



**Sustainable Development
Strategies Group**

Pillage of Natural Resources: The Long Road from Coercion to Consent

Luke Danielson and Kristi Dorr

108 W. Tomichi Ave., Suite D - Gunnison, Colorado USA 81230
Tel 1-970-641-4605 | Fax 1-970-641-4439 | www.sdsg.org | danielson@sdsg.org

This is a short note, designed to sketch out some ideas, some of which will certainly prove to be incomplete, or wrong. It is intended as an initial contribution on this important subject, and readers are encouraged to raise any questions with the authors by writing Marketa Zubkova at zubkova@sdsq.org.

INTRODUCTION

The idea that the powerful need anyone's consent for the appropriation of mineral resources would have seemed absurd through much of our shared history. The mineral resources belonged to the strong and the better armed; the king, as the strongest and best armed, often had exclusive rights to minerals, or at least to gold and silver. Weapons gave access to gold, and gold paid for weapons. But through our long and painful history there has been a growing hope that we can and will collectively move to something better. The vision of law, as a protector of the weak against the strong, is a vital part of the transition from coercion to consent.

We can now see the architecture of a possible new regime emerging. And the idea of consent, or prior informed consent, sometimes free prior informed consent, is a cornerstone of that future edifice. The idea of consent may need to be applied to the rights of *individuals*, as in the case of Nuremberg Principle 1,¹ where the modern idea was first expressed as part of the post war architecture, or as a right of *communities*, as in the case of consent by indigenous and tribal peoples under ILO Convention 169, or to the consent by *nation states*, which is our principal focus here. These are not mutually exclusive. Sustainable development of a mineral deposit may require several consents from several sources.

¹ Principle 1 of the 1947 Nuremberg Code, adopted in the wake of the Nuremberg Medical Trial, reads:

The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Report of the International Law Commission to the General Assembly, Doc. A/1316 (1950), reprinted in [1957] Vol. II, Y.B. Int'l L. Cmm'n. vol. II, Para. 97 (1950), U.N. Doc. A/CN. 4/SER.A/1950/Add. 1.

The idea that peoples had the right to manage their own resources, and to consent to their exploitation, was a key driver in ending the colonial period – an event that many of us have been delighted to witness. Just as access to minerals was a major driver of colonialism, obtaining control over minerals was a major driver of independence movements. But independence from colonial control has not stopped political evolution.

Today's news is that local communities expect to have a voice before companies, or their own national governments, start mining in their "back yards." The idea that communities have the right of consent before their established lives and livelihoods are turned upside down by resource exploitation directed entirely by outsiders is a revolution just as profound and one which may be vital in reconciling democratic ideals with meeting growing needs for all kinds of resources.

Much of that revolution has taken place at the front end of the process, when projects of development are proposed. We have now established a set of rules, still hazy in some areas but unmistakable in their importance, that resource development should not go forward without complying with at least three sets of norms:

- 1) The first group of norms is based upon the just expectations of affected communities to have some control over their own destinies;
- 2) The second is the emerging international framework of rules coming from multi stakeholder processes, the World Bank Group, international agreements and other sources; and
- 3) The third consists of compliance with the established legal requirements in host countries (and perhaps other countries)² under their national law.

The project that brings us together is a necessary complement to this rapid evolution. It recognizes the need for something *beyond* some kind of understood *ex ante* prerequisites for development. That is a need for *post facto* consequences when those prerequisites have been violated. Those *post facto* consequences will, in the most egregious cases, need to be in the criminal law.

² There is an increasing body of law in the home countries of multinational corporations regulating their activities abroad.

ELEMENTS

The pillage and appropriation of natural resources without the consent of the lawful owner during armed conflicts is a phenomenon with which the international community is all too familiar. War crime convictions for pillaging natural resources are few, in part because this area of law has not adequately been developed. To help define offenses and deter potential perpetrators, the International Criminal Court's (ICC) Assembly of States Parties³ adopted the *Elements of Crimes*, a non-binding but significant tool in war crimes prosecutions.⁴ The elements of the crime of pillage are that:

- 1) The perpetrator appropriated certain property
- 2) The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use
- 3) The appropriation was without the consent of the owner.**
- 4) The conduct took place in the context of and was associated with an international armed conflict.
- 5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁵

This short paper focuses on the third of these elements. Pillage is an *intentional* appropriation of certain property for private or personal use *without consent* of the owner.⁶ The purpose here is to express some ideas regarding the specific contours of consent in these contexts, and how and by whom it is lawfully expressed.

