

THE HYBRID STATE-CORPORATE ENTERPRISE AND
VIOLATIONS OF INDIGENOUS LAND RIGHTS: THEORIZING
CORPORATE RESPONSIBILITY AND ACCOUNTABILITY UNDER
INTERNATIONAL LAW

by
Lillian Aponte Miranda*

Despite the significant achievements of the contemporary indigenous rights movement, the protection of indigenous peoples' land rights continues to pose a challenge at the operational level. This challenge is due, in part, to the corporate interests that impact indigenous land rights yet bear little accountability to the indigenous peoples involved. This Article seeks to set forth the analytical foundation for developing approaches to corporate responsibility and accountability in the context of indigenous land rights. Part II evaluates the primary developments in contemporary conceptualizations of indigenous land rights that raise implications for theorizing corporate responsibility and accountability. Part III analyzes both the limitations and possibilities of grounding a theory of corporate responsibility and accountability within the discourse of human rights. Part IV suggests and evaluates three specific approaches for imposing responsibilities on corporate actors and for guaranteeing compliance with such responsibilities: a voluntarist approach, a state-centered approach, and a hybrid state-corporate approach. This Article proposes that there are possibilities within the framework of human rights for designing a regime of corporate responsibility and accountability that specifically addresses the protection of indigenous peoples' land rights. It ultimately concludes that a hybrid state-corporate approach potentially offers the more effective means of operationalizing indigenous peoples' land rights vis-à-vis corporate actors.

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* Assistant Professor of Legal Skills and Values, Florida International University College of Law; Visiting Assistant Professor of Law, University of Oregon School of Law (Fall 2006). This Article benefited from feedback received at the 2006 University of Idaho College of Law Symposium on Indigenous Peoples and International Law: Lands, Liberties, and Legacies and at the 2006 Law and Society Annual Meeting. I am grateful to Hari Osofsky, José Gabilondo, Jorge Esquirol, Ediberto Roman, Charles Pouncy, and Siegfried Wiessner for helpful comments on drafts of this Article. I am also thankful for the excellent research assistance of Erica Cañas.

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I. INTRODUCTION

In the Northeastern forests of the Colombian Andes, the indigenous U'wa people continue to live upon their ancestral lands and engage in their traditional cultural practices. At the heart of U'wa culture is a belief that the ancestral land that has sustained them for centuries is sacred and that oil, or "ruiria," is the blood of Mother Earth.¹ In 1995, the Colombian government granted Occidental of Colombia, a subsidiary of United States based multinational corporation Occidental Petroleum, an oil exploration license over portions of U'wa traditional lands.² Faced with the affront of oil prospecting, the U'wa threatened to commit mass suicide rather than witness their culture and homeland destroyed.³ Despite several years of well-publicized protests by the U'wa against the Colombian government and Occidental as well as domestic litigation regarding the legality of the oil exploration license,⁴ Occidental was

¹ See Jennifer Evans, *U'wa Protests Stall Occidental's Development Plans in Colombia*, 1997 COLO. J. INT'L ENVTL. L. & POL'Y 131, 131 (1997).

² See *Two High Courts Issue Contradictory Rulings on Environmental Viability of Big Oil Project*, INT'L ENV'T DAILY, Mar. 24, 1997, at D8, available at 3/24/97 IED d8 (Westlaw) [hereinafter *Two High Courts*]. The license gave Occidental the right to conduct oil exploration activities in the Samore Block, which includes land in the Arauca, Boyaca, and Norte de Santander regions, all traditional U'wa homelands. See Evans, *supra* note 1, at 131.

³ See Evans, *supra* note 1, at 131.

⁴ Primarily, the U'wa claimed the license was issued without the observance of constitutional and other domestic legal guarantees of prior consultation. The U'wa challenged the oil license before the Colombian Constitutional Court, the highest judicial authority on constitutional guarantees, as well as the Council of State, the highest authority on decisions by government agencies. See *Two High Courts*, *supra* note 2. Despite the Constitutional Court's ruling that the oil license violated the U'wa's constitutional right to prior consultation, the Council of State ultimately issued a decision approving the license. See *id.* Thereafter, the Colombian government, through its Ministry of Foreign Affairs, requested an expert opinion from the Organization of American States with respect to the continuation of the oil project. See Danielle Knight, *U'wa Tell Court: Mass Suicide Unless Oil Drilling Stops*, ALBION MONITOR, Oct. 20, 1997, <http://www.monitor.net/monitor/>

permitted to drill within the U'wa traditional lands but ultimately failed to find oil.⁵ While the U'wa celebrated Occidental's abandonment of its oil exploration project as a "cultural triumph," the U'wa remained wary of oil exploration by Repsol, a Spanish multinational corporation engaging in negotiations with the Colombian government and Ecopetrol, a Colombian state owned corporation, for rights to explore oil drilling in other areas the U'wa claim constitute their traditional lands.⁶ The U'wa have publicly denounced this new state-corporate project and have refused to participate any further in a consultation process with the Colombian government.⁷ The fate of the project remains undetermined.⁸

A primary objective of the contemporary indigenous rights movement has been to secure indigenous peoples' rights to own, occupy, use, and control their traditional lands and natural resources.⁹ For indigenous peoples, the ability to

9710a/uwatestify.html; see also Theodore Macdonald, S. James Anaya & Yadira Soto, Organization of American States/Harvard University Project on Colombia, *The Samoré Case: Observations and Recommendations* (1997) (on file with author). The recommendations issued in the expert report included the suspension of plans for oil drilling and the establishment of a consultation process under the supervision of the Colombian government. See Macdonald et al., *supra*, at 15–16. Thereafter, Occidental negotiated a reduction in the scope of the drilling project with the Colombian government and was ultimately granted a permit to engage in oil exploration on U'wa traditional land found outside the legally demarcated reservation. See Charles H. Roberts, *U'wa vs. Oxy*, COVERTACTION Q., Summer 2002, available at http://www.thirdworldtraveler.com/Oil_watch/U'Wa_Oxy.html. The U'wa claim they were not part of any formal consultation process prior to the granting of the permit. *Id.*

⁵ See Roberts, *supra* note 4.

⁶ See *U'wa Reject New Drilling Plans*, INDYBAY, Oct. 19, 2005, http://www.indybay.org/archives/archive_by_id.php?id+3690&category_id=53.

⁷ See *id.*

⁸ On December 2006, the Colombian Ministry of the Interior announced that Ecopetrol would be permitted to initiate oil exploration activities within the U'wa's ancestral land. See *U'was Perdieron Guerra de 14 Años*, EL TIEMPO.COM, Dec. 16, 2006, http://www.eltiempo.com/tiempoimpreso/edicionimpresa/nacion/2006-12-16/ARTICULO-WEB-NOTA_INTERIOR-3368147.html (last visited Feb. 10, 2007). The Ministry of the Interior declared that the Colombian government employed all necessary measures to allow the U'wa's participation in a process of prior consultation, but that the U'wa nevertheless refused to participate. *Id.* To date, the U'wa continue to threaten mass suicide in response to the looming exploitation of their lands and resources. *Id.*

⁹ The contemporary indigenous human rights movement has centered on indigenous peoples' claims to self-determination. For analyses of self-determination as applied to indigenous peoples, see Catherine J. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199 (1992); Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?* 7 HARV. HUM. RTS. J. 33 (1994); see also S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 15–34 (2d ed. 2004). The achievement of some level of self-determination depends, in part, on indigenous peoples' ability to secure their lands and resources. Specifically, indigenous peoples depend on their lands for the preservation of their culture and the practice of their religion as well as for their subsistence and economic development. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Transnational Investments and Operations in the*

reside communally upon their lands and to operate under traditional land tenure systems is inextricably tied to the preservation of their culture and religion.¹⁰ Indigenous peoples have been largely successful in gaining recognition of these unique ties to their ancestral lands at the international level, particularly under the human rights regime.¹¹ As a result, states now bear specific human rights responsibilities to indigenous peoples with respect to the management of their traditional lands and, furthermore, have been found accountable for violations of such responsibilities.¹² Nevertheless, the protection of indigenous peoples' land rights continues to pose a challenge at the operational level.¹³ This challenge is due, in part, to the corporate interests that impact indigenous land rights yet bear little accountability to the indigenous peoples involved.

As illustrated by the plight of the U'wa, indigenous peoples around the world continue to exercise their traditional ways of life in areas coveted by corporate interests for natural resource exploitation and large scale land

Lands of Indigenous Peoples, ¶ 13, U.N. Doc. E/CN.4/Sub.2/1991/49 (July 17, 1991) [hereinafter *Transnational Investments and Operations on Indigenous Lands, 1991 Report*] (finding that "without access to land, indigenous peoples cannot maintain their subsistence activities and their way of life"); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion & Prot. of Indigenous Peoples, *Indigenous Peoples' Permanent Sovereignty Over Natural Resources*, ¶ 8, U.N. Doc. E/CN.4/Sub.2/2004/30 (July 13, 2004) (prepared by Erica-Irene A. Daes) [hereinafter *Permanent Sovereignty Over Natural Resources*] (finding that "it has become clear that meaningful political and economic self-determination of indigenous peoples will never be possible without indigenous peoples having the legal authority to exercise control over their lands and territories").

¹⁰ See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion & Prot. of Human Rights, *Final Working Paper: Indigenous Peoples and Their Relationship to Land*, U.N. Doc. E/CN.4/Sub.2/2001/21 (June 11, 2001) (prepared by Erica-Irene A. Daes) [hereinafter *Indigenous Peoples' Relationship to Their Land*] (discussing indigenous peoples' unique cultural and religious ties to their lands).

¹¹ See *infra* Part II(A)–(B).

¹² See *infra* text accompanying notes 40–43.

¹³ See, e.g., *Transnational Investments and Operations on Indigenous Lands, 1991 Report*, *supra* note 9; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Transnational Investments and Operations on the Lands of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1992/54 (Sept. 3, 1992) [hereinafter *Transnational Investments and Operations on Indigenous Lands, 1992 Report*]; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Transnational Investments and Operations on the Lands of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/40 (June 15, 1994) [hereinafter *Transnational Investments and Operations on Indigenous Lands, 1994 Report*]; U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1999/20 (June 22, 1999) (prepared by Miguel Alfonso Martínez) [hereinafter *Study on Treaties*]; *Indigenous Peoples' Relationship to Their Land*, *supra* note 10; *Permanent Sovereignty Over Natural Resources*, *supra* note 9; see also Extractive Indus. Review, *Striking a Better Balance*, Volume 1: The World Bank Group and Extractive Industries (Dec. 2003) (providing, *inter alia*, an overview of the adverse effects on indigenous peoples' recognized land rights produced by private sector extractive industries).

development projects.¹⁴ Arguably, the most significant violations of indigenous peoples' land rights occur in the context of a hybrid state-corporate enterprise, where through a collaborative legal arrangement, a state effectively delegates many of its human rights responsibilities toward indigenous peoples to a joint corporate actor.¹⁵ As indigenous peoples continue to advocate for the protection of their rights to lands and resources, theories of corporate responsibility and accountability deserve attention.

To that end, this Article develops approaches to corporate responsibility and accountability in the context of indigenous land rights. Specifically, the analysis in this Article bridges two recent streams of scholarly literature. One stream of scholarship analyzes international law's treatment of indigenous peoples' claims with respect to lands and resources vis-à-vis state actors¹⁶ and

¹⁴ See, e.g., *Transnational Investments and Operations on Indigenous Lands, 1991 Report*, *supra* note 9 (surveying the overlaps between distinctly indigenous areas and both surface and subsurface natural resources, including hydrocarbon, uranium, lead-zinc, iron, boreal forests, oil, tin, copper, silver, gold, and diamonds). Indigenous peoples have also been significantly disrupted by hydroelectric development projects. See *id.* ¶ 38. There is also a breadth of scholarly literature that describes and analyzes the specific struggle for land rights faced by indigenous peoples in different localities. See, e.g., Maria McFarland Sánchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 *FORDHAM INT'L L.J.* 1663 (2004); David E. Cahn, *Homeless for Generations: Land Rights for the Chocoe Indians from Mogue, Panama*, 28 *FORDHAM INT'L L. J.* 232 (2004); Jose Mencion Molintas, *The Philippine Indigenous Peoples' Struggle for Land and Life: Challenging Legal Texts*, 21 *ARIZ. J. INT'L & COMP. L.* 269 (2004); Maxi Lyons, *A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress*, 32 *DENV. J. INT'L L. & POL'Y* 701 (2004); Larisa Wick, *Human Rights Violations in Nigeria: Corporate Malpractice and State Acquiescence in the Oil Producing Deltas of Nigeria*, 12 *MICH. ST. J. INT'L L.* 63 (2003); Judith Kimerling, *Rio + 10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia*, 27 *COLUM. J. ENVTL. L.* 523 (2002); Scott Holwick, Note, *Transnational Corporate Behavior and Its Disparate and Unjust Effects on the Indigenous Cultures and the Environment of Developing Nations: Jota v. Texaco, A Case Study*, 11 *COLO. J. INT'L ENVTL. L. & POL'Y* 183 (2000); Andrew I. Huff, Note, *Resource Development and Human Rights: A Look at the Case of the Lubicon Cree Indian Nation of Canada*, 10 *COLO. J. INT'L ENVTL. L. & POL'Y* 161 (1999); G.P.J. McGinley, *Natural Resource Companies and Aboriginal Title to Land: The Australian Experience—Mabo and Its Aftermath*, 28 *INT'L LAW.* 695 (1994); Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon*, 14 *HASTINGS INT'L & COMP. L. REV.* 849 (1991).

¹⁵ See *infra* Part II(C).

¹⁶ See, e.g., ANAYA, *supra* note 9; Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *HARV. HUM. RTS. J.* 57 (1999); Andrew Huff, *Indigenous Land Rights and the New Self-Determination*, 16 *COLO. J. INT'L ENVTL. L. & POL'Y* 295 (2005); Lindsey L. Wiersma, *Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims*, 54 *DUKE L.J.* 1061 (2005). This Article also draws from scholarly literature that addresses the existing regulatory gap with respect to corporate activity on indigenous peoples' lands. See, e.g., McFarland Sánchez-Moreno & Higgins, *supra* note 14; Lyons, *supra* note 14; Wick, *supra* note 14; Kimerling, *supra* note 14; Holwick, *supra* note 14; Huff, *supra* note 14; McGinley, *supra* note 14; Martin A. Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations—Emergent International Rights and Wrongs*, 38 *VA. J. INT'L L.* 331 (1998); Patrick Macklem, *Indigenous Rights and Multinational Corporations at International Law*,

another analyzes international law's treatment of corporate responsibility and accountability with respect to human rights abuses.¹⁷ Drawing from these two streams of scholarship, this Article develops approaches to corporate responsibility and accountability in the specific context of indigenous land rights.¹⁸ It further engages scholarship that addresses the complexities of ascribing meaningful accountability under international law to a corporate actor engaged in a state-corporate enterprise.¹⁹ More broadly, this Article provides a framework for developing other context-specific analyses of corporate responsibility and accountability under international law.²⁰ Analyses that focus

24 HASTINGS INT'L & COMP. L. REV. 475 (2001); Martin Wagner, *The International Legal Rights of Indigenous Peoples Affected by Natural Resource Exploitation: A Brief Case Study*, 24 HASTINGS INT'L & COMP. L. REV. 491 (2001); David N. Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations*, 76 N.Y.U. L. REV. 626 (2001). There is also a stream of scholarship that discusses the intersection between international environmental law and the protection of indigenous peoples' human rights. See, e.g., Jeremy Firestone et al., *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT'L L. REV. 219 (2005); Lawrence Watters, *Indigenous Peoples and the Environment: Convergence from a Nordic Perspective*, 20 UCLA J. ENVTL. L. & POL'Y 237 (2002); Jennifer A. Amriott, Note, *Environment, Equality, and Indigenous Peoples' Land Rights in the Inter-American Human Rights System*: Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua, 32 ENVTL. L. 873 (2002); see also Barry E. Hill et al., *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 GEO. INT'L ENVTL. L. REV. 359 (2004). For an analysis of the potential "convergence" and "divergence" between environmentalism and the human rights of indigenous peoples, see S. James Anaya, *Environmentalism, Human Rights and Indigenous Peoples: A Tale of Converging and Diverging Interests*, 7 BUFF. ENVTL. L.J. 1 (2000).

¹⁷ See, e.g., Rebecca M. Bratspies, "Organs of Society": A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities, 13 MICH. ST. J. INT'L L. 9 (2005); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931 (2004); Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309 (2004); Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1 (2003); Joel R. Paul, *Holding Multinational Corporations Responsible Under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285 (2001); Beth Stephens, *The Amoralism of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45 (2002); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461 (2001); LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 97, 97-118 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

¹⁸ The theoretical framework presented in this Article is also grounded in the experiences of indigenous peoples as documented in a series of United Nations reports. See *supra* notes 9, 10, 13. These reports not only lend support to the analyses in this Article, but also illustrate the progression of indigenous peoples' status under international law.

