

Lupaka Gold Corp.
Claimants,

v.

The Republic of Peru,
Defendant.

ICSID No. ARB/20/46

Expert Report of Iván Fabio Meini Méndez

22 March 2022

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I. INTRODUCTION

A. *SCOPE OF THE REPORT ON CRIMINAL LAW*

1. The Republic of Peru (“**Peru**”), through the Special Commission attached to the Ministry of Economy and Finance, which represents Peru in International Investment Disputes, and its legal advisors, Arnold & Porter, requested my legal opinion as an independent expert in Peruvian criminal law, on the criminal connotations pertaining to ICSID Case No. ARB/20/46, brought by Lupaka Gold Corp (“**Lupaka**” or the “**Claimant**”) against Peru. More specifically, I was asked to:
 - a. Assess whether the conduct of members of the Rural Community of Parán (“**Parán**”) between June 2018 and 2019 in the area of the Invicta Project is attributable to the Peruvian State;
 - b. Describe the rules, principles and procedures governing the actions of officers of the Prosecutor General’s Office of Peru (“**MP**”) and the Peruvian National Police (“**PNP**”) to prevent and control acts of violence against persons and property; and
 - c. Determine whether the actions of the officers of the MP, the PNP and, in general, the Peruvian authorities in respect of the conduct of the representatives and members of Parán, as recounted by the Claimant, complied with the legal guidelines existing in Peru or whether, on the contrary, were negligent or irregular.
2. The argument and conclusions of this report are based on the law in force in Peru at the time the events took place, Peruvian criminal and criminal procedural case law on the matter, the case law of the Inter-American Court of Human Rights (“**IACHR**”), and the documentation presented by the Claimant in ICSID case No. ARB/20/46.

B. *EXPERT’S QUALIFICATIONS AND REPRESENTATIONS*

3. I am a full-time senior lecturer at the Academic Department of Law of the Pontificia Universidad Católica del Perú, where I obtained my law degree. I obtained the academic degree of Doctor of Law at the Universidad de Cádiz, Spain, in 2002. My doctorate thesis received the Outstanding Doctorate Award of 2002. I undertook post-doctorate studies and investigations at the University of Fribourg, Switzerland (2002), at the Max Planck

Institute for Foreign and International Criminal Law in Freiburg i. B., Germany (2003), at the University of Göttingen, Germany (2008 y 2010), at the Universidad de los Andes, Bogotá, Colombia and at the University of Freiburg, Germany. I held a scholarship awarded by the Agencia Española de Cooperación Internacional [Spanish Agency for International Cooperation], the University of Fribourg, Switzerland, the Max Planck Company in Germany, the German Academic Exchange Service (DAAD), the US Department of State (“USA”) and the Ibero-American Network of Faculties of Law - Sui Iuris.

4. I am the author of 8 academic books on Criminal Law and more than 70 academic articles published in Peru, Latin America, Spain and Germany. I was Director of Studies of the School of Law (2014–2015), Head of the Academic Department of Law (2017–2020), Director of Master Studies in Criminal Law (2012–2021) and am a member of the Doctorate of Law Committee (2016-present day) at the Pontificia Universidad Católica del Perú.
5. In the professional field, I have worked as Deputy Anti-Corruption Prosecutor for the Fujimori-Montesinos cases (2004), advisor to the Office of the Supervisory Body of Peru (2007), Head of the Investigation Unit of the National Anti-Corruption Office (2008), a member of the advisory firm to the Ministry of Justice (2011), advisor to the Congress Commission for Justice and Human Rights (2015–2019), a member of the National Criminal Police Council (2016–2018) and a member of the Commission responsible for reviewing and drafting the Peruvian Criminal Code. I have advised the International Labour Organization (“ILO”), the United Nations Office on Drugs and Crime (“UNODC”), the German Technical Cooperation (“GIZ”) and the United States Agency for International Development (“USAID”). More information on my academic and professional experience can be found in Appendix I.¹ I authorize the use of my personal data in these arbitration proceedings.

C. *STRUCTURE OF THIS REPORT*

6. This report is divided into five parts:

¹ Ex. IMM-0001, Curriculum vitae, Iván Meini Méndez, February 2022.

- a. Firstly, it describes the relevant facts of the case (as presented by the Claimant) for a criminal legal analysis of the behavior of the representatives and members of Parán and of the officers of the Peruvian State. More specifically, it reports a) the background to the case; b) the actions attributed to the representatives and members of Parán; and c) the behavior of the authorities of the Peruvian State in relation to these actions.
- b. Secondly, it examines the lack of capacity of the representatives and members of the Rural and Native Communities of Peru, and in particular of the Rural Community of Parán, to act on behalf of the Peruvian State or as officers of the Peruvian government. In this section, I examine: *a)* the constitutional and legal regulatory framework of the Rural and Native Communities in Peru; *b)* the legal autonomy of the Rural and Native Communities in Peru to apply their own customary law provided it does not violate fundamental rights; and *c)* the legal impossibility of considering the representatives of Parán to be public government officers or agents performing any function of the Peruvian government in their actions against the company Invicta Mining Corp. (“**IMC**” or “**Invicta**”).
- c. Thirdly, it studies the criminal legal connotations of the behavior of the representatives and members of Parán between June 2018 and 2019. This section: *a)* offers a brief introduction on the events to which this part of the report relates; *b)* examines the possible offences perpetrated by members of the Community of Parán according to the account of the events offered by the Claimant, making a special assessment of the offence of usurpation in the form of dispossession; and *c)* the legal mechanisms provided for by the law in force in Peru for dealing with such actions, and the resulting legal impossibility of regaining possession of property by *de facto* means.
- d. Fourthly, it explains the constitutional and legal framework governing the actions of the officers of the MP and the PNP in the prevention and control of acts of violence against persons and property. More specifically, this section examines: a) the prevalence of the Political Constitution of Peru of 1993 (“**Constitution of Peru**” or simply the “**Constitution**”) and of the international instruments on

Human Rights over the legal provisions of the Peruvian State and the actions of the officers of the Peruvian State; b) the constitutional and legal framework of the PNP; c) the regulations on the use of force by the PNP; and d) the Operations Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC (“**Operations Order**”).

- e. Fifthly, based on the previous points, it examines whether the actions of the Peruvian public officers complied with the legal guidelines described above. Here: a) an initial approximation is offered and the problem forming the subject of the analysis is defined; b) the conduct of the officers of the PNP and the MP is examined; c) the reasonableness and constitutionality of the approach adopted by the Peruvian authorities of not executing the Operations Order is studied.

D. *MAIN CONCLUSIONS*

7. According to the Peruvian legal system, the Rural Community of Parán is a legal person under private law. It is autonomous in its organization, in the community work and in the use and free disposal of its land, and in economic and administrative matters.
8. Legal persons are not criminally liable under the Peruvian legal system. The actions of representatives and members of Parán, as well as those carried out by representatives and members of any other legal person established under private or public law, may only give rise to criminal liability for themselves and, possibly, subsidiary civil liability for the Community of Parán as the legal person being represented.
9. As Parán is a legal person under private law, neither the community nor its members represent or act on behalf of the Peruvian State. Nor do they perform any delegated function of the Peruvian government. There is no legal instrument that confers such representation on them or vests the community with any type of authority as part of the Peruvian State in any of its spheres. The representatives and members of Parán are neither public officers nor government officials. Their actions and omissions are not binding on the Peruvian State or on the Peruvian government and cannot be considered to be official acts.
10. The only legal scenario in which an officer of the Peruvian state could be criminally liable for the illegal conduct of persons not acting on behalf of the Peruvian State nor representing

it—such as the actions Claimant imputes on the members of Parán—requires proof: *a*) that the public officer had a legal duty to prevent illegal conduct by third parties (existence of the duty of guarantor); and *b*) that the public officer deliberately reneged on such duty despite it being possible and reasonable for him to honor it (willful default on the duty of guarantor).

11. The PNP and the MP have a duty of general guarantor for the prevention, investigation and prosecution of crime. According to the Constitution, the MP is responsible for bringing a legal action for the defense of legality and for conducting the investigation into the crime from its outset. The fundamental purpose of the PNP is to guarantee, maintain and restore internal order and to guarantee compliance with the laws and the safety of public and private property.
12. The law in force in Peru contains principles and rules governing the actions of members of the PNP and MP in situations such as that underpinning these arbitration proceedings. Compliance with these principles and rules is mandatory, subject to criminal and disciplinary liability.
13. The use of force by the PNP is governed by laws and international conventions. According to its own legal framework, the use of force is exceptional, gradual, and subject to principles of legality, strict necessity and suitability. The decision to make use of force has to be the consequence of a delicate and prudent consideration of all the interests at conflict, a detailed study of the social, political and geographical context in which the conflict arises and the consequences it would reasonably give rise to. According to the Peruvian legal framework, as an absolutely general rule, dialogue and other alternative means of resolving conflict are favored over the use of force (use of force as a last resort).
14. The principles and rules applicable to the handling of a social conflict and the use of force, insofar as they form part of the Peruvian legal system, are also binding on political authorities such as the Ministry of the Interior (“**MININTER**”), the Ministry of Energy and Mines (“**MINEM**”) and the Presidency of the Council of Ministers (“**PCM**”). The margin for discretion of these political authorities is always exercised in accordance with the criterion of reasonableness. The actions of the prosecutors are also subject to the

provisions of the law (constitutional principle of legality) and the criterion of reasonableness.

15. The actions of the officers of the PNP with regard to the events that occurred in June and October 2018 and in 2019 were legal and reasonable. In the circumstances of the case, the option of regaining possession of the Invicta mine by the use of force by the police was neither reasonable nor legally viable. Authorization for such action is not the province of the police officers sent to the scene of the events. If any of them had yielded to the pressure exerted by Invicta to regain the property by force and without authorization, he/she would have been held liable.
16. The political decision not to authorize the PNP to retake possession of the Invicta site by force was conformed to the provisions of Peruvian law and to the criterion of reasonableness applied to the actions of the PNP. The information on intelligence available at the time of the events warned of the dangers to life, integrity and property that would have been caused if the PNP had made use of force. In light of that information, any authorization for the PNP to enter would have been unreasonable and disproportionate.
17. In addition, there are no reasons to doubt that, in the best of cases, the use of force as Claimant demanded would only have provided a temporary and ineffective solution to resolving the social conflict that motivated the conduct of the members of the Community of Parán. In fact, the repossession of the mine by Invicta through the use of force would only have been guaranteed while the PNP officers remained on site, but, inevitably, once they returned to their everyday tasks in the service of the whole of society, the underlying social conflict would have increased, and it is highly likely that the resulting block and dispossession of the site would have been repeated and prolonged over time.
18. Peruvian law makes available to national and foreign natural and legal persons various mechanisms to recover possession of real property. The criminal channel is not specifically designed for that purpose. At issue in an investigation and in criminal proceedings are the possible perpetration of a crime and the possible criminal liability of the alleged perpetrators. Peruvian law provides other mechanisms which, owing to their civil legal nature and the fact they are faster, are suitable for the purposes sought by the Claimant. None of these mechanisms was pursued by Invicta or by Lupaka.

19. Dialogue and negotiations are another means of achieving the same objectives. The dialogue and negotiations between Invicta and the Community of Parán are interpreted as a decision taken by both parties to find a peaceful resolution of the conflict. Even more so if the dialogue is favored by the authorities of the MINEM, the PCM and the Office of Ombudsman (“**Ombudsman**”), among others.

II. FACTUAL BACKGROUND

20. This section provides a brief summary of the main factual background which the Claimant included in its Statement of Claim, and which is used as the basis for the analysis included in this report

A. GENERAL BACKGROUND

21. The case lodged by the Claimant relates to events occurring with regard to investments in a series of adjoining mining concessions known as the Victoria I, Victoria II, Victoria III, Victoria IV and Victoria VII concessions,² as well as the concession known as Invicta II.³
22. Lupaka acquired the Victoria and Invicta II concessions on October 1, 2012, by the acquisition of Invicta, holder of the rights to those concessions.⁴ Lupaka focused its attention on the Victoria I project (“**Project**”).⁵
23. The Victoria and Invicta II concessions are situated in a rural area of the Andes Mountain, 3,500 meters above sea level, in the province of Huaura, department of Lima, central coast of Peru, 120 kilometers north-east of the city of Lima.⁶ The area in which the mining concessions are situated comprises approximately 47 square kilometers.⁷

² **Ex. C-0028**, Public Mining Registry No. 02028980: Victoria Uno Concession, 19 July 1996, p. 1; **Ex. C-0029**, Public Mining Registry No. 02029020: Victoria Dos Concession, 4 September 1996, p. 1; **Ex. C-0030**, Public Mining Registry No. 02029079: Victoria Tres Concession, 9 October 1996, p. 1; **Ex. C-0031**, Public Mining Registry No. 02029320: Victoria Cuatro Concession, 31 December 1996, p. 1; **Ex. C-0032**, Public Mining Registry No. 02029352: Victoria Siete Concession, 24 January 1997, p. 1.

³ Claimant’s Memorial, ¶ 23.

⁴ Claimant’s Memorial, ¶ 22–23.

⁵ Claimant’s Memorial, ¶ 25.

⁶ Claimant’s Memorial, ¶ 26.

⁷ Claimant’s Memorial, ¶ 26.

24. The mining concessions and their area of impact, in accordance with the MINEM resolutions,⁸ cover territory of three Rural Communities: the Rural Community of Santo Domingo, the Rural Community of Lacsanga and the Rural Community of Parán.
25. According to the Environmental Impact Study (“EIA”) of 2009, Invicta had three years to commence activities for the development of the Project.⁹ This period expired in December 2012, two months after Lupaka purchased Invicta and acquired the rights to the Project.¹⁰ On October 17, 2012, Invicta applied to the MINEM for a two-year extension, up to December 2014, for the commencement of development activities.¹¹ The MINEM authorized Invicta’s application on November 14, 2012.¹²
26. By 2018, Invicta had made progress in the works involved in the infrastructure and development of the Project: (i) it had completed almost the entire route for the daily transit of lorries along the road from Lacsanga, which included the installation of drainage systems that enabled the water to flow under the road; (ii) the construction of an additional entrance to the mine at sublevel 3.430, which provided Invicta with easier access to the mine; and (iii) the infrastructure works at all sublevels of the mine and a ventilation system at all levels of the mine.
27. In 2018 Invicta had also obtained finance to commence the operation of the Project and had ensured the purchase of a suitable processing plant less than 100 kilometers away.

B. *THE ACTIONS ATTRIBUTED TO MEMBERS OF THE COMMUNITY OF PARÁN CAUSING HARM TO INVICTA*

28. The following account of events is relevant to this report and assumes the description thereof offered by the Claimant to be true.

⁸ **Ex. C-0058**, Technical Report on Resources, Invicta Gold Project, SRK CONSULTING, 6 April 2012, p. ii (“There are three neighboring communities within 12 km of the Invicta Project area: Parán, Lacsanga and San Domingo de Apache . . . These three communities are in the area of direct influence of the Invicta Project and are titleholders of the surface lands where Invicta Project development would occur.”).

⁹ Claimant’s Memorial, ¶ 35; **Ex. C-0008**, Report No. 1300-2012-MEM-AAM-ACHM, 14 November 2012, p. 1.

¹⁰ Claimant’s Memorial, ¶ 35; **Ex. C-0008**, Report No. 1300-2012-MEM-AAM-ACHM, 14 November 2012, p. 1.

¹¹ Claimant’s Memorial, ¶ 35; **Ex. C-0008**, Report No. 1300-2012-MEM-AAM-ACHM, 14 November 2012, p. 1.

¹² Claimant’s Memorial, ¶ 35; **Ex. C-0008**, Report No. 1300-2012-MEM-AAM-ACHM, 14 November 2012, p. 2.

1. *Takeover of the Project premises in June 2018*

29. On June 15, 2018, at a meeting between Invicta and representatives of Parán, the latter announced that they would make a peaceful protest against Invicta.¹³
30. On June 19, 2018, between 250 and 300 members of Parán entered and took over the Project installations (the “Site”).¹⁴ They detained Invicta employees against their will.¹⁵ According to the report of events offered by the Claimant, the members of Parán searched the buildings and the site, threatened the Invicta employees, even hitting one of them, and fired shots into the air.¹⁶
31. According to the Claimant, the people of Parán who entered the Site had forced the Invicta workers to sign a communiqué declaring that the takeover had been peaceful. Then, they abandoned the scene.¹⁷
32. That same June 19, 2018, two Invicta workers who had remained on the Site during the events filed a criminal report with the PNP.¹⁸ The following day, on June 20, 2018, the few PNP officers who were present in the locality inspected the Site¹⁹.

2. *The attempted invasion of the Site in September 2018 which was duly controlled by the preventive intervention of the PNP*

33. Towards the end of August 2018 and the beginning of September 2018, Invicta received information which suggested that the Community of Parán was planning to invade the Site again on September 11, 2018, as a protest against Invicta. With that information, on September 2, 2018, Mr Castañeda, a member of Invicta, asked the Chief Police Officer (“CPO”) of Sayán to intervene.²⁰

¹³ **Ex. C-0157**, Monthly Report on Invicta Project, SOCIAL SUSTAINABLE SOLUTIONS, June 2018, p. 4.

¹⁴ Claimant’s Memorial, ¶¶ 6, 105

¹⁵ Claimant’s Memorial, ¶ 105.

¹⁶ Claimant’s Memorial, ¶ 107.

¹⁷ Claimant’s Memorial, ¶ 107.

¹⁸ Claimant’s Memorial, ¶ 108.

¹⁹ Claimant’s Memorial, ¶ 109.

²⁰ **Ex. C-0134**, Letter from Invicta Mining Corp. S.A.C. (J. Castañeda) to Sayán Police Station (A. Rosales), 2 September 2018, p. 1.

34. In view of Invicta's request, on September 7, 2018, the CPO of Sayán, the prosecutor of Huaura and the subprefect of Huaura met members of the Community of Parán and warned them that the protests should not involve a new invasion of the Site. Thanks to that intervention, on September 8, 2018, the Assembly of the Community of Parán decided to cancel the invasion planned for September 11, 2018.
35. On September 10, 2018, the Police in the area took further preventive action to avoid a further possible invasion of the Site. As part of those actions, the CPO of Sayán, at the head of a contingent of 40 officers, secured the perimeter of the Site. This police contingent remained in the area until September 12, 2018.

3. *The blocking of the entrance to the Site on October 14, 2018*

36. On October 14, 2018, around 100 members of Parán installed barricades and blocked the entrance to the Site as a protest measure against Invicta. A police contingent arrived at the scene and, on assessing the situation, took photographs and warned the people not to cause damage or disturbances.²¹
37. Invicta reached an agreement with the representatives of Parán: the members of Parán would leave the scene if the Invicta employees also withdrew. Invicta would maintain a security guard on the Site, and the Community of Parán would place a representative 300 meters from the site. However, around 100 members of the Community of Parán maintained the barricade and did not allow entry to the Site, requesting a meeting to resume the talks.²²
38. That same October 14, 2018, Invicta sent a letter to the representatives of Parán proposing a meeting. Parán replied that they would meet under the auspices of the MINEM and the PCM.²³

C. *THE ACTIONS OF THE PERUVIAN STATE ENTITIES*

39. Around the end of 2018 and the beginning of 2019, Invicta held meetings with members of the MINEM and the PCM, and held meetings in which representatives of Parán, the

²¹ Claimant's Memorial, ¶¶ 119–120.

