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Sara Seck

Dalhousie University Schulich School of Law

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Relational law and the re-imagining of tools for environmental and climate justice

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By Sara L Seck, Associate Professor, Schulich School of Law, Dalhousie University, and Marine & Environmental Law Institute Sara.Seck@dal.ca The author would like to thank Schulich School of Law students Meg Williams (JD candidate), Keith MacMaster (LLM/PhD candidate), and Bahareh Jafarian (LLM candidate) for excellent research assistance, and both the Schulich School of Law, Dalhousie University, and a SSHRC Connections grant for funding support. I am grateful to the anonymous peer reviewers for their recommendations, as well as to those who provided feedback following presentations of earlier versions of this paper, including participants in the University of Toronto’s *Relational Autonomy Workshop* in January 2017; participants in the Resource Extraction and the Human Rights of Women and Girls conference, held October 26-27, 2017 in Ottawa; colleagues who attended a faculty seminar at the Schulich School of Law in Halifax in winter 2018; and participants in the Law & Society conference panel on Sustainable Development and Environmental Justice held in Toronto in June 2018.

Introduction

It is well documented that environmental and climate justice problems are associated with local and global extractive industry operations, and that concrete legal and policy reforms will be necessary if we might hope both to prevent and remedy harms. In this paper, I explore how a relational approach to legal analysis might contribute to the process of re-imagining legal tools for environmental and climate justice.¹ Thinking of environmental justice focuses our attention on sites of local harm, which are intertwined with histories of colonialism and racism.² Climate justice, on the other hand, draws our attention to the international, and the ‘glocal’, which, while equally

¹ This article builds upon previous work touching upon related themes. See especially Sara L Seck, “Transnational Labour Law and the Environment: Beyond the Bounded Autonomous Worker” (2018) 33:2 *Canadian Journal of Law & Society* 137-157, published online 5 September 2018, <https://doi.org/10.1017/cls.2018.15> (special issue, Adelle Blackett editor) [Seck, “Transnational Labour Law”]; Sara L Seck, “Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty” (2017) 26:2 *Transnat’l L & Contemp Probs* 383-413 (*Symposium: International Environmental Law, Environmental Justice, and the Global South*) [Seck, “Climate Justice”].

² On environmental justice and its relationship to international human rights law, see Carmen Gonzales “Environmental Justice, Human Rights, and the Global South” 2015 (13)(91) *Santa Clara Journal of International Law* 151-195.

intertwined with colonial and racist histories, present different challenges of the imagination.³ Both environmental justice and climate justice are also intertwined with gender justice, whether the focus is upon those who are most vulnerable to harms, or, those whose voices are crucial as agents of change.⁴ Attention to extractive industries (mining, oil & gas) and gender justice leads us to the tools of international human rights law, including the recognition of the human rights of women and girls, the responsibilities of businesses to respect human rights, and the duty of states to protect human rights from irresponsible business conduct.⁵

In this paper, I will argue that insights from relational theory can assist in the re-imagining of constructs and legal tools including approaches to the analysis of international human rights law, and that this re-imagining is one key piece of the puzzle as we seek environmental, climate, and gender justice in the context of extractive industries. Part of the process of seeking justice must be to bridge the international with the domestic/local, particularly if our focus is both on extractive industries operating within Canada and extractive industries that, while based in Canada, operate outside. Specifically, we must consider what legal tools could help to align our concerns for local and global environmental and climate justice, including gender justice, with respect for Indigenous laws and institutions, and implementation of the UN Declaration on the Rights of Indigenous Peoples.⁶ In the process of this examination, it becomes important to also interrogate the ‘human’ that is the subject of protection in international human rights law, and to challenge dualist understandings of humans as separate from nature and environment.

For the purpose of this paper, I will use the phrase “relational law” and “relational theory” to encompass diverse approaches to legal analysis that, in my view, share a desire to shine the spotlight away from the bounded autonomous individual of liberal thought, and toward relationships among people and the material world, including relationships in the international sphere.⁷ With this in

³ See for example Julia Dehm, “Post Paris reflections: fossil fuels, human rights and the need to excavate new ideas for climate justice” (2017) 8:2 *Journal of Human Rights and the Environment* 280-300.

⁴ Seck, “Climate Justice”, *supra* note 1.

⁵ The focus of this special issue and this article flows from the conference on Resource Extraction and the Human Rights of Women and Girls, held October 26-27, 2018 in Ottawa: <https://cdp-hrc.uottawa.ca/en/october-26-27-2017-conference-resource-extraction-and-human-rights-women-and-girls>. On duties of states and responsibilities of business for human rights and environmental justice, see Sara L Seck, “Human Rights and Extractive Industries: Environmental Law and Standards” *Human Rights Law and the Extractive Industries*, Paper No. 12, Page No. 12-1 – 12-42 (Rocky Mt. Min. L. Fdn. 2016).

⁶ *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), GA Res 61/295, UNHRCOR, 2007, UN Doc A/61/295, online: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

⁷ In this I am joined by others who participated in the University of Toronto’s *Relational Autonomy Workshop* held in January 2017, organized by Professor Karen Knop to celebrate the work of Jennifer Nedelsky. See for example Roxana Banu, “A Relational Feminist Approach to Conflict of Laws” (2017) 24:1 *Michigan Journal of Gender and Law* 1, Available at: <http://repository.law.umich.edu/mjgl/vol24/iss1/1>; Jessica Eisen, Roxanne Mykitiuk, & Dayna Nadine Scott, “Constituting Bodies Into the Future: Toward A Relational Theory of Intergenerational Justice” (2018) 51:1 *UBC Law Review* 1, Available at: <https://ssrn.com/abstract=3249762> .

mind, I will first explore how select relational and material feminist and vulnerability theorists approach legal analysis, before turning to the writings of select Indigenous feminist theorists. I will then explore relational feminist approaches to international legal analysis. Throughout the article, I will consider what lessons might be learned from these diverse relational approaches, norms that reflect these approaches, and how a turn to relational thinking could inform the quest for environmental and climate justice so as to prevent and remedy harms, including gendered harms arising from local and global extractive industries.

Feminist and Vulnerability Theorists

Feminist scholarship has drawn attention to the unspoken presence in legal analysis of the bounded autonomous individual from liberal thought, and offered a relational view of the individual as an alternative.⁸ For example, according to Jennifer Nedelsky, the common feminist critique of traditional liberalism is that “atomistic individuals” are taken as the “basic units of political and legal theory” and so the “inherently social nature of human beings” is ignored.⁹ A relational view of the individual, on the other hand, sees “that the person whose rights and well-being are at stake are constituted by their relationships such that it is only in the context of those relationships that one can understand how to foster their capacities, define and protect their rights, or promote their well-being.”¹⁰ It is therefore crucial to move beyond boundary metaphors to ask the real questions: “what patterns of relationship among people and the material world [do] we want?”¹¹

The relationship between people and the material world has also been the preoccupation of materials feminists. For example, in writings on consumerism and toxins, Dayna Nadine Scott and her co-authors Jennie Haw and Robyn Lee¹² draw upon the insights of material feminists and embrace the concept of corporeal citizenship so as to move beyond the common conceptualization of the individual as “stand[ing] outside of, and separate from, the environment.”¹³ Precautionary consumption, they argue, “accepts the assumption of a fully autonomous, clearly bounded individual who is able to act ‘against’ the environment to keep toxins out.”¹⁴ Yet this “limits agency to the individual and effectively depoliticizes efforts to address toxins.”¹⁵ Instead, they propose the frame of corporeal citizenship for anti-toxins advocacy, suggesting that the “movement of toxics across bodies, and through our environments and economies, provides a rationale for *why* we should extend out our spheres of political and ethical responsibility from the level of the individual or

⁸ Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011).

⁹ *Ibid* at 120.

¹⁰ *Ibid* at 121.

¹¹ *Ibid* at 117.

¹² Dayna Nadine Scott, Jennie Haw, & Robyn Lee, “Wannabe Toxic-Free? From precautionary consumption to corporeal citizenship” (2016) 26:2 *Environmental Politics* 322-342 at 331, online: <<http://dx.doi.org/10.1080/09644016.2016.1232523>>. See also Seck, “Transnational Labour Law”, *supra* note 1.