¹⁹ See, e.g., Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence, and International Law*, 36 N.Y.U. J. INT'L L. & POL. 331, 354 (2004); Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135 (2005); Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L.J. 71 (2005); MICHAEL B. LIKOSKY, LAW, INFRASTRUCTURE, AND HUMAN RIGHTS (William Twining & Christopher McCrudden eds., 2006).

²⁰ Many scholars have focused on designing all-encompassing theories of corporate responsibility and accountability applicable to a diverse range of human rights violations.

on the impact of corporate actors in a specific human rights context are a necessary complement to generalized discussions of international corporate regulation with respect to human rights violations.

Part II begins by examining the primary developments in contemporary conceptualizations of indigenous land rights that raise implications for developing approaches to corporate responsibility and accountability. Part III analyzes both the limitations and possibilities of grounding approaches to corporate responsibility and accountability within the discourse of human rights. Part IV suggests three specific approaches that could serve to impose responsibilities on corporate actors and to guarantee compliance with those responsibilities: a voluntarist approach, a state-centered approach, and a hybrid state-corporate approach. This Article proposes that there are possibilities within the discourse of human rights for designing a regime of corporate responsibility and accountability that specifically addresses the protection of indigenous peoples' land rights. It ultimately concludes that a hybrid state-corporate approach potentially offers the more effective means of operationalizing indigenous peoples' land rights vis-à-vis corporate actors.

II. INDIGENOUS LAND RIGHTS UNDER INTERNATIONAL LAW

There are three primary developments in the contemporary understanding of indigenous land rights that raise important implications for a theorization of corporate responsibility and accountability. First, the international legal order has recognized that indigenous land rights constitute human rights. Second, international law recognizes specific substantive and procedural indigenous land rights. Third, international institutions have acknowledged that forms of hybrid state-corporate activity have significant, and generally adverse, consequences for the indigenous peoples involved. The recognition of indigenous land rights within the discourse of human rights suggests that such discourse should be explored as an appropriate locus for an analysis of corporate responsibility and accountability. Moreover, the specific recognition of the significant role played by corporate actors involved in a hybrid state-corporate enterprise suggests the necessity for such analysis.

A. *Indigenous Land Rights as Human Rights*

Indigenous land rights have been historically limited and problematized under international law. Nevertheless, the human rights principles of the United Nations' post-World War II Charter have propelled the creation of a human rights regime supportive of indigenous peoples' contemporary claims with

See supra note 17. While, clearly, such theories are of great value and serve to systematically unpack a host of complexities, they tend to offer only a limited treatment of the inevitable discrepancies that exist between the specific roles and impact of corporate actors in varying contexts of human rights abuses.

respect to their lands and resources.²¹ The recognition of indigenous land rights as human rights bears specific consequences not only for the conceptualization of indigenous peoples' claims vis-à-vis states, but also for the imposition of corporate responsibility and accountability in the context of the hybrid state-corporate enterprise.

It should be noted that the international legal order did not always recognize indigenous peoples as subjects of international law bearing distinct rights with respect to their lands and resources and that some of the vestiges of these earlier conceptualizations still impact contemporary analyses. In the post-Westphalian order,²² the doctrine of sovereignty developed from a Eurocentric perspective to privilege existing European or European-derived territorial arrangements constituting states as the proper autonomous subjects of international law.²³ Over time, such limited perspective served to exclude indigenous social and political structures as sovereigns.²⁴ In effect, indigenous lands were considered *terra nullius*, legally unoccupied prior to colonial "discovery."²⁵ Moreover, indigenous land rights grounded in treaties were, for the most part, considered merely moral obligations of limited concern under international law.²⁶ As a result, the management of indigenous peoples' claims to lands and resources were relegated to the domestic level and the trusteeship doctrine developed as one of the predominant domestic vehicles for managing such claims.²⁷

Eurocentric notions of sovereignty further permeated the international order's decolonization project of the mid-twentieth century.²⁸ Self-determination applied only to an overseas colonial territory as a whole, irrespective of pre-colonial enclaves of indigenous peoples existing within the colonial territories and colonizing states.²⁹ As part of the decolonization

²¹ See ANAYA, *supra* note 9, at 49–72.

²² The 1648 Treaty of Westphalia led to the modern conception of the territorial state. *Id.* at 19.

²³ *Id.* at 19–31.

²⁴ *Id.* at 26–31 (arguing that under positivist formulations international law "became a legitimizing force for colonization and empire rather than a liberating one for indigenous peoples").

²⁵ *Id.* at 29 (finding that during the late nineteenth and early twentieth centuries, "[f]or international law purposes, indigenous lands prior to any colonial presence were considered legally unoccupied or *terra nullius* (vacant lands)" and that "[u]nder this fiction, discovery was employed to uphold colonial claims to indigenous lands and to bypass any claim to possession by the natives in the 'discovered' lands").

²⁶ *Id.* at 30.

²⁷ *Id.* at 31–34; see also Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 129–34 (1993) (describing the evolution of the Federal Trusteeship Doctrine in the United States as initially a vehicle for describing indigenous peoples' status as "domestic dependent nations," then as a source for legitimizing federal authority, and ultimately as a means of limited recovery to indigenous peoples).

²⁸ See ANAYA, *supra* note 9, at 54.

²⁹ See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), ¶ 5, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 14, 1960), available at www.un.org/depts/dhl/; see also Principles Which Should Guide

process, permanent sovereignty over natural resources was ultimately deemed to inhere in the state.³⁰ Accordingly, the international decolonization process also failed to account for indigenous peoples' ties to their traditional lands and resources.³¹

Despite these historical developments, indigenous peoples have continued to raise claims regarding the ownership, use, occupancy, and control of their lands and resources.³² Broadly, three interrelated arguments have served as the foundation for the advocacy of indigenous land rights.³³ Some indigenous groups and scholars have fashioned arguments for the recognition of

Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter, G.A. Res. 1541 (XV), princ. IV, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 15, 1960) (hinging the application of self-determination to geographically separate territories).

³⁰ Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), ¶¶ 1–3, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (Dec. 14, 1962) [hereinafter Resolution 1803]. The first three paragraphs of Resolution 1803 provide:

1. The rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.
3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between investors and the recipient State, due care being taken to ensure that *there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.*

Id. (emphasis added). See also *Permanent Sovereignty Over Natural Resources*, *supra* note 9, ¶ 10 (explaining that “[w]hile the principle [of permanent sovereignty over natural resources] originally arose as merely a political claim by newly independent states and colonized peoples attempting to take control over their resources,” it “became a general principle of international law”). The international principle of permanent sovereignty over natural resources has often been utilized by states engaged in extractive activities as a sword against the recognized interests of indigenous peoples rather than as a shield to protect their newly found independence from foreign economic control. See Dufresne, *supra* note 19, at 354 (finding that “[i]t is clear that treatment of legal issues concerning natural resources through the prism of permanent sovereignty is a legacy of the decolonization era” and that such doctrine “translates the assertive discourse of decolonized states that tried to rectify or counter pre-existing vectors of economic domination into legal concepts”).

³¹ See ANAYA, *supra* note 9, at 53–54 (“The regime of decolonization prescriptions that were developed and promoted through the international system, however, largely bypassed indigenous patterns of association and political ordering that originated prior to European colonization.”).

³² For a thorough historical overview of the contemporary indigenous rights movement, see *id.* at 56–72.

³³ See S. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 237, 240–44 (2005) (locating the foundations of indigenous rights in international law within the “divergence and interplay” of discourses regarding historical sovereignty and human rights).

indigenous land rights based primarily on the discourse of “historical sovereignty”³⁴ while others have anchored their claims, at least in part, within the discourse of human rights.³⁵ Some have additionally suggested that the recognition and enforcement of historical treaties could serve as a basis for securing the land rights of indigenous peoples.³⁶

Arguably, at the international level, indigenous peoples have found their greatest success under the human rights regime.³⁷ The international legal order has come to recognize indigenous land rights as human rights.³⁸ This specific recognition is evident in analyses from multiple international bodies that address human rights such as the United Nations Commission (now Council) on Human Rights,³⁹ the United Nations Human Rights Committee,⁴⁰ the United

³⁴ *Id.* Specifically, Anaya proposes the following:

One strain of argument occurs essentially within a state-centered frame. Indigenous groups are referred to as ‘nations’ and identified as having attributes of sovereignty that predate and, at least to some extent, trump the sovereignty of the states that now assert power over them. . . . Under this argument, claims to land, group equality, culture, and development assistance stem from the claim of reparations for the historical injustices against entities that, a priori, should be regarded as independent political communities with full status as such on the international plane.

Id.

³⁵ Anaya, *supra* note 33, at 239–40; *see also* Wiessner, *supra* note 16, at 127 (concluding that customary international law supports indigenous peoples’ claims to demarcate, own, develop, control, and use their traditional lands).

³⁶ Of course, a right to land could flow only from a treaty that recognizes a particular claim. *See Study on Treaties, supra* note 13, ¶¶ 260, 265, 271 (proposing that historical treaties with indigenous peoples have international legal status and could serve as a basis for protecting indigenous peoples’ land rights and, further, arguing that “treaties/agreements or constructive arrangements have the potential to become very important tools (because of their consensual basis) for formally establishing and implementing . . . inalienable ancestral rights, in particular land rights, in the specific context of a given society”); *see also* Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567 (1995) (proposing that treaties between American Indian nations and the U.S. government should have legal status under international law).

³⁷ *Id.* at 240. The contemporary human rights regime recognizes the individual as well as the collective, group rights of indigenous peoples. Importantly, indigenous peoples have successfully claimed a collective right to self-determination under such regime.

³⁸ *See* U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶ 75, U.N. Doc. E/CN.4/2003/90 (Jan. 21, 2003) (*prepared by* Rodolfo Stavenhagen) [hereinafter *Human Rights and Indigenous Issues*] (concluding that “indigenous land and property rights must be considered as human rights at all times, whether they are so recognized legally or not”).

³⁹ *See supra* notes 9, 10, and 13.

⁴⁰ *See Report of the Human Rights Committee*, vol. II, annex IX(A), U.N. GAOR, 45th Sess., Supp. No. 40, U.N. Doc. A/45/40 (1990) (finding that Canada violated Article 27 of the Covenant on Civil and Political Rights by allowing the province of Alberta to grant oil and gas leases as well as timber development rights to a corporate actor within the lands of the Lubicon Lake Band of Cree Indians); *Report of the Human Rights Committee*, vol. II, annex X(I), ¶ 9.6, U.N. GAOR, 50th Sess., Supp. No. 40, U.N. Doc. A/50/40 (1999) (finding that Finland had not violated Article 27 of the Covenant on Civil and Political Rights by allowing stone quarrying on lands where the indigenous Saami herd reindeer because

Nations Committee on the Elimination of Racial Discrimination,⁴¹ the Organization of American States Commission on Human Rights,⁴² the Inter-American Court of Human Rights,⁴³ and the International Labor Organization.⁴⁴

“reindeer herding in the area does not appear to have been adversely affected by such quarrying”).

⁴¹ See, e.g., *Report of the Committee on the Elimination of Racial Discrimination*, annex V, ¶ 3, U.N. GAOR, 52d Sess., Supp. No. 18, U.N. Doc. A/52/18 (1997) (finding that indigenous peoples have been “deprived of their human rights and fundamental freedoms and in particular . . . have also lost their land and resources to colonists, commercial companies, and State enterprises”).

⁴² See, e.g., *Maya Indigenous Cmty. of Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1, ¶¶ 120, 144 (2004) [hereinafter *Maya Case*] (finding that Belize violated the Maya peoples’ right to property under the American Declaration on the Rights and Duties of Man by granting logging and oil concessions to corporate actors, and further recognizing that the “effective protection of ancestral territories implies not only the protection of an economic unit but the protection of the human rights of a collective that bases its economic, social, and cultural development upon the relationship with the land”); *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 (2002), available at <http://www.cidh.org/annualrep/2002eng/toc.htm> [hereinafter *Dann Case*] (finding that the United States violated the Dann sisters’ “right to property under conditions of equality” with respect to the preservation of ancestral Western Shoshone lands under the American Declaration on the Rights and Duties of Man by failing to provide the Dann sisters with the same protections enjoyed by other property holders in the United States); *Enxet-Lamenxay & Kayleyphapopyet (Riachito) Indigenous Cmty. v. Paraguay*, Case 11.713, Inter-Am. C.H.R., Report No. 90/99, OEA/Ser.L./V/II.106, doc. 6 rev. ¶ 12 (1999) (resulting in a friendly settlement between the indigenous claimants and Paraguay wherein Paraguay “recognized the existence of the indigenous communities’ right to the land, at both the domestic and international levels”); *Yanomami v. Brazil*, Case 7615, Inter-Am. C.H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1 (1985) (finding that Brazil violated the rights of the Yanomami peoples with respect to their lands and resources under several provisions of the American Declaration on the Rights and Duties of Man by allowing resource exploitation, road construction, and the invasion of colonists and mining prospectors); *Kichwa Peoples of Sarayaku Cmty. & Members v. Ecuador*, Petition 167/03, Inter-Am. C.H.R., Report No. 64/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1 ¶ 74 (2004), available at <http://www.cidh.org/annualrep/2004eng/toc.htm> [hereinafter *Kichwa Case*] (finding that “acts denounced by the [Kichwa] regarding irregularities in the consultation process conducted by the State [of Ecuador] with respect to the oil exploration and exploitation concession granted to a company to be carried in the ancestral territory of the Kichwa indigenous people of Sarayaku . . . if proved, could constitute violations of . . . the American Convention”).

⁴³ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) [hereinafter *Awas Tingni Case*] (finding that Nicaragua violated the property rights of the Awas Tingni under the American Convention of Human Rights, despite the Awas Tingni’s lack of formal title to such lands, by granting a logging concession to a Korean transnational corporation). For a thorough review of this case, see S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT’L & COMP. L. 1 (2002).

⁴⁴ International Labor Organization, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* art. 14, June 27, 1989, 28 I.L.M. 1382 [hereinafter *ILO Convention No. 169*]. Article 14(1) of ILO Convention No. 169 specifically provides:

Art. 14 (1). The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall

Indisputably, the international legal order's acceptance of indigenous land rights as human rights has borne significant consequences for indigenous peoples. First, such recognition has served to transfer the management of indigenous peoples' claims regarding their lands and resources from the exclusively domestic realm to the international sphere. Indigenous land rights, in effect, function as a limit upon state claims to unbridled sovereignty regarding the management and development of lands indigenous peoples occupy or claim as their own.⁴⁵ Locating such rights within the human rights framework requires, at a minimum, a balancing between indigenous interests and state interests.⁴⁶ Second, arguments stemming from a human rights perspective obviate, to a substantial extent, problematized analyses of state sovereignty as well as problematized analyses of treaty recognition and interpretation. Pursuant to the human rights discourse, indigenous claims to ownership, possession, use, and control of ancestral lands do not necessarily hinge on arguments of historical first settlement or on the recognition of treaties or formal title, but upon the recognition of international human rights norms specific to indigenous peoples.⁴⁷ From a human rights perspective, the land rights of indigenous peoples are predominantly understood in accordance with their traditional land tenure systems.

This analysis is not meant to suggest that challenges no longer exist with respect to a legal acknowledgement of indigenous peoples' claims to lands and resources. For example, the international doctrine of permanent sovereignty over natural resources, in its original formulation, still poses some conceptual obstacles to indigenous peoples' substantive claims to ownership and control of subsurface resources.⁴⁸ However, even the contours of that doctrine have been

be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

Id.

⁴⁵ In the Maya case, the Inter-American Commission of Human Rights specifically highlighted that "the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition." *Maya Case*, *supra* note 42, ¶ 117; *see also Permanent Sovereignty Over Natural Resources*, *supra* note 9, ¶ 50 (reaffirming that a "general and widely understood principle in the field of human rights" is that "even lawful state authority must be exercised in a manner that protects and respects human rights," and therefore, "States' legal authority over lands and resources of indigenous peoples may be sharply limited where these lands and resources are critical to the human rights of the indigenous peoples").

⁴⁶ *See Maya Case*, *supra* note 42, ¶ 150. In the Maya case, the Inter-American Commission acknowledged the "importance of economic development for the prosperity of the populations of this Hemisphere," but also noted that "[a]t the same time, development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural, and spiritual well-being." *Id.*

⁴⁷ *See infra* Part II(B).