²² Claimant's Memorial, ¶ 121.

²³ Claimant's Memorial, ¶ 122.

MINEM and the PCM participated. Unfortunately, the parties to the social conflict—Parán and Invicta—did not reach an agreement to remove the barricade. Despite the existence of a dialogue, Invicta’s request to the Peruvian authorities was for the PNP to clear the entrance to the Site through the use of force.

40. In this context, the PNP, in performance of its duties, drew up the document “Operations Order No. 002-2019-Región Policial Lima /DIVPOL-H-CS.SEC ‘Maintenance and restoration of public order, clearing of the access road to the camp of the mining company Invicta Mining Corp. S.A.C. - located in the Paccho and Leoncio Prado districts’” (“**Operations Order**”).²⁴
41. The Operations Order was drawn up based on three reports that served as inputs: a) Risk Report on O/O No. 002 -2019-Region Policial Lima/DIVPOL-H-CS “Maintenance and restoration of public order, clearing the entry road to the site of the mining company Invicta Mining Corp. S.A.C. situated in the districts of Paccho and Leoncio Prado, of February 8, 2019 (“**Risk Report**”);²⁵ b) Assessment of the Situation regarding Operations Order O/O No. 002-2019-Region Policial Lima/DIOVPOL-H-CS “Maintenance and restoration of public order, clearing of the access road to the camp of the mining company Invicta Mining Corp. S.A.C. - located in the Paccho and Leoncio Prado districts,” of February 8, 2019 (“**Assessment of Situation**”);²⁶ and c) Assessment of Intelligence No. 021-2019-9C1U-U17, of February 6, 2019 (“**Assessment of Intelligence**”).²⁷
42. The Operations Order did not include a date of execution. The time at which it could be executed is described generically as day “D” and time “H.”²⁸ This must be understood as meaning that the PNP did not receive authorization to clear the blockade to the Site through the use of force. Therefore, it is reasonable that, in the event they received such authorization and a date was established for execution of the Operations Order, the PNP

²⁴ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019.

²⁵ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 27.

²⁶ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 33.

²⁷ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 40.

²⁸ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 1.

would check whether the information contained in the Risk Report, Assessment of Situation and Assessment of Intelligence was still valid.

43. On February 26, 2019, the MINEM organized a meeting between the representatives of Parán, representatives of MINEM and Invicta. Thanks to that effort, the representatives of Parán removed the barricade at the entrance to the Site and resumed talks.²⁹
44. However, on March 20, 2019, around 150 members of Parán once again invaded the land of the Invicta Project.³⁰ In view of these facts, Invicta sought to resolve the dispute with Parán by means of meetings with representatives of the PCM, the MINEM and the MININTER. At those meetings, it once again asked for the PNP to clear the entrance to the Site with the use of force.³¹
45. The national authorities assessed the risks and consequences that the use of force by the PNP would have on the social conflict. They opted to continue favoring talks and, consequently, the PNP did not enter the Site with the use of force.³²
46. With their expectations that the PNP would execute the Operations Order and regain possession of the Site through the use of force frustrated, Invicta hired the private security firm War Dogs Security S.A.C. (“**War Dogs**”)³³. War Dogs obtained information that led it to speculate that only a few members of Parán remained in the area and, *motu proprio*, on May 14, 2019, they tried to retake possession of the Site themselves.³⁴ When they took those actions, an altercation arose with members of Parán, who used firearms and injured two members of War Dogs.

²⁹ Claimant’s Memorial, ¶ 153.

³⁰ Claimant’s Memorial, ¶ 167.

³¹ Claimant’s Memorial, ¶ 168.

³² **Ex. C-0221**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman’s Office and Invicta Mining Corp. S.A.C., 2 July 2019, pp. 4–5; **Ex. C-0222**, Meeting Minutes, Meeting between MINEM, Council of Ministries, MININTER, Ombudsman’s Office and Invicta Mining Corp. S.A.C., 2 July 2019, pp. 3–4.

³³ Claimant’s Memorial, ¶ 175.

³⁴ Claimant’s Memorial, ¶ 177.

III. THE LACK OF CAPACITY OF THE REPRESENTATIVES AND MEMBERS OF THE COMMUNITY OF PARÁN TO ACT ON BEHALF OF THE PERUVIAN STATE AND AS PERUVIAN GOVERNMENT OFFICIALS

A. *CONSTITUTIONAL AND LEGAL REGULATORY FRAMEWORK OF THE RURAL AND NATIVE COMMUNITIES IN PERU.*

47. The Political Constitution of Peru of 1993 recognizes the existence of the Rural Communities. Article 89 states the following: “the Rural and Native Communities have legal existence and are legal persons. They are **autonomous** in their organization, in the community work and in the use and free disposal of their land, as well as in economic and administrative matters, within the framework established by the law. Ownership of their land is imprescriptible, except in the event of abandonment provided for by the foregoing article. The State respects the cultural identity of the Rural and Native Communities.”³⁵
48. Law No. 24656, the **General Law on Rural Communities**, follows the path traced by the Constitution with regard to the autonomy of the Rural Communities. Article 1 declares the integral development of the Rural Communities as of national necessity and of social and cultural interest. According to it, “the State recognizes them as fundamental democratic institutions, **autonomous in their organization**, community work and use of the land, as well as in economic and administrative matters, within the frameworks of the Constitution, this law and related provisions.”³⁶
49. The language of the Constitutional and the law is clear and leaves no room for any doubt as to the legal nature of the Rural Communities. **Parán**, being a Rural Community is a **legal person under private law**. It has full and total **autonomy** in its internal organization, in its community work, and in its economic and administrative system. The autonomy of Parán established by the Constitution means that the way in which it is organized, the decisions it takes and the actions it carries out do not depend on and are not subject to the approval, supervision or amendment of third parties, whether natural or legal persons, established under private or public law.

³⁵ Ex. IMM-0002, Political Constitution of Peru. 29 December 1993, Art. 89. (Emphasis added)

³⁶ Ex. IMM-0003, Law No. 24656, General Law of Rural Communities, 13 April 1987, Art. 1. (Emphasis added)

50. The autonomy of Parán also applies in respect of the State. The constitutional framework is clear in preventing any type of State interference in the functioning of the Rural Communities. For that reason, the Peruvian State would incur legal liability if any of its entities or Ministries decided to intervene in the organization of Parán or in its actions, thereby infringing article 89 of the Constitution.
51. Given that the Peruvian State cannot intervene in the organization of Parán or in the decisions it takes or actions it carries out, it cannot assume legal liability for what Parán, its representatives or its members do or fail to do. The Peruvian State does not act through the Rural Communities and, therefore, does not act through Parán, or through its representatives or members. This principle applies with special force in respect of criminal matters.
52. The constitutional and legal frameworks concerning the Rural Communities lead to an **initial preliminary conclusion** which will be confirmed by further considerations: Parán is a legal person established under private law and does not act in the name of Peru. The legal or illegal conduct of its representatives and members is not, and has never been, binding on the Peruvian State. The opposite assumption, proposed by Lupaka in its Statement of Claim, which ventures to maintain that Parán is acting in the name and on behalf of Peru, leads to unconstitutional, absurd, and untenable scenarios. Anyone subscribing to the Claimant's proposition against Peru, *a pari*, should not have any qualms about attributing liability to the Canadian State for the actions carried out by Lupaka, its representatives or its members.

B. *THE LEGAL AUTONOMY OF THE RURAL COMMUNITIES —AND CONSEQUENTLY THAT OF PARÁN— TO APPLY ITS OWN CUSTOMARY LAW PROVIDED IT DOES NOT VIOLATE FUNDAMENTAL RIGHTS.*

53. Article 149 of the Constitution states that “the authorities of the Rural and Native Communities, with the support of the Rural Patrols, may perform the jurisdictional functions within their territorial scope in accordance with customary law, **provided they do not violate the fundamental rights of the person.** The law establishes the forms of

coordination of that special jurisdiction with the Magistrate [Juzgados de Paz] and with the other authorities of the Judiciary.”³⁷

54. The constitutional recognition of the customary law is a direct consequence of the autonomy of the Rural Communities and their right to self-governance in matters related to their internal and local affairs. This right is not unrestricted, however. The Constitution itself establishes two limits to the exercise of the jurisdictional functions of the Rural Communities: a) that it is limited to the territorial scope of the Rural Community itself; b) that the fundamental rights of the person established in the Constitution itself are not infringed upon.³⁸
55. The application of article 149 of the Constitution to this case requires that the limitation on Parán’s right to apply its customary law within its territory be the respect for fundamental rights.
56. The Peruvian Constitutional Court has pronounced judgment in this respect. It has declared that the right of the Rural Communities to apply their customary law forms part of the series of constitutional provisions that constitute a “Multicultural constitution, insofar as it also recognizes the value of cultural diversity.”³⁹ To this effect, the Constitutional Court understands that “(...) the minority groups that form part of a Constitutional State (...) may not fully share the world view or the notions of majority justice (...) that does not prevent the fact that, within the framework of diversity, they have to feel identified with the fundamental rights contained in the Constitution. Hence, in order to reconcile this situation, that is, to maintain a unified, plural society around the fundamental law, the fundamental rights contained in it, held by all persons without distinction, must be considered to be initial agreements of morality, the content of which is not finalized and is permeable to the requirements of a plural reality.”⁴⁰

³⁷ **Ex. IMM-0002**, Political Constitution of Peru, 29 December 1993, Art. 149. (Emphasis added)

³⁸ **Ex. IMM-0002**, Political Constitution of Peru, 29 December 1993, Art. 149.

³⁹ **Ex. IMM-0005**, *Francisco Rojas Condemayta et al.*, Constitutional Tribunal of Peru (Cusco), Judgment 154/2021, Exp. No. 03158-2018-PA/TC, 21 January 2021, 12th ground.

⁴⁰ **Ex. IMM-0005**, *Francisco Rojas Condemayta et al.*, Constitutional Tribunal of Peru (Cusco), Judgment 154/2021, Exp. No. 03158-2018-PA/TC, 21 January 2021, 26th ground.

57. Respect for fundamental rights as the limit to customary law has also been examined by the Supreme Court of Justice. Plenary Decision No. 1-2009/CJ-116 of November 13, 2009, which is of mandatory compliance,⁴¹ established that: “the following must be considered to be conduct contrary to the essential content of fundamental rights and therefore, illegal and unacceptable under customary law: (i) deprivations of liberty without cause or reasonable grounds – totally arbitrary and falling outside typical patrol control; (ii) unreasonable or unjustified aggression towards persons when patrolmen intervene or detain them; (iii) violence, threats or humiliation to testify in one way or another; (iv) judgments without the slightest possibility of exercising defense, which is virtually equivalent to lynching; (vi) the application of penalties not imposed by customary law; (vii) the pain of extreme physical violence, such as serious injuries or mutilation, among others.”⁴²
58. According to the reasoning of the Peruvian Constitutional Court and the Supreme Court of Justice, the actions carried out by the members of Parán in June and October 2018 and during 2019, as described by the Claimant, cannot be an expression of the customary law recognized by the Constitution.
59. The opposite would mean admitting an absurdity. If the actions taken by the members of Parán against Invicta were actually part of their customs, one would have to start by recognizing that they apply among themselves. Violence, deprivation of liberty, injuries, coercion and dispossession would be the custom in Parán used by its members to resolve conflicts arising among them. It is clear that such a custom does not exist. And, in the event that such a custom existed, *quod non*, article 149 of the Constitution would prevent it from being invoked as customary law as it violates fundamental rights.
60. Claimant itself acknowledged as much when it filed criminal reports against several representatives of Parán. Those reports, as well as the investigations initiated by the PNP and MP as a result thereof,⁴³ demonstrate three key aspects for the preparation of this report.

⁴¹ Ex. IMM-0006, Plenary Agreement No. 1-2009/CJ-116 of November 13, 2009.

⁴² Ex. IMM-0006, Plenary Agreement No. 1-2009/CJ-116 of November 13, 2009, 12th ground.

⁴³ See paragraphs 175 *et seq.* of this report.

- a. Firstly, it demonstrates that Invicta admits that Parán does not represent and does not act on behalf of the Peruvian State and that its representatives and members do not carry out government acts. If Invicta reported the people of Parán, it is because it recognizes that the PNP and the MP are the competent Peruvian authorities to investigate the events of June 19 and October 14 (and that those events are not covered by the customary law of Parán). In other words, if Invicta asks the Peruvian State authorities responsible for criminal prosecution to intervene, it is because it agrees that the Peruvian State is not bound by the conduct of Parán or of its members.
- b. The second key aspect for this report that derives from the criminal reports filed by Invicta is that it chose the criminal path as the only path to try and regain possession and access to the Site. I do not believe that there is any evidence that Invicta **made use of other legal actions afforded by the Peruvian legal system that are specifically designed for regaining possession of property**. Such decision cannot and should not be assessed here, as it forms part of the legal strategy to which Invicta is entitled. Precisely for that reason, however, the Peruvian authorities could not be imputed with alleged negligence or failure to act in returning possession of the aforesaid property to Invicta, if the only legal channel that Invicta had recourse to was not the most suitable channel for regaining possession of the Site. As will be seen below,⁴⁴ regaining possession of the Site through the criminal path involves an investigation by the prosecutor, a criminal trial, a final and enforceable judgment, and the subsequent enforcement of such judgment.
- c. The third key aspect for this report refers to the appropriate reaction of the Peruvian authorities to events reported by Invicta. It cannot be denied that, based on the events reported in the Statement of Claim, the conduct of June 19 and October 14, 2018, attributed to the members of Parán has the appearance of a crime. Whether it constitutes a crime or not is something that only the judicial authority will be able to determine within the scope of criminal proceedings, as stipulated by the

⁴⁴ See paragraphs 102 *et seq.* of this report.

Constitution and the Peruvian Code of Criminal Procedure (“**CPP**”).⁴⁵ In any event, the existence of an event that appears to be a crime gives rise to the legal obligation of the MP to investigate it. Article 329 of the CPP states that “*The Prosecutor shall initiate investigations when he becomes aware of the suspected perpetration of **an act having the nature of a crime**. He shall promote the investigation ex officio or at the claimants’ request.*”⁴⁶ Given that the police and supervisory authorities received Invicta’s reports and initiated the corresponding investigations, it can be affirmed that the supervisory authorities complied with their duty to initiate investigations. What remains to be examined is whether those investigations took place in accordance with the legal framework in force in Peru. We will come back to this later.⁴⁷

C. *THE REPRESENTATIVES OF THE COMMUNITY OF PARÁN ARE NOT PUBLIC OFFICERS OR GOVERNMENT OFFICIALS.*

61. In addition to the point dealt with above, I will refer in this section to the concept of public officer or servant in Peruvian criminal law. The members of Parán do not fall into this category.
62. Article 425 of the Peruvian Criminal Code (“**CP**”) defines the concept of public officer within Peruvian criminal law:
- “Public officers or servants are:*
- 1. Persons following an administrative career.*
 - 2. Persons holding political offices or offices of trust, even if they are elected by the public.*
 - 3. Any person who, irrespective of the labor regulations he falls under, maintains an employment or contractual link of any nature with State entities or bodies, including State companies or semi-public companies included in the State’s business activities, on account of which he performs functions in those entities or bodies.*
 - 4. Managers and custodians of assets seized or deposited by a competent authority, even if they belong to individuals.*

⁴⁵ Ex. IMM-0007, Criminal Procedure Code of Peru. Legislative Decree No. 957, July 22, 2004.

⁴⁶ Ex. IMM-0007, Criminal Procedure Code of Peru. Legislative Decree No. 957, July 22, 2004, Art. 329. (Emphasis added)

⁴⁷ See paragraphs 169 *et seq.* of this report.

5. *Members of the Armed Forces and National Police.*

6. *Persons designated, elected or proclaimed, by a competent authority, to perform activities or functions in the name or service of the State or its entities.*

7. *Those other persons indicated by the Political Constitution and by law.*⁴⁸

63. Peruvian case law that has interpreted and applied article 425 of the CP maintains that the criminal concept of public officer included here refers to the ***de jure public officer***. This concept is based on two constituent parts: a) authorizing title, that is, a legally valid title to assume an office or position in the public sector; and, b) actual performance of the public function. To this effect, Court of Cassation Judgment No. 634-2015 of June 28, 2016, issued by the Transitory Criminal Division of the Supreme Court of Justice of the Republic, is emblematic: “(...) *article 425 of the Peruvian Criminal Code provides a list, which has been gradually refined —not without difficulty— for purposes of attribution of criminal liability, the essential content of which necessarily lies in the fact that the perpetrator has a title, a legal or other objective capacity —a functional concept— allowing for effective participation in the public function, that is, his contribution to the State function – the exercise of the public function pursuant to a public appointment. This is so because an examination of the various criminal offences against the Public Administration allows affirming, as a categorial protected legal interest, the services that the public authorities have to provide to the community (...).*”⁴⁹
64. The representatives of Parán do not hold any legal title that authorizes them to perform a public function. They have not been elected, appointed or designated to perform a public function; they have not participated in any election to hold a public office; they have not been awarded a job in a public competition or assumed a public position of trust. For these purposes, the only thing that can be affirmed about the representatives of Parán is that they have been elected by the General Assembly of the Rural Community of Parán. Therefore, the only title they hold is that of directors and representatives of the legal person under private law, the Rural Community of Parán.⁵⁰

⁴⁸ Ex. IMM-0011, Criminal Code of Peru, Legislative Decree No. 635, 3 April 1991, Art. 425.

⁴⁹ Ex. IMM-0008, Cassation Sentence No. 634-2015, 28 June 2016, 2nd legal ground.

⁵⁰ Ex. IMM-0003, Law No. 24656, General Law of Rural Communities, 13 April 1987. Arts. 17, 18.b.

