

Amicus Curiae

Presented to the Constitutional Court of Peru regarding File 00014-2016-0-1007-SP-CI-01

Justice and Corporate Accountability Project

Faculty of Law, Thompson Rivers University

Osgoode Hall Law School, York University

Canada

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PART I: INTRODUCTION

1. Request to be considered an Amicus Curiae

[1] Distinguished Justices of the Constitutional Court of Peru: In this *amicus curiae*, Professor Charis Kamphuis and Professor Shin Imai, members of the Justice & Corporate Accountability Project (JCAP) (justice-project.org), headquarter in Canada, intervene in this case with the objective of offering legal arguments and information that we believe will be useful for the Court's analysis of the *amparo* action brought by Oscar Avelino Mollohuanca Cruz and the Association of Livestock Producers of Huinipampa-Espinar.

[2] JCAP is a non-governmental organization composed of Canadian lawyers, law professors and law students. Its membership has knowledge and expertise with regard to the international human rights law regimes that apply to Indigenous peoples, Campesino communities and their relationship with extractive industry projects.

2. Summary of the Intervention

[3] In this *amicus curiae* we do not attempt to refer to all of the legal issues before the court. Our objective is to offer the Court information about some of the instruments of international law and policy that are relevant to the adjudication of this case.

[4] This *amparo* raises serious questions regarding the constitutionality of a series of “extraordinary and complementary” services contracts formed between mining company Xstrata Tintaya (now Antapaccay Mining) and the Peruvian National Police Force (“PNP”) with the objective of providing security services to the infrastructure and personnel associated with Tintaya Mine (now Antapaccay), located in Espinar Province in the Department of Cusco. This case is important because the terms of the Tintaya-PNP contract are very similar to a number of other contracts that we have personally examined between foreign resource companies and the PNP. Researchers have identified at least 20 such contracts, capturing the services of close to 500 police

officers and facilitating the transfer of millions of dollars to police institutions from private companies.¹

[5] Part II of this *amicus curiae* introduces the legal and social context of the Tintaya-PNP contract and of these agreements more generally. We begin with a basic description of the domestic legal regime that initially facilitated the formation of these contracts. With this background, we summarize the key provisions of the extraordinary and complementary services contract that governed the PNP's presence at Tintaya Mine from at least 2011 to 2013. Following this, we draw on highly reputable sources in order to establish: first, that the contracts in question are formed in an environment of intense social conflict between mine-affected communities and resource companies; second, that conflicts are often characterized by episodes of violence between police officers and protestors; and third, that affected communities typically suffer from various forms of social, cultural and economic exclusion, in part due to their status as Indigenous, Native or Campesino.

[6] We understand that the Peruvian Constitution protects values such as the rule of law, equality, non-discrimination and the community's rights to security. In Part III, we will present international statements of law and policy that establish the importance of the principle of police impartiality and its critical relationship to the principles of equality, non-discrimination and rule of law in a democratic society. Referring to these international statements, we argue that the contracts between the PNP and the transnational mining companies, are inconsistent with the well-established principle that the state must provide security services to its citizens in a manner that is impartial and responsive to the special needs of society's most vulnerable members.

¹ Instituto de Democracia y Derechos Humanos, *Diagnostico Nacional sobre la Situación de la Seguridad y el Respeto a los derechos Humanos. Referencia particular al sector extractivo en el Perú* (Lima, 2013) [Idehpucp]; Rael Mora, "Foreign Mining Companies Hire Peru's Police as Private Security", teleSUR (7 May 2015), online: <<http://www.telesurtv.net/english/news/Perus-Police-Criticized-for-Private-Financing-from-Business-20150507-0028.html>>.

PART 2 – SOCIAL & LEGAL CONTEXT

1. Domestic regime governing the contracts between the PNP and private companies

[7] This section will describe the legal regime in Peru that has allowed the PNP to enter into a services contract with companies like Xstrata Tintaya. Between 2012 and 2016, these contracts were governed by the 2012 *Law of the National Police Force of Peru*² (“*PNP Law*”), which authorized the PNP to enter into service agreements that are “extraordinary and complementary to the police function” in exchange for various forms of payment.³ In December of 2016, the *PNP Law* was replaced with a new law.⁴ However, the 2016 law contains provisions that authorize the same police services contracts as those authorized under the previous *PNP Law*.⁵

[8] In this same way, the 2009 Supreme Decree No 004-2009-IN⁶ contained standards and procedures that regulated the terms of extraordinary and complementary police services contracts until early 2017, when Supreme Decree No 003-2017-IN was passed.⁷ Like the new 2016 law, these new 2017 regulations continue to recognize and permit services contracts between the PNP and private companies.⁸ This section of our *amicus* analyzes the 2012 *PNP Law* and 2009 regulations, as together they form the legal framework that permitted the establishment of the specific Tintaya-PNP contract that we turn to analyze further in the following section.

The 2009 regulations aim, among other things: to optimize the administration of police personnel in order to fulfill the terms of the service agreements; to contribute to the well-being of the police force; to specify functions, responsibilities, duties and rights of the police force; and to protect the image of the PNP by ensuring that police officers do not jeopardize the force’s “public moral ethic”

² Decreto Legislativo No 1148, *Ley de la Policía Nacional del Perú* (most recently amended on 11 December 2012) [*Decreto Legislativo*].