Consent is not specifically defined in the Elements of Crimes regarding pillage, but other sections note "[i]t is understood that 'genuine consent' does not include consent obtained through deception."⁷ The Elements of Crimes further notes "[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."⁸ Tribunals have noted that coercive or

³ The Assembly of States Parties is the legislative arm of the International Criminal Court, composed of representatives of the States that have ratified and acceded to the Rome Statute, *available at* <http://www.icc-cpi.int/Menu/ASP/Assembly/>

⁴ International Criminal Court, Rome Statute, Elements of Crimes, Official Records, ICC-ASP/1/3, art. 8(2)(b)(xvi), (Sept. 3-10, 2002) [hereinafter Elements of Crimes], *available at* http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf.

⁵ Elements of Crimes, *supra* note 3 (emphasis added).

⁶ ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Flavia Lattanzi & William A. Schabas eds., (vol.2 1999).

⁷ Elements of Crimes, *supra* note 3, art. 7(1)(g)(5), Enforced Sterilization, notes.

⁸ *Id.* at Annex, note 51, art. 8(2)(b)(xxii)(1), Rape.

deceptive acts by a perpetrator void the victim's consent because the decision is not willing, knowing, or informed.⁹

To help support this developing area of law, the Open Society Justice Initiative has created a manual to assist war crimes prosecutors in convicting commercial actors for pillaging natural resources.¹⁰ This paper seeks to support the Manual for War Crimes Prosecutors by offering a legal analysis on the issue of consent to the appropriation of natural resources. We will begin by discussing the foundational issue of ownership of natural resources in order to analyze who is required to give consent to the appropriation of natural resources. The discussion will then turn to the issues of the preconditions for a valid consent to the appropriation of natural resources and how that consent has to be expressed. Because this area of law is far from developed, this paper will use by analogy, concepts and laws elaborating on the issue of consent from other areas of natural resources and international law. These ideas and legal requirements are generally designed to be applied *ex ante*, but in most cases they seem as if they should apply effectively *ex post*.

QUESTIONS AND ISSUES

We imagine consent as something that may be raised as an affirmative defense to a prosecution. The variation in fact patterns may in fact be enormous and the defenses raised limited only by the imagination of defense counsel.

The idea of consent, or prior informed consent, seems to imply at least these issues:

1. Who has the right to, and is able to give consent, and how can this be determined?
2. How and by whom is such consent received and documented?
3. How can it be determined whether the party giving consent was properly informed?
4. How is comprehension determined? What is volition, and how can an act be determined to be voluntary and not coerced?

⁹ See, e.g., Prosecutor v. Kunarac et al., Case No. IT-96-23 and IT-96-23/1-A, Judgment, (Feb. 22, 2002). See also Max du Plessis & Stephen Pete, *Who Guards the Guards?: the ICC and Serious Crimes Committed by United Nations Peacekeepers in Africa*, 13 AFR. SEC. REV., No 4 (2004).

¹⁰ James G. Stewart, *Corporate War Crimes: Prosecuting Commercial Actors for Pillaging Natural Resources* (Open Soc. Just. Initiative, Manual for War Crimes Prosecutors, 8 April 2010).

WHO MUST GIVE CONSENT?

a. The Concept of Property Rights and Ownership

Any discussion on the ownership of minerals must be prefaced by saying that the legal and practical requirements for the development of minerals have been undergoing a revolutionary transformation. The principal element in this transformation is the rapid departure from traditional property rights concepts as the basis for deciding who has a right to consent to mineral development.

Whether we are talking about (a) the expectations or rights of people in the so-called “informal sector” who have no legal title to the land they occupy,¹¹ (b) the rights of tribal and indigenous people to consent to activities that have impacts on their traditional territories,¹² (c) the rights of people with no property interests to have the impacts on them assessed under environmental impact assessment legislation,¹³ (d) the rights of “project affected people,” many of whom have no formal ownership, under IFC Performance Standard 5,¹⁴ or some other situations, the trend is clearly to give some important rights to various kinds of people *who have no cognizable property rights at all*.