65. Ruling out the possibility that the directors of Parán are *de jure* public officers under Peruvian criminal law, one could explore the possibility that they are *de facto* public officers. Peruvian doctrine and case law admit the possibility that, on some occasions, it is possible to perform a public function without there being a legally valid authorizing title. Court of Cassation Judgment No. 442-2017 ICA of December 11, 2019, issued by the Transitory Criminal Division of the Supreme Court of Justice of the Republic, defines the *de facto* public officer in Peruvian criminal law: “(...) the *de facto* officer is the legal or natural person who, through an invalid or irregular appointment—even if that person deems it and discharges it in good faith— performs functions of a public officer in an effective, exclusive, public, unchallenged or continuous manner.”⁵¹
66. The criminal concept of *de facto* public officer dispenses with a legally valid title, but still requires the presence of the essential core of this notion: the capacity of the person to bind the State with his actions or decisions.⁵² In fact, the common denominator between *de jure* public officers and *de facto* public officers is that both are public officers and, as such, have the capacity to bind the State with their actions and decisions. The representatives or directors of Parán do not have that capacity.
67. Moreover, according to the Supreme Court of Justice of Peru, it is not possible to exercise a *de facto* public function if the office held does not exist within the State administrative organization.⁵³ In these cases, it is not possible to bind the State by one’s actions. Given that the office of “representative” or “director” of the Rural Community of Parán has never existed at any level of the central, regional or local government, or in any of the three authorities of the Peruvian State, it is legally unfeasible to maintain that the representatives or directors of Parán can perform a *de facto* public function and bind Peru with their actions or decisions.

⁵¹ Ex. IMM-0009, Cassation Sentence No. 442-2017 ICA, 11 December 2019, 43rd ground.

⁵² Ex. IMM-0010, I. Meini, “*Función pública y funcionario público en derecho penal*,” REVISTA DERECHO PENAL Núm. 26 (2019), pages 151-164, in particular, pages 157 *et seq.*.

⁵³ Ex. IMM-0009, Cassation Sentence No. 442-2017 ICA, 11 December 2019, 44th ground.

IV. CONNOTATIONS UNDER CRIMINAL LAW OF THE CONDUCT OF THE REPRESENTATIVES AND MEMBERS OF THE COMMUNITY OF PARÁN IN JUNE AND OCTOBER OF 2018

A. INTRODUCTION

68. Claimant's account is assumed here solely for the purposes of this analysis. It is further assumed that the criminal complaints filed by Invicta provide an accurate account of the events that took place on June 19, 2018, and October 14, 2018, and that those events have the appearance of a criminal offense. This methodology allows the criminal legal analysis offered in this section to focus on the legal assessment of the events and to not dispute or challenge Lupaka's perspective of those events.
69. Based on the criminal reports made by Invicta and its workers (regarding crimes of extortion, injuries, crimes against property and others) and based on the investigations initiated by the PNP and MP in response to those reports, we can assess whether the Peruvian authorities acted in accordance with the legal standards.
70. As discussed in this section, one cannot impute criminal liability to the officers of the PNP and MP for the events that took place on June 19, 2018, and October 14, 2018, onwards, not even under the version of the events offered by Lupaka.
71. On the contrary, as will be examined in the sections below, if the PNP officers had attempted to regain possession of the Site through the use of force without a judicial order (which did not exist) or outside the legal possibilities contemplated by Peruvian law for that purpose (which, as will be seen, could not be invoked for various reasons), it is highly likely that they would have incurred criminal liability for the crimes of aggravated usurpation and arbitrary exercise of a right, without prejudice to the administrative liability they could also have incurred.
72. As examined below,⁵⁴ Peruvian law recognizes that the PNP can and should act in accordance with their duties. However, as it generally happens in different legal systems, compliance with the duty of members of the PNP in Peru is subject to certain requirements and limits. These requirements and limits are particularly important in cases involving the

⁵⁴ See paragraphs 127 *et seq.* of this report.

use of force because non-observance thereof gives rise to criminal liability. As such, for the purposes of this case, pursuant to article 8.2 of Legislative Decree 1186, the statute that governs the use of force by the Peruvian National Police,⁵⁵ the PNP can and should use force to:

- a. Detain a person caught committing a crime or by judicial order in accordance with the law.
- b. Comply with a duty or lawful orders issued by the competent authorities.
- c. Prevent the perpetration of crimes and misdemeanors.
- d. Protect or defend protected legal interests.
- e. Control any person resisting authority.

73. For the purposes of this report, and taking into account the events as described by the Claimant, the cases governed by article 8.2. of Legislative Decree 1186 require us to examine whether the PNP faced any of the following situations: (i) catching a person committing a crime as defined by Peruvian law, that would allow the PNP to intervene;⁵⁶ (ii) a judicial order ordering members of the PNP to regain possession of the Site by force;⁵⁷ (iii) authorization issued by the competent authorities authorizing and ordering execution of the Operations Order;⁵⁸ or (iv) a situation of extreme, insurmountable urgency to the life or freedom of any person justifying the intervention of the PNP.⁵⁹ According to the description of the events offered by the Claimant, none of these situations was present.

74. The possibility is ruled out in this case that the PNP faced a situation in which it would have had to use force to prevent the perpetration of crime or misdemeanors, as provided for by article 8.2.c of Legislative Decree 1186.⁶⁰ The use of force by the PNP as a **preventive** measure would require an analysis of the actions of the police officers at a time

⁵⁵ **Ex. IMM-040**, Legislative Decree No. 1186, governing the use of force by the Peruvian National Police, article 8.2.

⁵⁶ **Ex. IMM-040**, Legislative Decree No. 1186, governing the use of force by the Peruvian National Police, article 8.2.a. See paragraphs 98 *et seq.* of this report.

⁵⁷ **Ex. IMM-040**, Legislative Decree No. 1186, governing the use of force by the Peruvian National Police, article 8.2.a. See paragraphs 101 *et seq.* of this report.

⁵⁸ **Ex. IMM-040**, Legislative Decree No. 1186, governing the use of force by the Peruvian National Police, article 8.2.b. See paragraphs 127 *et seq.* of this report.

⁵⁹ **Ex. IMM-040**, Legislative Decree No. 1186, governing the use of force by the Peruvian National Police, article 8.2.d. and e. See paragraphs 127 *et seq.* of this report.

⁶⁰ **Ex. IMM-040**, Legislative Decree No. 1186, governing the use of force by the Peruvian National Police, article 8.2.c.

prior to that of the events that Lupaka considers to be harmful to its rights. In fact, preventive action by the PNP could only have taken place before the occurrence of the events that took place in June and October 2018.

75. One also has to rule out the possibility that in this case a situation existed in which the PNP had to use force to protect protected legal interests, as provided for by article 8.2.d of Legislative Decree 1186.⁶¹ According to the international legislative framework and the case law of the Inter-American Court of Human Rights, these legal interests must include as a priority the life, integrity or freedom of persons.⁶² Moreover, in such cases, the use of force is only legitimate if, *ex ante*, it passes the test of reasonableness.⁶³ As will be seen later,⁶⁴ regaining possession of the Site by the PNP could only have taken place under a judicial order or an order of any competent authority since, again, according to Claimant's account, once the Community had taken possession of the Site there would have been no risk to the life or integrity of persons as a result of dispossession, that is, there were no hostages or threats to the integrity of the Invicta employees.
76. The possibility that the PNP would have had to use force to control anyone resisting authority, as provided for by article 8.2.e of Legislative Decree 1186,⁶⁵ must also be ruled out in this case. The requisite context for such an analysis would include either the existence of an order issued by any authority which had also been disobeyed and thus warranted the use of force; or a certain police action that was resisted and required the use of force to be carried out. This case, however, does not involve the existence of an order which execution was resisted or a police measure which, having been resisted, warranted the use of force. On the contrary, Lupaka's claim arises from the absence of an order to retake possession of the Site and from the lack of action by the PNP. In any event, the use

⁶¹ **Ex. IMM-040**, Legislative Decree No. 1186, governing the use of force by the Peruvian National Police, article 8.2.d.

⁶² See paragraphs 127 *et seq.* of this report.

⁶³ See paragraphs 127 *et seq.* of this report.

⁶⁴ See paragraphs 169 *et seq.* of this report.

⁶⁵ **Ex. IMM-040**, Legislative Decree No. 1186, governing the use of force by the Peruvian National Police, article 8.2.e.

of force by the PNP must in all cases be examined in the light of the test of reasonableness.⁶⁶

B. *CRIMINAL OFFENSES POTENTIALLY PERPETRATED BY THE MEMBERS OF THE COMMUNITY OF PARÁN, PARTICULARLY THE CRIME OF USURPATION.*

77. Lupaka's claim focuses on two events: a) on the events that took place on June 19 when inhabitants of Parán entered the Site, threatened the Invicta employees who were working there, engaged in violence with them and forced them to sign a document recognizing that the Parán protest had been peaceful; and b) on taking possession of the Site and installing the block on the access road on October 14 which still remains there.
78. In the scenario described in the previous paragraph, the following crimes provided for by the Peruvian Criminal Code could have been committed: injuries,⁶⁷ coercion,⁶⁸ extortion,⁶⁹ damage⁷⁰ and usurpation. This statement is corroborated with the reports and events presented by Invicta to the PNP in which it reports those crimes and the actions characterizing such crimes⁷¹. As has been said, the legal description offered of these events by the Claimant will not be disputed in this section. In any event, the entry by the inhabitants of Parán into the Site offices on June 19, 2018, and taking possession of the Site and installing the barricade on the access road on October 14 form the two key aspects of the Claimant's claim. These events would have led to the loss of their investment as they were unable to operate the mine. In this account, the crime established by such events would be the crime of aggravated usurpation which is committed by anyone who, with violence or threats, takes total or partial possession of another person's property or disturbs his possession thereof.
79. In this context, two questions need to be answered to decide whether the action taken by the police officers in view of the events reported by Invicta was legal or not: (1) how should the PNP act in view of such events and in view of such a crime (legal standard of police

⁶⁶ See paragraphs 127 *et seq.* of this report.

⁶⁷ **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635. Arts. 121 *et seq.*

⁶⁸ **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635. Art. 151.

⁶⁹ **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635. Art. 200.

⁷⁰ **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635. Arts. 205 *et seq.*

⁷¹ Paragraphs 172 *et seq.* of this report.

action and the use of force)?; and (2) did the action taken by the PNP officers in this specific case comply with that legal standard? The answer to be given to these questions will demonstrate that the conduct of the PNP officers was lawful and did comply with what was required of them by the law in force in Peru. For that purpose, we need to begin by examining the crime of usurpation.

80. The criminal legal analysis offered of the crime of usurpation is based on the case law of the Peruvian Courts. This case law shows the way in which the crime of usurpation is interpreted and applied in Peru. Special relevance is given to the case law of the Supreme Court as the superior body.

81. The basic crime of usurpation is stipulated by article 202 of the CP:

“The following shall be punished with deprivation of freedom for not less than two and not more than five years:

1. Anyone who, in order to take possession of all or part of a property, destroys or alters the boundaries thereof.

2. Anyone who, with violence, threat, deceit or abuse of trust, takes total or partial possession or tenure of another person’s property or takes over exercise of another person’s real rights.

3. Anyone who, with violence or threat, disturbs possession of property.

4. Anyone who illegally enters a property, by hidden actions, in the absence of the owner or by taking precautions to ensure it is not known by persons having the right to object thereto.

The violence referred to in points 2 and 3 is applied both to persons and to property”⁷².

82. The aggravated crime of usurpation is described in article 204 of the CP:

“Imprisonment shall be of not less than five and not more than 12 years and disqualification, when appropriate, when usurpation is committed:

1. Using firearms, explosives or any other hazardous instrument or substance.

2. With the participation of two or more persons.

3. On property reserved for residential purposes.

4. On assets of the State or rural or native communities, or on assets intended for public services or property, forming part of the cultural heritage of the nation declared by the competent entity, or on natural areas protected by the State.

5. Affecting free movement on roads.

6. Installing boundaries, perimeter fences, hedges, panels or notices, demarcation of lots, installation of matting, plastics or other materials.

⁷² Ex. IMM-0011, Criminal Code of Peru, Legislative Decree No. 635, 3 April 1991, Art. 202.

7. *Abusing their capacity or position of officer, public servant or member of the notarial or arbitration function.*

8. *On rights of way or the location of areas granted for investment projects.*

9. *Using false or adulterated private documents.*

10. *In their capacity as representative of an association or other type of organization, representative of a legal person or any natural person, who submits or wrongly authorizes documents or validates acts of possession of land belonging to the State or individuals.*

11. *On property in areas declared to be of unmitigable risk.*

Anyone who organizes, finances, facilitates, encourages, directs, causes or promotes the perpetration of usurpation of publicly- or privately-owned property shall be punished with the same penalty”⁷³.

83. As provided for by articles 202 and 204 of the CP, the form of the crime of usurpation committed consists in taking total or partial possession or tenure of another person’s property or taking over exercise of their real rights, with violence or threat (article 202-2 of the CP). This crime is aggravated by the participation of two or more persons (article 204. 2 of the Peruvian Criminal Code) and, according to the reports presented by Invicta on July 26, 2018,⁷⁴ January 7, 2019,⁷⁵ and March 29, 2019,⁷⁶ for taking place on rights of way or in the location of an area granted for investment projects (article 204.8 of the CP).

1. *Possession as a protected legal interest in connection with usurpation*

84. According to Court of Cassation Judgment No. 458-2015, Cajamarca, of May 3, 2017, the crime of usurpation protects possession: “(...) More specifically, in the crime of usurpation, what is specifically protected is the use and benefit of the real rights, **essentially the possession, which is diminished and attacked when the victim is removed from the property.(...) The legal asset, the property, is protected not only in relation to the title to the property** or in relation to the real right, but also in relation to the fact of tenure, possession or quasi-possession to which the title confers the right, **or to the fact of tenure or possession exercised without a title granting rights thereto (...)**, consequently, this occurs when the victim is removed and prevented from carrying out the specific acts of

⁷³ Ex. IMM-0011, Criminal Code of Peru, Legislative Decree No. 635, 3 April 1991, Art. 204.

⁷⁴ Paragraphs 178 *et seq.* of this report.

⁷⁵ Paragraphs 181 *et seq.* of this report.

⁷⁶ Paragraphs 182 *et seq.* of this report.

occupancy that he was carrying out (...)”⁷⁷. To this effect, usurpation “**protects possession, understood to mean the *de facto* state**, consisting in maintaining *de facto* control over all or part of the property (...)”⁷⁸.

85. Based on this line of case law which identifies possession as a protected legal asset in the crime of usurpation, it is noted that the crime may be perpetrated when the possession that is the object of dispossession or disturbance is not covered by a legal title (possession without authorizing legal title or *de facto* possession).

2. *The crime of usurpation may be perpetrated when the possession that is the object of dispossession or disturbance is de facto—unlawful or precarious. Its application to this case*

86. *De facto* possession is protected in the crime of usurpation. This is recognized by Peruvian case law. In Court of Cassation No. 702-2019-Cusco, of April 13, 2021, the Supreme Court considered that “(...) in legal proceedings for crimes of usurpation, following the perspective of the protected legal asset, **it is not a matter of clarifying the legality of possession**, but only of whether it has been peaceful.”⁷⁹ In Appeal for nullity no. 2477-2016-Lima, of April 12, 2017, the Supreme Court expressly maintained that: “*the victim in this crime is the person who is in direct possession of the property; to this effect the holder must have possession of the property at the time the crime is committed, regardless of the title he may hold thereto; cases of unlawful possession or precarious possession are also covered by criminal law, the holder only being able to be deprived of the property by a lawful means.*”⁸⁰

87. This case-law framework makes it clear that any attempt by Invicta to regain possession of the Site by taking action (by its own hands) that is not covered by the law could give rise to criminal liability for the crime of usurpation. This statement is valid even when it is

⁷⁷ **Ex. IMM-0012**, Cassation Sentence No. 458-2015 Cajamarca of 3 May 2017, issued by the Permanent Criminal Division of the Supreme Court, 19th ground. (Emphasis added)

⁷⁸ **Ex. IMM-0012**, Cassation Sentence No. 458-2015 Court of Cassation Judgment No. 458-2015 Cajamarca of May 3, 2017 3 May 2017, issued by the Permanent Criminal Division of the Supreme Court, 20th ground. (Emphasis added)

⁷⁹ **Ex. IMM-0013**, Cassation Sentence No. 702-2019-Cusco, of 13 April 2021, issued by the Permanent Criminal Division of the Supreme Court, 3rd legal ground. It also recognizes that possession may be *de facto*: see **Ex. IMM-0014**, Cassation Sentence No. 38-2010-Huara, of 17 February 2011, p. 145, 7th ground.

⁸⁰ **Ex. IMM-0015**, Annulment Appeal No. 2477-2016-Lima of 12 April 2017, issued by the Permanent Criminal Division of the Supreme Court, ground 3.4. (Emphasis in Original)

admitted that the possession of the Site maintained by the inhabitants of Parán was illegal since, as pointed out in the previous paragraph, according to the Supreme Court, a crime of usurpation is also committed when *de facto* possession or unlawful possession is taken of another party's property with violence or threats.⁸¹

88. Besides the crime of usurpation, if Invicta were to take matters into their own hands to regain possession of the Site, its conduct could give rise to criminal liability for the crime of arbitrary exercise of rights. This crime is governed by article 417 of the Peruvian CP as a crime against the Administration of Justice: "Anyone who, in order to exercise a right, instead of having recourse to the authority, applies justice arbitrarily by himself, shall be punished with 20 to 40 days' community service."⁸²
89. The crime of arbitrary exercise of rights assumes that the existence of a right is a necessary but not sufficient reason for exercising it. For the legal system to consider the exercise of a right to be lawful, it cannot involve the arbitrary exercise thereof. If the exercise of a right is arbitrary, as provided for by article 417 of the CP, it will result in criminal liability.
90. To avoid incurring criminal liability for an offence of usurpation and an offence of arbitrary exercise of a right, in cases such as this one, the Peruvian legal system establishes legal ways and procedures for regaining possession of property.⁸³ Acting on one's own initiative outside such procedures is not only illegal but would also give rise to criminal liability. This is something that Invicta and the private security officers hired to try and regain possession of the Site on May 14, 2019, should have considered.⁸⁴
91. Criminal liability for the crime of usurpation would be held not only by the Invicta officers or workers,⁸⁵ or members of the private security firm contracted for that purpose. If the PNP had tried to regain possession of the Site with the use of force without verifying the legal requirements examined later on in this report for that purpose, or if they had collaborated with the Invicta employees or those of the private firm, they would also have

⁸¹ See paragraph 85 of this report.

⁸² **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635, 3 April 1991, Art. 417.

⁸³ See paragraphs 109 *et seq.* of this report.

⁸⁴ See paragraph 46 of this report.

⁸⁵ Who could also be liable for the crime of arbitrary exercise of rights. See paragraphs 85-57 and 121 of this report.

incurred criminal liability. Anyone wishing to regain possession of a property without incurring criminal liability should make use of one of the legal mechanisms afforded by the Peruvian legal system for that purpose⁸⁶.

