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Just business redux

Transnational corporate responsibility decoded through relational justice

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Thesis Introduction

Towards a theory of just business relationships

Consider a garment company, Great Garments, based in Singapore, which has relationships with suppliers in the United States (US) who sew the garments which Great Garments then sells in various markets across the globe. Injustices in such a scenario may be that these suppliers in the US routinely pay wages inadequate to sustain a minimum living standard in the US or have scant regard for worker safety in their factories.¹ Or perhaps the supplier uses a dye for its clothes that is toxic to wildlife in the river it discharges untreated waste in, leading to loss of livelihood for fisherfolk who rely on river fish for subsistence.² There exists many relationships here. One is the relationship between the supplier and the worker, another is the relationship between the supplier and the fisherfolk, and yet others are the (contractual) relationships between Great Garments and its intermediaries, and its intermediaries and US suppliers. One may think that corporate responsibilities that arise in one such relationship are insulated from other relationships in this structure — that Great Garments does not have any responsibility towards the workers or the fisherfolk in their supply chain, either after a harm has occurred or to prevent the occurrence of harm. As will be argued in this thesis, that is not the case.

Such corporate responsibilities are primarily articulated in the language of human rights responsibilities in law. Firstly, this thesis will show that normatively, using private law theory, corporations like Great Garments have a responsibility towards such distant workers or fisherfolk to prevent any negative impact on their human rights arising from such business

¹ Derek Guy, “‘Made in America’ Never Meant More Ethical” (*The Nation*, 20 November 2023) <<https://www.thenation.com/article/archive/made-in-america-never-meant-more-ethical/>> accessed 29 December 2023; ‘International Migrants Day: Global Analysis 2023’ (*Business & Human Rights Resource Centre*, December 2023) <https://www.business-humanrights.org/en/from-us/briefings/migrant-workers-2023/migrant-workers-rights-global-analysis-2023/#_global> accessed 15 January 2024 (76% of alleged migrant worker abuse in the Americas from 1 December 2022 to 30 November 2023 occurred in the US).

² ‘US Policies Fall Short’ (*Fashion FWD*, no date) <<https://www.fashionfwd.org/uspolicies>> accessed 5 January 2024.

operations independent of their liability for compensating for harm after-the-fact when it happens. Indeed, the legal trends reflect the same. So, secondly, it will be shown in the thesis how this private law theory normative assertion is reflected in relevant case law and legislation. First, however, allow the introduction to set the context. The research question is provided near the end of the fourth section, should you wish to see it before reading the context.

§1 Trends in business and human rights

There is a clear legal trend both in domestic jurisdictions and in international law to consider that corporations have responsibilities to respect human rights in their supply chain in some form. Within the past decade, the world has seen the adoption of the UN Guiding Principles on Business and Human Rights (UN Guiding Principles),³ the establishment of a UN treaty process for such transnational corporate responsibility,⁴ the adoption of human rights due diligence laws in France,⁵ The Netherlands,⁶ Germany,⁷ Norway,⁸ with laws in consideration elsewhere like at the European Union (which may soon be adopted),⁹ related modern slavery laws in the United Kingdom (UK),¹⁰ Australia,¹¹ and Canada,¹² and customs laws in the US on

³ UNHRC, ‘Human rights and transnational corporations and other business enterprises’ UN Doc A/HRC/RES/17/4 (6 July 2011) endorsing UNHRC, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ A/HRC/17/31 (21 March 2011) UN Doc A/HRC/17/31 (hereinafter ‘UNGPs’).

⁴ UNHRC, ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ UN Doc A/HRC/RES/26/9 (14 July 2014).

⁵ LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre 2017-399 (France 2017).

⁶ Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Netherlands 2019).

⁷ Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (Germany 2021).

⁸ Act relating to enterprises’ transparency and work on fundamental human rights and decent working conditions (Norway 2022).

⁹ Council of the European Union, ‘Letter to the Chair of the JURI Committee of the European Parliament - Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937’ (15 March 2024) <<https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf>>.

¹⁰ Modern Slavery Act 2015.

¹¹ Modern Slavery Act (Attorney-General’s Department Australia 2018).

¹² An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff (Canada 2023).

forced labour.¹³ Supply chain responsibility has moved beyond being judged in the ‘courts of public opinion’,¹⁴ i.e., from being a reputational risk for corporations into being a legal risk.

Even development of recent case law reflects such a trend. Upon a case brought by thousands of claimants from Zambia alleging that toxic discharge from a mine had negative effects on their health and livelihood, the UK Supreme Court observed that in cases where a corporation holds itself out to provide ‘training, supervision and enforcement’ of policies of a corporate group, even if does not factually do so, it is arguable in English law that the corporation may be held liable for the actions of a group company negatively impacting third parties in another country under ordinary tort law.¹⁵ In the 2021 case of *Milieudefensie v Shell* in The Netherlands, which raised the question of the human rights and environmental responsibility of Royal Dutch Shell, the Hague District Court stated that the UN Guiding Principles are the global standard of expected conduct, and given so, Shell not only has a responsibility to respect human rights in its supply chain but must also consider the human rights effects on end-users of its products in its business decisions.¹⁶ This was a decision on merits. This case was filed by Non-Governmental Organisations (NGOs) asking the court to pronounce that Shell had a legal duty to reduce carbon emissions based on its human rights responsibility in tort.¹⁷

On the other hand, across the Atlantic, the US Supreme Court held, in a case brought by persons trafficked as child slaves from Mali to Ivory Coast, buyer firms cannot be held liable merely because generic corporate activity of operational decisions in the US do not empower US courts to try the issue.¹⁸ In a sense, US business decisions are insulated from its effects elsewhere. Contrast this with another UK case, where the UK Supreme Court held that it is arguable that a transnational corporation may incur liability if group companies harm third

¹³ An act to ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China do not enter the United States market, and for other purposes (US 2021).

