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### A relational analysis of enterprise obligations and carbon majors for climate justice

Sara L. Seck

*Dalhousie University Schulich School of Law, sara.seck@dal.ca*

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**Sara L. Seck, “A relational analysis of enterprise obligations and carbon majors for climate justice” Oñati Socio-Legal Series, Forthcoming: Climate Justice in the Anthropocene**

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Sara L Seck, Associate Professor, Schulich School of Law, Marine & Environmental Law Institute, Dalhousie University: [Sara.Seck@dal.ca](mailto:Sara.Seck@dal.ca)

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**KEYWORDS**

Climate justice, relational theory, business and human rights, carbon majors, international human rights law

**ABSTRACT**

A coherent theory of climate justice must answer the question of “who owes what to whom, and why?” In this paper I consider this question with a focus on the contribution of business enterprises, in particular the ‘carbon majors’, to climate injustice. I will first introduce a relational approach to legal analysis, drawing upon the work of feminist and vulnerability theorists, Indigenous feminist theorists, and feminist corporate and international law theorists. This relational approach confronts the dominant yet unacknowledged prevalence of the bounded autonomous individual of liberal thought in diverse areas of law and policy, and offers a method not only for critique, but also for reinterpretation and transformation of law in the Anthropocene. I then examine the 2018 Principles on Climate Obligations of Enterprises, drafted by a sub-group of the legal experts responsible for drafting the 2015 Oslo Principles on Global Obligations to Reduce Climate Change. Here, I consider how the Enterprises Principles both reflect and depart from a relational approach to legal analysis, and the implications of this

for conceptualizing the human rights responsibilities of carbon majors for climate justice. In conclusion, I argue that a coherent theory of 'who owes what to whom and why' in the Anthropocene is dependent upon relational insights which enable us to tell old stories in new ways, and so reveal the interconnectedness and interdependence of all beings, while accounting for power and difference.

## **1. Introduction**

A coherent theory of climate justice must answer the question of “who owes what to whom, and why”? (Adelman 2016, p. 36). In this paper, I will consider this question with a focus on the contribution of business enterprises, particularly the carbon majors, to climate injustice. By carbon majors, I am referring to the less than 100 multinational and state-owned enterprises to whom a major share of responsibility for historical global greenhouse gas (GHG) emissions can be attributed due to their contributions as producers of fossil fuels and cement (Heede 2014, 2019). I will first introduce what I describe as a relational approach to legal analysis, which confronts the dominant yet unacknowledged prevalence of the bounded autonomous individual of liberal thought in diverse areas of law and policy, and offers a method for critique and the reinterpretation and transformation of law in the Anthropocene. The bounded autonomous individual is one that is imagined to be independent and self-reliant, with the impermeable boundaries that surround him representing a lack of acknowledgement or awareness of the reality of interconnectedness and interdependence that exists among humans and with nature. In formulating this relational approach to legal analysis, I consider insights from relational feminist and vulnerability theorists, Indigenous legal theorists, corporate sustainability theorists and feminist international law theorists. I then use this relational approach to assess the 2018 Principles on Climate Obligations of Enterprises (Enterprises Principles) (Expert Group on Climate Obligations of Enterprises 2018), which were drafted by a sub-group of the legal experts responsible for the 2015 Oslo Principles (Expert Group on Global

Climate Obligations 2015a). This analysis is offered as a contribution to debate over the interpretation of existing legal obligations, a debate that is welcomed by Jaap Spier, one of the drafters of both the Oslo and Enterprises Principles (Spier 2018, p. 333). I consider how the 2018 Enterprises Principles both reflect and depart from a relational approach to legal analysis, and the implications of this for conceptualizing the human rights responsibilities of the carbon majors for climate justice. In conclusion, I argue that a coherent theory of who owes what to whom and why in the Anthropocene is dependent upon relational insights which enable us to tell old stories in new ways and thereby reveal the interconnectedness and interdependence of all beings while accounting for power and difference.

## **2. Relational Approaches to Legal Analysis**

Relational approaches to legal analysis may be derived from varied sources. Irrespective of origin, such approaches confront the dominant yet unacknowledged prevalence of the bounded autonomous individual of liberal thought in diverse areas of law and policy, and offer a method not only for critique but also for reinterpretation and transformation of law in the Anthropocene. Drawing in part on previous work, I consider insights from relational feminist and vulnerability theorists, Indigenous legal theorists, corporate sustainability theorists, and feminist international law theorists who in different ways “share a desire to shine the spotlight away from the bounded autonomous individual of liberal thought and towards relationships among people and the material world, including in the international sphere” (Seck 2019a, p. 153; Seck 2017a; Seck 2018a).

The concept of the Anthropocene draws attention to the scientifically identified limits of planetary boundaries, and the increasing instability of earth systems as a result of human interference. The Anthropocene has implications for global environmental governance and international law, necessitating innovative governance responses (Craik, Jefferies, Seck, and Stephens, 2018). These arguably include a fundamental restructuring of global environmental constitutionalism (Kotzé and Muzangaza, 2018) together with a fundamental restructuring of both international environmental and economic law (Gonzalez, 2017). This re-imagining is an essential piece of the quest for climate justice, and must acknowledge the rights of future

generations and the rights of nature, the importance of intra-generational equity, and the need to challenge the global economic order (Gonzalez, 2017).

The terminology of the Anthropocene is used here in the spirit of “engaged analysis” (Castree 2014, pp. 233-60), fully conscious that other terminology such as ‘Capitalocene’ or ‘Chthulucene’ (Haraway 2016; Moore 2017) may more accurately acknowledge the particular responsibility of the wealthy, overconsumption, and capitalism rather than the ‘universal We’ that represents “the struggle between monolithic humankind and the systems of nature” and in so doing “elides any trace of power relations that may exist among communities, societies, and states” (Lepori 2015, p. 109). Crucially, to avoid universalizing tendencies, relational projects must be alert to difference and power – both of which a true relationally conscious analysis will illuminate rather than hide.

### **2.1 Feminist and Vulnerability Theorists**

Many theorists have drawn attention to the problematic yet unspoken presence of the bounded autonomous individual in legal analysis and offered a relational view as an alternative. For example, Jennifer Nedelsky suggests that a relational view sees “the person whose rights and well-being are at stake” as “constituted by their relationships” (Nedelsky 2011, p. 121). Consequently, “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” (Nedelsky 2011, p. 121). Recognizing that relationships extend beyond the social realm of human relationships to relationships between humans and the material world, Nedelsky highlights the importance of moving beyond metaphors that invoke boundaries to ask “what pattern of relationship among people and the material world [do] we want?” (Nedelsky 2011, p. 117). Material feminist thinking has led others to embrace the concept of “corporeal citizenship”, that is, the need to draw attention to the embodied nature of the individual and to “thinking about the environment *through the body*”, thus “emphasizing difference” (Seck 2019a, pp. 154-155, citing Scott, Haw & Lee 2017, p. 335, emphasis in original). Vulnerability theorists, on the other hand, including Martha Fineman and Anna Grear, have posited that even in the face of difference there is a universal vulnerability to the human condition, and that a “responsive state” is necessary to produce “resilience” among individuals in society, with responsibility

shared among “state, societal institutions, and individuals” (Fineman & Grear 2013, pp. 1-2). Angela Harris proposes an “ecological vulnerability” frame which emphasizes the “interdependency of the human body with a complex array of nonhuman and trans-human systems”, suggesting that state obligations extend to “non-human entities and processes” (Harris 2014, pp. 114, 127). Harris further proposes that while an indivisibility principle reflects the interdependence of environment and human rights, it must be informed by a humility or anti-subordination principle, so as to avoid the “universalizing language” of vulnerability which may inadvertently perpetuate policies that ignore social injustice (Harris 2014, pp. 129, 139).