3. *Perpetration of the crime of usurpation and its application to this case*

92. The perpetration of a crime triggers legal consequences. One of the most significant ones is that the flagrance of the criminal act ends 24 hours after perpetration thereof.⁸⁷
93. A crime is perpetrated when all the constituent parts (objective and subjective) described in criminal law are present. Three types of crime are recognized under this criterion:⁸⁸ a) crimes of immediate perpetration, which consummation takes place at a certain time and instantaneously (e.g., murder, which is committed when the victim dies); b) permanent crimes, in which perpetration extends over the period in which the perpetrator maintains the illegal state and ends with termination of the illegal state (e.g. abduction takes place while the victim's loss of freedom is maintained and ends when the victim regains his freedom; and c) state crimes, which are instantaneously perpetrated and which effects remain permanent. According to the Supreme Court, usurpation is a state crime.⁸⁹
94. As a state crime, usurpation is committed when a person takes possession of another person's property by violence, threat or any other means indicated by criminal law. Once dispossession has taken place, one can only talk of the effects of the crime committed.
95. The time at which usurpation of the Site took place has significant consequences for the matters discussed in these arbitration proceedings. In the events reported by Lupaka, a distinction needs to be made between the unauthorized and violent entry of the inhabitants of Parán to the Site that took place on June 19, 2018, and dispossession of the Site that took place on October 14, 2018.

⁸⁶ See paragraphs 109 *et seq.* of this report.

⁸⁷ **Ex. IMM-0007**, Criminal Procedure Code of Peru, Legislative Decree No. 957, Art. 259.4.

⁸⁸ **Ex. IMM-0016**, Excerpt S. Puig, CRIMINAL LAW (2016), Page 232.

⁸⁹ **Ex. IMM-0017**, Annulment Appeal No. 502-2002, Huánuco, of 13 April 2005, issued by the Supreme Court, 4th ground (“the crime of usurpation, in the form of dispossession, is a State crime or instantaneous crime having permanent effects (...) on which account the limitation period begins (...) when the perpetrator takes possession, his remaining in the property usurped and the resulting termination of taking possession or tenure of the property being irrelevant for these purposes”).

96. Always following the account of the events contained in the Statement of Claim, on June 19, 2018, crimes of injuries, coercion and extortion were committed.⁹⁰ But the crime caused more specifically by the entry of the members of Parán into the Invicta premises is unauthorized entry. The crime of unauthorized entry is described in article 159 of the Peruvian Criminal Code and “anyone who, without the right to do so, enters another person’s home or business premises, outbuildings or premises inhabited by another person or anyone who remains there refusing any orders by anyone entitled to issue any” shall be punished with deprivation of freedom for not more than two years and with a fine of 30 to 90 days.⁹¹
97. Nevertheless, on June 19, 2018, a crime of usurpation was not committed in the form of dispossession since, on that day, Invicta was not actually dispossessed of the Site. One might think, however, that the crime of usurpation could have been committed in the form of disturbing possession of property with violence or threats (article 202.3 of the CP). But such a possibility must also be questioned. Disturbance of possession must extend over a period that makes it possible to talk of possession disturbed over time. Nevertheless, even if, a crime of usurpation had been perpetrated on June 19, 2018, the commission of the crime would have been consummated on that very day, June 19, 2018, even if the inhabitants of Parán abandoned the Site on that same day. This applies to any crime that might have been committed that day.
98. The entry and violent taking of the Site and the blocking of the access road by the inhabitants of Parán on October 14, 2018, again according to the account offered by the Claimant, do configure usurpation by dispossession. Perpetration of the crime was consummated on October 14, 2018. Twenty-four hours later there would no longer be flagrante and therefore the PNP officers were not authorized to make any arrests or to intervene without a judicial order.⁹² As provided for by article 2.24 f) of the Constitution: *“no-one may be arrested other than by reasoned, written order of the judge or by the police authorities if caught committing a crime. The person under arrest must be brought before*

⁹⁰ This is recognized by Invicta when it reports these crimes in detail. See paragraph 172 *et seq.* of this report.

⁹¹ **Ex. IMM-0011**, Criminal Code of Peru. Legislative Decree No. 635, Art 159.

⁹² Another alternative is defense of possession (on this, see paragraph 115 of this report).

the corresponding court, within 24 hours or within the period appropriate to the distance”⁹³.

99. Along the same lines, article 259 of the CPP, which governs police detention, states the following:

“The National Police of Peru shall arrest anyone caught committing a crime without a judicial order. Flagrante delicto exists when:

- 1. The agent is discovered committing the punishable act.*
- 2. The agent has finished committing the punishable act and is discovered.*
- 3. The agent has fled and has been identified during or immediately after committing the punishable act, whether by the injured party or by another party witnessing the act, or by audiovisual means, devices or equipment recording his image by means of technology, and is found within twenty-four (24) hours of committing the punishable act.*
- 4. The agent is found within twenty-four (24) hours of committing the crime with effects or instruments originating therefrom or which were used to commit the crime, or with indications on himself or on his clothing indicating that he is the likely perpetrator of or participant in the criminal act”*⁹⁴.

100. The constitutional and legal provisions have been explained by the Supreme Court. Court of Cassation Judgment No. 553-2018-Lambayeque, issued on September 11, 2019, stated that: “a person will be caught committing a crime whenever the following occur (...) (i) immediacy in time means that the criminal act is taking place or has just taken place at the time of its discovery or intervention; and (ii) immediacy in person: the criminal is in the place of the act in a situation or with regard to aspects of the crime that indicate his direct participation therein”⁹⁵.

101. The conclusion inferred from the legal framework on the notion of flagrante applied to this case is: violent dispossession took place on October 14, 2018, and the commission of the crime of usurpation was consummated on that day. As from October 15, 2018, flagrante for the crime of usurpation in the form of dispossession had ended even though the Claimant had been unable to regain possession of the Site to which it was entitled. From that time on, the PNP could not make arrests or intervene unless a judicial authority issued a judicial order authorizing their intervention. Such a judicial order did come to exist.

⁹³ Ex. IMM-0002, Political Constitution of Peru. 29 December 1993, Art. 2.24 f.

⁹⁴ Ex. IMM-0007 Criminal Procedure Code of Peru. Legislative Decree No. 957, Art. 259.

⁹⁵ Ex. IMM-0018, Cassation Sentence No. 553-2018-Lambayeque, of 11 September 2019, 7th ground.

102. Indeed, a judicial order authorizing the PNP officers to intervene could originate, initially, in a final judgment obtained through “enforcement proceedings” within the terms of the Peruvian Code of Civil Procedure (“CPC”),⁹⁶ ordering the enforcement of a final criminal conviction for a crime of usurpation. Given that the PNP is the authority responsible for enforcing legal decisions, a judgment rendered in enforcement proceedings would have been implemented by the PNP. The criminal judgment would not only have declared the crime of usurpation proven and imputed criminal liability to the perpetrators and participants in the crime, but it would also have ordered possession of the Site to be returned to Invicta as civil redress for the crime. In this scenario, the return of possession of the Site would have been requested in the criminal proceedings by the civil plaintiff (Invicta). This possibility must be dismissed. No criminal proceedings exist at this time (or existed prior to the date on which Lupaka declared the loss of its investment) where a crime of usurpation by the persons participating in the events of June 19 and October 14, 2018 onwards is being adjudicated. Therefore, one may assume here the hypothesis in which Invicta had entered an appearance in criminal proceedings as a civil plaintiff, as provided for by the CPP.⁹⁷ The events of June 19 and of October 14, 2018, are being investigated by the Public Prosecutor’s Office and could possibly lead to criminal proceedings if the prosecutor responsible for the investigation makes an accusation and the criminal judge opens oral proceedings.⁹⁸ At present, these reports are at the stage of preliminary investigations and preparatory investigations.⁹⁹
103. Secondly, the judicial order authorizing members of the PNP to intervene could also originate from a legal decision ordering enforcement of a final legal judgment issued by a civil judge declaring as well-founded a civil claim of judicial defense of possession.¹⁰⁰ As far as we are aware, Invicta has not filed any civil claims. This second possibility also must be ruled out.

⁹⁶ Ex. **IMM-0019**, Civil Procedural Code, Legislative Decree No. 768, Arts. 688 *et seq.*, particularly arts. 713 *et seq.*

⁹⁷ Ex. **IMM-0007**, Criminal Procedure Code of Peru. Legislative Decree No. 957, Arts. 98-100.

⁹⁸ Ex. **IMM-0007**, Criminal Procedure Code of Peru. Legislative Decree No. 957, Art. 349 *et seq.*

⁹⁹ See paragraph 172 *et seq.* of this report.

¹⁰⁰ See paragraph 116 *et seq.* of this report.

104. A third possibility would involve a judicial order authorizing the intervention of the PNP to regain possession of the Site in the form of injunctive relief within a criminal proceeding. Article 311 of the CPP prescribes this possibility of injunctive relief as “preventive eviction” in proceedings for usurpation.¹⁰¹ This possibility must, however, also be ruled out in the absence of criminal proceedings (either ongoing or at the time Lupaka declared the loss of its investment) relating to the events that took place on June 19 and October 14 onwards, or where Invicta sought repossession of the Site.
105. A fourth possibility would involve a judicial order authorizing the intervention of the PNP to regain possession of the Site in the form of injunctive relief, instructing the anticipatory eviction in the context of the preliminary proceedings or at any stage of any preparatory investigation of the crime of usurpation. This possibility is governed by article 311.3 of the CPP.¹⁰² Insofar as the law limits this possibility to cases of usurpation, the analysis of whether a request was made for injunctive relief in the form of an anticipatory eviction ordering the return of possession of the Site to Invicta and, if so, whether any judge granted it, would have to be limited to the preliminary and preparatory prosecutor’s investigations that exist or have existed for the crime of usurpation or that have been initiated following the reports (of the crime of usurpation) filed by Invicta or by any of the parties involved in the events.

¹⁰¹ **Ex. IMM-0007**, Criminal Procedure Code of Peru. Legislative Decree No. 957, Art. 311: “1. In crimes of usurpation, the judge, at the request of the prosecutor or the injured party, shall order preventive eviction from the property occupied within a period of 24 hours, provisionally providing for possession by the injured party, provided there are reasonable grounds to maintain that the crime was committed and that the right of the injured party is sufficiently proven. Eviction shall be enforced within a period of 72 hours of its being granted. 2. The National Police, once aware that the crime has been committed, shall inform the prosecutor thereof and shall carry out the investigations warranted. The prosecutor, without prejudice to ordering the appropriate measures, shall immediately carry out an inspection of the property. The injured party shall receive a certified copy of the police measures and of the prosecutor’s inspection. 3. An application for eviction and provisional recovery of possession may be presented during the preliminary proceedings or at any stage of the preparatory investigation. Elements of proof demonstrating perpetration of the crime and the right of the injured party shall be attached. 4. The judge shall issue his decision, without any formalities, within a period of 24 hours. An appeal may be lodged against the decision pronounced. The lodging of an appeal shall suspend enforcement of the decision appealed against. 5. The judge shall submit the corresponding report within 24 hours of the appeal being filed within the scope of their responsibilities . The Division shall pronounce judgment within a period of three days, following a hearing of the parties following notification. If it supports the request for eviction and provisional recovery of possession, it shall inform the judge thereof for its immediate enforcement.”

¹⁰² **Ex. IMM-0007**, Criminal Procedure Code of Peru. Legislative Decree No. 957, Art. 311.3: “An application for eviction and provisional recovery of possession may be presented during the preliminary proceedings or at any stage of the preparatory investigation. Elements of proof demonstrating perpetration of the crime and the right of the injured party shall be attached.”

106. Invicta filed three criminal reports for crimes of usurpation: on July 26, 2018,¹⁰³ January 7, 2019¹⁰⁴ and March 29, 2019.¹⁰⁵ The first two gave rise to preliminary investigations and the third to a preparatory investigation. The Rural Community of Lacsanga also filed a report for a crime of usurpation on February 21, 2019, against the Community of Parán.¹⁰⁶ That report was dismissed. The last report of usurpation is the one filed on February 21, 2019, by Gilberto Azarias Palomares Torres against Roberto Cenen Guevara Becerra, Walter Frank Carnero Paz, Victoria Maria Tapia Espiritu, Williams Gian Pierre Valentin Gosme, Einer Sanchez Quiroz, Jorge Luis Velezmoro Antunez and Juan Rodolfo Rebaza Soriano, to the detriment of the Community of Parán.¹⁰⁷ That report gave rise to a preliminary investigation.
107. Based on the information available, there is nothing to suggest that Invicta applied for the injunctive relief of anticipatory eviction in any of the preliminary proceedings or preparatory investigations originating from the reports filed for usurpation. Nor is there any evidence that the Community of Lacsanga or the Community Parán filed an application to that effect. Consequently, we must rule out the existence of a judicial order which, as a measure for injunctive, anticipatory eviction, may have authorized the PNP legally to intervene.
108. So far, it is our understanding that no judicial order exists authorizing or ordering the PNP to use force to regain possession of the Site. Justification for the PNP's intervention due to a case of a person being caught committing a crime also must be ruled out.

C. *LEGAL MECHANISMS PROVIDED FOR BY THE PERUVIAN LEGAL SYSTEM TO REGAIN POSSESSION OF PROPERTY.*

109. The fact that the PNP was not authorized to intervene with the use of force because no-one was caught committing the crime and there was no judicial authorization still does not mean that the actions of the Peruvian authorities were legal. To reach that conclusion, we need first examine the mechanisms available to Lupaka under the legal system to regain

¹⁰³ See paragraph 178 of this report.

¹⁰⁴ See paragraph 181 of this report.

¹⁰⁵ See paragraph 182 of this report.

¹⁰⁶ See paragraph 176 of this report.

¹⁰⁷ See paragraph 177 of this report.

possession of the Site, and also confirm that the Claimant's decision not to avail itself of any of them was not imposed by any Peruvian authority.

110. The premise for the reasoning that follows is the necessary distinction between the criminal channel and the civil channel as means of achieving the return of property. The criminal channel presupposes that a series of requirements are met: firstly, that the existence of a crime of usurpation and the alleged parties liable are being investigated by the Criminal Prosecutor; and, secondly, should there be sufficient elements of proof and provided that all other requirements set forth in the CPP are met, that a formal accusation is logged against such parties.¹⁰⁸ The criminal judge then has to judge them and, if he considers that both the crime and the culpability of the parties accused have been proven beyond all reasonable doubt, issue a conviction,¹⁰⁹ which may be appealed (guarantee of appeal).¹¹⁰ That is, in the criminal court, three points are basically settled: whether the action reported is a crime; whether the persons accused of committing the crime are criminally liable and to what extent; and, if the first two are satisfied, the punishment to be imposed on each party liable. Only if a judgment of conviction is reached can the judge pronounce judgment on civil redress for the crime.
111. According to article 93 of the CP, redress originating from the crime includes “1. The return of the property or, if that is not possible, payment of the value thereof; and 2. Compensation for damages.”¹¹¹ For its part, article 94 of the CP provides that “the same property shall be returned, even if it is in the possession of third parties, without prejudice to the latter's right to claim the value thereof from the relevant party.”¹¹² The Claimant has the right to choose criminal proceedings as the sole means to seek repossession of the Site. However, repossession can only be achieved if a final judgment of conviction were rendered for the crime of usurpation.¹¹³

¹⁰⁸ **Ex. IMM-0007**, Criminal Procedure Code of Peru. Legislative Decree No. 957. Art. 349.

¹⁰⁹ **Ex. IMM-0 07**, Criminal Procedure Code of Peru. Legislative Decree No. 957, Art. 399.

¹¹⁰ **Ex. IMM-0007**, Criminal Procedure Code of Peru. Legislative Decree No. 957, Arts. 404 *et seq.*

¹¹¹ **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635, Art. 93.

¹¹² **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635 Art. 94.

¹¹³ The existence of an application for precautionary measures for preventive eviction has already been dismissed. See paragraph 101 of this report.

112. In a complex criminal case owing to the number of persons that would have to be investigated¹¹⁴ such as this one, opting solely for criminal proceedings involves the assumption of several risks that could delay the return of possession of the property or, in some cases, could even prevent it. Given that in criminal proceedings the return of property is a consequence of the judgment of conviction, any difficulty in providing evidence requiring the application of *in dubio pro reo*¹¹⁵ and preventing proof of the punishable act, or any circumstance calling into question the liability of the parties investigated (causes of justification or causes of acquittal¹¹⁶) or acting fraudulently (errors¹¹⁷) would prevent a conviction and would block the possibility of repossession of the property.
113. There is also the difficulty of identifying each of the parties participating in the events reported by Invicta and, above all, of identifying the conduct engaged in by each one. As appreciated in the Statement of Claim, more than 300 inhabitants of Parán participated in the events of June 19, 2018, and more than 100 in the events recorded on October 14, 2018. While an individual may report to the PNP or the MP “those persons liable,” as Invicta did, the procedural rules in force in Peru do not allow the MP to conduct a preparatory investigation against a group of anonymous persons or a crowd. One has to identify the alleged parties liable, as well as the charges made against each one of them, describe the crime or crimes that each one has committed and charge the perpetrator or participants with the crime or crimes. The right of defense, which has constitutional hierarchy, requires this.¹¹⁸
114. The obligation to identify the persons to be investigated and the obligation to identify the acts carried out by each one applies from the commencement of the police investigation. Article 67.1 of the CPP states that “the National Police, in performing its duties, shall, even on its own initiative, acquire a knowledge of the crimes and immediately report them to

¹¹⁴ **Ex. IMM-0007**, Criminal Procedure Code of Peru. Legislative Decree No. 957, Art. 342.3.

¹¹⁵ **Ex. IMM-0007**, Criminal Procedure Code of Peru. Legislative Decree No. 957, Arts. II.1 and VII.4 of the Preliminary Title and 398.1.

¹¹⁶ **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635, Arts. 20.3, 20.4, 20.5, 20.7, 20.8., 20.9 and 20.11.

¹¹⁷ **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635, Art. 14.