³ *Ibid* at art 49(5).

⁴ Decreto Legislativo No 1267, *Ley de la Policía Nacional del Perú*, 18 December 2016, [*Decreto Legislativo 2016*].

⁵ *Ibid*, Disposiciones Complementarias Finales, Sexta-Servicios Policiales Extraordinarios.

⁶ Decreto Supremo No 004-2009-IN, *Decreto Supremo que Aprueba el Reglamento de Prestacion de Servicios Extraordinarios Complementarios a la Funcion Policial* (11 July 2009) [*Decreto Supremo 2009*].

⁷ Decreto Supremo No. 003-2017-IN, *Decreto Supremo que aprueba los lineamientos rectores para la ejecución de los servicios policiales en cumplimiento de la función policial*, 21 de febrero de 2017 [*Decreto Supremo 2017*].

⁸ *Ibid*, arts 9-20.

in the performance of the agreements.⁹ In this framework, the Regional police authorities were responsible to ensure that officers working under these contracts perform their duties in accordance with both the regulations and the contract.¹⁰

[9] The PNP-Tintaya contract fell under the category of “permanent institutional contracts” as established in the regulation. Institutional contracts are formed between the PNP Director-General and the representatives of another institution, which may include a private company.¹¹ Permanent institutional contracts require the PNP to provide extraordinary and complementary services for the length of time specified in the contract, with the possibility of renewal.¹² Contracts are typically renewed under the same or similar terms. The authors of this *amicus* have reviewed documents that suggest that a permanent institutional contract with respect to Tintaya Mine remained in place, at a minimum, from 2000 until at least 2013 and from 2017 to date.

[10] Salaries paid to individual officers represent one category of payments for the services rendered under permanent institutional contracts.¹³ A second category is a payment made directly from the mining company to the PNP at the institutional level.¹⁴ This second category of funds are assigned to cover the logistical or administrative costs that the PNP incurs as a result of the services offered. According to the regulation, priority in the use of these funds is given to the acquisition of goods and services for the use and wellbeing of the PNP personnel and police stations that offer the services, including for the maintenance and improvement of police stations.¹⁵ The exact quantum of funds that may be transferred to the PNP is not specified in the regulation, rather it is determined as a percentage of the total salary earned by police personnel under the contract.¹⁶ Contracts may also contain a secrecy clause which imposes a duty of confidentiality

⁹ Decreto Supremo 2009 at art 2.

¹⁰ *Ibid* at art 12(4).

¹¹ Decreto Legislativo 2012, *supra* note 2 at art 49(5); Decreto Supremo 2009, *supra* note 6 at arts 1, 11.

¹² Decreto Supremo 2009, *ibid* at art 10.

¹³ *Ibid* at arts 5-7.

¹⁴ *Ibid* at art 8.

¹⁵ *Ibid*.

¹⁶ *Ibid* at arts 6, 8.

on the police personnel.¹⁷ Information regarding the contracts and the payments made are not easily available for public scrutiny.¹⁸

2. The PNP-Tintaya Contract

[11] Within the above legal framework, permanent institutional contracts like the PNP-Tintaya contract set out the terms of the relationship between the company and the PNP. The authors of this *amicus* have conducted a detailed review of one relatively recent PNP-Tintaya contract, dated May 16, 2011 and renewed in May 2012 for a period of one year.¹⁹ This contract states that the PNP will offer “exceptional police services complementary to ordinary duties” to Tintaya Mine’s infrastructure, goods and personnel.²⁰ In the contract, this includes surveillance, regular security and intelligence.²¹ The objective of the contract is to prevent crimes and acts of violence, including sabotage and terrorism, and to secure the PNP the logistical resources it needs to fulfill its contractual commitments.²² The PNP is required to report to the company with regard to its performance under the contract.²³

[12] The contract provides the company with a permanent police presence of 22 officers, including two intelligence officers, but the number of officers can increase as required.²⁴ There is no specified maximum number of officers who may provide services under the contract and the regulations similarly decline to limit the scope of the services or the number of officers involved

¹⁷ Charis Kamphuis, “La extracción de recursos mineros por empresas extranjeras y la privatización del poder coercitivo: un estudio de caso sobre la empresa de seguridad Forza” (2011) 68 *Apuntes: Centro de Investigación de la Universidad del Pacífico* at 78 [“Privatización del Poder Coercitivo”]; Charis Kamphuis, “Foreign Investment and the Privatization of Coercion: A Case Study of the Forza Security Company in Peru” (2011) 37 *Brooklyn Journal of International Law* 529 at 548 [“Privatization of Coercion”].

¹⁸ Coordinadora Nacional de Derechos Humanos, “Policía Nacional si presta servicios a empresas mineras, brindándoles protección y seguridad”, *Press Release* (3 November 2016), online at: http://derechoshumanos.pe/2016/11/policia-nacional-si-presta-servicios-a-empresas-mineras-brindandoles-proteccion-y-seguridad/?utm_source=feedburner&utm_medium=twitter&utm_campaign=Feed%3A+CoordinadoraNacionalDerechosHumanos+%28Coordinadora+Nacional+de+Derechos+Humanos%29

¹⁹ Convenio de Prestación de Servicios Extraordinarios Complementarios a la Función Policial entre la Empresa Minera Xstrata Tintaya S.A. y la Policía Nacional del Perú (X-DIRTEPOL Cusco), 16 May 2011, renewed May 2012 [Tintaya Contract].