This small sample of relational approaches illustrates that despite differences, there is a common recognition that an emphasis on relational thinking is necessary to move beyond a fixation with the bounded autonomous individual so as to acknowledge the reality of interrelations and interdependence among ‘humans’ and ‘environment’ or ‘nature’, while at the same time not universalizing the human experience. Several legal reform themes emerge as a result, including the need for state obligations enacted through law to protect humans and non-humans alike, for state law to enable resilient societies and ecosystems and to foster social and environmental justice (Seck 2019a, p. 157-8).

Moreover, as I have argued elsewhere (Seck 2018a), relational insights can and should inform every step of analysis, including how we imagine the constructs that laws are designed to protect, and even disciplinary understandings about what constitutes the scope of distinct fields of law. For example, the field of labour law is focused on the protection of the rights of workers. But how do we conceive workers? Who do we imagine them to be? A relational vision of workers would understand them as members of collectives of individuals in the workplace, who are each equally members of families and communities, surrounded by children and embedded in the material world (Seck 2018a). Protecting the embodied and relational worker through law would bring into focus the fact that high paying jobs for workers that are polluting or otherwise ecologically destructive are not ‘good’ jobs for anyone, as individual workers and their families, communities and the earth systems in which they are embedded are all vulnerable, although differentially, to the resulting ecological destruction. Yet this is a conversation that has tended to be beyond the scope of labour law’s focus on worker’s rights,

aside from concerns about worker health and safety, with attention to the impact of industrial pollution and ecological degradation consigned to the field of environmental law. A relational analysis therefore suggests the possibility of bridging distinct fields of law that tend to operate in separate silos. For example, the vulnerability of children to environmental harms becomes a concern of labour law when workers are viewed relationally, for without ecologically sustainable livelihoods for worker parents, children cannot thrive (Seck 2018a, pp 152-154).

The divide between humans and the environment embedded in the distinct fields of human rights law and environmental law similarly dissolves through the adoption of a relational approach, as all humans are embedded in earth systems and so vulnerable, though differentially, to ecological harms. Applied to the climate change problem, a relational understanding of the human that is the subject of rights necessarily raises concerns over climate justice. All humans depend on a safe climate system, yet individual humans are differentially situated and do not share the same climate vulnerabilities.

## **2.2 Relational Law and Indigenous Legal Orders**

The writings of Indigenous legal theorists also reveal relational thinking that emphasizes interconnection and interdependence, drawing upon Indigenous laws that are unique to each nation. For example, Janice Makokis, quoting a Cree female Elder's understanding of the Cree guiding framework *iyiniw pahminsowin*, describes the importance of fulfilling the "roles and responsibilities" of Cree law for members of Cree society: "We have been born into a social order that is based on sacred laws and teachings of responsibility to one another" (Makokis 2008, p. 43). She continues: "How we relate to each other is a fundamental component of how we organize and govern our lives" with "all of our relations" including "our human relations, our animal relations, spiritual relations, and the intimate relationship we have to Mother Earth who is our lifelong teacher in these unique kinship relations" (Makokis 2008, p. 44). Makokis emphasizes the distinct role of women within Cree law, a theme also found in Deborah McGregor's writing on water justice in Anishnaabek law (McGregor 2013). McGregor describes the importance of the Anishnaabe Mother Earth Water Walks which "re-establish the reciprocal

relationships with the waters through healing journeys” that are 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” (McGregor 2013, p. 74).

The importance and distinct nature of Indigenous laws and institutions are reiterated in other work by McGregor in which she proposes a distinct Indigenous environmental justice framework (McGregor 2020). She observes that implementation of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP 2007) provides an opportunity for international actors and nation-states to decolonize their laws and legal systems and reform them to address injustice (McGregor 2020, pp. 4, 6). However, McGregor emphasizes that Indigenous legal orders are unique to each nation and therefore collectively offer a diversity of Indigenous worldviews, theories, and intellectual and legal traditions that “reflect a series of reciprocal relationships and a co-existence with the natural world” as well as reciprocal relationships with ancestors and future generations (McGregor 2020, p. 9).

While the other relational approaches to law noted above have emphasized the importance of formal, positive state law, McGregor is clear that Indigenous laws and legal orders must be given space to thrive. This view is supported by Indigenous feminist Isabel Altamirano-Jiménez who argues that it is important that state law not be called upon to play “the saviour who rescues women from their own cultures” in situations where Indigenous customary laws exclude the equal participation of women (Altamirano-Jiménez 2017, p. 216). “[T]ransformation of Indigenous law” is, according to Altamirano-Jiménez, “an overt political project led by Indigenous women” and key to “living law” (Altamirano-Jiménez 2017, p. 229). She suggests that recognition of Indigenous law by the state as part of a “pluralistic legal regime” should not simultaneously call into question the legitimacy of Indigenous laws, to be judged for human rights compliance by that same state (Altamirano-Jiménez 2017, pp. 216, 219), although this is not to say that human rights compliance may not be judged by others.

What might we learn from these Indigenous legal theorists for the project of relational law and its application to climate justice? Importantly, women have been identified as among those most vulnerable to climate harms, with rural, minority, and Indigenous women facing the greatest challenges (Seck 2017a, p. 387; Atapattu 2016, p. 206). At the same time, women,

including Indigenous women, have the potential to lead as agents of change with the power to bring about crucial reforms. A key insight is that while legal reform through the decolonization of nation-state law and international laws and institutions is essential, it is not appropriate to seek a single universal understanding of law. Each indigenous legal order is uniquely related to a place where the natural world and Mother Earth are the holders of legal knowledge. It follows that it is essential to build into nation-state and international governance structures spaces for the sharing of Indigenous knowledge of law, including by Indigenous women, and to ensure that key decisions that affect the ability of Indigenous peoples to fulfill their reciprocal relations with mother earth, ancestors, and future generations are subject to their consent in accordance with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>1</sup>

### **2.3 Relational Law and the Corporate Form**

It is commonplace to hear both critiques of capitalism and calls for corporate legal accountability for local and global ecological destruction. How might a relational approach to legal analysis shed light on the problem of corporate impunity? Anna Grear has proposed the value of vulnerability theory in drawing attention to dominant assumptions of the liberal legal order out of which have emerged capitalism's "privileged corporate form" (Grear 2013, p. 45; Seck 2019a, p. 159). According to Grear, the autonomous individual of liberal law and capitalist economic theory excises embodiment and context in the pursuit of power while violence against embodied beings is legitimated (Grear 2013, p. 45). Meanwhile, the embodiment of abstract legal personality in the corporate form has elevated it above the individual through "a form of idiosyncratic embodiment reflecting disembodied characteristics that no human body can ultimately hope to replicate or benefit from" (Grear 2013, pp. 44-45) – that is, the

<sup>1</sup> While the meaning of free, prior and informed consent (FPIC) under UNDRIP is often contested, the application of relational law to understandings of the sovereign state as explored later in this chapter reveals that state-centric understandings of UNDRIP and FPIC are problematic and should be avoided as they replicate international law's colonial history.

corporation as a separate legal person, exists as a 'body' that is distinct from its human creators.