⁴⁸ *See supra* note 30 and accompanying text.

met with increased scrutiny when applied from a human rights perspective to indigenous peoples' claims.⁴⁹

The consequences flowing from the recognition of indigenous land rights as human rights also raise implications for developing a theory of corporate responsibility and accountability. Recognition of indigenous land rights as human rights suggests that the international legal order could constitute an appropriate forum for the scrutiny of corporate behavior that not only impacts such rights but is also executed in intimate collaboration with the state. More specifically, given indigenous peoples' relative success in articulating their claims within the human rights framework vis-à-vis states, it is worth exploring whether the same framework offers possibilities for also recognizing such claims vis-à-vis a corporate actor involved in a hybrid state-corporate enterprise. Additionally, based on contemporary affirmations of indigenous land rights, corporate responsibility and accountability should not be triggered exclusively by indigenous peoples' formal ownership over the lands and resources at issue. Rather, corporate responsibility and accountability should focus on the significant impact that joint state and corporate conduct produces on the ability of indigenous peoples to preserve their culture, religion, and means of subsistence, and ultimately, to chart their own future.

B. *Substantive and Procedural Land Rights*

Under the human rights framework, indigenous peoples have been successful in gaining recognition of specific rights to traditional lands and resources.⁵⁰ Although human rights treaties may not specifically reference the observance of indigenous peoples' rights, treaty provisions have been interpreted to offer protection to indigenous peoples' organizational structures and ways of life. These interpretations and myriad other institutional activities by intergovernmental organizations have given rise to a well established corpus of human rights norms that focus directly on indigenous peoples' concerns regarding the preservation of their lands and resources. These human rights norms now serve as benchmarks for the protection of indigenous peoples in all parts of the world. Significantly, however, these norms have been articulated in the context of state responsibility, with much less attention given to their potential as a source of corporate responsibility.

The recognized substantive and procedural land rights of indigenous peoples are partly grounded on human rights articulated in declarations and treaties, such as the right to self-determination,⁵¹ the right to cultural integrity,⁵²

⁴⁹ See *infra* notes 62–73 and accompanying text.

⁵⁰ See *supra* notes 40–43 and accompanying text.

⁵¹ See International Covenant on Economic, Social and Cultural Rights art. 1, ¶ 1, Dec. 16, 1966, S. EXEC. DOC. D, 95–2 (1978), 993 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 1, ¶ 1, Dec. 19, 1966, S. EXEC. DOC. E, 95–2 (1978), 999 U.N.T.S. 171.

⁵² See International Covenant on Civil and Political Rights, *supra* note 51, art. 27; see also ANAYA, *supra* note 9, at 134 (proposing that Article 27 of the International Covenant on Civil and Political Rights is representative of customary international law).

and the right to property.⁵³ These human rights precepts have been applied in a non-discriminatory manner to protect indigenous lands and resources and have further served as a foundation for articulating land rights specific to indigenous peoples in at least one binding treaty and, arguably, as part of customary international law.⁵⁴

International Labor Organization (“ILO”) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, which was adopted in 1989, is often referenced as a significant standard setting instrument even for states that have not ratified the convention.⁵⁵ The convention specifically states that indigenous land rights have a collective dimension⁵⁶ and that substantive indigenous land rights include ownership, use, possession, and control irrespective of formal title.⁵⁷ The convention further refers to indigenous peoples’ right to prior consultation with respect to activities that could affect indigenous interests in their lands and resources.⁵⁸

James Anaya has proposed that the prescriptive dialogue engaged in by states and other actors in multilateral settings has served to reiterate, expand upon, and further define the core precepts found in ILO Convention No. 169.⁵⁹ This prescriptive dialogue, which Professor Anaya considers constitutive of customary international law, is particularly evidenced, for example, in the land rights provisions found in both the United Nation’s Declaration on the Rights

⁵³ See Universal Declaration of Human Rights art. 17, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html> (providing, *inter alia*, that “[e]veryone has the right to own property alone as well as in association with others,” and “[n]o one shall be arbitrarily deprived of his property”); see also American Convention on Human Rights art. 21, Nov. 22, 1969, 1144 U.N.T.S. 143, available at <http://www.cidh.org/basic.eng.htm>; American Declaration on the Rights and Duties of Man art. XXIII, O.A.S. Official Rec., OEA/Ser.L./V./II.23, doc. 21 rev. 6 (1948), available at <http://www.cidh.org/basic.eng.htm>; Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, March 20, 1952, Europ. T.S. No. 9, 213 U.N.T.S. 262, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

⁵⁴ See ANAYA, *supra* note 9, at 148 (arguing that “[i]t is thus evident that certain minimum standards concerning indigenous land rights, rooted in otherwise accepted precepts of property, cultural integrity, non-discrimination, and self-determination, have made their way not just into conventional law but also into general or customary international law”); Wiessner, *supra* note 16, at 127.

⁵⁵ ILO Convention No. 169, *supra* note 44. Significantly, in his concurring opinion in the *Awas Tingni* case, Judge García Ramírez references the precepts found in ILO Convention No. 169 as significant to interpreting the scope and meaning of the term “property” in the American Convention as applied to the state of Nicaragua. See *Awas Tingni Case*, *supra* note 43 (García Ramírez, J., concurring, ¶ 7).

⁵⁶ ILO Convention No. 169, *supra* note 44, art. 13(1).

⁵⁷ *Id.* arts. 14(1), (2).

⁵⁸ *Id.* arts. 5(1), 14(1).

⁵⁹ See ANAYA, *supra* note 9, at 61–62 (proposing that the “prescriptive dialogue” produced by “modern international intergovernmental institutions and enhanced communications media, states, and other relevant actors” is constitutive of customary international law).

of Indigenous Peoples⁶⁰ and the Organization of American State's proposed American Declaration on the Rights of Indigenous Peoples.⁶¹ Based on this prescriptive dialogue, the land rights of indigenous peoples arguably include the following: 1) the right to legal recognition, demarcation, and titling of lands that indigenous peoples traditionally occupy;⁶² 2) the right to use, enjoyment, control, and development of such lands irrespective of formal title;⁶³ 3) the right, at a minimum, to the use of natural resources associated with such lands;⁶⁴ and 4) the right, at a minimum, to prior meaningful consultation when

⁶⁰ On June 29, 2006, the Human Rights Council adopted the United Nations' Declaration on the Rights of Indigenous Peoples. See U.N. Human Rights Council, *Report to the General Assembly on the First Session of the Human Rights Council*, Res. 2006/2, annex at 56, U.N. Doc. A/HRC/1/L.10 (June 30, 2006) [hereinafter U.N. Declaration]. Specifically, Article 26 of the United Nations' Declaration on the Rights of Indigenous Peoples provides:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied, or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Id. art. 26.

⁶¹ The Proposed American Declaration on the Rights of Indigenous Peoples remains a work in progress. For the most current working draft as of the completion of this Article, see Permanent Council of the Org. of Am. States, Comm. on Juridical and Political Affairs, *Ninth Meeting of Negotiations in the Quest for Points of Consensus: Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples*, OEA/Ser.K/XVI, GT/DADIN/doc.283/07 corr. 1 (Jan. 26, 2006) [hereinafter OAS Draft Declaration]. For the original draft approved by the Inter-American Commission on Human Rights on Feb. 26, 1997, see Proposed American Declaration on the Rights of Indigenous Peoples, OEA/Ser.L/V/II.95, doc. 6 (Feb. 26, 1997), available at <http://www.cidh.oas.org/Indigenous.htm>.

⁶² Indigenous peoples' property rights of ownership arise from indigenous peoples' own land tenure systems. See *Permanent Sovereignty Over Natural Resources*, *supra* note 9, ¶ 53 (“[I]nternational law has developed substantially concerning the legal obligations of States to recognize, demarcate and title indigenous peoples' rights to lands and associated resources. Legal standards now exist in international law that direct or guide States in determining what lands, territories, and resources belong to indigenous peoples.”); see also Dann Case, *supra* note 42, ¶ 130 (outlining “general international legal principles” concerning indigenous land rights); Maya Case, *supra* note 42, ¶¶ 121–56 (applying the principles outlined in the Dann case); ILO Convention No. 169, *supra* note 44, art. 14(2) (“Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.”).

⁶³ Specifically, these rights include the right to enjoy religious and cultural ties to the land and the right not to be displaced. See *Indigenous Peoples' Relationship to Their Land*, *supra* note 10; ILO Convention No. 169, *supra* note 44, art. 7(1); see also *Awat Tingni Case*, *supra* note 43 (finding that the Awat Tingni had a right to use, enjoy, and control their lands despite their lack of formal title to such lands); Dann Case, *supra* note 42 (finding that the Dann sisters had a right to graze cattle upon their lands without the possession of formal title or the need of a United States granted permit).

⁶⁴ See *infra* notes 67–73 and accompanying text.

a state government seeks to engage in activities upon such lands or in activities that affect indigenous rights over such lands.⁶⁵ While the scope of substantive rights over subsurface resources and the scope of procedural rights to participation continue to evolve, these rights are nevertheless grounded in well established minimum precepts.⁶⁶

Specifically, indigenous peoples have succeeded in establishing their substantive right to own, use, enjoy, control, and develop *surface* natural resources on their traditional lands,⁶⁷ but they have faced challenges with respect to similar substantive claims over *subsurface* resources.⁶⁸ This challenge stems from state assertions under domestic property regimes of formal ownership over subsurface resources. Under international law, such assertions by states are legitimized by an orthodox interpretation of the doctrine of permanent sovereignty over natural resources.⁶⁹ Nevertheless, arguments stemming from a historical sovereignty perspective pose that indigenous peoples' ownership of subsurface resources predates the formation of the state, and in the absence of a valid transfer of ownership to the state, substantive rights continue to inhere in indigenous peoples.⁷⁰ A human rights approach

⁶⁵ See *infra* notes 74–78 and accompanying text; see also *Permanent Sovereignty Over Natural Resources*, *supra* note 9, ¶ 38 (finding that there is an “increased recognition of indigenous peoples’ right to give or withhold their prior and informed consent to activities within their lands and territories and to activities that may affect their lands, territories, and resources”). Of course, substantial harm to the lands of indigenous peoples may have an effect on other recognized human rights, such as the right to life, the right to health and well-being, the right to food, and the right to self-determination.

⁶⁶ See S. James Anaya, *Indigenous Peoples’ Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT’L & COMP. L. 7 (2005) (analyzing the “extent and content of the duty of consultation owed to indigenous peoples” based on their substantive land rights). The legitimacy of state assertions to ownership over lands and resources are significant from the standpoint of theorizing corporate responsibility and accountability to the extent a corporate actor could seek to avoid obligations to indigenous peoples by shielding itself behind an arguably legitimate grant of state authority. See *infra* Part IV(C).

⁶⁷ See *Permanent Sovereignty Over Natural Resources*, *supra* note 9, ¶ 42 (finding that “there appears to be widespread understanding that natural resources located on indigenous lands or territories, resources such as timber, water, flora and fauna, belong to the indigenous peoples that own the land or territory”); see also *Awas Tingni Case*, *supra* note 43 (finding that the state of Nicaragua must respect the Awas Tingni peoples’ rights over the surface timber resources found on their traditional lands); ILO Convention No. 169, *supra* note 44, art. 15(2) (implicitly drawing a distinction between indigenous peoples’ rights with respect to surface and subsurface resources).

⁶⁸ See *Permanent Sovereignty Over Natural Resources*, *supra* note 9, ¶¶ 42–43 (finding that while there is a consensus regarding indigenous peoples’ rights to surface resources, there is much less agreement regarding subsurface resources).

⁶⁹ See *supra* note 30 and accompanying text.

⁷⁰ See *Alexkor Ltd. & Another v. Richtersveld Cmty. & Others* 2003 (12) BCLR 1301 (CC) ¶ 62 (S.Afr.) [hereinafter *Alexkor Ltd.*] (grounding its holding that the indigenous community owned the subsurface resources at issue on the fact that ownership of such resources was consistent with the indigenous community’s traditional land tenure system and on the fact that the resources had never belonged to anyone else); see also *Permanent*

suggests that indigenous peoples should have substantive rights to subsurface resources where the state's legal framework accords such rights to other landowners.⁷¹ Moreover, if subsurface resources are part of an indigenous peoples' land tenure system, then equal respect for indigenous peoples dictates that the state not appropriate those resources.⁷² Even where indigenous peoples' substantive rights over subsurface resources remain ambiguous, extraction has the potential effect of violating indigenous peoples' other recognized human rights. Ultimately, while the international doctrine of permanent sovereignty over natural resources may continue to play a role in shaping indigenous peoples' substantive rights to own, use, and manage subsurface resources, its rigid post-colonial interpretation is gradually giving way to an analysis that is more consistent with indigenous peoples' contemporary status under international law.⁷³

Additionally, even though indigenous peoples have been successful in establishing their procedural right to meaningfully participate in decisions affecting their lands and resources, they have faced challenges to the ultimate exercise of veto power.⁷⁴ Compelling arguments have been made that customary international law supports the norm of prior informed consent with

Sovereignty Over Natural Resources, *supra* note 9, ¶¶ 44–45 (promoting the reasoning of the African Constitutional Court in *Alexkor Ltd.*).

⁷¹ Anaya, *supra* note 66, at 10.

⁷² *Id.* at 16.

⁷³ See *Permanent Sovereignty Over Natural Resources*, *supra* note 9, ¶ 55 (concluding that “[t]hrough indigenous peoples’ permanent sovereignty over natural resources has not been explicitly recognized in international legal instruments . . . the right exists in international law by reason of the positive recognition of a broad range of human rights held by indigenous peoples, most notably the right to own property, the right of ownership of the lands they historically or traditionally use and occupy, the rights to self-determination and autonomy, the right to development, the right to be free from discrimination, and a host of other human rights”).

⁷⁴ For a comprehensive overview of issues associated with indigenous peoples’ right to participation in the “development” of their lands and resources by state-corporate enterprises, see *Transnational Investments and Operations on Indigenous Lands, 1992 Report*, *supra* note 13, ¶ 24. For one articulation of the norm, see, e.g., *Maya Case*, *supra* note 42, ¶ 142. Specifically, the Inter-American Commission observed the following in the Maya case:

[O]ne of the central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories. [A member state must] ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the Commission’s view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.

Id.

respect to a range of activities affecting indigenous lands,⁷⁵ and it is clear that indigenous peoples are entitled, at a minimum, to prior, meaningful consultation.⁷⁶ The important distinction is that while prior meaningful

⁷⁵ The position that indigenous peoples are entitled to prior informed consent under customary international law with respect to activities upon their traditional lands is supported by a recent standard setting working paper prepared by the U.N. Working Group on Indigenous Populations regarding the concept of free, prior and informed consent. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Promotion & Prot. of Human Rights, *Expanded Working Paper: Legal Commentary on the Concept of Free, Prior and Informed Consent*, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/WP.1 (July 14, 2005) (prepared by Antoanella-Iulia Motoc & Tebtebba Found.). The working paper states that such concept has "crystalliz[ed] . . . as a norm . . . to be applied in relation to indigenous peoples in pursuit of social and environmental justice, and human rights for all." *Id.* ¶ 6. While recognizing the role of the private sector, the working paper nevertheless exclusively focuses on elaborating the concept of free, prior and informed consent with respect to duties and obligations of states. *See id.* ¶ 7.

⁷⁶ Various articulations of indigenous peoples' participatory rights with respect to decisions affecting their interests in lands and resources are provided by standard setting international documents and decisions. For example, ILO Convention No. 169 requires prior consultation "with a view to ascertaining whether and to what degree [indigenous peoples'] interests would be prejudiced" to the proposed measures where the state retains ownership of subsurface resources or "rights to other resources pertaining to lands." ILO Convention No. 169, *supra* note 44, art. 15(2). If indigenous peoples are to be relocated, ILO Convention No. 169 requires "free and informed consent," or where consent cannot be obtained, appropriate procedures pursuant to national laws and regulations. *Id.* art. 16(2). The United Nations Declaration on the Rights of Indigenous Peoples refers to a state's obligation to "consult and cooperate in good faith" with indigenous peoples in order to "obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources." U.N. Declaration, *supra* note 60, art. 32. It further provides that relocation of indigenous peoples requires their "free, prior and informed consent." *Id.* art. 10. The Organization of American States' proposed Declaration on the Rights of Indigenous Peoples, in its most current formulation, provides that in cases where a state has "property rights over the minerals or resources of the subsoil" or over "over other resources existing in the lands and territories of the indigenous peoples," the "participation of the peoples concerned" is required before "undertaking or authorizing any program involving prospecting, planning, or exploitation of the resources existing on their lands and territories." OAS Draft Declaration, *supra* note 61, art. XXIV(7). A definitive text remains to be adopted regarding indigenous peoples' right to either "prior information or consultation" or "free, prior and informed consent" on measures and actions which may "affect the environment in indigenous lands." *Id.* art. XVIII(3), n.11. Nevertheless, it appears to be clear that indigenous peoples cannot be "transferred or relocated" without their "free, prior, and informed consent" with few exceptions. *Id.* art. XXV(1). Additionally, after much debate, the World Bank opted for a formulation of indigenous peoples' participatory rights as requiring only prior informed consultation with respect to projects financed by the Bank. World Bank, Operations Manual, BP 4.10: Indigenous Peoples (July 2005), <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/B52929624EB2A3538525672E00775F66/DBB9575225027E678525703100541C7D?OpenDocument>. Moreover, the Inter-American Commission on Human Rights has found that indigenous peoples' right to property under the American Convention and the Declaration on the Rights and Duties of Man is violated where the state fails to adequately consult with, or seek the informed consent of, indigenous peoples prior to engaging in activities upon their traditional lands. *See, e.g.,* Maya Case, *supra* note 42, ¶ 194 (finding that logging and oil concessions granted by the State of Belize to companies without "effective consultations with and informed consent of

consultation arguably enables indigenous peoples to play a significant participatory role in the management of their lands and resources, it may not be tantamount to the absolute right to veto activity upon their lands. Significantly, it appears that the norm is developing as one of prior informed consent where the state seeks to engage in the extraction of surface resources or in other development projects directly affecting indigenous peoples' rights to use, enjoy, control, and develop their traditional lands.⁷⁷ However, where the state claims ownership of the subsurface resources and extraction will indirectly affect indigenous peoples' other substantive rights, then prior informed consultation may be deemed to suffice.⁷⁸ Of course, if indigenous peoples were recognized to have substantive ownership rights to subsurface resources, then the state would need to obtain consent to appropriate the resources through extractive activities. In any case, for purposes of the analysis undertaken in this Article, the important core principle is that indigenous peoples have a right to be a part of meaningful decision making processes that affect their lands and resources and final decisions, whether subject to a veto or not, should be consistent with indigenous peoples' substantive rights.