¹³ Scott *et al*, *ibid* at 331.

¹⁴ *Ibid*.

¹⁵ *Ibid*.

family to cover broader ecosystems and communities.”¹⁶ According to the authors, “Corporeal citizenship ... turns attention to thinking about the environment *through the body*, emphasizing difference, with the ultimate aim of collective action and decision-making.”¹⁷ Ultimately, they argue that corporeal citizenship suggests that “the state’s responsibility to manage and protect the health of its population is inseparable from its responsibility to care for health of the environment.”¹⁸ It also has implications for the “sphere of ethical and political responsibility of ‘individual’ citizens” to care for the “wider social community and the environment.”¹⁹

A different relational approach is found in Martha Fineman’s theory of vulnerability which attempts to “problematiz[e] the core assumptions underlying the ‘autonomous’ subject of liberal law and politics.”²⁰ Instead, she puts forward a theory based on “the commonalities of the human condition . . . the universal vulnerability of human beings and the imperfection of the societal institutions created to address that vulnerability.”²¹ Fineman’s “vulnerability theory” draws attention to “humans” rather than the “rights” focus of prevailing approaches to human rights discourse.²² Fineman too calls for a “responsive state”, but one that helps to produce “resilience” among individuals in society, who are *all* understood to be vulnerable: “Vulnerability is posited as a fundamental characteristic that positions individuals in relation to each other as human beings and also suggests an appropriate relationship of shared responsibility as between State, societal institutions, and individuals.”²³ The theory exposes inequalities in the degree of vulnerability experienced by individuals and the availability of resources to produce resilience across the population: “[T]he central ethical impulse animating vulnerability theory [is] the question of embodied life and its ethical implications in *lived* situations in which highly selective forms of vulnerability . . . are deployed (sometimes imposed) to disguise their structural production.”²⁴

¹⁶ *Ibid*. The concept of corporeal citizenship, originating in the work of Gabrielson and Parady (who bring material feminism together with environmental political theory), addresses in part the problem of green citizenship theories which assume “autonomous human subjects” “have the knowledge and ability to participate in appropriate ‘green’ activities” while excluding those who cannot participate equally due to “unequal social locations.” *Ibid* at 334. See further T Gabrielson & K Parady, “Corporeal citizenship: rethinking green citizenship through the body” (2010) 19:3 *Environmental Politics* 374-391.

¹⁷ Scott *et al*, *ibid* at 335.

¹⁸ *Ibid* at 334.

¹⁹ *Ibid*. See further authors cited by Scott, Haw, and Lee, including contributors to Stacy Alaimo & Susan Hekman, eds, *Material feminisms* (Bloomington: Indiana University Press, 2008).

²⁰ Martha A. Fineman & Anna Grear, “Introduction: Vulnerability as Heuristic—An Invitation to Future Exploration”, in Martha A. Fineman & Anna Grear, eds, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Farnham: Ashgate, 2013). See further Seck, “Climate Justice”, *supra* note 1.

²¹ Fineman & Grear, *ibid*.

²² *Ibid* at 2 (stating “a focus on vulnerability is decidedly focused on exploring the nature of the human part, rather than the rights part, of the human rights trope”).

²³ *Ibid*.

²⁴ *Ibid* at 11.

Angela Harris argues that Fineman's vulnerability theory ignores interactions of humans within their environment.²⁵ She proposes instead an ecological vulnerability frame which recognizes that vulnerability is produced by the "interdependency of the human body with a complex array of nonhuman and trans-human systems".²⁶ Harris considers both "outside ecologies" or macro-level vulnerability and "inside ecologies" or micro-level vulnerability. Macro-level vulnerability deals with human life engaging with and depending on the environment and the "ecological 'web of life'".²⁷ Micro-level vulnerability deals with human biology and the complex ecosystem of each human body; it is the idea that the human body is a "complex ecosystem made up of interdependent living entities, and that the whole's survival and flourishing depends on the health of individual parts and their interrelations".²⁸ Together, these vulnerabilities suggest that there must be a rejection of the human as an autonomous political subject that is separate from its environment: "humans are dependent not only on one another but on a series of trans-human systems".²⁹ For the State to fully address human vulnerability, an ecological vulnerability approach suggests that the State must also fulfil obligations to nonhuman entities and processes. In this sense, ecological vulnerability "expands our concept of what it means to be a citizen".³⁰

Harris considers materialist theories and models that support the ecological vulnerability project,³¹ and the governance and legal implications of it. She proposes an indivisibility principle according to which the protection of the environment and of human rights are understood to be "inextricably intertwined",³² lending support to strengthened state responses, whether constitutional or statutory, to protect human health and enact anti-pollution measures, aligned with sustainability as a fundamental value.³³ Second, she proposes a principle of "humility", alternately described as the "anti-subordination principle", in order to address the problem of vulnerability theory's "universalizing language and policies that ignore social injustice and thereby perpetuate it."³⁴ This principle makes visible the role of power in the development of policy and treatment of people, and she suggests that it is of relevance to international treaty negotiations over issues such as climate change. Furthermore, Harris suggests that the anti-subordination principle encourages "skeptical vigilance" of knowledge and language that fosters justice for human and nonhuman beings and humility in interacting with the environment.³⁵ In conclusion, Harris identifies other models that already embrace ecological vulnerability, including Julian Agyeman's concept of "just

²⁵ Angela Harris, "Vulnerability and Power in the Age of the Anthropocene" (2014) 6:1 Washington & Lee J Energy, Climate & Environment 98-161, online:

<<https://scholarlycommons.law.wlu.edu/jece/vol6/iss1/5/>>

²⁶ *Ibid* at 114.

²⁷ *Ibid* at 116.

²⁸ *Ibid* at 122.

²⁹ *Ibid* at 126.

³⁰ *Ibid* at 127.

³¹ *Ibid* at 129-137. These models include the social construction thesis, Stacy Alaimo's "trans-corporeality" framework, humanism, and Haraway's cyborg constitutionalism, among other theories by Jane Bennett, Elizabeth Grosz, Rosemarie Garland-Thompson, and Felix Guattari.

³² Harris, *ibid* at 129.

³³ *Ibid* at 138-139.

³⁴ *Ibid* at 139.

³⁵ *Ibid* at 141.

sustainability”,³⁶ the environmental justice movement,³⁷ and the concept of *buen vivir* in South American law and public policy.³⁸

The concepts of corporeal citizenship and ecological vulnerability have much in common, and could assist in re-imagining international human rights law. First, the fact that human health is dependent upon a healthy environment lends support to international human rights movements that call attention to environmental rights, whether procedural rights to information, to participate in decision-making, or to access justice, or substantive rights to a healthy environment. That there is evidence of a global consensus that state obligations extend to these rights is found in the 2018 *Framework Principles for human rights and the environment*³⁹ recently presented to the UN Human Rights Council by (now former) Special Rapporteur on Human Rights and the Environment, John Knox.⁴⁰ Both ecological vulnerability and corporeal citizenship also emphasize difference, and so support the recognition that protection of environmental rights requires special attention to vulnerable groups, including children, women, and Indigenous peoples, groups that also receive attention in the *Framework principles*.⁴¹

Despite this promise, international human rights law has arguably been less inclined to recognize environmental rights than it has labour rights.⁴² This may be due to the long-standing work of the International Labour Organization,⁴³ and the lack of a global treaty on environmental rights (although there is currently a movement to establish one).⁴⁴ Often at the heart of contestation over extractive industry operations, there is a tension between those who want economic development and “jobs” and those who want environmental protection and livelihood protections. There is often a gendered dimension to this tension.⁴⁵ However, it is possible that the corporeal citizenship or ecological vulnerability concepts could help to bridge the environment/labour divide, if the “worker” that is the subject of labour law were conceived as ecologically vulnerable, or as a

³⁶ *Ibid* at 151.

³⁷ *Ibid* at 152.

³⁸ *Ibid* at 153; see especially the Constitutions of Bolivia (2009) and Ecuador (2008).

³⁹ *Framework principles on human rights and the environment*, UNHRCOR, 37th Sess, Agenda Item 3, UN Doc A/HRC/37/59 (2018); see principles 7, 9 & 10 for procedural rights and principles 1 & 2 for substantive rights.