The nature of the corporate form has been the subject of critique in transnational corporate accountability litigation, including for environmental and climate justice, particularly where traditional corporate law doctrines which view each corporate entity within a multinational enterprise as a separate legal person combine with jurisdictional rules of private international law that create hurdles to access justice through parent company home state courts (Seck 1999; Amnesty International 2014; Iglesias Márquez, 2019a; Varvastian and Kalunga, 2020). However, this bounded autonomous model of separate legal corporate entities has been subject to pressure through increasing social expectations, if not legal requirements, that parent companies undertake human rights due diligence across the enterprise, including supply chains, with attention to environment and climate change (OHCHR 2011; European Commission 2020). For example, recent jurisprudence from the United Kingdom Supreme Court has confirmed that at least some home state courts with jurisdiction over a parent company can hear cases alleging transnational environmental harm when substantial access to justice is out of reach in host state courts where the subsidiary is located and the pollution damage occurred (*Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors* 2019; Varvastian and Kalunga, 2020). Meanwhile, a decision of the Supreme Court of Canada has confirmed that at least under Canadian law, corporate accountability claims that implicate the host state in internationally wrongful conduct are nevertheless justiciable, and Canadian courts may develop a civil remedy in domestic law for direct corporate violations of at least some customary international law norms (*Nevsun Resources Ltd v Araya* 2020).<sup>2</sup> The key point is that previously unassailable doctrines of corporate entity theory have proven vulnerable to arguments based upon relational thinking, with the result that the separate legal personalities of parent and subsidiary companies are no longer inevitably viewed as separated by impermeable boundaries through which legal liability cannot reach (Ang 2018 pp.225-226,

<sup>2</sup> However, the norms at issue in *Nevsun* were forced labour, slavery, crimes against humanity, and cruel, inhuman or degrading treatment.

citing Philippopoulos-Mihalopoulos 2015; Seck 2019a, pp. 160-162). Rather than unquestioningly assume that corporate legal entities are bounded autonomous individuals, the reality of inter-relationships and interdependence between entities within the corporate enterprise, bolstered by the adoption and implementation of policies across the company in keeping with developments in international and transnational law, has created movement even though meaningful access to justice and corporate accountability remain elusive. No cases involving corporate accountability for transnational environmental or climate harms have yet been heard on the merits, and claims of corporate responsibility across contractual supply and value chains, among others, are still often dismissed on procedural grounds (Seck 2018a; *Das v George Weston Limited* 2018).<sup>3</sup> Nevertheless, this movement exists, and also extends to access to non-judicial remedy including non-state-based grievance mechanisms (OHCHR 2014; Iglesias Márquez, 2019b) which could provide access to justice through or together with indigenous legal institutions.

Drawing attention to the nature of the corporate form also creates an opportunity to ask deeper questions about the individuals sheltering behind the corporate entity. For example, do individual corporate officers, directors and managers have the requisite cultural or gender competence for responsible participation in resource extraction? (Seck 2019a, p. 176) Do they (must they) have the requisite knowledge essential to limit global ecological crisis? Analysis of sustainability reports from 1000 EU companies suggests that a large gap exists between what companies say and what they in fact report on climate change (Alliance for Corporate Transparency 2019). The slow push toward corporate board diversity is one example of attempts to use law to reform the 'DNA' of the corporate form, and could be aligned with co-management and co-ownership approaches to resource development (BC First Nations Energy

<sup>3</sup> The allegations in *Das* concerned the responsibility of the Canadian-based Loblaws and its auditor Beaureau Veritas for the deaths and injuries of workers in the horrific building collapse disaster at the Rana Plaza factory in Bangladesh where clothing was manufactured by contractual suppliers. The case was dismissed by Ontario courts on the basis that it would be more appropriately heard in the courts of Bangladesh.

& Mining Council 2010), as well as more rights respecting and environmentally sustainable corporate conduct ( MacMaster & Seck 2020).

Another example are reform initiatives designed to encourage companies to choose to certify as a B-corp<sup>4</sup> or to reincorporate as a benefit corporation (Liao 2017). Critics of such trends argue that legal doctrines that assert that corporations must seek profit over all else in order to maximize shareholder wealth are mistaken. Lynn Stout's aptly entitled *The Shareholder Value Myth* takes aim at these myths in noting that perhaps their greatest appeal is that "it seems to tame and simplify an unruly and complex reality: the natures of shareholders themselves" (Stout 2012, p. 106) She continues:

[T]he idea of maximizing shareholder value rests on an impossible abstraction of the 'shareholder' as a Platonic entity that cares only about the market price of a single corporation's equity. This means that shareholder value is an inherently flawed concept, because in reality different shareholders have different values. ... Conventional shareholder values thinking reconciles different shareholders' conflicting desires by simply assuming the conflicts away.

In the process, shareholder value ideology reduces investors to their lowest possible common human denominator. It favors the desire of the pathologically impatient investor over the long-sighted; favors the opportunistic and untrustworthy over those who want to be able to keep ex ante commitments to stakeholders and each other; favors the irrationally self-destructive over those more sensitive to their own interests as diversified universal owners; and favors the psychopathically selfish over the prosocial concerned about other people, future generations, and the planet. This single-dimensional conception of shareholder interest is not only unrealistic, but dysfunctional (Stout 2012, p. 107).

Stout makes clear that shareholder primacy is not legally required under even US corporate law. Even if it were, the passage above demonstrates that the ideology of the bounded autonomous

<sup>4</sup> A B Corporation is one that has been certified by the US-based non-profit B Lab (Liao 2017 pp.687-688).

individual mistakenly informs dominant understandings of the shareholder and arguably equally informs how we understand members of boards of directors. These observations align with a relational approach to the constructs of law paralleling the insights noted above about common assumptions about the 'worker'. What would be the result if shareholder primacy analysis were based on an understanding that shareholders are a collective of socially differentiated individuals with multiple differentiated ecologically vulnerable identities? What if the goal of the corporate enterprise was informed by the values and laws of members of Indigenous communities whose responsibilities extend to all earthly relations, including to ancestors, future generations, other species and nature?

A relational approach to the corporation has implications for the project of climate justice and the carbon majors. First, a legal assessment of corporate responsibility must not be limited by the boundaries of corporate legal personality, but rather must extend across the corporate enterprise to include supply chain and value chain responsibility – and importantly, producer responsibility. Yet at the same time, it is a mistake to view each carbon major as a monolithic whole, and to assume as dominant legal doctrine does that the interests of each (carbon major) company is limited to the interests of its bounded autonomous individual shareholders. Similarly, individuals within the enterprise, whether directors, managers, or workers must be encouraged to espouse relational values, and be understood as ecologically embedded relational beings for whom climate justice matters on a personal level – not as something that is experienced only by the 'other', external and unrelated to those within the firm.

#### **2.4 Relational Law and the Sovereign State**

The final essential piece of the framework for relational law steps into the international realm and queries the territorially bounded conception of the sovereign state – the counterpart to the autonomous individual - that is unquestioningly accepted as the fundamental building block of international legal analysis. As I have explored this model in detail elsewhere inspired by the work of Karen Knop (Seck 2019a, pp. 167-177; Seck 2017a; Knop 1993), and applied it to arguments put forward by the petitioners in the Philippines Climate Change Petition (Seck 2017a; Greenpeace Philippines 2015), here I summarise my insights and conclusions. The key as

before is to eschew the ideology of the bounded autonomous liberal individual and to seek relational constructs in order to imagine and re-imagine relational laws.

