutional agreements between the National Police of Peru and extractive companies for the permanent deployment of police personnel for custody and security work in their facilities, in exchange the companies undertook to financially remunerate the police and the police institution. The terms of these agreements only came to light following the breakout of socio-environmental conflicts in Cusco and Cajamarca in 2012, when logistical support provided by mining companies to police officers and the presence of police offices within the mining camps of Xstrata Tintaya and Yanacocha respectively, were observed. The interposition of judicial processes enabled the discovery of the existence of 14 agreements signed between the State and the companies, a situation that generated a series of questions prompting the modification of these regulations, and in 2017 the State issued Legislative Decree No. 003-2017-IN, where

² Defensoría del Pueblo del Perú, *Informe N° 156: Violencia en los Conflictos Sociales* (2012, Lima) 35-46.

³ Working Party on the Question of Human Rights and Transnational Corporations and Other Business Enterprises, *Report on its mission in Peru*, 6-12 <<https://undocs.org/A/HRC/38/48/Add.2>> accessed May 2018.

⁴ Defensoría del Pueblo del Perú, *Reporte de conflictos sociales N° 170*, (2018, Lima).

further justification was provided, which sanctioned the provision of extraordinary police services.

With regard to this situation, this paper seeks to analyse the performance of two important actors in social conflict scenarios: the Peruvian National Police and the mining companies within the context of these agreements signed between the two institutions. It also raises a series of questions related to this new type of police service, which are: What is the logic behind the provision of extraordinary police services adopted by the Peruvian State? What are the international commitments and national guidelines that have been developed in relation to the conduct of police forces, the handling of social conflicts and the responsibility of companies for respecting human rights? What is the degree of influence that companies have within the framework of the provision of extraordinary services in relation to police conduct? Do companies have any degree of responsibility when in the context of providing extraordinary police services, the latter infringes the human rights of third parties?

This paper seeks to answer these questions through each of the chapters; thus, the first chapter will focus initially on setting out the rationale embedded in the extractive model in Latin America, the impact it has on the territories where it has been implemented and the peculiarities that are manifested in the Peruvian case, and secondly, the role played by the police institutions, in the context of the two previous examples experienced in the Region, and in relation to the vision that is subsequently being built, both internationally and nationally.

The second chapter will present in summary form two concrete examples: the case of the Tintaya mining project located in the Province of Espinar in the Region of Cusco, and the case of the Conga mining project located in the Province of Celendín and Cajamarca in the Region of Cajamarca. In both cases, we will explain how the extractive rationale was introduced in both territories, the 20-year old relationship that these populations have maintained until now with these projects and the mining activity there, and the action of the State to control the issues of social conflicts through the police forces within the context of the agreements signed between the mining companies and the National Police of Peru.

The third chapter will focus on and analysis of the normative framework of one of the actors in the investigation, namely the police forces. To this end, the international commitments assumed by the State

in relation to the actions of the police forces and the use of force will be addressed and will focus on the issues of social conflict. This analysis will also cover the current regulations issued up to March 2018, with the aim of demonstrating the continuity of state policy and outlining criteria that will allow us to assert a possible non-compliance with international and national criteria in relation to the provision of extraordinary police services.

The fourth chapter will focus on the second actor in this research: the extractive companies. It will analyse the obligations and commitments that these companies have or assume at the international level in relation to their corporate actions and their responsibility for not being complicit in the actions of “third parties” related to them within the context of respecting human rights. It will also present national guidelines regarding the liability assumed by legal persons and specifically the figure of the civil third party responsible at the criminal level and also look at existing case law on civil liability for the actions of a subordinate third party.

The purpose of the fifth chapter of this research is to analyse the degree of influence that extractive companies, in this case mining companies, may have on police action within the context of providing extraordinary services. To this end, two agreements signed under Supreme Decree No. 004-2009-IN and the current model agreement approved by Ministerial Resolution No. 562-2017-IN will be analysed, in accordance with the provisions of Supreme Decree No. 003-2017-IN, which observes the power that companies have to determine the actions of police personnel in accordance with company guidelines or private standards, supervise the provision of the service the company receives and maintain the police presence in the mining area and its surroundings, among others. In addition, this chapter will demonstrate how this approach can become a factor that increases the bias of the police service, expressed as possible violations of fundamental rights and the degree of control that these two actors can have in re-establishing the conflict, in order to finally test possible contributions that can be considered when evaluating the civil liability of extractive companies in these scenarios.

In the development of the content of this thesis, there will also be arguments that facilitate a possible scenario of de-territorialisation which is being introduced in areas where mining activities take place, and how the provision of extraordinary police services, together with

other measures that the State is undertaking, is causing the diminution of the human rights in populations that develop in areas adjacent to the mine, as well as the consolidation of the image of a police State, turning these areas into sacrificial areas for the sake of national development.

Finally, in an appeal to academic honesty, I must point out that while I was working on this research, many questions arose that so far remain unanswered: What are we actually doing to change this situation? What is the development concept that we have from discourse and practice? Who is paying the price for this fast-paced growth? In reality the measures that are being adopted in Peru and other countries make self-evident the cost that we as a society are willing to pay to sustain this model of development and as Ruth Buen Día pointed out: Why should we always pay for the cost of progress? It is my opinion, as the author of this work, that these questions cannot be solved through research, however they must be at the fore front of our minds when reading this work and in our daily tasks.

1. Objectives of this research

General:

To present and analyse possible indications (that arise from sources and legal instruments of a number of hierarchies) that could suggest the existence of influence from extractive companies located in the Cusco and Cajamarca regions in Peru, which determines the actions of the police forces of the same country, in socio-environmental conflict settings during the years 2011-2012, which would entail possible human rights violations.

Specifics:

a) Analyse the obligations and/or legal commitments that exist at international and national level in relation to the performance of police forces and the treatment of socio-environmental conflicts.

b) Analyse the obligations and/or commitments that exist at international and national level in relation to company actions and their respect for human rights.

c) Assess the degree of influence exerted by companies in the provision of extraordinary services and within the context of police action.

d) Analyse corporate responsibility when, in the context of providing extraordinary police services, these services violate the human rights of third parties.

e) Present the rationale behind the provision of extraordinary police services in the context of an extractive economy.

2. Methodology

This paper will present an analysis of the agreements signed between the National Police of Peru and mining companies for the provision of extraordinary services supplementary to the police function. This will also include an analysis of the judicial resolutions where these instruments will be analysed within the context of socio-environmental conflicts. These environmental aspects will not be studied in depth as it would extend the scope of analysis excessively however, it is understood that in this situation these would be included within the definition of “human rights” in general.

This research was conducted in March 2013 following the discovery by community and social service organisations in Peru of approximately fourteen agreements that had been signed between the Peruvian National Police, including one with the military forces, and the mining companies. They were able to access the full content of only eight of these agreements, including the only agreement signed by the Peruvian Armed Forces.

There will be a detailed analysis of the agreements signed by the companies that managed the Tintaya and Conga projects. During the social protests for these two projects in 2012, violent police repression was observed, leaving three and five dead respectively and many more wounded. In addition to these two conflicts, the State decided to make a U-turn in the legal treatment of these situations by transferring both conflicts to judicial and fiscal districts that differed from those previously established.⁵

In addition, the Xstrata PLC and Yanacocha mines companies have an important presence in the raw materials market, with the first

⁵ Coordinadora Nacional de Derechos Humanos (National Coordinator for Human Rights), *Informe Anual 2014-2015* (2015) 38-46

reported to be the fourth largest producer of copper in the world, and the second having the largest gold deposit in South America and the second largest worldwide. Both companies have adhered to various international instruments before and during the events under analysis. Thus, in 2012, Xstrata PLC adhered to the United Nations Global Compact and in early 2013 to the voluntary principles and Yanacocha mines, in 2001 to the voluntary principles, and in 2004 to the Global Compact.

Additionally, these companies have had a 20-year presence in the area and their establishment in the territory created confrontation with the surrounding populations from the beginning. At the same time, as a result of the socio-environmental conflicts that occurred due to the presence of these projects in Cusco and Cajamarca, a series of judicial processes were initiated where these agreements were used for the first time to interpret the facts being studied.

The time line begins in 2011, the date on which the agreements between the Peruvian National Police and the mining companies Xstrata Tintaya and Yanacocha were signed, and extends until March 2018, the date on which the last regulation was issued regulating the subjects to be addressed.

This is exploratory research, as the previous research conducted on the topic determined that there were scarce bibliographic and doctrinal resources on the subject.

The structure of this paper is a descriptive bibliographic-documentary and the methodology used is qualitative. Several data collection sources and techniques have been used, including academic studies, statistical information, judicial sources, as well as official and public materials. Furthermore, a constraint of this paper is that much of the information analysed is deemed to be classified or confidential, and this information was obtained by filing *habeas data* or information requests to obtain copies of court records.

The normative hermeneutic texts and public documents have been used as part of the analysis technique. In addition, research has been carried out on the websites of public institutions at national and provincial level, in order to determine all the regulations and the main public policies currently in force.

1.

THEORETICAL CONCEPTUALISATION OF THE CENTRAL
CONCEPTS OF RESEARCH

The purpose of this chapter is to present the rationale behind the extractive model in Latin America and the impact it has on the territories where it is established. It will also address the role of the State through the police institution as an important actor in social conflict scenarios, and the different categories constructed around its policing.

1.1. ECONOMIC RATIONALE AND EXTRACTIVE COMPANIES

Enrique Leff⁶ argues that there are two types of rationale in the world today: economic rationale, with its variants, and ecological rationale and for the purposes of developing this paper, only the first rationale will be addressed.

Economic rationale is expressed through the securing of self and the metaphysics of nature, where the person is conceived as a being for production and consumption, and nature as an object.⁷ This rationale is known as the Quijano⁸ effect, similar to the spectre of globalisation, because it is established as a universal ideology and is a practice that is evident at the political-military, moral, psychological, legal and productive levels with a new way of managing life being conceived as a consequence.

When this rationale began to cause environmental damage, a new

⁶ Enrique Leff, *Racionalidad Ambiental. La reapropiación social de la naturaleza* (2004, México, Siglo XXI editores) ix-xxi.

⁷ *ibid* 352-361.

⁸ Olver Quijano Valencia, *Eufemismos. Cinismo y sugestión en el actual ampliación del campo de batalla* (2011, primera edición, Colombia, Editorial universidad del Cauca) 139-157.

paradigm emerged of the internalisation of external⁹ markets.¹⁰ This same rationale, evident at the social level, was also seen in individual ethics, in human rights and the regulation of legal systems that sanctioned the behaviour of economic and social actors while sustaining a monetarist vision.¹¹

At present, several authors consider that the universal crisis is not really an ecological catastrophe, but rather a crisis of civilisation because it permits the objectification of human beings and the over-exploitation of nature.¹²

1.1.1 Extractivism in Latin America and socio-environmental conflict

In the Latin American case, this economic rationale was established, according to Acosta,¹³ from the time of conquest and colonisation, when the capitalist system began to emerge worldwide. From that moment on, in the case of Latin America with emerging nascent capitalism, a relationship was built between the supplier of raw materials and the producer.

Currently, as postulated by Svampa and Viale,¹⁴ this role of raw material supplier has strengthened in Latin America over the past 10 years, moving from the Washington Consensus¹⁵ to the Commodities Consensus, consolidating itself as the most attractive region for mining investment in the world.¹⁶

⁹ From the author's point of view these externalities are not included in costs associated with business, the country or a region.

¹⁰ Joan Martínez Alier and Jordi Roca Jusmet, *Economía Ecológica y Política Ambiental*, (2013, third edition, Mexico, editorial Fondo de Cultura Económica)

¹¹ Leff (n 6) 99-105.

¹² *ibid* 352-361; Quijano Valencia (n 8); Franz Hinkelammert et Al, "Por una economía orientada hacia la reproducción de la vida", en *Revista de Ciencias Sociales de la Facultad Latinoamericana de Ciencias Sociales* (2009, 33), 39-49 <<https://bit.ly/2uuEqJr>> accessed May 2018.

¹³ Alberto Acosta, "Extractivismo y neoextractivismo. dos caras de la misma maldición", (2012), <<https://bit.ly/2zxNl2h>> accessed May 2018

¹⁴ Maristella Svampa and Enrique Viale, *La Argentina del extractivismo y el despojo* (2014, first edition, Buenos Aires, Argetina, Katz Editores) 15-20.

¹⁵ The authors point out that the Washington Consensus placed financial evaluation at the centre of the agenda and led to a policy of adjustments and privatisations, while the "Consensus of the Commodities" places the inclusion of extractive projects at the centre, regardless of whether the State is a greater regulator of it. However, these two models, with their differences, do not question the dominance of transnational capital.

¹⁶ International Commission of Jurists, *Industrias extractivas, derechos humanos y conflictos sociales en Perú* (2016, Geneva) 4-5.

The so-called “Commodity Consensus” or extractive model is based on the extraction of natural resources in large volumes or using high-intensity procedures. This essentially guides them to export 50% or more of the appropriate volume of raw materials, also identified as commodities, or to export them with minimal processing. These activities include mining projects, oil projects, monocultures, shrimp farming, etc.¹⁷

Some authors consider that this extractive or neo-extractivist development model, based on the over-exploitation of natural resources, has forcefully permeated territories previously considered as unproductive, thus having a significant negative impact on the people in the region affected. From a social point of view, the State has been imposing a policy of divestment of natural resources, territories and consequently of individual and social rights, as they consider these settings as an “area of sacrifice in favour of development”.¹⁸

Acosta¹⁹ also considers that an additional social impact is the process of de-territorialisation of the State. This leaves social demands in the hands of companies, thus consolidating an environment of violence, poverty and marginalisation; while at the same time constructing a vision of a police State that represses the population and instrumentalises legal reasoning, so that it answers to the interests and pressures of extractive companies, whether they are private or state-owned.

This consensus also creates the growing appearance of socio-environmental conflicts in the region, due to the State minimising the environmental consequences, the socio-economic effects of dependence, and constructing new forms of coercion on the population in favour of a false process of national development.²⁰

For its part, socio-environmental conflict has been defined in different ways by many authors, so from a legal stand point,²¹ considers that

¹⁷ Eduardo Gudynas, “Conflictos y extractivismos: conceptos, contenidos y dinámicas”, in *Decursos Revista en Ciencias Social de la Universidad Mayor de San Simón* (2014, decursos N° 27-28) 79-115.

¹⁸ Acosta (n 13); Svampa and Viale (n 14) 15-20; 81-84, and Eduardo Gudynas (n 17). This last concept, Svampa and Viale, conceive it as an area of sacrifice because environmental liabilities are settled in these territories, the annihilation of other economies, of the conception of life different from the dominant one; but they also justify this situation considering them as secondary problems and even as necessary costs to overcome poverty and exclusion.

¹⁹ Acosta (n 13).

²⁰ *ibid.*

²¹ Claudia Alexandra Múnevar Quintero (2011)

socio-environmental conflict arises from the imposition of interests that result in the non-observance of legal provisions, by action or omission, that violate the rights protected by these regulations.

Another author such as Sabatini²² points out that environmental conflicts arise from the conflicting interests between the environmental impact and/or external factors and their consequences on quality of life, the environment and local economies. These types of conflicts are essentially the same in both rural and urban areas. The environmental impact the project has on the economic, cultural and social aspects of the area as well as the local life systems and the control of the territory itself are in dispute therefore these conflicts are also social in character.

Furthermore, these environmental conflicts are also political in nature. Between the knowledge of the environmental impact and the decisions that affect the territory, there are interests of economic gain, quality of life and control of spaces to be taken into consideration. Technical issues are not usually a way out for conflict resolution either, as they may be subject to manipulation.²³

According to the People's Advocate of Ombudsman's Office (hereinafter DP, Defensoría del Pueblo), social conflict is defined as:

*[...] procesos complejos en el que grupos sociales, el Estado y las empresas perciben que sus intereses, valores, creencias son incompatibles o contradictorias, y esa contradicción puede derivar en violencia*²⁴

Moreover, in this conceptualisation, violence is conceived as an element alien to social conflict, but which is used by the actors to exert direct or strategic pressure, thus fuelling the most dangerous side of the conflict.

This institution also constructed a typology of social conflicts with the objective of directing the analysis of these phenomena and classifying them according to the topics and legal competencies of state institutions. It identified ten types of conflicts, considering socio-environmental conflicts as those where the dynamics are related to control, use and

²² Francisco Sabatini, "Conflictos ambientales y desarrollo sustentable de las Regiones Urbanas", in Revista EUE (1997, XXII, 68) 77-91.

²³ *ibid.*

²⁴ Defensoría del Pueblo del Perú, *Informe Defensorial N° 142 Fortalecimiento de la Policía Nacional del Perú: Cinco áreas de atención urgente* (2009, Lima) 34. (tr: [...] complex processes in which social groups, the State and companies perceive that their interests, values, beliefs are incompatible or contradictory, and that contradiction can lead to violence)

access to the environment and its resources, and which also have social, political, economic and cultural components.

This research will use the definition of socio-environmental conflict set out by the Ombudsman's as it embraces this social phenomenon more broadly, and its interpretation reflects the national context that will be analysed in this paper. The term social conflict or socio-environmental conflict will also be used interchangeably during the drafting of this document.

1.1.2 The Extractivist Model and Social Conflicts in Peru

In the public hearing of the 162nd session held in May 2017, the IACHR has indicated that Peru is ranked fourth in world countries in terms of the number of environmental activists murdered.²⁵ It is one of the leading countries in terms of Latin American²⁶ social conflict, with an average of 200 conflicts per year between 2004 and 2017, 45% of which are linked to the mining sector and mainly related to large-scale projects.²⁷

According to the DP,²⁸ social conflict in Peru has a socio-economic, political and cultural profile. It pointed out that in respect of the first, Peru has had an economic growth over the last decade that has resulted in an increase in the number of social conflicts and not been reflected in the social welfare and/or representation as the conflicts are largely related to extractive projects. Thus, the country is the third largest world producer of copper and silver and the sixth in gold, promoting a policy of capturing foreign investment mainly within the mining, sector which represented 24%²⁹ in 2015. In addition, between 2002 and 2009 there was a five-fold increase in GDP in the mining sector and mining income in the period between 2002 and 2012 multiplied tenfold nationally.³⁰ However, as a result of this activity, society started to make demands

²⁵ IACHR, "Report on public hearings of the 162nd session" (27 June 2017) <http://oas.org/en/iachr/media_center/PReleases/2017/085.asp> accessed 2018.

²⁶ PNUD, *La protesta social en América Latina* (2012, Buenos Aires: Siglo XXI Editores) 21-29.

²⁷ Working Party on the Question of Human Rights and Transnational Corporations and Other Business Enterprises (n 3).

²⁸ Defensoría del Pueblo del Perú (n 2) 35-46.

²⁹ ProInversión, "La inversión extranjera directa" (2018), <<https://bit.ly/2JkdktX>> accessed July 2018.

³⁰ International Commission of Jurists (n 16).

in relation to health and the environment, as well as to the lack of transparency surrounding the activity, access to information and the lack of participation in decision-making.³¹

With regard to the political aspect, it pointed out that the State did not fulfil its role as promoter of social development and overseer of economic activities. Instead it allowed problems to be approached asymmetrically by both society and the market.³² Thus, companies recognised that the Peruvian State had little presence in the areas where they operated, which in many cases were areas where poverty and inequality existed and were forced to deal with the demands of the population without government support.³³ The DP also noted a lack of management in relation to social conflicts within the three levels of government and a lack of interest in regaining the trust of the population in public administration.

On the issue of culture, it states that Peruvian society, including state actors, has not established a culture rooted in dialogue, tolerance, respect for the law and recognition of others.³⁴ This is a manifestation of the major failure to comply with existing agreements that usually exist between the state's population and companies.³⁵

From Acosta's perspective, it can be postulated that the geographical spaces occupied by mining companies in Peru are subject to a process of de-territorialisation, as the State does not undertake its role of guaranteeing the enjoyment of the fundamental rights of the people who live around the projects, abandoning its social responsibilities and delegating them to private actors.

The DP³⁶ pointed out that from the date on which the process of monitoring social conflicts began in 2004 to the present day, i.e. until September 2011, when the drafting of the defence report was initiated, social conflicts not only increased but also extended and intensified. Thus, from the 47 social conflicts mentioned in the first report,³⁷ they

³¹ Working Party on the Question of Human Rights and Transnational Corporations and Other Business Enterprises (n 3).

³² Defensoría del Pueblo del Perú (n 2) 35-46.

³³ Working Party on the Question of Human Rights and Transnational Corporations and Other Business Enterprises (n 3).

³⁴ Defensoría del Pueblo del Perú, (n 2) 35-46.

³⁵ Working Party on the Question of Human Rights and Transnational Corporations and Other Business Enterprises (n 3).

³⁶ Defensoría del Pueblo del Perú, *Resolución Defensorial* N° 009-2012/DP.1-4.

³⁷ For more information on monthly social conflict reports see: <<https://defensoria.gob.pe/temas.php?des=3#r>>.

increased, reaching a peak of 288 in September 2009, raising the frequency of social conflicts by over 300%. This increase is not only noticeable in relation to their number, but also in relation to the territorial extension in which they occur, for example in 2004 the conflicts covered 4 regions and in 2010 it reached 24 regions. With regard to the typology of social conflicts, the DP specified that the greatest increase (in number and extension) occurred in relation to socio-environmental conflicts, considering that as of September 2011 these represented 41.7% of the total number of conflicts recorded at the national level; with regard to intensity, it indicated that violent acts in relation to social conflicts increased significantly between January 2006 and September 2011, affecting life and physical integrity in those areas. In the month of April 2018 alone, 196 social conflicts were reported, covering the 22 regions of the country, 64.8% of which were socio-environmental related.³⁸

1.1.3. The police force

In relation to the police force, there are two models or concepts of police forces within Latin America: the military police model and the community police model. The first arose during dictatorial or military governments where the institution distanced itself from society and sought to maintain a high level of control of political life rather than crime, in many cases in confrontation with the citizen; then with the shift towards democracy many countries decided to opt for reform that reduced the levels of violence and there was a greater rapprochement and participation by society in the work of the police, this model is called “community policing”.³⁹

At the international level, it is argued that at present there is an evolution in the nature of conflicts due to greater low-intensity conflicts developing where urban areas have become the battle ground, with civilians being the most at risk as they are the target of various attacks. It is for this reason that the United Nations (hereinafter the UN) does not promote a specific model of police, but rather proposes that its

³⁸ Defensoría del Pueblo del Perú (n 4)

³⁹ Hugo Fruhling, “Policía Comunitaria y Reforma Policial en América Latina ¿Cuál es el impacto?”, in Boletín del Centro de Estudios en Seguridad Ciudadana (2003) 1-36 and Mark Ungar, “Reforma Policial contemporánea en América Latina: el desafío local de la política nacional” in Revista del Instituto Interamericano de Derechos Humanos, (2011) 165-194.

activity seeks to solve the problems of the community as a whole by being part of it, encouraging the active participation of citizens and the commitment of state officials to act impartially, carry out their duties respecting human rights and norms.

These proposals also reflect the premise that democratic states have placed a duty on police forces to protect all individuals, thereby empowering them to provide law enforcement, crime prevention and support for the community as a whole. In addition, citizens, through their legal systems, have established that this power granted to them must observe the principles of necessity, lawfulness and proportionality.⁴⁰

In Peru, the National Police (hereinafter referred to as the PNP) is in charge of the internal security of the State, which forms part of the national defence. To that end, it adopts preventative and response measures that seek to guarantee the economic and social development of the country, facilitate the advancement of both life and the State, and prevent acts of aggression within the territory as well as ensuring the exercise of human rights.⁴¹

It also guarantees the maintenance of domestic order, understood as a situation of normalcy, peace and tranquillity where people freely exercise their rights. This concept includes public security, the stability of political organisations and the protection of public institutions or services that cover vital and primary needs for the community. This legal asset is also called a police order because it is guaranteed by this institution and, unlike national security, those who seek to undermine it do not propose to overthrow or threaten the political regime or impose an ideology different from that adopted.⁴²

⁴⁰ ICRC, *Los derechos humanos y el derecho humanitario en los principios rectores de la aplicación profesional de la ley* (2002, Geneva) 12-22; United Nations Office on Drugs and Crime, *Police. Public Safety and Police Service Delivery. Criminal Justice Assessment Toolkit* (2006, New York), 1-5 <https://unodc.org/pdf/criminal_justice/PUBLIC_SAFETY.pdf> accessed June 2018; ICRC, *To Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Forces* (2014, Geneva) 179-194.

This approach was manifested in the various international instruments such as the Guiding Principles on Crime Prevention and Criminal Justice in the Context of Development and the New International Economic Order adopted by the Seventh United Nations Congress on the Crime and Treatment of Offenders, in Milan, from 26 August to 6 September 1985, and by the General Assembly of the United Nations in its resolution 40/32 and the Code of Conduct for Law Enforcement Officials adopted by the Assembly of the United Nations in its resolution 34/169 of 17 December 1979.

⁴¹ Tribunal Constitucional del Perú, Exp N° 0017-2003-AI/TC, 29-32.

⁴² *ibid* 4-5, 7-8 and Exp N° 005-2001-AI/TC, 2.

Citizen security is also a legal asset and at the same time an essential service that is associated with the general interest, because the holder is the citizenry in its collective group, and is made up of a set of elements that the State adopts for its protection, it being an active collaborator in its consolidation.⁴³

The presence of disruptive factors such as social conflicts that alter internal order must be controlled through the ordinary means available to the State. In cases of serious danger, the exceptional measures provided for in the law must only be used in order to eliminate these factors quickly and effectively.⁴⁴

The PNP, unlike the Constitutional Court of Peru (hereinafter TC), differentiates the concepts of internal order, public order and citizen security with the intention of focussing on the intervention of its departments. It therefore defines the concept of internal order as a situation of equilibrium that allows the State to function and its impact compromises the structures of the State and the Nation as a whole. The issues dealt with here include terrorism and organised crime, among other things. Special Directorates such as the Directorate of Special Operations (hereinafter DIROES) intervene in response to these events.

Public order is defined by four components: peace, security, health and public morality. Its violation affects social peace within the State and among the incidents observed here is the blockade of highways. The departments involved include the basic police service, the units of the USE-Territorial Directorate, the National Criminalistics Division (DIVINCRI) and the DIROES support unit.⁴⁵

Citizen protection has a more local vision where the causes that create violence can be observed and preventive action taken. In this scenario, police stations, municipal police, private security firms and firefighters all have an important role to play.⁴⁶

⁴³ Tribunal Constitucional del Perú, Exp N° 0041-2004-AI/TC, 44 and Exp N° 5287-2005-PHC/TC, 14-15.

⁴⁴ Tribunal Constitucional del Perú, Exp N° 0017-2003-AI/TC, 13-17

⁴⁵ The roles attributed to these units will be developed in more detail in chapter III of this work.

⁴⁶ Instituto de Derechos Humanos de la Pontificie Universidad Católica del Perú (Human Rights Institute of the Pontifical Catholic University of Peru) IDEHPUCP, *Diagnóstico Nacional sobre la situación de la Seguridad y el respeto a los Derechos Humanos. Referencia particular al sector extractivo en el Perú*, (2013, Lima, Peru) 125-132; Secretaría Técnica del Consejo Nacional de Seguridad Ciudadana (Technical Secretariat of the National Citizen Security Council)-CONASEC, *Plan Nacional de Seguridad y Convivencia Social* (2012, Lima).

In terms of the general or public interest, it should be understood as that which benefits everyone and does not serve a single particular interest. This element allows public servants to exercise discretion on the basis of justification, which is the explanation of a reason for the choice consistent with reality and with the objectives of the discretionary act, where although it cannot be accepted by society it is at least capable of being understood. It is for this reason that a discretionary exercise of power that contravenes the law or is devoid of objective foundation becomes arbitrary, and consequently does not meet the general interest.⁴⁷

Moreover, in the case of police officers this general interest must be manifested in the impartial and proper exercise of their powers, since in their daily work they are often faced with the dilemma of restricting the fundamental rights of citizens while exercising of their discretionary power. Therefore, it is necessary for them to understand the spirit of the law and to be able to discern the nuances of each situation they face. In addition to assessing their performance in terms of their legal powers, and the effects they may have on the individual and the community, a partial or disproportionate use of their position makes them violators of the law and discredits the perception of them as representatives of the law in society. As the ICRC points out:

However, they must understand that this very perception is what distinguishes those who enforce the law from (criminal) offenders. If law enforcement officials were to resort to practices that are against the law or that go beyond the powers and authorities granted to them by the law, the distinction between the two could no longer be made.⁴⁸

The terms internal order, citizen security and public safety will be used interchangeably in this paper. However, when examining the documentation prepared by the PNP such as its operational plans, the agreements signed between the PNP and extractive companies, among others, the views established by the National Police of Peru will be used to determine the perception that this police institution has of citizens and the free exercise of their rights in scenarios of socio-environmental conflict.

⁴⁷ Tribunal Constitucional del Perú, Exp N° 0090-2004-AA/TC, 11 and 12-15.

⁴⁸ ICRC, *To Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Forces* (2014, Geneva) 139

2.

EXAMINATION OF PROGRESS ON THE EXTRACTIVE
COMPANIES

Once the rationale for the extractive model, its impact and the role played by the Peruvian State through the police institution in social conflict scenarios have been addressed, this chapter will present two specific examples where this extractive model was implemented through mining projects creating social conflict situations, and the subsequent action taken by the State to control these scenarios through the police forces.

2.1. THE TINTAYA MINING PROJECT

The exploitation of the Tintaya mine dates back to 1980 when the Peruvian State through Minera Especial Tintaya SA decided to progressively expropriate 4000 hectares of property from the communities of Tintaya-Marquiri, Alto Huancané, Huano-Huano, Alto Huarca and Bajo Huancané that are located in the district of Yauri, who had to be relocated close to the outskirts of the mining project, thus becoming the third largest copper producer in the country by 1985.⁴⁹

The Tintaya mine was subsequently privatised and transferred to various companies such as Magma Tintaya SA, BHP Billinton, Xstrata PLC and is now owned by the Swiss equity firm Glencore PLC which encompasses a global manufacturing chain including processing, storage and transport of raw materials across three main sectors: metals-minerals, energy and agricultural products. It is the fourth largest

⁴⁹ Isabela Nuñez del Prado, “Un conflicto de larga duración: El caso Tintaya desde los clásicos de la Sociología”, in *Revista la Colmena del Departamento de Ciencias Sociales de la PUCP* (2013, 6) 66-68.

mining company in the world and the leading trader of raw materials globally, controlling 50% of the world copper market.⁵⁰

In regard to Xstrata PLC should be noted that it was headquartered in Brisbane, Australia. Until 2013 this international company had a commodities business unit called Xstrata Copper which in 2012 was reported to be the world's fourth largest producer of copper and one of the world's leading producers of smelted, refined and recycled copper.⁵¹

From the outset of mining activity in Espinar the population has had a tense relationship with each company that had subsequently acquired the mine. On May 21, 1990, the population mobilised in protest and entered the mining encampment. As a result of this confrontation, the population managed to get the State to electrify the urban area of Espinar, to provide them with machinery for the artisanal production of handicrafts and the 21 May was declared, at a provincial level, to be Espinar Dignity or K`ana Day.⁵²

After denouncing BHP Billinton internationally in 2001 and following numerous talks, the Marco Framework Agreement was signed in 2003. This was an innovative national milestone as the company committed itself to transfer 3% of its profits annually and to engage in dialogue with the communities at all times.⁵³

Following the signing of the Marco Framework Agreement, the population continued to report non-compliance with the agreements, delays in development works, and environmental pollution. In 2005, another social protest erupted, resulting in several injuries among both police and civilians, and culminating in the prosecution of 75 managers.