¹⁴ UNHRC, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’ UN Doc A/HRC/8/5 (7 April 2008), para 54.

¹⁵ *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20 (UK Supreme Court) [53]–[54].

¹⁶ *Vereniging Milieudefensie et. al. v Royal Dutch Shell Plc*, ECLI:NL:RBDHA:2021:5339 (Rb Den Haag) (The Netherlands), para 4.1.13 and 4.4.18 (emphasis supplied).

¹⁷ *ibid*, para 3.2.

¹⁸ *Nestlé USA, Inc v Doe* 141 SCt 1931, 5 (US 2021).

parties in third countries, given that without corporate approval, organisational decisions negatively affecting human rights are unlikely even, e.g., in Nigerian subsidiaries of UK companies.¹⁹ This was a case where 40,000 Nigerian individuals brought a case against oil spills in Nigeria where the contaminated water could not be used for drinking, sustenance of livelihood or even recreational activity.²⁰ In another case, speaking in context of the English tort law system, an English court observed in an *obiter dictum* that legal systems excluding supply chain responsibility would represent a ‘poor system of justice’.²¹

Jurisprudence on transnational corporate activity is still developing as the above cases mentioned are all from the past five years. The general direction of legal development seems nonetheless clear: that of making transnational corporations responsible for human rights impacts in their supply chains, including when these impacts take place overseas (with perhaps the US as somewhat of an exception).²² A large majority of the cases, including those mentioned above, brought pertaining to human rights harms caused by irresponsible corporate behaviour have been expressed in the language of private law harms to argue that there was a violation of legal obligations. However, deep engagement in specifically the theoretical aspects of private law on this phenomenon of human rights violations as torts is yet to be seen.²³

When one looks for a normative foundation for supply chain responsibility in private law theory, it becomes tricky. What is clear though is that any theory, whether of private law or otherwise, that aims to provide a normative foundation for corporate responsibility must be able to properly explain supply chain responsibility in order to stay relevant in the rapidly developing legal landscape on the topic. While the field of business and human rights has gained tremendous traction in the past half century, both as regards legal developments and

¹⁹ *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3 (UKSC) [157].

²⁰ *ibid* [3]–[4].

²¹ *Hamida Begum (on behalf of Md Khalil Mollah) v Maran (UK) Ltd* [2021] EWCA Civ 326 [141].

²² Barnali Choudhury, ‘Enforcing International Human Rights Law Against Corporations’ (SSRN Scholarly Paper, SSRN, 26 July 2023) <<https://papers.ssrn.com/abstract=4522094>> accessed 10 August 2023.

²³ Cf. George P Fletcher, *Tort Liability for Human Rights Abuses* (Bloomsbury Publishing 2008) (elaborating theoretical aspects of tort liability of US Alien Tort Statute cases with a prominent focus on international crimes).

social movements, engagement with it in private law theory is modest.²⁴ This is despite significant legislative or case-law developments.

Of course, there have been some attempts at discerning (transnational) corporate human rights responsibility in private law.²⁵ Social justice tort theory deals directly with corporate responsibility and mass torts.²⁶ Then, there is the strand of literature on production liability which follows, and forgive the over-simplification here, the general position of applying the principle of strict liability for defective products in consumer law also to cover harms caused during production processes of such products.²⁷ Yet, the normative foundations of how *private law theory* may normatively justify transnational *human rights* responsibilities of corporate actors directly against victims in supply chains is not clear and the internal debates within private law or international law do not help establish a normative foundation.²⁸ In such cases, private international law or conflict of laws concerns are also crucial, as evidenced by extensive

²⁴ Prominent private law theorists have rather engaged with general avenues and doctrines of corporate liability without engaging in the human rights harm aspect through engagement with the UN Guiding Principles. For example, see Gregory C Keating, 'Enterprise Liability' in Martin Petrin and Christian Witting (eds), *Research Handbook on Corporate Liability* (Edward Elgar Publishing 2023); Martin Petrin, 'Theoretical Approaches to Corporate Liability' in Martin Petrin and Christian Witting (eds), *Research Handbook on Corporate Liability* (Edward Elgar Publishing 2023) (identifying private law justifications for corporate liability for harms in general).

²⁵ For a summary on general justifications of corporate liability, including moral, economic, and criminal liability, see Petrin (n 24) 34–40; Robert J. Rhee, 'Corporate Tortious Liability' in Martin Petrin and Christian Witting (eds), *Research Handbook on Corporate Liability* (Edward Elgar Publishing 2023).

²⁶ Martha Chamallas, 'Social Justice Tort Theory' (2021) 14 *Journal of Tort Law* 309.