These include the right to benefit from development, to have their livelihoods restored, to make traditional uses of water, grass, timber, fish, wildlife and other resources, and above all the absolute right to be consulted, considered, and in some cases, to give their consent prior to minerals development. In the long run, criminal law will almost certainly be following suit. It is therefore a mistake to build our foundation entirely on property rights concepts.¹⁵

¹¹ See generally, HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (Basic Books 2000). See also HERNANDO DE SOTO, ET AL., EL OTRO SENDERO: LA REVOLUCION INFORMAL, INSTITUTO LIBERTAD Y DEMOCRACIA, (8th ed. 1990).

¹² This is provided by ILO Convention 169 and other subsequent declarations, including the United Nations Declaration on the Rights of Indigenous Peoples.

¹³ See generally, International Association for Impact Assessment, available at <http://www.iaia.org/about/mission-vision-values.aspx>

¹⁴ Performance Standard 5 gives people whose livelihoods or traditional occupancy are impacted a variety of rights, including a right to be at least as well off after minerals development as they were before. International Finance Corporation, World Bank Group, Performance Standards on Social & Environmental Sustainability, Performance Standard 5, Land Acquisition and Involuntary Resettlement (Apr. 30, 2006).

¹⁵ The fate of the peoples around Grasberg, the world’s largest gold mine, is a well known example. The local peoples were dispossessed without compensation or consultation because the Indonesian government did not regard them as having property rights, despite their occupation of the site since before the start of the mine.

We nevertheless start there, because it is the current and most widely understood regime. The very limited recognition of property rights may in fact be most prevalent in the very poor conditions when extreme poverty and civil strife are most often found.

b. Ownership of Minerals In Place and After Severance

In the majority of nations, ownership of minerals in place is public rather than private, meaning that minerals “belong to the state or to the people of the state as a collective whole.”¹⁶ This doctrine often has its origins in the concept that the king or sovereign had ownership of at least the precious metals. Ownership by the sovereign has evolved into ownership by the state.

While the basic principle is often stated in constitutions,¹⁷ the contours of such ownership and the conditions under which the state will allow its minerals to be produced and used by others is often legislatively defined.¹⁸ National legislation will usually define how the minerals are owned and regulated and in general, follows one of three major systems: land ownership, concessionary, and claims systems.¹⁹ The concession system is by far the most widely used. The concession system identifies a national authority which is authorized to grant the right to exploit minerals within the state.²⁰

There are two ways that can be done. In the more developed legal systems, there is a mining code in some form that sets out a system for granting of mining permits or licenses under prescribed conditions. In many of the less developed systems, which include many of the countries where resource conflicts and pillage may more commonly occur, the government may enter into a contract with a mining company for exploitation of minerals.

Under the mining code system, there are many national variations. Authority for exploration and extraction in various forms such as leases, licenses, and concessions, approvals can come from several different levels of government.²¹ Problematically, the State official who holds the granting rights is not

¹⁶ JAMES OTTO & JOHN CORDES, THE REGULATION OF MINERAL ENTERPRISES: A GLOBAL PERSPECTIVE ON ECONOMICS, LAW AND POLICY, 2-5 (Rocky Mountain Mineral Law Foundation 2002).

¹⁷ Elizabeth Bastida ET AL., INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY: TRENDS AND PROSPECTS 1011 (Kluwer Law International 2005).

¹⁸ *Id.* at 2-6.

¹⁹ *Id.*

²⁰ *Id.* at 2-7.

²¹ *Id.* at 3-12 and 3-25.

always made clear in the mining act, leading possibly to consent issues in situations where government may be fragmented by civil war or infighting for power.²² However, in more modern mining acts, the “power to grant an exploration right is clearly given to a titled officer, usually an officer in the ministry responsible for mines.”²³ But even with an exploration right, the holder of such may need further grants of authority to actualize that right.²⁴

The right to exploit minerals through some form of concession or license is almost always exclusive, though there are cases where there are coexisting rights to exploit different minerals in the same (or overlapping) geographic area.²⁵ It is generally the case that the holder of the concession, permit or license has an exclusive right either to specified minerals or minerals generally within the concession.²⁶ Increasingly, the tendency is to permit activities of artisanal miners where they do not directly interfere with operations of the concession holders.