As a result of environmental claims, the Provincial Municipality of Espinar conducted an environmental survey that showed that the water and soil monitoring points exceeded the maximum permissible limits set by the Peruvian State in 2011. In addition, in 2012 Congresswoman Veronica Mendoza informed the population of the results of the health study conducted by CENSOPAS⁵⁴ in 2010, which warned that people

⁵⁰ Red Sombra de Observadores de Glencore, *Informe sobre de las operaciones de Glencore en Latinoamérica* (2017), <<https://bit.ly/2uCTLJR>> accessed June 2018.

⁵¹ Xstrata Copper Division de Operaciones Perú, *Informe de Sostenibilidad* (2012), 2-5 <<https://bit.ly/2La9gxR>> accessed June 2018.

⁵² CooperAccion, *Mesa de Diálogo en la Provincia de Espinar Cusco 2012-2014* (2014, Lima, Perú).

⁵³ Nuñez del Prado (n 49).

⁵⁴ For further information see: <<http://cooperaccion.org.pe/wp-content/uploads/2017/11/ESPINAR-Informe-sobre-salud-4-1.pdf>>.

had been exposed to heavy metals over and above the reference limits.⁵⁵

On May 21, 2012, the united Front for the Defense of Espinar Province-FUDIE called an indefinite strike in the province. In this conflict, there were several clashes between the police and the population with two people being shot dead, several wounded (both residents and police), some arrested, and the detention of the prosecutor Hector Herrera on behalf of the public. On 29 May a state of emergency was declared in the province of Espinar, just days after the arrest of the main union leaders of the area and the Mayor of the Province. On the 31 of May, by means of Administrative Resolutions issued by the Judicial and Public Ministries, the jurisdictions of the cases which were opened as a consequence of this conflict were transferred to the judicial and fiscal district of Ica.⁵⁶

Since June 21, 2012, the National Government established a Roundtable that lasted until December 2013, where it presented a Final Integrated Report on Participatory Environmental Health Monitoring of the Province of Espinar.⁵⁷ However, its content did not address the main concern of the population which was to understand the causes of the environmental pollution in Espinar. It was also determined that 100% of the community members who participated in the study had been exposed to 11 metals, among them arsenic, cadmium, mercury and lead. They exceeded the permissible limits and the State had been implementing a Health Plan that was now under serious scrutiny.⁵⁸

The Tintaya mine is currently in a progressive closure phase until 2033, with its final closure planned for 2038. On the other hand, its extension, which is the Antapacay project, has been in operation since 2013 and has a useful life of 20 years.⁵⁹

⁵⁵ Prelatura de Sicuani, "Pronunciamiento: un modeloo de desarrollo sostenible, que asegure el bienestar de todos respetando el equilibrio ecológico" (2012), <<https://bit.ly/2ueMZIX>> accessed May 2018

⁵⁶ Servicio de Comunicación Intercultural SERVINDI, "Perú: IDL pide derogar norma que cambia competencias en casos Espinar y Cajamarca" (2012), <<https://servindi.org/actualidad/65608>> accessed June 2018.

⁵⁷ For further information see: <http://minam.gob.pe/espinar/wp-content/uploads/sites/14/2013/10/Informe_aprobado.pdf>

⁵⁸ Jaime Borda, "Espinar a tres años del conflicto; mucho ruido y pocas nueces" (2015), <<https://bit.ly/1HJ26fD>> accessed May 2018.

⁵⁹ Observatorio de Conflictos Mineros de América Latina, "Conflicto Minero: Tintaya en Espinar", <<https://bit.ly/2L9uLIQ>> accessed May 2018.

2.1.1. *Xstrata PLC and its responsibilities with regard to human rights*

In its 2012 Sustainability Report presented to the UN Global Compact, Xstrata stated that it focused on strengthening the way it addresses human rights issues, ensuring that its private security personnel and the public security forces, with whom it collaborates on certain activities, are trained in the voluntary principles on Security and Human Rights. In January 2012 it subscribed to the international standards regulated by the United Nations Global Compact and consequently to the ten principles established by the international instrument. At the beginning of 2013, they formally approved the incorporation of the Voluntary Principles on Security and Human Rights.⁶⁰

In its 2014 sustainability report, Glencore stated that in the countries where it operates, there is a high risk of human rights violations related to security. For this reason, Glencore urged its suppliers, contractors and partners to commit to and direct their conduct towards the respect of voluntary principles through the contracts they sign, and in the case of public security providers through memorandums of understanding.⁶¹

It also pointed out that it conducts training in relation to the voluntary principles and continuously monitors the performance of its security contractors and the potential impact they have on the communities. Glencore indicated that it seeks to mitigate the local risks that exist in relation to public and private security forces, formalising its relationship with public security forces and demanding compliance with the voluntary principles. It also stated that they have an approach for training/raising awareness in the countries involved, as well as policies aimed at imposing corrective behaviours on contractors in relation to respect for human rights in the countries where it operates, including Peru. In addition, the organisation also participated in the working group on voluntary principles in Peru.⁶²

⁶⁰ Xstrata Copper Division de Operaciones Perú (n 51) 6-7: 39-41.

⁶¹ Glencore, *Reporte de Sostenibilidad* (2014), 30-68 <<https://bit.ly/2mdzDbm>> accessed June 2018.

⁶² Socios Perú, *Principios Voluntarios de Seguridad y Derechos Humanos* (2015).

2.1.2. *Conflict considerations*

On May 28 at 9pm Jaime Borda Pari, Romualdo Teófilo Ttito Pinto and Sergio Huamaní Hilario (the first two were workers of the Vicaría de la Solidaridad-VS and the last was President of the Frente Único de los Interés de Espinar-FUDIE), were arrested and later taken by police to the interior of the mining camp. These individuals, minutes earlier, found themselves accompanied by Prosecutor Héctor Herrera and VS lawyers to verify the legal situation of 18 people (including 2 women and 1 child) who were deprived of their liberty at the Tintaya police station located inside the mining installation.⁶³

In a press conference it was stated that up to May 30 a total of 25 people had been deprived of their liberty, and transferred from Espinar to the city of Sicuani, where 18 people were released and the rest were transferred (among them Jaime Borda Pari, Romualdo Teófilo Ttito Pinto and Sergio Huamaní Hilario) to the city of Cusco where they were also released.⁶⁴

Likewise, on May 28, the Ministry of the Interior reported that the PNP intercepted a Serenazgo van found to be transporting numerous Molotov cocktails and sharp weapons. The recording shows that statements were made by those who were intercepted in the van inside the mining camp without the presence of their lawyers and a representative of the Public Prosecutor's Office.⁶⁵

There are also several news reports and videos of this conflict that reveal the death of three inhabitants as a result of the social conflict and the illegal detention of the FUDIE leader and the Mayor of the Municipality.⁶⁶

⁶³ Prelatura de Sicuani (n 55); Coordinadora Nacional de Derechos Humanos "Ruth Luque: 'Rechazamos categóricamente la presencia de municiones en nuestra camioneta'" (2012), <<https://bit.ly/2ulh4Xa>> accessed May 2018.

⁶⁴ WillaxTelevision, "Vicaría de Sicuani en contra del Estado de Emergencia", (2012, Peru).

⁶⁵ Noticiero 24 horas Edición Central, "Serenos detenidos con bombas molotov dicen que actuaron por orden del alcalde" (2012, Peru. Panorama Television).

⁶⁶ Coordinadora Nacional de Derechos Humanos, *Informe Anual 2015-2016* (2017) 64-81. For further information on the conflict see: <<https://bit.ly/2NRyVNP>>, <<https://bit.ly/2upFAXi>> and <<https://bit.ly/2mn8djC>> (recovered May 2018)>.

2.2. YANACOCCHA MINING COMPANY

The Yanacocha SRL Mining Company is made up of Buenaventura mines backed by Peruvian capital, Newmont Mining Corporation based in the United States of America and the International Finance Corporation-IFC which is the World Bank Group entity.⁶⁷

This company has worked the Yanacocha deposit located in the Cajamarca Region since 1993. It is the largest gold deposit in South America and the second largest in the world. The company's relationship with the population was tense from the beginning because it introduced open-cast mining as a new method of extraction involving an abundant use of natural resources, earthworks and water. According to Zavaleta,⁶⁸ the land was being reconfigured at that time because irrigation canal closures and water pollution were taking place in the rural areas adjacent to the project.

In 2000, an environmental incident occurred in the towns of San Juan, Magdalena, and Choropampa. This accident resulted in the contamination of approximately 1600 inhabitants because the company offered them an amount of money in exchange for recovered metal and it failed to inform them that the direct exposure to the metal would result in high levels of contamination. Thus, the population, mainly children, began to handle mercury with their hands, who then started to present with various related diseases.⁶⁹

Its unscrupulous attitude towards the population, led to the company being socially discredited which has had an affect on its expansion plans. Other projects planned by the company have been stalled since 2004 by the ongoing demonstrations by the population, including the Cerro Quillish, Carachungo II, Quinta Sur and Solitario projects as well as the most recent Conga mines in 2011.

⁶⁷ Minera Yanacocha SRL, *Estudio de Impacto Ambiental Proyecto Conga: Resumen Ejecutivo* (2010, Lima), 9.

⁶⁸ Mauricio Zavaleta, "La política de lo técnico: una aproximación al desarrollo", de Asociación Servicios Educativos Rurales SER, *Los límites de la expansión minera en el Perú* (2013, Lima, Perú) 109-149.

⁶⁹ This case is still pending, as some families negotiated directly with the company, while others have a judicial proceeding pending. Observatorio de Conflictos Mineros de América Latina OCMAL, "Derrame de mercurio en Choropampa: 15 años sin respuestas" (2015), <<https://bit.ly/2L6Nkac>> accessed May 2018.

2.2.1. Yanacocha SRL responsibilities in human rights issues

Minera Yanacocha SRL in its 2011 Sustainability Report submitted before the Global Compact, stated that it had adopted several international initiatives, so in 2001 it became part of the Voluntary Principles on Security and Human Rights and in April 2004 it adopted the Global Compact initiatives, and reported that since 2007 it had included the ten principles on human rights, labour, the environment and anti-corruption into their corporate policies.⁷⁰

Within the framework of the Voluntary Principles, the company reported that all of its personnel who provide security to Yanacocha, including the private companies it hires and the commanders of the police forces, receive annual training in the Voluntary Principles and United Nations Security Standards.

The Newmont Mining Corporation and the International Finance Corporation participated in the creation of the voluntary principles at the United Nations of which they are a part, and they are also part of the working group on voluntary principles in Peru.⁷¹

2.2.2 Resistance to the Conga Project

The Environmental Impact Study of the Conga project indicates that its mining concession is located at the headwaters of the Toromacho, Alto Jadibamba, Chugurmayo, Alto Chirimayo and Chailhuagón streams; it encompasses the Sorochuco and Huasmín districts of Celendín province and the Encañada district of Cajamarca province. Its area extends to cover 5,768.74 hectares and the mine is open pit with reserves of copper and gold.⁷²

In February 2010 the company submitted its EIA and obtained approval from the General Directorate of Mining Environmental Affairs of the Ministry of Energy and Mines in October of the same year. The main objection that the Cajamarquinos made to the EIA was the absence of a complete hydrology study for the project.⁷³

⁷⁰ Yanacocha, *Reporte de Sostenibilidad Yanacocha* (2011), 103-133 <<https://bit.ly/2NdZJcJ>> accessed June 2018.

⁷¹ *Socios Perú* (n 62).

⁷² Minera Yanacocha SRL (n 67) 9-16.

⁷³ Grupo de Formación e Intervención para el Desarrollo Sostenible GRUFIDES (Translation: Training and Intervention Group for Sustainable Development), “Conflicto Minero Conga” (n.d.), <<https://bit.ly/2uiZJyJ>> accessed June 2018.

In August 2011 the Cajamarca community associations submitted a request to the Ministry of the Environment to comment on the EIA of the Conga project. A few months later, on 25 November, the Ministry presented a report to the President which concluded that “no studies have been carried out to show that the tailings deposits will not produce seepage (...), a potential risk, since the EIA confirms the existence of groundwater sources”.⁷⁴

Faced with a lack of interest on the part of the National State in resolving the issue, roadblocks were carried out from October 14 to November 23, and on November 24 an indefinite and conclusive strike took place in the city of Cajamarca up to December 4, when the State declared a state of emergency for 60 days, allowing military personnel to enter the provinces of Cajamarca, Hualgayoc, Celendín and Contumazá.⁷⁵

According to the NGO, GRUFIDES, in 2012 the conflict was included in the technical debate regarding the assessment of Conga’s EIA. The State once again declared a state of emergency and allowed the military to enter the provinces of Celendín, Hualgayoc and Cajamarca. On May 31, through Administrative Resolutions issued by the Judicial Branch and the Public Prosecutor’s Office, the jurisdictions of the open cases were changed as a result of this conflict, referring them to the judicial and prosecutorial district of Lambayeque. That year ended with the declaration by the Yanacocha company announcing the suspension of the project until the social prerequisites for its execution were in place.⁷⁶

Finally, on April 27, 2016, after several years of resistance, the president of Buenaventura declared that the project was no longer economically viable due to the fall in the price of the ore.⁷⁷

⁷⁴ Redacción de la República, “Ministerio del Ambiente objeta el proyecto Conga” (2011), <<https://bit.ly/2mdFFZJ>> accessed July 2018.

⁷⁵ Juan Arribasplata, “Conga: Cronología de un conflicto”, in *Revista de Opinión y Análisis Voces* (2011, 38), 10-13.

⁷⁶ Servicio de Comunicación Intercultural SERVINDI, “Perú: IDL pide derogar norma que cambia competencias en casos Espinar y Cajamarca” (2012), <<https://servindi.org/actualidad/65608>> accessed June 2018.

⁷⁷ Grupo de Formación e Intervención para el Desarrollo Sostenible GRUFIDES (n 73).

2.2.3. Key references to the conflict

Following the indefinite strike called by community associations in Cajamarca in October 2011, police repression took place on November 29 in the areas of the Perol and La Cortada lagoons, located at the Huayramachay crossing of the Quengorio Alto settlement in the town of Quengorio Bajo, in the district of Bambamarca, province of Celendín, resulting in several of the residents being injured and detained.⁷⁸

As result of these events, the Celendín Prosecutor's Office opened a criminal investigation (which continues to date) for the offence of minor injuries to Segundo Abraham Carhuajulca Díaz and Roger Orlando Saldaña Castro, serious injuries to Wilder Saúl Maluquis Silva, Carlos Alberto Chávez Rodrigo and Alberto Izquierdo Vargas, abuse of authority to the detriment of the Ministry of the Interior - Peruvian National Police, Edwin Hidalgo Torres, Edgar Huamán Alfaro, Aladino Mayta Lozano, Luis Fernando Silva Torres, Faustino Silva Sánchez, Lander Reátegui Amsifuen, Elmer Eduardo Campos Álvarez and Mariano Carmelo Rodríguez Castañeda, against Amador Bacalla Huadalupe (Colonel with the PNP) and Wagner Enrique Ocampo Huamán (Captain with the PNP).

According to the version by the Public Ministry on November 29, 2011 in the morning hours in the areas of the "El Perol" and "La Cortada" lagoons, a group of residents, including the victims, participated in a strike with an intention of rendering the Conga mining project unworkable. In these circumstances there was a confrontation between the population and the members of the PNP-DINOES, resulting in several injuries, including Elmer Eduardo Campos Álvarez, who was shot in the back by police officers assigned to provide a security police service to the mining company Yanacocha SRL (the name assigned in the criminal investigation).

⁷⁸ For further information on the conflict of 29 November 2011 see: <<https://youtube.com/watch?v=qa3-evC0QUE&feature=youtu.be&t=1m10s>> accessed 2018.

3.

INTERNATIONAL AND NATIONAL REGULATORY
FRAMEWORK ON THE POLICE FORCE

Once the cases to be addressed have been described, questions arise as to what the obligations or commitments the Peruvian State must assume nationally and internationally in relation to social conflict and the role of its police forces. Thus, this chapter will first discuss international instruments and jurisprudence related to the performance of police forces, then it will address the most important regulations at the national level that regulate police performance, such as the signing of police agreements with extractive companies and the legal treatment applied to social conflicts, as well as the amendments that have so far been made to these issues.

This process will be carried out in order to demonstrate the continuation of state policy and to demonstrate non-compliance with international and national criteria in relation to the provision of extraordinary police services.

3.1. INTERNATIONAL REGULATORY FRAMEWORK FOR POLICE FORCES

The Peruvian Constitution states in Article 55 that treaties ratified by the State and which are in force are part of national law, in this sense the Constitutional Court specified that international instruments rank at the same level of the Constitution in the national legal order, in addition in the fourth final and transitory provision indicating the hermeneutic function of these instruments with respect to fundamental rights.⁷⁹

⁷⁹ Tribunal Constitucional del Perú, Exp N° 0025-2005-PI/TC and Exp N° 0026-2005-PI/TC, 25

For the International Committee of the Red Cross (ICRC), the instruments below are not categorised as treaties, but are specific ethical guidelines that guide the actions of state agents in charge of law enforcement, recognising that their actions have a direct impact on the human rights of individuals in society.⁸⁰ In the Peruvian case, these instruments were incorporated in various regulations that have legal status and that were enacted after 2012, however before this date they were included in Ministerial Resolutions that do not have the same legal status.

3.1.1. The Code of Conduct for Law Enforcement Officials

The United Nations General Assembly in its Resolution 34/169 of 17 December 1979 adopted this Code of Conduct (hereinafter the Code of Conduct) as an instrument containing ethical guidelines, because in the exercise of law enforcement functions, law enforcement officials may affect the quality of life of individuals and society as a whole.

Article 1 specifies that police officers with police functions - who are mainly authorized to arrest or detain - provide a service to the community, seeking to prioritize vulnerable sectors of the population. This measure seeks to ensure that the police service promotes the participation and cooperation of society and does not assume a militarist-type reactive role in doing so. In addition, it considers that the performance of its functions must respect human rights, and if force is used, it must be exceptional and must observe the principles of legality, necessity and proportionality⁸¹ (Arts. 2 and 3 of the Act).

In addition, private information obtained on the performance of police functions must be kept secret, unless it is necessary for justice or for the performance of its duty (art. 4 of the law).

In addition, Resolution No. 1989/61 of 24 May 1989 adopted guidelines for the effective implementation of the Code, specifying that the State should provide adequate remuneration and working conditions, as well as educating, selecting and training law enforcement officials (specific issues 1 and 2).

⁸⁰ ICRC, *To Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Forces* (2014, Geneva), 141-144.

⁸¹ United Nations Office on Drugs and Crime, *Police. Public Safety and Police Service Delivery. Criminal Justice Assessment Toolkit* (2006, New York), 2 <https://unodc.org/pdf/criminal_justice/PUBLIC_SAFETY.pdf> accessed June 2018.

3.1.2 Basic principles on the use of force and firearms by law enforcement officials

These principles were adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held from 27 August to 7 September 1990. This instrument, hereinafter referred to as the principles on the use of force, considers in its preamble that the threat to the security of the law enforcement agent is a threat to the stability of society, and that the use of force by them - and in some cases the use of firearms - must be reconciled with respect for human rights.

Underlying these assumptions is the approval of these basic principles, which recognise that the State must provide agents with protective equipment and various weaponry and ammunition so that agents are able to make a differentiated use of force, thereby increasingly restricting the use of weapons that injure or instances of fatalities (2nd provision).

In the performance of their duties, agents shall first use non-violent means and only use force when these prove ineffective. The use of force in an arbitrary or abusive manner must be punished and when used to cause injury or death, the superiors must immediately be informed of the fact (provisions 4, 6 and 7).

In unlawful nonviolent assembly scenarios, the state agent may decide not to disperse it to avoid a possible unnecessary and dangerous escalation or in its absence they should avoid the use of force or in the event of using force it should be kept to the minimum necessary.⁸² In the case of violent gatherings and having previously exhausted all less dangerous measures, they may disperse the meeting to stop the violence and very exceptionally use firearms when: 1) it is used in self-defence or in the defence of others, 2) there is imminent danger of death or serious injury, 3) to prevent a serious crime from being committed, 4) to detain a person representing a serious danger and where they have met with resistance or to prevent his or her escape, and 5) when there is no less burdensome measure to achieve the objectives. In all cases the use of force must be considered exceptional and must only be used to the extent necessary (Provisions 9, 12 and 13).

⁸² ICRC (n 80) 179-194.

3.1.3. *The practical application of the use of force in the Inter-American System*

It is internationally recognised that when the power or authority exercised by the State may affect or limit the human rights of the individual, then the exercise of it must be evaluated in accordance with the principles of legality, necessity and proportionality; and in the event that State agents use force, three fundamental aspects must also be examined: preventive actions, actions concomitant with the facts, and subsequent actions.⁸³ This paper will only address the first two aspects due to their relevance to the research.⁸⁴

With regard to preventive actions, the legality and exceptionality of the use of force should be examined, using the establishment of adequate internal policies for the use of force and firearms in accordance with the international instruments detailed above as criteria. In addition, it evaluates whether the State equips its personnel with different types of weapons, ammunition and protective equipment so that they use differentiated levels of force, and whether it provides adequate training in the use of firearms and in the situations they will face in the exercise of their function. Its non-compliance violates art. 2 of the ACHR related to the duty to adapt its internal regulations and to supervise its security forces.⁸⁵

In terms of concomitant actions, the Court considered that the use of force must comply with the principles of legality, absolute necessity and proportionality. In the case of the principle of legality, it must examine whether the action is covered by a legal provision and whether it seeks a legitimate objective, the principle of absolute necessity assesses whether there were other less harmful means to safeguard the situation to be protected and that the use of force is used against persons who represent a direct danger. The principle of proportionality makes it possible to analyse whether the level of force imposed is in accordance with the level of resistance, so that the use of force must be differentiated and progressive.⁸⁶

⁸³ IACHR. *Nadege Dorzema and others v. Dominican Republic*. Merits, Reparations and Costs. Judgment of 24 October 2012. Series C No. 251, Paragraph 78. *Hermanos Landaeta Mejías et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 27 August 2014. Series C No. 281, paragraph 124. *García Ibarra et al. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 17 November 2015. Series C No. 306, paragraph 109.

⁸⁴ ICRC (n 80) 245-265.

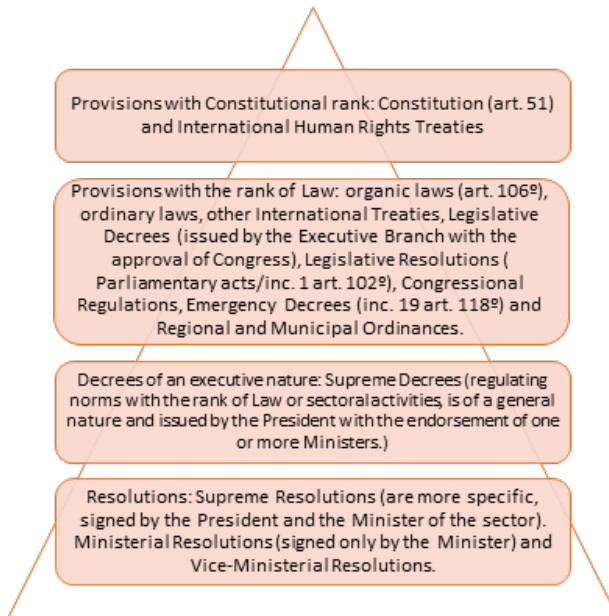
⁸⁵ IACHR *Nadege Dorzema et al. v. Dominican Republic*, paras. 79-82; *Hermanos Landaeta Mejías et al. v. Venezuela*, paras. 125-129. *Zambrano Velez and others v. Ecuador*. Background, Repairs and Costs. Judgment of 4 July 2007. Series C No. 166, paragraph 83.

⁸⁶ IACHR *Nadege Dorzema et al. v. Dominican Republic*, para. 85-90; *Hermanos Landaeta Mejías et al. v. Venezuela*, para. 134-135.

3.2. REGULATIONS GOVERNING POLICING AT THE NATIONAL LEVEL

The 1993 Peruvian Constitution was passed by the undemocratic government of Alberto Fujimori, in the context of a self-coup in 1992 and the intervention of the Justice System (Judicial Branch, Public Ministry and Constitutional Court), the Auditor General's Office of the Republic and Local Governments. With the return to democracy and the failure to find a political agreement to dictate a new constitutional charter, the various institutions of the Justice System are currently interpreting the constitutional regulations, in the broadest sense, in favour of human rights and applying a Constitutional Package and conventionality for the benefit of society; thus, the following hierarchy of regulations has been established:

The Judicial Hierarchy Pyramid. Source: Own creation, 2018



The TC or Constitutional Court considers that the State is a political organisation that concentrates the power delegated by society with the purpose of procuring its general welfare, for the purpose of developing public policies that seek social, economic and cultural development, the validity of human rights and the security of the Nation through the National Defence System.

Thus, the 1993 Political Constitution of the State (hereinafter CPE), in Chapter XII, sought to regulate security and national defence as legal assets in charge of the protection of the Armed Forces and the National Police (art 163° CPE).

Consequently, the National Police of Peru is in charge of the internal defence of the country and in fulfilment of this duty it has two basic functions: crime prevention to guarantee, maintain and re-establish internal order, compliance with laws and the security of public and private patrimony, as well as providing protection and assistance to individuals and the community, where in exceptional cases the Armed Forces also intervene, and the second function is to investigate and tackle crime under the direction of the competent jurisdictional bodies, under article 166 of the CPE.⁸⁷

It is also accepted that the State is one and sovereign. It has the legitimacy to exercise the necessary force for its mandates to be fulfilled through its institutions, including the Armed Forces and Police, whose members are considered public servants and consequently their activity is subordinated to constitutional power.⁸⁸ This status of public servant also obliges them to provide essential services - in this case citizen security and internal order - for the benefit of all citizens⁸⁹ (art. 44 of the CPE).

From these judicial interpretations it can therefore be deduced that the State has as its institutional policy a police system with community features, where a hierarchical, centralised military-type⁹⁰ structure is maintained, but the members of these institutions are public officials who exercise their power guaranteeing the observance and respect of human rights and providing the community with an active role so that they participate in the maintenance of internal order and social peace.

With regards to the regulations that govern the signing of agreements between the PNP and extractive companies, it has been shown that the

⁸⁷ Tribunal Constitucional del Perú, Exp N° 0022-2004-AI/TC, 43 and Exp N° 0002-2008-PI/TC, 10.

⁸⁸ Alberto Otárola Peñaranda, "Comentarios al art. 163 de la Constitución Política del Estado", in Walter Gutierrez, *La Constitución Comentada análisis artículo por artículo*, (2005, Lima, Gaceta Jurídica), 781-788.

⁸⁹ Tribunal Constitucional del Perú, Exp N° 0022-2004-AI/TC, 45 and Exp N° 0008-2005-PI/TC, 11-15.

⁹⁰ This characteristic is described in the Manual of Police Doctrine of 2015, which refers to the nature of the Peruvian National Police, p. 30. For more details please refer to information at the following link: <<https://es.scribd.com/document/266191445/Manual-Del-Curso-de-Doctrina-Policia>> accessed May 16, 2018.

political power legitimates this approach under Articles 166 and 171 of the CPE. The latter recognises the participation of the Armed Forces and the National Police in the economic and social development of the country.

In addition, it was considered that Article 171 of the CPE overestimates the institutional purpose of the PNP and its wording could be used to unduly expand or extend the functions entrusted to this institution.⁹¹

3.2.1. Regulations governing the signing of agreements between the Peruvian National Police and extractive companies

This section will first explain the most important provisions of each the regulations that enabled the signing of agreements between the PNP and extractive companies, the subject under analysis in this paper, and then describe the current regulations that continue to govern the signing of these agreements, in order to finally demonstrate the continuity in state policy in dealing with this issue.

This first part will review the rules that were in force at the time of signing the agreements discussed in this paper.

3.2.1.1. The Organic Law of the Peruvian National Police No. 27.238

This was the first law that regulated the police institution as we know it today.⁹² It was enacted on December 14, 1999 and repealed on December 11, 2012 by Legislative Decree No. 1148 “Law of the Peruvian National Police”.⁹³ It was regulated by Supreme Decree No. 0008-2000-IN and specifies that the National Police forms part of the organisational structure of the Ministry of the Interior.

⁹¹ Christian Donayre Montesinos, “Comentario al art. 171 de la Constitución Política del Estado”. in Walter Gutierrez, *La Constitución Comentada análisis artículo por artículo*, (2005, Lima, Perú, Gaceta Jurídica), 826-830.

⁹² The Peruvian National Police is an institution that throughout its history went through three important periods of re-organisation. The first is the period of division and specialisation in which three police forces emerged - Guardia Civil (The Civil Guard) in 1874, Guardia Republicana (The Republican Guard) in 1919 and Policía de Investigaciones (The Investigative Police) in 1948. The second focuses on the unity of the police forces and lasted from 1985 to 1990. Section 277 of the CPE was amended in 1979, culminating in Act No. 27238. The third period is currently in force and relates to initiatives to restructure the police institution and modernise it. Defensoría del Pueblo del Perú (n 36) 49-56.

⁹³ Legislative Decree No. 1148, Peru’s National Police Act, was repealed on 18 December 2016 by Legislative Decree No. 1267, Peru’s National Police Act, which is still in force.

With regard to the Extraordinary Police Service Provision (hereinafter PSE), the law empowers the Director General of the Peruvian National Police (hereinafter Director of the PNP), to enter into agreements with private and public legal persons on behalf of the PSE. In addition, intervening police personnel may be on duty, on leave or on vacation, receiving in return an additional payment that is neither remunerative nor pensionable. In the event of accidents or deaths, they will be considered as acts occurring while on duty or in service.⁹⁴

The Ministry of the Interior must be informed of the conclusion of these agreements (art. 6 and 51 of the Law).

3.2.1.2. Supreme Decree No. 004-2009-IN approving the Regulations on the Provision of Extraordinary Services Complementary to the Police Function

Prior to the enactment of this law, section 51 of Law 27238 permitted the hiring of individual police personnel on behalf of third parties for the provision of security and surveillance services during non-working hours, however there was no regulatory framework specifying the rights and obligations of each party.⁹⁵ With the enactment of this Supreme Decree on July 15, 2009 by the Ministry of the Interior, the protection and police security personnel were regulated by the PSE (Single Transitory and Final Provision of the DS).

⁹⁴ Article 51 was amended by Law No. 28857, Law on the management of Peruvian National Police Personnel on 27 July 2006. This law was also repealed on 11 December 2012 by Legislative Decree No. 1149, Law on the Career and Status of Peruvian National Police Personnel, which is currently in force. The previous text of Article 51 was as follows: “*Artículo 51.- Prestación de servicios. 51.1 La Policía Nacional del Perú, previa autorización del Titular del Sector, podrá celebrar convenios para la prestación individualizada o localizada de servicios rentados de naturaleza particular. Los procedimientos y las modalidades de la prestación serán establecidos en el reglamento respectivo. 51.2 Los ingresos propios que se generen por la prestación de los servicios constituyen recursos directamente recaudados y serán asignados a la función policial. Se rigen y administran de conformidad con las Leyes de Gestión Presupuestaria del Estado y Anual de Presupuesto, así como las normas específicas de carácter institucional*” (tr. Article 51.- Provision of services. 51.1 The Peruvian National Police, with the prior approval of the Sector Head, may enter into agreements for the individual or localised provision of rented services of a particular nature. The procedures and methods of provision shall be established in the respective regulations. 51.2 Revenue generated by the provision of services constitutes resources directly collected and shall be assigned to the police function. They are governed and administered in accordance with the Laws on State Budgetary Management and Annual Budget, as well as specific institutional rules.

⁹⁵ Instituto Pacífico, “La prestación de servicios de los miembros de la PNP”, in *Revista Actualidad Gubernamental* (2009, 11), VII-1-VII-3.