The development of specific substantive and procedural land rights has produced significant consequences for indigenous peoples. First, such recognition has allowed indigenous peoples to protect their interests without the need to necessarily engage in broader analyses under the rubrics of, for example, minority rights or environmental rights. Second, the recognition of specific human rights with respect to indigenous lands and resources evidences how human rights of general applicability have been interpreted to promote and secure indigenous peoples' legitimate claims. There has also been a willingness to re-conceptualize limiting interpretations of colonial and post-colonial international doctrines inconsistent with indigenous peoples' contemporary status. Third, to the extent indigenous land rights are grounded in customary international law, they are evidence of an international consensus and are binding upon states irrespective of treaty formalization. Fourth, while the outer parameters of some rights remain more ambiguous than others, there has been sufficient specificity to hold states responsible and accountable for a range of violations.⁷⁹ Through claims raised by indigenous peoples under the international human rights framework, these rights have also been the subject of much scrutiny and detailed analysis serving to reinforce underlying norms.

These consequences, in turn, raise implications for developing a theory of corporate responsibility and accountability. The way in which the discourse of human rights has evolved to free indigenous peoples from limiting interpretations of international documents and doctrines further reiterates the

the Maya people" constituted a violation of human rights guarantees); Dann Case, *supra* note 42, ¶ 131 (finding that international law requires "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent").

⁷⁷ Anaya, *supra* note 66, at 17.

⁷⁸ *Id.*

⁷⁹ *See supra* notes 42–43.

potential receptiveness of such discourse for recognizing indigenous peoples' legitimate claims vis-à-vis corporate actors that impact their survival and distinct ways of life. Additionally, because minimum precepts regarding indigenous land rights are arguably recognized as part of an international consensus, the international legal order may be particularly receptive to playing a role in assigning corporate responsibility and accountability where such rights are at issue. Indigenous land rights are also sufficiently specific and well-developed to serve as a starting point for proposing the actual substance of corporate obligations.⁸⁰

C. *Impact of Corporate Actors*

Indigenous peoples' recognized land rights are impacted not only by states but also by corporate actors engaged in collaborative enterprises with states. In the mainstream, these non-state actors are conceptualized as neutral, passive participants legally authorized by states to engage in their business. The real role of these actors, however, is more complex. While the circumstances leading to the creation of a collaborative venture between a state and corporate actor may differ and while the impact of such a collaborative venture may not be identical in every scenario where indigenous peoples are involved, it is evident that many of these ventures develop from an alignment of state and corporate interests.⁸¹

Specifically, in a hybrid state-corporate enterprise, the state government enters into a land concession agreement or other collaborative contractual arrangement such as a joint venture agreement, lease agreement, or franchising regime to allow corporate interests to exploit indigenous lands.⁸² The state and corporation share a common economic goal such as the extraction of natural

⁸⁰ See *infra* Part IV(C). Of course, the contemporary achievements of the indigenous rights movement have been the result of a lengthy historical struggle. Although the further elaboration of indigenous land rights vis-à-vis corporate actors may, likewise, not be immediate, such elaboration is no longer impossible.

⁸¹ See Ratner, *supra* note 17, at 462 (finding that "the desire of many less developed states to welcome foreign investment means that some governments have neither the interest nor the resources to monitor corporate behavior, either with respect to the TNEs' employees or with respect to the broader community" and "[i]n extreme cases, governments actually grant corporations de facto control over certain territories").

⁸² See *Transnational Investments and Operations on Indigenous Lands, 1994 Report*, *supra* note 13, ¶ 10 (finding that where a state government claims ownership of land or resources, "TNCs [transnational corporations] enjoy an advantage over indigenous peoples in obtaining secure legal title from [g]overnments"); *Permanent Sovereignty Over Natural Resources*, *supra* note 9, ¶ 43 (finding that with respect to subsurface resources, "in many countries, subsurface resources are declared by law to be the property of the State," and further emphasizing that "[s]uch legal regimes have a distinct and extremely adverse impact on indigenous peoples, because they purport to unilaterally deprive the indigenous peoples of the subsurface resources that they owned prior to colonial occupation and the creation of the present State").

resources or the execution of a large-scale development project.⁸³ Both the state and corporate actor depend on the other's support or acquiescence in order to successfully execute the project and profit from it.⁸⁴ Specifically, the corporation needs the state to obtain rights over the lands or resources necessary to pursue its business, whether it constitutes logging, mining, oil drilling or the construction of a pipeline or dam.⁸⁵ Corporations lobby state governments in order to access lands necessary for the realization of these business goals and seek the best terms for carrying them forth. The government seeks the primarily economic benefits to its economy produced by foreign investment upon such lands and ultimately possesses an equally significant economic stake in the project.⁸⁶ As an integral part of the business venture, the state sanctions the corporate activity and provides assistance to the corporation so that it may successfully execute the project.⁸⁷ By virtue of their mutual

⁸³ Generally, the "purpose of such projects [for the state] may vary, from furthering economic growth to flood control, generating electrical and other energy resources, improving transportation networks, promoting exports to obtain foreign exchange, creating new settlements, ensuring national security, and generating employment and income opportunities for the local population." *Human Rights and Indigenous Issues*, *supra* note 38, ¶ 6. Specifically, with respect to natural resource extraction, countries particularly burdened with high levels of external debt are "particularly anxious to attract TNCs to finance and to develop their extractive industries." *Transnational Investments and Operations on Indigenous Lands, 1994 Report*, *supra* note 13, ¶ 9. Several case studies discussing the effects of state-corporate activity on indigenous lands also point to the state's interest in the resulting economic boosts to the economy.

⁸⁴ Specific case studies of hybrid state-corporate activity on indigenous peoples' land rights have suggested that "TNCs often help support a regime that repays them with concessions of indigenous peoples' territories." *Transnational Investments and Operations on Indigenous Lands, 1994 Report*, *supra* note 13, ¶ 12. In extreme cases, oil corporations engaging in extraction activities upon lands plagued by issues of rebel control may be "prepared to tolerate a higher threshold of violence in order to maintain in place a government that is friendly to it." *See Dufresne*, *supra* note 19, at 347.

⁸⁵ *See Transnational Investments and Operations on Indigenous Lands, 1994 Report*, *supra* note 13, ¶¶ 9–12 (finding that some countries design land use policies to attract TNCs).

⁸⁶ *See supra* note 83. Some would consider the state's response a consequence of the "development project." The state presumably pursues these ventures as means of promoting the development of its economy, and thereby, the standard of living of its people as a whole. "Development" is generally conceptualized as serving the best interests of a society even if such interests conflict with the interests of specific constituencies such as indigenous peoples.

⁸⁷ A stark example of such state assistance is evident in the case of TNC activity on the lands of indigenous peoples in Myanmar. *Transnational Investments and Operations on Indigenous Lands, 1994 Report*, *supra* note 13, ¶ 12. The TNC involved in those operations helped support the Myanmar regime, which in turn, helped support the project by suppressing dissent among indigenous peoples. *See id.* Often such interdependence creates a vicious cycle of exploitation, where "the [g]overnment's efforts to suppress dissent lead to greater resistance, an increasing need for hard currency to pay for military operations, and satisfying that need through more extensive disposals of lands and resources to TNCs." *Id.*; *see also Doe I v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997). Another notable example involves Chile's "complete disregard for the [state's] existing indigenous and environmental legislation" in favor of its enterprise to build a dam with ENDESA, a private corporation. *See Human Rights and Indigenous Issues*, *supra* note 38, ¶ 35. In Chile,

interests and interdependence regarding the successful execution of the project, the corporation exercises considerable control or influence over government acts and omissions and the state likewise exercises significant control or influence over corporate behavior.⁸⁸ In this flux of inextricable power, both the state and corporation dictate the ultimate direction of the enterprise and its associated operations. The interests of indigenous communities affected by such projects are often neglected and overridden.⁸⁹ Ultimately, indigenous peoples are seldom meaningfully consulted prior to the engagement of hybrid state-corporate activity upon their lands, and such activity often leads to the loss of indigenous peoples' cultural, religious, and subsistence activities. Consultation processes that do not provide safeguards for, at a minimum, meaningful dialogue with indigenous peoples and incorporation of indigenous requests may be co-opted by state-corporate interests to provide a shroud of legitimacy to state-corporate projects.

In limited circumstances, generally where the state government domestically recognizes indigenous ownership of lands and resources, indigenous peoples have been able to negotiate directly with corporate actors interested in resource extraction or other activities upon their lands, and thereby have significantly protected their interests.⁹⁰ Of course, it is possible that even in cases where indigenous peoples themselves negotiate the terms of corporate activity upon their lands, such corporate activity may lead to adverse impacts.⁹¹

"business priorities, with State support, appear[ed] to override the social and environmental concerns that have been expressed by massive protests and court action undertaken by [the indigenous] Mapuche organizations and their supporters." *Id.* ¶ 36. Similarly, even though Colombia has been recognized as one of the most progressive countries with respect to their formalized protections of indigenous peoples' land rights, including constitutionally mandated consultation with indigenous peoples regarding state sponsored activities upon their lands, both the Embera-Katio and U'wa indigenous peoples have suffered violations to their land rights as a result of hybrid state-corporate activity related to dam building and oil drilling, respectively. *See id.* ¶¶ 37–43.

⁸⁸ *See supra* notes 83–84 and accompanying text.

⁸⁹ *See Transnational Investments and Operations on Indigenous Lands, 1991 Report, supra* note 9, ¶¶ 26–31 (outlining the environmental, social, cultural, and psychological impacts on indigenous peoples of "development" activities involving corporate actors and suggesting that these impacts may outweigh potential benefits to the indigenous communities in terms of employment or even royalties); *Human Rights and Indigenous Issues, supra* note 38, at 2 (finding generally that indigenous peoples "bear disproportionately the costs of resource-intensive and resource-extractive industries" and that the "principal human rights effects of [large multipurpose dams] for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence").

⁹⁰ *Transnational Investments and Operations on Indigenous Lands, 1991 Report, supra* note 9, ¶ 43.

⁹¹ *Id.* ¶¶ 33–34 (discussing problems with erosion and desertification resulting from coal-stripping operations by Peabody Coal Co. (United Kingdom), the Pittsburgh & Midway Coal Company, and Utah International pursuant to long-term leases executed directly with the Navajo tribe as well as problems with stream contamination from the Red Dog lead-zinc

However, indigenous peoples' direct, meaningful negotiation with the interested corporate actor is consistent with indigenous peoples' human right to self-determination and serves to diffuse the alignment between state and corporate interests.

The international legal order has acknowledged the significant effects of hybrid state-corporate activity on indigenous peoples and even emphasized the role played by the corporate actor involved. As early as 1989, the United Nations' Working Group on Indigenous Populations recommended that the then United Nations Centre on Transnational Corporations (UNCTC) assist the Working Group in preparing a database surveying transnational investments and operations on indigenous lands and territories with specific case studies from the Americas, Africa, and Asia.⁹² The UNCTC produced several reports that ultimately highlighted the significant role played by corporations in indigenous peoples' protection and enjoyment of their lands⁹³ as well as indigenous peoples' responses to such activity.⁹⁴ Taken together, the reports outline the often adverse impacts of corporate activity upon indigenous lands and resources, analyze the modalities and quality of indigenous peoples' participation in the planning and execution of such corporate activities, and make recommendations for the protection of indigenous peoples' interests.

The fourth and final report aptly captures the confluence of factors leading to the neglect of indigenous peoples' interests in the context of the hybrid state-corporate enterprise:

A major threat to the survival and sustainable development of indigenous peoples in all regions is private sector activity, over which most indigenous peoples still exercise little influence or control. The recent collapse of the former Soviet Union, transition to market-oriented economies in many formerly socialist countries, and democratization and

mine in northwest Alaska operated by a corporate actor under a lease with NANA, an indigenous regional corporation).

⁹² The United Nations Programme on Transnational Corporations was originally carried out by the UNCTC. However, the Programme on Transnational Corporations has been transferred to the United Nations Conference on Trade and Development (UNCTAD) and is now being implemented by UNCTAD's Division on Investment, Technology and Enterprise Development. For a discussion of the development of UNCTAD, see Peter T. Muchlinski, *Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 97, 97–117 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

⁹³ *Transnational Investments and Operations on Indigenous Lands, 1991 Report*, *supra* note 9; *Transnational Investments and Operations on Indigenous Lands, 1992 Report*, *supra* note 13; *Transnational Investments and Operations on Indigenous Lands, 1994 Report*, *supra* note 13.

⁹⁴ Indigenous peoples' opposition to state-corporate activity upon their lands may be grounded in different perspectives. Traditionalists within a tribe, for example, may be opposed to projects upon traditional indigenous lands on the ground that any developmental intrusion is an affront to indigenous culture and religion which is based on ties to the land. See *Transnational Investments and Operations on Indigenous Lands, 1992 Report*, *supra* note 13, ¶¶ 35–49. However, others within a tribe may not be completely opposed to corporate activity upon their lands, but rather, opposed to such activity without their consent or direct, meaningful negotiation. *Id.*

decentralization of many Governments in Africa and Latin America have reduced the role of State enterprises in the extractive sectors, such as mining and logging, which tend to have devastating impacts on indigenous peoples' territories. At the same time, many countries responded to the global recession by encouraging greater extraction of minerals and timber by TNCs [transnational corporations] to earn foreign exchange for imports and debt service. Moreover, few Governments enacted legislation to protect indigenous peoples' land rights.⁹⁵

Nevertheless, the ultimate recommendations found in the reports focus on potential reforms inherent in the behavior of states and affected indigenous peoples, with little analysis on the imposition of direct corporate responsibility and international accountability. These recommendations include the development of programs to "assist [g]overnments and indigenous peoples in designing mechanisms for sharing responsibility for natural resource management" or to "help indigenous peoples strengthen their capacity for negotiating with transnational corporations, and conducting environmental assessments."⁹⁶ With respect to corporate actors, the report suggests that they should be "encouraged" to negotiate partnership agreements with indigenous peoples through, again, "vigorous State enforcement of land rights against companies that trespass or cause ecological harm; national and international concessional support for enterprises that respect and work in partnership with indigenous peoples; and investment in indigenous peoples' capacity to manage resources, evaluate project proposals, and negotiate agreements."⁹⁷ While the recommendations at least support some measure of corporate "encouragement," they fall short of proposing the imposition of any meaningful responsibility or accountability upon the corporate actor involved.

More recently, Rodolfo Stavenhagen, the Special Rapporteur to the Commission on Human Rights on indigenous issues, prepared a report regarding the impact of large-scale or major development projects on the human rights and fundamental freedoms of indigenous peoples.⁹⁸ The report includes selected case studies from Costa Rica, Chile, Colombia, India, and the Philippines that highlight the adverse impacts suffered by indigenous peoples as a result of hybrid state-corporate activities undertaken upon their lands without their meaningful consent or participation. More specifically, the report explains:

Traditionally, few Governments have taken the rights and interests of indigenous peoples into account when making plans for major development projects. As the projects mature, which may take several years depending on their characteristics, the concerns of indigenous

⁹⁵ *Transnational Investments and Operations on Indigenous Lands, 1994 Report*, *supra* note 13, ¶ 18.