²⁷ Aditi Bagchi, 'Production Liability' (2018–19) 87 *Fordham L Rev* 2501; Vibe Ulfbeck, 'Supply Chain Liability for Workers' Injuries – Lessons to Be Learned from Products Liability?' (2018) 9 *Journal of European Tort Law* 269; Susan H Maynard, 'Skinner v. Reed-Prentice: The Application of Contribution to Strict Production Liability Case Note' (1978–79) 12 *J Marshall J Prac & Proc* 165; Trang Nguyen, 'Hidden Power in Global Supply Chains' (2023) 64 *Harv Int'l LJ* 35; Jaakko Salminen, 'From Product Liability to Production Liability: Modelling a Response to the Liability Deficit of Global Value Chains on Historical Transformations of Production' (2019) 23 *Competition & Change* 420; Eva Kocher, 'Transnational Labour Law? "Corporate Social Responsibility" and the Law' in Miriam Saage-Maaß and others (eds), *Transnational Legal Activism in Global Value Chains: The Ali Enterprises Factory Fire and the Struggle for Justice* (Springer Nature 2021); Gerhard Wagner, 'Tort Law and Human Rights' in Miriam Saage-Maaß and others (eds), *Transnational Legal Activism in Global Value Chains: The Ali Enterprises Factory Fire and the Struggle for Justice* (Springer Nature 2021).

²⁸ Other theories that target the direct horizontality of human rights are Gunther Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors' (2006) 69 *The Modern Law Review* 327; Gunther Teubner, 'Transnational Fundamental Rights: Horizontal Effect?' (2011) 40 *Rechtsphilosophie en Rechtstheorie* 191; John H Knox, 'Horizontal Human Rights Law' (2008) 102 *Am J Int'l L* 1; Elena Pribytkova, 'What Global Human Rights Obligations Do We Have' (2019) 20 *Chi J Int'l L* 384; Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy & Public Affairs* 315.

literature on the topic.²⁹ The thesis, however, is less concerned with conflict on laws — in the sense of the rules of jurisdiction permitting adjudication of a specific dispute by any particular court or what substantive law applies in the adjudication of specific factual circumstances of a claim — and more with the existence of a private law relationship in its normative justification of corporate responsibility.

One private law theory that does take up this task of engaging with business and human rights is the theory of relational justice developed by Hanoch Dagan and Avihay Dorfman. In describing one aspect of their theory, they say that ‘substandard employment practices’ in sweatshops in supply chains and ‘land grab[bing]’, for example, are ‘unhappy interpersonal transnational encounters part and parcel of an increasingly globalized environment, typified by the significant role of horizontal (interpersonal) transnational interactions.’³⁰ Like the previous Great Garments example of the Singaporean company outsourcing manufacturing to the US where labour standards may not be maintained, they say that ‘sweatshops do not comply with the minimum labor standards’ where ‘[t]he failure to hold corporations (...) accountable for grave violations of the fundamental private rights of persons (...) is a matter of growing international concern.’³¹ Their approach, in their own words, is as follows:

We argue that the best way to respond to these difficulties is by delving into the normative DNA of private law and bringing to light its own *human rights underpinnings*. We claim

²⁹ Liesbeth Enneking, *Foreign Direct Liability and beyond. Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Eleven International Publishing 2012); Liesbeth Enneking, ‘Judicial Remedies: The Issue of Applicable Law’ in Juan José Álvarez Rubio and Katerina Yiannibas (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017); Upendra Baxi, ‘Whose Conflicts? What Law?’ in *Mass Torts, Multinational Enterprise Liability and Private International Law* (Collected Courses of the Hague Academy of International Law, 1999) vol 276; Stephanie Bijlmakers, ‘The Role of Tort Law and Private International Law in Operationalizing the Human Rights Due Diligence Concept and Legal Implications: Towards a Presumption of a Legal Duty of Human Rights Due Diligence.’ [2016] International Conference on Business and Human Rights 20 - 21 October, Sevilla; Catherine Kessedjian and Humberto Cantú Rivera (eds), *Private International Law Aspects of Corporate Social Responsibility* (Ius Comparatum - Global Studies in Comparative Law, Springer Nature 2020); Lucas Roorda and Cedric Ryngaert, ‘Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction’ (2016) 80 *Rechtszeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* 783.

³⁰ Hanoch Dagan and Avihay Dorfman, ‘Interpersonal Human Rights’ (2018) 51 *Cornell Int’l L J* 361, 362.

³¹ *ibid* 362–63.

that transnational encounters of the kind that concern us should be analyzed through the prism of private law theory because although transnational encounters involve citizens (or residents) of different jurisdictions, they are primarily *interpersonal* interactions.³²

Broadly speaking, Dagan and Dorfman's relational justice theory contends that liberal private law, which is their conception of private law, establishes the framework of relationships of interpersonal respect to recognise individuals as genuinely free and equal.³³ It is this theory that the thesis utilises to articulate, what is called in the thesis as a 'supply chain responsibility' for human rights impacts.

§2 Private law theory and relational justice

While proper elaborations of the relational justice theory and its concepts follow in the first chapter, it is useful to flag what the theory that is the normative framework of the thesis is. However, before there can be a discussion of what relational justice is, it needs to be made clear what is meant by private law theory.³⁴ This quote from the proponents of the relational justice theory is helpful in what they understand private law theory to be:

Conceptually, a private law theory explains what makes private law private; normatively, it highlights the values that private law vindicates or promotes; and, jurisprudentially, it accounts for the relationship between doctrinal details and private law's more abstract features (...). Together, these answers constitute a 'specific language' for legislatures, judges, lawyers, and academics on which to draw when making claims in specific doctrinal

³² *ibid* 364 (emphasis supplied on human rights).