²⁰ *Ibid* at Third Clause.

²¹ *Ibid* at Fifth Clause, 5.1.16.

²² *Ibid* at Fourth Clause, Fifth Clause, 5.1.5.

²³ *Ibid* at Fifth Clause, 5.1.11.

²⁴ *Ibid* at Fifth Clause, 5.1.16.

in any given contract.²⁵ The officers use state-issued uniforms and weapons, but the company provides some of their equipment and supplies, as well as logistical support, transportation, housing and accident insurance.²⁶ This means that community members observe officers wearing their official PNP uniforms while being transported in company vehicles.

[13] Police officers working under the terms of the Contract remain under the control and supervision of the PNP chain of command, although the company reserves the right to replace individual officers or withdraw their pay if it is unhappy with their services.²⁷ Officers exercise the full range of activities associated with their ordinary police role as specified by law,²⁸ but they must also adhere to the mining company's corporate policies, including any human rights policies in place.²⁹ The Contract states that officers must avoid acts that violate human rights and that they must only use force in exceptional and extreme cases when there is an eminent risk to human life.³⁰

[14] The previous paragraphs describe some of the Contract's core terms which detail the agreement between the PNP and Glencore to exchange police services for payment and other benefits. However, the Contract broadly states that its terms do not signify that the PNP or its personnel are subordinate or dependant in any way that might indicate an employment relationship with the company.³¹ We have reviewed Ministerial Resolution No 1233-2017-IN dated December 1, 2017, and we understand that the PNP currently has a Specific Covenant of Inter-institutional Cooperation (Convenio Específico de Cooperación Interinstitucional) related to the Antapaccay Mine (previously named Tintaya). Unfortunately, the contract is not public, and as such we are unable to undertake an analysis of its contents.

²⁵ Decreto Supremo 2009, *supra* note 6 at art 10.

²⁶ Tintaya Contract, *supra* note 19 at Fifth Clause, 5.1.17, 5.2.1, 5.2.2, 5.2.8.

²⁷ *Ibid* at Fifth Clause, 5.1.3, 5.1.15, 5.2.5.

²⁸ *Ibid* at Fifth Clause, 5.1.8.

²⁹ *Ibid* at Fifth Clause, 5.1.9, 5.1.12.

³⁰ *Ibid* at Sixth Clause, 6.3.

³¹ *Ibid* at Sixth Clause, 6.2, Tenth Clause.

3. Social Context of the PNP-Tintaya Contract

[15] Permanent institutional contracts for extraordinary complementary services between the PNP and mining companies like Antapaccay, are formed in a context of intense social conflict between local communities and extractive industries in Peru. This section will describe the general characteristics of these conflicts from an international human rights perspective. It will also provide a very brief description of *some* of the social conflicts that have taken place in Peru in recent years between local communities, foreign mining companies and the PNP, while the latter was in the course of fulfilling an extraordinary complementary services agreement. With this background, the social conflict surrounding Tintaya Mine will be described in somewhat greater detail.

[16] Environmental conflicts in Peru typically impact Indigenous and Campesino communities who have concerns about the project's impact on their land, livelihood and the environment.³² It is important to emphasize that these communities' concerns in relation to extractive industry projects often raise human rights issues in domestic and international law. In international law, Peru is obligated to consult with Indigenous peoples with a view to obtaining their free, prior and informed consent before approving resource projects and in some cases, the consent of affected communities is required.³³ Environmental conflicts may also result from or cause the violation of other internationally recognized rights, including the right to free expression and association, the right to culture, as well as the right to fair and equitable compensation when a project impacts land, environments and livelihoods.³⁴ Many of the conflicts between local communities in Peru and the mining and extractive companies results from a general failure to respect affected communities' rights.³⁵

³² OAS, Inter-American Commission on Human Rights, *Criminalization of the Work of Human Rights Defenders*, OEA/Ser.L/V/II.Doc.49/15 (2015) at para 49 [*Criminalization of Human Rights*]; Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, *Extractive industries and indigenous peoples*, GA, 24th Sess, UN Doc A/HRC/24/41 (2013) at paras 48-49 [Anaya].

³³ OAS, Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction Exploitation, and Development Activities*, OEA/Ser.L/V/II.Doc.47/15 (2015) at para 150; Global Witness, *On Dangerous Ground* (June 2016) at 12, 16, online: <<https://www.globalwitness.org/en/reports/dangerous-ground/>> [Global Witness]; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, (2007) [UNDRIP] at art 19, 10.

³⁴ *Criminalization of Human Rights*, *supra* note 32 at para 45; Anaya, *supra* note 32 at paras 19, 38; UNDRIP at art 10, 28.

³⁵ Global Witness, *supra* note 33 at 12, 16; Idehpucp, *supra* note 33 at 45-7.