⁹⁶ *Transnational Investments and Operations on Indigenous Lands, 1992 Report*, *supra* note 13, ¶ 32.

⁹⁷ *Transnational Investments and Operations on Indigenous Lands, 1994 Report*, *supra* note 13, ¶ 25.

⁹⁸ *See Human Rights and Indigenous Issues*, *supra* note 38.

peoples, who are seldom consulted on the matter, take a back seat to an overriding “national interest,” or to market-driven business objectives aimed at developing new economic activities, and maximizing productivity and profits.⁹⁹

One conclusion drawn from the report is that the issue of extractive resource development and human rights does not involve merely the state and indigenous peoples but rather “the relationship between indigenous peoples, Governments and the private sector.”¹⁰⁰ The report speaks directly to “potential investors,” providing that “[p]otential investors must be made aware at all times that the human rights of indigenous peoples should be a prime objective when investment decisions in development projects are made in such areas or are expected to affect indigenous peoples directly or indirectly.”¹⁰¹ Unlike the earlier reports of the UNCTC, this report suggests that, in addition to state efforts, the private sector should, and could, bear responsibilities and accountability to indigenous peoples.

Additionally, the United Nations’ Sub-Commission on the Promotion and Protection of Human Rights issued a report from the United Nations High Commissioner on Human Rights relating to the responsibilities of transnational corporations and related business enterprises.¹⁰² In analyzing the question of which human rights should trigger business responsibilities, this U.N. report provides a non-exhaustive list of the most relevant human rights to businesses and includes a general reference to indigenous peoples’ rights. It does not, however, provide a specific elaboration of what precisely a corporate actor must do to observe indigenous peoples’ rights.¹⁰³ Significantly, the report highlights the need to understand with more specificity the nature and scope of corporate human rights responsibilities as well as the possible frameworks for guaranteeing compliance.¹⁰⁴

The analyses in these reports have further shaped the contemporary understanding of indigenous land rights. It is clear that states are not the only actors capable of impacting the land rights of indigenous peoples. What these analyses effectively show is that corporate actors are not external, passive sidelines in the relationship between indigenous peoples and the state, but invested, participatory entities with interests often inextricably aligned with

⁹⁹ *Id.* ¶ 8.

¹⁰⁰ *Id.* ¶ 66.

¹⁰¹ *Id.* ¶ 72.

¹⁰² U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Promotion & Prot. of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005) [hereinafter *U.N. Report Regarding Human Rights of Business Enterprises*]. The report engages three different analyses: 1) it reviews the scope and legal standards of existing corporate responsibility initiatives with respect to human rights; 2) it provides a comparison of the various initiatives and standards; and 3) it outlines several outstanding issues with respect to providing a systematic framework of corporate responsibility and accountability under international law.

¹⁰³ *Id.* ¶ 42.

¹⁰⁴ *Id.* ¶¶ 27–48.

those of the state. While some may continue to argue that corporate investment and activity upon indigenous lands has the potential to produce tangible benefits to the indigenous peoples involved, studies of such activities have shown that often the results are devastating to the indigenous communities and “never negligible.”¹⁰⁵

These analyses also suggest that focusing on the state and the indigenous peoples involved is not enough to operationalize indigenous land rights; rather, meaningful corporate responsibility and accountability is necessary. While the first three UNCTC reports emphasize the significant influence exerted by corporate actors on states and the potentially adverse impacts of corporate activity on indigenous peoples’ lands, the reports’ ultimate conclusions and recommendations do not refer to corporate actors’ own share of responsibility and accountability. Rather, these initial analyses focus on the state, and even indigenous peoples themselves, as the ultimate bearers of responsibility and accountability for the adverse effects produced, at least in part, by corporate acts. Nevertheless, the latter reports appear to recognize the more responsible role that corporate actors not only could, but should, exercise with respect to activities impacting indigenous peoples’ land rights and ultimately suggest that corporate actors should not escape some measure of scrutiny at the international level.

III. CORPORATE RESPONSIBILITY AND ACCOUNTABILITY UNDER THE DISCOURSE OF HUMAN RIGHTS

Because indigenous peoples have been successful in gaining specific recognition of their claims to lands and resources against the state within the discourse of human rights, it would seem appropriate to analyze the possibility of grounding a theory of corporate responsibility and accountability within such discourse. While much analysis has been focused on utilizing human rights precepts to support indigenous peoples’ claims to lands and resources vis-à-vis states, the use of these precepts to also support indigenous peoples’ claims to lands and resources vis-à-vis corporations has received less attention. Indisputably, grounding corporate responsibility and accountability for violations of indigenous land rights within a human rights analysis presents limitations. Nevertheless, the human rights discourse is continuously evolving and, in its most recent formulation, likely constitutes a promising source for international corporate regulation relevant to indigenous peoples’ land rights.¹⁰⁶

There are three primary approaches consistent with a human rights analysis that could be utilized to theorize corporate responsibility and accountability at the international level in the context of hybrid state-corporate activity. First, indigenous peoples could advocate for the promotion of voluntary business initiatives that specifically outline corporate responsibilities of businesses with respect to indigenous land rights. Second, moving beyond voluntarism, indigenous peoples could advocate a state-centered approach

¹⁰⁵ *Human Rights and Indigenous Issues*, *supra* note 38, at 2.

¹⁰⁶ *See, e.g.*, Kinley & Tadaki, *supra* note 17; Deva, *supra* note 17.

whereby the state remains the exclusive bearer of international human rights responsibility and accountability and the joint corporate actor bears indirect responsibility and accountability through the state. Third, indigenous peoples could advocate for a hybrid state-corporate approach whereby both the state and its joint corporate actor bear commensurate international human rights responsibilities and direct international accountability. All of these approaches present both challenges and possibilities for operationalizing indigenous peoples' human rights over lands and resources and are more fully examined in Part IV.

As developed more fully below, limitations inherent in the discourse of human rights suggest that the first two approaches are perhaps the most immediately feasible. However, the third approach arguably provides the most protection to indigenous peoples and, while a more challenging proposition, could nevertheless find justification within a human rights analysis.

A. *Assessing the Limitations*

The discourse of human rights presents some limitations to a theorization of corporate responsibility and accountability that are not necessarily unique to the context of indigenous peoples' land rights. The interplay between two primary structural principles in international law have served to focus discussions of human rights responsibilities on states and curb systematic discussion regarding the potential human rights responsibilities and accountability of corporations. These include the public/private binary¹⁰⁷ and the orthodox doctrine of state sovereignty.

The public/private binary has generally served to circumscribe the assignment of international human rights responsibilities on corporate actors. One result has been that, despite the absence of a bright line between "public" state and "private" corporate action in the context of hybrid state-corporate activity on indigenous lands, indigenous human rights jurisprudence has focused on developing the responsibilities of states.¹⁰⁸

Pursuant to such binary, public law is canonically concerned with regulating the impact of state action.¹⁰⁹ At the international level, public law focuses on the assignment of rights and duties on states in relation to other states and in relation to the constituents of a state.¹¹⁰ International human rights have been largely developed as precepts of public international law that serve

¹⁰⁷ For a discussion of how the public/private binary serves to limit analyses of corporate responsibility, see Dufresne, *supra* note 19, at 369–77.

¹⁰⁸ There is, nevertheless, literature on the impact of multinational corporate activity on indigenous land rights. *See supra* note 16.

¹⁰⁹ "Canonically, public law consists 'of constitutional, administrative, criminal, and international law, concerned with the organization of the state, the relations between the state and the people who compose it, the responsibilities of public officers to the state, to each other, and to private persons, and the relations of states to one another.'" Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 518 (2005).

¹¹⁰ *Id.*

to regulate state action with respect to a state's constituents at the international level. This development is notably at odds with the language in the preamble to the Universal Declaration of Human Rights, which proposes that "every individual and every organ of society . . . shall strive . . . to promote respect for . . . [human] rights and freedoms."¹¹¹

The private sphere, conversely, has been traditionally concerned with the impact of transactions between individuals, including juridical persons such as corporations.¹¹² Much of the private sphere is particularly concerned with economic transactions between individuals.¹¹³ Within this economic context, the private sphere has been infused with largely neo-liberal economic ideology that has served to distance economic transactions from notions of legal governmental regulation.¹¹⁴ In effect, the law is considered an exceptional measure for rectifying market forces.¹¹⁵ While the regulation of transactions between individuals and juridical persons has conventionally been relegated to the domestic level, globalization has resulted in increased transnational economic transactions between non-state actors.¹¹⁶ Therefore, at the international level, the private sphere is largely concerned with the regulation of economic transactions that transpire between global actors.¹¹⁷

Ultimately, the international sphere of the public, within which human rights precepts are subsumed, has developed separately from the international sphere of the private. This has perhaps led to the association of human rights precepts with state duties and the association of transnational economic

¹¹¹ See Universal Declaration of Human Rights, *supra* note 53, pmbl.

¹¹² See Berman, *supra* note 109, at 518 (finding that private international law consists of "[t]hat portion of law which defines, regulates, enforces, and administers relationships among individuals, associations, and corporations"); see also Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 34 (1996), available at <http://www.jus.uio.no/lm/man/pdf/1905017200.pdf> (analyzing the "associated fields" of private international law, international business law, international economic law, and public international law and pointing out the "emptiness of the category 'private international law'").

¹¹³ See Michael K. Addo, *Human Rights Perspectives of Corporate Groups*, 37 CONN. L. REV. 667, 675 (2005) (referencing and critiquing the "enduring belief in the separation between the private domain (to which economic affairs belong) and the public domain, each with a different organizational structure and different aims and purposes").

¹¹⁴ *Id.* ("[T]he principles of freedom of the market as the primary rules may only be tempered by the rules of law to the extent only that the latter enriches and advances the ideals of economic priorities. The intervention in economic affairs through law is therefore exceptional to the general rule of economic freedom.")

¹¹⁵ *Id.*

¹¹⁶ For a discussion of globalization and its effect on the protection of human rights, see Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273 (2002), available at http://www.bc.edu/bc_org/avp/law/lwsch/journals/bcicl/25_2/06_TXT.htm. For a discussion of whether internationalization produces a transfer of power from public to private authorities, see David Kennedy, *Receiving the International*, 10 CONN. J. INT'L L. 1 (1994), available at <http://www.law.harvard.edu/faculty/dkennedy/publications/connecticut.pdf>.

¹¹⁷ See Shelton, *supra* note 116, at 382-84.

corporate activity with neo-liberal notions of deregulation.¹¹⁸ By implication, international human rights precepts have been understood as imposing responsibilities almost exclusively on states even though they could also be understood to give rise to responsibilities on behalf of non-state actors.¹¹⁹ An undiscerning adherence to the divide between “the public” and “the private” has the potential of positing analyses regarding indigenous human rights, including land rights, as diametrically opposed to analyses of corporate responsibility, or even further, as wholly incompatible.¹²⁰

The public/private binary further interplays with the orthodox doctrine of state sovereignty to potentially circumscribe the development of an international theory of direct corporate accountability. Despite the potential collusive nexus between a corporate actor and the state in a hybrid state-corporate enterprise and the significant impact of such corporate actor’s conduct on the indigenous peoples involved, an international theory of direct corporate accountability in such context lacks development.

The state retains primacy in the international order, and therefore, the implementation and enforcement of human rights norms is deemed to first be a matter of state action.¹²¹ The purpose of the international human rights accountability framework is to ensure that states are complying with international human rights norms.¹²² Accordingly, potential violations of human rights involving corporate actors are more likely to be conceptualized as failures of states to effectively implement human rights legislation or enforce legislation against those actors. The final result is that international law analyses regarding corporate activity that impacts human rights are typically limited to notions of indirect legal accountability arrived at via the direct legal accountability of the state.¹²³

¹¹⁸ Of course, the association of human rights precepts with state duties could be a product of the historical primacy of the state in the international system. *See* Ratner, *supra* note 17, at 469.

¹¹⁹ *See id.* (“Thus, while human rights law has focused on state duties, the two are by no means tied to each other jurisprudentially or even historically. The link is rather a product of a decision by those concerned with human rights, including those in government, that (1) states represent the greatest danger to the individual; (2) domestic law cannot alone effectively constrain state action; (3) domestic law can effectively regulate private action; and probably (4) states will never accept international regulation of private entities.”)

¹²⁰ *See* Addo, *supra* note 113, at 670 (“In transnational business matters, the separation of domains of responsibility between governments and TNCs is both fictitious and unworkable to the extent that tasks and responsibilities of public and private entities are inextricably mixed.”).

¹²¹ *See* Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 INT’L LAW. 69, 71–72 (2003).

¹²² *See* ANAYA, *supra* note 9, at 217–18 (“Offending states—regardless of their consent—may find themselves subject to a level of international scrutiny depending upon the gravity of noncompliance with applicable norms or the degree to which violations of human rights linger unchecked by domestic institutions and decision makers”).

¹²³ This result is aided by TNCs’ own efforts. *See* Dufresne, *supra* note 19, at 334, 348–77 (examining “how TNCs are prompt to use major structural divides of international law to dis-embed themselves from the host state’s polity on issues of enforcement and to project all responsibility for enforcement activities on the government”).

As a corollary, international initiatives seeking to impose human rights responsibilities directly on corporate actors are for the most part designed within a paradigm of voluntarism.¹²⁴ Accordingly, at the international level, corporate accountability for violations of indigenous land rights appears limited to notions of indirect accountability or to corporate self-regulation.¹²⁵

An undiscerning adherence to the conceptual limitations outlined above could frustrate theorizations of corporate responsibility and accountability beyond a voluntarism or state-centered approach. However, the discourse of human rights is evolving and should be looked to for possibilities beyond these two approaches.

B. *Exploring the Possibilities*

The aforementioned structural barriers, while not completely dismantled, have nevertheless received considerable criticism.¹²⁶ The view that human rights precepts only give rise at the international level to state responsibility appears to be undergoing a conceptual shift.¹²⁷ While there is no international, systematic regulatory regime that addresses corporate responsibility for human rights violations, there are four initiatives that have garnered significant attention. These include the International Labor Organization's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,¹²⁸ the Organization for Economic Cooperation and Development's

¹²⁴ For a comparison of international initiatives seeking to impose human rights responsibilities directly on corporate actors, see *U.N. Report Regarding Human Rights of Business Enterprises*, *supra* note 102, annex III.

¹²⁵ These structural barriers to direct legal accountability of corporate actors under international law are compounded by the domestic discourse of entity theory which dictates the legal structure of the world's biggest businesses. For a concise treatment of the challenges presented to a theorization of transnational corporate accountability by entity theory, see Phillip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT'L & COMP. L. REV. 297 (2001).

¹²⁶ See, e.g., ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 137 (1993); see also Dufresne, *supra* note 19; Ratner, *supra* note 17; Berman, *supra* note 109; Addo, *supra* note 113. Feminist scholars have also paid particular attention to the illusory divide between the public and the private sphere. See, e.g., Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 625-30 (1991). The norm of sovereignty has also been subject to re-conceptualization as a result of human rights analyses. See, e.g., William J. Aceves, *Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation*, 25 HASTINGS INT'L & COMP. L. REV. 261 (2002); Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT'L L. 527, 533 (2001).

¹²⁷ See Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006) (discussing the "ramifications of current efforts to internationalize the regulation of corporate social responsibility").

¹²⁸ International Labor Office, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, Nov. 16, 1977, 17 I.L.M. 422. This document is primarily concerned with human rights violations in the context of employment.

Guidelines for Multinational Enterprises,¹²⁹ the United Nations' Global Compact,¹³⁰ and most recently, the United Nations' Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights ("U.N. Draft Norms").¹³¹ While none of these initiatives outline with sufficient specificity what the international community expects of businesses whose activities affect the enjoyment of human rights,¹³² what they do provide is evidence of an emerging international consensus that corporations should bear responsibilities with regard to human rights.¹³³ Such initiatives also suggest that the international legal order constitutes an appropriate forum for the establishment of some form of corporate accountability. Notably, the U.N. Draft Norms propose the development of international monitoring and other mechanisms for scrutinizing corporate actors' compliance with human rights responsibilities.¹³⁴

¹²⁹ Organization for Economic Co-operation & Development, Guidelines for Multinational Enterprises, June 21, 1976, 15 I.L.M. 969. This document only includes a general reference to corporate responsibility with respect to human rights.

¹³⁰ Press Release, U.N. Sec'y-Gen. Kofi Annan, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Doc. SG/SM/6881 (Feb. 1, 1999). The global compact principles only include a general reference to corporate responsibility with respect to human rights.

¹³¹ U.N. Office of High Comm'r for Human Rights, Sub-Comm'n on Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *U.N. Draft Norms*]. This is the most comprehensive document and it specifically refers to the rights of indigenous peoples.