This regulation referred to two PSE models which are personal⁹⁶ and institutional services. With regard to the institutional service, it specified that the protection and police security service would be provided to natural or legal persons, whether public or private, public entities in general and State-owned companies at the national level, provided that it does not compromise the image and respect for the institution.

In addition, it indicated that this service would operate when the Director of the PNP signs an agreement with the beneficiary and is charged with informing the Minister of the Interior. Its content should specify the period of time for which the service is to be provided, the number of police personnel to be seconded - specifying where the main personnel to be seconded should be provided from-, the logistical means to be used by the police force, the compensation in favour of the police force and the police institution, and insurance for damages against third parties. It details that the nature of the service is a police function for all intents and purposes and the service would be provided on a continuous basis.

From the explanatory memorandum and Article 2(c), it is clear that the reasons for which the PSE was regulated were to improve the economic conditions of police personnel and to generate income for the institution through the secondment of police personnel, thus distorting the purpose of the police service in favour of the protection of society in general.

3.2.1.3. Ministerial Resolution No. 2265-2006-IN/0301

Enacted on November 15, 2006 and resolved to approve Directive No. 007-2006-IN-0305 which established the technical guidelines and procedures for the formulation, negotiation, signing, execution, assessment and renewal of agreements the Ministry of the Interior had

⁹⁶ This model was provided by police officers before the issuance of the Regulations, as can be seen in Report No. A/HRC/7/7/Add.2 of 4 February 2008, in which concern was expressed regarding the hiring of members of the security forces during their free hours, using their uniforms and regulation weapons by private security companies. The report also indicates that there were reports where police officers hired under this arrangement violated privacy and even caused the death of environmental activists in Cajamarca. The United Nations Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, "Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination", A/HRC/7/7/Add.2 accessed May 2018.

reached with other public administration entities, national and foreign private legal entities, as well as those established with international organisations.

It specified the steps involved in signing an agreement with the police institution, which are: 1) the expression of interest of the entity to sign an agreement, 2) the formulation of the preliminary draft of the agreement, 3) negotiation, 4) formulation of the MR that approves the agreement, 5) approval, 6) signing and 7) implementation.

It is interesting to highlight the first stage in view of the fact that it is the police entity that expresses its interest in signing an agreement with a third party, in this case those who may request it are Senior Management, CEOs and police personnel who hold a management position; they must also consider that the agreements must meet medium and short-term institutional objectives (VI specific provision, letter B).

The regulations described above allowed the different Police Directorates to sign PSE agreements with private companies -including extractive companies-, so DIROES signed 21 agreements where it established counter-terrorist bases in the mining and hydrocarbon centres, accounting for approximately 4% of the national police personnel for this PSE.⁹⁷ In April 2013, 13 agreements were signed by the Territorial Directors and mining and hydrocarbon companies, specifying that this information is to be considered confidential by the police institution.⁹⁸

The second part of this paper will examine the actual regulation which is in force and used to regulate the PSE.

⁹⁷ Instituto de Derechos Humanos de la Pontificia Universidad Católica del Perú IDEHPUCP, *Diagnóstico Nacional sobre la situación de la Seguridad y el respeto a los Derechos Humanos. Referencia particular al sector extractivo en el Perú*, (2013, Lima, Peru). With regard to this information, the following should be noted: 1) that the detailed percentage does not include police personnel belonging to other Directorates or Police Divisions where this type of agreement has been signed, it only belongs to DIROES personnel and the universe was measured on the total number of police personnel in Peru. 2) In the assessment, reference is made to the number of agreements but the content is not accessible. 3) This assessment was commissioned by the working group on Voluntary Principles on Security and Human Rights in Peru.

⁹⁸ Alonso Ramos, "Policía Mercenaria", in *Hildebrandt en sus trece* (2013, Lima) 2-4 and 39-40.

3.2.1.4. *Legislative Decree No. 1267 of the National Police of Peru*⁹⁹

This law preserves the PSE regulation by modifying some criteria and that is that the method will now be carried out with personnel who are not in service and who wish to participate voluntarily. This service will also be provided to public or private sector entities that have situations that affect or compromise public order and citizen safety and security. The regulation incorporates the provisions of Supreme Decree No. 004-2009-IN, insofar as the police institution continues to be responsible for proposing the execution of these agreements, but the difference is that the request is made to the Ministry of the Interior (art. 6 and sixth Final Complementary Provision of the Legislative Decree).

It is clear from its content that the police institution must guarantee the “impartiality, objectivity and neutrality” of police personnel when exercising their functions, and police officers are prohibited from intervening in matters where their personal, economic and other interests may be in conflict with the performance of their functions or duties assigned to them by their role (art. 6 of the Legislative Decree).

This provision also makes explicit the double discourse that the Ministry of the Interior administers, since the PSE was removed from the personal service model (last paragraph of the sixth Final Complementary Provision and art. 6 of the D. Leg. 1267), where the economic benefit was only received by the police force, and the institutional agreement arrangement was maintained where the police personnel and the police institution benefit economically, thus observing that the State continues to maintain a regulatory framework to counteract the very low salaries it pays, transferring its obligation to its workers, depriving them of their employment rights such as vacations or breaks between weeks while at the same time deriving an economic benefit from it.¹⁰⁰

⁹⁹ This regulation was enacted on December 18, 2016, and still in force at the time of writing this paper, and is regulated through Supreme Decree No. 026-2017-IN.

¹⁰⁰ Although this aspect of the issue will not be addressed in this paper, it is important to consider it for future research.

3.2.1.5. Supreme Decree No. 003-2017-IN approving the guidelines for the implementation of police services in the performance of police duties

¹⁰¹

Unlike Supreme Decree No. 004-2009-IN, this refers to the PSE's nature no longer being solely one of "security and surveillance", but now the provision of "police services" in its entirety. Under this premise, the law states that contracts will only be signed with public and/or private sector entities that face situations that may compromise and/or affect public order and citizen security, as is the case of extractive companies, indicating that the service is external security¹⁰² (arts. 9, 10 and 11 of the DS).

The other difference is that the executed contracts must also contain: 1) the description of the possible logistical support by the beneficiary (transport, food, vehicles, accommodation, infrastructure and others contributing to the police work), 2) the personnel seconded to this service should not be on duty and their participation is voluntary, 3) the recognition by the beneficiary that they have no power of direction over the police personnel and therefore will not interfere with the police operations carried out by the seconded personnel, and 4) the recognition by the beneficiary that the provision of extraordinary services does not limit the police personnel to carrying out their institutional tasks (art. 13 and 15 of the DS).

With the intention of improving the situation of non PSE personnel but who may co-ordinate actions with those who do provide these services, the amendment to the regulation indicates that the former may benefit from death, disability, injury and emergency care insurance, as well as from the logistical support that the beneficiary entity will provide to the latter, which must be previously stipulated in the agreement (art.10, 14 and 15 of the DS).

With regard to the change in the nature of police service provision, it is this author's opinion that there is no difference with respect to what was regulated in earlier legislation, as it specified that the "security and

¹⁰¹ This regulation was enacted on February 20 2017, some of its articles were amended by Supreme Decree No. 018-2017-IN published on June 9, 2017.

¹⁰² It is not known what this external security service consists of because neither the regulation nor the agreements model approved in 2017 regulate it; however, the DIROES Report warns that its unit, within the framework of the previous regulation, carried out patrols and security activities at internal and external permanent posts, presuming then that this new method could only eliminate security through internal permanent posts.

surveillance” service also had the status of a “police function” (first supplementary provision of DS No. 004-2009-IN). This assertion is also consistent with article 8 of Law 27.238, which specifies that the police may intervene in all circumstances that their function requires because they are permanently on duty. What has changed substantially is the definition of those who benefit from the service and the intention to standardise the content of police agreements.

With regard to police personnel provided by PSE, in practice - and before the repeal of DS No. 004-2009-IN - the agreements stipulated that police personnel should not be on duty,¹⁰³ a similar situation occurs with the clauses recognising the extractive companies lack the managerial power and the inability to limit the responsibilities of police personnel.¹⁰⁴

3.2.1.6. *Ministerial Resolution N° 552-2017-IN*¹⁰⁵

This regulation stipulates that the working day of police personnel who provide extraordinary services in general is an 8-hour day or a 48-hour week. In addition, the payment to police officers who participate in the PSE to strategic facilities linked to the exploitation and transportation of natural resources is S/.15.63 soles per hour (the highest amount compared to other services that would benefit from this approach) and that police officers who cannot return to their home or place of habitual residence will be compensated at a daily rate of an amount equivalent to 2 hours of additional work.

From what has been described above, it could be inferred that the State is currently encouraging its police personnel to opt for providing extraordinary police services to extractive companies as opposed to other areas regulated by the law.

3.2.1.7. *Ministerial Resolution N° 562-2017-IN*¹⁰⁶

This regulation approves various models of agreements that must be observed by police personnel and state and private institutions, among them is the model agreement that must be signed with extractive companies. The clauses detailed in the model agreement approved by this

¹⁰³ This can be seen in clause 5.1.1 of the agreement between Tintaya and PNP and in clause 4.1.3 of the agreement between Yanacocha SRL and PNP.

¹⁰⁴ Acknowledgement of this can be seen in Clauses 6.2 and 10 of the agreement between Tintaya and PNP and Clauses 9.1 and 10 of the agreement between Yanacocha SRL and PNP.

¹⁰⁵ Published on July 9, 2017 and at the time of writing this paper is still in force.

¹⁰⁶ Published on June 12, 2017 and at the time of writing this paper is still in force.

Resolution will be discussed in point 5.3. of this research.

However, the aforementioned regulations have received a series of challenges since the existence of these agreements was made known in 2013. The IDEHPUCP,¹⁰⁷ for example, conducted a review of the previous regulations (DS No. 004-2009-IN) and considered that this measure is not illegal because it is in accordance with the law, but in practice it delegitimizes the police function. Other stances taken by social institutions are that the PSE regulated until recently by Supreme Decree No. 004-2009-IN and now established in Legislative Decree No. 1267 and Supreme Decree No. 003-2017-IN is unconstitutional for a number of reasons. Among them, they argue that this approach distorts the institutional purpose of the PNP recognised in art. 166° CPE, since the law does not give special attention to an advantaged sector of society such as extractive companies, but rather prioritises its attention on vulnerable social sectors. In addition, it is considered that the principle of impartiality and public interest established in article 39 of the CPE was affected, because this approach conflicts with the interest of the police officer, who is either defending the population or the company, thereby bringing about the privatization of the police function.¹⁰⁸

Sustaining the position of unconstitutionality, it is this author's opinion that these arguments should be complemented by the fact that the PSE does not correspond to the model of community policing prescribed by article 166° of the CPE, or to the criteria established by the United Nations in relation to police activity (Art 1 of the code of conduct for functionaries in charge of law enforcement). Legislative Decree No. 1267 and Supreme Decree No. 003-2017-IN state that the PSE will be provided only to public and/or private sector entities that face situations that may compromise and/or affect public order and public security. However, its content and the model agreement for extractive companies approved by MR No. 562-2017-IN do not regulate the means of participation, monitoring, coordination and/or inspection so that the citizens supposedly benefited by the measure can actively intervene in the maintenance of public order and citizen

¹⁰⁷ Instituto de Derechos Humanos de la Pontificia Universidad Católica del Perú IDEHPUCP (n 97) 9-17.

¹⁰⁸ Juan Carlos Ruiz et al., *El convenio Las Bambas y la privatización de la función policial como problema no resuelto* (2018), <<https://bit.ly/2mdHO7J>> accessed June 2018.

security, either through their representative social institutions or Local and/or Regional Governments.¹⁰⁹

Another point that must be examined is whether the arguments that sustained the enactment of Supreme Decree No. 003-2017-IN meet the criteria established by the Constitution and international instruments. Under this premise, it is advised that the foundation laid by the Executive Power to justify the issuance of this DS is primarily intended to improve the economic conditions of the police and even the police institution.

Secondly, in relation to the importance of increasing the presence of police officers in the areas where the PSE will be provided for the benefit of individuals and the population; and in relation to the beneficiary companies, it specifies that by providing them with the extraordinary police service, it creates a major impact on public safety, public order and domestic order, as well as on the perception thereof.

The analysis in the context of this work will be based on the last two arguments supporting the enactment of this measure, which is that DS No. 003-2017-IN does not specify the expertise required of the police personnel who will provide this police service, as does MR No. 562-2017-IN. Nor does it establish any criteria for their selection, a situation that consequently allows for a degree of discretion that has no objective basis and creates additional uncertainty because the previous regulation did not establish these guidelines either. In the signed agreements it was observed that the police personnel who stood out were or continue to be intelligence personnel, riot police or those in counterterrorism. Furthermore, it was noted that derogatory connotations have been conveyed when referring to persons or actions that disrupted their business activities, calling them *personas al margen de la ley* (tr. “persons outside the law”) or outlaws and were further singled out by the installation of counter-terrorism units within company facilities.

If we refer to chapter V of this research, an analysis of the current agreement model (and of the agreements approved with the previous

¹⁰⁹ Law No. 27972, Organic Law of Municipalities, of 27 May 2003, article 85 and Law No. 27867, Organic Law of Regional Governments, of 18 November 2002, article 61 recognise the obligation of Local and Regional Governments respectively to establish a system of public security with the participation of civil society and the PNP. This is also the case with Supreme Decree No. 012-2017-DE approving the National Security and Defence Policy, published on 22 December 2017 in its objective No. 01, which regulates the active, articulated and integral participation of all State institutions, including Regional and Local Governments and society as a whole, in order to guarantee national security and defence.

regulations) will show the degree of influence that extractive companies have in relation to police action, thereby allowing a better positioning of a private entity when compared to other forms of social representation in extractive sectors.

In addition, there was no substantial change in the type of extraordinary police service in relation to the number of police personnel, nor were there any channels established for public participation to warn of these excesses or to supervise the provision of services. Consequently, it is the author's opinion that this argument is not objectively justified, becoming entirely arbitrary and therefore would not be in the general interest.

With regard to the high impact on public security, public and domestic order and public perception, the study of 2013 entitled *Diagnóstico Nacional sobre la situación de la Seguridad y el respeto a los Derechos Humanos con referencia particular al sector extractivo en el Perú* (tr. National Diagnosis of the Security Situation and Respect for Human Rights with Particular Reference to the Extractive Sector in Peru) showed that the PSE then regulated by Supreme Decree No. 004-2009-IN in practice had the effect of de-legitimising the police function. As a result, human rights advocates, including regional and provincial government officials, perceived there was an alliance between the state and the mining company, and consequently a subordination of the PNP in the latter's interests.

For this reason, they felt intimidated by their work in the defence and promotion of human rights. In some cases, this perceived lack of impartiality was extended to other state institutions such as the Public Prosecutor's Office and the Ombudsman's Office,¹¹⁰ a perception that is also familiar to police officers and mining companies.¹¹¹

Finally, given that Legislative Decree No. 1267 and Supreme Decree No. 003-2017-IN did not make substantial changes with respect to the manner in which the PSE will be provided, it could also be inferred that

¹¹⁰ Interviews with Javier Torres Seoane (SER research anthropologist), Julia Cuadros Falla (Executive Director of the NGO CooperAcción), Manuel Moisés Silva Chávez (Municipal Manager of Celendín-Cajamarca), Gregorio Santos (President of the Regional Government of Cajamarca), Miguel Vizcarra (President of the Frente de Defensa de los Derechos del distrito de Torata) and Wilfredo Saavedra (member of the Frente de Defensa ambiental de Cajamarca), between 2012-2013 for the drafting of the National Assessment of the State of Security and Respect for Human Rights with particular reference to the extractive sector in Peru, IDEHPUCP (n 97) 87-124.

¹¹¹ Interviews with the Head of the Cajamarca Police Force, Legal Manager of Newmont and Security Supervisor of the Angloamerica mining company, between 2012-2013 for the preparation of the National Assessment of the State of Security and Respect for Human Rights with particular reference to the extractive sector in Peru, IDEHPUCP (n 97) 87-124.

this perception may continue to be upheld in society, in clear breach of the guidelines of the Code of Conduct for Law Enforcement Officials and the provisions of the CPE.

3.2.2. The regulations governing the legal treatment of social conflicts and the use of force

As in the previous section, in the case of the legal treatment of social conflicts, we will first discuss the most important guidelines of each of the provisions that regulated police action in the two social conflict scenarios under examination in the first instance, followed by a description of the regulatory modifications currently in force to demonstrate the institutional policy that exists in relation to this issue.

This first part will discuss the regulations related to the legal treatment of social conflicts and the use of force, which were in force during the analysis period of this paper.

*3.2.2.1. Law 29.334 on the organisation and functions of the Ministry of the Interior*¹¹²

With regard to social intervention and control, it should be pointed out that Article 9 of the law states that it is the function of the Vice Minister of Internal Order to conduct sector planning and formulate policy to guarantee internal order through the Peruvian National Police.

3.2.2.2. The Organic Law of the National Police of Peru N° 27.238

Article 7 of the Act and article 9 of the Regulations specify that the National Police is the only entity whose main function is to maintain public security and peace for the free exercise of fundamental rights, to safeguard the life and physical integrity of persons, public and private property, and to ensure the security of public goods and services.

With regard to the use of force, it should be noted that article 10 of the Act and article 12 of the Regulations incorporate into national legislation the Code of Conduct for Law Enforcement Officials, calling for its observance.

¹¹² This law was published on March 22, 2009 and repealed on December 10, 2012 by Legislative Decree No. 1135, which was also repealed on December 17, 2016 by Legislative Decree No. 1266, Law of the Organisation and Functions of the Ministry of the Interior, and is in force as of the writing of this paper.

The PNP office that participates in the reinstatement of internal order is the General Directorate, the highest-level institution, is advised by the General Staff. Both governing bodies are high ranking institutions (art. 14 and 15 of the Regulations). Then there are the executive bodies made up of the Executive Directorate of Order and Security and the Executive Directorate of Special Police Operations (hereinafter DIREOP), where the Territorial Directorates and the specialised police divisions are attached respectively (art. 13 of the Regulations).

The Territorial Directorates carry out the police functions in a given geographical jurisdiction and may group together several police regions. It has a Special Services Division that is organised into several units; the Special Services Unit (hereinafter USE) is responsible for restoring internal order within the territorial jurisdiction.

The DIREOP has among its specialised directorates the Special Operations Directorate, which is the regulatory, technical and executive body responsible for providing support to the Territorial Directorates in restoring internal order when the latter's capacities are exceeded. DIREOP acts through the Special Operations Division (hereinafter DINOES), which is considered an elite unit of the PNP because its main function is to restore and fight terrorism. They are trained for confrontation, applying ambush techniques, firing and tactical operations. Its organisation is a militarised model and they make use of this type of weaponry.¹¹³

3.2.2.3. Ministerial Resolution No. 1452-2006-IN.

This resolution was published on June 12, 2006 and adopts the “Manual on Human Rights Applied to the Police Function”. This instrument establishes police procedures within the framework of the observance of human rights, and thus the PNP defines “force” as the compulsive means to achieve control of a situation that threatens security, public order and the lives of people, applying a discretionary, legal, legitimate and professional act; its excessive use is transformed into violence.

It acknowledges that there are scenarios in which various models of

¹¹³ Secretaría Técnica del Consejo Nacional de Seguridad Ciudadana (Technical Secretariat of the National Citizen Security Council)-CONASEC, *Plan Nacional de Seguridad y Convivencia Social* (2012, Lima).

resistance are used by people to prevent the restoration of public order. The first level is the passive resistance that manifests as a latent risk; the latter is defined as the permanent threat, not visible and present in any police intervention, and in addition is related to the geographical and socio-economic environment and criminal activities that occur. It acknowledges that there are scenarios in which various models of resistance are used by people to prevent the restoration of public order. The first level is the passive resistance that manifests as a latent risk; the latter is defined as the permanent threat, not visible and present in any police intervention, and in addition is related to the geographical and socio-economic environment and criminal activities that occur. Passive resistance is also expressed by the PNP in terms of the cooperation or non-cooperation that exists on the part of citizens who violate the law, or alleged offenders, to the extent that the latter abides by the guidelines and maintains respect for the act of police authority or, failing that, does not abide by them but does not escalate to a level of physical aggression. The other level of resistance is active resistance, understood as physical resistance, non-lethal and lethal aggression towards the role of police officers. (Chapter 2 p 21)

On the subject of these levels of resistance, it is the police force that regulates the use of force, since in passive resistance scenarios the level of force used by the police is measured, first by the police presence that demonstrates authority, deters and prevents the commission of a crime, second by visual contact and third by the use of verbal communication. In active resistance scenarios it is necessary to take physical control as well as non-lethal or lethal defensive tactics as measures, depending on the scenario faced.

It also considers that public nuisance is expressed when there are marches, rallies, demonstrations and other types of protests, without considering that these are in reality the legitimate exercise of the right to freedom of expression and opinion, freedom of association and peaceful assembly recognized in international treaties and in the CPE¹¹⁴. Finally, it does not differentiate between criminal violence and social conflict scenarios.

¹¹⁴ The right to freedom of assembly is recognised in art. 21.a of the ICCPR, art. 15.b of the ACHR and art. 2.12 of the CPE. The right to freedom of expression is recognised in art. 19.a of the ICCPR, art. 13.b of the ACHR and art. 2.4 of the CPE.

3.2.2.4. *Vice-Ministerial Resolution No. 033-2009-IN/0103.1*¹¹⁵

This resolution was enacted on July 17, 2009, approving Directive No. 1-2009-IN/0103.1 entitled “Establishing procedures for the respect of the fundamental rights of persons in the management, organisation and execution of operations for the control, maintenance and restoration of public order”, and the Directory for police personnel participating in operations for the maintenance and restoration of public order (hereinafter the Police Directory). According to the Ombudsman’s Office, this was the only provision that included specific rules for dealing with situations of violence in social conflict scenarios.¹¹⁶

It also advises that this provision applied the same rationale for dealing with social protests as with delinquent acts, failing to consider that the former arise from inadequate management by the State to deal with citizen complaints, and that in most cases their demands involve possible violations of human rights.

3.2.2.5. *The National Police’s Operation in Response to Violence in Social Conflicts*

The DP prepared a report on police action in social conflict¹¹⁷ scenarios, specifying that in this scenario the PNP’s capacity to exercise its functions in the area of restoring public order and protecting rights is significant. Police intervention is carried out through operational plans and orders detailing the socio-political context in which the intervention will take place, the number of police officers deployed, the line of command and functional responsibilities, operational strategies, objectives and risk assessments (art. 10.1 of the Regulations of Act No. 27238). Thus, the DIREOP and other specialised entities of the General Staff draw up general operational plans, which are a reference document for the operational plans applied to each specific case, in addition to being involved in the preparation of operational orders.

The basis for the development of the operational instruments

¹¹⁵ This resolution is currently not available on the Ministry of the Interior website. For purposes of analysis, the 2012 report of the Office of the Ombudsman and Report No. 02-2013-DIROES-PNP/EM-UNIPED prepared by DIROES in 2013 were taken into account.

¹¹⁶ Defensoría del Pueblo del Perú, *Informe N° 156: Violencia en los Conflictos Sociales* (2012, Lima) 89-96.

¹¹⁷ The work of the Ombudsman’s Office is cited to the extent that it analyses various Directorial Resolutions that are not found on the web because they are internal documents of the Peruvian National Police, such as Vice-Ministerial Resolution No. 033-2009-IN/0103.1 and Directorial Resolution No. 1988-98-DGPNP/EMG, dated July 1, 1998.

indicated by the Police is the information provided initially through the Special Services Unit (USE). The information should detail the geo-political, social and economic context of the area, identify the possible root causes, the actors involved, the activities planned by the demonstrators, an assessment of the risks, among other factors. This information is based on assumptions and specific facts.

It deems operational plans to be provisional measures that the National Police decides to undertake to respond to a disruptive situation of limited duration based on intelligence information. Operational orders are executive instructions that a command transfers to a subordinate for execution.¹¹⁸

Furthermore, in the execution phase of the operations it observed three instances of intervention: 1) the operations directorate in charge of the High Command, DIREOP, Specialised Directorates, Territorial Directorates and Regional Headquarters, all of which are in charge of controlling, supervising and evaluating the entire process of police intervention, 2) the organisation of operations in charge of the operational commands that were given the mission of restoring public order, establishing the line of command and the special arrest and response groups with firearms, determining the places of detention and liaising with the Public Prosecutor's Office, and 3) the execution of operations involving all police personnel either directly or indirectly involved in the operations.¹¹⁹

It is the author's opinion that the National Police are limited when drawing up a Plan of Operations for dealing with social conflict as it is not differentiated in its legal treatment. What is produced in practice is a reinforcement of treating social conflicts as criminal acts that alter social order in the first place, and the social institutions that call for and/or support social protests as adverse forces that they must defend themselves against or repel. This assessment can be seen, for example, in the 2010¹²⁰ General Operations Plan No. 4 for the restoration of public order:

¹¹⁸ Defensoría del Pueblo (n 116) 112-121.

¹¹⁹ Peruvian National Police, "Cartilla para el personal policial que participa en operaciones de mantenimiento y restablecimiento del orden público" (2009), <<https://bit.ly/2L5ZWP1>> accessed 2018.

¹²⁰ This plan makes specific reference to situations of social conflict and was obtained through a judicial process because it is a document restricted to the PNP.

18. Las Marchas, Paros, Huelgas, Mitines y otros tienen resultados significativos, afectando el normal desarrollo de todos los campos de la actividad nacional, que a su vez se trasluce en un clima de intranquilidad, sensación de inseguridad y descontento social; constituyéndose algunas veces en acciones de envergadura que producen connotación nacional e internacional.

C. Fuerzas Adversas

1. Organizaciones y gremios en conflicto, contrarios al gobierno.
2. Organizaciones Indígenas.
3. Gremios de Cocalleros, Agricultores, Frentes de Defensa en conflicto y otros.
4. OO.TT.
5. DD.CC.
6. Delincuentes Terroristas infiltrados en los diferentes gremios.
7. DDCC, que bajo la cubierta de DDTT aprovechen la coyuntura para cometer delitos.
8. ONGs que instigan la violencia (defensoras del medio ambiente).

The assumptions they make in order to build strategies for restoring public order are based on the premise that, faced with police intervention, the adverse forces will provoke confrontations in order to generate social costs, and specifically social-environmental organisations will implement radical initiatives that threaten the mine's infrastructure.

D. Suposiciones

1. Que las Organizaciones Indígenas que agrupan a las comunidades nativas (AIDSEP, CAOI, CONQA, ETC.), Centrales Sindicales (CGTP, CNTCCP, SUTEP, FENDUP, FENTUP, FECHOP, CUT, FENUTSA, AIDSEP, ETC), Frentes Regionales, así como organizaciones políticas ejecuten o promuevan la realización de
2. Que durante la materialización de la movilización, ejecuten bloqueos de vías, afectando el desarrollo de las actividades socio-económicas, y que, ante la intervención de la PNP para restablecer el orden público, los agitadores provoquen enfrentamientos con las fuerzas del orden tratando de generar costo social.

8. Que, las ONGs defensoras del medio ambiente continúen exacerbando los ánimos y el rechazo del campesinado y de las organizaciones populares como las RRCC de las zonas alto andinas de Piura, Cajamarca, Ancash, La libertad, Pasco, Arequipa, Cuzco, Apurímac, Puno, Amazonas, San Martín, ejecuten acciones de fuerza concertadas, con perfiles radicales y que atenten contra infraestructura minera, sus ejecutivos, toma de rehenes, bloqueo de

vías, afectando el normal desenvolvimiento de las actividades ciudadanas.

There appears to be a lack of an official notice of this operational plan, for example measures that refer to the protection that police officers must provide to those who exercise their right to protest, nor are there mechanisms to allow social protest and, at the same time, or alternatives to minimise the disruption that may be caused to the running of social activities. This document ignores the fact that the exercise of social protest may generate disruptions in the day-to-day running of social activities, but that these scenarios are part of the development of a democratic society, and that their limitation must be duly justified since this right is at the same time an essential characteristic of the democratic system.¹²¹

This will be followed by a review of the regulations relating to the legal treatment of social conflicts and the use of force, which are currently in effect.

3.2.2.6. Legislative Decree No. 1186 regulating the use of force by the Peruvian National Police¹²²

This decree regulates the use of force by the PNP in accordance with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Code of Conduct for Law Enforcement Officials. It also includes many concepts and contributions developed in the Manual on Human Rights applied to the police function in 2006, such as the general rules for the use of force, levels of resistance and

¹²¹ IACHR, "Criminalization of Human Rights Defenders," OEA/Ser.L/V/II.Doc.49/15 (2015), 63-66 <<http://oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>> accessed 2018.

¹²² This regulation was enacted on August 15, 2015, is still in force today, and is regulated by Supreme Decree No. 012-2016-IN enacted on July 26, 2016.

use of force, the application of its principles and the regulations for the conduct of police personnel, and includes the responsibilities for police intervention in a regulation with the legal status.

However, the legislative content of the law and its regulations do not include, for example, the concept of social or socio-environmental conflicts, thus placing it within the category of a riotous gatherings, understood as the multitude of people who come together in a place for a given reason, whether it is violent or not (art. 3.i of the Regulation).

3.2.2.7. Ministerial Resolution No. 0813-2016-IN

This is a regulation that has been in force since August 31, 2016, which provides that all PNP personnel must exercise their operational functions to restore and maintain public order, respecting the Political Constitution of Peru, Legislative Decree No. 1186 and the Manual of Operations and Restoration of Public Order.

3.2.2.8. Directorate Resolution No. 179-2016-DIRGEN-EMG-PNP

This resolution adopted the Manual of Operations and Restoration of Public Order on March 22, 2016. In the same spirit as the Manual that preceded it, this document applies a unified police approach to social protests as well as to criminal acts. It justified the differentiated and progressive use of force according to the level of resistance maintained by the population and did not examine the reasons behind the situation and nor did it consider the possibility for the police institution to promote measures other than the use of force.

3.2.2.9. Ministerial Resolution No. 487-2018-IN

This resolution was published on March 28, 2018 and provides for the pre-publication of the draft Handbook on Human Rights as applied to the Police Function with the intention of receiving input from civil society.

From the above detailed Resolutions, the documents reviewed and the DP report, it can be seen that the State, through the police institution, pursues a policy that addresses violence in social conflicts from the perspective of criminal violence. However, these documents do not specify the extent to which the State perceives these events as dangerous. Thus, within the classification of the concepts of citizen security, public order and internal order, the State classified social conflicts in a grey area

that borders somewhere between public order and national security.¹²³

This statement is also inferred from the Report prepared by DIROES in 2013, where it stated that in the high Andean and jungle areas where the exploitation of minerals and hydrocarbons is located, there are activities directed at internal disorder, which is why its management has 22 counter-terrorist units placed in mining and hydrocarbon exploitation centres, among which is the Conga mining centre that belongs to the Yanacocha SRL mine, participating in the preventive and active stages of the conflict. In addition, conflicts are considered in conjunction with terrorism, drug trafficking, organised crime and illicit drug trafficking as hybrid threats, and consequently the State has been opting for the military specialisation of its police units and the exceptional participation of the Military Forces¹²⁴ in areas declared to be in states of emergency.¹²⁵

Another situation that is important to highlight is that the PNP views police presence as a preventive use of force because it deters and prevents the commission of criminal acts. Under this premise, and bearing in mind that it classifies social conflicts as hybrid threats and the places where they take place as scenarios of passive resistance, the PSE allows the use of force in the first instance at a preventive level by police personnel in areas located near extractive projects to achieve control of hybrid threats (owing to the specialism of the police officers who stand out), thus favouring an actor in civil society and not the community as a whole.