¹¹⁸ **Ex. IMM-0002**, Political Constitution of Peru, 29 December 1993, Art. 139.14; **Ex. IMM-0007**, Criminal Procedure Code of Peru. Legislative Decree No. 957. Art IX.1 of the Preliminary title.

the prosecutor, without prejudice to carrying out essential, urgent measures to prevent the consequences thereof, **identify the perpetrators and participants (...)**”¹¹⁹ And article 332.3 of the CPP, which refers to the content of the Police Report prepared by the PNP on completing their investigation and delivered by the MP, states that “the police report shall include the documents drawn up, statements received, expert appraisals made, recommendations on acts of investigation **and anything considered essential for a clarification of the accusation, as well as evidence of the address and particulars of the parties accused.**”¹²⁰

115. The correct identification of the parties accused, of the acts carried out by each one, a suitable description of the crime and determination of the degree of criminal participation (perpetrator or participant) is a requirement for the MP to be able to open a formal investigation. To this effect, article 330.2 of the CPP provides that “Preliminary measures have the immediate purpose of carrying out urgent or non-deferable measures intended to determine whether **the acts brought to its knowledge and the criminal nature thereof** have taken place, and to ensure there is material evidence of the perpetration thereof, **identify the persons involved in the perpetration thereof**, including the injured parties, and, within the limits laid down by law, duly check them.”¹²¹ Without such identification, the investigation cannot be formalized, as indicated by article 336.1 of the CPP: “If evidence appears in the report, the Police Report or the Preliminary Measures carried out indicating the existence of a crime, not yet time-barred, **in which the accused is identified** and if the requirements of admissibility have been satisfied, it shall order the formalization and continuation of the Preparatory Investigation.”¹²² And, for its part, article 336.2 of the CPP states that “The order of formalization shall contain: a) The **full name of the party accused**; b) The **facts and the corresponding specific description**. The Prosecutor may, where appropriate, record alternative descriptions of the facts investigated, indicating the reasons for such classification; (...).”¹²³

¹¹⁹ Ex. IMM-0007, Criminal Procedure Code of Peru, Legislative Decree No. 957, Art. 67.1. (Emphasis added)

¹²⁰ Ex. IMM-0007, Criminal Procedure Code of Peru, Legislative Decree No. 957, Art. 332.3. (Emphasis added)

¹²¹ Ex. IMM-0007, Criminal Procedure Code of Peru, Legislative Decree No. 957, Art. 330.2. (Emphasis added)

¹²² Ex. IMM-0007, Criminal Procedure Code of Peru, Legislative Decree No. 957, Art. 336.1. (Emphasis added)

¹²³ Ex. IMM-0007, Criminal Procedure Code of Peru, Legislative Decree No. 957, Art. 336.2. (Emphasis added)

Although the authorities of the MP must investigate the events reported by Invicta, Peruvian law does not allow it to formalize a preparatory investigation until each of the persons against whom the preparatory investigation commences and the acts carried out by them, which are precisely the acts that the prosecutor will investigate, have been identified. Absent fulfilment of this requirement, it is not possible for the parties investigated to exercise their right of defense. The identification of the alleged perpetrators and the acts carried out by them falls within the preliminary investigation.¹²⁴ If it has not been possible to identify the alleged parties liable for the crime in the preliminary measures, no preparatory investigation can be formalized. That is stipulated by article 336 of the CPP.¹²⁵

116. Taking into account the number of persons involved in the events described by the Claimant, the choice of resorting only to the criminal channel in this case means that the authorities responsible for the criminal investigation will deal with an extremely complex scenario that will reasonably delay the prosecutor's pronouncement and even prevent it due to possible insufficient evidence.
117. In the civil channel, on the other hand, there are mechanisms specifically designed to defend possession of a property and to claim the return of possession in cases of dispossession. These mechanisms may be invoked in addition to the criminal channel.
118. The first of these mechanisms is the **extrajudicial** defense of possession. Through it, the possessor may repel the force used against him or against the property through his own actions and avoid dispossession or regain possession, if dispossessed. Article 920 of the CC provides as follows:

*“The holder may repel the force used against him or the property and regain possession of it, if he is dispossessed. **The action shall be taken within fifteen***

¹²⁴ **Ex. IMM-0007**, Criminal Procedure Code of Peru, Legislative Decree No. 957. Art. 334.3: “If the act is criminal and the criminal action is not time-barred, but lacks the identification of the perpetrator or participant, police intervention shall be ordered for that purpose.”

¹²⁵ **Ex. IMM-0007**, Criminal Procedure Code of Peru, Legislative Decree No. 957. Art. 336: “Formalization and continuation of the Preparatory Investigation: 1. If the report, the Police Report or the Preliminary Measures carried out reveal evidence of the existence of a crime, which the criminal action has not time-barred, the party accused is identified and, where appropriate, the requirements of admissibility have been satisfied, it shall order the formalization and continuation of the Preparatory Investigation. 2. The Order of formalization shall contain: a) The full name of the party accused; b) The facts and the relevant specific description. The Prosecutor may, where appropriate, record alternative descriptions of the facts investigated, indicating the reasons for such classification (...).”

(15) days of the day he becomes aware of dispossession. In any event, he must refrain from taking action not justified by the circumstances.

The owner of a property that has no buildings or is in the process of building may also invoke the defense indicated in the foregoing paragraph if his property is occupied by a precarious holder. Under no circumstances shall defense of possession take place if the precarious holder has benefited from the property as owner for at least (10) years.

The Peruvian National Police and the respective Municipalities, within the scope of their competence provided for by the Organic Law on Municipalities, shall provide the necessary support to guarantee strict compliance with this article, under their responsibility.

Under no circumstances shall defense of possession be applied against the owner of a property, unless the time limitation has applied, as provided for by article 950 of this Code.”¹²⁶

119. Article 921 of the CC provides for **judicial defense of possession**:

“Any holder of registered movable property and immovable property may make use of actions for possession and writs of possession. If he has possessed the property for more than one year, he may reject any writs of possession filed against him” .¹²⁷

120. The second mechanism is the **writ for regaining possession** provided for by article 603 del Peruvian Code of Civil Procedure (“CPC”):

“This may be used when the holder is dispossessed of his possession, provided no preliminary proceedings have been brought.

However, if it is proven that dispossession took place on exercising the right contained in article 920 of the Peruvian Civil Code, the claim shall be declared inadmissible.

An application for provisional possession of the property may be made at the party’s request once the claim has been admitted, which shall be subject to the requirements and formalities of the precautionary measure”¹²⁸.

121. In addition, article 604 of the CPC states the following:

Having declared that the claim is well-founded, the judge shall reinstate the claimant’s right of possession from which he has been deprived and, where appropriate, shall order payment of the benefits and of the relevant compensation.¹²⁹

¹²⁶ **Ex. IMM-0020**: Civil Code, Legislative Decree 295, Art. 920.

¹²⁷ **Ex. IMM-0020**: Civil Code, Legislative Decree 295, Art. 921.

¹²⁸ **Ex. IMM-0019**: Civil Procedural Code, Legislative Decree No. 768, Art. 603.

¹²⁹ **Ex. IMM-0019**: Civil Procedural Code, Legislative Decree No. 768, Art. 604.

122. Court of Cassation Judgment No. 19992-2017-Cajamarca of May 28, 2019, sheds light into the difference between judicial defense of possession provided for by article 921 of the CC and the writ to regain possession provided for by article 603 of the CC: “(...) actions for possession protect the right to possession by means of a proceeding in which full evidence is provided to demonstrate that right; while through writs of possession the fact of possession is protected in summary proceedings in which evidence reserved to demonstrate possession and disturbing acts or acts of dispossession is admitted”¹³⁰.
123. In a criminal legal report such as this one, the details of these civil mechanisms are not examined. Nor does one speculate on the reasons Claimant might have considered for not availing itself of them. An opinion is issued on facts: the 15-day period for exercising the extrajudicial defense of possession contemplated by article 920 of the CC expired on October 29, 2018, and the claim for a writ of possession provided for by article 603 of the CPC were time-barred one year as from dispossession, that is, on October 14, 2019.¹³¹ After that date, the interested party is still free to claim his right of possession in a hearing by means of judicial defense of possession provided for by article 921 of the CC.
124. The facts described in the paragraph above have several criminal legal consequences. Firstly, any attempt at regaining possession of the Site through one’s own actions when the legal period for exercising **extrajudicial defense of possession** has expired would involve a high risk of incurring criminal liability for the crime of usurpation and one would certainly incur criminal liability for the crime of arbitrary exercise of a right (article 417 of the CP).¹³²
125. Secondly, the possibility of filing a writ to regain possession was time-barred in October of 2019, and there is no document or fact in the Statement of Claim, in its annexes or in the reports filed by Invicta indicating that a civil claim for **judicial defense of possession** was ever filed before that possibility became time-barred. The absence of a civil action accompanying the criminal complaints here rules out any reasonable expectation that the

¹³⁰ **Ex. IMM-0021**, Court of Cassation Judgment N° 19992-2017-Cajamarca, of May 28, 2019, Constitutional Law and Social Division of the Supreme Court of Justice of the Republic, ground 5.4.

¹³¹ **Ex. IMM-0019**, Civil Procedural Code, Legislative Decree 768, Art. 603: “Claims for a writ of possession shall be time-barred at one year as from commencement of the event on which the claim is based. On expiry of that period, however, the claimant may exercise his right of possession in a hearing.”

¹³² See paragraphs 85-87 of this report.

Peruvian Judiciary could render, promptly enough, a final judgment ordering restitution of the possession of the Site to IMC.

126. In this scenario, any attempt at recovering the Site through one's own hand would lack any legal protection and would be highly likely to give rise to criminal liability for the participating parties. If the persons participating are public officers (e.g., members of the PNP) their criminal liability would be exacerbated as provided for by article 46-A of the CP¹³³.

V. LEGAL FRAMEWORK GOVERNING THE USE OF FORCE BY THE PERUVIAN NATIONAL POLICE

A. *THE ACTS OF PUBLIC OFFICERS ARE SUBJECT TO THE CONSTITUTION AND TO THE INTERNATIONAL LEGAL FRAMEWORK ON HUMAN RIGHTS*

127. All conduct of public officers is subject to the Constitution. The test of reasonableness is used to assess whether the performance of public functions has respected that standard. This test consists in examining, in the specific case, the suitability, necessity and proportionality in the strict sense of the measure in relation to the purpose sought. This was established by the Constitutional Court in the judgment pronounced in Case No. 0050-2004-AI/TC, of June 3, 2005.¹³⁴ In that judgment, the Constitutional Court declared that: “the test of reasonableness is an examination of proportionality that is directly linked to the higher value of justice; it therefore constitutes **an indispensable parameter of constitutionality for determining the action of public authorities, particularly when it affects the exercise of fundamental rights.**”¹³⁵ This is also provided for in article IV.1.1.

¹³³ **Ex. IMM-0011:** Criminal Code of Peru, Legislative Decree No. 635, 3 April 1991, Art. 46-A: “Criminal liability is increased if the perpetrator makes use of his capacity as a member of the Armed Forces, National Police, authority, officer or public servant, to commit a punishable act, or uses arms provided by the State for that purpose or arms that he is authorized to use owing to his capacity as a public officer. In these cases, the judge increases the punishment by up to half above the legal maximum fixed for the crime committed, without being able to exceed 35 years of deprivation of freedom (...).”

¹³⁴ **Ex. IMM-0022,** Constitutionality Proceedings (Nos. 0050-2004-AI/TC et al.), Judgment, 3 June 2005, 109th ground.

¹³⁵ **Ex. IMM-0022,** Constitutionality Proceedings (Nos. 0050-2004-AI/TC et al.), Judgment, 3 June 2005, 109th ground (Emphasis added). To a similar effect, the judgment pronounced in Case No. 2192-2004-AA/TC, of October 11, 2004, (**Ex. IMM-0023**) 17th ground: “it is in the actions of the Administration where the principle of proportionality acquires special relevance, due to the margins of discretion with which the Administration inevitably acts to deal with the claims of a constantly changing society, but also due to the presence of general and indeterminate clauses such as general interest or common good, which must be rendered compatible with other clauses or principles equally open to interpretation, such as fundamental rights or the dignity of persons.”

of Law 27444, the Law on General Administrative Procedure (“LPAG”): “The administrative authorities must act in observance of the Constitution, the law and rights, within the powers attributed to them and according to the purposes for which they have been conferred on them.”¹³⁶

128. When the exercise of a public office relates to human rights, it is also subject to the Conventions and Treaties on fundamental rights ratified by the Peruvian State. Extensive case law of the IACHR establishes this principle under the heading of compliance review. In the case of *Gelman v. Uruguay*, for example, the IACHR found that control of conformity is “an institution that is used to apply International Law, in this case International Law on Human Rights, and specifically the American Convention and its sources, including the case law of this Court”¹³⁷. That has been recognized in turn by the Peruvian Constitutional Court.¹³⁸
129. The constitutional and conventional standard referred to must be applied to interpret the national legislation governing the use of force by the Police and to determine whether the actions of members of the PNP in this case were reasonable. Similarly, it must be used to investigate whether the lack of authorization of the use of force by the police (no authorization for execution of the Operations Order) exceeded the constitutional and conventional standards.
130. For that purpose, we must outline the legal framework governing the functions of the PNP and the MP;¹³⁹ the national, international and case-law regulations binding on Peru on the use of force by the Police;¹⁴⁰ and describe the Operations Order.¹⁴¹ Only in that way will

¹³⁶ **Ex. IMM-0024**: General Administrative Procedural Law, Law No. 27444, Art. IV.1.1.

¹³⁷ **Ex. IMM-0025**, IACHR, *Gelman v. Uruguay* Case. Monitoring of compliance of the judgment. Judgment of March 20, 2013, para. 65.

¹³⁸ **Ex. IMM-0026**, Constitutional Court Judgment (No. 4587-2004-HC/TC), 29 November 2005, 44th ground. To the same effect, the judgment pronounced in Case No. 04617-2012-PA/TC, of 12 March 2014 (**Ex. IMM-0031**), 5th ground: “(...) the Constitutional Court not only has to focus on only exercising control over constitutionality; but is also required to exercise control of conformity, that is, the jurisdictional authority of the local judges and the supranational court, which in our case consists of the Inter-American Court of Human Rights (IACHR), to resolve disputes deriving from provisions, acts and conduct contrary to the American Convention on Human Rights, regional treaties on human rights ratified by Peru, the *jus cogens* and the case law of the IACHR.”

¹³⁹ See paragraph 132 *et seq.* of this report.

¹⁴⁰ See paragraph 133 *et seq.* of this report.

¹⁴¹ See paragraph 158 *et seq.* of this report.

we be able assess the criminal legal risks that might have been created by approving the Operations Order and enforcement thereof at the time of the events.¹⁴²

131. The conclusion of the analysis offered in the following paragraphs is that both the conduct of the PNP officers and the decision not to enforce the Operations Order were reasonable and legal. It will also be seen that a possible enforcement of the Operations Order and the use of force by the PNP would have lacked suitability and proportionality, and it is also highly likely that it would have given rise to criminal liability for those persons ordering the enforcement thereof and those persons enforcing it.

B. *THE LEGAL FRAMEWORK OF THE PERUVIAN NATIONAL POLICE*

132. The Peruvian National Police is the body responsible for maintaining internal order and for combating crime. This purpose and function are provided for in the Constitution. Article 166 of the Constitution provides that “The National Police have the fundamental purpose of guaranteeing, maintaining and restoring internal order. They provide protection and assistance for people and the community. They guarantee compliance with the laws and the security of public and private property. They prevent, investigate and combat crime. They monitor and control the borders”¹⁴³.
133. The legal development of the purpose, functions and organization of the PNP is provided for in Legislative Decree 1267, the Law on the Peruvian National Police (“**LPNP**”). Article 1 of that statute states the following on the scope of competence of the PNP:

“Article 1.- Scope of competence

The Peruvian National Police shall exercise functional and sole competence at national level with regard to internal order and public order; and shared competence with regard to citizen security. Within the framework thereof, it shall provide protection and assistance for persons and the community; it shall guarantee compliance with the laws, the security of public and private property; it shall prevent, investigate and fight criminality and organized crime; it shall monitor and control the borders.”¹⁴⁴

¹⁴² See paragraph 169 *et seq.* of this report.

¹⁴³ **Ex. IMM-0002**, Political Constitution of Peru, 29 December 1993, Art.166.

¹⁴⁴ **Ex. IMM-0027**, Peruvian National Police Law, Legislative Decree No. 1267, Art. 1.

C. *THE LEGAL REGULATIONS ON THE USE OF FORCE BY THE PERUVIAN NATIONAL POLICE*

134. In order to comply with its purpose and function, members of the PNP may use force. However, the use of force is never discretionary or arbitrary. It is regulated in detail in internal law and in international law. According to those sources of law, the PNP may not use force unless it has exhausted all alternative means that do not involve violence or a risk of harm to persons (the use of force is admitted as an exception or as a last resort) or that involve a risk of minor injury (criterion of progressiveness in the use of force). In this section, I will refer specifically to each of these principles.

135. For the purposes of this report, the phrase “use of force” includes both the use of force in and of itself, and the order issued by the competent higher authority to use it.

1. *International legal framework governing the use of force by members of the Police*

136. There are several international instruments governing the use of force by officers responsible for ensuring compliance with the law that are binding on Peru. They all coincide in the **strictly exceptional nature** of force and in the **need to exhaust all alternative mechanisms** that avoid the use of force and firearms for the performance of police duties. If that is not possible, the use of force must be limited to what is strictly necessary and must always be as minimum as possible.

137. Article 3 of the “Code of Conduct for law enforcement officials,” adopted by the General Assembly in its resolution 34/169 of December 17, 1979, provides that force may be used “only when it is strictly necessary and insofar as is required for the performance of their tasks.”¹⁴⁵

138. To the same effect, the “Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,” adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from August 27 to September 7, 1990, state in their General Provisions:

“4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They

¹⁴⁵ Ex. IMM-0028, Code of Conduct for Law Enforcement Agents. Adopted by the General Assembly in its resolution 34/169 of 17 December 1979, Art. 3.

may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result."¹⁴⁶

139. In this context, the use of firearms by police forces is expressly restricted to exceptional cases. The General Provision of the "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials" states the following in this respect:

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."¹⁴⁷

140. The international legal framework leaves no doubt as to the fact that "in all police activities, the principles of legality, necessity, non-discrimination, proportionality and humanity shall be observed."¹⁴⁸ On applying these principles, one must take into account the relationship between proportionality as a criterion for determining the use of force and the legitimate purposes it is sought through the use thereof.¹⁴⁹ Transferred to this case, this means that, in examining the test of reasonableness of the decision not to enforce the Operations Order to regain possession of the Site through the use of police force, the objective sought is of primary importance.

The **objective** cannot be reduced simplistically to recovery of possession of the Site by Lupaka. Such a limited and narrow vision of the problem would obviate the complex social conflict underlying the protest measure installed by Parán and the various social, historical, economic and political aspects involved therein. Anyone taking this path will be unable to fully comprehend that the objective that the Peruvian authorities were required to ensure was the integral solution of the social conflict. Whether such an objective could be achieved

¹⁴⁶ Ex. IMM-0029, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. United Nations Office of the High Commissioner for Human Rights, 1990. General Provision 4.

¹⁴⁷ Ex. IMM-0029, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. United Nations Office of the High Commissioner for Human Rights, 1990. General Provision 9. (Emphasis Added).

¹⁴⁸ Ex. IMM-0030, Expanded Manual for the Police on Human Rights, United Nations High Commissioner for Human Rights, 2003, page 3.