⁴⁰ *Ibid*.

⁴¹ *Framework principles*, *supra* note 39; see principles 3, 14 & 15. See also John Knox, *Report on children’s rights and the environment*, UNHRCOR, 37th Sess, Annex, Agenda 3, UN Doc A/HRC/37/58 (2018); Baskut Tuncak, *Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous wastes, Rights of the Child*, UN HRC, 33rd Sess, A/HRC/33/41 (2 August 2016).

⁴² Seck, “Transnational Labour Law”, *supra* note 1.

⁴³ International Labour Organization, online: <<http://www.ilo.org/global/lang--en/index.htm>>

⁴⁴ *Towards a Global Pact for the Environment*, UNHRCOR, 72nd Sess, Agenda Item 14, UN Doc A/72/L.51 (2018).

⁴⁵ See for example Raywat Deonandan, Kalowatie Deonandan, and Brennan Field, “Mining the Gap: Aboriginal Women and the Mining Industry” (2016), online: <http://hdl.handle.net/10393/35187>; Areli Valencia, *Human Rights Trade-Offs in Times of Economic Growth: The Long-Term Capability Impacts of Extractive-Led Development* (Palgrave MacMillan, 2016). But see Dean Laplonge, “The ‘un-womanly’ attitudes of women in mining towards the environment” (2017) 4 *Extractive Industries and Society* 304-309.

corporeal citizen. Moreover, if the worker is understood relationally, as embedded in supportive and interdependent relationships of family, community, and environment, the labour vs environment contestation could be re-imagined as a mutually beneficial search for sustainable livelihood choices, rather than the dominant “either/or” “winners/losers” proposition.⁴⁶ There is evidence of such re-imagining where attention is paid to workers as parents, and the protection of the rights of the child is understood as requiring healthy living conditions free of toxic contamination.⁴⁷ Of course to fully embrace ecological vulnerability would require attention also to justice for nonhuman beings, perhaps in keeping with recognition of rights of nature.⁴⁸

Anna Grear takes Fineman’s analysis in a different, yet still relational, direction,, seeing the potential for vulnerability to increase “juridical responsiveness” to a number of issues facing the world.⁴⁹ She emphasizes the utility of vulnerability theory as an approach that seeks to “directly . . . address the inadequacy and distortion produced by the dominant assumptions of the existing liberal legal and political order.”⁵⁰ These dominant assumptions portray the law as neutral, with its “mythic,” “rational,” “disembodied” actors operating on a level playing field.⁵¹ Grear draws attention to what she terms “the ‘double-excisions’ of the liberal judicial ethos.”⁵² She suggests the current liberal order encourages an excision of bodies and socio-material context to serve “highly particular interests,” an approach which merged “with other impulses to produce an identifiable form of ideological hegemony which has in turn produced . . . [a] coupling between the imperatives of neoliberal capitalism and law in the contemporary globalised context.”⁵³ Vulnerability, in its emphasis on *both* embodiment and context, is thus offered as a solution to “the ways in which the legal order performs its ‘rationalising’ function in the production of capitalistic privilege and disadvantage.”⁵⁴ After recounting the historical development of the “capitalist liberal subject” through “[the rise of] a particular form of disembodied rationalism within liberal law, the ascendancy of methodological individualism and . . . the rational, autonomous (male) individual of liberal legalism and capitalist economic theory,” Grear suggests law similarly excises embodiment and context in furtherance of power.⁵⁵ She writes: “[t]here is a red thread of continuity discernible between capitalism and law’s disciplinary control of the body, the body’s selective excision, ‘legitimated’ violence against embodied beings and the body’s analogical reproduction in the privileged corporate form.”⁵⁶ She suggests the corporate form has been elevated above the individual through upholding corporate “embodiment,” “a form of idiosyncratic embodiment

⁴⁶ Seck, “Transnational Labour Law”, *supra* note 1 at 53.

⁴⁷ *Ibid* at 153-155.

⁴⁸ David R Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (ECW Press, 2017).

⁴⁹ Anna Grear, “Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject”, in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* in Fineman & Grear, *supra* note 20, at 41–60 (seeking to examine vulnerability theory in the context of “bio-material embodiment” and the “materialities of advanced global capitalism.”).

⁵⁰ *Ibid* at 42.

⁵¹ *Ibid* at 44.

⁵² *Ibid* at 34.

⁵³ *Ibid* at 43.

⁵⁴ *Ibid* at 45 (citation omitted).

⁵⁵ *Ibid*.

⁵⁶ *Ibid*.

reflecting disembodied characteristics that no human body can ultimately hope to replicate or benefit from.”⁵⁷

Gear’s use of vulnerability theory to reveal capitalism’s privileged corporate form, coupled with the law’s legitimized violence against embodied beings, suggests that a reimagining of the corporation is essential, even as it is essential to ensure the protection of environmental human rights defenders, a growing tragedy that has caught the attention of the UN Special Rapporteur on human rights defenders.⁵⁸ International human rights law may not seem the obvious tool for a reimagining of the corporation, yet recent attention in the form of the UN Guiding Principles on Business and Human Rights to the responsibilities of businesses to respect human rights, to engage in human rights due diligence, and to prevent and remedy harms that result from corporate relationships, reveal a social if not legal expectation that businesses as organs of society share a responsibility to care for society and environment beyond what is mandated in host state law.⁵⁹ Importantly, this expectation has been embedded in guidance tools for transnational business conduct, including sector-specific guidance for extractive companies that is promoted by home and host states, and backed by state-based non-judicial remedy mechanisms.⁶⁰

In addition, Gear’s recognition of capitalism’s elevation of the corporate form above the individual suggests the importance of looking behind the individual separate legal corporate entities to reveal the relationships between the entities that make up the transnational or multinational corporate enterprise, as well as other contractual relationships in supply and value chains, both of which are important steps in the quest for corporate legal accountability.⁶¹ Examples of failures to achieve environmental justice by victims of extractive industry harms that are attributable to a court’s refusal to embrace enterprise theories of liability are easy to find,⁶² while

⁵⁷ *Ibid* at 44–45.

⁵⁸ *Report of the Special Rapporteur on the situation of human rights defenders*, UNHRCOR, 71st Sess, UN Doc A/71/281 (2016), (highlighting the situation of environmental human rights defenders).

⁵⁹ *Report of the Special Representative on Business and Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc A/HRC/17/31 (2011) [hereinafter, UN Guiding Principles].

⁶⁰ On the embedding of business responsibilities for human rights in guidance tools for extractive companies, and the promotion of this guidance to extractive companies operating internationally, see Sara L Seck, “Business, Human Rights, and Canadian Mining Lawyers” (2015) 56 *Canadian Business Law Journal* 208-237; Sara L Seck, “Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights” (2011) 49 *Canadian Yearbook of International Law* 51-116; on the equal applicability of OECD guidance both within and outside of Canada, see Olabisi D Akinkugbe and Sara L Seck, “2017 Developments in Home and Host State Policy Responses to Foreign Direct Investment” in Lisa Sachs, Lise Johnson, and Jesse Coleman, eds, *Yearbook on Investment Law & Policy 2017* (Oxford University Press, forthcoming).

⁶¹ *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Access to effective remedies under the Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework*, UNHRCOR, 72nd Sess, UN Doc A/72/162 (2017); *Report of the United Nations High Commissioner for Human Rights, Improving accountability and access to remedy for victims of business-related human rights abuse*, UNHRCOR, 32nd Sess, UN Doc A/HRC/32/19 (2016).