[17] When these underlying human rights concerns remain unaddressed, conflicts often escalate to involve confrontations between security forces and protestors in ways that can become violent, resulting in death and injury to community members and sometimes police officers. According to one international study, in 2015 twelve environmental protestors were killed in Peru, and eleven of those deaths occurred in conflicts with mining and extractive industry projects.³⁶ Based on these figures, Peru has some of the highest incidences of killings of environmental protestors in the world.³⁷ Researchers have found that there is a general perception among these vulnerable populations that the PNP privileges the interests of mining companies, and not the interests of the public as a whole.³⁸

[18] There are some well-documented examples of violent conflicts between the PNP and local communities while the latter is operating under the auspices of an extraordinary and complementary services contract with a foreign mining company. In 2006, a protest at Yanacocha Mine in Cajamarca escalated when up to 200-armed officers were called to respond to a road blockade. In the confrontation, officers shot and killed an unarmed Campesino protestor.³⁹ Yanacocha Mine had a services agreement with the PNP at the time.⁴⁰ The authors of this *amicus* have had the opportunity to examine a renewed agreement with Yanacocha, dated 2011. This is an indication that companies and the PNP continue to renew extraordinary and complementary services contracts even after incidents of serious violence including death. Researchers have documented similar incidents of the PNP causing injury to protestors while working in the scope of extraordinary and complementary services agreements at the following foreign-owned mining projects: Antamina, Sulliden Shahuindo, Gold Fields, La Cima, and Santa Luisa.⁴¹

[19] Violence allegedly committed by the PNP while working under a complementary and extraordinary services contract was the subject of civil litigation against Xstrata (now Glencore)

³⁶ Global Witness, *ibid.*

³⁷ *Ibid.*

³⁸ Jen Moore, MiningWatch Canada and International Civil Liberties Monitoring Group, “In the National Interest? Criminalization of Land and Environment Defenders in the Americas” (August 2015) at 37, online: <http://iclmg.ca/wpcontent/uploads/sites/37/2015/09/IntheNationalInterest_FullReport.pdf>.

³⁹ Privatization of Coercion, *supra* note 17 at 549.

⁴⁰ *Ibid* at 548-550; Idehpucp, *supra* note 1 at 49.

⁴¹ GRUFIDES, “Police in the Pay of Mining Companies: The Responsibility of Switzerland and Peru for Human Rights Violations in Mining Disputes” (December 2013) at 11-19 [“GRUFIDES”], online: <http://assets.gfbv.ch/downloads/report_english_def_2_12_13.pdf>.

in the United Kingdom (UK) in the case of *Vilca v Xstrata Ltd.*⁴² Xstrata is one of the former owners of Tintaya Mine and recently merged with Glencore in 2013 as part of a deal that transferred ownership of the mine to the latter company.⁴³

[20] The UK litigation arose from events that took place in May 2012 when Indigenous communities neighbouring Tintaya's operations organized a protest. The reported reasons for the protest were Xstrata's alleged failure to fulfill promises made in agreements with surrounding communities and concerns about environmental contamination.⁴⁴ Xstrata responded by calling upon the services of the PNP, pursuant to the terms of the contract cited in the previous section, which was in place at the time.⁴⁵ The PNP responded to the protest by opening fire on the protestors, killing two people, and critically injuring another protestor, along with causing numerous other severe injuries.⁴⁶ There were 22 plaintiffs in the *Vilca* action, who, in addition to these shootings, allege that the PNP used live ammunition, beat and arbitrarily detained them, and subjected them to other abusive actions including racial abuse.⁴⁷ In the course of the UK legal proceedings, the plaintiffs' lawyers have obtained documents that they allege demonstrate that Xstrata directly requested that PNP officers mistreat the protestors.⁴⁸ In 2018, the UK court dismissed the action after the company convinced the court that the plaintiffs had brought the lawsuit outside of the limitation period permitted by Peruvian law.⁴⁹

[21] In sum, there is credible evidence that the PNP have responded violently to Campesino and Indigenous protests while working under the terms of extraordinary and complementary services contracts with foreign mining companies.

⁴² [2016] EWHC 389 (QB) [*Vilca*].

⁴³ Glencore plc, Media Release, "Glencore's Response to the 'Corporate Conquistadors' Report, Published by The Democracy Center, TNI, and CEO" (19 January 2015) at 1, online: <<http://www.glencore.com/assets/public-positions/doc/Glencores-response-to-the-Corporate-Conquistadors-report.pdf>>

⁴⁴ GRUFIDES, *supra* note 41 at 14.

⁴⁵ *Vilca*, *supra* note 42 at para 13.

⁴⁶ *Ibid* at para 13. The shootings were filmed and the footage is available online: <<https://www.youtube.com/watch?v=ttGv22k84z4&feature=youtu.be>>

⁴⁷ *Ibid* at paras 14-15.

⁴⁸ Richard Meeran, "Indigenous Peruvians' Human Rights Claim: UK High Court Rules on Dispute Over Disclosure of Documents by Mining Giant Xstrata", *Leigh Day* (21 July 2016), online: <<https://www.leighday.co.uk/News/News-2016/July-2016/UK-High-Court-rules-on-Xstrata-dispute-over-disclo>>

⁴⁹ *Vilca & Ors v Xstrata Ltd & Anor* [2018] EWHC 27 (QB) (19 January 2018).