¹³² The Commentary to the U.N. Draft Norms does elaborate on the potential human rights responsibilities of corporate actors to indigenous peoples. It provides in relevant part:

Transnational corporations and other business enterprises shall respect the rights of local communities affected by their activities and the rights of indigenous peoples and communities consistent with international human rights standards such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169). They shall particularly respect the rights of indigenous peoples and similar communities to own, occupy, develop, control, protect and use their lands, other natural resources, and cultural and intellectual property. They shall also respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects. Indigenous peoples and communities shall not be deprived of their own means of subsistence, nor shall they be removed from lands which they occupy in a manner inconsistent with Convention No. 169. Further, they shall avoid endangering the health, environment, culture, and institutions of indigenous peoples and communities in the context of projects, including road building in or near indigenous peoples and communities. Transnational corporations and other business enterprises shall use particular care in situations in which indigenous lands, resources, or rights thereto have not been adequately demarcated or defined.

U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion & Protection of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 10(c), U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003) [hereinafter *Commentary on U.N. Draft Norms*].

¹³³ The international legal order has already recognized the human rights responsibilities of non-state actors, including rebel groups and individuals. See Ratner, *supra* note 17, at 466–67.

¹³⁴ See *Commentary on U.N. Draft Norms*, *supra* note 132, ¶ 16(b).

Despite conceptual limitations in the discourse of human rights, these developments suggest there is room for formulating a theory of direct corporate responsibility and legal accountability at the international level.

C. *Analyzing Potential Justifications*

In an effort to move completely beyond voluntarist and state-centered approaches, much analysis has been devoted to justifications for imposing legally enforceable human rights responsibilities on corporate actors performing without the direct collaboration of the state.¹³⁵ Specific justifications have ranged from claims of the emergence of a transnational corporate legal personality to more general affirmations of increased transnational corporate power.¹³⁶ Arguments of transnational legal personality are based primarily on rights acquired by transnational corporations within the international economic order.¹³⁷ For example, under the North American Free Trade Agreement (NAFTA), private corporations are allowed to haul governments other than their own to binding arbitration if the government violates NAFTA's investor protection provisions.¹³⁸ More general arguments regarding increased transnational corporate power stem from the very real social, political, and economic impact of transnational corporate activity on international agenda setting.

While these justifications carry great analytical weight and may serve to legitimize human rights responsibilities on corporate actors irrespective of any clear nexus to the state, resort to them may be unnecessary in the specific context of a hybrid state-corporate enterprise. A corporate actor's direct

¹³⁵ See *supra* note 17.

¹³⁶ See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57 (6th ed. 2003) ("A subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims."). While Brownlie asserts that "[i]n principle, corporations of municipal law do not have international legal personality," he also proposes that "it will not always be easy to distinguish corporations which are so closely controlled by governments as to be state agencies, with or without some degree of autonomy, and private corporations not sharing in the international law capacity of a state." *Id.* at 65. He further warns: "In view of the complex nature of international relations and the absence of a centralized law of corporations, it would be strange if the legal situation had an extreme simplicity. The number of entities with personality *for particular purposes* is considerable." *Id.* at 67 (emphasis in text). He ultimately concludes that "it is not always easy to distinguish . . . a private or public corporation under some degree of state control from the state itself." *Id.*

¹³⁷ See Ratner, *supra* note 17, at 487–88 (discussing the "inconsistent posture among decisionmakers over the role of corporations in the international legal order" where "business enterprises have *rights* under international law, whether the economic right under investment treaties to receive nondiscriminatory treatment and to bring a state to international arbitration, or clearly recognizable political rights such as freedom of speech" and yet "governments appear to remain somewhat ambivalent about accepting . . . in particular, duties that corporations might have toward individuals in states where they operate") (emphasis in original).

¹³⁸ North American Free Trade Agreement, U.S.-Can.-Mex., arts. 1115–1121, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

responsibility could arguably be justified by the corporate actor's inextricable collaborative venture with the state, which indisputably bears human rights responsibilities.¹³⁹ When a corporate actor engages in a joint enterprise with a state that affects indigenous peoples' land rights, the human rights responsibilities of the state are effectively being shared with, or in some measure delegated to, the corporate actor involved.¹⁴⁰ While it may be difficult to pinpoint whether the corporation is a de facto agent of the state, whether the state is a de facto agent of the corporation, or whether the corporation is in complicity with the state, the point is that the corporate actor engages in quasi-public functions and the inextricable flow of influence and authority between both actors often facilitates the violation of indigenous human rights. At a minimum, the international legal order's acknowledgement of a corporation's intimate nexus to the state in the context of hybrid state-corporate activity on indigenous lands could serve to justify heightened corporate responsibility.¹⁴¹

With respect to accountability, to the extent a corporate actor has voluntarily entered into a state-corporate enterprise and shares human rights responsibilities with the state, its actions should also be subject to international scrutiny.¹⁴² Indeed, international supervisory mechanisms are particularly necessary to ensure the promotion, fulfillment, and protection of human rights to the extent the state and the corporate actor's interests are aligned.¹⁴³ In the

¹³⁹ See Ratner, *supra* note 17, at 524. In presenting his theory of corporate legal responsibility for human rights violations, Ratner posits that the "duties of a company are a direct function of its capacity to harm human dignity," and therefore, "corporate responsibility will depend upon the enterprise's proximity to the violation as determined by its relationship to the government, its nexus to the affected populations, the individual right at issue, and principles of attribution that connect those committing the violations to the company."

¹⁴⁰ See *id.* at 424 ("All other things being equal, the corporation's duties to protect human rights increase as a function of its ties to the government. If the corporation receives requests from the government leading to violations, knowingly and substantially aids and abets governmental abuses, carries out governmental functions and causes abuses, or, in some circumstances, allows governmental actors to commit them, *its responsibility flows from that of the state.*") (emphasis added); Addo, *supra* note 113, at 671 ("The modern regime of privatization has allowed foreign corporations to bid and when successful operate . . . traditional public services, . . . [and] [a]lthough the speed and volume of changes has made it impossible for legal institutions and processes to respond effectively in this entirely novel reality of fluid responsibilities, suggestions of intermingled responsibilities should not be dismissed outright."); see also Kichwa Case, *supra* note 42, ¶ 64 (finding that an oil company holding a concession contract granted by the government of Ecuador was "acting in representation of the State").

¹⁴¹ Ratner, *supra* note 17, at 524.

¹⁴² For example, a corporation that chooses to engage itself in an enterprise with a state for extractive industry purposes or the so-called "development" of indigenous lands should be subject to accountability by virtue of its relationship with the state. It is not the transnational nature of a corporation that would necessarily make it the proper subject of international scrutiny, but rather the corporation's participation in a state-corporate enterprise could be said to carry with it human rights responsibilities.

¹⁴³ See *Permanent Sovereignty Over Natural Resources*, *supra* note 9, ¶ 47 (finding that "[t]he urgency and the difficulty of guarding against . . . unjust conditions and protecting indigenous peoples' ownership of resources that are coveted by others call for the creation of

context of a state-corporate enterprise, a state may be unable or unwilling to effectively regulate domestically the actions of its joint corporate actor.¹⁴⁴

IV. APPROACHES TO CORPORATE RESPONSIBILITY AND ACCOUNTABILITY IN THE CONTEXT OF INDIGENOUS LAND RIGHTS

An international theory of corporate responsibility and accountability could be based on either, or all, of the various approaches introduced in Part III.¹⁴⁵ The attraction to voluntarist and state-centered approaches is

international mechanisms and bodies capable of preventing the unjust loss of indigenous resources"). In reference specifically to the U.N. Draft Norms, at least one expert has emphasized the significance of international pressure on corporate actors due to potentially "weak" domestic courts that may also be "subject to corruption or collusion with transnational corporations." U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Prot. of Human Rights, *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Fourth Session*, ¶ 29, U.N. Doc. E/CN.4/Sub.2/2002/13 (Aug. 15, 2002) (prepared by El-Hadji Guissé) [hereinafter *Methods and Activities of TNCs*].

¹⁴⁴ See *Methods and Activities of TNCs*, supra note 143; see also supra Part II(C).

¹⁴⁵ Domestic avenues of corporate accountability that do not hinge on regulation by the very state engaged in the state-corporate enterprise could also be explored. See Lillian Aponte Miranda, *The U'wa and Occidental Petroleum: Searching for Corporate Accountability in Violations of Indigenous Land Rights*, AM. INDIAN L. REV. (forthcoming March 2007, manuscript on file with author) (analyzing, *inter alia*, the scope and potential limits of existing domestic approaches to corporate accountability for violations of indigenous land rights). For example, a home state of a multinational corporation could provide for the regulation of the subsidiaries engaged in state-corporate enterprises abroad. However, even if the challenges posed by principles of entity law were surpassed, such initiatives are likely to fail for myriad other reasons. See, e.g., Redmond, supra note 121, at 72 ("In practice, there are formidable obstacles to home state regulation of the offshore activities of locally incorporated companies, much less of their foreign affiliates."); Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 75, 85–87 (Menno T. Kamminga and Saman Zia-Zarifi ed., 2000) (suggesting that holding home states liable under international human rights law for the extraterritorial actions of non-state actors "is a radical step which would probably necessitate relevant treaty amendments, or the adoption of appropriate optional protocols"). The United States' Alien Tort Claims Act is often referenced as an example of a domestic vehicle that could provide relief to foreign nationals for international human rights violations by corporate actors. See 28 U.S.C. § 1350 (2000). While traditionally a federal statute limited to suits by foreign nationals for a very limited category of violations of "the international law of nations," suits have been filed under ATCA by foreign plaintiffs seeking to hold corporate actors accountable for violations of human rights abuses overseas. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005); *In re S. Afr. Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Beanal v. FreePort-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997). It is doubtful, however, that ATCA could provide relief to indigenous peoples seeking to hold an overseas subsidiary of a U.S. corporation accountable for violations of their land rights even under an expansive interpretation. See Miranda, supra (manuscript at 16–18). Moreover, some have suggested that the application of ATCA to multinational corporations rests on questionable statutory authority and is wrought with multiple challenges. See, e.g., Michael D. Ramsey, *Multinational Corporate Liability Under the Alien Tort Claims Act:*

understandable considering that the human rights legal enforceability frameworks are predominantly state-centered. However, given the nature of the interests involved in the state-corporate enterprise, such approaches may not consistently and effectively translate into on-the-ground reform. On the other hand, subjecting corporate actors to an existing international legal enforceability framework would require the type of conceptual shift outlined above to propel the reach of such framework to a non-state actor. While the outlines of this conceptual shift are emerging within the international legal order, a legal enforceability framework for corporate violations of human rights is yet to be adopted. In effect, voluntarist or state-centered approaches may have to necessarily serve as precursors to direct corporate responsibility and international enforceability. However, a theory of direct corporate responsibility and international accountability in the context of the hybrid state-corporate enterprise should continue to be explored as such approach potentially offers the more effective means of operationalizing indigenous land rights vis-à-vis corporate actors.

A. *A Voluntarist Approach*

A voluntarist approach is consistent with the imposition of direct, albeit voluntary, human rights responsibilities on corporate actors. This approach could result in the education of the business community with respect to the impact of their activities. Indigenous peoples could focus their efforts on existing international initiatives that specifically speak to corporations or on the development of new initiatives. For example, the International Labor Organization's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the Organization for Economic Cooperation and Development's Guidelines for Multinational Enterprises, and United Nations' Global Compact could serve as potential sources for the elaboration of voluntary corporate responsibilities specific to indigenous peoples' land rights. Bodies such as the United Nations Permanent Forum on Indigenous Issues¹⁴⁶ and the United Nations Working Group on Indigenous Populations¹⁴⁷ could also potentially play a role in the elaboration of specific codes of voluntary corporate responsibility while non-governmental organizations could provide

Some Structural Concerns, 24 HASTINGS INT'L & COMP. L. REV. 361, 361 (2001) (finding that an expansive view of multinational corporate liability under ATCA "amounts to U.S. courts making foreign policy on the basis of very thin statutory authorization"). With respect to the impact of domestic analyses under ATCA on a theorization of corporate responsibility and accountability at the international level, some have proposed that such analyses represent a United States-centered view of corporate responsibility and accountability that "cannot simply be transferred to the international arena." See Ratner, *supra* note 17, at 450.

¹⁴⁶ The Permanent Forum was created to serve as an advisory body on indigenous issues to the Economic and Social Council and to promote awareness on such issues within the United Nations framework. ANAYA, *supra* note 9, at 219–20.

¹⁴⁷ The United Nations Working Group on Indigenous Populations reviews developments concerning indigenous peoples through the receipt of reports from governments, inter-governmental institutions, indigenous peoples, and non-governmental organizations. *Id.*

avenues for the dissemination of such information. Voluntary initiatives targeted to the oil, gas, and extractive sector could also provide avenues for the development of principles specific to the protection of indigenous land rights.¹⁴⁸ Corporate actors could ultimately rely on the elaboration of these direct, voluntary principles of responsibility to self-regulate their behavior with respect to indigenous peoples.

The effectiveness of this approach, however, is limited from the standpoint of accountability. The aforementioned initiatives would merely impose “voluntary” obligations on business actors. The aforementioned existing international initiatives do not provide for complaint procedures that would allow indigenous peoples themselves to lodge complaints against corporate violators and do not provide for the imposition of legal accountability on the corporate actor.¹⁴⁹ These initiatives, like internal corporate codes of conduct,¹⁵⁰ largely provide self-regulatory regimes that depend on some measure of corporate self-interest for their implementation, leading ultimately to unpredictable results.

Given the nature of the state-corporate enterprise, even where there is genuine commitment, corporate self-regulation may give way to more powerful commercial interests.¹⁵¹ If self-regulation was the best means to ensure human rights, then one might have expected the number of abuses attributable to businesses to have diminished.¹⁵² As a result of these limitations, it is worthwhile to explore other potential frameworks of accountability.

B. A State-Centered Approach

Under an international state-centered approach, there could be an assessment of whether provisions in certain human rights treaties¹⁵³ could be

¹⁴⁸ See Cynthia A. Williams, *Civil Society Initiatives and “Soft Law” in the Oil and Gas Industry*, 36 N.Y.U. J. INT’L L. & POL. 457, 460–61 (2004) (proposing that voluntary corporate codes of conduct could be a means of effectively regulating corporate behavior).

¹⁴⁹ INT’L COUNCIL ON HUMAN RIGHTS POLICY, *BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES*, 1, 66–70, 102–06 (2002) [hereinafter *BEYOND VOLUNTARISM*]. This source provides a very helpful analysis of the direct and indirect obligations of corporate actors under the international legal order.

¹⁵⁰ For a discussion of the proliferation of corporate codes of conduct and other soft law aimed at self-regulation by transnational corporations, see Bantekas, *supra* note 17.

¹⁵¹ See *BEYOND VOLUNTARISM*, *supra* note 149, at 7–19; see also Addo, *supra* note 113, at 673 (“At the margins of business, without the compelling force of law, it is not entirely clear how human rights as CSR [corporate social responsibility] expects to successfully challenge and change reprehensible conduct.”)

¹⁵² *BEYOND VOLUNTARISM*, *supra* note 149, at 7–19.

¹⁵³ There are a range of treaty interpretation and dispute resolution bodies within the United Nations and regional human rights systems, including the United Nations Committee on Economic, Social, and Cultural Rights, the United Nations Committee on the Elimination of Racial Discrimination, the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights. For an overview of the Organization of American States’ human rights bodies and their practical engagement by indigenous peoples, see FERGUS MACKAY, *A GUIDE TO INDIGENOUS PEOPLES’ RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* (2002). Under a state-

specifically interpreted to require a state to regulate, or prevent, behavior of a joint corporate actor that violates human rights.¹⁵⁴ There is evidence of this approach as it pertains to indigenous peoples' land rights in the existing interpretations of treaties by human rights bodies and regional human rights courts.

For example, in the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court of Human Rights found that the state of Nicaragua had an affirmative duty to prevent corporate actors engaged in hybrid state-corporate enterprises with the State from infringing the land rights of the Awas Tingni.¹⁵⁵ Specifically, the Inter-American Court found that "members of the Awas Tingni Community have the right that the State abstain from carrying out, until . . . delimitation, demarcation, and titling [of the territory belonging to the Community] ha[s] been done, actions that might lead agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where members of the Community live or carry out their activities."¹⁵⁶ The Court ultimately found that Nicaragua had violated the rights of the Awas Tingni to use and enjoyment of their property under Article 21 of the American Convention by "grant[ing] concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled [as Awas Tingni lands]."¹⁵⁷

Additionally, in the case of *Maya Indigenous Communities of the Toledo District v. Belize*, the Inter-American Commission reiterated the Inter-American Court's finding that a state has the affirmative duty to prevent corporate actors from holding natural resource concession rights over lands traditionally used and occupied by indigenous peoples. In its report on the merits of the case, the Inter-American Commission concluded that the state of Belize had violated the Maya peoples' rights to property and equality grounded in provisions of the American Declaration on the Rights and Duties of Man by granting logging and oil concession rights to several companies without the Maya peoples' prior meaningful consultation and without regard for their traditional land tenure.¹⁵⁸ The Commission ultimately recommended that Belize abstain from any acts that might lead third parties acting with the state's acquiescence or tolerance to affect the interests of the Maya peoples to their

centered approach, a state could be found to have violated its duty to protect human rights by failing to prevent the behavior of corporate actors performing within its borders or, perhaps it could even be argued, by failing to prevent the extraterritorial behavior of subsidiary corporate actors with a parent company within the state's borders.