⁶² See for example various case studies in Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Rights to Remedy* (London, UK, 2014).

similar issues may arise in the recognition and enforcement of foreign judgments from host state courts.⁶³ Yet tools are being developed that embrace ideas of human rights due diligence across contractual relationships, including due diligence guidance for responsible conduct across mineral supply chains.⁶⁴ In theory there is no reason that similar tools could not be developed to address environmental justice concerns associated with mineral supply chains, or even climate justice concerns arising from fossil fuel infrastructure and global value chains.⁶⁵ An additional step would be to look inside the corporate enterprise to reveal the individuals in positions of power within, whether managers, officers, or members of the board of directors, and ensure legal reforms that would hold those responsible who fail to exercise appropriate diligence to prevent harm. An international human rights approach would also lend support to the importance of corporate board diversity, both as a means of empowering those who have been historically subject to discrimination, and as a means of enabling business enterprises to develop the cultural or gender competence essential for meaningfully carrying out their human rights responsibilities.⁶⁶ It is well documented that there are few women, and fewer racialized women in positions of power within extractive companies, and increasingly well documented that a lack of gender diversity on corporate boards leads to less environmentally and socially conscious corporate conduct.⁶⁷ Further more radical implications of Grear's analysis could lead to a reimagining of business structures, lending support to current trends to move away from the dominant for-profit form of capitalist business, to new forms of social enterprise including benefit corporations.⁶⁸ What might the ideal business structure

⁶³ See for example Chevron enforcement action in Ontario courts, *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472.

⁶⁴ See for example OECD (2016), *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264252479-en>, online: <http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf> (although environmental justice concerns are not captured by this guidance). See more recent but not industry specific OECD (2018) *OECD Due Diligence Guidance for Responsible Business Conduct*, online: <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

⁶⁵ Dehm, *supra* note 3, at 296-302.

⁶⁶ On corporate board diversity, see generally Aaron A. Dhir, *Challenging Boardroom Homogeneity: Corporate Law, Governance, and Diversity* (New York: Cambridge University Press, 2015).

⁶⁷ For statistics on board diversity focusing on gender in Canadian companies, see Andrew MacDougall, John Valley et al., *2017 Diversity Disclosure Practices Women in leadership roles at TSX-listed companies*, (Toronto: Osler LLP, 2018); CSA, "Roundtable Discussion – Third Review of Women on Boards and in Executive Officer Positions" (24 October, 2017), online at:

http://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20171103_transcript-wob-roundtable.pdf and Staff Review of Women on Boards and in Executive Officer Positions- Compliance with NI 58-101 Disclosure of Corporate Governance Practices, CSA Staff Notice 58-309 (October 5, 2017). For sample empirical studies on the role of women on boards and sustainability practices, see Lin Liao, Le Luo, Qingliang Tang, "Gender diversity, board independence, environmental committee, and greenhouse gas disclosure" (2015) *The British Accounting Review* 409-424; Corinne Post, Noushi Rahman, Cathleen McQuillen, "From Board Composition to Corporate Environmental Performance Through Sustainability-Themed Alliances" (2015) *J Bus Ethics* 423-435.

⁶⁸ Gideon D. Markman et al, "Entrepreneurship as a Platform for Pursuing Multiple Goals: A Special Issue on Sustainability, Ethics, and Entrepreneurship" (2016) *53:5 J Management Studies* 673-694.

for responsible extraction of rare earth minerals essential for green energy production look like if, for example, it was led by Indigenous women business leaders?

Lessons from Indigenous Feminists

There is also evidence of relational thinking if we turn to writings on Indigenous law and women, including insights arising from Indigenous feminism.⁶⁹ The importance of actively seeking out the writings of Indigenous women who may or may not self-identify as presenting an Indigenous feminist view is suggested by the work of Joyce Green, the editor of *Making Space for Indigenous Feminism*, first published in 2007, with a second edition released in 2017. Green notes that “Indigenous feminism has been routinely denigrated as untraditional, inauthentic, non-liberatory for Indigenous women and illegitimate as an ideological position, political analysis, and organizational process.”⁷⁰ However, she suggests that the “fear and marginalization that Indigenous feminists felt so keenly because of explicit hostility ... are somewhat mitigated (though not erased) in 2017.”⁷¹ Indigenous feminism fuses theory “with strategic action and solidarities” as “part of a broad and deep stream of feminist activism”.⁷² Green claims that the issues raised by Indigenous feminists would not be illuminated “but for their voices”.⁷³

I will refer to two examples of Canadian Indigenous women’s writings before turning to an example from Mexico. The writings of Janice Makokis explore what self-determination means from the perspective of a Cree woman.⁷⁴ Makokis urges caution in accepting understandings of self-determination as found in international human rights law, as the core values “are premised on western notions of what individual “human rights” are.”⁷⁵ She offers instead a “discussion and expression of [her] own ceremonial journey to understand what self-determination is” while being clear that she does not “speak to all Indigenous women’s experiences, how Indigenous women come to understand their sacred roles, or what an Indigenous gendered perspective of self-determination is.”⁷⁶ For Makokis, teachings originating in ceremony are key to “shaping autonomous individuals” who live “life uninhabited by colonial thinking.”⁷⁷ She quotes a Cree female Elder’s understanding of *iyiniw pahminsowin*, a “Cree framework for guiding our life”, who highlights the importance of fulfilling “roles and responsibilities as a result of our birth into Cree society”: “... we are not individualistic and independent of each other, much less the Creator. We have been born into a social order that is based on sacred laws and teachings of responsibility to one another. Hence we are interconnected and interdependent beings. At no time in our lives, are we ever alone.”⁷⁸ Makokis

⁶⁹ See Joyce Green, ed, *Making Space for Indigenous Feminism* 2nd ed (Fernwood Publishing, 2017).

⁷⁰ Joyce Green, “Taking More Account of Indigenous Feminism: An Introduction” in Joyce Green, ed, *ibid* 1 at 3.

⁷¹ *Ibid* at 3.

⁷² *Ibid* at 17.

⁷³ *Ibid* at 17.

⁷⁴ Wahpimaskwasis (Little White Bear), Janice Alison Makokis, “Nehiyaw iskwew kiskinowâtasinahikewina - paminisowin namôya tipeyimisowin: Learning Self Determination Through the Sacred” (2008) 26:3,4 *Canadian Women Studies* 39-50.

⁷⁵ *Ibid* at 40.

⁷⁶ *Ibid* at 39.

⁷⁷ *Ibid* at 42.

⁷⁸ *Ibid* at 43.

later elaborates: “we derive our identity from the family, community, and nation we are born into. How we relate to each other is a fundamental component of how we organize and govern our lives. By “relate” I am referring to how we relate to “all of our relations” and this includes our human relations, animal relations, spiritual relations, and the intimate relationship we have to Mother Earth who is our lifelong teacher in these unique kinship relations.”⁷⁹ In conclusion, she highlights the importance of Cree women reclaiming their “sacred roles as *nehiyaw iskwewak*” so as to “decolonize and revive a governance structure that reflects a respectful gender balance and honours the power and strength women have in giving life and sustaining our nations.”⁸⁰

Deborah McGregor offers a complementary view when speaking of water justice from the perspective of Anishnaabek law. She describes the concept of *zaagidowin* or love as a legal principle for achieving well-being or *Mnaamodzawin*, which is “enacted and embodied through the Mother Earth Water Walks” (MEWW).⁸¹ She describes waters as sentient beings that have experienced historical traumas of contamination and so their ability to “fulfil their responsibilities around giving and supporting life” has been disrupted.⁸² The MEWWs seek to “re-establish the reciprocal relationships with the waters through healing journeys”, a “call to consciousness by current generations, a call to enact obligations to ensure that future generations would know the waters as healthy living entities,” “grounded in enacting Anishinaabekwe responsibilities to care and speak for water.”⁸³

Makokis and McGregor both highlight the importance of sacred laws and ceremony, and the vital role played by women in Cree and Anishnaabek laws. While the language of responsibility and relationship with family, community, animals, water, and mother earth, as described by Makokis bears some similarity to the material feminist concept of corporeal citizenship, for example, McGregor’s recognition of the reciprocal agency and responsibility of nature (water) appears to move into another realm, although arguably captured by the concept of ecological vulnerability. Re-imagining international human rights law so as to create space for the voices of Indigenous women tasked with enacting responsibilities to care and speak for water, for example, then appears to be essential. This ambition could be realized through a combination of procedural environmental rights protections (including participation, and rights of free expression), substantive environmental rights protections, and implementation of free, prior and informed consent of Indigenous peoples as articulated in UNDRIP. An additional development could be recognition of the rights of nature. As noted above, the 2018 *Framework Principles on human rights and the environment* reflect many of these ideals, as do other sources of international norms.⁸⁴ There is also

⁷⁹ *Ibid* at 44.