³³ Relational justice in this thesis is meant in this particular sense of Dagan and Dorfman's theory. See Hanoch Dagan and Avihay Dorfman, 'Just Relationships' (2016) 116 *Colum L Rev* 1395; This is not to say that Dagan and Dorfman have a monopoly on the term relational justice or that 'relational justice' ordinary refers to Dagan and Dorfman's theory. For an example of other theoretical uses of the term, see Dan Wielsch, 'Relational Justice The Public Dimension of Contract' (2013) 76 *Law & Contemp Probs* 191; A similar caveat as the previous applies to the term 'interpersonal' in the thesis. In this regard, see Zhong Xing Tan, 'The Enigma of Interpersonal Justice in Private Law Theory' (2023) 43 *Oxf J Leg Stud* 699.

³⁴ For a succinct overview of private law theory, see Peter Cane, 'The Anatomy of Private Law Theory: A 25th Anniversary Essay' (2005) 25 *Oxf J Leg Stud* 203 (Cane claims that private law theory as a distinct field had the 'Problem of Social Cost' article by Ronald Coase from 1960 as its genesis.); Ronald H Coase, 'The Problem of Social Cost' (2013) 56 *JL & Econ* 837 (reprint of the 1960 article); See 'In Memoriam' (2013) 56 *JL & Econ* [iii].

contexts, both regarding what the law is and respecting how it should (or should not) be reformed.³⁵

In that context, Dagan and Dorfman say that their particular theory of relational justice covers the following aspects:

Conceptually, we claimed that private law should be understood as the law governing our interpersonal relationships as private individuals (as opposed to citizens or public officials). Normatively, we maintained that the rules of private law should be shaped (in a liberal polity, properly called) in line with the fundamental maxim of reciprocal respect for self-determination and substantive equality, which we dub relational justice. Jurisprudentially, we argued that an interpretive legal theory depends on a normative judgment that determines which doctrinal details are deemed core and which marginalized, thus rendering it necessarily reconstructive and potentially reformist.³⁶

The theory therefore defines private law as the law that provides a framework of respectful interpersonal interactions between *persons* where their characteristics as *citizens* are orthogonal or irrelevant.³⁷ Within this framework, as a framework of interactions, adjudication is a fallback mechanism by distinguishing private *law* as framework from private law *adjudication* which is the institutional means of vindicating the former.³⁸ At its core, this (liberal) framework of private law secures self-determination and substantive equality; the former is the opportunity for people to live the life with the ends they choose³⁹ and the latter is to treat people as they really are, embedded in power relations with their specific characteristics.⁴⁰ The 'justice' in relational justice means precisely that: the horizontal respect for self-determination and substantive equality.

³⁵ Hanoch Dagan and Avihay Dorfman, 'The Domain of Private Law' (2020) 71 *University of Toronto Law Journal* 207, 207.

³⁶ *ibid* 208.

³⁷ Dagan and Dorfman, 'Just Relationships' (n 33) 1397.

³⁸ *ibid* 1399.

³⁹ *ibid* 1403–16.

⁴⁰ *ibid* 1418.

Given this framework, the ambition of the theory extends to justifying responsibility for human rights impacts arising out of the activity of transnational corporations.⁴¹ In order to effectuate this ambition, Dagan and Dorfman elaborate that relational justice contains a subset called ‘interpersonal human rights’ which is defined as the minimum floor below which private law ceases to be legitimate (as being a framework of just interpersonal conduct) irrespective of domestic positive law.⁴² This is because they problematise a statist conception of private law as being domestic, and consequently, bound to state borders,⁴³ where the transnational characteristic of modern corporate harm and conduct proves to be a challenge. Their formulation, they say, provides a direct interpersonal obligation without reference to the state, but is not state-free law as the institutions of enforcement, i.e., the vindication mechanisms are provided by the state.⁴⁴ Their conception of harm from transnational corporations seems to refer to the phenomenon of such large corporations being beyond the jurisdiction of the domestic private law of one state.

§3 Usage and context of terms in the thesis

§2.1 *Transnationality*

Transnationality can be of two types, as the word will be used in the thesis, viz. geographical and legal/organisational.⁴⁵ The former signifies the characteristic of a transnational

⁴¹ Dagan and Dorfman, ‘Interpersonal Human Rights’ (n 30); Dagan and Dorfman, ‘The domain of private law’ (n 35) 228–29.

⁴² Dagan and Dorfman, ‘Interpersonal Human Rights’ (n 30) 385; Dagan and Dorfman, ‘The domain of private law’ (n 35) 230.

⁴³ Dagan and Dorfman, ‘Interpersonal Human Rights’ (n 30) 365–72.

⁴⁴ Hanoch Dagan and Avihay Dorfman, ‘Justice, Politics, and Interpersonal Human Rights’ (2018) 51 *Cornell Int’l L J Online* 139, 143.