PART 3 – INTERNATIONAL LAW ANALYSIS

[22] This section will present statements of international law and principles that describe the importance of police impartiality in a democratic society that respects the rule of law and human rights. The sources of these statements are documents approved by organs of the Organization of American States (OAS) and the United Nations (UN). Drawing on these statements, we will describe how the PNP-Tintaya Contract violates the police impartiality principle.

[23] The role of the PNP in Peru's democratic society is rooted in article 166 of the Peruvian Constitution⁵⁰, which sets out the force's mandate to guarantee, maintain and re-establish internal order, to offer protection and help individuals as well as the community in general, and to guarantee both the observance of laws and the security of property. Additionally, article 170 states that PNP funding shall be dedicated to the logistical requirements of the police, and that funds must be designated for a particular institutional purpose, under control of the authority set by law. Finally, article 171 states that the PNP participates in the economic and social development of the country and the defence of civilians in accordance with the law.

1. The Principle of Police Impartiality at the Organization of American States

[24] According to the preamble of the *Inter-American Democratic Charter*⁵¹ (“*Democratic Charter*”) the promotion and protection of human rights is a basic prerequisite for the existence of a democratic society. Article 1 of the *American Convention on Human Rights*⁵² (“*American*

⁵⁰ *Constitución Política del Perú, 1993* [Peruvian Constitution].

⁵¹ OAS, General Assembly, *Inter-American Democratic Charter*, (2001) [*Democratic Charter*], online: <http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm>. The *Democratic Charter* was adopted by the General Assembly at a special session held in Lima, Peru on September 11, 2001. Peru in particular was thanked during the meeting for their work in making the special session possible and for bringing the *Democratic Charter* into being. United States representative Colin Powell stated that the *Democratic Charter* was born in the town plazas of Peru: OAS, General Assembly, *Vigésimo Octavo Período Extraordinario de Sesiones*, XXVIII-E.2 (2001) at 20, 159.

⁵² OAS, *American Convention on Human Rights*, (1969) at art 1, online: <https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm>.[*American Convention*]. Signed by Peru in 1977, and ratified in 1978: Secretariat for Legal Affairs, “Multilateral Treaties: American Convention on Human Rights “Pact of San Jose, Costa Rica: Signatories and Ratifications” (2014), online: <https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm>.

Convention”) similarly declares that the state’s fundamental obligation is to protect the rights and freedoms of *all persons* subject to its jurisdiction.

[25] States must fulfill these human rights obligations in accordance with the principle of non-discrimination. Article 24 of the *American Convention* establishes that all persons are equal before the law and entitled to equal protection of the law without discrimination.⁵³ The importance of the principles of equality and non-discrimination are underscored in article 9 of the *Democratic Charter*, which states that democracy is strengthened by the elimination all forms of discrimination and by the protection of the human rights of indigenous peoples in particular.⁵⁴

[26] In order for the principles of non-discrimination and respect for human rights to have meaning, they must inform the state’s provision of public services. Article 16 of the *Social Charter of the Americas*⁵⁵ (“*Social Charter*”) recognizes not only that access to public services should be non-discriminatory, but that it should also be fair and equitable.⁵⁶ The principles of equity and equality in public services are also present in article 14, which adds that such services should be provided in a manner that gives priority to persons living in conditions of poverty and vulnerability.⁵⁷

[27] The Peruvian Constitution recognizes in article 166 that the PNP’s security services are an essential public service offered to the community as a whole. On this basis, the *American Convention*, the *Democratic Charter* and the *Social Charter* taken together require that, as public services, the PNP’s services should be provided in a manner that is consistent with the principles outlined above: the protection of human rights, non-discrimination, equality, fairness and equity.

[28] The rule of law is also a defining characteristic of a representative democracy and is integral to the respect for human rights and non-discrimination. The *Democratic Charter* makes this

⁵³*American Convention*, *ibid* at art 24.

⁵⁴*Democratic Charter*, *supra* note 51 at art 9.

⁵⁵ OAS, General Assembly, *Social Charter of the Americas*, 42nd Sess, OR OEA/Ser.P/AG/doc.5242/12rev. 2 (2012) at art 16 [*Social Charter*]. The Minister of Foreign Affairs of Peru, Rafael Rocagliolo, publically expressed satisfaction with the *Charter*’s adoption: OAS, Press Release, E-206/12, “OAS Assembly Adopts Social Charter of the Americas” (4 June 2012), online: <http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-206/12>.

⁵⁶ *Social Charter*, *ibid* at art 16.

⁵⁷ *Ibid* at art 14.

connection in article 3 where it declares that all states must respect human rights, access to justice, and exercise power in accordance with the rule of law.⁵⁸ Article 4 clarifies that this involves the constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law generally.⁵⁹ Article 24 of the *American Convention* further connects the rule of law to the principle of non-discrimination, requiring the state to ensure equal protection of the law without discrimination.⁶⁰ Thus, the law in a democratic society must embody the principles of respect for human rights and non-discrimination and must govern expressions of state power. Moreover, when public institutions fulfill their responsibility to uphold the rule of law, they must ensure equal protection of the law without discrimination.