First, the foundational premise that the sovereign state is the primary international law actor means that interests of non-state groups that align across borders, such as the shared concerns of women or Indigenous peoples, including for climate justice, are diluted in international legal analysis. The assumption of a uniform state capable of acting in one voice on the international stage does not reflect the differentiated reality within each state, but it does reflect an image of the state as an autonomous unified liberal individual. Moving away from this assumption to recognition of non-state actors as participants, if not subjects, of international law would create space to more appropriately value the voices of groups that unite across borders. For example, legal scholars, advocates, policy makers, and judicial decision-makers should not assess the legal 'bindingness' of instruments such as UNDRIP solely from the perspective of member states of the UN General Assembly, but rather from the perspective of Indigenous peoples themselves – that is, as a statement of existing rights drafted over many years through collective action by Indigenous peoples movements (Seck 2019a, pp. 168-169). Similarly, legal scholars and others must assign appropriately significant weight to collective transnational non-state actor statements and actions on women's rights and climate action, rather than defer to legal interpretations that privilege the views of nation states. As claims for climate justice are often framed in human rights terms by non-state actors, this suggests that the inadequacy of state commitments in the Paris Agreement and failure to address climate loss and damage (Doelle & Seck 2019) should not be understood as the final word on state climate obligations. Moreover, building on the recent Supreme Court of Canada decision in *Nevsun*, carbon major conduct that violates human rights must be interpreted, as advocated by transnational climate justice movements, to be sufficiently egregious to meet the *jus cogens* threshold for direct liability under customary international law.

Second, there is a need for a decisive shift away from a territorially bounded vision of the state that denies the reality of ecological and economic interdependence. The idea that the sovereign Westphalian state is defined by fixed and impermeable territorial borders with the reach of state jurisdiction and obligation limited by these borders is mythical. The reality of our

world is that pollutants cross borders through air or water, in the bodies of migratory species or as ship cargo, and all states share ecological and climate vulnerability as the planetary boundaries of Earth systems are exceeded, even as states and individuals have contributed differentially to these harms and are differentially vulnerable to them. Similarly, transnational economic relationships are forged across borders through transnational or multinational enterprises engaged in foreign investment or as parties to supply chain contracts. Instead of invoking and reinforcing the image of the Westphalian state by using terminology such as 'extraterritorial' to describe an exercise of jurisdiction or the existence of an obligation (Seck 2019b, pp. 49-66), international lawyers, advocates, and policy makers should carefully choose terminology that builds and reinforces responsible relationships across borders and international cooperation for problem solving (Seck 2019a; 2019b). For example, why not speak of transnational obligations to regulate transnational corporations, rather than implicitly suggesting through use of the word 'extraterritorial' that the obligations at issue are physically located outside the legitimate scope of the territorially bounded home state? What is to be gained by invoking extraterritorial obligations rather than transboundary ones where climate harms are experienced within the territory of one state, and emissions attributable to carbon major conduct originates within another state or states? The image of the bounded autonomous sovereign state is, after all, one that pretends the impossible: to live well independently and behind walls, cut off from the international community of states and invulnerable to climate and other planetary boundary harms.

A third theme emerging from the critique of the bounded autonomous state is the need to challenge bright-line distinctions between public and private actors and between public international and domestic law. For example, while the Philippines climate petition has focused attention upon the investor-owned carbon majors, the studies by Richard Heede that underpin the petition trace anthropogenic emissions equally to state-owned carbon major enterprises, and nation-state carbon majors<sup>5</sup>, which are also significant contributors to greenhouse gas

<sup>5</sup> Nation state producers are described as "current or former centrally planned states" (Heede 2014, part 4), and include 9 government operated coal producers (Heede 2019, p.9).

emissions (Seck 2019a; 2017a; Heede 2014; 2019). Concern over the application of legal doctrines such as sovereign immunity (Seck 2017a pp. 404-407) may explain the focus of the Philippine petitioners upon investor-owned carbon majors. A relational approach to legal doctrine suggests that international lawyers and advocates should prefer interpretations that encourage shared responsibility for global problem solving and international cooperation rather than reinforcing the ability of states and state-owned actors to hide behind sovereign walls (Seck 2019a, p. 173).

The assumed bright line dividing international and domestic law in many countries is another version of the public-private boundary critique, whereas a relational approach would facilitate the integration of international legal norms into domestic laws. These could include recognition of the direct responsibilities of businesses for violations of public international law norms such as threats to human rights from environmental and climatic harms (Seck 2019a, p. 174). For example, the expectation that businesses should respect rights articulated in the 2011 UN Guiding Principles on Business and Human Rights – existing over and above domestic legal compliance – should be argued by advocates and interpreted by domestic courts as a reflection of relevant international legal normativity rather than discounted as ‘voluntary’ in a binary world of law and non-law. (Seck 2015). The *Nevsun* decision, while not specifically relying on the UN Guiding Principles, nor extending to climate harms, takes a step in this direction with its acceptance that customary international law norms may be actionable in corporate accountability litigation in domestic Canadian courts.

A final strand of relational international law is the importance of transcending international law’s vision of the unified state so as 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 (Seck 2019a, pp. 174-175). This theme relates to the first by reminding us that the state is not internally unified. Beyond recognition of non-state actor understandings as relevant to international legal normativity as explained earlier in this part, this theme highlights the need to rethink the territorially defined nature of state sovereignty, and opens the door to embracing overlapping sovereignties with greater appreciation of the necessity for polycentric governance

and law (Seck 2019a, p. 175). As will be explored in the next part, the three pillars of the 2011 UN Guiding Principles, which elaborate the nature of state duties, business responsibilities and access to remedies, may provide a model – however imperfect – upon which relational international law can be based, despite its failure to explicitly address climate change (OHCHR 2011).

## **2.5 Summary**

I have laid out a framework for a relational approach to legal analysis comprised of many strands which together form essential building blocks for climate justice and corporate accountability. An ecologically embedded relational approach offers opportunities in many different areas of law, from human rights and environmental law to corporate and international law, to align legal analysis with the realities of interconnectedness and interdependence among humans and mother earth, while acknowledging differences in histories of colonialism and contemporary power. This power includes the capacity to tell different stories about the interpretation of the law and the nature of legal constructs that underpin it, including workers, managers, investors and states. Misused or misunderstood, power enables dominant narratives to silence the voices and stories about other ways of knowing and being. Importantly, accepting the relational reality of our world must not be misinterpreted to suggest that those who are especially ecologically and socially vulnerable lack agency. Rather, relational approaches to law can empower those whose understandings of the world are silenced. The next part will explore insights which emerge from a relational approach to the responsibilities of carbon majors for climate justice by examining the Principles on Climate Obligations of Enterprises (Expert Group 2018).

## **3. Climate Obligations and Corporate Enterprises**

Richard Heede's 2014 and 2019 climate attribution science studies quantify the historic contributions of carbon-majors to climate change (Heede 2014, 2019). Heede classifies carbon-majors into investor-owned, state-owned and nation state producers of oil, natural gas, coal and cement, and concluded in 2014 that 63 per cent of cumulative worldwide emissions of carbon dioxide and methane from 1854-2010 were attributable to identifiable carbon-majors

(Heede 2014, p. 229). In a 2019 study of global greenhouse gas emitters since 1965, Heede identifies the top twenty carbon majors (Guardian 2019; Heede 2019). These studies provide an alternative to the focus on state responsibility in traditional public international law literature (Voigt 2008; Wewerinke-Singh 2018). Investigations, inquiries and litigation targeting investor-owned carbon majors have begun to proliferate (Greenpeace 2015; The Permanent Peoples' Tribunal 2018; Ganguly *et al.* 2018), some of which have been inspired in part by the corporate responsibility to respect human rights as clarified in the 2011 UN Guiding Principles (Seck 2017a; Iglesias Márquez, 2019b).

This part will first explore the way in which international human rights mechanisms have addressed the responsibilities of businesses in relation to climate change, then turn to the analysis of the 2018 Principles on the Climate Obligations of Enterprises.