⁸⁰ *Ibid* at 49.

⁸¹ Deborah McGregor, “Indigenous Women, Water Justice and *Zaagidowin* (Love)” (2013) 30:2 *Canadian Woman Studies* 71 at 72.

⁸² *Ibid* at 72-73.

⁸³ *Ibid* at 74.

⁸⁴ *Framework Principles*, *supra* note 39, 41; UNDRIP, *supra* note 6; Boyd, *supra* note 48. On other sources of international norms that support environmental human rights in the extractive industries context, see Seck, *supra* note 5. On biodiversity and human rights, see John Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: biodiversity*, UNHRC, 34th Sess, UN Doc A/HRC/34/49 (2017), online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/009/97/PDF/G1700997.pdf?OpenElement>>

increasing evidence in the domestic Canadian environmental impact assessment context of the importance of grounding sustainable resource extraction in meaningful participation rights that both include Indigenous peoples and draw attention to gender differences.⁸⁵

A different but related issue is revealed in the work of Isabel Altamirano-Jiménez in her contribution to *Indigenous Feminisms*.⁸⁶ Altamirano-Jiménez explores the relationship between Indigenous “customary” law in Mexico and Mexican state law. She begins her chapter by describing how an Indigenous woman was elected to be mayor of her community, only to be told by her Zapotec community that women were excluded from participating in politics under Indigenous customary law.⁸⁷ After filing a complaint with the National Human Rights Commission, her rights were found to have been violated, and, in 2014, a bill was proposed to amend the constitution “to guarantee equal participation of Indigenous women in electoral processes”.⁸⁸ The justification for the law was that “Indigenous normative or customary systems could not be above human rights.”⁸⁹ Yet Altamirano-Jiménez expresses concern that this experience constructs the “state as the saviour who rescues women from their own cultures”, and represents “Indigenous law as anti-democratic” while national law is viewed as “neutral and objective.”⁹⁰ She suggests that the neoliberal restructuring of the Mexican state and “recognition of Indigenous collective rights” has created zones of both legality and illegality that “work to limit Indigenous autonomy and self-determination” for “Indigenous law is simultaneously defined as a set of practices for asserting land rights and as ‘customs’ that are ‘inconsistent’ with national laws and international human rights law.”⁹¹ Consequently, “the legitimacy of Indigenous laws and Indigenous women’s rights are always in question.”⁹² Indeed, Altamirano-Jiménez suggests that while some celebrated the Mexican state’s “recognition of Indigenous normative systems” as the effective establishment of a “pluralistic legal regime”, others were concerned that “recognition of Indigenous customary law delegated the risk of dispossession and the responsibility to deal with dispossession onto Indigenous communities.”⁹³ Altamirano-Jiménez highlights the simultaneous construction of Indigenous normative systems as “a set of practices for asserting Indigenous rights and as customs that are inconsistent with national laws and universal human rights.”⁹⁴ From the perspective of Indigenous women’s politics, however, “deliberation and dissent” including with regard to the adaptation of laws to include Indigenous women’s rights, is not only key to validating Indigenous law but is also vital “in approaching law as

⁸⁵ See Jennifer Koshan “Bills C-68 and C-69 and the Consideration of Sex, Gender and Other Identity Factors” (2 May, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/05/Blog_JK_Bills_C68_69.pdf

⁸⁶ Isabel Altamirano-Jiménez, “The State is Not a Saviour: Indigenous Law, Gender and the Neoliberal State in Oaxaca” in Green, *supra* note 70 at 215-233.

⁸⁷ *Ibid* at 215.

⁸⁸ *Ibid* at 215-216, 227-228.

⁸⁹ *Ibid* at 216.

⁹⁰ *Ibid* at 216.

⁹¹ *Ibid* at 216.

⁹² *Ibid*.

⁹³ *Ibid* at 219.

⁹⁴ *Ibid* at 228.

a living, intellectual resource.” “The transformation of Indigenous law, then, is an overt political project led by Indigenous women.”⁹⁵

What lessons might we learn from this for the project of reimagining international human rights law for environmental and climate justice, including gender justice, in the extractive industries context? Clearly implementation by the State of Indigenous rights as reflected in UNDRIP is part of the answer, along with a caution that the State avoid playing the role of saviour of Indigenous women by legislating participation rights in a way that undermines the legitimacy of Indigenous laws. Yet this does not mean there is no role for State law in supporting respect for the human rights of women and girls through more subtle tools that acknowledge the living nature of all laws, and so the need to create space for contestation and evolution. Indeed the embedding of gender-based analysis into environmental impact assessment of project proposals, including of extractive industry projects may be precisely the kind of tool that is needed.⁹⁶ Beyond the state, there is a need for extractive companies to respect the rights and laws of Indigenous peoples, including women and girls, which must include respecting their rights to free expression and protest. New OECD guidance for extractive companies on human rights due diligence in stakeholder engagement practices holds promise in this regard, with annexes dedicated to Indigenous rights and women.⁹⁷ Equally promising is the Canadian OECD National Contact Point’s reminder that this guidance applies to companies operating both within and outside of Canada.⁹⁸ Recent guidance for companies on respect for civic freedoms and human rights defenders is also a welcome complement.⁹⁹

International Law & Feminist Theory

The approaches described above may have more to offer environmental justice than climate justice with their focus on locally experienced harms, although some issues and solutions overlap. To fully grapple with the reimagining of international human rights law for climate justice requires further consideration of feminist and relational theories but this time with attention to the structure

⁹⁵ *Ibid* at 229. The author cites Snyder, Napoleon, and Borrows (2015) for the observation that deliberation and dissent are key to living law; see Emily Snyder, Val Napoleon & John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” (2015) 48:2 UBC L Rev 593-654.

⁹⁶ See FemNetNorth Policy Impact Paper, “Gender-based analysis meets environmental assessment: <http://fnn.criaw-icref.ca/images/userfiles/files/GBAMeetsEnviroAssessPP.pdf>

⁹⁷ See OECD (2017), *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264252462-en>; Sara L Seck, “Indigenous Rights, Environmental Rights, or Stakeholder Engagement? Comparing IFC and OECD Approaches to the Implementation of the Business Responsibility to Respect Human Rights” (2016) 12:1 McGill Journal of Sustainable Development Law 48-91, online: https://www.mcgill.ca/mjsdl/files/mjsdl/volume_12_issue_1_seck-10-03-2016.pdf.

⁹⁸ See Seabridge Gold and the Southeast Alaska Conservation Council, online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_stat-seabridge-comm_finale.aspx?lang=eng as discussed in Akinkugbe & Seck, *supra* note 59.

⁹⁹ See for example “Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders – Guidance for Companies” (September 2018) https://www.business-humanrights.org/sites/default/files/documents/Shared%20Space%20Under%20Pressure%20-%20Business%20Support%20for%20Civic%20Freedoms%20and%20Human%20Rights%20Defenders_2.pdf

of international law. Feminist theorists have drawn attention to the need to question the underlying structures of international law.¹⁰⁰ Indeed, some scholars have questioned whether pushing the boundaries of public space in international law to include issues of concern to women that have previously been considered part of the private space of domestic law is desirable, if the “fundamental ‘architecture’ of international law” is not challenged.¹⁰¹ The analysis here aims to do precisely that – to challenge that fundamental architecture and in doing so to move beyond local/global binaries, a project that is also embraced by the “critical feminist and legal geographies literature” which has been said to “assist[] us to problematize the fixity and certainty of spaces of international law and their detachment from social, legal, and political realities.”¹⁰² In the words of Zoe Pearson: “The utility of concepts of space for this inquiry is that the focus is brought more strongly to the locations of the law within the fluid, multiple societal contexts in which law operates, and to the creation, visibility, and longevity of these locations and their connection to the social, political, economic, cultural, historical and legal realities.”¹⁰³ This then “is not a project of inclusion because of the emphasis on multidimensionality, the understanding that the spaces of international law are made up of many dimensions.”¹⁰⁴ The aim is to avoid “the hegemonic *representations of space* of our discipline that focus on global sites and institutions” ... “we must also recognise the intra-actively produced nature of the local, regional and global that means the seemingly peripheral lived spaces of international law are spaces that are in fact integral to our conceptions of the spaces of international law.”¹⁰⁵

The task of reimagining international law for climate justice from a feminist theory perspective is the subject of a recently published article of mine entitled “Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism and State Sovereignty”¹⁰⁶ that is inspired by insights from a 1993 article written by Karen Knop, entitled “Re/Statements: Feminism and State Sovereignty in International Law”.¹⁰⁷ The focus of “Climate Justice” is upon how Knop’s analysis might inform legal strategies to seek the accountability of the extractive industry ‘Carbon Majors’ for climate harms in a petition brought before the Philippine Human Rights Commission.¹⁰⁸

¹⁰⁰ See for example Anne Orford, “Feminism, Imperialism and the Mission of International Law” (2002) 71 *Nordic J Intl L* 275-296; Hilary Charlesworth, “Feminist Methods in International Law” (1999) 93 *AJIL* 379; Doris E Buss & Ambreena Manji, eds, *International Law: Modern Feminist Approaches* (Hart Publishing, 2005).