Generally, minerals are considered the property of the state so long as they are in place, but the property of the license or permit holder once they are severed.²⁷ Thus, pillaging resources could violate the established rights:

- Of the state, where minerals are severed by the perpetrator;
- Of the concession holder, as a violation of its rights to exclusive access under the terms of the concession (and sometimes the mining code); and/or
- Of the concession holder, (or someone to whom the concession holder may have sold the minerals) as a violation of their property rights in minerals that have previously been severed.

Under the contract system, the answers may be determined partly by legal codes, and partly by the terms of the contract, but the answers are basically the same.

²² Otto, *supra* note 14, at 3-25.

²³ *Id.*

²⁴ *Id.* at 3-26.

²⁵ Bastida, *supra* note 15, at 750.

²⁶ *Id.* at 742.

²⁷ *Id.* at 903.

A defense of consent, where there has been illegal exploitation of a mine in circumstances otherwise amounting to pillage, might therefore need to establish both the consent of the state and the consent of the lawful concessionary or the contracting party.

WHO GIVES CONSENT AND HOW?

a. The Need for State Consent

Permanent sovereignty over natural wealth and resources serves as “a basic constituent of the right to self-determination.”²⁸ The developing right of consent, expressed in most cases as “prior informed consent” or “free prior informed consent” seems to have its origins in the fundamental re-evaluation of medical ethics in light of the horrors of the Nazi medical experiments on prisoners.²⁹ It arose therefore as a right of the individual. This concept has proven so powerful that it has been adapted to apply to indigenous or tribal peoples,³⁰ and now, increasingly, a principle applicable to nation states.³¹

Because we are mostly focused on minerals as property of the state, and some of the issues of consent are different for states than for individuals,³² we will use the conventions and treaties in which the state is the party with the right to give consent. The right of the sovereign to prior informed consent in the area of natural resources has undergone significant development in recent years. These treaties may provide helpful guidance in analyzing the issue of consent in the mineral context, particularly on the concept of state consent, the meaning of consent, and how consent is expressed.

²⁸ G.A. res. 1803 (XVII), 15, U.N. Doc. A/5217 (Sept. 14, 1962).

²⁹ RATNER, STEVEN R., ET AL. ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (Oxford University Press 3rd ed. 2009).

³⁰ Indigenous and Tribal Peoples Convention, International Labour Organization (No. 169), Jun. 27, 1989, C169. See also *International Workshop on Free, Prior, and Informed Consent and Indigenous Peoples*, U.N., New York, (Jan. 17-19, 2005), available at <http://www.un.org/esa/socdev/unpfii/en/workshopFPIC.html>.

³¹ Conventions requiring some form of prior informed consent by states include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 28 I.L.M. 657 (1989), Mar. 22, 1989, 1673 U.N.T.S. 125; The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 38 ILM (1999), Sept. 10, 1998; Cartagena Protocol on Biosafety Dec. 29 1993.

³² There are however some striking issues in common whether we talk individuals, communities or countries. We intend to explore these in a forthcoming symposium on prior informed consent.

b.Explicit Consent

We imagine that a defense to a pillage prosecution might be that lack of objection, or some other conduct, created an implied consent. Our conclusion is that there is little if any room for implied consent in these circumstances, and that consent must be explicit.

Conventions governing trade of hazardous waste require explicit, informed State consent and this requisite is, across the board, absolute *i.e.* consent must be explicit and may not be implied.³³ Under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, a State proposing to export waste must notify, in writing, “the competent authority of the States concerned of any proposed transboundary movement of hazardous wastes or other wastes.”³⁴

The European Union (EU) implemented the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) at the Community level through European Community Regulation (EC) No 689/2008. The European Court of First Instance³⁵ interpreting the Rotterdam Convention and (EC) No 689/2008 found that “any country into which such substance or products [listed in the Annex] are being imported must expressly agree to receive *each* individual shipment of the substance or product.”³⁶

The less stringent Cartagena Protocol, which deals with the protection of biological diversity from modern biotechnology, still holds that a Party of import’s “failure to acknowledge receipt of a notification or to communicate a decision within the stipulated time shall not imply its consent to the transboundary movement.”³⁷