### **3.1 Business Responsibilities for Human Rights and Climate Change**

The idea that businesses as well as states have human rights duties in relation to climate change was evident in a November 2015 OHCHR submission to COP21 which, while predominantly focused on state action, stressed that “businesses are also duty-bearers” and must “be accountable for their climate impacts and participate responsibility in climate change mitigation and adaptation efforts with full respect for human rights” (OHCHR 2015a, p. 4, para. 8). Consideration 8 (“To protect human rights from business harms”) explicitly relies upon the business responsibility to respect human rights under the UN Guiding Principles, and suggests that business compliance with these responsibilities is especially crucial “[w]here States incorporate private financing or market-based approaches within the international climate change framework” (OHCHR 2015b, p.3). While a useful step, this 2015 interpretation leaves room for greater clarity on what precisely is required of businesses for climate justice, and on the relationship between the duties and responsibilities of businesses and those of states. For example, what should the role of business be where a state has chosen not to incorporate private financing or market-based approaches to climate change, or the approaches adopted are clearly inadequate, even if it can be assumed that market-based approaches are an effective way to address climate change? Moreover, how, where, and to whom should businesses take responsibility and be accountable for the remediation of climatic harms?

Although the 2011 UN Guiding Principles do not address climate change, they are nevertheless relevant given that attention to climate justice raises human rights concerns. Indeed, the Working Group on Business and Human Rights is proposing to post an “Information Note” in the near future on each of the three pillars of the UN Guiding Principles in relation to climate change (OHCHR 2020). Clearly, as suggested by the Working Group, “business enterprises may not be able to discharge their responsibility to respect all internationally recognised human rights unless they integrate climate change into their due diligence processes” (OHCHR 2020). Drawing upon the UN Guiding Principles, it can be argued that as the business responsibility is independent of the state duty, the failure of a state to take climate obligations seriously cannot be used as an excuse for irresponsible business conduct (OHCHR 2011, p.13). The Commentary to Principle 11 of the UN Guiding Principles confirms this independent responsibility of business enterprises, irrespective of the willingness or abilities of states to fulfil their own obligations, and clarifies that it “exists over and above compliance with national laws and regulations protecting human rights” (OHCHR 2011, p.13). Moreover, the UN Guiding Principles provide that for businesses to address “adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation” while other activities that “support and promote human rights”, even contributing to their enjoyment, cannot “offset a failure to respect human rights throughout their operations” (OHCHR 2011, p.13). Applied to the climate context, this suggests that business enterprises that are high GHG emitters but are otherwise human rights respecting must nevertheless not only take measures to reduce emissions, but also to remedy climate harms. Furthermore, “business enterprises should not undermine States’ abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes” (OHCHR 2011, p.13).

In 2018, the Committee on Economic, Social and Cultural Rights issued a Statement on climate change which reinforces the work of the OHCHR, noting that in the climate change context it is a “duty of both State and non-State actors” to comply with human rights (CESCR 2018). With regard to the duty of corporations, the CESCR is explicit: “Corporate entities are expected to respect Covenant rights regardless of whether domestic laws exist or are fully enforced in

practice”<sup>6</sup> (CESCR, 2018). Nevertheless, the June 2019 report of the UN Special Rapporteur on extreme poverty and human rights, which argues that human rights advocates have largely failed to robustly reflect the impacts of climate change on human rights (OHCHR 2019a, pp. 6-9), completely ignores the business responsibility to respect human rights in relation to climate change, including notable non-UN contributions such as the International Bar Association’s 2015 Climate Justice Report (Seck & Slattery 2015). However, the July 2019 Safe Climate report released by the UN Special Rapporteur on Human Rights and the Environment, David Boyd, does explicitly – if briefly - consider the business responsibility (OHCHR 2019b). According to the *Safe Climate* report, businesses “must adopt human rights policies, conduct human rights due diligence, remedy human rights violations for which they are responsible, and work to influence other actors to respect human rights where relationships of leverage exist” (OHCHR 2019b, para 71). The report then elaborates that the business responsibility requires the reduction of GHG emissions from activities, products and services while minimizing emissions from suppliers, and ensuring those impacted by business climate harms can access remedies (OHCHR 2019b, para 72). In addition, the Safe Climate report confirms that businesses should support public policies designed to effectively address climate harms, rather than opposing them (OHCHR 2019, para 72). While some of this clearly reflects language used in the UN Guiding Principles, the Safe Climate report also claims to rely for insights upon the Principles on Climate Obligations of Enterprises (Enterprises Principles), which will be examined below (OHCHR 2019b, note 90).

Other international human rights mechanisms are also beginning to consider business responsibilities for human rights in relation to climate change, such as the recent report on Business and Human Rights of the Special Rapporteur on Economic, Social, Cultural, and Environmental Rights of the Inter-American Commission on Human Rights (REDESCA 2019). However, while approximately ten pages of this over 200 page report are devoted to climate change, only a single paragraph is devoted to the responsibilities of business enterprises,

<sup>6</sup> This refers to the CESCR’s General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (10 August 2017).

largely replicating the recommendations of the Safe Climate report, including reliance on the UN Guiding Principles and the Enterprises Principles (REDESCA 2019, p. 127-128). There is, however, specific reference to the role of investment and financing institutions, in keeping with the Enterprises Principles, and to the importance of respect for the right to a healthy environment and the protection and support of environmental human rights defenders, themes that have received attention in other Inter-American reports (REDESCA 2019, p. 127-128).

To date, both the UN Guiding Principles and the Enterprises Principles have been relied upon by international human rights mechanisms to support claims that businesses have duties or responsibilities with regard to climate change that are distinct from the obligations of states. As noted above, the UN Guiding Principles do not themselves address climate change, but do provide a framework for the analysis of human rights responsibilities of businesses that is relevant to the climate context. Usefully, this three pillar framework situates business responsibilities relative to the duties of states outlined in the first pillar, and the importance of access to remedy in pillar three. As such, the structure of the UN Guiding Principles can be said to reflect several elements of a relational approach, including acknowledgement that both state and non-state actors have human rights obligations under international law, that a failure to meet the international business responsibility may give rise to judicial or non-judicial remedy in domestic courts or institutions, and that the responsibility extends beyond the separate legal personality of the corporate entity to the enterprise as a whole and further to existing relationships. The additional necessary step of interpreting the UN Guiding Principles through an ecologically embedded relational lens would enable consideration of how to understand the human is that is the subject of rights, as well as the workers, managers, and investors behind the corporate form.

In the same year as the 2015 OHCHR submission, a group of legal experts adopted principles that attempted to grapple in more detail with the responsibilities of businesses and states in relation to climate change. This attempt is briefly examined below before a more detailed examination of the related subsequent drafting initiative that resulted in the Principles on Climate Obligations of Enterprises. Interwoven with the description of these initiatives are

insights arising from relational approaches to legal analysis, with reference as appropriate to insights arising from the UN Guiding Principles.

### **3.2 The Oslo Principles and the Enterprises Principles**

The Oslo Principles on Global Obligations to Reduce Climate Change were adopted by a group of legal experts in March 2015 (Expert Group 2015a). The Principles claim to “identify and articulate a set of Principles that comprise the essential obligations States and enterprises have to avert the critical level of global warming” (*Ibid.*, p.1-3). The Principles do not consider adaptation or loss and damage but instead focus upon mitigation alone. Legal responsibility for climate change rests not only with states but also with “enterprises”: “[w]hile all people, individually and through all the varieties of associations that they form, share the moral duty to avert climate change, the primary legal responsibility rests with States and enterprises” (*Ibid.*). This legal responsibility arises from a duty of humanity as “guardians and trustees of the Earth” to “preserve, protect and sustain the biosphere” as part of the “common heritage of humanity” (*Ibid.*). The Oslo Principles claim to reflect existing legal obligations to “respond urgently and effectively to climate change in a manner that respects, protects, and fulfils the basic dignity and human rights of the world’s people and the safety and integrity of the biosphere” (*Ibid.*, p.3). These obligations are derived from “local, national, regional, and international” sources of law including “international human rights law, environmental law, and tort law” as well as the precautionary principle (*Ibid.*, p.3).<sup>7</sup> The Oslo Principles thus explicitly view climate change as a human rights issue, but also as an issue that touches on other fields of law (*Ibid.*, pp. 15-16).