⁴⁵ This ‘transnational’ element would constitute what is called the ‘global value chain’ in private law literature. See Klaas Hendrik Eller, ‘Is “Global Value Chain” a Legal Concept?: Situating Contract Law in Discourses Around Global Production’ (2020) 16 *European Review of Contract Law* 3; Anna Beckers, ‘Global Value Chains in EU Law’ [2023] *Yearbook of European Law*; Laura D Knöpfel, ‘An Anthropological Reimagining of Contract in Global Value Chains: The Governance of Corporate-Community Relations in the Colombian Mining Sector’ (2020) 16 *European Review of Contract Law* 118; Peer Zumbansen, ‘“Economic Law” and the Contractual Constitution of Global Supply Chains’ (2019) 52 *Kritische Justiz* 670; Talya Ucaryilmaz Deibel, ‘Corporate Social Responsibility in the Legal Framework of Global Value Chains’ (2022) 15 *Law and Development Review* 329; Jaakko Salminen and Mikko Rajavuori, ‘Private International Law, Global Value Chains and the Externalities of Transnational Production: Towards Alignment?’ (2021) 12 *Transnational Legal Theory* 230.

corporation as being situated in multiple states, but it does so only through it being comprised of various entities, which is the latter element of transnationality. Thus, when referring to transnational corporations and their supply chains, *both* these elements are constitutive of this transnationality. This transnationality creates ‘distances’, as is used in the language of the research question laid down near the end of the fourth section of this introduction, viz. the geographical and the legal distance between the transnational corporation and the human rights impact. What this means is that, often, not only is the human rights impact *physically* distant from the transnational corporation but also *legally* distant through a chain of relationships that may involve shareholding relationships (i.e., subsidiaries) or contractual relationships (i.e., suppliers).

§2.2 Legal distance as a problem in relational justice

The legal and geographical distance formulations are useful to visualise what Dagan and Dorfman’s articulation of relational justice does and does not do. What their articulation of relational justice currently provides a justification for is that whether a relationship is in US, UK or Uzbekistan, or between entities in US and the UK, the considerations of justness remain the same irrespective of state borders since it is a direct relationship without reference to the state. Let us go back to the Great Garments example. Remember that Great Garments, based in Singapore, has relationships with suppliers in the US who sew the garments. Thus, if Great Garments was to directly pollute a US river, relational justice would say that the fact the company is in Singapore and the people are in US is irrelevant – relationships have the same considerations of justness if they were wholly within Singapore or within the US. This is where Dagan and Dorfman stop.

What their articulation of relational justice does *not* provide a justification for is how Great Garments has a responsibility to respect human rights even for the workers at the US supplier or the fisherfolk nearby the supplier, i.e., the legal transnationality element. This is because they say nothing about what considerations Great Garments must have for other relationships beyond its immediate contractual relationships (its first-tier suppliers), which is usually far detached from the eventual US supplier. If this is the ideal of relational justice, then it is

incomplete. Great Garments, in fact, does have the responsibility to respect human rights of such people, as articulated in the UN Guiding Principles,⁴⁶ and in emerging laws that draw from the UN Guiding Principles. The human rights due diligence legislations from France, Germany and Norway mentioned in the beginning of the introduction also reflect the UN Guiding Principles' understanding of such a responsibility, and is also affirmed by the discussions at the treaty process.⁴⁷ Relational justice *can* be extended to provide such a justification of the *legal* distance apart from the *physical* distance, which is what is demonstrated in the thesis, going beyond what Dagan and Dorfman articulate about relational justice. The argument is elaborated after this section on usage of terms.

§2.3 *Transnational corporations*

However, one may wonder: if the transnational corporation is conceived of as a singular entity spanning multiple jurisdictions, how is there even a physical distance in the first place? Transnational corporations are notoriously hard to define and no major regulatory instrument such as the UN Guiding Principles or the OECD Guidelines on Multinational Enterprises define it, and deliberately so. The OECD Guidelines, for example, say, 'A precise definition of multinational enterprises is not required for the purposes of the Guidelines.'⁴⁸ It thereafter states that 'the international nature of an enterprise's structure or activities and its commercial form, purpose, or activities are main factors to consider' in determining whether a corporation is a multinational enterprise.⁴⁹ A definition is particularly difficult because of the various forms and structures such transnationality can take, as was the case with discussions on defining transnational corporations for previous attempts at UN instruments on regulation of

⁴⁶ UNGPs (n 3), principle 13(b).

⁴⁷ UN Office of the High Commissioner for Human Rights, 'Updated Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (2023) para 8.1 <<https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf>> accessed 3 August 2023.

⁴⁸ *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (Organisation for Economic Cooperation and Development 2023) ch I, para 4 (for the purposes of this thesis there is no functional difference between a multinational enterprise and a transnational corporation).

⁴⁹ *ibid* ch 1, para 4.

transnational corporate conduct.⁵⁰ For the purposes of the thesis, a clear definition is also not necessary since it primarily focuses on supply chains (constructed by contractual relationships) so the precise form of transnational corporations is irrelevant. As a consequence, a reference to the term ‘transnational corporation’ generally means the *parent* transnational corporation or the *chain leader* unless stated otherwise.⁵¹

This supply chain leader is the (buyer) corporation that, given the context of the global nature of supply chains, has increasingly concentrated buyer power especially regarding compliance with product specifications, manufacturing processes, commercial terms, standards of labour etc. across the chain.⁵² These buyers, i.e., the transnational corporations in the thesis, shape this through contracts, codes of conduct and the like which make it difficult for local firms and host states to ‘influence the terms on which they access supply chain structures and the returns they receive from participating in them.’⁵³ The term transnational corporation, therefore, as the chain leader, is intended to remind the reader where the axis of responsibility is situated in the thesis.

§2.2 Globalisation as an established fact

Now, the question slowly moves on from what transnationality and transnational corporations are to the significance of transnationality. John Ruggie, tasked with clarifying corporate responsibility as the Special Representative of the UN Secretary General, in his first report in 2006, stated that, in contrast to 1945, when the state-based human rights regime was taking shape, today’s globalisation involves ‘*multiple corporate entities* spread across and within *multiple countries*’ which can prove to be a challenge to the protection of human rights when

⁵⁰ David Weissbrodt and Muria Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) 97 Am J Int’l L 901, 907–12.