Further, under the Basel Convention, written confirmation that a contract exists between the exporter and the disposer is required.³⁸ The European Court of Justice has interpreted this contractual requirement quite stringently stating, “the notifier of a shipment of waste must supply evidence of a

³³ DAVID LANGLET, *PRIOR INFORMED CONSENT AND HAZARDOUS TRADE: REGULATING TRADE IN HAZARDOUS GOODS AT THE INTERSECTION OF SOVEREIGNTY, FREE TRADE AND ENVIRONMENTAL PROTECTION* 201(Vol. 3 Wolters Kluwer 2009). *See also* Basel Convention, Rotterdam Convention, and Cartagena Protocol, *supra* note 29.

³⁴ Basel Convention, *supra* note 29, at Art. 6(1)

³⁵ *Id*

³⁶ *Id*

³⁷ LANGLET, *supra* note 34, at 201, *citing* Cartagena Protocol, Arts. 9(4) and 10(5).

³⁸ Basel Convention, *supra* note 29, at Art. 6(3)(a) and(b).

contract concluded between him and the recipient, laying down obligations with respect to the recovery or disposal of the notified waste, as well as the obligation for the notifier to take back waste when a shipment cannot be completed or when a shipment is illegal.”

c. Prior Consent and Informed Consent

The consent must be prior. In other words, before property rights are affected, an authorized representative must give consent to the proposed changes. An exporter may not commence shipment of wastes under the Basel Convention until written confirmation has been received from the importing State explicitly consenting to the import of such waste.³⁹

The consent must be informed. Under the Basel Convention, there are 21 criteria which the notifier must include in the writing in order for the country of import to make an informed decision on whether to allow the import of such waste.⁴⁰ These criteria include reasons for the waste’s export, transfer methods, verifications, and insurance, *inter alia*.⁴¹ The State of import may also request additional information before approving or denying the transfer.⁴²

d. Who Are Consenting State Authorities?

An obvious issue in some conflict situations is who is entitled to express consent for the state. There may be elements of the government on the ‘rebel’ side, or disaffected officials (or ex officials) allied with armed organizations.

The Basel Convention defines ‘competent authority’ as “one governmental authority designated by a Party to be responsible, within such geographical areas as the Party may think fit, for receiving the notification of a transboundary movement of hazardous wastes...and for responding to such a notification...”⁴³ Each Party has discretion in whom they designate as ‘competent authority’ for dealing with communications on hazardous trade issues, though such designations are largely consistent among

³⁹ Basel Convention, *supra* note 29, at Art. 6(4).

⁴⁰ Basel Convention, *supra* note 29, at Annex V(A) INFORMATION TO BE PROVIDED ON NOTIFICATION.

⁴¹ Basel Convention, *supra* note 29, at Annex V(A) INFORMATION TO BE PROVIDED ON NOTIFICATION.

⁴² Basel Convention, *supra* note 29, at Art. 6(2).

⁴³ Basel Convention, *supra* note 29, at Art 2(6).

the Parties. For example, Algeria designated the Director General for the Environment; the Democratic Republic of the Congo designated the Minister for the Environment, Conservation of Nature, Air and Forests, while Chile has designated the Secretary of Health from the Ministry of Health.⁴⁴ A State need not be a Party or a signatory to the Convention in order to be a ‘State concerned,’ thus extending the Basel Convention’s right to notification of the transboundary movement of waste to any States of export, import, or transit.⁴⁵

Under the Cartagena Protocol, there are a minimum of two national authorities for each party who are designated to perform various duties involving consent communications under the Protocol.⁴⁶ The first is the ‘national focal point’ who is responsible for all communications with the Secretariat.⁴⁷ The second is the ‘competent national authority’ who performs the administrative functions required under the Protocol.⁴⁸ The competent national authority is authorized to act on behalf of their Party to perform all duties under the Protocol e.g. receiving notifications on the export of waste.⁴⁹

Under the Rotterdam Convention, the EU grants each Member State the power to authorize a “Designated National Authority” or DNA whom is responsible for implementation and compliance with the Convention’s notification and consent requirements.⁵⁰ The Convention requires that governments provide DNAs with the power necessary and access to the areas of government relevant to fulfill Party duties under the Convention.⁵¹ This includes the power to make “regulatory decisions for the use of pesticides and industry chemicals... controls on the import and export of chemicals...making decisions on the future import of chemicals listed in Annex III of the Convention and to report these decisions to the Secretariat on behalf of the government.”⁵²

⁴⁴ Secretariat of the Basel Convention, Competent Authorities, 04-May-10, *available at* [basel.int/Parties%20\(CA\).doc](http://basel.int/Parties%20(CA).doc) (translations of authority titles are unofficial).