¹⁰¹ See for example discussion of concerns raised by Doris Buss in Zoe Pearson, “Feminist Project (s): The Spaces of International Law” in Sari Kouvo and Zoe Pearson, eds, *Feminist Perspectives on Contemporary International Law* (Oxford & Portland, Oregon: Hart Publishing, 2011) 47 at 59: (“Buss asks whether processes of inclusion necessarily represent progress: ‘What are we being included in, and under whose terms?’”)

¹⁰² Pearson, *ibid* at 61.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid*

¹⁰⁶ Seck, “Climate Justice”, *supra* note 1.

¹⁰⁷ Karen Knop, “Re/Statements: Feminism and State Sovereignty in International Law (1993) 3 *Transnat’l L & Contemp Probs* 293.

¹⁰⁸ Greenpeace Philippines, *Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from Impacts of Climate Change* (Sept 22, 2015), online: <<http://www.greenpeace.org/seasia/ph/PageFiles/105904/Climate-Change-and-Human-Rights->

Part of this project considers how critiques of the bounded, autonomous, liberal subject that informs assumptions about the nature of the State and State sovereignty in international law might offer insights for legal reform. As will be seen, other sources also offer relevant insights.

First, Knop queries the centrality of the State to international law, positing that it “might be important for women to reject—or, at least, not to assume—the centrality of the State” due to the fact that “women’s interests and concerns are not defined exclusively, or in many cases even significantly, by State borders.”¹⁰⁹ Treating the State as the primary actor in international law means that women’s voices can only be heard through the State, and that women from different States who wish to work together must rely upon the formation of alliances “between their respective States.”¹¹⁰ International legal theorists have differed in their approach, with some arguing non-governmental women’s groups that contribute directly to the formation of customary international law should be recognized, independent of state consent, because non-state actor cooperation or “action in concert” deserves equal recognition to cooperative or conflictual behavior of states.¹¹¹ This recognition of non-state actors as participants if not subjects of international law aligns with bottom up approaches to international legal analysis that see the formation of international law as the result of individual and group action, including in the area of human rights. A key example is UNDRIP,¹¹² which could have its legal ‘bindingness’ assessed from the perspective of Indigenous peoples rather than waiting for endorsement by the state, as is generally the accepted practice.¹¹³ The rationale for this approach could either be the explicit endorsement or implementation of UNDRIP by Indigenous peoples within their own legal orders, or because an assessment of UNDRIP’s normativity in the international sphere must account for the 50 year period during which Indigenous peoples movements worked to draft the text and seek state recognition.¹¹⁴ Similarly, Rebecca Bratspies argues that environmental human rights are claimed by those who engage in protest to protect sites of extractive industry proposals, and their legal status should be understood

[Complaint.pdf](#)>. “Climate Justice” also serves to supplement an earlier chapter with an environmental justice focus. See Sara L Seck, “Transnational Corporations and Extractive Industries” in Shawkat Alam, Sumudu Atapattu, Carmen G Gonzalez & Jona Razzaque, eds, *International Environmental Law and the Global South* (Cambridge University Press, 2015) 380.

¹⁰⁹ Knop, *supra* note 107 at 308 (explaining instead that “they are shaped by gender, sexuality, culture, and other factors”).

¹¹⁰ *Ibid* at 309.

¹¹¹ See *ibid* at 311–13 (drawing heavily upon the work of Isabelle Gunning); see also Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, (1991)31 Va J Int’l L 211–214.

¹¹² UNDRIP *supra* note 6; See further Centre for International Governance Innovation (CIGI), *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws: Special Report* (2017).

¹¹³ Sara L Seck, “Treaties and the Emancipatory Potential of International Law” in John Borrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (University of Toronto Press, 2017) 344-369 at 354.

¹¹⁴ *Ibid* at 359-360. See also Knop, *supra* note 107 at 342. Knop considers the evolution of the rights of Indigenous peoples at international law, and highlights the frustration experienced by Indigenous peoples who, having been denied “collective forms of representation in the international legal system” were increasingly “demanding recognition as subjects of international law so that they can represent their own interests directly in international fora.” See further CIGI, *supra* note 110 at 48.

from this perspective, rather than waiting for states or international law to “grant” these rights.¹¹⁵ Indeed, according to Bratspies, it is through the memory of those who give their lives to claim their rights “that the human right to a healthy environment becomes instantiated.”¹¹⁶ This move away from the centrality of the state in international law would also appear to align with Altamirano-Jiménez’s concern noted above that the state not be tasked with playing the role of “saviour” of Indigenous women.

A second example arises from Knop’s observation that some feminist international law scholars view “the self as connected to others through a web of relationships, instead of as separate and surrounded by solid boundaries that protect its autonomy.”¹¹⁷ If an analogy between the State and the individual is accepted, then this relational view of the State can provide “explanatory, and possibly prescriptive power, for the ‘nature of relationships between States’ in international environmental law.”¹¹⁸ Notions of global environmental stewardship reflect this vision of interconnection and responsibility to present and future generations, while language that reflects “fixed and rigid boundaries between States” not only fails to “reflect patterns of interaction and responsibility” but may “worse, prevent the formation” of desirable patterns of relationships.¹¹⁹ Applying insights about the relational nature of the State to the quest for environmental and climate justice in the extractive industries context suggests that it would be strategically wise to avoid recourse to language that reinforces the rigid boundaries of the State. For example, when arguments are made with regard to the scope of the state duty to protect human rights with respect to the conduct of transnational corporate actors, attempts to persuade states to embrace “extraterritorial obligations” as is common in the business and human rights discourse may be doomed to failure by reinforcing a territorially bounded vision of the state, and thus the fiction that States, like individuals, can exist as autonomous bounded entities irrespective of what else goes on in the world.¹²⁰ An alternate strategy would be to embrace relational language, with an emphasis on interconnection and interdependence, shared responsibility, and a duty of international cooperation. There is some evidence of this approach in human rights approaches to climate justice, unlike in the business and human rights field. For example, John Ruggie chose to include the language of permissive state extraterritoriality in the 2011 UN Guiding Principles on Business and Human Rights,¹²¹ and the 2011 Maastricht Principles¹²² on economic, social, and cultural rights also adopt the language of extraterritoriality although as a state obligation, as does

¹¹⁵ Rebecca Bratspies, “Claimed Not Granted: Finding a Human Right to a Healthy Environment” (2017) 26 *Transnat’l L & Contemp Probs* 268-279.

¹¹⁶ *Ibid* at 279.

¹¹⁷ Seck, “Climate Justice” *supra* note 1 at 403, citing Knop at 321.

¹¹⁸ *Ibid* at 403.

¹¹⁹ *Ibid*.

¹²⁰ See further Sara L Seck, “Moving Beyond the E-word in the Anthropocene”, in Daniel S Margolies, Umut Özsu, Maïa Pal, and Ntina Tzouvala, eds, *Standards and Sovereigns: Histories and Theories of Extraterritoriality*, (Routledge, forthcoming 2019).

¹²¹ Sara L Seck, “Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights” (2011) 49 *Canadian YB Intl Law* 51-116 at 106-108. However, the reference to extraterritoriality is found in the Commentary to the Guiding Principles, not within the Principles themselves.