⁵¹ Beckers (n 45) 8–12.

⁵² Dan Danielsen, ‘Situating Human Rights Approaches to Corporate Accountability in the Political Economy of Supply Chain Capitalism’ in Daniel Brinks and others (eds), *Power, Participation, and Private Regulatory Initiatives: Human Rights Under Supply Chain Capitalism* (University of Pennsylvania Press 2021) 227–28.

⁵³ *ibid* 228.

companies abuse such rights.⁵⁴ Corporate responsibility is inherently *transnational* specifically because of supply chain globalisation,⁵⁵ which was an inherent part of global economic liberalisation.⁵⁶ That transnational corporate activity can result in a negative impact on human rights has been affirmed time and again in the past half-century, including in important UN reports on the role of transnational corporations and development,⁵⁷ which led to a specific UN institution to study the possibilities of regulating transnational corporations.⁵⁸ Human rights had thus come to face the challenge of globalisation,⁵⁹ becoming a battleground for conceptualisation, *inter alia*, on how to deal with the challenge of transnational corporations in a liberal world.⁶⁰ Human rights actors found it difficult to effectuate adequate protections against the negative effects of globalisation.⁶¹ This context is important, since, given that supply

⁵⁴ UNHRC, 'Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' Report 2006/97 (22 February 2006) UN Doc E/CN.4/2006/97 (emphasis supplied).

⁵⁵ Of course, one should be careful in stating in absolute terms that the problem was not transnational before globalised supply chains. The public-private separation between colonial states was a critical issue in corporate responsibility since five hundred years, see Martti Koskenniemi, 'The Law and Economics of State-Building: England c. 1450–c. 1650' in *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (Cambridge University Press 2021) 588; Philip J Stern, *Empire, Incorporated: The Corporations That Built British Colonialism* (Harvard University Press 2023).

⁵⁶ Syed Javed Maswood, 'Origins and Consequences of Economic Globalization: Moving beyond a Flawed Orthodoxy' (2021) 27 Eur J Int'l Rel 428.

⁵⁷ The UN Department of Economic and Social Affairs, 'The impact of multinational corporations on development and on international relations' UN Doc E/5500/Rev.1 (22 May 1974), Report of the Group of Eminent Persons 14.

⁵⁸ UN ECOSOC, 'The impact of transnational corporations on the development process and on international relations' UN Doc E/RES/1913(LVII) (5 Dec 1974), para 3(f) (the centre was eventually dissolved); for a detailed account see Khalil Hamdani and Lorraine Ruffing, *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (Routledge 2015).

⁵⁹ Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34 Eur J Int'l Law 7, 17; Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018); Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso Books 2019).

⁶⁰ Anghie (n 59) 20–24 (the critiques were mostly attributed to *neoliberalism*); Baxi, 'Whose conflicts? What law?' (n 29); Upendra Baxi, 'Market Fundamentalisms: Business Ethics at the Altar of Human Rights' (2005) 5 Human Rights Law Review 1; Upendra Baxi, 'Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?' (2016) 1 Business and Human Rights Journal 21.

⁶¹ Anghie (n 59) 40; Bhupinder Singh Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century Symposium: Third World Approaches to International Law (TWAIL) Conference: Capitalism and the Common Good' (2012) 14 Or Rev Int'l L 17; Bhupinder Singh Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 Eur J Int'l Law 1; Makau Mutua, 'Human Rights in Africa: The Limited Promise of Liberalism' (2008) 51 African Studies Review 17; Samuel Moyn, 'Human Rights and the Crisis of Liberalism' in Jack Snyder and others (eds), *Human Rights Futures* (Cambridge University Press 2017).

chain responsibility is to be articulated in this background, it becomes imperative that a private law theory be able to go beyond particularities of positive law in individual jurisdictions, like relational justice does, to be useful for articulating supply chain responsibility.

§2.3 Human rights impacts and human rights due diligence

That said, one way the challenge to human rights protection from transnational corporate activity was sought to be addressed is the UN Guiding Principles, which is arguably the single-most important instrument in business and human rights today.⁶² This was the first instrument ‘endorsed’ at the UN which affirmed that corporations have a responsibility to respect human rights throughout their operations and should conduct ‘human rights due diligence’ to ensure that they prevent and mitigate human rights impacts.⁶³ What Dagan and Dorfman provide is an engagement directly of a private law theory with the question of corporate human rights responsibility by placing a part of their theory in the business and human rights debate surrounding the work of John Ruggie, the author of the UN Guiding Principles, at the UN.⁶⁴ This is a rare, if not the only attempt at doing so from within private law theory, which has otherwise been restricted in its attention to private law doctrine and principles missing the opportunity to initiate a discussion with international law of business and human rights. Until now.

Nonetheless, another question arises. What kind of human rights impacts are addressed in this thesis, especially given the private law theory context of the thesis? Most importantly, like the definition of transnational corporations, there is no particular definition of human rights impacts in the UN Guiding Principles or even legislation outlining corporate human rights responsibility. The Interpretive Guide on Corporate Responsibility in the UN Guiding Principles defines ‘adverse human rights impact’ as something that ‘occurs when an action

⁶² UNGPs (n 3).