⁴⁵ Basel Convention, *supra* note 29, at Art. 2(13).

⁴⁶ Cartagena Protocol, *supra* note 29, at Art. 19(1).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Cartagena Protocol, *supra* note 29, Art. 8(1).

⁵⁰ Thematic workshop on trade related issues under the Rotterdam Convention for the European Commission and selected trade partners, The Rotterdam Convention Secretariat June 26-29, 2009, Limassol, Cyprus).

⁵¹ Frequently Asked Questions about the Rotterdam Convention, *available at* <http://www.pic.int/home.php?type=s&id=19> last visited on October 15, 2010.

⁵² *Id.*

While these conventions are not directly applicable, they do stand for a general principle: that not all organisms of government are capable of consenting. Only those with specific competence in this particular matter can do so. In other words, if there is legislation establishing a Ministry of Mines or the like and giving it exclusive rights to grant mining concessions, a purported “consent” from some other organ of government is presumably of no effect.

Counter to these ideas is some law dealing with state liability, holding government accountable for the conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.⁵³

United States courts have looked at issues of sovereignty, particularly the issues of apparent and actual authority in the area of commercial transactions. “[W]here [an] officer’s powers are limited by statute; his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden.”⁵⁴ In the context of commercial paper, in the wake of an armed insurrection and civil war in that country, U.S. courts found that the purchaser of a commercial paper which was issued by a government official and claimed to be binding on the government had an affirmative obligation to verify whether the agent had the express authority to bind the government.⁵⁵ “In dealings with the government, unlike those with private parties, one is charged with knowledge of the extent of the actual authority of the government’s contracting agent since no agent ... can hold out to have any authority not sanctioned by law”⁵⁶

Under customary international law, “the acts of persons, groups or organizations may be imputed to a State where they act as de facto organs or agents of that State.”⁵⁷ One may speak of imputability as

⁵³ ILC, *Article 7, Excess of authority or Contravention of instructions*, The Work of the International Law Commission, 7th ed., vol. 1, U.N. Sales No. E.07.V.9 (2007).

⁵⁴ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). This issue was analyzed in the context of the Foreign Sovereign Immunity Act, leading the court to find an officer precluded from sovereign immunity where his acts surpassed that authorized by the sovereign.

⁵⁵ *The Floyd Acceptances*, 74 U.S. 666, 676 (1869).

⁵⁶ *Atlantic Tobacco Co. v. United States*, 249 F. Supp. 661, 663 (D.S.C. 1966).

⁵⁷ *Prosecutor v Tadić*, Trial judgment, Case No IT-94-1-T, ICL 92, Judgment, (Jan. 31, 2000).

“the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official, and the attribution of breach and liability to the State.”⁵⁸

Courts use the “effective control” test to determine whether a country is liable for acts of groups.⁵⁹

“Considering whether the acts of the *contras*, being the rebel forces opposed to the Government of Nicaragua, could be imputed to the United States the Court asked whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.”

PRIOR INFORMED CONSENT AND INDIGENOUS COMMUNITIES

The continuing displacement of original inhabitants by violence, fraud, or overwhelming power has often been motivated by the desire to access mineral wealth. Indigenous and tribal peoples’ legal rights are undergoing transformation in this new age of human, social, and environmental rights development.⁶⁰ The notion that indigenous and tribal peoples have the right to Free Prior Informed Consent (FPIC) to mineral development that affects traditional land or resources is a natural outgrowth of the right to self-determination and sovereignty. The United Nations Declaration on the Rights of Indigenous Peoples particularly recognizes the right to give or withhold consent to projects affecting their natural resources.⁶¹

The basic right of free prior informed consent (FPIC) of indigenous and tribal peoples for the development and safeguarding of their land and resources has been codified in ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries.⁶² This Convention requires states to “consult and cooperate in good faith with the indigenous peoples” “to obtain their free and informed consent *prior to*” any project affecting tribal lands or resources.⁶³ This requisite particularly attaches to

⁵⁸ I.A. Shearer, *Starke's International Law* (11 ed., Butterworths, Sydney, 1994), 276.