¹⁴⁹ Ex. IMM-0028, Code of Conduct for Law Enforcement Agents. Adopted by the General Assembly in its resolution 34/169 of 17 December 1979. Commentary b) of article 3.

with the use of police force (consequently assuming the risk of exacerbating the violence, prolonging the social conflict and causing more harm than what it is seeking to remedy) or whether, on the contrary, talks had to be called between Invicta and the Community of Parán and avoid the use of force as far as possible, as required by the international legal framework, is something that will be examined in detail in the light of the test of reasonableness and from an *ex ante* perspective.¹⁵⁰

2. *Inter-American Court of Human Rights case law binding in Peru on the use of force by Police officers*

141. The IACHR has not been unaware of the problem of the use of force by the Police and officers to enforce the law. In its judgments, which are binding on Peru,¹⁵¹ it has insisted on the use of force as an exception and on the need to exhaust all alternatives.
142. On repeated occasions,¹⁵² the IACHR has stated that, when the use of force is required, police actions must satisfy the principles of legality, absolute necessity and proportionality, in the following terms: “**Legality**: the use of force must be addressed at achieving a legitimate objective, and a regulatory framework must exist that establishes the guidelines for this situation. **Absolute necessity**: the use of force must be limited to the inexistence or non-availability of other means to protect the life and integrity of the individual or situation that it is intended to protect, depending on the circumstances of the case. **Proportionality**: the means and method used should be proportionate to the resistance offered and the danger that exists. Thus, agents must apply a standard of differentiated and gradual use of force, based on the degree of cooperation, resistance or aggression by the

¹⁵⁰ See paragraphs 172 *et seq.* and 205 *et seq.* of this report.

¹⁵¹ According to the test of conformity, the case law issued by the IACHR is binding on the States that are parties to the American Convention on Human Rights. **Ex. IMM-0025**, *Gelman v. Uruguay*, IACHR, Judgment, 20 March 2013, para. 66.

¹⁵² See, for example, **Ex. IMM-0032**, *J. v. Peru*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 17 April 2015; **Ex. IMM-0033**, *Nadege Dorzema, et al., v. Dominican Republic*, IACHR, Merits, Reparations and Costs, 24 October 2012 Series C No. 25; **Ex. IMM-0034**, *Mujeres Víctimas de Tortura Sexual en Atenco v. Mexico*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 28 November 2018. Series C No. 371.

subject to be restrained and, consequently, use tactics of negotiation, control or use of forces, as appropriate.”¹⁵³

143. In the case of *Zambrano Vélez et al. v. Ecuador*, the IACHR declared that **“the use of force by law enforcement officials must be defined by exceptionality, and must be planned and limited by the authorities. As such, the Tribunal has considered that force or coercive means can only be used once all other methods of control have been exhausted and have failed”**¹⁵⁴ and **“the use of lethal force and firearms against individuals by law enforcement officials – which must be forbidden as a general rule – is only justified in even more extraordinary cases. The exceptional circumstances under which firearms and lethal force may be used shall be determined by the law and restrictively construed, so that they are used to the minimum extent possible in all circumstances and never exceed the use which is “absolutely necessary” in relation to the force or threat to be repealed.”**¹⁵⁵
144. For the IACHR, the intentional use of lethal arms is only legitimate “when it is absolutely unavoidable to protect life.” To this effect, **“State agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury and persons who do not present such a threat, and use force only against the former.”**¹⁵⁶

¹⁵³ **Ex. IMM-0034**, *Mujeres Víctimas de Tortura Sexual en Atenco v. Mexico*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 28 November 2018. Series C No. 371, para 162. See also **Ex. IMM-0033**, *Nadege Dorzema, et al., v. Dominican Republic*, IACHR, Merits, Reparations and Costs, 24 October 2012 Series C No. 25, para 85.

¹⁵⁴ **Ex. IMM-0035**, *Zambrano Vélez y otros v. Ecuador*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 4 July 2007. Series C No. 166; para. 83. (Emphasis Added).

¹⁵⁵ **Ex. IMM-0035**, *Zambrano Vélez y otros v. Ecuador*, IACHR, Preliminary Objections, Merits, Reparations and Costs, 4 July 2007. Series C No. 166; para. 84. (Emphasis Added). To the same effect, in the case of the *Hermanos Landaeta Mejías, et al., v. Venezuela* (**Ex. IMM-0036**), the IACHR maintained that “As a general rule, the use of firearms is established as a measure of last resort in light of both domestic and international law. Thus, the Basic Rules on the Use of Force establish that “[law] enforcement officers shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme measures are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life” case of the *Hermanos Landaeta Mejías, et al., v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 27 August 2014. Series C No. 281. (Emphasis Added).

¹⁵⁶ **Ex. IMM-0037**, *Cruz Sánchez, et al., v. Peru*, CIDH, IACHR, Preliminary Objections, Merits, Reparations and Costs. Judgment of 17 April 2015. Series C No. 292, para. 264: “Finally, the international rules and case law of this Court established that “State agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury and persons who do not present such a threat, and use force only against the former.”

145. The proportionality test plays a fundamental role in the case law of the IACHR to decide on the legitimacy of the use of force and, more specifically, of the intensity thereof. This analysis involved taking into account the conditions and characteristics of the case, the nature and intensity of the danger it is sought to prevent with the use of force and the consequences that will reasonably arise from the use of force in this specific case. As indicated by the IACHR in the case of the Landaeta Mejías Brothers *et al.* v. Venezuela: “the severity of the situation that the agent faces must be assessed. To this end, among other circumstances, it is necessary to consider: **the level of intensity and danger of the threat**; the attitude of the individual; **the conditions of the surrounding area**, and the means available to the agent to deal with the specific situation. In addition, this principle requires the law enforcement agent, at all times, to reduce to a minimum the harm or injuries caused to anyone, as well as to use the lowest level of force required to achieve the legitimate purpose sought.”¹⁵⁷
146. The order derived from the case law of the IACHR is that the use of force by the law enforcement authorities must be exceptional, strictly necessary and gradual. This standard prevents the Operations Order from being executed by the PNP as a suitable means of regaining possession of the Site. As will be seen in detail below, there were other far less harmful mechanisms for dealing with the social conflict between Parán and Invicta, such as the talks engaged in.
3. *Domestic legal framework governing the use of force by officers of the Peruvian National Police*
147. Peruvian law expressly governs the use of force by the PNP officers. The domestic legal framework, consisting mainly of the Law on the Peruvian National Police¹⁵⁸ and Legislative Decree 1186, governing the use of force by the Peruvian National Police,¹⁵⁹

¹⁵⁷ **Ex. IMM-0036**, *Hermanos Landaeta Mejías, et al., v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 27 August 2014. Series C No. 281, para. 136. (Emphasis Added). To the same effect, in Judgment of November 28, 2018 in the Case of Women Victims of Sexual Torture in Atenco v. Mexico (**Ex. IMM-0034**) the IACHR states the following: “An assessment of the conventionality of the use of force should be made in every circumstance and in the context of the events, taking the above criteria into account” Series C No. 371, para. 163.

¹⁵⁸ **Ex. IMM-0027**, Peruvian National Police Law, Legislative Decree No. 1267.

¹⁵⁹ **Ex. IMM-0040**, Legislative Decree No. 1186, governing the use of force by the Peruvian National Police.

respects both constitutional and conventional standards,¹⁶⁰ and authorizes the use of force only in exceptional cases, in a gradual and differentiated manner, and when use thereof is appropriate, that is, when it can ensure achievement of the objectives for which force is used. In this respect, it is important not to lose sight of the fact that the objective that had to be sought was to resolve the social conflict between the Community of Parán and Invicta peacefully. Regaining possession of the Site was just another aspect of the conflict that had arisen and must be examined within the general context of the social conflict (on which account it neither determines nor conditions the way in which the conflict should be dealt with overall).

148. **Gradual approach and differentiation** in the use of force are governed by article 6 of Legislative Decree 1186: “force must be used in a **gradual and differentiated** manner, in accordance with the principles and levels established in this Legislative Decree.”¹⁶¹ The progressive and differentiated use of force is also required by the Regulations of Legislative Decree No. 1186, the Legislative Decree governing the use of force by officers of the Peruvian National Police, approved by Supreme Decree 012-2016-IN,¹⁶² and the Manual of Human Rights applied to the Police Force, approved by Ministerial Resolution No. 952-2018-IN (“**PNP Human Rights Manual**”).¹⁶³

¹⁶⁰ To this effect, article 3.8. of the LPNP (**Ex. IMM-0027**) provides that one of the powers of Police Officers is “to make use of force, according to the legislation in force, the Code of Conduct for Law Enforcement Officials, and the Basic Principles on the Use of Force and Firearms, within the framework of the resolutions passed by the United Nations,” and article 4.1. of the LPNP states that, in fulfilling their obligations, police officers must “respect and comply with the orders established in the Constitution, laws, regulations and orders issued by their superiors within the legal framework in force.” To the same effect, article 5 of Legislative Decree 1186 (**Ex. IMM-0040**), states that its provisions “shall be interpreted as provided for by the Political Constitution of Peru, the rules of International Law on Human Rights recognized by the Peruvian State, the decisions of supranational bodies; the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Code of Conduct for Law Enforcement Officials.”

¹⁶¹ **Ex. IMM-0040**, Law of the Peruvian National Police, Legislative Decree 1186, Art. 6.

¹⁶² **Ex. IMM-0038**, Supreme Decree No. 012-2016-IN, Regulations of Legislative Decree governing the use of force by officers of the Peruvian National Police, Article 7: “the progressive and differentiated use of force is the graduation and adaptation, by police officers, of the means and methods to be used taking into account the level of cooperation, resistance or aggression of the person on whom they are to take action or the situation to be controlled.”

¹⁶³ **Ex. IMM-0039**, Manual of Human Rights applied to the Police Force, approved by Ministerial Resolution No. 952-2018-IN, Chapter II.C, p. 53. Its section “Circumstances in the use of force” states: “Police officers may use force in a progressive and differentiated manner, in accordance with the principles of legality, necessity and proportionality and the levels of use of force in the following circumstances: - To detain a person caught committing a crime or by judicial order in accordance with the law; - To comply with a duty or legal orders issued by the competent authorities; - To prevent the perpetration of crimes and misdemeanors; - To protect or defend protected legal assets; - To control any person resisting authority.”

149. The principles governing the use of force by the PNP in Peruvian law are legality and necessity. According to article 4.1 of Legislative Decree 1186, “*the use of force by officers of the National Police shall be based on **respect for fundamental rights and compliance with the following principles***:
- a. **Legality**.- The use of force must be aimed at achieving a legal objective. The means and methods used for performance of the duty must be provided for within the framework of the International Human Rights Law, the Political Constitution of Peru and other national provisions on the matter.*
- b. **Necessity**.- The use of force in the performance of duty is necessary when other means prove ineffective or do not guarantee achievement of the legal objective sought in any way. In order to determine the level of force to be used, one must reasonably consider, among other circumstances, the level of cooperation, resistance or aggression of the person on whom action is to be taken or the conditions of the surrounding area.”¹⁶⁴*
150. Any use of force by the PNP failing to respect the principles of legality and necessity is deemed to be **arbitrary use of force**. This is provided for by article 3 of Supreme Decree 012-2016-IN, which states that arbitrary use of force “is any unjustified use of force, failing to comply with the principles of legality, necessity and proportionality, that affects fundamental rights.”¹⁶⁵
151. In accordance with the foregoing, the use of force by the PNP is only allowed in the cases expressly provided for by law. Apart from those cases, force should not be used by the PNP, under its liability. As has been seen,¹⁶⁶ article 8.2 of Legislative Decree 1186 provides that “*Officers of the Peruvian National Police may use force, in accordance with articles 4, 6 and point 7.2, in the following circumstances*:

¹⁶⁴ **Ex. IMM-0040**, Legislative Decree No. 1186, governing the use of force by the Peruvian National Police. Article 4.1. a) and b). Virtually identical terms are used by article 6 of Supreme Decree 012-2016-IN, Regulations of the Legislative Decree governing the use of force by officers of the Peruvian National Police (**Ex. IMM-0038**), and the Manual of Human Rights applied to the Police Force, approved by Ministerial Resolution No. 952-2018-IN (**Ex. IMM-0039**, Chapter II.A, p. 51), in the section “Principles of the use of force.”

¹⁶⁵ **Ex. IMM-0038**, Supreme Decree No. 012-2016-IN, Regulations of the Legislative Decree governing the use of force by officers of the Peruvian National Police, Art. 3(j).

¹⁶⁶ See also paragraphs 75, 77, 78 and 79 of this report.

- a. *To detain anyone caught committing a crime or by judicial order in accordance with the law.*
- b. *To comply with a duty or legal orders issued by the competent authorities.*
- c. *To prevent the perpetration of crimes or misdemeanors.*
- d. *To protect of defend protected legal interests.*
- e. *To control any person resisting authority.”*¹⁶⁷

152. This legal framework follows the line traced by international law and the case law of the IACHR. The possible execution of the Operations Order to regain possession of the Site, as claimed by the Claimant, must be examined in the light of the legal framework outlined. If execution of the Operations Order was not necessary, suitable or reasonable, there should be no doubt as to the liability that would have been incurred by anyone authorizing execution thereof and anyone who, despite the illegality of execution of the Operations Order, executed it. As stated by article 3 of Law 31012, the Law on Police Protection: “If the Peruvian National Police use their arms or means of defense, contravening the Political Constitution of Peru, the rules of the International Human Rights Law recognized by the Peruvian State or this law, they shall incur criminal liability and the benefits of this law shall not apply.”¹⁶⁸

4. *Binding national case law on the use of force by Police officers*

153. The Peruvian high courts have also pronounced judgment on the use of force by the PNP. And they have done so to the same effect as international law, the case law of the IACHR and domestic law. All these sources of law require the use of force to be both necessary (exceptional, gradual and differentiated) and appropriate.

154. Plenary Resolution No. 05-2019/CJ-116 of September 10, 2019, issued by the Supreme Court of Justice of the Republic, examined the police action and exemption from criminal liability for the use of force in compliance with their duty.¹⁶⁹ Some of its whereas clauses

¹⁶⁷ The same is stated by the Manual of Human Rights applied to the Police Force, approved by Ministerial Resolution No. 952-2018-IN, (Ex. IMM-0039, Chapter II.C, p. 53), in the section “Circumstances in the use of force.”

¹⁶⁸ Ex. IMM-0041, Law No. 31012, Police Protection Law, of 11 September 2019, Article 3.

¹⁶⁹ Ex. IMM-0042, Plenary Agreement No. 05-2019/CJ-116, of 10 September 2019, issued by the Supreme Court of Justice of the Republic - IX Jurisdictional Plenary Session of the Permanent, Transitory and Special Criminal Division. Re: police action and exemption from criminal liability.

constitute binding legal doctrine and must be invoked by the judges of all courts. Two of these binding whereas clauses relate directly to the use of force and are relevant to this case.

155. Firstly, the Supreme Court emphasized that a police officer may be exempted from criminal liability for his acts in discharging his duties if his performance complied with the Constitution and the minimum possible violence was used. The PNP officer must have ruled out the feasibility of any other less harmful means and, opting for the use of force, use the least violence possible.
156. According to the 52nd ground of Plenary Resolution No. 05-2019/CJ-116: “The grounds for exemption of acting to perform a duty do not include inhuman or degrading treatment prohibited by the Political Constitution and internationally, as they involve a grave attack against the dignity of the person, on which account, in order to assess such a cause of justification, the officer must also act first and foremost to perform his duty. For the aforementioned grounds for exemption to apply, there must be as little violence as possible for the purpose sought, that is, firstly, the least dangerous means must be used and, secondly, that means must use the least harmful method possible.”¹⁷⁰
157. Secondly, Plenary Resolution No. 05-2019/CJ-116 made it very clear that the use of force must respect international standards: Peruvian law does not “exempt Peru and its police officers from reducing or obviating the parameters for the use of force established for everyone worldwide, as in the international instruments which the United Nations Community in which our country is included has undertaken to comply with; nor can the local rules be interpreted in a way that contravenes them.”¹⁷¹

¹⁷⁰ **Ex. IMM-0042**, Plenary Agreement No. 05-2019/CJ-116, of 10 September 2019, issued by the Supreme Court of Justice of the Republic - IX Jurisdictional Plenary Session of the Permanent, Transitory and Special Criminal Division. Re: police action and exemption from criminal liability, 52nd ground.

¹⁷¹ **Ex. IMM-0042**, Plenary Agreement No. 05-2019/CJ-116, of 10 September 2019, issued by the Supreme Court of Justice of the Republic - IX Jurisdictional Plenary Session of the Permanent, Transitory and Special Criminal Division. Re: police action and exemption from criminal liability, 53rd ground.

D. *OPERATIONS ORDER NO. 002 -2019-REGION POLICIAL LIMA /DIVPOL- H-CS.SEC*

158. For the PNP to be able to comply with its task of maintaining public order, its action “must be based on the appropriate management, organization and execution of police operations.”¹⁷² According to the Manual of Human Rights Applied to the Police Force, a Plan or Operations Order records the tasks established for police intervention in order to control an incident, emergency or crisis.¹⁷³ Operating plans “must be based on the up-to-date Assessment of Intelligence, which will make it possible to assess the extent of the event through the perception of the risk and also make use of human potential in good physical and mental condition, trained, prepared and equipped for that purpose.”¹⁷⁴
159. As indicated in the Background of this report, the PNP drew up the document “Operations Order No. 002 -2019-Región Policial Lima /DIVPOL-H-CS.SEC “maintenance and restoration of public order, clearing the access road to the site of Empresa Minera Invicta Mining Corp. S.A.C. – situated in the districts of Paccho and Leoncio Prado.” This Operations Order aimed to organize the police intervention to regain possession of the Site.
160. Lupaka does not question the Operations Order. In its structure and content, the Operations Order fully respects the formal and basic requirements laid down by international and national legislation on the use of force by the PNP. In the Statement of Claim, Lupaka focuses on the failure to execute the Operations Order. According to Claimant’s theory of the case, that was the reason why it failed to regain possession of the Site.¹⁷⁵
161. In accordance with the legislation in force, the Operations Order was drawn up based on three reports serving as inputs:
- a. Risk Report on O/O No. 002-2019-Region Policial Lima/DIVPOL-H-CS “Maintenance and restoration of public order, clearing of the access road to the camp of the mining company Invicta Mining Corp. S.A.C. located in the Paccho

¹⁷² **Ex. IMM-0039**, Manual of Human Rights applied to the Police Force, approved by Ministerial Resolution No. 952-2018-IN, p. 76.

¹⁷³ **Ex. IMM-0039**, Manual of Human Rights applied to the Police Force, approved by Ministerial Resolution No. 952-2018-IN, p. 84.

¹⁷⁴ **Ex. IMM-0039**, Manual of Human Rights applied to the Police Force, approved by Ministerial Resolution No. 952-2018-IN, p. 77.