While the Oslo Principles claim that both states and enterprises have obligations to ensure that the increase in global average temperature is kept below the 2°C threshold in the Paris Agreement, obligations to reduce GHG emissions are qualified by cost, and obligations to

<sup>7</sup> “a. The Precautionary Principle requires that: 1) GHG emissions be reduced to the extent, and at a pace, necessary to protect against the threats of climate change that can still be avoided; and 2) the level of reductions of GHG emissions required to achieve this, should be based on any credible and realistic worst-case scenario accepted by a substantial number of eminent climate change experts. b. The measures required by the Precautionary Principle should be adopted without regard to the cost, unless that cost is completely disproportionate to the reduction in emissions that will be brought about by expending it.”

refrain from new emitting activities may not apply if the activity is indispensable “in light of prevailing circumstances” (*Ibid.*, principles 6-8). State obligations are “common but differentiated” and considered on a per capita basis with least developed countries subject to less stringent obligations (*Ibid.*, principles 13-19). Principle 21 requires States to refrain from subsidizing facilities that create “unnecessarily high or, in the given circumstances, unsustainable quantities of GHG, either within or outside their territories” (*Ibid.*, p. 6). The Commentary suggests, relying in part of the UN Guiding Principles, that states are obligated to enact legislation preventing financial institutions under their jurisdiction from “enabling, inducing or instigating such activities” (*Ibid.*, p.81). However, the Oslo Principles do not contend that States (or at a minimum developed States) have an obligation to prevent such activities from being carried out at all. Nor is it clear from a human rights perspective why the obligation is to keep global temperature below the 2°C threshold in the Paris Agreement, rather than an obligation (perhaps of due diligence) to do no harm, at least for rich countries and large emitters. Of course, the inadequacy of the 2°C threshold has been since established in the IPCC’s 2018 report on the serious consequences of exceeding 1.5 °C (IPCC 2018).

The Oslo Principles also articulate four Principles pertinent to enterprises (*ibid.*, principles 27-30), however the drafters were not all in agreement and a smaller group of “lawyers from five continents” worked together to develop more concrete obligations for enterprises and investors (Spier 2018a, p. 321). The Commentary to the Oslo Principles suggests that the drafters grappled extensively with how to align the obligations of enterprises with concerns that dominate climate law including the need to differentiate between the obligations of developed and developing/least developed states based upon current, historic and per capita responsibilities for GHG emissions (Expert Group 2015b, pp. 87-92). These are not addressed in the UN Guiding Principles, although Principle 14 touches upon the idea that the “means through which a business enterprise meets its responsibility to respect” may be “proportional to, among other factors, size”.

The 2018 *Principles on Climate Obligations of Enterprises* (Expert Group 2018) take as its starting point that the “legal maximum” for global warming is 2 degrees Celsius, even as the

authors acknowledge that this “is by no means safe in view of the increasing amount and severity of natural disasters the world is already experiencing today” (Expert Group 2018, p. 24).<sup>8</sup> Yet the authors claim that if all countries curbed emissions to stay within the 2°C threshold there would be no need to consider the obligations of enterprises (Expert Group 2018, p. 28). This is an unfortunate starting point, not least from a relational law perspective. For example, the 2-degrees threshold is clearly inconsistent with Indigenous peoples’ reciprocal responsibilities to Mother Earth and future generations, suggesting that this analysis was not informed by Indigenous ways of knowing, or from the perspective of ecologically embedded relational individuals more generally. The assumption that there would be nothing to talk about if all states curbed emissions so as to meet even a 1.5 degree threshold can only be explained by the exclusive focus of the Enterprises Principles – as with the Oslo Principles – on climate mitigation (prevention) (Expert Group 2018, p. 43). The drafters are explicit that they “do not express a view on damages” and suggest that this is consistent with international environmental law (Expert Group 2018, p. 43; Spier 2018a, p. 324). However, this claim is widely contested, given the extensive efforts to put climate loss and damage on the international agenda, led by vulnerable states and communities, including those who have already been forced from their homes and forced to migrate, and informed by other fields of law, especially international human rights law (Doelle & Seck 2019; Nagra 2017). Even if there is value to the focus on prevention, it is problematic to interpret legal thresholds for prevention without first embedding relational thinking into the analysis. Failing to do so erases the experiences of those who suffer and will suffer the implications of loss and damage resulting from a failure of mitigation and adaptation.

As noted the Enterprises Principles focus on the obligations of enterprises as distinct from the preoccupation of the much of the Oslo Principles with states. According to the Enterprises Principles, the definition of an enterprise includes a “business, company, firm, venture,

<sup>8</sup> The Principles claim to align with the Paris Agreement. Indeed, the authors state that at the time of writing they believe there is no “*legal* obligation to take measures to limit global warming to 1.5°C” (Expert Group 2018, p. 50-59). However, this is clearly no longer tenable from a human rights perspective in light of the IPCC’s 1.5°C report (IPCC 2018).

organisation, operation, or undertaking that is private” unless it “does not carry on commercial or industrial activities”, as well as “any non-private entity when and to the extent that it carries on commercial or industrial activities” (Expert Group 2018, p. 1). Whether or not an enterprise is ‘private’ hinges on whether it is “under the financial control of one or multiple governments” (Expert Group 2018, p. 104), yet it is unclear why it matters given both private and non-private are included, nor whether there is a difference between a non-private and a public enterprise, for example. The definition of enterprise appears to hinge on the carrying out of commercial or industrial activities, which is said to be “self-explanatory” or otherwise informed by whether or not the enterprise generates profits, is engaged in competition, or “the nature of the activity” (Expert Group 2018, p. 104). It is acknowledged that this definition is not always satisfactory (Expert Group 2018, p. 105), which creates uncertainty. Would industrial carbon major activities that are carried out for a public purpose by a state-owned or majority state-owned company fall within the Enterprises Principles? Jap Spier suggests that state-owned enterprises that carry out industrial or commercial activities would (Spier 2018b, p. 102). Yet would the Enterprises Principles apply to each of the categories in the Heede (2014, 2019) studies (investor-owned; state-owned; or nation-state carbon majors)? From a relational perspective, is it necessary or helpful to distinguish the obligations of carbon majors based upon their public/private, state/non-state status? Doing so clearly creates complexity. However, according to Jan Spier, as the Enterprises Principles are concerned with prevention, they are not pre-occupied with historical emissions and take the position that all enterprises have reduction obligations, not just the handful that would fall into the category of carbon majors (Spier 2018a, p. 325). Moreover, as will be seen, the need to define enterprise as distinct from state is at the core of the complex allocation of permissible quantum of emissions that is central to this project. A different observation is that the terminology in this definition does not clearly match the common corporate law distinction between the separate legal personality of the individual corporate entity and the relational corporate group typically described as an enterprise.<sup>9</sup> Thus it

<sup>9</sup> For example, the definition suggests that a non-private entity can itself be an enterprise.

is not immediately obvious how the boundaries of separate legal personality inform the structure of the Principles.