⁶³ UNHRC, ‘Human rights and transnational corporations and other business enterprises’ (n 3), para 1; UNGPs (n 3), principles 11 and 17.

⁶⁴ Dagan and Dorfman, ‘Interpersonal Human Rights’ (n 30).

removes or reduces the ability of an individual to enjoy his or her human rights.’⁶⁵ The latest version of the business and human rights treaty under negotiation, similarly, states that an adverse human rights impact means ‘a harm which corresponds to a reduction in or removal of a person’s ability to enjoy an internationally recognized human right.’⁶⁶

Is theft or murder a human rights impact on the right to property and the right to life, respectively? While it may indeed be the case, the human rights impacts in focus in this thesis are more large scale and structural or systemic,⁶⁷ even though individual instantiations may be illustrated. Since the focus is on transnational corporations and their supply chains, which are in itself large scale entities, non-structural human rights issues would be difficult to put in focus in the enquiry.

A critical tool for mitigation of such impacts is human rights due diligence. Human rights due diligence, in the UN Guiding Principles, is mentioned as the process through which businesses identify such human rights impacts and prevent and mitigate them.⁶⁸ Instead of due diligence as ordinarily meaning mitigation of risk to the entity conducting due diligence, human rights due diligence focuses on identification and mitigation of risks to *third parties*.⁶⁹ It is independent of a responsibility to remediate harms since human rights due diligence is an *ex-ante* prevention and mitigation process.⁷⁰ The process is explained in detail in Chapter 3. Human rights due diligence, understood as this *ex ante* requirement of corporations in relational justice, is indeed an important articulation of the extension of relational justice in that chapter.

⁶⁵ UN OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012) 5; A similar definition is contained in the latest version of the draft treaty on corporate responsibility currently under negotiation UN Office of the High Commissioner for Human Rights (n 47) para 1.2.

⁶⁶ UN Office of the High Commissioner for Human Rights (n 47) para 1.

⁶⁷ By systemic (or structural), reference is made to the ordinary dictionary definition, which is ‘Relating to a system as a whole; inherent in the system’, see ‘Systemic’, *Oxford English Dictionary* (2023).

⁶⁸ UNGPs (n 3), principle 17.

⁶⁹ John Gerard Ruggie and others, ‘Ten Years After: From UN Guiding Principles To Multi-Fiduciary Obligations’ (2021) 6 *Business and Human Rights Journal* 179, 186–87.

⁷⁰ UNGPs (n 3), see principles 17 and 22.

§2.4 Responsibility

At this juncture, it also becomes imperative to address what a ‘responsibility’ is, especially given that, earlier, it was mentioned that adjudication is a fallback mechanism in our private law theory normative framework of relational justice. Responsibility, in the ordinary legal sense, is an attribution of fault for a harm caused by an actor.⁷¹ This form of understanding responsibility is intricately intertwined with litigation demanding that the actor causing the harm pay damages and remedy the situation caused.⁷² This ‘liability model of responsibility’ is the dominant form of conceptualisation of (business and) human rights responsibility.⁷³

The conception of the ‘liability model of responsibility’ or a ‘backward-looking responsibility’ was best explained by Iris Marion Young in her critique of this kind of responsibility for harms like human rights impacts.⁷⁴ Under such a model, causality, intention and consequences take the centre stage as a backward-looking method of attributing fault or blame to an actor so that it results in civil or criminal liability.⁷⁵ As such, the responsibility only arises in the presupposition that a particular event causing the harm has taken place sometime in the past.⁷⁶ Hence, the question becomes one of compensation.⁷⁷

⁷¹ Iris Marion Young, *Responsibility for Justice* (Oxford University Press 2011) 97.

⁷² Kathryn Sikkink, *The Hidden Face of Rights* (Castle Lecture Series, Yale University Press 2020) 39.

⁷³ *ibid*; Lucas Roorda, ‘Adjudicate This! Foreign Direct Liability and Civil Jurisdiction in Europe’ in Angelica Bonfanti (ed), *Business and Human Rights in Europe* (Routledge 2018) 195; Marta Requejo Isidro, ‘Business and Human Rights Abuses: Claiming Compensation under the Brussels I Recast Special Issue: The Corporate Responsibility to Respect Human Rights: The Emerging European Union Regime’ (2016) 10 *Hum Rts & Int’l Legal Discourse* 72; Anil Yilmaz Vastardis and Rachel Chambers, ‘Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?’ (2018) 67 *International & Comparative Law Quarterly* 389; Robert C Blitt, ‘Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance’ (2012–13) 48 *Tex Int’l L J* 33; Nadia Bernaz and Irene Pietropaoli, ‘Developing a Business and Human Rights Treaty: Lessons from the Deep Seabed Mining Regime Under the United Nations Convention on the Law of the Sea’ (2020) 5 *Business and Human Rights Journal* 200; Nicolas Bueno and Claire Bright, ‘Implementing Corporate Human Rights Due Diligence through Corporate Civil Liability’ (2020) 69 *International & Comparative Law Quarterly* 789.

⁷⁴ Young (n 71).

⁷⁵ *ibid* 97–99.

⁷⁶ *ibid* 180.

⁷⁷ *ibid*.