¹⁵⁴ See Joseph, *supra* note 145, at 85–87; see also CLAPHAM, *supra* note 126, at 89–133.

¹⁵⁵ See Anaya, *supra* note 66, at 14 (proposing that in the Maya Case the Inter-American Court of Human Rights "affirmed not only a right against state interference with indigenous peoples' rights in lands and resources without their consent, but also an affirmative right to state protection from such interference by private parties").

¹⁵⁶ Awas Tingni Case, *supra* note 43, ¶ 153 (emphasis added).

¹⁵⁷ *Id.*

¹⁵⁸ Maya Case, *supra* note 42, ¶¶ 140, 144.

lands and resources pending the proper delimitation, demarcation, and titling of the territory at issue.¹⁵⁹ These findings implicitly suggest that activities of private actors that “affect the existence, value, use or enjoyment of [indigenous peoples’] property” give rise to human rights violations, and moreover, that states have duties under respective treaties to prevent such human rights abuses.

It could perhaps be argued that, as part of customary international law, states bear a duty irrespective of treaty obligations to effectively regulate, or prevent, corporate behavior that infringes on indigenous land rights. At a minimum, there would need to be an assessment of the prescriptive dialogue at the international level regarding such state responsibility,¹⁶⁰ and under a more traditional approach, an assessment of the relevant state practice. If this customary norm were substantiated, human rights bodies could look to it as a reference point for assessing state responsibility within the bodies’ respective mandates and spheres.

With respect to accountability, existing treaty monitoring or treaty complaint resolution bodies could be employed to scrutinize the laws, regulations, and enforcement procedures of a state regarding corporate behavior that impacts indigenous land rights, and indirectly, the behavior of the state’s joint corporate actor. For example, a state could be forced to report on its compliance with such responsibility to the appropriate United Nations treaty-based oversight committee. Moreover, under the human rights framework of the Organization of American States, the Inter-American Commission on Human Rights could take an active role in investigating, and reporting upon, a state’s failure to comply with such responsibility. Regional human rights courts could additionally take into consideration such potential state obligation when evaluating state violations of indigenous land rights, like the Inter-American Court did in the *Awatitzi* case. This approach may serve to bring issues of adverse corporate activity on indigenous lands to the forefront of international human rights bodies and potentially serve to promote domestic reform. The benefit is that while retaining a state-centered approach, these human rights bodies would be forced to scrutinize the corporate behavior at issue.

Such approach, however, has its limitations. First, corporate responsibility is framed as indirect responsibility via the direct responsibility of the state. This approach, in the end, does not speak directly to corporate actors. Second, from the standpoint of accountability, this approach relies on states engaged in state-corporate enterprises to ensure that a corporation’s failure to respect indigenous land rights results in domestic legal consequences. While this approach does potentially offer a measure of legal accountability, due to the state’s vested interest in the state-corporate enterprise, a state is less likely to engage in the implementation of effective domestic regulation that holds its joint corporate actor accountable.¹⁶¹ The ability of either a home or host state to effectively

¹⁵⁹ *Id.* ¶ 6.

¹⁶⁰ See *supra* note 59 and accompanying text.

¹⁶¹ See Dufresne, *supra* note 19, at 356 (appropriately articulating the complicated status of states as both regulators of corporate activity and joint partners in corporate endeavors: “[i]n its regulatory role, the state seeks to ensure the protection of the public

protect indigenous peoples' land rights from a joint corporate partner is equally problematic given the potential collusion of interest.¹⁶² Moreover, to the extent a state is undergoing a process of significant state-building, the odds of ineffective oversight of its joint corporate actor are heightened.

Even given these limitations, however, a state-centered approach should not be discounted as it provides an existing method of holding corporate actors legally accountable, albeit at the domestic level, for violations of indigenous land rights.

C. A Hybrid State-Corporate Approach

The purpose of a hybrid state-corporate approach would be to impose direct international human rights responsibilities¹⁶³ and international legal

goods, whereas its position as party to a business venture creates an interest to make the oil exploitation [or any other joint project] as financially successful and rewarding as possible"); see also *Methods and Activities of TNCs*, *supra* note 143, ¶ 18 (acknowledging that "ineffective regulation by states" of corporate activity is often due to the fact "that [g]overnments [perceive themselves as] too weak, or as a result of corruption and collusion between the [s]tate and the corporation, or owing to obligations that the [s]tate [has] taken in international economic forums which constrain [its] capacity to promote human rights"). Furthermore, specific case studies of corporate activity on indigenous peoples' land rights have suggested that "TNCs often help support a regime that repays them with concessions of indigenous peoples' territories." *Transnational Investments and Operations on Indigenous Lands, 1994 Report*, *supra* note 13, ¶ 12. Ultimately, "numerous formally recognized legal rights of indigenous peoples are not fully implemented in practice, either in the courts by way of final adjudication determined by the judiciary, or as a result of new legislative acts which in fact weaken or reduce previously legislated rights." *Human Rights and Indigenous Issues*, *supra* note 38, ¶ 18. Even where a state government recognizes indigenous land rights in principle, the state may not be in the best position to regulate the behavior of its joint actor because the state government may lack "adequate institutional capacity to monitor and supervise TNCs' activities." *Transnational Investments and Operations on Indigenous Lands, 1994 Report*, *supra* note 13, ¶ 11; see also *Maya Case*, *supra* note 42, ¶ 147 (finding that the State of Belize "failed to put into place adequate safeguards and mechanisms, to supervise, monitor and ensure that it had sufficient staff to oversee that the execution of the logging concessions would not cause further environmental damage to the Maya lands and communities").

¹⁶² A parent corporation could engage in a state-corporate enterprise with its home state. It is often, however, a subsidiary of a transnational corporation incorporated in a foreign state that engages in a hybrid enterprise with a host state. Steven Ratner proposes the following explanation of the factors involved "foreign investment-human rights interactions:"

In terms of the four actors involved in the foreign investment-human rights interactions, the contemporary situation is thus defined as follows in terms of international law: host states and home states enjoying juridical equality, with economic forces and international economic law now promoting free trade and investment as a recipe for progress; host states (as well as home states) having obligations to their populations under human rights law; and host states having significant obligations to TNEs and individual investors pursuant to various international legal instruments.

Ratner, *supra* note 17, at 460.

¹⁶³ To attain an optimal level of legitimacy, the elaboration of legally binding international norms applicable to corporate actors should probably be developed with the input of all affected actors, including governments, businesses, and indigenous peoples. See

accountability upon a corporate actor involved in a hybrid state-corporate enterprise. This approach would speak directly to corporate actors and seek their adherence to specific human rights assigned in commensurate proportion to the responsibility of the joint state actor and developed with due regard for the corporate form. With respect to accountability, this approach moves beyond voluntarism to the extent that it seeks to impose legal accountability on the corporate actor. It also moves beyond the state-centered approach to the extent it seeks to remove the joint state actor as a necessary mediator in the assignment of accountability; the corporate actor would be held to direct legal accountability at the international level.

The imposition of direct obligations on non-state actors under international law is not devoid of precedent.¹⁶⁴ Under international law, individuals are subject to accountability for genocide, war crimes, crimes against humanity, and torture.¹⁶⁵ As discussed under Part III(B), several international initiatives impose direct, albeit voluntary, human rights obligations on corporate actors.¹⁶⁶ Beyond the realm of human rights, several international environmental treaties impose obligations directly on corporate actors although those obligations are in turn enforced through domestic measures.¹⁶⁷ Moreover, the international system implicitly recognizes anti-corruption obligations on corporate actors through the Convention on Combating Bribery of Public Officials in International Business Transactions.¹⁶⁸

Corporate behavior specifically undertaken in conjunction with a state generally bypasses international accountability as a result of presently state-centered regulatory regimes, but the need to design meaningful accountability for such joint corporate actors has nevertheless received recent attention by

Ratner, *supra* note 17, at 451. Moreover, the elaboration of these norms could even serve to inform voluntary approaches or state-centered approaches. *See id.* at 465 (“In order to hold states accountable for corporate conduct in a coherent fashion, . . . one would still need a theory of understanding when a corporation’s violation of human rights rises to such a level that the state is responsible for preventing or suppressing it.”); *see also* Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748 (1983) (suggesting that the international legal order should allow transnational corporations to participate in the design of applicable international obligations).

¹⁶⁴ *See generally* Ratner, *supra* note 17, at 475–91.

¹⁶⁵ *Id.* at 491–92.

¹⁶⁶ *See supra* Part III(B).

¹⁶⁷ *See* Ratner, *supra* note 17, at 479–80. Ratner enumerates the following treaties: 1) 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, 2) 1962 Brussels Convention on the Liability of Operators of Nuclear Ships, 3) 1963 Vienna Convention on Civil Liability for Nuclear Damage, 4) the 1969 International Convention on Civil Liability for Oil Pollution Damage and the complementary 1984 Protocol, 5) 1971 Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, and 6) 1976 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources. *Id.*

¹⁶⁸ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1, *available at* http://www.oecd.org/document/21/0,2340,en_2649_201185_2017813_1_1_1_1,00.html.

Pursuant to such Convention, the state must criminally sanction corporate behavior entailing the bribery of a foreign public official where such bribery is executed within the state.

international law scholars. Specifically, scholars have addressed the lack of international accountability structures capable of comprehensively addressing the “complex mix of corporate and governmental behavior” that often results in environmental degradation and climate change.¹⁶⁹ In analyzing the challenges of fashioning a transnational regulatory approach in the context of climate change, Hari Osofsky has suggested that while states appear to be the dominant actors in the international system, “the political and financial clout of non-state actors and their interactions with governmental actors complicate the regulatory picture.”¹⁷⁰ This complicated picture stems, in part, from uncertainty regarding the appropriate role of international law in assigning direct corporate responsibility and creating attendant compliance mechanisms.¹⁷¹

Scholars also have recognized the increasing role played by corporate actors in the execution of military functions and foreign aid as a result of the privatization of these functions by states.¹⁷² Under such privatization schemes, states effectively delegate foreign affairs functions to private corporate actors through contractual arrangements.¹⁷³ In this context, Laura Dickinson argues that “the very fact of privatization—with its hybrid public-private character—may actually open up alternative norms and avenues of accountability beyond the formal instruments of international law.”¹⁷⁴ She proposes that while international law could play a role in the assignment of corporate accountability, “formal international law instruments are a relatively weak accountability mechanism even with regard to state actors, let alone private entities.” Therefore, she suggests that international law scholars should consider alternative modes of corporate accountability including the incorporation of corporate liability provisions within state-corporate contractual arrangements for breach of human rights standards.¹⁷⁵

Scholars have, furthermore, starkly captured the particular challenges to developing a regime of meaningful accountability for corporate actors engaged in potentially collusive relationships with states.¹⁷⁶ In this context, Robert Dufresne has characterized the contractual relationship between host states and corporate actors engaged in oil exploitation as “a symbiotic collaboration” that places “the externalization of costs or burdens onto the local people.”¹⁷⁷ Dufresne proposes “increased scrutiny of the behavior of actors at the heart of

¹⁶⁹ See Osofsky, *supra* note 19, at 97; see also Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789 (2005).

¹⁷⁰ Osofsky, *supra* note 169, at 1798.

¹⁷¹ *Id.* at 1799.

¹⁷² See Dickinson, *supra* note 19, at 139; see also Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383 (2006) (proposing a contract based approach to increase the accountability of corporate actors engaged in public functions such as military interrogation and the disbursement of foreign aid).

¹⁷³ See Dickinson, *supra* note 19, at 139–41.

¹⁷⁴ See *id.* at 141.

¹⁷⁵ *Id.*

¹⁷⁶ See Dufresne, *supra* note 19, at 391.

¹⁷⁷ *Id.* at 389.

those practices” and the development of “legal institutions operating within the nodal point formed by the interactions of state authorities, oil corporations, and local groups.”¹⁷⁸

While possibilities may exist for regulating the behavior of corporate actors engaged in state-corporate enterprises outside the purview of the international system, such possibilities are compatible with, and should be supplemented by, an international accountability component.¹⁷⁹ In the context of indigenous land rights, international oversight is particularly significant given the potential collusion of interest between a state and its joint corporate actor. The hybrid state-corporate approach proposed more fully below is consistent with the aforementioned movements in international law toward the imposition of obligations directly on non-state actors. It is also consistent with efforts to address significant accountability gaps with respect to corporate actors engaged in joint enterprises with states.

Pursuant to a hybrid state-corporate approach, the state’s joint corporate actor would bear direct human rights responsibilities to the indigenous peoples affected by the enterprise’s project. Significantly, while the substantive and procedural land rights of indigenous peoples have been developed in the context of state responsibility, they could nevertheless serve as a source for designing the contours of responsibility for the joint corporate actor.¹⁸⁰ Clearly, certain rights, such as the right to legal recognition of indigenous lands, can only be operationalized by a state, but many of the articulated rights are implicated by, and could be promoted, protected, and fulfilled by, corporate actors involved in a hybrid state-corporate enterprise.¹⁸¹ There is no reason why the existing human rights norms specifically applicable to the protection of indigenous peoples’ lands and resources could not serve as the foundation for the specific articulation of substantive and procedural corporate responsibilities.¹⁸² Accordingly, it is not necessary to theorize a wholly independent regime of responsibilities applicable exclusively to corporations involved in a hybrid state-corporate enterprise.

Moreover, direct corporate responsibility should not hinge on whether a state can self-professedly grant a concession, lease, or other contractual right to

¹⁷⁸ *Id.* at 390–91; *see also* LIKOSKY, *supra* note 19, at 170 (proposing the “establishment of an institution under the auspices of the United Nations (UN) to handle human rights issues arising in the context of PPPs [public-private partnerships]”).

¹⁷⁹ *See supra* text accompanying note 145.

¹⁸⁰ *See* Ratner, *supra* note 17, at 468 (discussing the jurisprudential premise that “the rights of individuals give rise to not only a variety of duties but also a variety of *dutyholders*” by reference to theories of Joseph Raz and Kant).

¹⁸¹ *See U.N. Report Regarding Human Rights of Business Enterprises, supra* note 102 (suggesting corporate actors could promote, protect, and fulfill human rights).

¹⁸² The fact that indigenous land rights may be premised on customary international law should not be considered a barrier to theorizing substantive corporate responsibilities from such rights. Customary international norms constitute a sound jurisprudential source of indigenous rights. Moreover, the core precepts of indigenous land rights are well defined as part of customary international law. *See supra* Part II(B).

the lands and resources at issue.¹⁸³ Pursuant to a human rights perspective, indigenous claims to possession, use, and control of ancestral lands do not hinge on arguments of historical first settlement or on the recognition of treaties, but upon the recognition of international human rights norms specific to indigenous peoples.¹⁸⁴ Effectively, indigenous peoples' rights to own, possess, use, occupy, and control their lands or resources are not necessarily extinguished by state claims to title and ownership.¹⁸⁵ The legal character of a state's permanent sovereignty over natural resources, moreover, continues to be shaped and limited by the recognized land rights of indigenous peoples.¹⁸⁶ Therefore, a corporation engaged in a hybrid state-corporate enterprise should not be able to escape specific substantive and procedural responsibilities to the indigenous peoples involved simply because the state claims formal title or ownership of the lands or resources at issue.

Rather, the primary challenge to assigning direct corporate responsibility with respect to indigenous land rights lies in articulating the nature of the corporate responsibility vis-à-vis the joint state actor and in accordance with the corporate form.¹⁸⁷ A recent United Nations report with respect to the responsibilities of business enterprises sets forth that the "responsibilities of States cannot . . . simply be transferred to business; the responsibilities of the latter must be defined separately, in proportion to its nature and activities."¹⁸⁸ The report further presents three useful starting forms of responsibility

¹⁸³ See Dufresne, *supra* note 19, at 349. Dufresne's explanation of the implicit position taken by oil corporations involved in cycles of violence with significant impacts to local communities starkly captures international law's inability to "pin" the corporation:

With respect to contractual formation and to the rights created therein, oil corporations' position suggests that they belong to a realm in which both the host government and its population, vicariously through it, are present. This allows oil corporations to derive automatically an entitlement to full enforcement of the rights validly created under petroleum agreements. However, when the actual enforcement of contractual rights and its modalities are at stake, oil corporations immediately take some distance and portray themselves as uninvolved or neutrally caught in a domestic political struggle. This combination allows them to claim that the rights that they hold are valid *erga omnes* and enforceable, while remaining separate from and unaccountable for the violence involved as part of the concrete conditions of their enforcement.