The Enterprises Principles note the wide range of corporate conduct that actually or potentially cause climatic harms and limit their focus to GHG emissions that can be attributed to specific enterprises even as they claim that the methodology for doing so is contested (2018, pp. 30-36). The approach adopted here attributes “emissions from oil exploration, extraction and refining to the responsible oil company, whereas emissions from combustion in an airplane are attributed to the airline” (Expert Group 2018, p. 32). This is arguably not in keeping with a relational analysis which would always extend beyond the separate legal corporate person to the enterprise, and further to include producer responsibility. The Enterprises Principles adopt the per capita approach in the Oslo Principles and use the carbon budget approach to distinguish between countries that are “Below Permissible Quantum (BPQ)” who are “not (yet) under a general *legal* obligation to reduce their GHG-emissions”<sup>10</sup> and those that are “Above Permissible Quantum (APQ)” who “must reduce [their] emissions to the permissible quantum ‘within the shortest time feasible’” (Expert Group 2018, pp. 60-61). Mitigation obligations of enterprises are then aligned with those of the countries in which they operate (Expert Group 2018, pp. 2, 110-114), although countries are given flexibility to allocate enterprise reduction targets differently (Expert Group 2018, pp. 2, 121-129). This approach aligns with distinctions between developed and developing countries that are fundamental to the climate regime even as they have evolved over time (Knox 2016, paras. 43, 48; Galvao Ferreira 2018). Notably, global enterprises<sup>11</sup> are treated distinctly from other enterprises on the pretext that emerging trends place “special emphasis on the role, responsibilities and obligations of multinational enterprises” and many global enterprises outsource production to less developed countries (Expert Group 2018, pp. 4, 129-137). The corresponding calculation is highly complex, although

<sup>10</sup> However, if these countries “have accepted reduction obligations under the Paris Agreement or a subsequent amendment thereof, they are bound to honour their pledges.”

<sup>11</sup> A global enterprise is defined as “an enterprise or a group of enterprises that manufactures products or offers services that are, for a significant part, consumed in multiple APQ countries. However, an enterprise in a BPQ country is considered to be a global enterprise only if it is, directly or indirectly, a subsidiary of an enterprise based in an APQ country. Expert Group 2018, p. 1.

overall placing global companies under additional obligations, including for operations in BPQ countries. Moreover, controlling enterprises must ensure any enterprise under their control comply with the Enterprises Principles (*Ibid.*, pp. 4, 137-138). Overall, while on the one hand the attempt to align enterprise obligations with those of states has the appearance of addressing climate justice concerns by accounting for common but differentiated responsibilities between developed and developing states, on the other hand, the result is both complex and complicated, at times bordering on incomprehensible which in itself creates an access to justice problem.

There are further justice concerns in the details. For example, the Enterprises Principles expect enterprises to reduce GHG emissions in circumstances where additional costs are not incurred and where additional costs will be offset by future financial gains or savings (*Ibid.*, pp. 4-5, 138-141). This cannot align with a climate justice approach as failing to reduce emissions imposes costs (externalities) on those outside the firm who experience increased risk of climate harms. The Principles further suggest that enterprises should avoid “activities that will or are likely to cause excessive GHG emissions” such as “operating coal-fired power plants” unless they also offset the excessive emissions (*Ibid.*, pp. 5, 141-146)<sup>12</sup> and avoid products or services with excessive GHG emissions, absent offsets (*Ibid.*, pp. 5, 146-149).<sup>13</sup> However, this is not required in the case of enterprises associated with least developed countries where an activity, product, or service “can be shown to be indispensable in light of prevailing circumstances” (*Ibid.*, pp. 5, 149-150). As above, the obligations of enterprises are aligned with their country context. However, overall, offsetting is permitted if GHG emissions are not reduced as required and a grace period may be contemplated (*Ibid.*, pp. 5-6, 150-152). Yet a human rights approach would

<sup>12</sup> The authors refer to my draft International Law Association study, without endorsing it. The ILA paper suggests that to be business and human rights compliant all businesses should seek to become carbon neutral and in the interim to offset their emissions, while taking into account the need to provide remedies for climatic harms (Seck 2017b, pp. 15-16).

<sup>13</sup> The authors suggest that this aligns with Principles 13 of the UN Guiding Principles. Principle 13 states: “13. The responsibility to respect human rights requires that business enterprises:

1. (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
2. (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”

not allow a grace period or accept that positive contributions could offset violations of human rights (Ruggie 2016, p.3; OHCHR 2011, p. 13). The cost-contingent approach combined with reliance on offsets clearly does not guarantee an overall reduction in GHG emissions, instead justifying failure.

The Enterprises Principles suggest that where exceptional circumstances such as climatic disasters occur, an enterprise may be exempt from reduction targets (*Ibid.*, pp. 6, 160). However, it is hard to see why enterprises that fail to adequately anticipate what will increasingly be seen as events that fall within the new normal should be exempt.<sup>14</sup> From a relational perspective, a failure to anticipate such events may be attributable to a failure to ensure that ecologically embedded relational perspectives were integrated into corporate governance decision-making. Beyond this, the Enterprises Principles suggest that “to the extent reasonably and feasibly possible”, an enterprise should “ascertain and take into account the GHG emissions of the suppliers of good and services to the enterprise” when it is “selecting its suppliers” (*Ibid.*, pp., 160-166). Thus, the GHG emissions of suppliers are not routinely attributed to the enterprise, as a relational view of the corporate enterprise that embraces supply chain responsibility suggests they should be, as would a human rights approach to responsibility under the second pillar of the UN Guiding Principles (OHCHR 2011, p. 18; Expert Group, p. 162).<sup>15</sup> It is also arguably out of step with how companies increasingly view their responsibility to reduce GHG emissions in their supply chains (CDP 2019).

The Enterprises Principles also provide guidance on disclosure obligations, including of vulnerability to climate change, and of emissions from products and services (*Ibid.*, pp. 7-8, 166-191). The list of those to whom information should be disclosed includes employees and the public along with investors, shareholders, financiers, securities regulators and clients (*Ibid.*, p.

<sup>14</sup> For example, fossil fuel companies in Houston, Texas should have anticipated the likelihood of a disaster such as the recent Hurricane Harvey and therefore should not be able to rely on this for failing to meet emissions reduction obligations (Mufson 2017).

<sup>15</sup> What precisely would be required of human rights due diligence in the climate context is unclear, although supply chain responsibility for GHGs could be viewed as due diligence across relationships through the exercise of leverage. The authors of the Enterprises Principles did consider the UN Guiding Principles and related OECD guidance when developing the scope of this principle and came to a different conclusion.

7), and disclosure includes disclosure of compliance with the GHG reduction principles (*Ibid.*, pp. 7-8, 183-186). Special attention is given to disclosure of the growing risk of stranded assets consistent with the “carbon budget” concept, to investors, the public and employees (*Ibid.*, pp. 8, 187-192). From a relational law and climate justice perspective, informational disclosure can play an important role in enabling those vulnerable to environmental and climate harms to access relevant information, and encouraging companies to reflect on their practices as they gather the requisite information to disclose. However, to contribute to climate justice, it is important that the information gathered and disclosed is not only about the impact of emissions and climate change on the enterprise itself, but rather, integrating a human rights due diligence approach, about harms to rights-holders as required under the Principle 17 of the UN Guiding Principles.<sup>16</sup> In the climate change context it is not obvious what this would entail, but it would go beyond disclosure of information focused on the enterprise itself (such as its own vulnerability to climate change) and consider more deeply the impact of its emissions on others. That the Enterprises Principles specifically identifies the public as among those who would be interested in disclosure illustrates awareness of relationships beyond those internal to the business of the firm, a step in the right direction.