As a result, the actions of the PSE must be assessed to see whether or not it meets the international criteria for the use of force, that is to say whether the measure proves to be exceptional and complies with the principle of legality, necessity and proportionality. For the purposes of analysis, the Inter-American Court of Human Rights (IACHR) considers that this situation should be evaluated in three phases: preventive actions, concomitant actions, and subsequent actions.

¹²³ Sonia Alda, “¿Qué modelo de fuerzas es necesarios para el actual escenario de inseguridad? Una propuesta para el Perú”, in *Revista temática Centros de Altos Estudios Nacionales* (2016, 2), 48-78.

National security is a judicial asset whose impairment implies a serious deterioration and threat to territorial integrity; it is violence to the very foundations of the democratic system by political elements or by those intending to impose an ideology; the Armed Forces are responsible for its defence (Exp N° 0005-2001-AI/TC, f. 2).

¹²⁴ Tribunal Constitucional del Perú, Exp N° 0002-2008-PI/TC, 46.

¹²⁵ Instituto de Derechos Humanos de la Pontificia Universidad Católica del Perú IDEHPUCP (n 97) 125-132 and Alda (n 123).

With regard to preventive actions, it is the opinion of the author that the State could be failing to establish adequate internal policies to regulate the re-establishment of public order and the use of force in scenarios of social or socio-environmental conflicts. Since 2006,¹²⁶ it has issued ministerial regulations regulating operations to restore and maintain public order, in which it assigns the same treatment to social conflicts as it does to acts of criminal violence. This was specifically seen in the operational plans under consideration, ignoring the fact that the former entails a burden in its claims of possible violation of human rights, which is why its nature is unique,¹²⁷ and reinforces the view of social expression being a criminal act. In addition, the 2016 manual is the first document to refer to the use of force in cases of restoration of public order, and until 2015 there was no rule of law regulating the use of force in the police sector. In conclusion, to date there has been no regulation with legal or ministerial status that addresses the use of force in particular settings such as social conflicts and provides it with special treatment.

This author also believes that there could be non-compliance with the provision of weapons, ammunition and equipment adequate for the differentiated use of force, since the police personnel of DINOES and USE do not have adequate infrastructure to deal with scenarios of re-establishing internal order, thereby creating a risk to the human rights of persons involved in social conflicts. A similar situation unfortunately occurs in the education and training of police personnel responsible for re-establishing public order,¹²⁸ thus disregarding Resolution No. 1989/61, which establishes guidelines for effective compliance with the Code of Conduct.

¹²⁶ This assertion is made due to the temporary curtailment of the investigation, which does not mean that the State has not issued, prior to 2006, regulations related to the restoration and maintenance of public order.

¹²⁷ Defensoría del Pueblo (n 116) 89-101.

¹²⁸ The conclusions reached regarding the provision of weapons, ammunition and equipment, as well as the training and education of police personnel, were obtained from Ombudsman's Report No. 156 prepared by the DP and from interviews with the Director of the Centre for International Humanitarian Law and Human Rights of the Armed Forces, Director of DIROES, the Chief of the Police Department, Director of DIROES, the Chief of the Police Department of Cajamarca, Director of the Territorial Police Department of Moquegua between 2012-2013 that were collected by the Institute of Human Rights of the Pontifical Catholic University of Peru IDEHPUCP for the preparation of the National Assessment on security and respect for human rights with particular reference to the extractive sector in Peru, (n 97) 87-124. In addition to this situation, in the framework of the aforementioned investigation, the Armed Forces and the PNP refused to provide information regarding the location, number and equipment of their personnel at the national level, arguing that this information is within the exemptions of access to information. Instituto de Derechos Humanos de la Pontificie Universidad Católica del Perú IDEHPUCP (n 97).

Neither would the State use force exceptionally, since from 2012 to the present day it has not seriously resolved social conflicts by continuing to address them in a fragmented manner following an outbreak of violence in a conflict. Thus, expressing the State's view by first adopting defence policies before assuming management measures as warned by the National Security and Defence Policy of 2017, observing a possible breach of Article 2 of the ACHR.

Regarding concomitant actions, where the principle of legality, absolute necessity and proportionality are applied, the PSE would not comply with the principle of legality because its design does not meet the criteria recognised by the United Nations (UN) regarding police actions as warned in paragraph 3.2.1 of this research, this approach may also distort the purpose of policing and could therefore affect the principle of impartiality established by the CPE as expressed in Chapter V of this paper, so this measure is not aimed at achieving a legitimate objective.

With regard to the principle of absolute necessity, in instances where the PSE is in place permanently in mining areas and their surroundings, irrespective of whether the internal order is effectively disrupted, there are times when there are no specific individuals posing a direct danger or threat. The aim of the measure is precisely to use the police force to first prevent these domestic disruptions. However, by treating the social conflict violence as acts of criminal violence, what is happening in practice is perceived as intimidating the work of human rights activists¹²⁹ who intervene in the areas surrounding extractive activity (providing services to individual entities) as a result of the use of increased numbers of police trained in riot control. On the other hand, it must be understood that the PSE does not solve the issue of social conflicts and potential violence that can be exercised in these scenarios. This is due to the fact that the grievances have a particular characteristic, the treatment of which is not the criminalisation of these grievances, but the appropriate management of the citizens' demands, which from 2012 to the present day have not been implemented in a reliable manner.

Finally, with regard to proportionality, it is noted that the PSE makes excessive use of police force, without considering that it is used in scenarios where the resistance of the population adjacent to the mining company is variable, since the measure regulates preventive actions

¹²⁹ For further information, see section 3.2.1 of this document.

such as mobile patrolling or walking in the areas adjacent to the extractive projects and security of installations with militarised police personnel in fixed posts,¹³⁰ specialised in riot control or intelligence in scenarios where in a period of time there were moments of escalation and even crisis in social conflicts,¹³¹ but where there are also situations of tranquillity and no disturbance of public order, due to the fact that the conflict is in a latent state or under discussion.¹³²

Consequently, it can be concluded that there are indications that could demonstrate that the PSE, regulated in Supreme Decree No. 004-2009-IN and now established in Legislative Decree No. 1267 and Supreme Decree No. 003-2017-IN, does not comply with international guidelines and the nature of the CPE with respect to the police function.

¹³⁰ This information is taken from Report No. 02-2013-DIROES-PNP/EM-UNIPPEP prepared by DIROES in 2013.

¹³¹ Escalation and crisis are phases of social conflict. The first refers to an increase in tensions between the parties to the conflict and intensification of actions leading to direct physical violence, and the second is the phase in which acts of violence committed by parties to the conflict occur. Ombudsman's Office (Defensoría del Pueblo) (n 116) 30-34.

¹³² The latent state of a conflict occurs when the problem has been perceived but the conflict is not publicly manifested or the parties stopped publicly expressing their disagreement, being inactive, hidden. Dialogue is a phase of conflict where the parties seek to build agreements. Ombudsman's Office (Defensoría del Pueblo) (n 116) 30-34.

4.

INTERNATIONAL AND NATIONAL REGULATORY
FRAMEWORK ON EXTRACTIVE INDUSTRIES

Having put forward some arguments that allow us to consider the possibility of non-compliance with international and national criteria in relation to PSE and the treatment of social conflicts, as well as a continuation of state policy in relation to these issues, the question that arises next is whether or not extractive companies as an actor in these conflicts, have any degree of responsibility when within the PSE framework, for the part police officers play in infringing the human rights of third parties and in understanding what the obligations would be, if any, in relation to business activity at international or national level.

The following chapters will provide answers to the questions posed above. This chapter will address the last question which is the relevance of the international and national regulatory framework in relation to the obligations or commitments that companies in general have or assume respectively, and will also focus on the responsibility of not being complicit in the actions of “third parties” that relate to their commercial operations, products or services, whether natural or legal, public or private. This chapter will also seek to present case law that demonstrates its application to specific cases at the national level.

4.1. INTERNATIONAL REGULATORY FRAMEWORK ON EXTRACTIVE INDUSTRIES

4.1.1. *International attempts to regulate the activities of transnational corporations*

Companies are an important stakeholder and in some cases they more powerful than a State due to the role they play in the world market. Their economic activities can have a significant impact due to their presence in several continents, the number of people directly and indirectly linked to them, and the socio-environmental cost they can generate in the world. Their role is of such magnitude that even in the criminal trials after World War II German companies were charged with corporate criminal liability for their participation in the commission of international crimes.¹³³

In the 1970s, when a new international economic order was being established and new independent countries were emerging, the “Group of 77” expressed to the international community the need to regulate the actions of transnational corporations, due to the degree of power they could accumulate and the influences they could generate to the detriment of their newly consolidating national sovereignties.¹³⁴

Thus, the United Nations decided to address this concern in order to equalize the distribution of wealth between developed and developing countries, and to regulate growing entrepreneurial power. In 1982 the first draft of the Code of Conduct for Transnational Corporations was presented and due to the disputes between the two international factions (these were between developed and developing countries), the debate on the issue continued until 1992 when the negotiations were suspended; the fact is that developed countries were looking for a minimalist code with non-binding guidelines while the developing countries aspired to achieve a binding and regulatory standard.¹³⁵

De Schutter points out that since 1970 the Organisation for Economic

¹³³ Humberto Cantú Rivera, *Empresas y derechos humanos: ¿hacia una regulación jurídica efectiva o el mantenimiento del status quo?* (Universidad Nacional Autónoma de México, Anuario Mexicano de Derecho internacional del Instituto de Investigaciones jurídicas, 2013) 313-354.

¹³⁴ Olivier De Schutter, “Foreword: beyond the Guiding Principles” in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013).

¹³⁵ Cantú Rivera (n 133).

Cooperation and Development (hereinafter OECD) had been debating the same issue, approving in 1976 the Guidelines for Multinational Enterprises, updating these non-binding guidelines for States until 2000 when its supervisory mechanism was strengthened.¹³⁶

In November 1977, the International Labour Organisation (hereinafter ILO) approved the Tripartite Declaration on Multinational Enterprises and Social Policy on a voluntary basis, and the States adopting the declaration were required to prepare a report every four years on the application of the principles set out in the Declaration.

Due to the environmental and human rights impacts of rampant corporate activities, in 1999 UN Secretary General, Kofi Annan, proposed nine voluntary principles related to environmental issues, employment and human rights at the World Economic Forum in Davos-Switzerland. In 2004, the fight against corruption was added as an additional topic.¹³⁷

Between 2002 and 2003, the UN Sub-Commission for the Promotion and Protection of Human Rights adopted Resolution 2003/16, containing the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights. This instrument regulated the obligations that companies should assume within their sphere of control and influence, and which were binding on them together with the State because they were society bodies. This measure was declared legally null and void by the UN Commission on Human Rights at its 56th session on 20 April 2004.¹³⁸

Between 2005 and 2011, the UN Commission on Human Rights appointed John Ruggie as the Secretary-General's Special Representative on Human Rights and Transnational Corporations. During his tenure, he designed the Guiding Principles on Business and Human Rights that implement the conceptual framework of "Protect, Respect and Remedy".

Finally, with the purpose of implementing these principles, in 2011 the Office of the UN High Commissioner for Human Rights set up a Working Group on the issue of human rights and transnational corporations and other business enterprises, which is still in operation today.¹³⁹

¹³⁶ De Schutter (n 134).

¹³⁷ *ibid.*

¹³⁸ Cantú Rivera (n 133). For more information see the document entitled "UN Doc. 2004/116 of 20 April 2004 on the Responsibilities of transnational corporations and other business enterprises with regard to human rights, see: <<http://ap.ohchr.org/documents/S/CHR/decisions/E-CN-4-DEC-2004-116.doc>> accessed 07 August 2018.

¹³⁹ Cantú Rivera (n 133).

4.1.2. *Corporate Responsibility within the Global System*

4.1.2.1. *The United Nations Global Compact*

This Pact governs ten universal principles to promote corporate social responsibility in the areas of human rights, employment standards, the environment and the fight against corruption in the activities and business strategy of companies, being one of the largest voluntary initiatives in this area in the world.¹⁴⁰ This is an initiative where adherence is not based on compliance with the principles nor does it have the purpose of sanctioning non-compliance, but rather it focuses on building spaces for companies to implement these instruments in the most effective way within their commercial activity and through the experiences of their peers. One of the commitments undertaken by the company is to present an Annual Report on its progress in implementation.¹⁴¹

The first two principles relate to human rights, the first of which specifies that companies should respect and support the protection of universally recognised fundamental human rights. Respect means due diligence to ensure that human rights are not violated and to address the negative impact of the company's behaviour.

The second advocates that companies should not be complicit in the violation of human rights, specifying that this principle has two elements that are the action or omission to support a third party that violates human rights and the knowledge of the company that its conduct could help in the commission of the crime. It also indicates that complicity can be: 1) direct, when the company supports the violation of human rights, 2) advantageous, when the company obtains some benefit from the violation of human rights, and 3) tacit, when knowing in the interaction with the authorities that the violation of human rights is committed, the company decides not to act and therefore allow the violation.

With respect to the scope of their responsibility, the Global Compact considers that associated companies, should assess three factors in order to avoid any possible negative impact resulting from their activities. These are: 1) whether the legal system and the context of the country in which they operate violate international standards or the standards

¹⁴⁰ United Nations Global Compact, "The Ten Principles of the UN Global Compact," (n.d.), <<https://bit.ly/1TNldZL>> accessed June 2018.

¹⁴¹ International Federation for Human Rights FIDH *Corporate Accountability for Human Rights Abuses. A Guide for Victims and NGOs on Recourse Mechanisms* (2016), 553-562.

are inadequately applied, 2) whether their activity (through their own actions or those of third parties) is causing or contributing to the violation of rights and their policies and practices should be adjusted to prevent it, and 3) consider the background of the entities with which the company is linked (private or public) in order to avoid complicity.

The Global Compact Office is also empowered to receive complaints of serious or systematic abuses by one of its subscribers, forwarding the information to the company for comment and informing the office of any steps taken to address the problem. The Office can assist in remedying the alleged situation, pursue legal redress and, as an extreme measure, exclude the organisation from the Pact.¹⁴²

With respect to the companies to be discussed in this paper, it is noted that Yanacocha SRL joined the Compact in April 2004, and that Glencore signed it in June 2014, after its merger with Xstrata PLC.

This approach adopted by the UN is now criticised by many organisations in civil society on the grounds that it favours “greenwashing”. Organisations are subscribed to the Compact and can use the logo and present their companies to society as a whole as being compliant with the principles, when in reality this measure does not certify effective compliance with these principles set out in the Compact or compliance with human rights.¹⁴³

4.1.2.2. *Guiding Principles on Business and Human Rights*

This instrument was prepared by the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations (Report No. A/HRC/17/31), and the Guiding Principles were endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011. It does not have the character of an international instrument that States can ratify because the Council, in endorsing it, endorsed this responsibility by the Member States of the United Nations, and because it clarifies the obligations that the State has under international law and are guidelines that companies must observe in order to have their activities recognised as respecting human rights.¹⁴⁴

¹⁴² United Nations Global Compact, “Integrity Measures” (2016), <https://unglobalcompact.org/docs/about_the_gc/Integrity_measures/Integrity_Measures_Note_EN.pdf> accessed June 2018.

¹⁴³ International Federation for Human Rights FIDH (n 141).

¹⁴⁴ OHCHR, *Frequently Asked Questions about the Guiding Principles on Business and Human Rights*, HR/PUB/14/3 (2014), <https://ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf> accessed 2018.

As a result, these principles do not create new obligations under international law, but clarify those already assumed by the parties and are based on the obligation of the State to provide protection against human rights abuses committed by third parties, including business, the obligation of corporations (regardless of their size or business activity) to respect human rights, and the need to improve access to effective remedies, both judicial and extrajudicial for victims of human rights abuses.¹⁴⁵

In relation to the obligations of the State, Founding Principle 2 of the Guiding Principles (United Nations Guiding Principles on Business and Human Rights) recommends to the UN the possibility of adopting an extraterritorial regulation of the activities of companies registered in a jurisdiction different from the place where they operate, with the intention of ensuring predictable behaviour and respect for human rights outside their State of origin, as a measure to prevent, investigate, punish and redress abuses committed by private agents.¹⁴⁶

In relation to company obligations, it stipulates that a company's responsibility is by action or omission of its own acts or those of third parties, understanding "third parties" to be persons related to its commercial operations, products or services, whether natural or legal, public or private. In addition, there is a requirement that the company's conduct be diligent in preventing and mitigating possible threats, as well as being answerable to the negative consequences of their activity and those caused by third parties (founding principles 13 and 17).

Actions or diligent measures taken by the company will be considered in the light of the following factors: 1) the national context in which the corporation carries out its commercial activities, in order to assess the international commitments assumed by the State, and the differences between international standards, laws and national practice in the area of human rights, 2) the impact that its activity has or can carry out in relation to the human rights of the different social groups they interact with, and 3) the relationship it has with third parties, as the company is under an

¹⁴⁵ John Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises." A/HRC/17/31 (21 March 2011).

¹⁴⁶ OHCHR, *Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04 (2011), <https://ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 2018.

obligation to avoid being complicit in the harm or damage caused by third parties.¹⁴⁷

However, a company can become an accomplice when, with knowledge of the harmful practices carried out by third parties linked to it and despite having the power to change such practices, it decides not to take the appropriate diligent measures to prevent, mitigate and put an end to them. Complicity therefore is understood as the tangible assistance given to an actor in the knowledge of the commission of a crime and by ability to influence or to modify the practices of third parties.

Operating principle 19 of the Guiding Principles states that if a company can modify the conduct of a third party related to it in order to prevent or mitigate negative consequences, it has the obligation to exercise this capacity to influence the actions of the third party. In addition, if it does not have the influence to modify the third party conduct associated with it, it has the obligation to find a way to obtain or enhance its influence in order to prevent or mitigate the negative consequences created, or to consider terminating its business relationship with the third party.¹⁴⁸

Where the third party plays a crucial role in the company's commercial relationship, for example as the sole supplier for its activity, the company must consider that it will be complicit in the third party's actions as long as the negative consequences of the third party and its commercial relationship with the third party continues (Guiding Principle 19).

Similarly, if the company has an enormous number of valued entities within its supply chain that it finds due diligence difficult to carry out, then it must identify the areas that present the greatest risk of negative consequences for human rights, either because of the operational context of third parties, the goods or services they provide, the location of their operations, etc.

When facing conflict scenarios in its operating environment, it should consider that there is a greater risk of being complicit in human rights abuses by other actors, so the company is obliged not to exacerbate the situation, to respect human rights as much as possible and to act with due diligence (Principle 23).

¹⁴⁷ John Ruggie, "Clarifying the concepts of "sphere of influence" and "complicity". Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises., A/HRC/8/16 (15 May 2008).

¹⁴⁸ OHCHR (n 146).

Finally, the Guiding Principles state that “the responsibility to respect human rights applies even when such legislation does not exist or is not effectively applied”; that is, the company cannot justify its failure to respect human rights on the basis of a failure by the State to regulate the Guiding Principles or when they are regulated as a power of the company to observe them.¹⁴⁹

4.1.2.2.1 Working Group on the Question of Human Rights and Transnational Corporations and Other Business Enterprises

The UN Working Group is mandated to disseminate and implement the Guiding Principles (hereafter GP), conduct country visits, receive individual petitions and develop recommendations on the access to effective remedies for individuals whose human rights have been affected by business activity.

This working group represents a special procedure of the UN Human Rights Council, being established in 2011 and in 2017 this mandate was renewed for the second time for a period of 3 years (A/HRC/RES/35/7). During its mandate it prioritised the dissemination and implementation of the principles in the legislation of the State parties, expressing at the outset its inability to investigate individual cases. Although it rectified this statement, many civil society organisations question its work because it does not address issues related to effective judicial and extrajudicial remedies and their regulation within the countries, and the absence of clear rules for this institution to accept claims.¹⁵⁰

In May 2018, this working group issued Report A/HCR/38/48/Add.2 in which it reported on the state of human rights and transnational corporations and other business enterprises in Peru. It acknowledged that there is national interest in implementing the Guiding Principles as expressed in the 2018 National Human Rights Plan. However, the Group did not see a coherence between the State’s aspiration to become a member of the OECD and the State’s policy regarding the regulation of the GPs in business initiatives and human rights, mainly with respect to due diligence in corporate actions.

¹⁴⁹ OHCHR (n 144) 31.

¹⁵⁰ Cesar Garavito, “Empresas y derechos humanos un marco conceptual y un mapa de estrategias regulatorias”, in *Empresas y derechos humanos en el siglo XXI. La actividad corporativa bajo la lupa, entre las regulaciones internacionales y la acción de la sociedad civil* (2018, Buenos Aires, Siglo XXI editores) 29-74.

It further stated that the business sector claimed that due diligence is embedded in its good business practices, however “they hardly referred to the way in which the real risks to human rights had been identified” (number 18, page 5), pointing out that this principle must be applied in business activities so that political statements are reflected in the real changes being made.

On the subject of the agreements signed between companies and the PNP, the UN Working Group noted that this type of policy creates confusion regarding the role of the police in protecting the population and recommended that this policy should be stopped.

4.1.2.3. Open-ended intergovernmental working group on transnational corporations and other business enterprises with regard to human rights

One of the most recent UN efforts in this area is the formation of a working group with the aim of drafting an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises in international human rights law. This measure was approved on 26 June 2014.

4.1.3. Corporate Responsibility in the Inter-American System

At present, the Special Rapporteur for Economic, Social, Cultural, and Environmental Rights is the entity in charge of conducting a study on inter-American standards in matters of business and human rights. This request was made by the General Assembly of the Organisation of American States to the Inter-American Commission on Human Rights through Resolution AG/RES. 2887 (XLVI-O/16), which was approved at the plenary session on June 14, 2016.¹⁵¹

With regard to the subject under investigation, at the public hearing in Argentina between 22 and 27 May 2017, at the 162nd session of the Inter-American Commission on Human Rights (IACHR), Peru’s community and social service organisations expressed their concerns regarding the state of human rights and extractive industries, and denounced preventive states of emergency, agreements signed between security forces and extractive companies, and the abusive use of public force.

¹⁵¹ REDESCA-CIDH(IACHR), “Presentación sobre Derechos Humanos y Empresas” (Presentation on Human Rights and Business), (2018, Bogotá), <<http://scm.oas.org/pdfs/2018/CP38733T.pdf>> accessed 2018.

In view of this information, the IACHR indicated that Peru was ranked fourth in the world in terms of the number of environmental activists murdered, and since its return to democracy there has only been one case in which a police officer has been held responsible. Therefore, the IACHR urges the State to take appropriate preventive measures and to investigate any alleged acts of violence against human rights activists.¹⁵²

4.1.4. Other International Initiatives

4.1.4.1 Voluntary Principles on Security and Human Rights

The Voluntary Principles on Security and Human Rights (hereafter VP) were first released in December 2000 by the U.S. Department of State and the U.K. Office of Foreign Affairs after a year-long process involving representatives of those governments, NGO's and companies from the oil, mining and gas sectors with headquarters in the participating countries.¹⁵³

The Principles are the result of abuses committed by surveillance companies offering their services to extractive industry companies in countries such as Colombia, Ghana, Republic of Congo, among others. They are practical guides for companies operating in conflict zones or areas of fragile governance to ensure that public or private security forces protecting their operations operate within a human rights framework and provide companies with a solution to this international concern.¹⁵⁴

Thus, the first principle refers to risk assessment, specifying that companies must first identify security risks, noting primarily what factors trigger them in order to address them and whether the actions taken by them increase the existing risk. It must then assess the potential for violence, and it is therefore necessary to examine these patterns in the areas in which the company operates to prevent them. As a third criterion, it must maintain records on human rights, that is to say, to analyse the background of abuses or actions of the public and private security forces and their reputation in this regard, in order to

¹⁵² IACHR, "Report on public hearings of the 162nd session" (27 June 2017), <http://oas.org/en/iachr/media_center/PReleases/2017/085.asp> accessed 2018.

¹⁵³ Voluntary Principles on Security Human Rights, "Voluntary Principles on Security Human Rights" (s.f.), <<http://voluntaryprinciples.org/resources/>> accessed June 2018.

¹⁵⁴ International Federation for Human Rights FIDH (n 141) 569-57

avoid any repetition of these and, failing that, to demand that they take responsibility for their actions.

Another risk assessment criterion is that the company must assess is the capacity of the local justice system to determine the responsibility of those who violated human rights and to demonstrate respect for the rights of the accused. As a final criterion, an assessment must be made of the risk posed by the company supplying weapons to the security service it hires, while also taking into account past incidents.

The next principle related to this research is the interaction between companies and public safety. This principle recognises the privatisation of the public security forces existing in various countries such as Peru and Colombia.¹⁵⁵ It does not question this relationship but rather seeks to ensure that companies have an influential role and to a certain extent some control over this actor.

First, it opens up the possibility of economic recognition of the State provided security service. This principle obliges companies to consult communities about the impact of their public security arrangements on security, and it also requires companies to communicate their company policies on human rights regarding the public security services employed and that the agreements they enter into are made public and accessible to the population at large.

With regard to its use and conduct, it indicates that companies should exert their influence so that individuals with histories of human rights abuse are not assigned to their operations, so that force is used in accordance with international instruments and the exercise of free association and peaceful assembly is maintained and respected. It should also support the State's efforts to train and educate security forces. Finally, it obliges the latter to inform the competent authorities and the company of any situations in which physical force was used.

When human rights abuses occur, the principles require companies to actively monitor the status of investigations, including the use of equipment they supply and to investigate when and whether it had been misused.¹⁵⁶

¹⁵⁵ For more information on the status of the agreement between the Colombian security forces and the mining and energy sector see: <<http://ivancepedacastro.com/wp-content/uploads/2015/11/DEBATE-CONVENIOS.pdf>> accessed 2018.

¹⁵⁶ Voluntary Principles on Security Human Rights, "Principios Voluntarios de Seguridad y Derechos Humanos" (2000), <<https://bit.ly/2ursGqY>> accessed May 2018.

The participants in this agreement are obliged, according to FIDH,¹⁵⁷ to submit an annual report to the Steering Committee detailing the efforts they have made to apply these principles, and to engage in conversations and provide information in response to reasonable requests from other participants.

As for the mining companies that had signed PSE agreements with the Peruvian police forces that are the subject of this study, Xstrata PLC joined the VP in 2013 and Yanacocha SRL in 2001.¹⁵⁸

Like other international instruments, some civil society bodies have questioned this measure on the grounds of its voluntary nature, the absence of a coercive mechanism and the lack of transparent processes.¹⁵⁹

From the author's perspective, this international initiative is at odds with the international instruments of the United Nations, among them the Code of Conduct for Law Enforcement Officials, in particular. It does not encourage the provision of officers to fulfil police duties, in our case particularly police personnel, it fails to address the problems of the community as a whole, neither does it seek impartial conduct by police personnel, nor does it adhere to the community policing model as outlined by the CPE where participation of the local community is permitted. On the contrary, it promotes the control of extractive companies over the performance of the public security service and their involvement in human rights abuse investigations opened by the latter, thus promoting private interference in the decisions and actions of public servants and as a consequence of a bias in their actions.

From this author's point of view, this instrument contravenes both the aforementioned principles and the guidelines; it should also be noted that in some settings this approach is very difficult to dismantle.¹⁶⁰ It is therefore useful to have guidelines that provide specific responsibilities to all the actors involved in this relationship, so that they can guarantee respect for human rights through the adoption of preventive measures

¹⁵⁷ International Federation for Human Rights FIDH (n 141).

¹⁵⁸ Xstrata Copper Division de Operaciones Perú, *Informe de Sostenibilidad* (2012), 5-7 <<https://bit.ly/2La9gxR>> accessed June 2018; Yanacocha, *Reporte de Sostenibilidad Yanacocha* (2011), 103-135 <<https://bit.ly/2NdZJcJ>> accessed June 2018.

¹⁵⁹ International Federation for Human Rights FIDH (n 141).

¹⁶⁰ At the start of 2016 the government of Óllanta Humala tried to eliminate the PSE from the police function and on seeing the decline in their income many police officers questioned the policy and even at one point there was talk of a police strike. For more information see: <<http://ojo-publico.com/219/eliminacion-del-24x24-fue-abrupta-y-sin-tomar-en-cuenta-la-remuneracion-de-los-policias>> accessed 2018.

or, failing that, in the event of any adverse consequences, they can be held legally responsible, either for their actions or for their complicity by means of their deliberate omission or failure to act.

4.1.4.2. *The Organisation for Economic Co-operation and Development (OECD)*

Founded in 1960, the Organisation for Economic Co-operation and Development (hereinafter OECD) brings together 36 member countries and its mission is to promote policies that improve the economic and social well-being of people around the world.¹⁶¹

In 1976 the OECD adopted the Guidelines for Multinational Enterprises, the last update being in May 2011, which includes the following changes: a chapter on human rights in line with UN GPs, an approach to due diligence and responsible supply chain management, and a clearer procedural guide to strengthen the role of national points of contact.

These Guidelines are non-binding voluntary recommendations made by States to multinational enterprises. These are understood as those established in more than one country and related to others in such a way that they can coordinate their activities (parent company and local entities). The Governments that endorsed these guidelines, most of which are countries where the headquarters of the multinationals are located, should encourage companies operating in their territories to comply with these guidelines throughout their business organisation, i.e. the parent company and its branches or local entities.¹⁶²

With regard to the section on human rights, the guidelines encourage companies to prevent, mitigate and avoid negative consequences in order to achieve the enjoyment of human rights directly or as partners, and to exercise due diligence in their business conduct.

It also regulates OECD contact points at State level within this international instrument with the intention of promoting the OECD Guidelines, and also acts as a platform for mediation and conciliation to resolve matters that may be reported under the Guidelines. Since Peru

¹⁶¹ OECD, “Acerca de la Organización para la Cooperación y el Desarrollo Económicos (OCDE)” (s.f.) “About the Organisation for Economic Co-operation and Development” (n.d.), <<https://oecd.org/centrodemexico/laocde/>> accessed July 2018.

¹⁶² OECD, *OECD Guidelines for Multinational Enterprises*, OECD Publishing (2011), <<https://doi.org/10.1787/9789264115415-en>> accessed July 2018.

aspires to join the OECD, it has set up a contact point at ProInversión. However, the Working Group on Human Rights and Transnational Corporations has pointed out that it lacks impartiality because of its functional dependence on the institution.¹⁶³

This organisation currently has 36 member countries, including Australia (which was the headquarters of Xstrata PLC), Switzerland (headquarters for Glencore PLC), the United States (headquarters of Newmont Mining Corporation which is a shareholder of Yanacocha SRL) and Peru as a non-member country but which signed the implementation of the OECD Guidelines.¹⁶⁴

Like the other international instruments, it has to be said that this institution does not represent a court of law, and that its role is one of mediation and conciliation, culminating in the release of communiqués and the formulation of recommendations that are not enforceable.¹⁶⁵

4.1.5. Opinions on the effectiveness of international instruments regulating corporate liability

For Quijano,¹⁶⁶ corporate responsibility¹⁶⁷ arises from social pressure emanating from the environmental and social effects created by companies and their economic activity. However, he maintains that, although on a voluntary basis, it creates a marketing image in favour of the company. Ethical considerations are used not as a reference point for redirecting or improving business activities and remedying the aforementioned issues, but rather as a cosmetic instrument that disguises a political pattern of not seriously confronting the social and environmental problems suffered by humanity. That is why it questions those who defend corporate responsibility and believe that a qualitative capitalist leap has been achieved.

¹⁶³ The OECD contact point in Peru is attached to ProInversión which is an agency attached to the Ministry of Economy and Finance in charge of promoting private investment.

¹⁶⁴ Xstrata Copper Division of Operations Peru (n. 158) 2-5; Glencore, *Reporte de Sostenibilidad* (2014), 3-5 <<https://bit.ly/2mdzDbm>> accessed June 2018; Yanacocha (n 158) 103-133.