[29] Articles 166 and 171 of the Peruvian Constitution dictate that the PNP's role in Peruvian society is to ensure the observance of the law, giving the PNP a clear mandate with respect to the rule of law. The *Democratic Charter* is clear that, as an institution that exercises state power, the PNP is also subject to the rule of law. In Peru, this includes the Peruvian Constitution and the international human rights treaties that Peru has ratified.⁶¹ Furthermore, the *Democratic Charter* and the *American Convention* establish that the Peruvian government, and by extension the PNP, must exercise its power to uphold the rule of law in accordance with the principles of non-discrimination and respect for human rights.

[30] To summarize, under the Peruvian Constitution, the PNP is an institution with two distinct but interrelated functions: it exercises state power to uphold the rule of law *and* it provides public security services to the community as a whole. As such, the above statements and principles of international law unequivocally support the assertion that the PNP must abide by the principles of respect for human rights, equality, non-discrimination, equity, fairness and the rule of law.

⁵⁸ *Democratic Charter*, *supra* note 51 at art 3.

⁵⁹ *Ibid* at art 4.

⁶⁰ *Ibid* at art 24.

⁶¹ Peru's Constitution explicitly incorporates international treaties into national law upon ratification by the Peruvian state: *Peruvian Constitution*, *supra* note 50 at art 55. Peru's Constitutional Tribunal has interpreted this provision to include international human rights treaties: STC No. 4587-2004-AA/TC (29 November 2005) at para 44; STC No. 0025-2005-PI/TC (25 April 2006) at para 30. It has also recognized that provisions of ILO *Convention concerning Indigenous and Tribal Peoples in Independent Countries* and the jurisprudence of the Inter-American Court of Human Rights both have the status of enforceable law in Peru: STC No. 00007-2007-PI/TC (19 June 2007) at para 36.

[31] We argue that in order to uphold these principles the PNP must be impartial, both in the provisions of its services and in the arrangement of its institutional structures. There can be no doubt that the principle of police impartiality is integral to all of the principles described above. This assertion is further supported and articulated in United Nations documents, to which we turn in the next section.

2. The Principle of Police Impartiality at the United Nations

[32] In a document endorsed by the UN Human Rights Council in 2011, the former UN Special Representative on Business and Human Rights, John Ruggie, stated that it is an established principle of international law that the state's duty to protect human rights involves engaging in appropriate steps to prevent, investigate and punish abuse through effective policies.⁶² This statement is directly relevant to the PNP because in a democratic society the prevention and investigation of human rights abuses is primarily the legal responsibility of the police force, in accordance with the principles described in the previous section. This is reflected in the statements in articles 166 and 171 of the Peruvian Constitution that the police function is to ensure the observance of the law.

[33] The UN Special Representative has also stated that in preventing and investigating abuse, states are responsible for ensuring equality before the law and fairness in its application.⁶³ Thus police forces, including the PNP, are once again captured by the principles of equality and fairness in their role of providing security and protecting human rights. A report of the UN Development Programme on citizen's security confirms this with the statement that security is a public good that all people should have equal access to.⁶⁴

⁶² Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy' Framework*, HRCOR, A/HRC/17/31, (2011) [*Guiding Principles*] at art 1(a)(1), online: <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusiness_HR_EN.pdf>.

⁶³ *Ibid* at Commentary on (1)(a)(1).

⁶⁴ United Nations Development Programme, *Seguridad Ciudadana con Rostro Humana: diagnostico y propuestas para América Latina*, UNDP, (2013-2014) at 9 [*Seguridad Ciudadana*], online: <<http://www.latinamerica.undp.org/content/dam/rblac/img/IDH/IDH-AL%20Resumen%20Ejecutivo.pdf>>

[34] There are a number of UN documents that specifically govern police conduct. The UN *Code of Conduct for Law Enforcement Officials*⁶⁵ (“*Code of Conduct*”) adopted by the General Assembly in 1979, states in article 1 that in fulfilling their duties, police officers must serve the community and protect all persons. The commentary to article 1 elaborates that the concept of “service to the community” is intended to include particularly the provision of services to members of society who, by reason of economic, social or other emergencies, are in need of immediate aid.⁶⁶ The *Code of Conduct* also recognizes, in article 2, that in the performance of their duties, police officers shall respect and protect human dignity and maintain the human rights of all persons. The UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*,⁶⁷ adopted by the UN Congress on Prevention of Crime and Treatment of Offenders in order to further clarify the *Code of Conduct*, states that the role of police officers is to protect the rights to life, liberty and security of the person and to maintain public safety and social peace.⁶⁸

[35] The document *Human Rights Standards and Practice for the Police*,⁶⁹ published by the UN High Commissioner for Human Rights, is a training and reference guide intended for use by police officers in UN member states. This document states that law enforcement officials must at all times strive to fulfill the duty imposed on them by law by serving the community and protecting all persons equally.⁷⁰ It further explains that, in this role, every member of law enforcement is accountable to the community as a whole.⁷¹

⁶⁵ *Code of Conduct for Law Enforcement Officials*, GA Res 34/169, UNGAOR, 34th Sess, UN Doc A/RES/34/169 (1979) [*Code of Conduct*], online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>>. The *Code of Conduct* does not require signature or ratification, but is known as the overarching global standard for policing regulation.

⁶⁶ *Ibid* at art 1.