The Enterprises Principles also require enterprises to conduct an environmental impact assessment of major new facilities or expansions, including carbon footprints, mitigation opportunities and potential future climate change effects (*Ibid.*, pp. 8, 168-181, 192-198). But they do not require consideration of the need for the project or alternatives to the project with lower GHG emissions if not zero emission, and no direction is given about what to do with the EIA information (*Ibid.*, pp. 193-196).<sup>17</sup> Moreover, there is no expectation that the views of those

<sup>16</sup> According to the Commentary to Principle 17:

“Principle 17 defines the parameters of human rights due diligence while Principles 18-21 elaborate its essential components. Human rights risks are understood to be the business enterprise’s potential adverse human rights impacts. Potential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred – should be a subject for remediation (Principle 22). Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.”

<sup>17</sup> However, see detailed recounting of recent Austrian court decision in which consideration of climate impacts and related public interest led to the cancelling of a proposed third airport runway.

who may be negatively affected by climatic change should be actively included in the assessment process. The Commentary concludes by noting that, beyond domestic environmental assessment legislation, business-led human rights impact assessments are “progressing rapidly” (*Ibid.*, p.198). This is clearly an understatement given the importance of human rights due diligence under the UN Guiding Principles and its relationship with human rights impact assessment which has been embedded into many responsible business conduct tools, even if they often fall short of integrating concern for climate change (OECD 2017, 2018; Seck 2018b).

Finally, the Enterprises Principles address the obligations of banks engaged in project finance, pensions funds, insurers and reinsurers and draw attention to the financial implications of failing to adequately consider GHG emissions associated with a project or investment (*Ibid.*, pp. 8-9) and call for justifications for investment in non-complying enterprises (*Ibid.*, pp. 9). The need for investors to play an active role in promoting compliance is also identified (*Ibid.*, p. 9). However, the principles again leave many unanswered questions that a relational approach could help to answer. Are investors really only concerned about their own financial returns, or, as Lynn Stout (2012, p. 107) asks, does this assumption favour the “pathologically impatient investor” over the “prosocial” who is “concerned about other people, future generations, and the planet”? At a minimum, how might a relational understanding of investors inform a richer conceptualization of investor and enterprise obligations under the Enterprises Principles?

#### **4. Conclusion**

By focusing on both states and enterprises, both the Oslo Principles and Enterprises Principles acknowledge that states are not the only duty bearers of human rights responsibilities, an observation that aligns with the relational approach presented in the first part of this paper. Moreover, by considering the responsibilities of global enterprises, among others, they reveal an awareness of the need to not be limited by doctrines of separate legal personality, even as they are inconsistent in embracing responsibilities that extend to relationships such as supply chains. However, aside from brief reference to employees and investors in relation to

disclosure, they do not consider the nature of the individuals behind the enterprise (workers, managers, directors, or investors) or individuals outside it, failing to embrace ecologically embedded relational insights. In other words, they do not provide opportunities to embed these individuals in their material environments and so draw attention to the human and ecological consequences of their activities.

Moreover, by focusing on mitigation to the exclusion of adaptation and loss and damage, the Principles are a partial and ultimately misleading guide for both states and enterprises. Despite reference to the UN Guiding Principles, there is no mention of the need for business to take responsibility to remedy climate harms as under Principle 22 of the UN Guiding Principles.<sup>18</sup> This is not surprising given the challenge of linking the emissions of a specific industry player with specific harms experienced by climate vulnerable populations. However, Principle 22 of the UN Guiding Principles provides that the business responsibility arises in cases where an enterprise has “contributed to adverse impacts” rather than only where there is proof of causation.

The assumption that it is possible to speak of mitigation without equal attention to adaptation and loss and damage reveals a bounded autonomy understanding of the problem and of the relevant actors involved. The primary concern of the drafters of the Enterprises Principles appears to be the enterprises that contribute to climate change and may be financially harmed by it (including as a result of their own failure to adapt) but individuals within the enterprise remain invisible, as are individuals outside the enterprise who are differentially impacted by climate change. If they were revealed and their views taken into account as ecologically embedded relational subjects, it would become apparent that adaptation and remedies for loss and damage, as well as sufficiently rigorous mitigation standards, are all equally essential for climate justice. This failure to open the door to alternate narratives informed by relational world views. Of course, full engagement with relational world views would go beyond those

<sup>18</sup> “Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes” (United Nations Human Rights Office of the High Commissioner 2011, Principle 22).

individuals who have a direct association with the enterprise to embrace the responsibility of the enterprise to respect all human rights-holders impacted by its operations. The failure to adopt a relational view of even those individuals who have a close connection to the enterprise is indicative of a larger and more encompassing silencing of relational world views.

Nevertheless, the Enterprises Principles take a somewhat nuanced approach when grappling with the nature of the international actors such as carbon majors. Rather than assuming that all sovereign states and all enterprises based in them are operating on an equal footing and bear equal responsibility, the Enterprises Principles seek to grapple with the complexities of the common but differentiated responsibilities of states, a contentious issue that goes to the heart of climate justice, as well as carbon budget allocations between states, poverty and development. The results are unfortunately highly complex and arguably uncertain.

The Enterprises Principles have been endorsed by many critical scholars, including myself. This article has considered how they simultaneously reflect and depart from a relational approach to legal analysis, and the implications of this for conceptualizing the human rights responsibilities of carbon majors for climate justice. A coherent theory of climate justice responds to the question of who owes what to whom and why. In the Anthropocene, the coherence of such a theory is dependent upon relational insights which enable us to tell old stories in new ways, and so reveal the interconnectedness and interdependence of all beings, while accounting for power and difference. The routine silencing of relational world views in legal analysis and in our conceptualization of the constructs underpinning legal analysis must be confronted and overcome.

Yet the question remains as to whether the Enterprises Principles, or a revised and more relationally aware version, might serve a useful purpose in the quest for climate justice. An increasing number of business actors are voluntarily committing to climate action in the face of state failures to act, and well thought out guidance on how to be a climate responsible business is desperately needed for those businesses that desire to engage in human rights-respecting

climate action.<sup>19</sup> A different question is why the Enterprises Principles were drafted in the way they were, and in particular why they fail to better reflect relational insights, let alone the UN Guiding Principles. The founders and drafters of the initiative include well respected academic philosophers and human rights lawyers as well as experts in liability law.<sup>20</sup> Endorsements have come from a broad range of actors, from academics to judges to environmental NGOs to politicians and UN representatives, although not obviously from the business sector, nor Indigenous communities. This suggests that the limitations in the Enterprises Principles reflect a failure of imagination or re-imagination – despite embracing the possibilities of business responsibilities, the lesson of the Enterprises Principles may be that the bounded autonomous individual lurks deeply and unconsciously in the minds of even those with the best of intentions. It is well past time to confront its hidden power, and replace it with the insights of relational constructs and relational laws.

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<sup>19</sup> See for example the sample of resources available for businesses on the Caring for Climate website:

<http://caringforclimate.org/resources-2/>.

<sup>20</sup> For example, based on information readily available on the website Climate Principles for Enterprises, <https://climateprinciplesforenterprises.org>, founding members included Yale academics philosopher Thomas Pogge and clinical human rights law professor James J Silk. Liability law specialist Jaap Spier, a Senior Associate at the University of Cambridge's Institute for Sustainability Leadership, took the lead in drafting the Commentaries, and in spreading the word about the Enterprises Principles in many academic and non-academic fora.

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### **Case Law**

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