¹⁶⁵ Jesús Carrión and Julia Martí, “OCDE y OIT” (n.d.), <<http://omal.info/spip.php?article48058>> accessed June 2018.

¹⁶⁶ Olver Quijano Valencia, *Eufemismos. Cinismo y sugestión en el actual ampliación del campo de batalla* (2011, primera edición, Colombia, Editorial universidad del Cauca), 88-117.

¹⁶⁷ For the author, the concept of corporate responsibility includes all the denominations that currently exist, such as “social and environmental responsibility”, “corporate citizenship”, “corporate citizens”, “inclusive business”, “corporate social entrepreneurship”, “business ethics”, etc.

These voluntary instruments used by the UN, the European Union (EU), the International Labour Organization (ILO), the Organization for Economic Cooperation and Development (OECD), the States and even the companies themselves, have imprecise language as a weakness with undefined and confusing wording, which are voluntary in their application and fail to correct the excesses of the market, but principally do not question the very essence of the economic system, preferring to maintain neo-liberal thought and practice.¹⁶⁸

According to Laville,¹⁶⁹ ecological and social disasters can only be tackled through an approach that involves international agreements that reflect horizontal and vertical solidarity. The first relates to the rich and poor and the second to present and future generations. It refers to solidarity not in the philanthropic sense of ethical volunteering of stakeholders, who seek to demonstrate their capacity for self-control (such as the internalisation of negative outside factors) in order to avoid external intervention detrimental to their interests; but, solidarity in the democratic sense, setting social justice and ecological sustainability as the framework for the market at large.

Ruggie¹⁷⁰ disagrees in the sense that he considers that these international instruments, which do not comply with the conventionalist model, seek to implement a different approach and are currently succeeding in their new global regulatory dynamics. In particular, he considers that the implementation of GPs in some places helps to reduce the overall incidence of human rights abuses and provides non-judicial redress. He also points out that this new form of regulation - which is not through a Convention or a Declaration - contributes to a greater extent to the defence of human rights as opposed to other positions that demand recognition of this corporate responsibility under more conventional established forms.

¹⁶⁸ Quijano Valencia (n 166).

¹⁶⁹ Jean-Louis Laville, "Solidaridad", in Antonio David Cattani et al., *Diccionario de la otra economía: Colección lecturas sobre Economía Social* (2009, Argentina, Editorial Altamira) 350-355.

¹⁷⁰ John Gerard Ruggie, "Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises" in César Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017), 11-45.

4.2. NATIONAL LEGISLATION ON EXTRACTIVE INDUSTRIES

The CPE of 1993 in chapter I (arts. 58° to 63°) specifies that the Peruvian economy is a social market economy, where private investment is granted a broad parameter of performance, its limit being the common good and the general interest. Thus, the model of the Social and Democratic State of Law¹⁷¹ (arts. 3 and 43 of the CPE) reinforces the social character of the economy, since the Constitution put man at the centre of the state organisation and consequently, when the lucrative interests of the company come into conflict with the collective welfare or the defence of assets necessary for human life, the latter should be preferred.¹⁷²

The State also recognises that private enterprise is an important sector of society but that its actions have caused many issues. For this reason, it was necessary to adopt certain obligatory measures to ensure that its incorporation into society takes place in the most peaceful manner, thus constructing the concept of social responsibility as a specific obligation of this sector. In the case of extractive companies, this obligation means that their activity must be carried out in a manner that is in balance with the environment, and with natural and cultural resources. Consequently, their economic stability for the development of their operations depends on their own conduct as well as on the State itself.¹⁷³

In addition, in the case of private investment in extractive industries, the Constitutional Court stipulates that this activity is protected to the extent that it meets four criteria, including aspects related to the prevention of conflicts, the potential damage generated by the investment, and the fulfilment of comprehensive reparations should the population be affected.¹⁷⁴

With regard to the first point, considering that it is up to the company to take on certain costs that allow it to prevent the origin or escalation

¹⁷¹ The Social and Democratic Rule of Law for the TC is that which imprints social functions on the foundations of the Liberal State, seeks social integration and reconciles the legitimate interests of society with the interests of the individual, whose defence and respect for their dignity constitute the supreme aim of society and the State (Tribunal Constitucional del Perú, Exp N° 0048-2004-AI/TC, 4-5).

¹⁷² *ibid*, 15 and 37.

¹⁷³ Tribunal Constitucional del Perú, Exp N° 03343-2007-PA/TC, 23 and 25.

¹⁷⁴ Tribunal Constitucional del Perú, Exp N° 0001-2012-PI/C, 44.

of social conflicts, opting for measures aimed at solving rather than imposing isolated measures, avoids resolving and preventing the real problems in consultation with the inhabitants of the area. On the second point, it specifies that in cases where the business activity generates damage, these should not only be sanctioned by the Administration, but reparation should be direct, fair and proportionate. The company should not wait to receive a legal complaint to comply with its obligation, and the State should provide legal support to the population to fully exercise its rights.¹⁷⁵

As the subject of this research is related to the responsibility of extractive companies in scenarios of socio-environmental conflict, it should be pointed out that many of the complaints made to police officers and companies are of a civil and criminal nature, and since the criminal process combines punitive action and civil reparation, it is deemed appropriate to approach the issue of corporate responsibility from the criminal point of view.

4.2.1 Criminal liability of the legal person

In Peru there are three legal entities that impose responsibilities on companies for their actions: independent liability, third party civil liability and collateral liability. The first entity was incorporated into the legal system in January 2018 for crimes related to corruption of officials, money laundering and the financing of terrorism.¹⁷⁶

4.2.1.1. Third party civil liability

The other entity is the third-party civil liability regulated in articles 111 to 113 of the Code of Criminal Procedure (hereinafter CPP). This is the natural or legal person who, without having participated in the commission of the crime, has to pay its economic consequences. In the case of juridical persons, the liability for the damage of the subordinate is enshrined in art. 1981 of the Civil Code (hereinafter CC) which establishes the following: “whoever has another under his orders is liable for the loss caused by the latter, if this loss occurred in the exercise

¹⁷⁵ *ibid*, 50 and 54.

¹⁷⁶ This legal entity is enacted with Law No. 30424, Law on Administrative Liability of the Legal Person, modified by Legislative Decree No. 1352. It will not be developed further as it has no direct relationship with the issue to be addressed in this thesis.

of the office or a performance of a respective service”.¹⁷⁷

This type of strict liability is not only vicarious because the damage is caused by the activity of the company itself and the company has not proved the subordinate’s liability,¹⁷⁸ but the company is obliged to compensate the subordinate as well because he is liable for his own activity and not for collateral damage caused by the acts of subordinates. It is for this reason that this legal entity looks to place responsibility for the damage caused to firmly with those who are generally in the best position to prevent the occurrence of these events under the principle that “whoever benefits from an activity is also responsible for the damage it causes”.¹⁷⁹

The Justice System has specified that for the definition of liability regulated in art. 1981 of the CC there are elements that are: 1) the subordination relationship, 2) that the subordinate causes damage, 3) that there is a causal relationship. With regard to the first element, it specifies that the formal qualification is not taken into account, but the effective existence of controlling the risk factors of the activity,¹⁸⁰ and thus its scope extends to all types of dependency, supervision, control or subordination relationships, as is the case of third party companies, and may even be evident in relationships arising from specific circumstances within which damage is caused to a third party,¹⁸¹ so there must necessarily be an oversight in the choice of the provider or a lack of adequate supervision of the provider’s performance to determine liability. With respect to the second element, the conduct that the subordinate causes is related to the performance of the activity assigned for the benefit of the legal person, and the third element refers to the exercise of its activities for the benefit of the legal person having a connection with the damage caused.¹⁸²

¹⁷⁷ Victor Cubas Villanueva, *El proceso penal, teoría y práctica* (1998, Lima, Palestra Editores).

¹⁷⁸ Segunda Sala Penal Especial de la Corte Superior de Justicia de Lima, Exp N° 011-2001 (08.08.2006), Caso *José Enrique Crousillat*, paragraph 91 <<https://bit.ly/2LjAbYh>> accessed June 2018.

¹⁷⁹ Alfredo Bullard, *Derecho y Economía. El análisis económico de las instituciones legales* (2003, Lima, Palestra Editores)

¹⁸⁰ *Caso José Enrique Crousillat* (n 178) paragraph 92.

¹⁸¹ Alfredo Bullard et al., “Temas de responsabilidad civil en debate: nuevas tendencias”, in *Revista Ius et Veritas* (2012, N° 45, December) 422-433.

¹⁸² Carlos Patrón Salinas, “Responsabilidad civil por los actos del subordinado”, in *Código Civil commentary by the 100 best specialists* (2003, Lima, Gaceta Jurídica) 174-182.

Taboada¹⁸³ specifies that civil liability has four elements: 1) damage caused, 2) the unlawfulness or unlawfulness of the conduct, 3) the causal link, and 4) the attribution factor. Respect for the first element is understood to be the impairment of the interest or legal good that the State seeks to protect in favour of society or the individual, and this may or may not be patrimonial in nature. The second element refers to the framing of the conduct to a factual assumption of a prohibitive legal norm, or when the conduct violates the legal assets that the system seeks to protect.

The causal link requires proof that the author's unlawful conduct is suitable and sufficient to produce the damage attributed to the subject. The last element has to do with subjective attribution of liability such as wilful misconduct or negligence in the action, and with the objective attributions that the norm regulates/is regulated by the legal situation of the holder or by certain activities - this attribution dispenses with subjective attributions and is given, for example, in the case of art. 1981°. This last factor starts from the presumption of fault because if the subject used goods or performed an activity that involves an additional risk to the ordinary to cause damage, then he acted with malice by reversing the burden of proof to the violator of the rule.¹⁸⁴ To these elements the justice system defines the criterion of accountability as the ability of the subject to be held accountable for the damage caused.¹⁸⁵

In the Peruvian case, civil liability resulting from an unlawful act is often an extra-contractual and objective liability because the unlawful conduct breaches a general duty not to cause harm to anyone, and the people who caused it are jointly and severally liable. It also does not depend on the determination of criminal responsibility for its judicial pronouncement, in compliance with the principle of procedural economy and the observance of the link between criminal and civil claims.¹⁸⁶

¹⁸³ Lizardo Taboada Cordova, *Elementos de la responsabilidad civil: comentarios a las normas dedicadas por el Código Civil a la responsabilidad civil contractual y extracontractual* (2003, Lima, Grijley editores) 36-42.

¹⁸⁴ *ibid* 111-132.

¹⁸⁵ *Caso José Enrique Crousillat* (n 178) paragraph 88.

¹⁸⁶ Roberto Pérez Prieto De las Casas, "Qué juzgado debe ser el competente (en razón de materia) cuando se involucra a tercero civilmente responsable", in *Themis-Revista de Derecho*, (2016) 217-226.

The purpose of civil liability is the restitution of the property, and if this is not possible, the payment of its value and, additionally, compensation for damages caused, as well as reaffirming the sanctioning power of the State, and dissuading anyone who attempts voluntarily or culpably to commit harmful acts to the detriment of third parties¹⁸⁷ (art. 93 CPP).

4.2.1.2. *Ancillary consequences*

This concept is regulated by articles 104 and 105 of the Peruvian Penal Code and is adopted as a preventive-special measure in relation to the legal person, in order to prevent it from enjoying the illegal benefits obtained from the commission of crimes and/or to prevent criminal continuity. They are measures that restrict the social exercise of the legal person, even ordering its dissolution and also generates an effect on other persons (natural and / or legal) that relate to it, resulting in a warning for the subject possibly harmed by the measure to abstain from participating in the commission of crimes.¹⁸⁸

These measures can be imposed on legal persons if the crime was committed by taking advantage of a defect in organisation, i.e. when they omitted to adopt measures to prevent the commission of a crime and a failure to maintain an orderly development of their business activity; a criterion used in these circumstances is the relationship between the activity in which the company engages and its link with the commission of the crime.¹⁸⁹

Plenary Agreement No. 7-2009/CJ-116 specifies that the imposition of ancillary consequences are not exclusive to the imposition of civil reparation, but by contrast, it is subject to: 1) the commission of a punishable act, 2) evidence that the legal person was used to carry out, encourage or conceal the crime, and 3) the conviction of the perpetrator.

The measures that the Judge may order are: 1) closure of premises or establishments on a temporary or permanent basis, 2) dissolution and liquidation of the legal person, 3) suspension of the activities of the legal person, 4) prohibition of the legal person from engaging in future activities of the kind in which the offence was committed, encouraged or concealed, 5) intervention of the legal person to safeguard the rights of workers

¹⁸⁷ *Caso José Enrique Crousillat*, Exp (n 178) paragraph 87.

¹⁸⁸ Zúñiga Rodríguez, “Las consecuencias accesorias aplicables a las personas jurídicas del art. 105 CP: Principales Problema” in *Anuario de Derecho Penal de la Universidad de Friburgo* (2003) 473-505.

¹⁸⁹ *Caso BTR*, File No. 99-09 (527-09), sentence issued by the Second Criminal Court Specialised in Criminal Matters for trials with inmates in jail on March 23, 2012, considering 4 of the consequences applicable to legal persons.

and creditors, 6) fines, and 7) cancellation of licenses, rights and other administrative or municipal permits.

4.2.2. *Case law evidencing the application of these measures*

In the Peruvian case, the latter two figures were used in criminal proceedings against legal persons - companies and municipalities - who were responsible for: 1) illicit acts committed by their legal representatives and shareholders,¹⁹⁰ as well as by their workers,¹⁹¹ 2) the inadequate performance or omission to adopt precautionary measures for companies subcontracted by the company for a specific provision of services, and 3) non-compliance with oversight or coordination duties previously established in their corporate regulations with respect to the performance of third parties.¹⁹²

Without prejudice to the foregoing, this author points out that the judgments referred to in the previous section dealt with highly publicised national events, due to the political and economic weight of those under investigation and those injured at the time, both natural and legal persons. However, despite the existence of legal figures and jurisprudence at the national level where the responsibility of legal persons is recognised, those affected in situations of socio-environmental conflicts chose to take the cases to the jurisdiction of the countries where the head offices of these industries are located.

Thus, in October 2009, the United Kingdom Superior Court of Justice

¹⁹⁰ The case of José Enrique Crousillat (n 178) sentence issued by the Second Special Criminal Court dated 08 August 2006, with respect to civil liability see recitals 81 to 101 and with respect to accessory consequences see recital 102. <http://idehpucp.pucp.edu.pe/images/documentos/anticorrupcion/jurisprudencia/sentencia_crousillat_011-2001.pdf> accessed 2018.

¹⁹¹ *Caso BTR* (n 189) see recitals 2074 to 2090 on civil reparation and, with regard to accessory consequences applicable to legal persons, see section with the same title, recitals 1 below. <http://historico.pj.gob.pe/CorteSuprema/documentos/SentenciaBTR_230312.pdf> accessed 2018. In this case it is believed that the communications of the environmental NGO GRUFIDES were intercepted and that the company BTR (who were convicted) cooperated with the security company FORZA, which provides security to the Yanacocha company, legal basis 10.

¹⁹² *Caso Walter Arturo Oyarce*, R. N. N° 1658-2014 Lima, March 15, 2016, Supreme Court of Justice of the Republic of Peru. In this case, natural and legal persons were held criminally and civilly convicted for the murder of a person in a football match in the hands of several *barristas*. In the case of legal persons, a sports club was sentenced for failing to exercise control over the security measures being taken by a third party employed by it. The Board of Directors of the stadium where the sports event took place was also held civilly liable because it also had the function of coordinating the adoption of security measures with the subcontracted company and including the jurisdiction's Municipality for not fulfilling its inspection function adequately with respect to the security measures that these companies were implementing.

admitted a case against Monterrico Metals (owner of the Rio Blanco mine located in the Province of Huancabamba, Department of Piura-Peru), where 28 people had been detained by police officers in a socio-environmental conflict against their company in 2005. The detainees alleged that they were tortured and deprived of their liberty for three days inside the mining camp, with the active participation of police officers, company officials and personnel from the private security service subcontracted by the mine. They also pointed out that the company provided material support to the police and did not react to or prevent abuses from being committed.¹⁹³

In 2011, it became clear that Monterrico Metals, despite expressly denying its responsibility, had agreed to indemnify the plaintiffs with the intention of having their case filed in the United Kingdom.¹⁹⁴ In addition, in 2012, the First Appeals Chamber of Piura convicted the prosecutor in charge of investigating these acts of torture for the crime of omission of a complaint, due to the fact that it/he deliberately omitted to continue the investigation against the officials of the Rio Blanco mining company and the personnel who provided private security services for it.¹⁹⁵

A similar situation occurred with respect to the events to be examined in the Espinar case. The injured, those detained and the relatives of those killed in the 2012 socio-environmental conflict decided to take civil action in the London Courts against Glencore. In this process, responsibility was attributed to the company, alleging that it hired Peruvian police personnel to mistreat the demonstrators, facilitate logistics for their stay in the area during the conflict, and encouraged acts of torture against those detained inside their facility.¹⁹⁶ It should be pointed out that prosecutions were brought in Peru¹⁹⁷ following the investigation into the death of three people in the aforementioned socio-environmental conflict.

While this paper is not intended to address the extraterritorial jurisdiction of crimes committed by personnel subordinate to transnational extractive companies, it is necessary to mention this data in order to understand the magnitude of the problem.

¹⁹³ Boyd, S., *Cuando la tierra llora: Operación Diablo* (2010, Perú, Guarango).

¹⁹⁴ Leigh Day & Co., "Demandates peruanos por torturas indemnizados por Monterrico" (s.f.), <<https://servindi.org/actualidad/48219>> accessed June 2018.

¹⁹⁵ Business & Human Rights Resource Centre, "Monterrico Metals lawsuit (re Peru)" (2014), <<https://business-humanrights.org/en/monterrico-metals-lawsuit-re-peru-0#c18018>> accessed May 2018.

¹⁹⁶ "UK mining firm in court over claims it mistreated environmental activists" *The Guardian* (2017), <<https://bit.ly/2z2OZVG>> accessed June 2018.

¹⁹⁷ Coordinadora Nacional de Derechos Humanos, *Informe Anual 2015-2016* (2017) 64-71.

5.

ANALYSIS OF THE AGREEMENTS SIGNED BETWEEN
EXTRACTIVE COMPANIES AND THE PERUVIAN NATIONAL
POLICE AND THEIR MANIFESTATION IN SOCIAL CONFLICT
SITUATIONS

The previous chapter explained the obligations and commitments that companies assumed at the international and national level in regard to respect for human rights and not being complicit in the actions of a third party linked to them. In this chapter I will examine the agreements that regulate the PSE-two with the previous regulation and another relating to the regulations in force- signed between the two actors identified in this research that are the police force and extractive companies. This will demonstrate the influence exerted by extractive companies over police action. It will also expose the effects these agreements produce and how this relationship is expressed in social conflict scenarios where reference is made to possible violations of the human rights of third parties in order to subsequently test criteria that will enable us to evaluate the civil responsibility that companies may undertake in such contexts.

Thus, before beginning the analysis of these agreements, it should be noted by way of background, that they were considered by the PNP to be reserved documents, but that in 2013 various civil society organisations through the use of judicial processes and information access requests, obtained access to the information. However, it is not clear from what exact date the PSE was used for extractive companies, nor is it certain whether some of these agreements are still in force today.¹⁹⁸

¹⁹⁸ Coordinadora Nacional de Derechos Humanos, *Informe Anual 2015-2016* (2017); Alonso Ramos, "Policía Mercenaria", in *Hildebrandt en sus trece* (2013, Lima) 2-4 and 39-40.

5.1. EXTRAORDINARY POLICE SERVICE AGREEMENT BETWEEN X-DIRTEPOL
CUSCO AND THE XSTRATA S.A. MINING COMPANY

This agreement was signed on May 16, 2011 with a validity of one year. However, it was renewed on two occasions and the most recent renewal was specified as the current term “until the signing of a new agreement pursuant to the provisions of the Ministry of Interior”, so there is no official information on its validity. In addition, it was noted at the time that the first PSE agreement between the parties, dates to the year 2000.¹⁹⁹ The legal basis for the signing of this agreement is based in particular on section 1.2 of the same, where this manner of service provided by the police institution is permitted by the CPE in sections 166 and 171, a state of affairs that was not supported at any time in the content of Law No. 27238, Organic Law of the PNP or in DS No. 004-2009-IN which regulates the PSE. The existence of a rationale that permits this approach, which could be considered erroneous, has been examined in point 3.2. of this paper.

5.1.1 Functions carried out by the Peruvian National Police

***CLÁUSULA TERCERA: OBJETO DEL CONVENIO**

El presente Convenio tiene por objeto establecer los lineamientos de cooperación y coordinación interinstitucional entre TINTAYA y la POLICIA NACIONAL DEL PERÚ para la prestación de servicios extraordinarios complementarios a la función policial, para prestar servicios de vigilancia, seguridad regular, fiscalización y control de insumos químicos fiscalizados y otros servicios Especializados por la POLICIA NACIONAL DEL PERÚ, de las instalaciones, proyectos, bienes y personal de TINTAYA.

Unlike the Yanacocha agreement, it specifies that the service provided by police officers is not only regular surveillance and security, but also the inspection and control of chemical materials in accordance with section 3 of Law No. 29037 in force at the time of signing the document, which is under the jurisdiction of the PNP.

It establishes that the area in which the service is provided consists of the mining installation, the mining projects owned by the company such as Antapacay and Coroccohuayco, the company's assets such as those used in the productive activities it implements, and even the premises of the Tintaya Foundation.

¹⁹⁹ Ramos (n 198).

CLÁUSULA CUARTA: OBJETIVOS DEL CONVENIO

El presente Convenio tiene como objetivos:

- 4.1. Establecer un servicio extraordinario complementario a la función policial, para prestar servicios de vigilancia, seguridad y fiscalización y control de insumos químicos fiscalizados y otros servicios en el Campamento Minero de TINTAYA y Proyectos; así como, prevenir la comisión de delitos o actos de violencia en cualquiera de sus modalidades de conformidad a la normatividad vigente, manual y guía de procedimientos establecidos.
- 5.1.5. Mantener el orden público, atender denuncias de delitos y faltas, prevenir y proteger contra actos de sabotaje, terrorismo y cualquier otro tipo de acciones a las áreas antes indicadas, que son de su competencia.
- 5.1.6. Evitar la presencia de personas extrañas en la propiedad así como en las zonas aledañas a las instalaciones en que prestará seguridad, así como hacer cumplir las normas de seguridad, establecidas por TINTAYA.

These paragraphs show how the two actors who signed the agreement perceived the relationship they had for years with the population adjacent to the company, and refer to the prevention of acts of sabotage and terrorism, when there are no terrorist groups in the Espinar area, since the return to democracy in Peru, nor have terrorist acts occurred in the area, thus illustrating the degree of perceived danger that the State assigns to social conflicts.²⁰⁰

In addition, reference is made to the prevention of the perpetration of crimes or violent acts, as this measure is an expression of excluding outsiders within the company as well as within the property of the mine and even in adjacent areas. It clearly fails to recognise and respect the property rights that the communities have, since the adjacent areas referred to by the mine are rural farming communities that surround the mining facility and its other projects.

It is also noted that the regulation imposed by the mining company on the police for the PSE provision, in response to a rationale where public-police action can be controlled or directed through private guidelines such as the “Tintaya safety standards”, actually prioritises the interests of the company. The last numerical reference at Point 5.1.6 accurately reflects the spirit of the VPs because it seeks the intervention of the company in the actions of third parties that provide security, including the public police force.

²⁰⁰ The terrorist backdrop in Peru is focused on the Huallaga and Apurimac valleys, Ene and Mantaro rivers. National Police of Peru <<https://bit.ly/2trqKPd>> accessed June 2018; and in relation to the degree of danger that the State assigns to the conflicts focused on the norm that regulate their treatment see section 3.2.2.1 of this chapter.

La POLICIA NACIONAL DEL PERU, cubrirá los servicios establecidos en el presente Convenio, veinte y dos (22) efectivos policiales, cuyo número podrá ser modificado conforme a requerimiento de TINTAYA, de los cuales el Oficial y/o Suboficial más antiguo desempeñará el cargo de Jefe de Destacamento, además cumplirá las funciones de supervisión y control de los servicios, y los demás efectivos policiales tendrán las siguientes funciones específicas:

- Diecinueve (19) efectivos policiales prestarán servicios de vigilancia y seguridad regular, sean en el campamento minero Tintaya, como en los Proyectos de Antapacay y Corocochayaco en lo que fuera requerido.
- Dos (02) efectivos policiales de la Oficina Regional de Inteligencia, realizarán labores de inteligencia con relación a TINTAYA.
- Un (01) efectivo policial de la División de Antidrogas PNP Cusco, estará a cargo de la fiscalización y control de insumos químicos fiscalizados.
- Asimismo, como parte de sus funciones en la Provincia de Espinar, el Comandante Jefe de la Comisaría Sectorial PNP Espinar apoyará el desenvolvimiento del Destacamento Policial de Tintaya. Al Comandante Jefe de la División Policial de Canchis-Sicuani, se le considerará como elemento de apoyo, información y control.

Unlike the Yanacocha agreement, it does not specify the specialism of 19 police officers who are stationed in the area; however, the presence of intelligence personnel is strange because DS No. 004-209-IN specifies that the PSE approach should focus on security and surveillance, without indicating how this service would be provided.²⁰¹

This paragraph of the agreement also warns that the PSE not only regularly involves 22 police officers who are stationed at the mining camp but also includes in the PSE numbers regular support from the Espinar sectoral commission located in the plaza de Armas in Yauri-Espinar, and the Canchis-Sicuani Police Division for support, information and control, with a greater number of personnel generally involved in protecting a particular asset.

This situation described above could mean in practice that active police officers assigned to both police stations, and as part of their daily functions, could be on standby to prevent the commission of crimes or acts of violence that would affect the interests of the Tintaya mining company within their territorial jurisdictions. In this context, it is the Espinar branch police station that handles the complaints, carries out operations and registers incidents involving the Espinar population as a

²⁰¹ In relation to this point, it should be pointed out that in May 2017 several NGOs nationally denounced the detention of Jennifer Moore, the coordinator of MiningWatch Canada's Latin America programme, in the city of Cusco for questioning the bad practices of the Hudbay company, thereby affecting public order. They also denounced that she was the subject of monitoring in the districts of Chamaca, Velille and Santo Tomas since her arrival, with police personnel asking about the detainee in the various places she went and prior to her arrest by the police, who also warned that the Hudbay Company had a PSE agreement with X-DIRTEPOL CUSCO; for more information see: <<http://muqui.org/comunicaciones/noticias/item/587-solicitan-orden-judicial-para-que-mininter-no-transgreda-libertad-de-expresion-de-jennifer-moore>> accessed 2018.

whole. Two and a half hours away, in the city of Yauri-Espinara, there is a similar situation involving the Canchis-Sicuani Police Division.

5.1.2. *The police service provision system*

5.1.1. Asignar a TINTAYA, personal policial voluntario con aptitud "A" (Salud) que se encuentra en periodo vacacional y excepcionalmente cuando la situación lo amerite personal policial de servicio, con la experiencia y entrenamiento adecuados, que permitan garantizar su seguridad y protección de todas las propiedades de TINTAYA emplazadas en el Campamento de Tintaya y Proyectos de ser el caso.

5.1.9. Antes de iniciar la prestación del servicio, cada grupo de efectivos PNP que preste servicios materia del presente Convenio deberá recibir la charla de inducción necesaria para actuar dentro del marco de la política de HSEC (Salud, Seguridad, Medio Ambiente y Comunidades) y Guía de Conducta de Negocios de TINTAYA.

6.3.6. La POLICIA NACIONAL DEL PERU (X-DIRTEPOL CUSCO) no asignará para el servicio a personal policial con implicaciones creíbles o probadas en abuso de los Derechos Humanos.

The personnel selection criteria and induction seminars regulated in this section are in line with the deployment and conduct guidelines, as are consultations and advice related to the interrelationships between companies and public safety established by the VPs, and it is precisely these criteria that may demonstrate the influence that Xstrata may have in practice vis-à-vis police forces in restricting public action to the guidelines published as part of the company's business policies.

5.1.2. Se establecerá un servicio de 24 horas en fracciones de cuatro turnos en los horarios de: 07:00 a 13:00, 13:00 a 19:00, 19:00 a 01:00 y 01:00 a 07:00 horas, en cuatro puestos fijos de vigilancia, los mismos que serán supervisados por un servicio de ronda, la misma que abarcará el perímetro de propiedad del Campamento TINTAYA y otros que se considere necesarios para la protección de las propiedades y/o bienes de TINTAYA.

5.1.3. Los servicios policiales estarán al mando de un Oficial, excepcionalmente por un Suboficial PNP más antiguo, el mismo tendrá el cargo de Jefe del Destacamento, tales servicios estarán bajo el control, supervisión, coordinación, evaluación y planeamiento del Sr. Gral. PNP Director de la X-DIRTERPOL Cusco.

Unlike the Yanacocha agreement, it establishes an organisation within the PSE by establishing an institutional police hierarchy within it, and furthermore describes another feature of the PSE prevention measures - apart from preventing' outsiders within the company both inside the mine property and even in neighbouring areas - which is surveillance through permanent checkpoints in its various projects.

- 5.1.11.- El Jefe del Destacamento Policial presentará a TINTAYA los PARTES diarios de asistencia de los efectivos, cuyo cómputo, resultará en la confección de la planilla de pagos, informes relacionados con su servicios, así como los solicitados por TINTAYA al término de cada quincena, el Oficial responsable entregará a TINTAYA un informe del servicio prestado durante ese periodo, incluyendo las ocurrencias diarias registradas.
- 5.1.14.- El Jefe de Destacamento o el más antiguo del servicio, ante cualquier contingencia, deberá dirigir las operaciones policiales en la parte que le corresponde, determinando las estrategias más convenientes y sin sustraerse de cualquier intervención policial o pedido solicitado por terceros o de TINTAYA ante algún hecho que requiera su presencia, ya sea dentro del área de responsabilidad de la empresa o cuando las circunstancias lo amerite fuera de ella, debido a que el funcionario policial no debe perder su categoría al prestar servicios de seguridad en una instalación privada.
- 5.1.15.- En caso que algún miembro de la POLICÍA NACIONAL DEL PERÚ, suscrito en el presente Convenio, cometiera alguna falta que a juicio de TINTAYA mereciera censura, deberá ser reemplazado, previa coordinación con la POLICÍA NACIONAL DEL PERÚ. Sin perjuicio de ello, la Institución Policial podrá realizar la investigación administrativa correspondiente, respecto a su efectivo PNP.

In the section 5.1.11 above, staff turnover is fortnightly, and the Chief of Operations, in charge of the group of stationed police officers, has the function of reporting the provision of police security services not to the Director of X-DIRTEPOL CUSCO, as specified in point 5.1.3 of the agreement, but to the mining company so that the provision of the service can be verified and, as a result, the corresponding payment made.

It is important to note that point 5.1.15 specifies that the Head of the Detachment and the police personnel under his charge must accede to the requests made by the Tintaya company without being able to refuse to comply, regardless of whether they are related to the police function or not, both in and outside the company premises.

This degree of influence over the police entity allows the company to independently determine censorship and set the parameters surrounding police action and without the police institution or the head of the detachment, being empowered to ask for a change in the censored police force and without the need for a previous intervention or opinion from the Head of Staff in charge. In other words, the maintenance of a police force provided by the PSE does not depend solely on the police institution but also on the company-specific criteria.

These points lead to the conclusion that the agreement could remove all autonomy and independence from the police officers assigned to the company, given that they do not only report to the police institution, but may also be subordinated to the control, orders, and monitoring

of their activities by the company, which may even determine the payment, continuity, and censorship applied by the company regardless of whether a crime or sanction is perceived.