⁶⁷ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, UN Congress on the Prevention of Crime and Treatment of Offenders, 8th Sess, (1990) [*Basic Principles on the Use of Force*], online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>>. This document was created to further clarify the *Code of Conduct* as a set of guidelines that UN member states are expected to implement into their domestic police forces.

⁶⁸ *Ibid* at Introduction.

⁶⁹ UN, *Human Rights Standards and Practice for the Police*, 5th ed, (New York and Geneva: United Nations Publication. 2004) [*Human Rights Standards*], online: <<http://www.ohchr.org/Documents/Publications/training5Add3en.pdf>>. This document is part of a series of UN training manuals for police officers in member countries. It instructs police officers in the implementation of the *Code of Conduct* and the *Basic Principles on the Use of Force*.

⁷⁰ *Ibid* at 55.

⁷¹ *Ibid*.

[36] These international statements of principles, endorsed by various UN organs and representatives, all agree that one of the fundamental roles of the police force in a democratic society is to respect and protect human rights impartially. Moreover, these sources agree that police services are a “public good” that must be provided to the community as a whole in a manner that is fair, equal and equitable. Taken together, these principles again support our assertion that in a democratic society the police force must be impartial, as an institution and in the services it provides.

3. The PNP-Tintaya Contract Violates the Principle of Police Impartiality

[37] The description of the PNP-Tintaya Contract in Part Two of this *amicus* indicates that it affords Xstrata Tintaya, a foreign mining company, a permanent police presence of at least 22 officers who work to protect its property and provide surveillance and intelligence services. According to the Contract, the number of assigned officers may increase as required. There is no specified limit in the regulations or in the Contract on the number of officers that could be assigned to fulfil these contractual terms. There is also evidence that the PNP has acted within the scope of the Contract to control public protests against Xstrata Tintaya’s operations. The Contract further requires PNP officers to follow company policies, including its human rights policies. Nonetheless, there are seriously allegations that the both company and the PNP have committed human rights violations within the scope of the Contract.

[38] The Contract requires the PNP to regularly report to the company on the performance of its contractual obligations. It also gives the company the discretion to remove or discipline individual officers. In return, the company pays officers’ salaries, provides medical insurance, transportation, housing and other basic services. The company also regularly transfers lump sum compensation to the PNP as an institution, calculated as a percentage of salary payments. The regulations allow the PNP to use these funds to purchase goods and services for personnel, as well as provide maintenance and improvement of police stations. The Contract, or a substantially similar contract, has been in place between the company and the PNP for at least 13 years.

[39] In our view, these facts establish that the PNP-Tintaya Contract has put the company in a position of control over the PNP. The PNP has a contractual obligation to report to the company, to follow its policies, and to respond to its security concerns and requests. The Contract gives Xstrata the power to remove or discipline individual officers. This further establishes company control over the PNP and its personnel.

[40] The facts also establish that the PNP-Tintaya Contract has caused the PNP to become financially dependent on the company. Funds acquired under the Contract can be used for maintenance of police stations and the purchase of goods and services for the use of the police force. These uses clearly go beyond merely covering basic costs generated by the administration of the Contract. Rather funds may be used for police infrastructure and operational costs, thereby supplementing the PNP's core budget items. Furthermore, the PNP has used and relied upon these funds for at least thirteen years.

[41] The PNP's relationship of financial dependency on the company strengthens the company's control of the PNP through the terms of the Contract. Company control of the PNP, and PNP financial dependence on the company, together produces a situation where the PNP is no longer able to act impartially. By definition, the PNP cannot be impartial if it is even *partly* controlled by or financially dependent on a private actor. Thus, the PNP-Tintaya Contract violates the international principle of police impartiality, a fundamental principle in a democratic state. The PNP's dependence and loss of autonomy with respect to Xstrata mean that it is no longer able to serve the community *as a whole*, as required by the UN *Code of Conduct* and supporting documents.⁷²

[42] Previous sections of this *amicus* described how the principle of police impartiality is integral to the principles of non-discrimination and equality in a democratic society. In this respect, the PNP-Tintaya Contract also violates the principle of equal access to public security services.⁷³ It is clear that the Contract provides special services to the company, in qualitative and quantitative terms, which are not available to other members of the community. Not only is the PNP

⁷² *Code of Conduct*, *supra* note 65 at art 1. Also see *Human Rights Standards*, *supra* note 64 at 55.

⁷³ *Social Charter*, *supra* note 55 at art 16; *Seguridad Ciudadana*, *supra* note 64 at 9.

permanently present to protect company property, it also undertakes surveillance and intelligence gathering on behalf of the company.⁷⁴ Critically, the company receives these special services due to the fact that it is a large business property holder and as such is able to pay for these services.

[43] In short then, the Contract makes special security services available to those who are able to pay. Not only does this violate the principle of equal access to public services, but it also risks prejudicing the adequate provision of security services to the rest of the community. This risk is highlighted by the fact that neither the regulations nor the Contract specify a limit on the PNP services required under the Contract, nor do they explicitly endeavour to protect a minimum standard of services to the non-contracting public.