¹²² ETO Consortium, *Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights* (28 September 2011).

the recent General Comment 24 of the Committee on Economic, Social, and Cultural Rights.¹²³ On the other hand, John Knox, the former Special Rapporteur on Human Rights and the Environment has chosen to embrace a relational approach to state obligations, including with regard to human rights affected by climate change, by rooting state obligations in the duty to cooperate.¹²⁴

Similarly, business and human rights advocates could learn lessons from the efforts of the International Law Commission to codify draft *Articles on the Prevention of Transboundary Harm Arising from Hazardous Activities*, as well as draft *Loss Allocation Principles*.¹²⁵ For example, it could be argued that business and human rights harms are often transboundary or transnational in nature, rather than extraterritorial.¹²⁶ This would help to clarify the nature of the relationship at issue in each particular case, and so reveal gaps in coverage. For example, the term transnational harm best illuminates contexts in which a corporate enterprise is domiciled in a home state yet impacts are felt by local communities in a host state (following the language of “transnational corporations”). On the other hand, border-crossing transboundary environmental harms are a different kind of problem that demands a different response, one that is similar to, yet distinct from, global harms such as climate change. Avoidance of impervious boundary-reinforcing terminology (“extraterritorial”) and adoption of relational terminology that is suggestive of porous boundaries (“transboundary”, “transnational”) thus provides greater clarity of the nature of the problem, and of the necessary response. This could facilitate critique of emerging guidance tools such as the OECD due diligence guidance for stakeholder engagement in the extractive industries, by noting that while it provides a useful tool for local and transnational stakeholder engagement, it is deficient in failing to provide guidance on transboundary and global stakeholder engagement, both critically important for extractive companies that mine or emit toxic substances that transcend political borders (such as mercury or other heavy metals released into fresh water sources, for example), or engage in climate harming operations (such as extraction of fossil fuels.)¹²⁷ Moreover, instead of

¹²³ CESCR, ‘General Comment No 24 on State obligations under the Covenant on Economic, Social and Cultural Rights in the context of business activities’ (10 August 2017) E/C.12/GC/24 at paras 29-37.

¹²⁴ John Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: climate change*, UNHRCOR, 31st Sess, UN Doc A/HRC/31/52 (2016), online:

<www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/Annualreports.aspx> at paras 70-77, 83-84.

¹²⁵ International Law Commission, Report of the International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, 53rd Sess, UN Doc A/56/10 (2001) 366-436; International Law Commission, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising from Hazardous Activities*, Report of the International Law Commission: 58th Sess, UN Doc A/61/10 (2006) 101-182. See further Sara L Seck, “Lessons for the Treaty Process from the International Law Commission and International Environmental Law” in Nicolás Carrillo-Santarelli & Jernej Letnar Čerňič, eds, *Perspectives on the Proposed Treaty on Business and Human Rights* (Intersentia, 2018) 273.

¹²⁶ See Sara L Seck, “Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations” (2011) 3:1 Trade, Law & Development 164-202 (TWAIL special issue, invited).

¹²⁷ See OECD Stakeholder Engagement Guidance, *supra* note 97 at footnote 2, page 42 (stating: “Certain impacts may not fit into this geographical area, such as the project’s contribution to national revenues, or the impact of the project on global warming. These impacts should be included in the enterprise’s due diligence considerations; however, it may not be possible or appropriate to deal with these impacts through site-level stakeholder engagement activities.”) On mercury as a substance that travels throughout the environment irrespective, see UNEP, “At A

seeking to take apart the notion of separate legal personality of transnational corporate entities – a legal concept that fixes impermeable boundaries between the entities that make up a transnational enterprise – the ILC Articles and Loss Allocation Principles focus on the “operator” instead, or “where appropriate, other persons or entities”.¹²⁸ These ideas complement the reforms suggested above following from Anna Grear’s challenge to the capitalist corporate form.

Another theme that feminist relational scholarship has identified as problematic is an emphasis on bright-line boundaries between public and private, and critiques of the public/private boundary have been applied to the “boundary between international and domestic jurisdiction.”¹²⁹ Knop suggests that some feminist critiques conclude that the boundaries should be eliminated, while others suggest that “rigid” boundaries “should become permeable.”¹³⁰ While relations between states are regulated by international law, the state’s treatment of its nationals is said to occur away from scrutiny within the private sphere of the State. International human rights law has shifted the boundary between domestic and international jurisdiction, yet has not called it into question.¹³¹ Accordingly, assumptions arising from these public/private boundaries should be scrutinized.

In my paper, “Climate Justice”, I critique the Philippine Climate Change Petition on investor-owned Carbon Majors, for its failure to expand the reach of the petition to encompass State-owned carbon major enterprises and Nation State carbon majors, both significant contributors of greenhouse gas emissions according to the Heede Carbon Majors study.¹³² This distinction between public and private actors may be evidence of unquestioning acceptance of the public/private boundary, likely informed by pragmatic concerns that any attempt to ask the Philippines Commission to investigate these actors would immediately be challenged by accepted doctrines such as sovereign immunity.¹³³ Re-imagining the doctrine of sovereign immunity in a relational frame would suggest that the doctrine should be interpreted narrowly so as to encourage an embrace of shared responsibility and cooperation, rather than encouraging state or state-related actors to hide behind sovereign walls. Again, the ILC Prevention Articles and Loss Allocation Principles also offer food for thought, as a focus on the “operator” of the hazardous activity does not distinguish between public and private actors.¹³⁴

A second version of the public/private boundary critique is found in the bright line division between international and domestic law. The Philippine petition relies on the precautionary principle of international environmental law, and as well as signed or ratified international human rights law treaties. According to the petition, under domestic Philippine law, the law of the land

Glance: Minamata Convention on Mercury”, online:

http://www.mercuryconvention.org/Portals/11/documents/Awareness%20raising/FACT%20SHEETS/Minamata%20Convention%20on%20Mercury%20at%20a%20glance_COP1%202017.pdf

¹²⁸ Seck, “Lessons for the Treaty Process” *supra* note 125 at 295.

¹²⁹ Seck, “Climate Justice”, *supra* note 1 at 405-406.

¹³⁰ *Ibid* at 406, citing Knop at 329.

¹³¹ *Ibid*.

¹³² *Ibid* at 404.

¹³³ *Ibid* at 404. Alternate doctrines that could be called into play might include comity of nations, political question, or non-justiciability.

¹³⁴ Seck, “Lessons for the Treaty Process” *supra* note 125 at 295-296.

includes “generally accepted principles of international law”.¹³⁵ This would be consistent with a relational approach that aims to render the boundary between international and domestic law permeable to normative developments in international law. A different but related issue in the Philippine petition is the extensive reliance on the UN Guiding Principles and in particular the business responsibility to respect human rights, described in the petition as reflecting current “norms and standards on the responsibility of corporate actors.”¹³⁶ To the extent that there is an unresolved debate as to the existence of direct obligations of business enterprises under international human rights law, perhaps especially with regard to human rights affected by environmental harms and climate change,¹³⁷ it could be said that the social expectation of the UNGPs that is said to exist “over and above legal compliance” should be understood as a reflection of international legal normativity.¹³⁸ A relational approach would suggest that these normative developments should be taken seriously within domestic law, including by domestic courts. This would help to open the door to human rights-based climate change litigation against fossil fuel companies, whether private or state-owned, including claims brought by Indigenous communities, women, and children.¹³⁹

The final theme in “Climate Justice” is the emergence of overlapping and interdependent sovereignties and corresponding implications for understandings of the “subjects of international law and the practice of sovereignty”.¹⁴⁰ The starting point here, drawing upon Knop, is the need to move beyond the analogy between the individual and the State in acknowledgement of the fact that “whatever the analogic conventions of international law, the State is not a unified self.”¹⁴¹ Knop’s aim is to provide feminists with insights into how sovereignty can be reconceived so as to explore “how women might participate in international law-making” as individuals as well as “through their membership in different, potentially overlapping groups.”¹⁴² Of particular relevance to the analysis of the Philippine climate petition, and other climate litigation that targets fossil fuel companies, is

¹³⁵ Seck, “Climate Justice”, *supra* note 1 at 405.