- 5.1.17. Los efectivos policiales que efectúen el servicio en el marco del presente Convenio, deberán realizarlo con el uniforme de faena reglamentario, armamento largo asignado por la Institución en puestos fijos y armamento de corto alcance de su propiedad (revolver o pistola), fornitura, vara de ley, griletes de seguridad, libreta de control, silbato y chaleco y casco de seguridad, estas últimas indumentarias proporcionadas por TINTAYA, en los que fueran necesarios, el incumplimiento de este compromiso, será motivo para que el personal sea desactivado del servicio. Asimismo, cada efectivo policial deberá portar ropa de cama respectiva.

The policy specifies that the use of force by police personnel must be carried out by the police institution and by the officer himself. With regard to the use of privately owned weapons by police officers, it should be noted that this situation could be used to avoid police control, as they are not owned by the company or the police institution, and the characteristics of the weapon and the quantity of ammunition used, would not be recorded. Even in a social conflict scenario, appropriate expert opinion would not be required because it is unclear whether it was used by police personnel in that scenario. There is no reference whatsoever to a register of weapons used by police personnel who are seconded to the company.

- 6.3.2. De darse dichas circunstancias, el personal de la POLICIA NACIONAL DEL PERU procurará prestar toda la asistencia médica y humanitaria posible a las personas que hayan resultado lesionadas.

- 6.3.3. En los casos excepcionales y fuera del control donde haya sido necesario el uso de las fuerzas o armas, el jefe de la unidad policial hará llegar a la Gerencia de Seguridad de TINTAYA una copia del informe que presente a su Comando sobre el incidente que obligó al uso de la fuerza o de las armas.

- 6.3.5. Informar a su comando y a TINTAYA sobre cualquier hecho que pueda implicar la violación de Derechos Humanos por su personal o empleados de TINTAYA.

In point 6.3.2 above, the parties agree that the use of force shall be carried out in exceptional cases and when the lives of persons are at imminent risk, with police personnel not being obliged to assist injured persons.

In compliance with the VP criteria of consultation and advice, the company obliges police personnel to inform it of any incident involving the use of force, weapons, or human rights violations. This demonstrates, yet again, the level of control, monitoring and influence the company has over police performance.

5.1.3. Company obligations

In point 5.2. of this Agreement and within the framework of the VPs the company undertakes to:

- Provide the necessary support to the PNP for the provision of the services regulated in the agreement, that is, lodgings, food, an office for properly equipped police services (computer equipment, printer and office material), as well as transportation of personnel.
- Supports academic, research or any other activities intended for the welfare and development of the police institution and that benefit the community at large.
- Point 5.2.5. specifies that the undertaking shall not pay financial compensation, in whole or in part, to personnel who fail to comply with the above obligations.
- The ninth clause of the company's policy provides the police officers on secondment with supplementary insurance against the risk of accidents in the event of death, permanent disability, treatment and funeral expenses.
- It sets out the amounts to be paid directly and personally to deployed police officers who are part of the PSE the sum of 110 soles per day to Senior PNP Officers and 100 soles per day to non-commissioned PNP officers, and also pay the police institution (that is X DIRTEPOL Cusco) the sum of 0.11% of the Tax Unit-UIT per hour of service.

5.1.4. Some comments on the agreement

This agreement does not refer to the formation of a police station inside the mining facility,²⁰² however, the establishment of one has been proven. In addition, unlike the Yanacocha agreement, it establishes a hierarchy of police personnel and criteria for assigning personnel to its facilities. The agreement does not explicitly state the actions of the mining company in situations where it would face social conflicts

²⁰² In some geographic areas, police stations are seen as the only face of the State because they provide interaction between the population and the State and where the different divisions of the PNP come together to carry out police functions. It has within it an organic structure and according to the DP its primary function is to satisfy the security needs of the citizen. Defensoría del Pueblo del Perú, *Informe Defensorial N° 142 Fortalecimiento de la Policía Nacional del Perú: Cinco áreas de atención urgente* (2009, Lima) 99-103.

in a phase of growth or crisis, nor does it demonstrate an interest in collaborating with higher levels of the police institution to train police personnel in human rights and security issues.

Also, despite the absence of a confidentiality clause in the document, the PNP did not voluntarily release this information to social institutions but only did so in compliance with a court order.²⁰³

5.2. AGREEMENT FOR THE PROVISION OF EXTRAORDINARY POLICE SERVICE BETWEEN THE XIV-TERRITORIAL DIRECTORATE OF THE POLICE- CAJAMARCA AND MINERA YANACOCOA S.R.L.

This agreement was in force from March 31, 2011 until December 31, 2012 without clear information on possible supplementary extensions. Furthermore, according to the report entitled “ Comprehensive review of the policies of Minera Yanacocha in light of the Voluntary Principles of Security and Human Rights”, there have been agreements signed between the parties from 2009²⁰⁴ and in accordance with Ministerial Resolution No. 1003-2017-IN of October 9, 2017, which currently governs another agreement with the same mining company.²⁰⁵

In keeping with the Espinar agreement, the XIV Territorial Directorate of the Cajamarca Police considered that articles 166 and 171 of the CPE protected the signing of this agreement to provide extraordinary police security and surveillance services to the Yanacocha mining company, as well as to the projects it has, its assets and personnel. In addition to its content, it is observed that this measure was taken with the intention of contributing to the security of the city of Cajamarca and other locations in its area of influence. However, at the time of examining the clauses, there was no particular support for the population adjacent to the company, nor did it establish channels of interaction between the PNP, the company, the regional or local authorities and the local communities.

²⁰³ Coordinadora Nacional de Derechos Humanos, *Informe Anual 2014-2015* (2015) 38-46.

²⁰⁴ Gino Costa, *Revisión integral de las políticas de Minera Yanacocha a la luz de los Principios Voluntarios de Seguridad y Derechos Humanos* (2009, Lima).

²⁰⁵ Ministerio del Interior del Gobierno Peruano (2018), <<https://bit.ly/2L5ZWp1>> accessed June 2018.

5.2.1. *The Powers of the Peruvian National Police*

- 2.2 De conformidad con lo señalado en el artículo 10°, literal A, numeral 1, del Reglamento de Prestación de Servicios Extraordinarios Complementarios a la Función Policial, aprobado mediante Decreto Supremo N° 004-2009-IN, el objeto del presente Convenio consiste en la prestación por parte de la **POLICÍA NACIONAL** de Servicios Extraordinarios Complementarios Institucionales Permanentes a la Función Policial para garantizar el normal desarrollo de las actividades administrativas y productivas de **MINERA YANACocha**, con la finalidad de prevenir la comisión de delitos o actos de violación de la ley en cualquiera de sus modalidades, perpetrados por personas al margen de la ley que puedan atentar contra el personal, bienes e instalaciones de **MINERA YANACocha**, estableciéndose para ello medidas de prevención y patrullaje con el fin de detectar y neutralizar los riesgos que se pudiesen presentar.
- 3.1 Establecer medidas de Prevención y Patrullaje a través del personal de la **XIV DIRTEPOL Cajamarca**, con la finalidad de prevenir, detectar y neutralizar riesgos que atenten contra el personal, instalaciones, maquinaria y equipo de **MINERA YANACocha** y contratistas, garantizando el normal desarrollo de las actividades mineras y otros aspectos técnicos propios de esta actividad.
- 4.1.2 El personal policial que se designe para cubrir el **Servicio Policial de Seguridad**, será aquel que la **POLICÍA NACIONAL** representada por el **Director de la XIV DIRTEPOL Cajamarca** determine en función a las normas y reglamentos que establecen la disposición y movilización de personal. No obstante para esta elección la **POLICÍA NACIONAL** designará prioritariamente personal especializado en control de multitudes de Cajamarca **DIVISION DE SERVICIOS ESPECIALES y DIRECCION DE OPERACIONES ESPECIALES (DIVSEESP y DIROES)**, en caso de ser necesario y cuando las circunstancias lo ameriten personal de esa especialidad de otras grandes Unidades Policiales.

As Ruiz Molleda y Másquez²⁰⁶ point out, this paragraph specifies that the purpose of the agreement was to guarantee the normal functioning of the mining company's activities, without making any reference to citizen security, and to deploy police personnel specialised in crowd control precisely in order to repress social protests. Although this paper does not seek to address the issue of police repression, it is important to bear in mind that **DIROES'** participation in these scenarios, as established by the DP, had to be exceptional and only activated when the conflict situation exceeded the response capacity of the USE or special services unit, given that its formation is primarily focused on the fight

²⁰⁶ Juan Carlos Ruiz Molleda and Álvaro Másquez Salvador, *La Privatización de la Seguridad Ciudadana La inconstitucionalidad de los contratos de seguridad privada entre empresas mineras y la Policía Nacional del Perú*. (s.f., Lima, Perú), <<https://bit.ly/2KSryYk>> accessed June 2018.

against terrorism.²⁰⁷ However, this agreement ignored this situation, as illustrated in Report No. 02-2013-DIROES-PNP/EM-UNIPEP, and allowed its agents to participate even in preventative actions such as patrols and the security of installations at fixed internal and external positions, with approximately 51 police officers deployed and the provision of a counter-terrorism unit²⁰⁸ at the police facility.

As a result joint PNP and company policy was implemented in this situation, and not only did they consider the people in the sector who led them to consider the implementation of this first policy i.e. -whether or not they can exercise their right- as “people on the fringe of the law”, but the two parties to the policy were also able to assign the area as a possible scenario for terrorist action and assume measures of prevention, detection and neutralization under the same approach -of a possible fight against terrorism-, due to the category assigned to the police base, thus failing to comply with point 3 of the deployment and conduct rules mentioned in the criterion of interaction between the companies and the public security of the VPs.

4.1.1 El Servicio Policial de Seguridad incluirá el planeamiento, ejecución y control del servicio de seguridad para la custodia de las instalaciones y personal de MINERA YANACocha ubicados en la localidad de Cajamarca.

However, in point 4.1.1. above, the report entitled “Integral Review of Minera Yanacocha’s Policies in the Light of the Voluntary Principles of Security and Human Rights” warned that, in practice, the mining company’s security team had responsibility for the integration and conduct of police officers and third parties who provided private security to the company,²⁰⁹ thus distorting the provisions of this paragraph and demonstrating a possible direction of police action dictated by company requirements.

4.1.12 La POLICÍA NACIONAL, ejecutará Servicio de Patrullaje Rural en Área de Operaciones y Zona de Influencia de MINE YANACocha, para lo cual asignará vehículos de acuerdo a especificado en el Ítem 4.2.5 del presente documento.

²⁰⁷ Defensoría del Pueblo del Perú, *Informe N° 156: Violencia en los Conflictos Sociales* (2012, Lima), 96-101; 130-131.

²⁰⁸ Instituto de Derechos Humanos de la Pontificia Universidad Católica del Perú IDEHPUCP, *Diagnóstico Nacional sobre la situación de la Seguridad y el respeto a los Derechos Humanos. Referencia particular al sector extractivo en el Perú*, (2013, Lima, Peru), 125-132.

²⁰⁹ Costa (n 204).

4.1.13 DEL SERVICIO POLICIAL DE SEGURIDAD

La POLICÍA NACIONAL, en cumplimiento a sus funciones intervendrá en situaciones especiales cuando la situación político social haga previsible que podrían afectarse directamente la integridad física de los trabajadores y contratistas de **MINERA YANACocha**, así como sus bienes de conformidad a la Constitución y la Ley.

In addition, when it indicates that patrols could be carried out within the mining company's areas of influence, what is being observed is, in reality, an incursion. According to the agreement, it may have already been in existence in the rural communities and hamlets adjacent to the company's activities.

It is also noted that the police, in effect, under the PSE, did not only perform a crime prevention function or a function of restoring internal order, but extended their power to intervene in situations outside these criteria, giving them a broad discretionary power to determine when a social political situation - such as a communal meeting or *ronderil* for example - could foreseeably affect the company and consequently intervene to "prevent, detect and neutralise" the possible risks that may affect it.

4.1.9 En el caso que MINERA YANACocha verifique la ocurrencia de un incidente que pudiera implicar una deficiencia en el Servicio Policial de Seguridad, será reportado al oficial de coordinación y oficial que éste designe para que adopte las medidas del caso.

The clause above advises of the possible inspection role that the company had at the time of assessing the quality of the PSE service offered by the PNP, and consequently acknowledges the degree of influence it was able to exert over the actions of a third party linked to it.

4.1.15 El Servicio Policial de Seguridad será prestado en los lugares y condiciones indicadas a continuación:

La POLICÍA NACIONAL prestará el **Servicio Policial de Seguridad** a la Empresa **MINERA YANACocha** en zonas de propiedad de la misma y zonas de influencia de acuerdo a las situaciones de riesgo que se prevean y en cualquier otro lugar que sea requerido dentro de la zona de operaciones. **MINERA YANACocha** proporcionará transporte, alimentación y hospedaje adecuado que permita el alojamiento del personal policial y la protección del material y/o equipos logísticos para el cumplimiento de las funciones del personal policial asignado para prestar el **Servicio Policial de Seguridad**.

Asimismo, previa coordinación entre el Oficial de Coordinación y el Asesor Encargado por **MINERA YANACocha**, se prestarán otros servicios que requieran de personal policial, dentro de la Jurisdicción de la XIV DIRTEPOL de Cajamarca.

This point of the agreement confirms what has been stated above, which is that the mining company had the possibility of directing the police service, so it could determine in which areas of its property or area of influence it needed the PNP security service. Even in the last paragraph, it states that the company, after prior arrangements had been made, it could request the police officers to provide services other than the security and surveillance of its facilities. During the term of the agreement, there was an allegation by the civilian population that police personnel providing PSE to the mining company had participated in evictions, and an important international case was brought by Máxima Acuña²¹⁰ against the company.

4.1.5 Para el Servicio Policial de Seguridad relacionado con el servicio policial básico, el personal policial lo realizará en la Comisaría Móvil ubicada en el Campamento de MINERA YANACocha, ubicado en el km. 24 de la carretera a Bambamarca; el personal policial tendrá alojamiento y alimentación, permanecerá uniformado y presto a intervenir en los diferentes asuntos que se relacionan con su función.

In this paragraph Ruiz Molleda and Másquez²¹¹ contend that the State provided for the use of police infrastructure such as mobile police stations in support of private interests. This situation, for example, was not observed in the Espinar agreement, where a police station was installed within the company's premises.

5.2.2. The police service provision system

2.3 Para estos efectos, la POLICÍA NACIONAL convocará la participación del personal policial que se encuentre de vacaciones o de franco pertenecientes a la XIV DIRECCION TERRITORIAL DE LA POLICIA Cajamarca (DIRTEPOL Cajamarca), que voluntariamente acepten prestar el servicio individualizado. De ser el caso, cuando se rebase la capacidad de dicho personal, la POLICÍA NACIONAL empleará un contingente de personal policial que se encuentren de servicio.

The agreement specified that the police personnel assigned to the

²¹⁰ For further reference see: <<http://dhsf-cusco.blogspot.com.ar/2016/02/nuevo-atentado-minera-yanacocha-deja.html>,<http://grufides.org/content/denuncian-nuevas-amenazas-y-atentados-contra-familia-de-maxima-acu>> and <<https://youtube.com/watch?v=u2a8Kb8Lv9M>>, accessed 2018.

²¹¹ Ruiz Molleda and Másquez Salvador (n 206).

Yanacocha SRL mining company were personnel who were either on vacation or were being provided free of charge. In contradiction to the provisions of DS No. 004-2009-IN, it was only when the situation exceeded the capacity of the personnel (as is usually the case in cases of socio-environmental conflicts), that it assumed that police personnel could have been assigned in service with the company. This scenario for Ruiz Molleda and Másquez²¹² clearly meant an involvement of the police service by subordinating the citizen demand for police officers to the needs of the company.

4.1.7 Teniendo en cuenta la modalidad de servicio que ejecuta la POLICÍA NACIONAL; los efectivos policiales que prestan el Servicio Policial de Seguridad en MINERA YANACOCCHA, permanecerán en las instalaciones de ésta durante las VEINTICUATRO (24) horas del día,

cumpliendo una facción de servicio, durante el día, de OCHO (08) horas.

El personal policial asignado permanecerá uniformado y equipado reglamentariamente, de acuerdo a las disposiciones vigentes para este tipo de servicios.

Likewise, for Ruiz Molleda and Másquez²¹³ these paragraphs demonstrated the co-opting and limiting of police personnel mobility, preventing the population's access to police officers when they needed their services because their function was only answerable to private interests as detailed in the agreement. Although it is not possible to provide an assertion such as the one indicated above, this author believes that it is necessary to point out that the agreement could indeed limit the mobility of police personnel by stating that they had to remain on the company's premises 24 hours a day, regardless of whether or not they were outside their working hours.

²¹² Ruiz Molleda and Másquez Salvador (n 206).

²¹³ *ibid.*

5.2.3. Situations in which the company may request an increase in the number of police personnel assigned on a regular basis

4.1.8 MINERA YANACOCCHA solicitará por escrito al Oficial de Coordinación a que se refiere la Cláusula QUINTA de este Convenio, las oportunidades en las que requerirá del Servicio Policial de Seguridad, en forma adicional al que ya esta asignado de manera regular, así como la cantidad de personal policial que requerirá para cada una de dichas oportunidades. Excepcionalmente (de acuerdo a la situación) se hará el requerimiento telefónicamente con cargo a ser regularizado por escrito. Asimismo, la documentación que acredite el movimiento de personal, será considerada como anexo del presente, y será consolidada en un solo archivo.

4.1.11 Cuando la situación requiera apoyo policial de otra Unidades o Subunidades de la **POLICIA NACIONAL** que tengan que desplazarse a la ciudad de Cajamarca, el Director de la XIV DIRTEPOL Cajamarca coordinará previamente con **MINERA YANACOCCHA**, quien correrá con todos los gastos que irroguen estos desplazamientos, tanto de salida, como de retorno, de todo el personal policial, conforme a lo establecido en la cláusula QUINTA, los mismos que dependerán operativa y administrativamente del Director de la XIV DIRTEPOL Cajamarca.

Ruiz Molleda and Másquez²¹⁴ state that these measures extended the company's discretion to request an increase in the number of police personnel, without there being criteria to be observed when making this request. This resulted in neglecting the security of the citizens of Celendín, Cajamarca and even other nearby regions where police personnel were transferred to participate in the PSE in support of the company. Without agreeing with the last conclusion referred to by the authors, i.e. the impact on public safety in other areas because they do not demonstrate data to corroborate what has been said, this author believes it is necessary to note that it was not the PSE institution that assessed the increase in staff, but it was the company alone that could decide the increased number of police personnel that it needed for its protection, thus demonstrating a potential gateway to PSE intervention that could be translated into a degree of relationship or connection with the highest level police authorities at territorial level. These paragraphs also satisfy the interaction criterion between the companies and public security, since they acknowledge that companies contribute to the costs incurred by the States in providing them with protection.

²¹⁴ Ruiz Molleda and Másquez Salvador (n 206).

10.4 Finalmente, las partes dejan constancia que cuando el personal de la POLICÍA NACIONAL realicen un acto de servicio en ejercicio de la función policial (y por tanto no estén prestando el Servicio Policial de Seguridad), no resultarán exigibles las obligaciones de MINERA YANACocha referidas en la cláusula, Cuarta, a excepción de los numerales 4.2.2 y 4.2.4 de la referida cláusula.

4.1.14 En los casos que la POLICÍA NACIONAL preste las garantías necesarias para salvaguardar la integridad física de las personas, así como de los bienes de MINERA YANACocha y sus trabajadores o contratistas, puede realizar actos de servicio e intervenir en

cumplimiento de su mandato constitucional, conforme a lo indicado en la cláusula séptima.

It is clear from paragraph 10.4 that the PNP and the company differentiated between the police and the PSE. From this author's perspective, this differentiation could be clearly observed in situations where the police officers stationed at the mining camp intervened in situations where the company was not a party, for example, in a conflict between private individuals, and consequently the only benefits received were the insurance policy and medical care, but not the sums allocated to the agent by the PSE, among other benefits.

From this author's perspective, the description in this paragraph indicates there were questions raised regarding this type of service, because in situations where socio-environmental conflicts related to mining activity occurred, it was not known with certainty whether the PNP was exercising its police function of restoring internal order and protecting the human rights of all parties, or if police officers were protecting the company using the powers made available to them within the context of the agreements made with the PSE, which governed the situation.

In addition to the above, clause 4.1.14 expressly and clearly warned against the subordination of public interests in favour of private interests. This was because it required that police officers first ensure the security of the company so that they can then carry out their police function and in practice - as can be demonstrated in section 6. 1 there were cases of social conflicts where it was possible to clearly identify that the police action prioritised the protection of the private interest or, in the absence of evidence for that, violated the rights of "persons outside the law" or outlaws, and even where the participation of the company in these events, whether active or by omission, was noted.

5.2.4. *Company Responsibilities*

Clause 4.2 of the agreement details the obligations undertaken by the company and its provisions which demonstrate compliance with the interaction criterion between the companies and the public safety of the VPs, and these commitments were undertaken as follows:

- The company undertook to provide financial compensation to police officers for the sum of 38 soles per day for each officer, and 18 soles per day for each sub-officer, and the sum of 78 soles for services provided in places without logistical facilities. It also paid the XIV DIRTEPOL Cajamarca 0.11% of the Tax Unit-UIT per hour of effective service provision, as regulated by DS No. 004-2009-IN.
- It offered the benefit of an insurance policy to police officers who were stationed for the security of the company. This policy covered cases of death, permanent disability, treatment for minor or serious injuries, funeral costs and transfer for medical care.
- It covered accommodation, food, transportation and other equipment for the proper exercise of the security service.
- It also undertook to strengthen the training of police personnel on human rights and security issues, in consultation with the National Police, and assumed all the costs involved in the intervention of other special units.
- It covered the cost of maintenance and repair of weapons, accessories and/or replacement of uniform as a result of the police security service.
- It also covered the travel ticket costs for the Director of the XIV DIRTEPOL Cajamarca when travelling to the city of Lima to report to the Institutional Command on the state of the social situation of the mining company.

With regard to this last point, it should be noted that this commitment is in accordance with Directive No. 007-2006-IN-0305 which states that the Territorial Director is a legitimate actor to apply for the renewal or signing of an agreement with a private entity, having to state how the agreement contributes to the institutional objectives in the medium and short term and in what way it does so.

Therefore, it is this author's opinion that the signing of these agreements influences the lack of independence in police action.

5.2.5. Some observations on the Agreement

In contrast to the Xstrata agreement, this agreement placed greater emphasis on possible conflict scenarios and detailed the powers that the company would have in such a situation. There was a greater focus on staff training and support for the police institution, demonstrating a possible inclination to facilitate and move towards better levels of training on human rights and security issues for embedded police personnel.

The agreement also established a confidentiality clause in breach of point three of the security agreements regarding the criterion for interaction between the companies and the public security of the VPs.

5.3. MODEL AGREEMENT TO BE SIGNED BETWEEN EXTRACTIVE COMPANIES
AND THE PERUVIAN NATIONAL POLICE

This is a standard model agreement (hereinafter the agreement) to be used for companies linked to the exploitation and transport of natural resources. It aims to increase police services in the areas of influence of companies and at the same time provide the PSE to preserve internal order, public order and public safety. Thus, like the Yanacocha agreement, this standard differentiates between the police service and the extraordinary police service-PSE. One of its structural weaknesses is that it does not specify how police units will be selected to intervene in these areas, nor does it establish channels of communication with regional, local or communal authorities and the social groups that provide security in the areas (rural patrols, local military or self-defence committees), leading to uncertainty that the measure effectively addresses the demands of the citizens who are impacted by it.²¹⁵

Without prejudice to the deficiencies indicated above, this author considers that the following clauses may present an overview from 2017 to its validity in relation to this issue.

²¹⁵ The legal questions regarding this measure were discussed further in section 3.2.1.2 of this thesis.

5.3.1. Corporate Responsibility

Clause 3.1.5 indicates that the company must cooperate with the PNP to maintain order in its area of influence, however it does not specify whether or not the area of influence²¹⁶ is determined by the company's EIS²¹⁷ or of its own free will and who will benefit from the decision as to where its area of influence extends. This arises because in the Xstrata case, in which the PSE was extended to another province that was not covered by its EIA. Additionally, under the premise of promoting greater security through an increase in police presence, police activity should not be limited to a geographical area of the company but should strengthen the police presence in district and provincial areas where there are more incidences of crime and fewer police personnel.²¹⁸

Clause 3.1.8. also specifies that the company is responsible for reporting complaints to the police institution regarding the work of personnel assigned for its security, but omits to indicate the mechanism that could be used by government institutions and the population in their area of influence in order to file their complaints with the police service.

Unlike the agreements reviewed above, this model does not expressly refer to the use of training facilities promoted by the company to share its institutional policies on ethical conduct, safety and the environment

²¹⁶ The area or zone of influence according to the Environmental Assessment and Control Agency -OEFA is the geographic space that can potentially produce environmental impacts caused by the development of economic activities or projects, see: <<https://bit.ly/2DTHZ0m>> accessed June 2018.

²¹⁷ The environmental impact study-EIS (EIA) is an environmental management instrument for projects whose characteristics, size and/or location can produce significant environmental impacts both quantitatively and qualitatively, see: Organismo de Evaluación y Fiscalización Ambiental - OEFA, *La vinculación y la retroalimentación entre la certificación y la fiscalización ambiental* (2016 Lima), 18-20 <<https://bit.ly/2Xaa4Jv>> accessed 2018.

²¹⁸ Cusco has the province with the highest incidence of crime, Cuzco, with Espinar ranked 9th out of 13 provinces, in relation to crime with the highest regional incidence of crimes against property. Comité Regional de Seguridad Ciudadana de Cusco, *Plan Regional de Seguridad Ciudadana* (2018, Cusco). The Province of Espinar has as its capital the District of Yauri which has family violence as its main problem, the Comité Distrital de Seguridad Ciudadana de Espinar, *Plan Local de Seguridad Ciudadana del Distrito de Espinar*, (2017, Espinar, Cusco-Peru). In the case of the Cajamarca region, the province of Cajamarca has crime against property as its main incidence in the districts of Cajamarca and Baños del Inca, being the fifth district of La Encañada with the highest incidence out of 10 districts. In the case of the Province of Celendín, the highest incidence of crime in Huasmin and Sorochuco are crimes against patrimony expressed in assaults and abigeato, respectively. Comité Regional de Seguridad Ciudadana de Cajamarca, *Plan Regional de Seguridad Ciudadana* (2017, Cajamarca-Peru).

with police officers (clause 3.1.7). However, if the company specifies that it must communicate this information to the PNP, then it is complying with point 2 of the arrangements relating to the safeguarding of the interaction criteria between the companies and the public safety of the VPs.

The agreement recognises that there is coordination of joint actions between police officers on police service and PSE officers, for example when dealing with social conflicts, and therefore specifies that the company must take out insurance for both types of police officers for death, disability, injury and emergency care, as well as providing logistical support to deal with this type of eventuality (clauses 3.1.2 and 3.1.4).

In contrast to the two agreements discussed above, these clauses provide greater clarity regarding the benefits enjoyed by police personnel who were not regularly assigned to the company, but also warns that the participation of the PNP in scenarios of socio-environmental conflicts falls within the framework of the agreement signed between the police institution and the company.

Finally, clause 3.1.9. establishes that the company has no power of direction over PNP personnel, however, as already indicated above, this clause was also incorporated into the two previous agreements.²¹⁹

5.3.2. Functions carried out by the Peruvian National Police

In clause 3.2.1 of the agreement, the PNP commits to increase the police service in the company's area of influence to preserve or restore domestic or public order. This author believes this clause should be considered in conjunction with Legislative Decree No. 1267, which maintains that the role of police units²²⁰ as a temporary and exceptional organisation are presently dependent on the Police Macro-Regions. In 2013, these were created so that there would be a greater police presence

²¹⁹ This acknowledgement can be seen in Clauses 6.2 and 10 of the Agreement between Tintaya and the PNP and Clauses 9.1 and 10 of the Agreement between Yanacocha SRL and the PNP.

²²⁰ This police structure was introduced in Article 14 of Legislative Decree No. 1148, Peru's National Police Law which came into effect on December 11, 2012. It was later repealed on December 18, 2016 by Legislative Decree No. 1267 which regulates this structure in Article 24. This approach, introduced by the Government of Ollanta Humala, was aimed at removing police personnel from the company's premises and maintaining the company's security from the police stations in the area and at the police units, in an attempt to bring the company closer to the population. Instituto de Derechos Humanos de la Pontificie Universidad Católica del Perú IDEHPUCP (n 201) 102.

to deal with social conflicts, in accordance with the statement made by former Interior Minister Wilfredo Pedraza, who went so far as to set up police units in the areas of Sicuani-Cusco and Cajamarca.²²¹

From August 2017 to the present day,²²² a state of preventive emergency was gradually declared in the Sur Andino²²³ mining corridor, extending to a length of 500 km²²⁴ and allowing the armed forces to intervene in the area. This measure suspended the constitutional rights relating to liberty, personal security, the inviolability of the home, freedom of assembly and transit of approximately one hundred thousand inhabitants,²²⁵ proving the typical features of a sacrificial area highlighted by Svampa and Viale. The relativisation of fundamental rights is manifested not only in the continuation of the provision of extraordinary police services. This is also evident in the establishment of these police units, as well as the declaration of preventive states of emergency, thus consolidating the relativisation of fundamental rights and the consolidation of a scenario that allows the extractive model to be developed.

Clause 3.2.6. states that part of the activities of the extraordinary police service is to patrol areas of influence in order to maintain public order for the benefit of the company and the population. As with the agreements above, this author believes that there are still many concerns surrounding the way in which the PSE is implemented. Notwithstanding the foregoing, this author considers that this method could omit the

²²¹ Instituto de Derechos Humanos de la Pontificie Universidad Católica del Perú IDEHPUCP (n 201) 87-132; Nylva Hiruelas, "La policía se mercenariza cuando brinda seguridad a una minera" (2016), <<https://bit.ly/2L6EcSY>> accessed May 2018.

²²² Although this aspect of the problem will not be addressed in this paper either, it is necessary to consider it for future research and specify that this measure is currently being examined by the Constitutional Court of Peru, see: <<https://bit.ly/2DZbSwj>> accessed June 2018.

²²³ There is no clear definition of a mining corridor, but the South Andean mining corridor category refers to the areas that will be impacted by the pipeline that connects the Bambas and Xstrata Tintaya projects and whose route crosses three provinces and two regions, see: <<https://bit.ly/2InFEA9>> accessed June 2018.

²²⁴ The Supreme Decree 006-2018-PCM declared a state of preventive emergency along the Apurímac - Cusco - Arequipa road corridor with a length of almost 500 kms. This route links the mining operations of Constancia and Antapaccay in Cusco and the Bambas de Apurímac with a railway that connects the port of Matarani located in Arequipa. In response to this situation, the Regional Community of the Southern Macro Region, made up of the Regional Governments of Arequipa, Apurímac, Cusco, Madre de Dios, Moquegua, Puno and Tacna, passed a motion asking the National Government to lift the state of emergency and resume social dialogue to resolve citizens' demands. <<http://cooperaccion.org.pe/wp-content/uploads/2018/03/Boletin-Actualidad-Minera-del-Per%C3%BA-March-2018.pdf>> accessed 2018.