Id.

¹⁸⁴ See *supra* Part II(A)–(B); see also *Permanent Sovereignty Over Natural Resources*, *supra* note 9, ¶ 49 ("Whether or not State authority exists that limits indigenous resource rights, one principle is clear: all State authority over resources, even resources the State clearly owns, must be exercised in a manner consistent with the human rights of indigenous peoples.").

¹⁸⁵ See *supra* Part II(A).

¹⁸⁶ See *supra* Part II(B).

¹⁸⁷ The rights of indigenous peoples must be balanced, to some extent, against business interests; the uniqueness of the business form cannot be completely ignored. See Joseph, *supra* note 145, at 90–92. Complexities also arise with respect to the particular corporation's "sphere of influence," such as whether the corporate actor at issue should be held responsible for the acts or omissions of its sub-contractors. See *U.N. Report Regarding Human Rights of Business Enterprises*, *supra* note 102, ¶ 38.

¹⁸⁸ See *U.N. Report Regarding Human Rights of Business Enterprises*, *supra* note 102, ¶ 27.

primarily drawing from the principles found in the U.N. Global Compact. First, corporations could have a responsibility to “respect” human rights.¹⁸⁹ Second, corporations could have a responsibility to “support” human rights.¹⁹⁰ Third, corporations could have a responsibility to “make sure they are not complicit” in human rights abuses.¹⁹¹

Taking such U.N. report’s analytical framework as an initial step, the following premises provide an example of the substantive corporate responsibilities that could be articulated in the context of indigenous peoples’ procedural land rights.¹⁹² First, a corporation could be said to have a responsibility to respect human rights by not entering into a state-corporate enterprise if the state has not engaged in prior meaningful consultation with indigenous peoples. Second, a corporation could be said to have a responsibility to affirmatively support human rights by engaging in a meaningful consultation process with indigenous communities prior to entering into a state-corporate enterprise.¹⁹³ Third, a corporation could be said to have a

¹⁸⁹ A responsibility to “respect” human rights “requires [a] business to refrain from acts that could interfere with the enjoyment of human rights.” *Id.* ¶ 30.

¹⁹⁰ A responsibility to “support” human rights is more complex, as it suggests a corporation would have to undertake an affirmative act to promote human rights. The U.N. Report further sub-categorizes this responsibility into the responsibility to protect, promote, provide, and facilitate human rights. *Id.* ¶¶ 31–32.

¹⁹¹ The report points out that the responsibility not to be complicit in human rights abuses specifically applies in situations where corporations act “with national and local governments.” *Id.* ¶¶ 33–35. At first glance, “complicity” would appear to be particularly significant in the context of a state-corporate enterprise because it would seem to capture instances of collaborative arrangements between states and corporations; nevertheless, other theories of collaborative responsibility should be explored.

¹⁹² The reason procedural land rights are particularly significant to a theorization of corporate responsibility and accountability is that such rights serve a gate-keeping function: they theoretically dictate whether the project will commence in the first place and under what terms it will be carried forth. *See Transnational Investments and Operations on Indigenous Lands, 1994 Report, supra* note 13, ¶¶ 21–22. Other potential substantive responsibilities, however, could be theorized taking the U.N. report’s framework as an initial step. For example, a corporate actor could be said to have a responsibility to respect human rights by not entering into a hybrid state-corporate enterprise where the state has not demarcated lands indigenous peoples occupy and claim as theirs. This particular responsibility could also serve a gate-keeping function. Or, a corporate actor could be said to have a responsibility to affirmatively support human rights by conducting its activities on indigenous lands in ways that do not infringe on indigenous peoples’ cultural or religious practices. The point is to define the substance of the responsibility to a degree that a corporation could actually implement.

¹⁹³ There would need to be an assessment of the best method for operationalizing this affirmative responsibility. For one suggestion, *see* Melissa A. Jamison, *Rural Electric Cooperatives: A Model for Indigenous Peoples’ Permanent Sovereignty Over Their Natural Resources*, 12 TULSA J. COMP. & INT’L L. 401, 453 (2005), *available at* <http://www.utulsa.edu/law/ilj/index5.htm> (proposing that private corporations could engage in consultations with “Indigenous Cooperatives” as means of securing indigenous peoples rights over their natural resources); *see also* Stefan Matiation, *Impact Benefits Agreements Between Mining Companies and Aboriginal Communities in Canada: A Model for Natural Resource Developments Affecting Indigenous Groups in Latin America?* 7 GREAT PLAINS NAT. RESOURCES J. 204 (2002) (suggesting that impact benefit agreements, which are

responsibility to not be complicit in the human rights abuses of the state by not engaging in acts upon indigenous lands that are at odds with the parameters established by the consultative processes undertaken by the state.

As an initial matter, the assignment of these responsibilities on corporate actors could raise questions regarding state sovereignty. For example, is state sovereignty threatened by direct communication between indigenous peoples and the corporate actor? If a corporation could be deemed to have a responsibility to engage in meaningful consultation prior to entering into a state-corporate enterprise, what would happen if indigenous peoples make demands which the state does not believe are necessary? On a broader scale, how would placing any or all of these responsibilities on corporate actors affect the traditional discretion of states to make appropriate choices regarding the balance between economic development and policies to protect human rights?

Of course, placing such responsibilities on corporate actors could serve to reaffirm indigenous peoples' right to self-determination and to further protect indigenous land rights at the operational level. The inevitable result may be that the substance of corporate responsibilities may overlap with the substance of state responsibilities and orthodox notions of state sovereignty may have to give way to contemporary understandings of indigenous peoples' human rights.

Pursuant to a hybrid state-corporate approach, the joint state corporate actor would also bear direct legal accountability at the international level for breaches of the potential responsibilities outlined above. A corporation's risk of facing direct legal accountability at the international level could serve as a significant deterrent to engaging in state-corporate enterprises where an appropriate consultative process has not occurred or to engaging in activities executed by such enterprises that violate other indigenous rights.¹⁹⁴ Even if formal international law instruments are considered relatively weak accountability mechanisms with regard to state actors, such mechanisms have the potential of creating distinct deterrent effects on corporate actors. Corporate actors must engage cost-benefit considerations in a different light than states; corporations are ultimately driven by different concerns than a state. In order to continue in existence, a corporate actor has an economic bottom line it must continue to meet, and therefore, it needs to assess the consequences of its actions on its ability to continue to generate profit. Direct legal accountability at the international level could constitute a potentially costly consequence of violating indigenous land rights, a consequence worthy of factoring into a profit driven bottom line. By virtue of appearing before an international forum for alleged human rights violations, a corporate actor significantly risks loss of profits, the payment of damages, or perhaps some form of sanction. Real incentives for corporate compliance with indigenous land rights are presently

generally negotiated directly by indigenous peoples and business actors, could provide a model for indigenous peoples' participation in natural resource extraction projects).

¹⁹⁴ See Ratner, *supra* note 17, at 464–65 (“If international law provided for a regime whereby the corporations had duties themselves and incurred some penalty for violations of them, it would place the incentives on the party with the greatest ability and interest in addressing corporate conduct.”).

missing under the international legal order; a corporation does not have to give a second thought to such rights as long as it has a green light from the state.

A state-corporate approach offers benefits in addition to the deterrence of irresponsible corporate behavior. Another significant benefit is the institution of a potentially necessary check on state action.¹⁹⁵ Given a state's vested interest in the state-corporate enterprise, indigenous peoples may not be able to operationalize their land rights purely through domestic claims or through claims in a state-centered international legal accountability framework.¹⁹⁶ Furthermore, a systematic international approach to corporate responsibility and accountability would reduce ad hoc domestic responses, and thereby, serve to level the playing field for corporate actors seeking to engage in hybrid state-corporate enterprises.¹⁹⁷ Those corporate actors that do engage in higher standards of self-regulated behavior would not have to compete with corporate actors that do not. Finally, if appropriate, corporate actors could provide an additional source for the payment of damages to indigenous peoples whose rights have been violated.¹⁹⁸

A hybrid state-corporate approach would require a shift in the exclusively state-centered mandates of the existing human rights legal accountability frameworks or, even further, the creation of a wholly separate framework specific to corporate actors or public-private partnerships.¹⁹⁹ Some would argue

¹⁹⁵ See *supra* note 161 and accompanying text.

¹⁹⁶ Even where indigenous peoples file petitions with the national government and under the Inter-American human rights system, indigenous peoples may “not receive[] the protection they require.” *Human Rights and Indigenous Issues*, *supra* note 38, ¶ 21. For example, indigenous communities affected by mining and logging activities carried out by corporate actors without their prior consent or participation have not received adequate protection of their rights despite petitions filed with the national government of Suriname and the Inter-American Commission of Human Rights. See *id.* Indigenous people in Kenya affected by mining have been “forcibly evicted from their land without compensation” despite a judicial appeal to the country’s highest court. See *id.* ¶ 23. In Chile, despite indigenous and environmental legislation which facilitated indigenous peoples’ resistance to projects “politically [and] in court,” the state government ultimately recognized that “indigenous law is subordinate to other laws.” *Id.* ¶ 34.

¹⁹⁷ See Ratner, *supra* note 17, at 448 (explaining that without the implementation of an international legal framework, domestic “[d]ecisionmakers . . . whether legislatures or international organizations contemplating regulation, courts facing suits, or officials deciding whether to intervene in a dispute involving . . . human rights—will respond in an ad hoc manner, driven by domestic priorities or by legal frameworks that are likely to differ significantly across the planet”).

¹⁹⁸ Payment of damages by corporate actors is already contemplated by the U.N. Draft Norms. See *U.N. Draft Norms*, *supra* note 131, ¶ 18 (“Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law”).

¹⁹⁹ See LIKOSKY, *supra* note 19, at 170–79 (discussing the benefits of establishing a “Human Rights Unit (HRU)” under the auspices of the United Nations as an “institutional

that neither possibility is likely, but perhaps it is more efficient to re-conceptualize the appropriate scope of jurisdictional mandates within existing human rights legal accountability frameworks than to create a separate international regime of corporate accountability.²⁰⁰ In the specific context of the hybrid state-corporate enterprise, the nexus between the state and the corporate actor could serve as a basis for justifying the extension of existing and appropriate human rights accountability frameworks directly to the corporate actor involved.²⁰¹ The scope of oversight assigned to these bodies could include direct scrutiny of the state's joint corporate actor. To the extent these human rights bodies are already indirectly scrutinizing corporate behavior under a state-centered approach, the extension of such scope would not seem incongruous to their mission or overly burdensome.²⁰² The state and corporate acts giving rise to violations of indigenous human rights under international law are likely to be based on similar facts and are likely to require the assignment of commensurate responsibility and accountability. Therefore, in the context of the hybrid state-corporate enterprise, it would make sense to treat state and corporate responsibility and accountability jointly.

Existing human rights bodies have not only been receptive to indigenous peoples' claims but are now quite familiar with the human rights law applicable to indigenous peoples. Indigenous peoples have been particularly successful in bringing their contemporary claims regarding rights to lands and resources to relevant United Nations committees and commissions charged with overseeing various human rights treaties applicable to states.²⁰³ They have also been successful in litigating their claims via the Inter-American Commission on Human Rights before the Inter-American Court of Human Rights.²⁰⁴ These bodies are probably the best suited to undertake an analysis of corporate activity that impacts indigenous land rights.

While it may not be necessary to theorize an independent framework of direct, legal corporate accountability at the international level, should an

solution" to the "problem of an alleged lack of respect for human rights by major [public-private] infrastructure projects globally").

²⁰⁰ For example, the Committee on Economic, Social, and Cultural Rights has suggested that Article 11 of the Covenant on Economic, Social, and Cultural Rights establishing a right to food imposes a direct duty on corporate actors to observe such right. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Report on the Twentieth and Twenty-First Sessions*, Supp. No. 2, annex V, ¶ 20, U.N. Doc. E/2000/22-E/C.12/1999/11 (2000), available at www.un.org/depts/dhl ("While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society—individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities in the realization of the right to adequate food.").

²⁰¹ See *supra* Part III(C). In the context of comments regarding the U.N. Draft Norms, at least one NGO proposed the "involvement of the United Nations treaty bodies and the special mechanisms of the Commission as [a] possible way of improving the monitoring and implementation of the draft norms." *Methods and Activities of TNCs*, *supra* note 143, ¶ 37.

²⁰² See *supra* Part IV(B).

²⁰³ See *supra* notes 40–41 and accompanying text.

²⁰⁴ See *supra* notes 42–43 and accompanying text.

independent framework be implemented, it could also provide an effective locus for accountability. The U.N. Draft Norms, for example, offer the possibility of periodic monitoring and verification of corporate activity by “international and national mechanisms already in existence or yet to be created.”²⁰⁵ The U.N. Draft Norms, however, are not specific to indigenous peoples’ human rights and, in their current status, do not offer any binding authority.²⁰⁶

Ultimately, a hybrid state-corporate approach potentially provides a significant deterrent to corporate actors who may violate indigenous land rights because it poses the consequence of direct legal accountability at the international level. This approach does not replace state responsibility with corporate responsibility or diminish state responsibility; rather, it dictates commensurate responsibility for the joint corporate actor and removes the joint state actor as a necessary intermediary in the imposition of corporate accountability. This result is particularly significant given the potential alignment of interests between the state and its joint corporate actor in a hybrid state-corporate enterprise.

V. CONCLUSIONS AND REMAINING QUESTIONS

The discourse of human rights has indisputably served to raise indigenous peoples’ claims to the international level. Consequently, indigenous peoples have been able to effectively utilize the human rights frameworks of state accountability to protect their recognized land rights vis-à-vis the state. However, indigenous land rights have yet to be operationalized given, in significant measure, the impact of joint state-corporate activity and the lack of a systematic approach to treating the behavior of a joint corporate actor.

This Article ultimately proposes that while the human rights discourse suffers from certain limitations, it nevertheless offers possibilities for designing corporate responsibility and accountability, and thereby, could serve as a vehicle for operationalizing indigenous land rights vis-à-vis corporate actors engaged in a hybrid state-corporate enterprise. The challenge for indigenous peoples will be harnessing the momentum of the emerging human rights discourse of corporate responsibility and accountability in a way that effectively captures the specific nuances raised by collusive state-corporate projects on their lands. While voluntarist and state-centered approaches may pose lesser conceptual challenges to devising an international theory of corporate responsibility and accountability, these approaches are not necessarily the best suited to produce practical results given the nature of the state-corporate enterprise. To the extent indigenous peoples’ would be better served by the imposition of direct human rights responsibilities on corporate actors and a framework of direct legal accountability, the nexus between the state and the corporate actor offers a basis for exploring such possibility.

²⁰⁵ *Commentary on U.N. Draft Norms*, *supra* note 132, ¶ 16.

²⁰⁶ *See U.N. Report Regarding Human Rights of Business Enterprises*, *supra* note 102, annex III.

Under a hybrid state-corporate approach, the development of a corporate actor's direct obligations could be based on indigenous peoples' already recognized land rights. However, the substantive nature of the responsibilities would need to be assigned in proportion to those of the joint state actor and developed in accordance with the corporate form. To that end, theories of collaborative responsibility would need to be analyzed and the scope of a corporate actor's responsibility would also need to be assessed.

The nature of the state-corporate enterprise also raises implications for establishing an effective framework of corporate accountability. Due to the state's vested interest in the successful execution of the joint project, a state is less likely to engage in the implementation of effective domestic regulation and processes that hold corporations it's engaged in business with accountable. At a minimum, domestic efforts are compatible with, and should be supplemented by, an international legal accountability framework.

Although existing international human rights frameworks may constitute appropriate forums for addressing corporate accountability, such frameworks would clearly require a conceptual shift to allow for the direct scrutiny of corporations. Currently, corporate actors can only bear indirect accountability via the direct international accountability placed on a state for allowing corporate violations. But again, due to the state's vested interest in the state-corporate enterprise, it is unlikely that the state will, in turn, be willing to hold the corporate actor domestically accountable. Nevertheless, to the extent a hybrid state-corporate approach has yet to materialize, voluntarist and state-centered approaches offer viable alternatives.

The attainment of greater control by indigenous peoples over their lands and resources probably cannot be accomplished solely by imposing responsibilities on governments and funneling resources into indigenous capacity building. There is a missing piece of the puzzle, which is the need for systematic and effective corporate restraint. Corporate responsibility and accountability in the context of indigenous land rights is neither impossible nor inappropriate, but only largely un-theorized. It is time that approaches to corporate responsibility and accountability in the context of hybrid state-corporate activity are developed and tested with the aim of operationalizing the protection of indigenous peoples' lands from the corporate actors that continue to reap significant benefits at the cost of indigenous peoples' human rights.