¹⁷⁵ Claimant’s Memorial, ¶¶ 173-178.

and Leoncio Prado districts,” of February 8, 2019 (previously defined in this report as the “**Risk Report**”),¹⁷⁶

- b. Assessment of the Situation regarding Operations Order O/O No. 002-2019-Region Policial Lima/DIOVPOL-H-CS “Maintenance and restoration of public order, clearing of the access road to the camp of the mining company Invicta Mining Corp. S.A.C. located in the Paccho and Leoncio Prado districts,” of February 8, 2019 (previously defined as the “**Assessment of Situation**”),¹⁷⁷ and
 - c. Assessment of Intelligence No. 021-2019-9C1U-U17, of February 6, 2019 (previously defined as the “**Assessment of Intelligence**”).¹⁷⁸
162. The Operations Order details the activities that the PNP will have to execute to clear the entrance to the Site, identifies the police authorities responsible for coordinating and executing the Operations Order and identifies the various scenarios that may arise during execution thereof, with the resulting instructions that the police officers would have to follow in each of those scenarios. The Operations Order describes the background to the social conflict giving rise to the occupancy of the Site and, in the same way as in the Risk Report,¹⁷⁹ in the Assessment of Situation¹⁸⁰ and in the Assessment of Intelligence,¹⁸¹ warns of the existence of risks:

“That members of the Rural Community of Parán try to take over the installations of Mina Invicta Mining Corp. SAC if no agreement is reached with the mining company Invicta Mining Corp. SAC., as happened on JUNE 19, 2018.

That inhabitants of the communities of Parán attack PNP officers installed on the Picunche road to clear the road taken since October 14, 2019.

That members of the rural patrols of the Community of Parán make improper use of the arms (breech-loaded guns) supplied by the Peruvian army for terrorist violence, against the PNP officers installed on the Picunche road to clear the road.

¹⁷⁶ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 27

¹⁷⁷ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 33.

¹⁷⁸ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 40.

¹⁷⁹ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, pp. 2–10, 27–28.

¹⁸⁰ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, pp. 33–37

¹⁸¹ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, pp. 45–48.

That members of the rural patrols of the Community of Parán make improper use of the arms (breech-loaded guns) supplied by the Peruvian army for terrorist violence, against the members of Empresa Minera Invicta Mining Corp. SAC.

That members of the Rural Community of Parán try to take the arsenal from Mina Invicta Mining Corp. SAC., as the mining company does not have sufficient security to be able to control the inhabitants of the community, if acts of violence arise.

That inhabitants of the Community of Parán try to destroy the mining tunnels built by Mina Invicta Mining Corp. SAC.

That confrontations arise between the Communities of Lacsanga and Santo Domingo de Apache against the Community of Parán, insofar as the former do agree on the presence of the mining company Invicta in the land of their community.

That relatives of the members of the Community of Parán who are members of civil construction unions in Sayán become involved in the Community's problem with the mining company and hire other members of that union to carry out acts of violence against the mining company Invicta using short- and long-range firearms.

That members of the Rural Community of Parán and/or other communities enter the site of the mining company Invicta to take the equipment, devices and machinery still found on the site.

That members of the Rural Community of Parán, other communities or other territories enter the site of the MINING COMPANY INVICTA to remove the explosives stored in the arsenal.”¹⁸²

163. The Risk Report, for its part, expressly stated in the Analysis section: “Despite the many conversations and talks between officers of the mining company Invicta and managers of the Rural Community of Parán, the members of the Community refuse to accept the proposals made by the mining company and clear the measure of force maintained since October 14, 2018, installed in the ‘Milcopallan’ area, some 800 meters from the site of the mining company Invicta Mining Corp. Sac., to prevent the entry of workers, **returning daily in pickets of ten to twenty Community members, who warn Community members of any confrontation with mining company workers trying to enter the site**”¹⁸³ and “**The Rural Community of Parán has some 200 members and, with the**

¹⁸² Ex. C-0193, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 48.

¹⁸³ Ex. C-0193, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 29. Risk Report, Analysis, point F.

participation of their relatives, it is presumed that around 300 people would participate in the measures of force if EMPRESA MINERA INVICTA tries to resume its activities on the mining site.”¹⁸⁴

164. The same Risk Report, in the Recommendations section, places special emphasis on stating that: “In order to perform the task assigned, given the nature, extent and background of violence created by the inhabitants of the Rural Community of Parán, **it is recommended that the maximum number of police officers** requested at the Forces Administration Unit **be present**, duly equipped and with sufficient logistical support, anticipating to this effect that police support would be provided on the date and at the time established by the Chief of Operations (DAY “D” TIME “H”), in order to prevent any type of violent acts on the part of the inhabitants of the Rural Community of Parán, avoiding any disturbance of public order and avoiding risks that might give rise to events causing harm to civilians and police officers, always taking into account the unrestricted respect for human rights applied to the police force, as provided for by the Political Constitution of Peru and the legislation in force.”
165. The Assessment of Situation, for its part, in the Jurisdiction Issues section, in assessing the social/psychological factor, states the following: “**The atmosphere is unlikely to result in a rapprochement between the PNP and the inhabitants of the Rural Community of Parán**”¹⁸⁵ And later, in the Recommendations section, it adds: “**Based on the events mentioned above, approx. 200 to 250 people are involved, which is why the Police personnel who will provide their assistance to the restoration and recovery of the access road to the INVICTA MINING CORP SAC must be in equal numbers or more numerous to ensure the mission is a success.**”¹⁸⁶

¹⁸⁴ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 29. Risk Report, Analysis, point G.

¹⁸⁵ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 37. Assessment of Situation, in the section Problems of Jurisdiction, in assessing the Social/Psychological Factor, E.1.c.

¹⁸⁶ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 38. Assessment of Situation, in the Recommendations section.

166. The Operations Order and the documents serving as input warn of the serious risks and dangers involved in the execution thereof. For that reason, execution thereof was classified as being of “**highest risk.**”¹⁸⁷
167. However, given that a police officer always assumes risks, that is not sufficient reason for not authorizing execution thereof. To this effect, the failure to execute the Operations Order must be examined in the context of the social conflict between Parán and Invicta and taking into account the risks recognized by the Operations Order itself. Only in that way can the test of reasonableness mandated by the sources of law examined in previous sections be examined, and the reasonableness and constitutionality of not ordering execution of and not executing the Operations Order be applied. This analysis is made in the following section of the report.¹⁸⁸
168. The analysis made and the conclusion reached that failure to execute the Operations Order was reasonable and constitutional give rise to a consequence that must be indicated: the approval of the Operations Order and execution thereof would not only have been illegal but it is also highly likely that it would also have given rise to criminal liability for the persons approving it and for the persons executing it. The criminal legal consequences that it is reasonably demonstrated had a high probability of occurrence if the Operations Order had been executed are a very good reason for supporting the lack of approval thereof.

VI. ANALYSIS OF THE ACTIONS OF THE PERUVIAN PUBLIC OFFICERS

A. INITIAL APPROACH

169. In Section III (Lack of capacity of the representatives and members of the Rural Community of Parán to act on behalf of the Peruvian State and as Peruvian government officials), it was demonstrated that the Peruvian State was not bound by the actions of the representatives of Parán. In this section of the report, we will examine whether the actions of the Peruvian authorities with regard to the events forming the subject of these arbitration proceedings was reasonable and complied with the Peruvian constitutional and legal

¹⁸⁷ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 31. Risk Report, Conclusions, F).

¹⁸⁸ See paragraph 169 *et seq.* of this report.

framework. From an analysis of the circumstances of the case, one may conclude that, had execution of the Operations Order been ordered, it is highly likely that the Peruvian authorities involved would have incurred criminal liability, possible international liability and, from my experience and analysis, would have exacerbated the existing social conflict.

170. The analysis must be made from an *ex-ante* perspective. On that basis, failure to grant authorization to retake the Site by way of police force and the criminal implications of possible intervention must be assessed by considering only the information existing and available at the time of the events at issue, and not information that could be obtained later.
171. From this point of view, the decision not to execute the Operations Order will be reasonable and in keeping with the law if it is plausible to maintain that, based on the information available at the time of the events, the alternatives to the use of force (necessity of the use of force as a last resort) had not been exhausted and the possibility existed that police intervention on the Site might have generated greater risks than those which it was sought to reverse (the use of force would not be *suitable*).
172. In this context one has to consider in particular two circumstances that condition the analysis. Firstly, the open, official, constant talks between Invicta and Parán. The aim of the negotiations was to find a peaceful resolution of the social conflict that led to the protests by Parán and the taking of the Site. Secondly, the consequences that would reasonably have arisen if the use of police force had been approved.
173. As will be demonstrated below, the application of the test of reasonableness and the principles and criteria laid down in the international and national legislation on the use of force, as well as the case law of the IACHR and that of the Supreme Court of Peru, indicate that the decision not to execute the Operations Order was appropriate given the circumstances, and in full conformity with the Constitution.
174. This does not mean to disregard Invicta's right to the possession and operation of the Site. Simply that the use of police force implicit in execution of the Operations Order was not the *appropriate* means, nor was there any *necessity* for the execution of that Operations Order and that, consequently, it did not satisfy the proportionality required by the law in force.

B. *THE CONDUCT OF THE OFFICERS OF THE PERUVIAN NATIONAL POLICE AND THAT OF THE PROSECUTOR GENERAL'S OFFICE*

1. *The criminal reports placing Invicta as an aggravated party*

175. The object of the analysis now is the actions of the police officers and of the prosecutors in relation to the criminal reports filed by Invicta against the representatives of Parán, its members and any persons responsible. According to the information to which I have had access to prepare this report, there are and there were seven (7) criminal reports on the social conflict between the Community of Parán and Invicta. A table is attached to this report with the most significant details of these reports.¹⁸⁹ However, two of them will not be examined here because they were not filed by Invicta and they are not made against its officers or workers. There is no criminal legal connection with Invicta (and therefore with Lupaka) or its members.
176. The first report was filed on February 21, 2019, by Dimas Pelayo Claros Mejia, in his capacity as President of the Rural Community of Lacsanga, against the members of Parán liable for the crime of usurpation. That report, bearing no. 1006014500-2019-1204-0, was dealt with by the Second Investigation Office under the responsibility of the prosecutor Alex Leon Moreno. It was initially dismissed because, according to the Public Prosecutor's Office, the claimant failed to satisfy either the objective requirements (demonstrate possession of the property) or the subjective requirements (willful misconduct).¹⁹⁰
177. The second report which does not relate to Invicta or to its officers or workers, either as claimants or as injured parties, is that of May 29, 2019, filed by the Rural Community of Parán against seven alleged parties liable for crimes of aggravated usurpation, manufacture, marketing, use or carrying of firearms.¹⁹¹ This report is being dealt with by the Third Investigation Office under No. 1006014500-2019-3824-0.¹⁹²

¹⁸⁹ **Ex. IMM-0047**, Index of Criminal Complaints Filed by Invicta (created by the author of this Report) .

¹⁹⁰ **Ex. IMM-0004**, Prosecution Resolution No. 1 of 13 March 2019 of Case No. 1006014500-2019-1204-019, issued by the Third Investigation Office of the Criminal Provincial Prosecutor's Office of Huaura. Grounds 4.2. and 4.5.

¹⁹¹ **Ex. IMM-0049**, Criminal Complaint, 29 May 2019.

¹⁹² **Ex. IMM-0049**, Criminal Complaint filed on 29 May 2019 by the Rural Community of Parán in Case No. 1006014500-2019-3824-0, against seven alleged parties liable for crimes of aggravated usurpation, manufacture, marketing and use or carrying of arms.

178. The first of the five reports filed by Invicta is the one dated June 20, 2018, filed against Eduardo Narvasta Cruz, Orlando Palomares, Oliden Palomares, Albino Torres Davila, Luis Nasvasta Escudero, Felipe Torres Narvasta, Saul Torres Narvasta, Uber Narvasta Mejia, Isidro Roman Palomares and those parties liable for the crime of coercion to the detriment of Miguel Angel Mariños Garcia, Marco Antonio Estrada Casma and Branko Slavko Yvanchovich.¹⁹³ That report is being dealt with by the Third Investigation Office under No. 1006014500-2018-4336-0. Invicta requested an extension of the report by the perpetration of aggravated usurpation and aggravated damage on July 26, 2018, and on March 11, 2020, and April 26, 2021, for the investigation to be extended. This report is currently being investigated by the Prosecutor General’s Office.
179. The second report linked to Invicta is the one dated September 4, 2018, filed against the parties liable and the Rural Community of Parán, for disturbances – attacking the physical integrity of persons and simple damage (alleged acts of vandalism in the district of Paccho), to the detriment of Invicta Mining Corp. and the State.¹⁹⁴ This report refers to the threat of takeover of Invicta’s installations by members of Parán in September 2018, which, thanks to the appropriate intermediation of the PNP, did not happen.
180. This report, bearing No. 1007010900-2018-192-0, was filed at the Prosecutor’s Office for the Prevention of Crime. On December 5, 2018, it was dismissed as it was considered that: “one of the conditions for the intervention of the Public Prosecutor’s Office at **preventive level** is ‘that there is an actual risk of the possible perpetration of the crime or when the events have a social impact or repercussions with regard to the prevention of crime ... for it to be considered certain, the threat must be based on actual and not imaginary facts and must be imminent, that is the harm will occur in the immediate future.’”¹⁹⁵ This reasoning is correct since, if possession of the Site had not been taken in September 2018, there would

¹⁹³ **Ex. C-0125**, Criminal Complaint filed on 20 June 2018 by Invicta in Case No. 1006014500-2018-4336-0. Individuals not listed on the initial report were subsequently identified through later amendments to such initial report.

¹⁹⁴ **Ex. IMM-0051**, Criminal Complaint filed on 4 September 2018 in Case No. 1007010900-2018-192-0 against the parties liable and the Rural Community of Parán, for disturbances – attacking the physical integrity of persons and simple damage (alleged acts of vandalism in the district of Paccho), to the detriment of Invicta.

¹⁹⁵ **Ex. IMM-0055**, Prosecutorial Resolution No. 02 of 5 December 2018, issued in Case No. 1007010900-2018-192-0, §§ III.2-3, p. 2. Report filed against the parties liable and the Rural Community of Parán, for disturbances – attack against the physical integrity of persons and simple damage (alleged acts of vandalism in the district of Paccho), to the detriment of Invicta.

be no crime which the MP would have to investigate in a preventive manner. Moreover, the prosecution order for dismissal also provides for “deriving the actions forming the subject of this investigation, carried out against the parties liable of the Rural Community of Parán, from the alleged perpetration of the crime of violation of personal freedom, in the form of coercion, ... the Coordination Office of the Corporate Criminal Provincial Prosecutor’s Office of Huara should proceed in accordance with its powers.”¹⁹⁶ Correct action is appreciated here too, as, within the scope of his preventive duties, a prosecutor would have to derive a (possible) punishable act already caused to a competent unit.

181. The third report linked to Invicta was filed on December 4, 2018, against Isidro Roman Palomares and the parties liable for the possible perpetration of the crime of extortion.¹⁹⁷ It bears No. 1006014500-2018-7786-0 and was filed at the Third Investigation Office. On January 7, 2019, Invicta filed an extension to the criminal report for alleged crimes of violence against the authority for preventing the performance of its duties in their aggravated form, disobeying the authority, aggravated usurpation, aggravated theft and illegal possession of explosives against Isidro Roman Palomares, Azarias Gilberto Torres Palomares, Jhonatan Narvasta Pacheco, Silas Narvasta Pantoja and others.¹⁹⁸ This report is at the preliminary investigation stage.
182. The fourth report linked to Invicta is that filed by Domingo Ramos Luciano on March 29, 2019, against Juan Narbasta Palomares, Domingo Neiro Roman Palomares, Huber Kempes Mejia Narvasta, Savino Eusebio Samar Ugarte, Gilberto Azarias Torres Palomares and Luis Eduardo Narvasta Cruz. The alleged crime is aggravated usurpation, and the injured parties are Invicta and the Rural Community of Lacsanga. This report is being dealt with

¹⁹⁶ **Ex. IMM-0055**, Prosecutorial Resolution No. 02 of 5 December 2018, issued in Case No. 1007010900-2018-192-0, § III.6, p. 3. Report filed against the parties liable and the Rural Community of Parán, for disturbances – attack against the physical integrity of persons and simple damage (alleged acts of vandalism in the district of Paccho), to the detriment of Invicta.

¹⁹⁷ **Ex. IMM-0052**, Criminal Complaint filed on 4 December 2018 by Invicta in Case No. 1006014500-2018-7786-0, against Isidro Román Palomares and the parties liable for the possible perpetration of the crime of extortion.

¹⁹⁸ **Ex. IMM-0053**, Supplemental Criminal Complaint filed on 7 January 2019 by Invicta, issued in Case No. 1006014500-2018-7786-0.

by the First Investigation Office under No. 1006014500-2019-2104-0.¹⁹⁹ On January 22, 2020, the preparatory investigation was formalized.

183. The fifth and final report was filed by Invicta on March 21, 2019, against the parties liable and Azarías Torres Palomares for the alleged perpetration of the crime of coercion and aggravated theft, to the detriment of Invicta Mining Corp. The events that led to this report are the events that took place on October 14, 2018, and March 19, 2019. This report bears No. 1006014500-2175-2019-0 and is filed with the Third Investigation Office.²⁰⁰
184. This report was dismissed on February 24, 2020, on the following grounds: with regard to the crime of coercion: “the claimant has failed to state either in its police report or in its statement the ‘psychological violence and force’ used by the parties investigated to evict them from the location, nor are there any other elements of proof to date that allow their statements to be corroborated” (...) “the workers of the mining company in question withdrew peacefully. That being the case, it is noted that the typical assumptions required for a crime of coercion to exist are not present in this case, as the existence of threat and violence has not been demonstrated -...”; “the victims of the crime (injured parties) have not been fully identified, taking into account the fact that the claimant has not stated that it has been directly affected by the events, but that it was the workers of the mining company who withdrew from the installations; however, no further details thereof are provided.” With regard to the crime of aggravated theft: “to date the claimant has failed to demonstrate by means of a suitable document the pre-existence of the property allegedly stolen”; “it has failed to provide full details of the other persons who also carried out the acts ...”; “it has failed to present any document to prove its statements.” Consequently, according to the prosecutor’s office, “the injured party itself is failing to collaborate with the investigation, ... and as there is no element of proof to demonstrate perpetration of the crimes of coercion and aggravated theft; the preparatory investigation has to be declared inadmissible and discontinued, dismissing all details of the acts carried out.”²⁰¹

¹⁹⁹ **Ex. C-0248**, Criminal Complaint Filed by Lacsanga Community, Case No. 1006014500-2019-2104-0, 29 March 2019.

²⁰⁰ **Ex. C-0208**, Criminal Complaints Filed by Invicta Mining Corp. S.A.C. Representative, PNP and Sayán Police Station, Case No. 1006014500-2175-2019-0, 21 March 2019.

²⁰¹ **Ex. IMM-0054**, Prosecutorial Resolution No. 02 of 24 February 2020, in Case No. 1006014500-2175-2019-0, § III, Grounds 7-9, 12-15.