⁵⁹ ICJ, *Nicaragua v. United States*, (1986) ICJ Reps 14 (“Nicaragua case”), Case Concerning Military and Paramilitary Activities in and Against Nicaragua.

⁶⁰ Dias, International Standard Setting on the Rights of Indigenous Peoples: Implications for Mineral Development.

⁶¹ United Nations, Human Rights Council, Declaration on the Rights of Indigenous Peoples,

⁶² Indigenous and Tribal Peoples Convention, *supra* note 28 at Art. 15(1).

⁶³ *Id.*(emphasis added).

the “development, utilization or exploitation of mineral, water or other resources” is one that is gaining international recognition, both institutionally and judicially.⁶⁴

The Inter-American Court of Human Rights recently distinguished the requisite ‘consultations’ from ‘consent’ stating that regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, *according to their customs and traditions*.⁶⁵ This holding takes the notion of consent well past the idea that it, at a minimum, must be free and informed and places the onus on the state to ensure consent is done in a manner consistent with the tribal communities’ expectations, not just those of external societies. A gloss on this has been the suggestion that where the customary and traditional decisionmaking process does not conform to norms of due process, (e.g., only men are allowed to participate) it may be necessary to obtain both the approval by majority vote and the approval through traditional mechanisms for the consent of an indigenous community to be valid.

Once again, the rights of indigenous and tribal peoples to consent – or not consent – to the development of mineral resources within their territories will in most cases not be a property right in the traditional conception. If this requires consent, and if someone pillages the minerals without that consent, this is probably best conceived as a crime based on violation of something other than ownership or property rights, since the constitutions of most countries, or their legislation, regard the minerals in place as property of the nation state, even where the minerals are located in traditional indigenous territories. This is not a comment on what the moral claims or legal rights of indigenous communities should be, simply a reflection of the difficulty of prosecuting someone for taking property in a country whose laws expressly state that the victim lacks any property right.

The exception would be those countries – and there are some – where indigenous communities have legally established territories and ownership of the mineral rights in those lands.

⁶⁴ United Nations Declaration on the Rights of Indigenous Peoples, Article 32, Resolution 61/295 (Sept. 13, 2007).

⁶⁵ *Saramaka People v. Suriname*, The Inter-American Court of Human Rights, para. 134, IHRL 3046 (IACHR Nov. 28, 2007) (emphasis added).

CONSENT OF PRIVATE OWNER

Private parties, in most cases, can be injured by resource pillaging in one of two ways. The first is where the lawful owner of a properly granted mineral concession is deprived of the exclusive benefit of mining the concession. The second is where the mineral has already been severed from the earth, and therefore ceases to become state property and becomes the property of a lawful owner. Like state consent, private consent must be explicit, not implied. Much of the analysis on the issue of consent in the area of private mineral concessions stems from basic contract law. “The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.”⁶⁶ “What must be established is that the relevant persons had no real choice.”⁶⁷ If there is any element of coercion, the consent should not be considered valid. If there is inadequate information for the party giving consent to know the consequences of the consent, there is an omission of material facts relevant to the decision, or there is misinformation – fraud or deceit – the consent is invalid.⁶⁸

A crime is an offense against the state, the public, or on human dignity or the common good; a private victim does not have the power to negate the criminal status of the action by post-facto consent.

⁶⁶Prosecutor v. Milorad Krnojelac, Appeal Judgment, Case No IT-97-25-T (Sept. 17, 2003) *citing* Kunarac Trial Judgment, par 542. The Krnojelac case is a labour consent case focused on whether the particular detainee had lost his choice to consent or to refuse the work he was doing. In this sense it is similar to the crime of rape, where apparent consent induced by force or threat of force is not considered to be real consent.

⁶⁷ *Id.*

⁶⁸ The statement of these ideas in Principle 1 of the 1947 Nuremberg Code, set out in note 1 above, is an excellent summary.