¹³⁶ *Ibid* at 407, citing petition at 17.

¹³⁷ Justine Nolan, “The corporate responsibility to respect human rights: soft law or not law?” in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2003); see also reports of the Special Rapporteur on toxic substances and hazardous wastes who explicitly provides guidance for businesses to clarify their responsibility to respect human rights: Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, *Guidelines for good practices in relation to the human rights obligations related to the environmentally sound management and disposal of hazardous substances and wastes*, UNHRCOR, 36th Sess, UN Doc A/HRC/36/41; *Mandate of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes*, UNHRCOR, 21st Sess, UN Doc A/HRC/RES/21/17 (2017).

¹³⁸ See in more detail Seck, “Climate Justice”, *supra* note 1 at 407-409.

¹³⁹ *Ibid*. For the current state of climate litigation adopting a human rights approach, see Jacqueline Peel and Hari M Osofsky, “A Rights Turn in Climate Change Litigation?” (2018) 7:1 *Transnational Environmental Law* 37-67 (discussing, among other cases, the 2005 Inuit climate change petition to the Inter-American Commission on Human Rights, the Juliana litigation against the United States brought by youth plaintiffs for breach of the public trust doctrine among others.)

¹⁴⁰ Seck, “Re-visiting TNCs”, *supra* note 1 at 407-410.

¹⁴¹ *Ibid* at 409, citing Knop at 333.

¹⁴² *Ibid* at 410, citing Knop at 341.

that a move toward recognition of non-state actor participants in international law-making, if not non-state actor international legal subjects, opens the door to greater consideration both of collective claims by rights-holders, and to allocation of collective responsibilities and accountability. The polycentric governance structure of the UN Guiding Principles according to which the business responsibility exists independently of the state duty to protect and is over and above domestic law is arguably an example of such overlapping and interdependent sovereignties.¹⁴³ A related example is that of the ILC Prevention Articles and Loss Allocation Principles, where consideration is given to the different roles that exist for operators, and other persons or entities, as well as the state of origin, and the affected state.¹⁴⁴ Similarly, a layering of state and non-state responsibilities and liabilities, including international institutions and private contractors, may be found in the deep seabed mining regime.¹⁴⁵ Finally, attention to the emergence of overlapping sovereignties opens the door for recognition of Indigenous legal orders within the colonial State, of particularly crucial importance in the Canadian context in 2018, following the Calls to Action of the Truth and Reconciliation Commission.¹⁴⁶ Indeed, it has been suggested that there is a need to “braid” together international, domestic, and Indigenous laws in the implementation of UNDRIP.¹⁴⁷

Conclusions

I have argued that relational approaches to the re-imagining of constructs and legal tools can serve to focus our attention on cultivating relationships among people and the material world, including relationships in the international sphere, that are essential for environmental and climate justice. The writings of relational feminist and vulnerability theorists considered in the first part of this article move beyond critique of the bounded autonomous individual, and offer alternatives such as the corporeal citizen who is ecologically vulnerable. Re-imagining all mining industry workers as ecologically vulnerable, corporeal citizens focuses our attention on the need for resource extraction

¹⁴³ *Ibid* at 410. See also UN Guiding Principles, *supra* note 58 at 13.

¹⁴⁴ Seck, “Lessons for the Treaty Process” *supra* note 125 at 295.

¹⁴⁵ Anna Dolidze and Sara L Seck, “ITLOS Case No. 17 and the Evolving Principles for Corporate Responsibility under International Law” in Noemi Gal-Or, Math Noortmann, and Cedric Ryngaert, eds, *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Brill Publishers, 2015) 235-259.

¹⁴⁶ Truth and Reconciliation Commission of Canada, Calls to Action (2015), online: <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf>

¹⁴⁷ CIGI, *supra* note 112. Indeed, in the words of James (Sa’ke’j) Younblood Henderson:

“braiding will be more like contrapuntal music, rather than architectural blueprints. The quandary of how to implement the human rights of Indigenous peoples within the law of the nation-state is an important, pressing and daunting challenge, as these rights present an enigma to theories of Eurocentric law, as well as to Eurocentric theories of humanity and society. Indigenous peoples’ human rights undermine and unsettle the arrangement of most nations, societies and politics, making these arrangements, derived from the institutions of the state, seem contingent, precarious, and defective. These human rights reveal the innermost secrets of both Indigenous and Eurocentric approaches to humanity and leave unanswered many question about the rule of law in forming or designing social order.”

from “The Art of Braiding Indigenous Peoples’ Inherent Human Rights into the Law of Nation-States” in *UNDRIP Implementation*, *ibid* at 13.

to support sustainable livelihoods, irrespective of the gender of workers, and to ensure sustainable futures for children, communities, and the non-human world. These writings also draw into focus the problematic nature of the disembodied corporate form that typifies industrial resource extraction yet might be re-imagined as an embodied and responsible enterprise, one that undertakes human rights due diligence to prevent and remedy harm, including across contractual relationships. Re-imagining the corporate form as embodied also draws our attention to the individuals behind the enterprise, and leads us to wonder who they are, and to ask whether they demonstrate essential cultural and gender competence for responsible participation in resource extraction.

In the second part of the paper I turn to the writings of Indigenous feminists, who offer further relational insights that are similar to, yet distinct from the concepts of corporeal citizenship and ecological vulnerability, Indigenous feminist legal scholars emphasize understandings of interconnection and interdependence through responsibility and relationship to family, community, animals, water, and mother earth. Yet Indigenous feminist writers also highlight the spiritual nature of reciprocal kinship relationships, which can only be realized if space is created in decision-making processes to enable Indigenous women to enact their responsibilities to care and speak for nature. At the same time, it is crucial that the state not be placed in the position of saviour to Indigenous women, with international human rights law used to question the legitimacy of Indigenous laws. These Indigenous laws must be subject to transformation in political processes led by Indigenous women, and colonial laws and responsible business guidance for extractive industries must be careful to enable rather than suppress these processes.

Finally, I turn to international law and feminist theory to argue for the importance of recognition of non-state actors in international legal analysis rather than assuming the centrality of the state so as to give voice to women's movements that are united across borders. Second, there is a need to avoid reinforcing a territorially bounded vision of the state that denies the reality of ecological interdependence and transnational economic ties. Instead, international lawyers should carefully choose the language in which they frame their arguments so as to build and reinforce responsible relationships across borders, whether transboundary, transnational, or global, as well as the importance of international cooperation. Another theme is the need to challenge bright-lines between public and private, whether in distinctions between public and private actors, or between public international law and domestic laws. In this way, legal doctrines can more fully reflect the relational reality of our world, and so enable climate justice including for the most vulnerable women of the global south. Finally, international law's vision of the unified state must be transcended to acknowledge the existence of overlapping yet interdependent sovereignties, including Indigenous sovereignties, even as international legal norms are relied upon to argue for the protection of the human rights of women and girls. Implementation of these lessons will require careful attention from multiple actors including those who advocate on behalf of women and girls engaged in resistance to extractive sector harms.

The modest aim of this article is to draw attention to structural issues that inhibit the quest for environmental and climate justice in a world in which extractive industries are too often able to go about their business without consequence for the harms they cause, whether local or global, within global north or global south. By considering the writings of feminist and relational theorists, including Indigenous women, the article has attempted to illustrate that a wide range of sources support relational thinking and that the ideas that emerge from these readings challenge commonly accepted constructs and legal doctrines. The article also reveals that there are signs of change,

including the emergence of guidance tools for extractive companies, although much work remains to be done. Perhaps the key point is that we need to be vigilant and guard against unconscious acceptance of legal structures that invoke the bounded autonomous liberal individual. Instead, we must actively seek relational laws and practices, whether in international law, human rights law, business law, Indigenous law, and even environmental law. If we take seriously the ecological vulnerability challenge to human rights, we must reimagine the field to make explicit that humans and environment are inextricably intertwined in a relational embrace. At the same time, we must accept that international human rights law is not (just) what states say it is, but rather what those who claim their rights know to be true, including those who rely upon Indigenous laws to inform their actions and understandings. In this way we may move closer to understanding the legal normativity of environmental and climate justice claims, including gender justice, and so be better able to prevent and remedy such harms.