²²⁵ Observatorio de Conflictos Mineros de América Latina OCMAL, "Conflicto Minero: Tintaya en Espinar" <<https://bit.ly/2L9uLIQ>>, accessed May 2018.

security of the installations in internal fixed posts, which at one time was indicated by DIROES, which implemented and maintained patrols and security at external fixed points of the premises.²²⁶

Clause 4.4 of the agreement refers to the neutrality that should exist among police personnel in relation to their intervention in situations of social conflict between the company and the population. However, as explained in section 3.2.1.2. of this paper, this method, which has been regulated since 2009, is not socially legitimate given that various social actors perceive the PNP as being close to the mining company, and as can be seen in section 5.5 of this paper. This method has in practice contributed to creating situations concerning possible violations of human rights, police conduct in which there is a lack of independence in the company's actions, and its participation in these acts, whether by complicity or by omission.

Clause 4.5 provides that police personnel shall not spend the night at the company's premises, unless there is no adequate infrastructure to house them at the police premises, in which case, the company may provide them with space within its premises. This assumption consequently preserves the situation currently faced by police personnel assigned to the PSE. This same police entity, in the explanatory statement of DS N° 003-2017-IN, recognised that this type of PSE is being maintained due to its lack of economic resources, and this allows it to earn an additional income over and above that assigned annually by Congress.

Clause 5.2. states that the PSE will continue to be provided with the PNP uniform. However, there is no specific mention relating to the weapons used for this service. It does not specify whether this will include only those assigned by the police institution, or whether they will also be able to carry personal weapons (this is in relation to the Tintaya agreement, which stipulated that the PSE should also be provided with weapons for personal use).

With regard to the provisions to be observed in the performance of the police function, clause 4.6. specifies that police personnel are obliged to abide by the company's rules or guidelines, and unlike the previous agreements, it is specified that such compliance shall be carried out whenever appropriate.

²²⁶ Instituto de Derechos Humanos de la Pontificie Universidad Católica del Perú IDEHPUCP (n 208)125-132.

Finally, with regard to the public information of the agreements, Clause 6 indicates that their content is public; however, it is evident that in practice the Ministry of the Interior is failing to publish the content of the agreements. This has been demonstrated by R.M N° 1003-2017-IN of October 9, 2017, which approved the new agreement between the PNP and Yanacocha SRL, but so far, the content of this agreement has not been made available to the public.²²⁷

5.4. A REVIEW OF THE EFFECTS OF THE AGREEMENTS

The content of the first two agreements clearly demonstrates the derogatory connotation embedded in the respective organisations when referring to persons or actions that disrupt their activities, regardless of whether or not they were carried out in the exercise of a fundamental right. In the case of the Yanacocha agreement they were referred to as “people outside the law” and the organisation’s response was to establish a counter-terrorism base within its facility. The Xstrata’s agreement qualifies the behaviour as “the possibility of terrorist acts”, illustrating the organisation’s perception in relation to the social conflicts they face, and this leads to the possibility of justifying a policy of repression in both scenarios.

It is also evident that according to the agreements, the companies have the power to define the actions of police personnel and to supervise the provision of services received in accordance with their own guidelines or private regulations, although this is to a lesser extent in the case of the third agreement. In the case of the first two agreements, there is also the power to order police interventions in areas even outside company premises, and in some exceptional cases the power to censor police personnel and request their replacement in accordance with company interests. The three cases also show the role played by the police in maintaining their presence in a given geographical area.

These abovementioned characteristics actually demonstrate the abdication of the State’s power to direct and/or sustain the State’s monopoly in the use of force in favour of the private sector in matters

²²⁷ Ministerio del Interior del Gobierno Peruano (2018), <<https://bit.ly/2L5ZWP1>> accessed June 2018.

related to internal order, social conflicts and the defence of particular interests. These are features, which Acosta describes as the process of the ‘de-territorialisation’ of the State. This is due to the State not only renouncing the fulfilment or channelling of citizens’ demands through the state institution, but also through the PSE. The State has also decided to renounce certain internal obligations in order to share power with a private party for the benefit of the latter, to the detriment of the population. This will be discussed further in section 5.5.

The three agreements aim, as a primary objective, to prevent illegal acts that mainly affect the normal development of business activities. However, they do not specify how this extraordinary police service will be carried out. In some cases, very ambiguous terms such as “prevent, detect and neutralize” are used, allowing for a wide margin of discretion in the execution of police actions without any oversight or control due to the secretive nature of their operations. Added to this is the lack of knowledge adopted by this measure in relation to other social actors that exercise the same powers in the same geographical jurisdiction, such as regional and local governments and community and social service organisations with constitutionally recognised powers, and the inability of the latter to oversee this form of police PSE. This enables the greater positioning of a private individual in the extractive environments studied vis-à-vis other forms of social representation.

In all three cases, the PSE allows the protection of private interests to be extended beyond the area of its operations. This generates an upsurge in social spaces in the surrounding populations and contributes to the perception of a possible alliance between the State and the company. These alliances are manifested in the perceived lack of independence in police action, the sense of intimidation in people’s daily lives, and the lack of knowledge and understanding of their legitimacy as an authority in charge of enforcing the law.

Added to this, the three agreements in question not only involve regularly deployed police personnel but may also include all the police personnel of the territorial directorate where the company is located, as well as other territorial directorates that border it. This may even include Specialized Units that depend on other directorates, thereby revealing how a particular interest is able to penetrate different levels of the police institution, providing the potential for private influence in the public provision of a state service such as the internal defence of the State.

However, the latest form of agreement approved in 2017 undoubtedly uses more moderate language with respect to previous agreements in relation to the direction and influence that the company can exercise over police functions. Nevertheless, this cannot rule out the possibility there will continue to be a lack of independence in police action and a lack of control over both actors when it comes to restoring internal order and carrying out procedures for initiating criminal investigations, as described, for example, in section 5.5 of this thesis. Even more so when the business sector continues to issue statements that contribute nothing to a policy of conflict transformation, but rather one of delegitimisation. The statement made by the Social Relations Manager of the Tía María²²⁸ project, which belongs to the mining company Southern Perú, in an event of the Institute of Mining Engineers, suggested that the population that resists the project has “terrorism in their DNA” given that the region is the birthplace of Abimael Guzmán.²²⁹

As this section will show, it is not being asserted that the PSE per se violates the human rights of third parties unrelated to the contractual relationship. On the contrary, these agreements expose the degree of influence extractive companies may exert and the probability of police bias in their operations. Depending on the agreement, these may be to a greater or lesser extent, particularly when providing these services in favour of the company or to the detriment of the surrounding population and are consequently the responsibilities that both actors should undertake when in practice, a real violation of human rights is observed within the framework of these agreements.

²²⁸ The Tía María project is a copper mining project owned by the Mexican capital company Southern. It is located in the district of Cocachacra, Islay province, Arequipa-Peru Region. In February 2018 the company announced that it would obtain the construction license for the project, which was the reason behind the strike initiated by the people of Cocachacra. For more information visit <<https://ocmal.org/tia-maria-sigue-sin-licencia-social-pese-a-campana-de-la-southern/>> accessed 3 July 2018.

²²⁹ Abimael Guzmán Reynoso is the leader of the terrorist group Sendero Luminoso (Shining Path) that was responsible for 54% of deaths and disappearances reported to the Truth and Reconciliation Commission during the internal armed conflict, for more information see: <<file:///D:/maestria%20argentina/tesis/cajamarca/hatun-willakuy-cvr-espanol.pdf>> accessed July 3, 2018.

5.5 DEMONSTRATIONS AGAINST THE EXTRACTIVE COMPANY AND THE
PERUVIAN NATIONAL POLICE IN SOCIAL CONFLICT/UNREST SETTINGS WITHIN
THE CONTEXT OF THE AGREEMENTS

This section seeks to highlight the behaviour assumed by police personnel and the company in the context of social conflicts in which human rights violations took place within the framework of the agreements examined. It also seeks to illustrate how the inclusion of this document in the judicial processes allowed the courts to place greater emphasis on the way in which police personnel and the company acted, showing signs of biased police conduct and possible civil liability on the part of the company.

The analysis was based on two specific cases, the first is the case of Espinar where emphasis was placed on the actions of police personnel, and the second is the case of Cajamarca where preliminary corporate responsibility is tested. The attempt to demonstrate the conduct of both police personnel and the company in these two cases does not mean that it can be extrapolated to other similar cases, but it does not rule this out as a possibility either.

5.5.1. Judicial proceedings in relation to the conflict in Espinar

In view of the incidents described in section 2.2.2. of this paper, social organisations decided on May 30, 2012 to file a Habeas Corpus lawsuit in the city of Cusco against prosecutor Carmen Rosas Salas Achircana and Captain Cesar Valiente Aspiros of the PNP, for the violation of the right to personal liberty on behalf of Jaime Borda Pari, Romualdo Teófilo Tito Pinto and Sergio Huamani Hilario.

The Judge of the Fourth Preparatory Investigation Court of Cusco, upon learning of the situation, issued that same day the sentence of habeas corpus²³⁰ declaring the lawsuit to be well-founded, since the deprivation of liberty of the beneficiaries was proven beyond the strictly necessary

²³⁰ It should be noted that the aforementioned sentence was the subject of an appeal in the second instance before the First Criminal Court of Appeals of Cusco, which by Resolution No. 04 of July 3, 2012 ordered the sentence be overturned *a quo* and by amending it declared the request of the plaintiffs inadmissible. It was also the subject of a constitutional complaint before the Constitutional Court, which on 10 October 2012 issued the resolution also declaring the lawsuit inadmissible. With regard to this case, this author must point out that the discussion in the second instance and in the TC was related to the nature of habeas corpus and not to the facts described in the case.

period and even the constitutionally pre-established period. In addition, it ordered the defendants to refrain from engaging in actions or omissions similar to those for which the complaint had been filed. From the facts detailed in the *habeas corpus* sentence, Jaime Borda Pari, Romualdo Teófilo Tito Pinto and Sergio Huamaní Hilario had been arrested and taken to the Tintaya police station on May 28 at 9 pm. They were then notified of their arrest on May 29 between 5 and 8 am, while they were inside the mining installation.

In the acquittal sentence issued on July 17, 2017 by the First Unipersonal Court of Ica²³¹, in the judicial proceeding against Sergio Huamani Hilario, Oscar Mollohuanca Cruz and Herbert Huamán Llave, for the crime of endangering public safety, the Court, in taking into consideration the agreement signed by the PNP and the company, preferred not to pronounce on it, due to the fact that it did not understand the support that the State provided for this type of document. Nevertheless, it is this author's opinion that the Judge should have been able to pronounce on his legal findings based on, for example, the police records of 30 May and 1 June 2012, as well as from the photographic record of 30 May 2012, where the material damage to the Xstrata Tintaya mining company property was recorded. However, the minutes of the proceedings failed to detail whether any basic service had been affected that had harmed the local population, but rather they focused on the damage caused to the company; consequently, they decided not to punish those investigated for the crime of endangering public safety, since they did not demonstrate any impact on a basic service that would clearly affect the security of the population. Furthermore, they pointed out that mining activity is not a basic service and that the criminal offence does not punish the impact on a private individual (recitals 12 and 14).

It also highlighted that police intervention of 29 May 2012 which recorded that Herbert Huamán Llave, the FUDIE leader, had been involved in a situation on the premises of the Hospital of the Province of Espinar allegedly inciting villagers to escalate an indefinite general strike against the Xstrata Tintaya mining company. However, with regard to the arrest, the court had access to a video which did not show an incitement to violence, but rather that he, together with a group of inhabitants, were asking about the wounded and dead (recital 10), thus undermining the

²³¹ The full transcript of the judgment can be viewed at: <<http://sullcasurandino.blogspot.com/2017/08/sentencia-de-primera-instancia-caso.html>> accessed June 2018.

lack of independence of police operations in scenarios of social conflict to the detriment of the population according to this author.

In addition to the ruling, the participation of the company can be clearly seen through the facilitation of its premises for the performance of police duties, as can be seen from the statements of Raúl Umasi Llave (resident arrested on May 28, 2012), Daniel Alfredo Condori Vilca (nightwatchman who was intercepted with the Espinar Municipality truck) and Jaime Borda Pari, who stated that at the time of their arrest they were beaten and taken to the Tintaya camp. The statements made by Ebert Villasante Maravi were also read, who referred to being a police officer on duty at the Xstrata mining camp from 19 May to 09 June 2012 and who participated in the arrest of the Espinar Municipality night van, transferring the detainees to the police station at the Tintaya camp to carry out the appropriate searches of the individuals. (recitals 5.1.1, 5.2.3.1, 5.2.1.1 and 5.5.1).

It can also be inferred from Prosecutor Hector Herrera's statement that both actors, the PNP and the company each had some control over the proceedings being carried out and in some cases they were the ones which directed the actions of the Public Ministry in some way -without this implying a loss of independence. As a consequence of the confrontations between the PNP and the strikers, he ordered that the prosecutors attached to his office be established at the mining camp to carry out the corresponding proceedings. He also received a call from the representative of the mine who asked him to incorporate the sector called Casa Bomba in order to check and write up a report, following serious damage to company property, and pointed out that he had difficulties entering the mining camp because he was not allowed to enter unless he used police or public prosecutor's transport (recital 5.5.3).

The intervention of the company's personnel in social conflict scenarios is also evident. Prosecutor Héctor Herrera explained that when he went to the company's morgue, following a call from a police officer, he confirmed the presence of people who were injured and a person who had died. Those who were there, were advised that it was not possible to carry out the removal of the body or legal medical examinations with a doctor from the mining company, but rather this would be a professional from the Public Prosecutor's Office.

This is compounded by the information obtained in the London proceedings, where the hearings disclosed emails sent by Charlie Sartain - Xstrata Copper Executive Chairman - to José Marun - Executive Vice President of Xstrata Copper's South American Operations division -

where he stated verbatim “José, I think we should take a more direct, proactive and strong approach to confront these sons of bitches”.²³²

For all the above, it could be concluded that this form of PSE in practice could become a factor that strengthens the case for the impartiality of the police service and translates into violations of the human rights of the population adjacent to the mining company because the latter maintains a police presence in conflict scenarios. In addition, it is the company that covers the costs of injuries to police officers through insurance policies, provides in this specific case its facility as a fortress for police planning and the performance of various duties, and assuming that a more direct, proactive and strong approach has been taken to deal with the inhabitants, the company can exercise some power of direction over the actions of the police officers within the framework of the agreement.

In addition, this approach allowed the PNP and the mining company to be the main actors in restoring order in this type of situation, giving them greater power over other actors who, in normal situations, have the same degree of importance as, for example, the Public Prosecutor’s Office, which is responsible for directing police action in situations where criminal acts are committed and intervening in crime prevention, and was limited in the exercise of its constitutional functions, as it is in some way dependent on the decisions taken by the PNP or the mining company in conflict scenarios to carry out its investigative functions.

These facts also demonstrate another characteristic of the de-territorialisation process described by Acosta. This is the result, in this case, of the State not only failing in its duty to guarantee people’s health rights and to democratically channel social grievances, but rather -as described- it played a role with the mining company to transform itself into a police state where it used the public use of force to impose a state of order on the population, violating their fundamental rights, acting illegally in some cases and weakening other institutional actors who, although they have constitutional recognition, did not form part of the rationale that regulates the PNP/company agreement.

²³² “UK mining firm in court over claims it mistreated environmental activists” *The Guardian* (2017), <<https://bit.ly/2z2OZVG>> accessed June 2018.

5.5.2. Judicial proceedings in relation to the Conga conflict

The Celendín Public Prosecutor's Office opened a criminal investigation into the events that occurred on November 29, 2011 in the areas of the "El Perol" and "La Cortada" lagoons. In the morning, a group of residents came to the area to participate in a strike to declare the Conga mining project unviable. In this case, there was a confrontation between the population and the members of the PNP-DINOES, resulting in several injuries, among them Elmer Eduardo Campos Álvarez, who was shot in the back by the police assigned to provide a police-led security service to the Yanacocha SRL mining company.

On January 24, 2013, the Public Prosecutor's Office formally initiated the preparatory investigation and requested the inclusion of the Ministry of the Interior as the responsible civil third-party and, in the same vein, Elmer Eduardo Campos Álvarez's defence team also requested the inclusion of Yanacocha SRL as part of the investigation.

In the first instance, the Preparatory Investigation Court of Celendín on April 3, 2017 declared the technical defence request unfounded, specifying that the PNP would not be dependent on Yanacocha SRL mining company, since the former has an institutional dependency as recognised by art. 166 of the CPE, and takes its decisions to protect citizen security based on an operation to confront the protest carried out in Huayramachay. He also stated that the existence of a cooperation agreement between the two institutions does not determine a relationship of subordination, since it would be unthinkable to consider that Yanacocha could give orders to the PNP.

Faced with this resolution, the Criminal Court of Appeals of Cajamarca decided to declare the appeal filed by the technical defence of Elmer Eduardo Campos Álvarez as justified ordering it to revoke the Resolution issued by the Court of First Instance referred to, declaring the claim of the plaintiff unfounded and amending it, decided to incorporate Yanacocha SRL as the responsible civil third-party.

The arguments for accepting the incorporation of the company in the investigation are based on the fact that at the time of the events under investigation, Yanacocha SRL and the PNP had a PSE agreement in force and that its contents stated that the PNP would provide its services to ensure the normal development of administrative and production activities of the Yanacocha mining company in exchange for financial compensation from the company and protection of material and / or logistical equipment for the performance of their functions. In addition,

it added that although point 9.1. of the agreement does not recognise an employment relationship, it is nevertheless true that in this case there is a legal link that establishes the protection of the company from any act that damages its assets or personnel (recital 16-19).

It also states that point 4.1.15 of the agreement specifies that the company may arrange for police personnel to provide other services that are required by the agreement, and in accordance with the report entitled “Comprehensive review of Minera Yanacocha policies in light of the Voluntary Principles on Security and Human Rights”.²³³ It essentially demonstrated that police officers are considered as part of the company’s security system (recital 20).

He also stated that the police action in the present case was not carried out on the merit of a police function, but rather as a complementary action to it. The police report states that the confrontation originated because the inhabitants intended to set fire to the machines and the camp of the Conga project, which is why DINOES intervened. In addition, it is specified in the agreement that the personnel assigned to provide complementary extraordinary services will be from the unit indicated above. Finally, he points out that there is documentation that allows us to prove, on a limited basis, the coordination that Yanacocha’s security carried out with those investigated before and during the social conflict (recitals 22 and 21). Finally, he points out that there is documentation that allows for the direction of the safety of Yanacocha with those investigated before and during the social conflict. (recitals 22 and 21).

From this perspective, this author considers that the inclusion of the agreement in judicial proceedings during the preparatory investigation phase -as in this case- maintain this viewpoint, which in previous situations could not be argued because of the lack of documentary evidence to postulate the difference between the police function and the extraordinary police service, and the degree of influence that a private actor could have in the re-establishment of public order. This is the first case where a company is included as a responsible civil third-party in a criminal proceeding against police officers who operated in the company’s premises under these agreements and who are currently formally under investigation.

The author would like to emphasise that the Court, when analysing the relationship between the police and the mining company, is first

²³³ Costa (n 204).

differentiating between the Ministry of the Interior and the PNP as entities of the State and the people that make it up, because it does not analyse whether/give consideration to the fact the National Police of Peru (an institution that belongs to the Ministry of the Interior) in signing these agreements continues to be independent or autonomous in its actions as a State institution. Therefore, by separating the police agents from the police institution, the situation arises of the possibility of linking them to another institutional hierarchy such as the security system of the Yanacocha SRL mining company. For this reason, the argument is directed towards the fact that the police officers in the investigation were protecting the company's property.

The members of the Court splits the public security function from the security offered to the mining company, pointing out that "they would not have performed a police function, but complementary work to it"; that is to say, the police officers do not have as a function the specific protection of the private property of a person (natural or legal), but a general protection role vis-à-vis the whole community, and that the agreement created is to complement an additional service to the police function such as the protection of the private property from a specific act and that this duty is fulfilled within the framework of the agreements.

5.6. POSSIBLE ELEMENTS TO CONSIDER WHEN ASSESSING CORPORATE LIABILITY UNDER EXTRAORDINARY POLICE SERVICE AGREEMENTS

In order to evaluate the possible responsibility of the company in civil unrest situations, this author considers that there are some elements that must be studied in order to provide more information or analysis on the subject. This section will only focus on the first two elements regulated by art. 1981° of the CC, as the causal relationship is built on the basis of the accreditation of the first two elements.

It should be borne in mind that the PSE allows the extractive company to exert a degree of influence on the actions of the police personnel assigned to its unit, through obligatory compliance with internal guidelines, the supervision or monitoring that the company provides for the provision of the service, and the logistical and financial support that the company provides for the provision of the police service. In some agreements even this influence is expressed in the possibility of ordering police personnel to take specific actions, the power to censor a police officer in accordance with their internal policies and irrespective of police

disciplinary regulations, and even the power to request the change of police personnel, thus showing evidence of compliance with an element established in art. 1981 of the CC, which is “the relationship of third-party subordination”²³⁴ in this case vis-à-vis the company. As indicated above, this relationship does not reflect a purely vicarious responsibility, but from the position of the PJ it analyses the real existence of the company being able to control the risk conditions of the activity of a third party.

The argument that there are clauses in the agreements that recognise the absolute independence of the PNP personnel or the lack of managerial power of the company cannot be legally protected under this criterion. In some cases, this approach cannot be interpreted as treating police officers as employees, partners or agents of the company, because the criminal process considers the real power of the company to influence the actions of a third party and is not limited to a formal qualification.

This so-called ‘subordination relationship’ also enables an assessment of the possible existence of “negligence at the time of service provider selection or a lack of adequate vigilance in the conduct of the third party”, in order to determine the potential liability of the company benefiting from the service. This criterion, from this author’s perspective, must be examined by observing the concept of due diligence recognised by the GPs given that the Constitutional Court has established that corporate action must be in line with respect for/to human rights, since the State and society are not willing to support an activity that generates environmental and social liabilities.²³⁵ In addition, these are minimum responsibilities that companies must undertake in order to ensure that their actions respect human rights,²³⁶ and bearing in mind that this instrument seeks to make the company aware of the scenario in which it(the Constitutional Court) is intervening so that the company/ it can mitigate or prevent possible damage that may arise from its actions or from the actions of a third party linked to it, and failing this, so that it also takes responsibility for the damage under the principle that “whoever benefits from an activity is also responsible for the damage it causes”.

Thus, in order to determine the possible responsibility of companies for the events described in Chapter 2 of this research, which were caused

²³⁴ For more information on this element, see section 4.2.1. of this paper.

²³⁵ Constitutional Court Exp No. 0048-2004-AI/TC pp 4 and 5, Exp No. 0001-2012, pp 49.

²³⁶ OHCHR, *Frequently Asked Questions about the Guiding Principles on Business and Human Rights*, HR/PUB/14/3 (2014), <https://ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf> accessed 2018.

by police officers who provided their services within the framework of the agreements previously examined, this author argues that criminal investigations should first consider the policy application to national and sectoral issues in relation to the social conflicts in force at the time the events occurred, and second evaluate the conditions under which the PSE was provided. At the time of the events under investigation - that is, the provision of logistical material for the differentiated use of force, specialised training in restoring public order, and police training - the third party must evaluate the measures that the company benefiting from the service adopted in the two previous criteria to prevent or mitigate the possible damage that could arise from the activity of the third party linked to it, and examine its conduct in relation to the events under investigation.

With regard to the first criterion, this author considers that it is linked to the first factor to be observed in the GP insofar as the company must evaluate the differences between international regulations, laws and its national practice focusing on civil unrest so that, assuming it perceives a difference between them, it can adopt the necessary measures to reduce the gap that exists through its internal policies and then impose them on the various actors that provide security services, including police officers.

The second criterion relates to the third factor to be found in the GPs, which is the relationship it has with third parties. To that extent this author believes that the company should assess the performance of the third party in order to avoid being complicit in the damage it may cause. In this case, the performance of the police forces or the PSE and the situation in which the police services are provided must be assessed, because if the company knows that the third party linked to it has poorly trained personnel, with little training, a record of abuse or questions the exercise of their functions and does not have an adequate provision of equipment to provide a service in accordance with national and international guidelines and, despite this, decides to maintain a commercial relationship with it, the company is obliged to take the corresponding measures to redirect the third party's actions and to prevent or mitigate the negative consequences that may be caused by that third party's actions.²³⁷

On the measures to be taken by the beneficiary company, this author considers that this is based not only on the operational principle 19 of the PRs, but also on the very logic of art. 1981° of the CC due to the fact that

²³⁷ This statement is in response to operating principle 19 of the GPs, which specifies that if the company has the influence to prevent or mitigate the negative consequences of a third party, it has the obligation to act accordingly.

this legal figure aims for the damage caused to be assumed by those who are generally in the best position to prevent them, as it is the most suitable vehicle to mitigate the occurrence of these facts and consequently, due to the reversal of the burden of proof, it is the responsibility of the beneficiary company to demonstrate that it adopted the necessary measures to modify the actions of the third party and prevent or mitigate the damage caused by the third party.

With respect to the second element regulated in art. 1981° of the CC which is “the subordinate causes damages caused in the exercise of the function or in the fulfilment of a service”, this author considers that the Justice System must consider if the conduct of the police personnel complied with the functions established in the PSE agreement. In the two previous cases, it has been demonstrated at the outset that the police officers acted within the framework of the agreement and that their function was also aimed at protecting the interests of the company - in the case of Yanacocha to protect the company’s assets and in the case of Espinar to record the damage suffered by the company among their other duties. In addition, this author considers it necessary to evaluate whether police action is regulated in other internal company instruments such as codes of conduct, including requesting plans and operational orders, and intelligence reports that support the aforementioned documents. Also in relation to the reports filed by those in charge of the units once the conflict has ceased, in order to study how police resources were deployed, which facilities were protected, where a larger police contingent was focused, among other data as recommended by the DP;²³⁸ and with the intention of having a greater appreciation of the substantiating the responsibility or not of a third party when damage occurs.

An example of the information that can be obtained from a plan of operations applied to a specific conflict is the Operational Plan N° 018-2010-X-DIRTEPOL/JEM-OFIPLO “Espinar 2010 Indefinite Strike” developed in the framework of the call for a strike against the Majes Sigwas II²³⁹ project in Espinar.

²³⁸ Defensoría del Pueblo (n 207) 95-101.

²³⁹ The Majes Sigwas II project is a project that involved the Arequipa and Cusco Regions, involving the damming of the Apurimac River waters along the Espinar-Cusco zone to divert them to the 60,000 hectare irrigation system located on the Majes- Arequipa pampas. The Regional Government of Cusco questioned this project because it would exacerbate the decline in the flow of river waters that supplied irrigation and affect drinking water supplies to the population of Espinar. This is the reason why a series of legal proceedings were initiated between both regions and deployments. José de Echave, Peru: Majes Sigwas II, un conflicto por el derecho al agua (n.f.) <<https://servindi.org/actualidad/31956>> accessed July 2018.

The following can be noted from this document:

1. The perception that the police have in relation to citizen complaints and the actors in the conflict, because in this operational plan the claims of this social action are considered illegitimate, as shown below:
10. Es de resaltar como característica particular del actuar de los dirigentes sociales de la provincia de Espinar, su resistencia y proceder injustificado frente a cualquier asunto que consideren como perjudicial, haciéndolo parecer un tema de vital interés que atenta contra el común de la gente que habita en Yauri. han conducido a sus habitantes a plegarse a medidas de fuerza que no todos aprueban. Su voluntad, es decir, la voluntad de los dirigentes, en especial del Comité de Lucha y FUDIE ha primado y se ha impuesto por sobre cualquier otro interés, incluso por sobre el liderazgo de la única autoridad elegida por voto popular como es el Alcalde Provincial, a quien manipulan y amenazan a su antojo.

Added to this is the consideration of decision-makers as actors to be confronted or controlled because they are the ones who called for an indefinite strike, consequently maintaining the vision set out in the General Operations Plan No. 4 for the restoration of public order in 2010, as can be seen from the following paragraphs of the operational plan focused on the Espinar strike in 2010 that regulates:

C. FUERZAS ADVERSAS

1. Organizaciones y gremios en conflicto, contrarios al gobierno.
2. Organizaciones Indígenas.
3. OO.TT.
4. DD.CC.
5. Delinquentes Terroristas infiltrados en los diferentes gremios.
6. ONGs que instigan la violencia (defensoras del medio ambiente)

B. SUPOSICIONES

1. Que, las Organizaciones Políticas y Gremiales en conflicto de la Provincia de Espinar ejecuten bloqueos de vías, afectando el desarrollo de las actividades socio-económicas, y que, ante la intervención de las FFOO en el restablecimiento del orden público, los agitadores provoquen enfrentamientos, a fin de generar costo social.

2. An operational plan also shows how police officers perceive the role played by a particular actor, in this case the company, in relation to the environment in which it operates.
11. El Comité de Lucha y el FUDIE ha instaurado abiertamente su antagonismo y poder, en base a las amenazas, al temor y oposición contra las actividades que desarrolla la principal fuente de ingresos de Yauri, como es la empresa minera Xstrata Tintaya, a pesar de conocer el valioso apoyo económico que brinda a sus habitantes y al aporte significativo en pos del desarrollo que ofrece a la ciudad.

In addition, in the following sections they specify that although the indefinite strike is not aimed at questioning the business activity of the mine, it will be indirectly harmed by the actions taken by the population participating in the called strike.

II. SITUACIÓN.

La problemática latente de la provincia de Espinar, está ligada al tema de la Licitación y Construcción del proyecto hidroenergético Angostura Majes Sigvas II; sin embargo éste inconveniente (medidas de fuerza) no sólo afecta la economía de la población espinarenses, sino que directamente a la Empresa Minera Xstrata Tintaya, puesto que los dirigentes de los gremios en conflicto de la provincia de Espinar, presionan al Gobierno Central a través de anuncios y tomas de las instalaciones mineras.

Es necesario, tener en cuenta que ésta situación (anuncios y toma de las instalaciones del asiento minero) se ha producido reiteradamente durante los últimos siete años (2003-2010), habiendo causado no solamente saqueos, destrozos, sino que también haber paralizado las operaciones mineras en varias oportunidades, causando miles de millones de dólares en pérdidas.

Por otro lado, todo problema que se suscita en la provincia de Espinar, es atribuido directa e indirectamente a la empresa minera, pues los dirigentes espinarenses se han acostumbrado a coaccionar a la dicha empresa minera.

In addition to the foregoing, priority was given to the protection of the image of the National State in the light of citizen complaints, thus demonstrating that the operation in this case was aimed primarily at

protecting the company and restoring order with the intention that the activities of the private individual would no longer be affected, as can be seen below:

17. Un aspecto importante que siempre es explotado por la dirigencia de Espinar para presionar al Gobierno Central a aceptar sus reclamos, como ha sido en anteriores ocasiones, es direccionar su lucha contra un objetivo sensible, como la empresa minera Xstrata Tintaya, por el hecho de conocer que se trata de una empresa de capitales internacionales y que por lo tanto el Estado Peruano tiene compromisos basados en convenios del más alto nivel que no puede poner en riesgo por el descrédito que implica.

3. Que, las Organizaciones Políticas y Gremiales en conflicto de la Provincia, ONGs. defensoras del medio ambiente y grupos contrarios a la inversión privada, utilizando a los dirigentes extremistas, continúen exacerbando los ánimos y ejecuten acciones de fuerza, con perfiles radicales y que atenten contra infraestructura e instalaciones de la empresa minera Xstrata Tintaya, sus ejecutivos, toma de rehenes, bloqueo de vías, afectando el normal desenvolvimiento de las actividades ciudadanas.

3. Regarding the measures taken by the PNP, this conflict led the National Police to allocate four hundred and four police officers to intervene in the area, and two hundred DIROES officers were entrusted with the task of safeguarding the mining facility and reinforcing security services, as can be seen:

DIROES (PREVIA COORDINACIÓN, POR DISPOSICIÓN DE LA DIRGEN-PNP)

- a. Designará la cantidad de (200) efectivos policiales (JJ, OO y SS PNP); premunidos con equipo antimotines, para que apoyen los servicios en la provincia de Espinar, a fin de resguardar las instalaciones del asiento minero Xstrata Tintaya.
- e. Reforzará los servicios de seguridad interna y externa establecidos en las Instalaciones de la Empresa Minera Xstrata Tintaya.