185. Invicta filed a legal complaint on March 11, 2020, asking the public prosecutor to revoke the order not to formalize or continue with the preparatory investigation for coercion and aggravated theft.²⁰² On July 5, 2021, the legal complaint filed was declared unfounded and the Order of February 2020 confirmed.²⁰³

2. *The proper conduct of the officers of the PNP and that of the MP in respect of the criminal reports placing Invicta or Lupaka as an aggravated party*

186. A review of these reports indicates that the officers of the MP and of the PNP acted in accordance with their duties. They received the reports, they took the corresponding statements and they investigated. As some of these reports are still open, it is not possible to issue an opinion on the results that might be achieved. However, it can be said that the investigations and proceedings are taking place within the reasonable terms normal to the Prosecutor General's Office and the Peruvian Courts in this type of proceedings.

187. All in all, what confirms the correct and proper performance of the members of the PNP and of the MP is the absence of any reports or complaints filed against them. It is to be expected that anyone filing a criminal complaint and believing that the investigations are not following their legal course will raise the corresponding complaints. The law in force in Peru provides for this possibility. As there are no criminal or administrative complaints that question the actions of the police officers and those of public prosecutors responsible for the investigations in which Invicta is the injured party, it follows that the Claimant itself does not believe such challenges to exist.

C. *THE REASONABLENESS OF NOT EXECUTING THE OPERATIONS ORDER AND THE INTERVENTION OF OFFICERS OF THE MINISTRY OF THE INTERIOR, THE MINISTRY OF ENERGY AND MINES AND THE OFFICE OF THE CHAIRMAN OF THE COUNCIL OF MINISTERS*

188. As indicated in the Statement of Claim, Lupaka's allegation is based on two alternative arguments. Firstly, the members of Parán represent the Peruvian State. According to this argument, the actions of the representatives and members of Parán from June 2018 onwards

²⁰² Ex. IMM-0050, Complaint Appeal filed on 11 March 2020, by Invicta, issued in Case No. 1006014500-2175-2019-0.

²⁰³ Ex. IMM-0048, Prosecutorial Resolution No. 77-2021-I FSPH of 5 July 2021, issued in Case No. 1006014500-2175-2019-0.

constitute government acts. Secondly, the Peruvian State violated its duties and caused harm to Lupaka by failing to execute the Operations Order that should have enabled it to regain possession of the Site.

189. It has been demonstrated that the first allegation is untenable.²⁰⁴ It will be shown here that the second argument too is unviable, as explained before, it is highly likely that the persons approving execution or executing the Operations Order would have incurred criminal liability.

1. *The context: use of force and its impact on the social conflict*

190. The analysis of the necessity and suitability of the use of police force in this case cannot be based solely on the recovery of possession of the Site by Invicta.²⁰⁵ The acts of protest carried out by the inhabitants of the Community of Parán against Invicta in June and October 2019 are just one of the many aspects of the social conflict. Given that it is not possible to surgically split up a social conflict, whatever action one takes when faced with a social conflict will have side effects on the other aspects. Authorizing execution of the Operations Order without considering the consequences that it would have on the social conflict in its entirety would be irresponsible and counterproductive.

191. Within the Peruvian State there is a formal, legal structure that requires preference to be given to dialogue. This makes it possible to affirm that the Peruvian authorities are legally required to organize and implement means of dialogue to deal with social conflicts. One sign of this is that, for several years, specialist bodies have existed for dealing with social conflicts in different Ministries. In 2007, the General Social Management Office (“OGGS”) was formed within the Ministry of Energy and Mines and, in 2008, the Socio-environmental Matters Advisory Office (“OAAS”) was formed within the Ministry of the Environment (“MINAM”).²⁰⁶ Similarly, according to article 41 of the Rules on the Organization and Functions of the Office of the Chairman of the Council of Ministers (“ROFPCM”), the Department for Social Management and Dialogue of the Office of the Chairman of the Council of Ministers conducts “processes of dialogue, mediation and

²⁰⁴ See paragraph 89 *et seq.* of this report.

²⁰⁵ See paragraphs 160 and 161 of this report.

²⁰⁶ **Ex. IMM-0043**, Ombudsman’s Office Report, “*El valor del dialogo*,” September 2017, Lima, p. 179.

negotiations, among other mechanisms, with the various social stakeholders, representatives of private institutions and public officers to contribute towards the settlement of social conflicts, in order to consolidate a culture of peace, respect for international and national human rights' obligations and other values for the sustainability and defense of the *de jure* State.”²⁰⁷

192. The political and legal decision regarding dialogue as a general mechanism for dealing with social conflicts adopted by the Peruvian State is clearly indicated in Supreme Decree No. 060-2011-PCM of July 6, 2011, the Final Additional Provision of which provides that “those sectors of the Executive Power that do not have offices for dealing with social conflicts organized within them shall use bodies dealing with and coordinating the management of social conflicts, answering to the Ministerial Office.”²⁰⁸

193. The way in which action is taken to organize and hold talks in each social conflict will depend on a profound and adequate understanding and assessment of the social, historical, economic and political variables as particular, unique circumstances of each social conflict.

194. It follows from the foregoing that the analysis of the necessity and suitability of the use of police force (authorization and execution of the Operations Order) must be made in the context of the complex social conflict underlying this case, and not be limited to the effects that it might have had as a means of regaining possession of the Site.

2. *Unsuitability of the use of force: the foreseeable consequences of the use of force for the social conflict*

195. According to the Constitutional Court, in accordance with the **principle of suitability or adequacy** “any interference in fundamental rights must be suitable for promoting a constitutionally legitimate objective, assuming two things: firstly, the constitutional legitimacy of the objective and, secondly, the suitability of the measure in question.”²⁰⁹

196. The objective sought with the dialogue between Parán and Invicta was a peaceful solution to the social conflict. This objective goes beyond the temporary recovery of possession of

²⁰⁷ Ex. IMM-0044, Framework of the Organization and Functions of the Presidency of the Council of Ministers. Art. 93.

²⁰⁸ Ex. IMM-0045, Supreme Decree No. 060-2011-PCM of 6 July 2011. Final Additional Provision.

²⁰⁹ Ex. IMM-0022, STC pronounced in Case No. 0050-2004-AI/TC of 3 June 2005. 109th ground.

the Site that could be aspired to with the use of police force. One should not doubt the constitutional legitimacy of this objective, as the Constitution recognizes the right to peace and to public tranquility (article 2.24 of the Constitution)²¹⁰ and the right to freedom of enterprise (article 59 of the Constitution).²¹¹

197. In general, the use of police force is not a suitable mechanism for resolving social conflicts. In particular, the unsuitability of the use of force to resolve the social conflict between the Rural Community of Parán and Invicta is clear and evident. This is demonstrated by two facts.
198. The first is the exceptional nature of the use of police force. International instruments,²¹² the case law of the IACHR,²¹³ the national legislation²¹⁴ and the case law of the Supreme Court²¹⁵ insist that the use of force may only be authorized as a last resort (use of force as *ultima ratio*) and after exhausting all alternative mechanisms. This standard promotes the duty of criminal legal guarantor held by the Peruvian officers to evaluate and approve or reject the use of force. Authorizing execution of the Operations Order and the resulting use of police force does not appear to be the most appropriate path to take when conducting talks and negotiations between Invicta and the Community of Parán with the aim of achieving an integral, peaceful and permanent response to the social conflict.
199. The second argument that demonstrates the lack of suitability of the use of force is that, in the best of cases, it would only allow for the temporary recovery of possession of the Site by Invicta. Unless the latter is prepared to maintain a permanent police contingent of more than 300 officers²¹⁶ on the Site to ensure that possession by Invicta is not disturbed again,

²¹⁰ **Ex. IMM-0002**, Political Constitution of Peru, 29 December 1993, Art. 2.22.

²¹¹ **Ex. IMM-0002**, Political Constitution of Peru, 29 December 1993, Art. 59.

²¹² See paragraph 136 *et seq.* of this report.

²¹³ See paragraph 141 *et seq.* of this report.

²¹⁴ See paragraph 147 *et seq.* of this report.

²¹⁵ See paragraph 153 *et seq.* of this report.

²¹⁶ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019. According to the Assessment of Situation, in the Jurisdiction Issues section, in assessing the social/psychological factor: “c) The atmosphere is unlikely to result in a rapprochement between the PNP and the inhabitants of the Rural Community of Parán.” *Id.*, § II.E.2.c. And later, in the Recommendations section, it adds: “Based on the events mentioned above, approx. 200 to 250 people are involved, which is why the Police personnel who will provide their assistance to the restoration and recovery of the access road to the INVICTA MINING CORP SAC must be in equal numbers or more numerous to ensure the mission is a success.” *Id.*, § IV.

thus forcing those police officers to disregard their everyday functions that they are required to perform, the use of police force is a temporary and therefore unsuitable response.

3. *The element of necessity to use police force and the lack thereof: the talks between the Rural Community of Parán and Invicta.*

200. The Constitutional Court has stated that the **sub-principle of necessity**, as an integral part of the test of reasonableness, “means that (...) there must be no other alternative means that is at least as suitable for achieving the objective proposed and that is more nonthreatening to the right affected. It requires an analysis, firstly, of the equivalent or greater suitability of the alternative means and, also, of the lesser degree that the latter interferes with the fundamental right in question.”²¹⁷
201. It has already been seen that the use of force is not a suitable mechanism for resolving social conflicts. In any event, and in the best of cases, it is only a temporary response to one aspect of the conflict that does not guarantee a full, permanent and peaceful solution. We now have to *a)* assess whether dialogue as a means of negotiation and reconciliation in contexts of social conflict is more suitable than the use of police force; and *b)* examine whether discussions between Parán and Invicta at the behest of the Peruvian State interfere with the fundamental rights at risk with less intensity than that which would occur with the use of police force.
202. The greater suitability of dialogue *vis a vis* the aforesaid incapacity of the police force to resolve social conflicts is corroborated with the Peruvian State’s institutional commitment to it. Dialogue is the regular *institutional* means of resolving social conflicts, to such a point that, as stated before,²¹⁸ several Ministries include offices within its ranks responsible for the prevention and resolution of social conflicts by conciliation and dialogue.
203. It is foreseeable that the use of police force would have had a negative impact on fundamental rights. One need simply look at the Operations Order,²¹⁹ and in particular the

²¹⁷ Ex. IMM-0022: STC pronounced in Case No. 0050-2004-AI/TC of 3 June 2005. 109th ground.

²¹⁸ Ex. IMM-0045, Supreme Decree No. 060-2011-PCM of 6 July 2011. Final Additional Provision. See also paragraph 187 *et seq.* of this report.

²¹⁹ Ex. C-0193, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019.

Risk Report²²⁰ and the Assessment of Situation,²²¹ to see that execution of the Operations Order was classified as “highest risk”²²² and that it foresaw the violent reaction of the inhabitants of Parán, with the resulting harm to integrity and property damage, and it did not rule out the possibility of risks to life. Moreover, due to its very nature, the use of force will always impact on fundamental rights; it must be used as an exception for that reason.

204. The fact that possible intervention by the police force would have been counterproductive, exacerbating the social conflict and failing to offer a sustainable solution in time is further confirmed by what happened on May 14, 2019, when the employees of the private security firm War Dogs, hired by Invicta, tried to regain possession of the Site with force.²²³ The violence with which they were repelled with firearms and the fact that two people were injured are but a small indication of what might have happened if the Operations Order had been executed. As indicated in the Operations Order itself,²²⁴ it would have required the presence of 285 PNP officers to deal with the foreseeable intervention of all the members of the Community of Parán.
205. Again from an *ex-ante* perspective, unlike the use of force, dialogue could not have harmed fundamental rights such as personal integrity, health or life. The “most detrimental” effect that would be caused by continuing dialogue to fundamental rights would be a delay in the operation of the Site. It would affect the right to freedom of enterprise. A simple comparison between these two possible effects does not allow for any doubt: the fundamental rights that would have been placed at risk with execution of the Operations Order (life, integrity, property) are of greater importance than the freedom of enterprise (property).

²²⁰ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, pp. 28-31.

²²¹ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, pp. 33-35.

²²² **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, 9 February 2019, p. 31.

²²³ See paragraph 46 of this report.

²²⁴ **Ex. C-0193**, Order No. 002-2019-REGION POLICIAL LIMA/DIVPOL-H-CS.SEC, February 9, 2019, p. 39. Assessment of Situation, Administration of force in the Order of Operations. This section refers to the need for 285 police officers.

4. *Proportionality in the strict sense*

206. The Constitutional Court maintains that “according to **the principle of proportionality in the strict sense**, for an interference with fundamental rights to be legitimate, the degree of achievement of the objective thereof must be at least equivalent or proportional to the degree of harm to the fundamental right, comparing the two intensities or degrees: the degree of achievement of the purpose of the measure examined and that of impact on the fundamental right.”²²⁵
207. The application of the rule of proportionality in the strict sense to this case means: the decision to execute the Operations Order would have been legitimate and therefore enforceable, if the intensity with which the rights to life, integrity and property as a result of execution thereof had been harmed was equivalent to the degree in which the use of force would have resolved the social conflict or contributed towards resolving it. Once again, insofar as the constitutionality or unconstitutionality of a decision that was not adopted is examined (e.g., use of police force), one has to opt for an *ex ante* perspective.
208. As it has been demonstrated, there is no room to doubt the unsuitability of police force for resolving the social conflict between the Rural Community of Parán and Invicta. In other words, there are no reasons that allow one to assume, even with the minimum amount of plausibility, that the use of police force would have been an integral and permanent solution to the social conflict and that it could have been accepted by the parties. This argument gives sufficient reason to affirm that the use of police force lacked any capacity to contribute towards resolving the social conflict. Therefore, authorization for the PNP to execute the Operations Order, use force and regain possession of the Site would have been unlawful and unconstitutional.
209. The only possibility in which the suitability of police force and its possible legitimacy could be assessed would be by waiving an integral and permanent solution to the social conflict sought by dialogue between Parán and Invicta. That dialogue was promoted and supported by the Peruvian authorities in strict compliance with the law in force. By replacing that objective, one would have to be content with the possible temporary recovery

²²⁵ Ex. IMM-0022, STC pronounced in Case No. 0050-2004-AI/TC of 3 June 2005. 109th ground.

of possession of the Site, also assuming the high risk to fundamental rights involved in the execution thereof. However, such a scenario should be rejected. It has been demonstrated that the temporary recovery of the Site could not be considered to be the final objective of the dialogue or of the social conflict. At least not under the law in force in Peru.

210. To conclude: authorization to execute Operations Order No. 002-2019-Región Policial Lima/DIVPOL-F-CS.SEC “Maintenance and restoration of public order, clearing of the access road to the site of the mining company Invicta Mining Corp. S.A.C. situated in the districts of Paccho and Leoncio Prado” does not pass the test of reasonableness and would have been unconstitutional.

VII. RISKS UNDER CRIMINAL LAW THAT WOULD DERIVE FROM THE APPROVAL AND EXECUTION OF OPERATIONS ORDER No. 002-2019-REGIÓN POLICIAL LIMA/DIVPOL-F-CS.SEC

211. In accordance with the legal and case-law framework set out in the previous sections, I conclude that authorization to execute Operations Order No. 002-2019-Región Policial Lima/DIVPOL-F-CS.SEC would not have passed the test of reasonableness and, therefore, would not have been in compliance with the constitutional and conventional standard for the use of police force since, while alternatives such as dialogue exist, that should have been the path to take and continue, particularly in view of the seriousness of the situation and the “**very high risk**” involved in proceeding with police intervention to regain possession of the Site. Moreover, the use of force, far from guaranteeing a final solution to the social conflict, would have exacerbated and prolonged it. Authorization to execute Operations Order No. 002-2019-Región Policial Lima/DIVPOL-F-CS.SEC and execution thereof would have been unreasonable and, if the risks identified in the Operations Order and the consequent loss of human life and property damage materialized, would have been both illegal and unconstitutional. In that context, it is highly likely that the Peruvian authorities authorizing its execution and the officers executing it would have incurred criminal and disciplinary liability.

212. There is not a crime punishing the approval of an illegal order *per se*. However, if one takes the risks to life, integrity and property described in the Operations Order, the Risk Report, the Assessment of Situation and the Assessment of Intelligence seriously, one has to

examine the possible criminal liability for the crimes against life, integrity and property that would have taken place.

213. In this scenario, the criminal liability of the police officers who would have executed the Operations Order could be avoided if the instruction received by them is not clearly unconstitutional. In such event, they could invoke having acted under an insurmountable error that prevented them from recognizing the illegality of the order. They could not invoke having acted in compliance with a duty because article 20.11 of the CP requires that conduct in discharging their duties be constitutional.²²⁶
214. With regard to the authorities that would have approved the Operations Order, the criminal liability which they would have incurred will depend on the risks resulting from the execution thereof. These risks are described in the Operations Order. This means that, assuming the lack of reasonableness of the Operations Order, execution thereof would mean the commencement of courses of action which the law prohibits to preserve life, integrity and property. The crimes that would be considered would be crimes against life in the form of murder (articles 106 of the CP²²⁷ *et seq.*), crimes of injuries (article 121²²⁸ of the CP *et seq.*) and crimes of property damage.²²⁹
215. The fact of a harmful result, such as a death, harm to integrity or property damage, would implicate, according to national case law, perpetration of the crime.
216. In all these cases, one would have to determine whether action had been taken with willful misconduct or negligence. That is particularly important in the event of crimes of murder and injuries penalized both in the event of willful misconduct and in the event of negligence.²³⁰ According to the most recent national case law, willful misconduct includes

²²⁶ **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635, Article 20.11: “Personnel of the Armed Forces and Peruvian National Police who, in the performance of their constitutional duties and in the use of arms or other means of defense, in the form laid down by the regulations, cause injury or death.”

²²⁷ **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635, Articles 106, 108.

²²⁸ **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635, Articles 121, 122 and 123.

²²⁹ **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635, Article 205 *et seq.*

²³⁰ **Ex. IMM-0011**, Criminal Code of Peru, Legislative Decree No. 635, Articles 111 and 124, respectively.

a knowledge of the risk run by the prohibited conduct engaged in.²³¹ In this case, willful misconduct could be imputed if the risks to life and integrity were known *ex ante*. That would be the case here. However, even if willful misconduct could not be attributed, liability for manslaughter and culpable injuries would be intact if any death or injury had occurred.

217. The potential for harm to fundamental legal interests and for incurring criminal liability should execution of the Operations Order be approved advises caution. Such injuries could not be justified as reasonable. The proper conduct in keeping with the law was not to execute the Operations Order.

I declare that I have the capacity and the necessary knowledge to issue this Report. I also declare that the Report reflects my objective and independent opinion and that I have no conflict or incompatibility for issuing this Report.

March 22, 2022



Iván Meini Méndez

²³¹ **Ex. IMM-0046**, Cassation Sentence No. 67-2011 of 15 July 2013, issued by the Permanent Criminal Division of the Supreme Court. Ground 4.1.

Title and Date	No.
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Title and Date	No.
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<i>Zambrano Vélez y otros v. Ecuador</i> , IACHR, Preliminary Objections, Merits, Reparations and Costs, 4 July 2007 (García Ramírez, <i>et al.</i>).	IMM-0035
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