[44] The PNP-Tintaya Contract further violates the principle of equal protection of the law without discrimination.⁷⁵ As described above, the PNP is constitutionally required to ensure the observance of the law and this obligation exists with respect to the community as a whole. However, the Contract provides the company with a special contractual right to enforce this obligation. In other words, the company is afforded special protection of its security interests, enforceable by contract. This form of special protection through contractual obligations is not offered to other individuals or groups, thereby creating a situation where all members of the community no longer enjoy equal protection of law.

[45] The PNP's failure, due to the PNP-Tintaya Contract, to ensure equal access to services and equal protection of the law further reinforces the argument put forward above that by virtue of the Contract the PNP is no longer impartial. These failures are particularly of concern on the facts of this case, where the company is the proponent of a controversial resource exploitation project and where its actions, along with those of specific PNP officers, are the subject of credible human rights concerns, including international litigation.⁷⁶ In the UK court case of *Vilca*, the allegations included not only violence against Indigenous protestors, but also racial abuse based on their Indigenous status.

⁷⁴ Tintaya Contract, *supra* note 19, Third Clause, Fifth Clause, 5.1.16.

⁷⁵ *American Convention*, *supra* note 52 at art 24; *Guiding Principles*, *supra* note 62 at Commentary on art 1(a)(1); *Human Rights Standards*, *supra* note 69 at 55.

⁷⁶ *Vilca*, *supra* note 42 at para 13.

[46] It is significant then that the PNP as an institution has lost its impartiality, not in the abstract, but in favour of a private company that is accused, together with specific PNP officers, of failures to respect human rights. As described in the previous section, the Peruvian state's fundamental obligations in international law include the prevention and investigation of human rights abuses.⁷⁷ The PNP is charged with these tasks and must exercise its power in accordance with the rule of law and respect for human rights.⁷⁸ There can be no doubt that the PNP cannot comply with these obligations if it is in a contractual relationship with a company that is embroiled in a social conflict with community members and is facing numerous accusations of human rights violations, including in a court of law.

[47] Finally, the PNP-Tintaya Contract also jeopardizes the principles of non-discrimination and equitable access to security and police services.⁷⁹ These principles require the PNP to provide services in a way that is fair and equitable, giving priority to persons that live in conditions of poverty, and whose economic or social circumstances render them in greater need of aid.⁸⁰ The conflict between Xstrata, its predecessors, and surrounding communities is consistent with the widespread observation that Indigenous and Campesino peoples are disproportionately affected by resource extraction.⁸¹ These groups also suffer from some of the greatest indicators of social exclusion, including discrimination, extreme poverty and lack of access to education and healthcare.⁸² Thus, not only does the PNP-Tintaya violate the principle of equality described above, it also violates the principles of non-discrimination and equity for the reason that it provides special services to a powerful company based on its social status and its capacity to pay. This favouring of the company appears to occur to the detriment of surrounding communities, who suffer from poverty and other conditions of social exclusion. As such, the PNP-Tintaya Contract exists in a context of social inequality and its impact is to exacerbate that inequality rather than ameliorate it.

⁷⁷ *American Convention*, *supra* note 52 at art 1; *Guiding Principles*, *supra* note 62 at art 1(a)(1).

⁷⁸ *Democratic Charter*, *supra* note 51 at art 3; *Code of Conduct*, *supra* note 65 at art 2.

⁷⁹ *American Convention*, *supra* note 52 at art 24; *Democratic Charter*, *supra* note 51 at art 9.

⁸⁰ *Social Charter*, *supra* note 55 at arts 14, 16; *Code of Conduct*, *supra* note 65 at art 1 and Commentary.

⁸¹ *Criminalization of Human Rights*, *supra* note 32 at para 49; *On Dangerous Ground*, *supra* note 32 at 6, 13, 16.

⁸² OAS, Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru: Chapter X, Rights of Indigenous Communities*, OEA/Ser.L/V/II.106 (2000) at paras 32-38.

[48] In sum, the PNP-Tintaya Contract compromises the impartiality of the PNP and renders it incapable of ensuring equal access to police services and equal protection of the law. The fact that this Contract is formed between the public police force and a powerful private company accused of human rights violations with respect to affected Indigenous communities puts the PNP in a situation where it cannot ensure the respect for human rights, and the non-discriminatory and equitable provision of police services. International law indicates that adherence to all of these principles is fundamental to Peru's function as a democratic state. As such, the PNP's failures in this regard are a very serious matter and of grave concern to the international community.

PART 4 – CONCLUSION

[49] In Part Two of this *amicus* we described the legal and social context of the Tintaya-PNP Contract as well as the specific terms of the Contract itself. In Part Three we drew on documents at the OAS and the UN to summarize international statements of law with regard to respect for human rights, equality, non-discrimination and rule of law. We analyzed these statements in the context of police services and concluded that they amount to an international principle of police impartiality in a democratic society. Considering the 2011-2013 Tintaya-PNP Contract in light of these principles, we concluded that its existence renders the PNP unable to fulfil its role in relation to these principles. We believe that this conclusion applies to any services contract that is substantive similar to the contract that we have analyzed here.

[50] We hope that the contents of this *amicus curiae* are useful to this Court in its consideration of this case.

Sincerely,

Charis Kamphuis
Professor
Faculty of Law
Thompson Rivers University

Shin Imai
Professor
Osgoode Hall Law School
York University

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