4. This operational plan also shows how police officers acknowledge the performance of the mining company - at least in the planning stage - in restoring public order. This is noticed from:

- e. Mantendrá estrecha coordinación con personal especializado de Aerotransportes de Seguridad Interna de la Empresa Minera Xstrata Tintaya (Sr. Héctor CHÁVEZ PRIETO Celular RPC 054958344021) a fin de coordinar el lugar de aterrizaje de las aeronaves PNP.

V. ADMINISTRACIÓN

Todas las coordinaciones se realizarán con el Gerente de Seguridad de la empresa minera Xstrata Tintaya Ing. Luis LLANQUE CHATA (Nº-RPC 959376669; 958344021; 958334631)

- C. TRANSPORTE : EMPRESA MINERA XSTRATA TINTAYA (PREVIA COORDINACIÓN)
- D. ADMINISTRACIÓN : ABASTECIMIENTO OFAD-X-DIRTEPOL. EMPRESA MINERA / XSTRATA TINTAYA (PREVIA COORDINACIÓN)
- E. HOSPEDAJE : EMPRESA MINERA XSTRATA TINTAYA (PREVIA COORDINACIÓN)
- F. ALIMENTACIÓN : EMPRESA MINERA XSTRATA TINTAYA (PREVIA COORDINACIÓN).
- G. EVACUACIÓN Y HOSP : PERSONAL MÉDICO DE LA EMPRESA MINERA XSTRATA TINTAYA

VI. COMANDO Y COMUNICACIONES.

A. PP.CC.

- 1. Comando General : Comisaría Espinar.
- 2. Comando Operativo : Instalaciones de la Empresa Minera Xstrata Tintaya
- 3. Jefe Operativo : Instalaciones de la Empresa Minera Xstrata Tintaya

Demonstrating in this case that the action of police officers in the indefinite strike of Espinar in 2010 focused mainly on the protection of the facilities of the mining company under the possible framework of an agreement.²⁴⁰ It has also been demonstrated that the company has also considered the police officers by participating in the restoration of internal order through the provision of logistics and economic maintenance of police personnel in the area of intervention. The company facilities provided for use, by the company, as a command area for the Head of operations of Operational Command, can be credited minimally through the second element of art. 1981 of the CC of this document which is that “the subordinate causes damage arising from the exercise of the function or in the performance of a service”.

²⁴⁰ As indicated in section 5.1. of this thesis, the agreement analysed in relation to Xstrata dates back to 2011, although it has been pointed out that other types of agreements with the PNP may have been in force since 2000. Alonso Ramos, “Policía Mercenaria”, in *Hildebrandt en sus trece* (2013, Lima) 2-4 and 39-40.

CONCLUSIONS

The DS N° 003-2017-IN that currently regulates the extraordinary police services to the police function essentially maintain the same rationale that was established in the repealed DS N° 004-2009-IN. This established the provision of complementary extraordinary services in the institutional service category, first because a police officer at the time of providing “the extraordinary police service” or the “security or surveillance” service, respectively, may intervene in any situation exercising his or her police duties because he or she is in permanent service in accordance with the provisions of section 5.2 of Legislative Decree N° 1267 and section 5.2 of Legislative Decree N° 1267. 8° of Law N° 27238 repealed, and the first complementary provision of DS N° 004-2009-IN established that the «security and surveillance» service also had the character of a «police function», and secondly because of the deployed police personnel that, as the DS is stated. A similar situation occurs with the provisions for the recognition of extractive companies in relation to their lack of managerial power and the inability to restrict the obligations that police officers have; thus, demonstrating continuity in state policy when addressing this issue.

With respect to the extraordinary police service - denominated in this paper as PSE - in Peru there are two positions, the first recognises that this method is not illegal but extends the citizen de-legitimisation of the police function,²⁴¹ and the second considers that it not only delegitimises the police function but also becomes unconstitutional since it enables special attention to a privileged sector of society, and

²⁴¹ Instituto de Derechos Humanos de la Pontificie Universidad Católica del Perú IDEHPUCP (n 208) 9-17.

opens the possibility of affecting the principle of impartiality and public interest of the police officer.²⁴² In addition, this paper provides the basis for the second position, considering that this approach does not correspond to the model of community policing prescribed by article 166 of the CPE and the criteria established by the United Nations with regard to police activity regulated by article 1 of the Code of Conduct for law enforcement officials, since it does not allow citizen participation through their representative community and social service organisations or local and/or regional governments.

Another aspect to be mentioned is that the arguments used to support Supreme Decree No. 003-2017-IN are related to, among others, the increase in police presence for the benefit of the private individual and the surrounding population, and the significant impact that extractive activity has on perception and security. In the first argument, the research has shown that the current model of agreement regulating the PSE for the extractive sector allows for (like previous agreements) a degree of influence to be exerted by companies over police action, thereby generating a greater positioning of a private actor within extractive areas in comparison to other forms of social representation. In addition, neither DS No. 003-2017-IN nor MR No. 562-2017-IN specify the specialisation of the police personnel who will provide this service, nor does it establish any criteria for their selection, generating a degree of discretion in the State Power that has no objective basis and creating a scenario of great uncertainty since the previous regulations (which also did not regulate criteria for the provision of police personnel) allowed police personnel from intelligence, riot or terrorism squads to be deployed. The derogatory connotations attached to people or actions that disrupted extractive activities was also noticed, including in some cases the installation of counter-terrorism units within the mining camps.²⁴³ With regard to the second criterion, it was considered that since no substantial changes were made to the new PSE regulation, it could also be inferred that the population²⁴⁴ will continue to have this perception of police de-legitimisation.

²⁴² Juan Carlos Ruiz et al., *El convenio Las Bambas y la privatización de la función policial como problema no resuelto* (2018), <<https://bit.ly/2mdHO7J>> accessed June 2018.

²⁴³ Instituto de Derechos Humanos de la Pontificie Universidad Católica del Perú IDEHPUCP (n. 208) 125-13

²⁴⁴ *ibid* 87-124.

This work also demonstrated that the PSE, initially regulated by the previous regulations, allowed the use of preventive force in areas located near extractive projects. From a general point of view, there is evidence to suggest that the international criteria for the use of force have not been met, since the requirement of implementing adequate internal policies for the use of force has not been observed, as there is as yet no legal or ministerial provision regulating the restoration of public order and the use of force in scenarios of social or socio-environmental conflicts, but rather they are still treated in the same way as a criminal act that disrupts public order and reinforces a criminal view of these situations. In addition, there has been no compliance until 2012 with the provision of weapons, ammunition and equipment adequate for the differentiated use of force, and there have been shortcomings in the training and specialised training of police personnel who participated in these scenarios.²⁴⁵ Nor was the use of force considered to be exceptional. To date, the State resolves social conflicts in a fragmented manner²⁴⁶ and only after the outbreak or use of violence in a conflict.

With regard to its compliance with the principles of legality, absolute necessity and proportionality in the use of force, this paper concludes that there are indications that the PSE would not comply with the principle of legality, since its structure does not meet UN guidelines or the Political Constitution of the Peruvian State, as was noted in the first conclusion, and therefore it does not achieve a legitimate objective. Moreover, it would not comply with the principle of absolute necessity because the service is provided on a permanent basis, allowing an increased presence of police personnel specialised in riot control to be stationed on the premises and in the service of a private individual in the mining areas and their surroundings, regardless of whether or not there was a real disruption to the internal order or there are specific persons who represented a direct danger, thus creating a perception of intimidation among the inhabitants of the area. This measure does not solve the problem of social conflicts because there have been complaints of possible human rights violations. Finally, in relation to proportionality, it has been noted that the PSE could use excessive force, because it

²⁴⁵ Instituto de Derechos Humanos de la Pontificie Universidad Católica del Perú IDEHPUCP (n. 201) 58-65; 87-132; Defensoría del Pueblo del Perú (n 208) 130-131.

²⁴⁶ Supreme Decree N° 012-2017-DE published in the *Diario Oficial el Peruano* on December 22, 2017 approving the National Security and Defense Policy of 2017.

applies in scenarios where the resistance of the population is at times non-existent because the conflict is in a state of latency or dialogue.

In relation to the regulation of extractive companies internationally and their link to respect for human rights, this paper has shown that the Voluntary Principles promote the control of extractive companies over the performance of the public security service, that is to say, the interference of a private party in the decisions and actions of public servants. As a consequence of a bias in their actions, and although this author considers that they are provisions that contravene the police model prescribed by art. 166° of the CPE and the criteria established by the United Nations in relation to police activity, their mandatory nature would allow that as long as these models are not removed (which is also the case in the Colombian case), the actors involved in this relationship become responsible for guaranteeing respect for human rights or for the negative impacts that this relationship creates. It has also been shown that Peru has not yet implemented the United Nations Guiding Principles, as well as other international guidelines,²⁴⁷ but that in its national legislation and jurisprudence there are cases where companies have been sanctioned for being responsible civil third parties in the cases of crimes committed by third parties linked to the companies themselves.

In relation to the use of the PSE through the agreements signed between the PNP and the mining companies, it has been documented that the three agreements examined -two with the previous regulation and one with the current regulation-, provide the company the powers to delineate the actions of police personnel in accordance with company guidelines or private regulations, supervise the provision of the service they receive and maintain the police presence in the mining area and its surrounding areas; and the two regulated agreements under DS No. 004-2009-IN also empowered them to order police interventions in areas even outside their property, and in some exceptional cases the power to censor police personnel and request their replacement in accordance with their own company interests. The three agreements also permitted the protection of private interests to be extended even outside the area of their operations, involve an infinite number of police officers indirectly in the defence of private interests, and use very broad terms that provide

²⁴⁷ Working Party on the Question of Human Rights and Transnational Corporations and Other Business Enterprises, *Report on its mission in Peru*, 6-12 <<https://undocs.org/A/HRC/38/48/Add.2>> accessed May 2018.

a wide margin of discretion in the execution of the PSE, thus proving the relinquishing of certain powers of direction and/or sustainability of the monopoly of the State force in favour of a private party.

This paper has also demonstrated how, in the Espinar and Cajamarca conflicts where these types of agreements were in force, it became evident that this PSE model could in practice become a factor that strengthens the bias held by the police service, which is expressed in possible violations of fundamental rights, in the degree of control that these two actors can have in the re-establishment of the conflict, the direction exercised in the actions of other State institutions, such as the Public Prosecutor's Office in these scenarios, and even the possible active intervention of the company in the dispute. It also demonstrates how this agreement was used in court to take a closer look at police action in conflict scenarios, to support a potential distinction between the police function of rendering extraordinary services and the police function of rehearsing civil liability for an act of a third party, in this case the liability of extractive companies in relation to the conduct of the police service under the principle of "whoever benefits from an activity is also liable for the damage it causes" and the general duty of every person not to cause injury or damage.

In the light of these developments, this paper also provides some elements for consideration in evaluating the civil liability regulated in article 1981° of the Civil Code of Peru. Thus, with regard to the element of "subordination relationship of a third party", it was considered that the agreement is an element that makes it possible to demonstrate the degree of influence of the extractive company on the actions of the police personnel seconded to its unit, and consequently the possibility of controlling the risk conditions of the activity of a third party by whomever benefits from the service. In addition to evaluating the neglect and lack of vigilance in the performance of those who benefit from the activity (in this case the extractive company), the possibility was postulated of inserting into said evaluation the criteria established by the Guiding Principles on companies and human rights, and consequently analysing the national and sectoral policy in relation to the social conflicts in force at the time the events occurred. It also evaluated the conditions in which the provision of extraordinary police services was provided at the time of the events under investigation, i.e. the provision of logistical material for the differentiated use of force, specialised training in restoring public order and police training, and assessed the measures adopted by the company benefiting from the service in the two previous criteria to

prevent or mitigate the possible damage that could arise from the activity of the third party linked to it, and also to analyse the conduct of the company in relation to the events under investigation. With regard to the second element of art. 1981° of the CC linked to the fact that “the subordinate causes damage or injury in the exercise of the function or in the performance of a service”, it was considered that in the previous cases it was seen that police action also responded to protect the interests of the company, which is why it is necessary to examine this element not only to evaluate the content of the agreements, but also the internal policies of the companies and the plans, reports and other documents produced by the police.

Finally, it is clear that in the geographical areas where mining companies are located in Peru there is a process of de-territorialisation, as the State fails to fulfil its role of guaranteeing the enjoyment of the fundamental rights of the people living in the vicinity of these projects, thereby surrendering its social responsibilities to private actors. The State has also used legal instruments with the aim of establishing in practice the human rights of the people who carry out their activities in the areas adjacent to the mining camps, through the provision of extraordinary police services, the establishment of police fronts in mining areas such as Cusco and Cajamarca and the declaration of preventive states of emergency in mining corridors that may even cover several regions, thus consolidating the image of a police state from the Acostas²⁴⁸ point of view and sacrificing entire areas as seen from the perspective provided by Svampa and Viale.²⁴⁹ It has been shown that extractive activity is being prioritised over actual attention to the demands of the population for the economic development of the country as expressed by different State authorities,²⁵⁰ and consequently these measures provide uncertainty as part of an economic rationale.

²⁴⁸ Alberto Acosta, “Extractivismo y neoextractivismo. dos caras de la misma maldición”, (2012), <<https://bit.ly/2zxxNI2h>> accessed May 2018.

²⁴⁹ Maristella Svampa and Enrique Viale, *La Argentina del extractivismo y el despojo* (2014, first edition, Buenos Aires, Argetina, Katz Editores) 15-20; 81-84

²⁵⁰ In the Mining Convention held in 2017 in Arequipa-Peru several officials of the Peruvian State explained the institutional guidelines in this economic sector, so that the Ombudsman focused its participation on the relationship between mining activity and human rights, under the phrase “without mining investment there is no economic growth, without economic growth human rights will not be realized for everyone”, see: <https://bit.ly/2ScSG3l> accessed June 2018.

BIBLIOGRAPHY

BOOKS AND ARTICLES

- Acosta, Alberto “Extractivismo y neoextractivismo. dos caras de la misma maldición”, (2012), <<https://bit.ly/2zxNl2h>> accessed May 2018.
- Alda, Sonia, “¿Qué modelo de fuerzas es necesarios para el actual escenario de inseguridad?”, in Revista temática Centros de Altos Estudios Nacionales (2016, 2), 48-78.
- Arribasplata, Juan, “Conga: Cronología de un conflicto”, in Revista de Opinión y Análisis Voces (2011, 38), 10-13.
- Bullard, Alfredo *Derecho y Economía. El análisis económico de las instituciones legales* (2003, Lima, Palestra Editores).
- ; Escobar Rozas, Freddy; León Hilario, Leysser “Temas de responsabilidad civil en debate: nuevas tendencias”, in Revista Ius Et Veritas (2012, N° 45, December) 422-433.
- Cantú Rivera, Humberto Fernando, *Empresas y derechos humanos: ¿ha hacia una regulación jurídica efectiva o el mantenimiento del status quo?* (Universidad Nacional Autónoma de Mexico, Anuario Mexicano de Derecho internacional del Instituto de Investigaciones jurídicas, 2013) 313-354.
- Comité Regional de Seguridad Ciudadana de Cusco, *Plan Regional de Seguridad Ciudadana* (2018, Cusco).
- Comité Distrital de Seguridad Ciudadana de Espinar, *Plan Local de Seguridad Ciudadana del Distrito de Espinar*, (2017, Espinar, Cusco-Peru).
- Comité Regional de Seguridad Ciudadana de Cajamarca, *Plan Regional de Seguridad Ciudadana* (2017, Cajamarca-Peru).
- CooperAccion Mesa de Diálogo en la Provincia de Espinar Cusco 2012-2014 (2014, Lima, Peru).
- Coordinadora Nacional de Derechos Humanos (National Coordinator for Human Rights), *Informe Anual 2014-2015* (2015).
- *Informe Anual 2015-2016* (2017).
- Costa, Gino, *Revisión integral de las políticas de Minera Yanacocha a la luz de los Principios Voluntarios de Seguridad y Derechos Humanos* (2009, Lima).
- Cubas Villanueva Victor, *El proceso penal, teoría y práctica* (1998, Lima, Palestra Editores).

- De Echave, José, *Majes Siguas II, un conflicto por el derecho al agua* (n.f.) <<https://servindi.org/actualidad/31956>> accessed July 2018.
- De Schutter, Olivier “Foreword: beyond the Guiding Principles” in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013).
- Defensoría del Pueblo del Perú, *Informe N° 156: Violencia en los Conflictos Sociales* (2012, Lima).
- Defensoría del Pueblo del Perú, *Informe Defensorial N° 142 Fortalecimiento de la Policía Nacional del Perú: Cinco áreas de atención urgente* (2009, Lima).
- Defensoría del Pueblo del Perú, *Reporte de conflictos sociales N° 170*, (2018, Lima).
- Defensoría del Pueblo del Perú, *Informe Defensorial N° 142 Fortalecimiento de la Policía Nacional del Perú: Cinco áreas de atención urgente* (2009, Lima).
- Defensoría del Pueblo del Perú, *Resolución Defensorial N° 009-2012/DP*.
- Donayre Montesinos, Christian “Comentario al art. 171 de la Constitución Política del Estado” in Walter Gutierrez, *La Constitución Comentada análisis artículo por artículo*, (2005, Lima, Perú, Gaceta Jurídica), 826-830.
- Fruhling, Hugo, “Policía Comunitaria y Reforma Policial en América Latina ¿Cuál es el impacto”, in Boletín del Centro de Estudios en Seguridad Ciudadana (2003) 1-36.
- Glencore, *Reporte de Sostenibilidad* (2014) <<https://bit.ly/2mdzDbm>> accessed June 2018.
- Garavito, Cesar “Empresas y derechos humanos un marco conceptual y un mapa de estrategias regulatorias”, in *Empresas y derechos humanos en el siglo XXI. La actividad corporativa bajo la lupa, entre las regulaciones internacionales y la acción de la sociedad civil* (2018, Buenos Aires, Siglo XXI editores) 29-74
- Gudynas, Eduardo “Conflictos y extractivismos: conceptos, contenidos y dinámicas”, in Revista en Ciencias Social de la Universidad Mayor de San Simón (2014), 27-28: 79-115.
- Hinkelammert J., Franz; Mora Jiménez, Henry, “Por una economía orientada hacia la reproducción de la vida”, in Revista de Ciencias Sociales de la Facultad Latinoamericana de Ciencias Sociales (2009, 33), 39-49 <<https://bit.ly/2uuEqJr>> accessed May 2018.
- IACHR, “Criminalization of Human Rights Defenders,” OEA/Ser.L/V/II.Doc.49/15 (2015) <<http://oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>> accessed 2018.
- IACHR, “Report on public hearings of the 162nd session” (27 June 2017) <http://oas.org/en/iachr/media_center/PReleases/2017/085.asp> accessed 2018.
- Instituto de Derechos Humanos de la Pontificia Universidad Católica del Perú IDEHPUCP, *Diagnóstico Nacional sobre la situación de la Seguridad y el respeto a los Derechos Humanos. Referencia particular al sector extractivo en el Perú* (2013, Lima, Peru).
- Instituto Pacífico, “La prestación de servicios de los miembros de la PNP”, in Revista Actualidad Gubernamental (2009, 11), VII-1-VII-3.
- International Commission of Jurists, *Industrias extractivas, derechos humanos y conflictos sociales en Perú* (2016, Geneva).
- International Federation for Human Rights FIDH, *Corporate Accountability for Human Rights Abuses. A Guide for Victims and NGOs on Recourse Mechanisms* (2016).

- ICRC, *Los derechos humanos y el derecho humanitario en los principios rectores de la aplicación profesional de la ley* (2002, Geneva).
- ICRC, *To Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Forces* (2014, Geneva).
- Laville, Jean-Louis, "Solidaridad", in Antonio David Cattani et al., *Diccionario de la otra economía: Colección lecturas sobre Economía Social* (2009, Argentina, Editorial Altamira) 350-355.
- Leff, Enrique, *Racionalidad Ambiental. La reapropiación social de la naturaleza* (2004, Mexico, Siglo XXI editores).
- Martínez Alier, Joan; Roca Jusmet, Jordi, *Economía Ecológica y Política Ambiental*, (2013, third edition, Mexico, Fondo de Cultura Económica publishing house).
- Minera Yanacocha SRL, *Estudio de Impacto Ambiental Proyecto Conga: Resumen Ejecutivo* (2010, Lima).
- Núñez del Prado, Isabela, "Un conflicto de larga duración: El caso Tintaya desde los clásicos de la Sociología", in Revista la Colmena del Departamento de Ciencias Sociales de la PUCP (2013, 6) 66-68.
- OECD, *OECD Guidelines for Multinational Enterprises*, OECD Publishing (2011), <<https://doi.org/10.1787/9789264115415-en>> accessed July 2018.
- Organismo de Evaluación y Fiscalización Ambiental - OEFA, *La vinculación y la retroalimentación entre la certificación y la fiscalización ambiental* (2016 Lima), 18-20 <<https://bit.ly/2Xaa4Jv>> accessed 2018.
- OHCHR, *Frequently Asked Questions about the Guiding Principles on Business and Human Rights*, HR/PUB/14/3 (2014) <https://ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf> accessed 2018.
- OHCHR, *Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04 (2011) <https://ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 2018.
- Otárola Peñaranda, Alberto "Comentarios al art. 163 de la Constitución Política del Estado", in Walter Gutierrez, *La Constitución Comentada análisis artículo por artículo*, (2005, Lima, Gaceta Jurídica), 781-788.
- Patrón Salinas, Carlos A "Responsabilidad civil por los actos del subordinado", in *Código Civil commented by the 100 best specialists* (2003, Lima, Gaceta Jurídica) 174-182.
- Prieto De las Casas, Roberto Pérez, "Qué juzgado debe ser el competente (en razón de materia) cuando se involucra a tercero civilmente responsable? in Themis-Revista de Derecho, (2016) 217-226.
- Quijano Valencia, Olver, *Eufemismos. Cinismo y sugestión en el actual ampliación del campo de batalla* (2011, first edition, Colombia, Editorial universidad del Cauca).
- Red Sombra de Observadores de Glencore, *Informe sobre las operaciones de Glencore en Latinoamérica* (2017), <<https://bit.ly/2uCTLJR>> accessed June 2018.
- REDESCA-CIDH(IACHR), "Presentación sobre Derechos Humanos y Empresas" (Presentation on Human Rights and Business), (2018, Bogotá), <<http://scm.oas.org/pdfs/2018/CP38733T.pdf>> accessed 2018.

- Ruggie, John, "Clarifying the concepts of "sphere of influence" and "complicity". Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises" A/HRC/8/16 (15 May 2008).
- Ruggie, John, "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises." A/HRC/17/31 (21 March 2011).
- Ruggie JG, "Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises" in César Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2017).
- Ruiz Molleda, Juan Carlo and Másquez Salvador, A., *La Privatización de la Seguridad Ciudadana La inconstitucionalidad de los contratos de seguridad privada entre empresas mineras y la Policía Nacional del Perú* (s.f., Lima, Perú), <<https://bit.ly/2KSryYk>> accessed June 2018.
- Ruiz, Juan Carlos, Quispe, Maritza y Másquez, A., *El convenio Las Bambas y la privatización de la función policial como problema no resuelto* (2018), <<https://bit.ly/2mdHO7J>> accessed June 2018.
- Sabatini, Francisco, "Conflictos ambientales y desarrollo sustentable de las Regiones Urbanas", in Revista EUE (1997, XXII, 68) 77-91.
- Socios Perú, *Principios Voluntarios de Seguridad y Derechos Humanos* (2015).
- Svampa, Maristella; Viale, Enrique, *La Argentina del extractivismo y el despojo* (2014, first edition, Buenos Aires, Argetina, Katz Editores).
- Taboada Cordova, Lizardo, *Elementos de la responsabilidad civil: comentarios a las normas dedicadas por el Código Civil a la responsabilidad civil contractual y extracontractual* (2003, Lima, Grijley editores).
- Ungar, Mark (2011). "Reforma Policial contemporánea en America Latina: el desafío local de la política nacional", Revista del Instituto Interamericano de Derechos Humanos, pp. 165-194.
- United Nations Office on Drugs and Crime, *Police. Public Safety and Police Service Delivery. Criminal Justice Assessment Toolkit* (2006, New York) <https://unodc.org/pdf/criminal_justice/PUBLIC_SAFETY.pdf> accessed June 2018.
- Working Party on the Question of Human Rights and Transnational Corporations and Other Business Enterprises, *Report on its mission in Peru*, 6-12 <<https://undocs.org/A/HRC/38/48/Add.2>> accessed May 2018.
- Xstrata Copper Division de Operaciones Perú, *Informe de Sostenibilidad* (2012) <<https://bit.ly/2La9gxR>> accessed June 2018.
- Yanacocha, *Reporte de Sostenibilidad Yanacocha* (2011) <<https://bit.ly/2NdzJeJ>> accessed June 2018.
- Zavaleta, Mauricio, "La política de lo técnico: una aproximación al desarrollo", from Asociación Servicios Educativos Rurales SER, *Los límites de la expansión minera en el Perú* (2013, Lima, Perú) 109-149.
- Zuñiga Rodríguez, L. , "Las consecuencias accesorias aplicables a las personas jurídicas del art. 105 CP: Principales Problema" in Yearbook of Criminal Law of the University of Freiburg (2003) 473-505.

CASE LAW

- Inter-American Court of Human Rights, *García Ibarra et al. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Series C No. 306. (17.11.2015).
- *Hermanos Landaeta Mejías et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Series C No. 281. (27.08.2014).
 - *Nadege Dorzema and others v. Dominican Republic*. Merits, Reparations and Costs. Judgment. Series C No. 251. (24.10.2012).
 - *Zambrano Velez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment. Series C No. 166, (4.07.2007).
- Sala Penal Transitoria de la Corte Suprema de Justicia de la República del Perú, R. N. N° 1658-2014 (15.03.2016), <<https://bit.ly/1Uzt6mj>> and <<https://bit.ly/21vhDEU>> accessed July 2018.
- Segunda Sala Penal Especial de la Corte Superior de Justicia de Lima, Exp N° 011-2001 (08.08.2006), <<https://bit.ly/2LjAbYh>> accessed June 2018.
- Segunda Sala Penal Especializada en lo penal para procesos con inmos en cárcel de la Corte Superior de Justicia de Lima, Exp N° 99-09 (527-09) (23.03.2012), <<https://bit.ly/2LluAkl>> accessed June 2018.
- Tribunal Constitucional del Perú, Exp N° 0001-2012-PI/C, proceso de inconstitucionalidad (17.04.2012).
- Exp N° 0002-2008-PI/TC, proceso de inconstitucionalidad (09.09.2009).
 - Exp N° 0005-2001-AI/TC, proceso de inconstitucionalidad (15.11.2001).
 - Exp N° 0017-2003-AI/TC, proceso de inconstitucionalidad (16.03.2004).
 - Exp N° 0022-2004-AI/TC, proceso de inconstitucionalidad (12.08.2005).
 - Exp N° 0025-2005-PI/TC and Exp N° 0026-2005-PI/TC proceso de inconstitucionalidad (25.04.2006).
 - Exp N° 0048-2004-AI/TC, proceso de inconstitucionalidad (03.01.2005).
 - Exp N° 0090-2004-AA/TC, proceso de amparo (05.08.2004).
 - Exp No. 03343-2007-PA/TC, proceso de amparo (19.02.2009).
 - Exp N° 5287-2005-PHC/TC, proceso de habeas corpus (17.09.2005).

INTERNET RESOURCES

- Borda, Jaime “Espinar a tres años del conflicto; mucho ruido y pocas nueces” (2015), <<https://bit.ly/1HJ26fD>> accessed May 2018.
- Business & Human Rights Resource Centre, “Monterrico Metals lawsuit (re Peru)” (2014), <<https://business-humanrights.org/en/monterrico-metals-lawsuit-re-peru-0#c18018>> accessed May 2018.
- Carrión, Jesús; Martí, Julia “OCDE y OIT” (n.d.), <<http://omal.info/spip.php?article48058>> accessed June 2018.
- Coordinadora Nacional de Derechos Humanos “Ruth Luque: ‘Rechazamos categóricamente la presencia de municiones en nuestra camioneta’” (2012), <<https://bit.ly/2ulh4Xa>> accessed May 2018.
- Grupo de Formación e Intervención para el Desarrollo Sostenible GRUFIDES, “Conflicto Minero Conga” (n.d.), <<https://bit.ly/2uiZJyj>> accessed June 2018.

- Hiruelas, Nylva “La policía se mercenariza cuando brinda seguridad a una minera” (2016), <<https://bit.ly/2L6EcSY>> accessed May 2018.
- Leigh Day & Co., “Demandates peruanos por torturas indemnizados por Monterrico” (n.d.), <<https://servindi.org/actualidad/48219>> accessed June 2018.
- Observatorio de Conflictos Mineros de América Latina OCMAL, “Derrame de mercurio en Choropampa: 15 años sin respuestas” (2015), <<https://bit.ly/2L6Nkac>> accessed May 2018.
- “Conflicto Minero: Tintaya en Espinar” <<https://bit.ly/2L9uLIQ>> accessed May 2018.
- OECD, “Acerca de la Organización para la Cooperación y el Desarrollo Económicos (OCDE)” (s.f.) “About the Organisation for Economic Co-operation and Development” (n.d.), <<https://oecd.org/centrodemexico/laocde/>> accessed July 2018.
- Prelatura de Sicuani, “Pronunciamiento: un modelo de desarrollo sostenible, que asegure el bienestar de todos respetando el equilibrio ecológico” (2012), <<https://bit.ly/2ueMZIX>> accessed May 2018.
- ProInversión, “La inversión extranjera directa” (2018), <web: <https://bit.ly/2JkdktX>> accessed July 2018.
- ProInversión, “¿Por qué invertir en el Perú?” (s.f.), <<https://fundacaoaip.pt/wp-content/uploads/2017/01/Por-que-invertir-en-Peru-2016.pdf>> accessed July 2018.
- Ramos, Alonso “Policía Mercenaria”, in *Hildebrandt en sus trece* (2013, Lima) 2-4 and 39-40.
- Redacción de la República, “Ministerio del Ambiente objeta el proyecto Conga” (2011), <<https://bit.ly/2mdFFZJ>> accessed July 2018.
- “Gerente de Southern deja entrever que en distrito arequipeño tienen genes terroristas” (2018), <<https://bit.ly/2IHfj2l>> accessed July 2018.
- Servicio de Comunicación Intercultural SERVINDI, “Perú: IDL pide derogar norma que cambia competencias en casos Espinar y Cajamarca” (2012), <<https://servindi.org/actualidad/65608>> accessed June 2018.
- “UK mining firm in court over claims it mistreated environmental activists” *The Guardian* (2017), <<https://bit.ly/2z2OZVG>> accessed June 2018.
- Vicaría de la Solidaridad de la Prelatura de Sicuani-Cusco, “Espinar: Informe sobre la paralización en Espinar - Cusco” (2012), <<https://bit.ly/2NMRBOD>> accessed May 2018.

VIDEOS

- Boyd, S., “*Cuando la tierra llora: Operación Diablo*” (2010, Perú, Guarango).
- Noticiero 24 horas Edición Central, “*Serenos detenidos con bombas molotov dicen que actuaron por orden del alcalde*” (2012, Perú. Panorama Televisión).
- WillaxTelevision, “*Vicaría de Sicuani en contra del Estado de Emergencia*”, (2012, Perú).

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