The liability model, in private law, is considered a mechanism for rectification of loss,⁷⁸ and is only a means of eliminating effects of a wrong on part of the defendant.⁷⁹ Loss-shifting and compensation are commonly accepted as the primary purposes of tort law.⁸⁰ In this focus on compensation, prevention of harm and reduction of structural injustices, as future oriented elements of law, receive little attention in tort law.⁸¹ Put simply, this conflates the existence of a duty with the breach of a duty,⁸² and puts the cart before the horse by treating violations of duties of conduct as secondary to remedial mechanisms.⁸³

This is also why tort law, in line with relational justice, is understood in the thesis as the law that defines the just terms of interactions between parties even in a perfectly just society where no remedy is necessitated.⁸⁴ This definition departs from understandings of tort law in major camps like law and economics where a tort norm is defined as having been violated *because* a cost is allocated to a party, not that committing a tort results in costs,⁸⁵ or from understandings of tort as a right to sue when an injury takes place,⁸⁶ or from understanding tort law as a mechanism for correction of losses.⁸⁷ Putting aside the specificities of what each school says, it

⁷⁸ Ernest J Weinrib, 'Chapter 5 - Correlativity' in *The Idea of Private Law* (Oxford University Press 2012) 136; John Murphy, 'Contemporary Tort Theory and Tort Law's Evolution' (2019) 32 Can J L & Jurisprudence 413, 424.

⁷⁹ Weinrib, 'Chapter 5—Correlativity' (n 78) 136.

⁸⁰ Marc A Loth, 'Corrective and Distributive Justice in Tort Law: On the Restoration of Autonomy and a Minimal Level of Protection of the Victim' (2015) 22 Maastricht Journal of European and Comparative Law 788, 792.

⁸¹ *ibid* 796.

⁸² Jared Marshall, 'On the Idea of Understanding Weinrib: Weinrib and Keating on Bipolarity, Duty, and the Nature of Negligence Note' (2009–10) 19 S Cal Interdisc LJ 385, 405–07.

⁸³ Lisa J Laplante, 'Human Torts' (2017–18) 39 Cardozo L Rev 245, 294.

⁸⁴ Hanoch Dagan and Avihay Dorfman, 'Against Private Law Escapism: Comment on Arthur Ripstein, Private Wrongs' (2016) 14 Jerusalem Review of Legal Studies 37, 46; Cf. Bryan A. Garner (ed), *Black's Law Dictionary* (Abridged Tenth ed., Thomson Reuters 2015) 1263 (defining tort as 'a civil wrong, other than breach of contract, for which a remedy *may* be obtained, usually in the form of damages. [emphasis supplied]).

⁸⁵ John Gardner, 'Tort Law and Its Theory' in John Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge Companions to Law, Cambridge University Press 2020) 359; Guido Calabresi, 'The Decision for Accidents: An Approach to Nonfault Allocation of Costs' (1964) 78 Harv L Rev 713; Richard A Posner, 'A Theory of Negligence' (1972) 1 The Journal of Legal Studies 29; Catherine M Sharkey, 'In Search of the Cheapest Cost Avoider: Another View of the Economic Loss Rule' (2017–18) 85 U Cin L Rev 1017.

⁸⁶ John CP Goldberg and Benjamin C Zipursky, 'Rights and Responsibility in the Law of Torts' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Bloomsbury Academic 2014).

⁸⁷ Ernest J Weinrib, 'Chapter 3 - Remedies' in *Corrective Justice* (Oxford University Press 2012).

would be difficult to sustain a principled argument that tort law does *not* define interpersonal conduct whatever the position of rectification may be in a framework. This is in the context of private law meaning the law of horizontal interactions between persons qua persons, not citizens of states.⁸⁸

Consequently, in the thesis, the use of the word corporate ‘responsibility’ does not mean the liability model of responsibility. The court-determined civil liability scenario is termed as corporate ‘liability’ instead of corporate ‘responsibility’ in the thesis. When the word responsibility is used, it is used in the sense of a normative demand and not necessarily a breach of legislative prescriptions though it may include such scenarios. This normative demand can arise from obligations in private law and is not *restricted* to non-compliance with legislation. Corporate human rights responsibility in this normative sense means a legal-normative consequence and not *merely* a moral prescription. It is thus an expectation of conduct instead of a duty to right a wrong, which is the concern of remedy, and is independent. Responsibility is thus a normative demand to do something, which, in our case, is the corporate responsibility *to respect human rights*, separate from the corporate liability arising from the *breach* of such human rights responsibility.

As such, responsibility is ‘pre-remedy’ so to say. When there is a normative requirement for a corporation to act in a certain way, legally speaking, the normative prescription will give rise to a corporate human rights responsibility; but what kind of liability it may give rise to upon its breach is a separate question. While this certainly does not mean that responsibility is superior to remedy, it does entail that the ‘responsibility’ conceived of in this thesis is *prior* to remedy.

Thus, the extensive engagement with corporate liability in private law elsewhere⁸⁹ provides an opportunity, especially in the relational justice view of remedy as a backup mechanism, to step

⁸⁸ Dagan and Dorfman, ‘Just Relationships’ (n 33) 1416–17.

⁸⁹ John CP Goldberg and Benjamin C Zipursky (n 86) 261; Avihay Dorfman, ‘Private Law Exceptionalism? Part I: A Basic Difficulty with the Structural Arguments from Bipolarity and Civil Recourse’ (2016) 35 *Law and Philos* 165, 177–79; Benjamin C Zipursky, ‘Rights, Wrongs, and Recourse in the Law of Torts’ (1998) 51 *Vand L Rev* 1, 9–11; Weinrib, ‘Chapter 3—Remedies’ (n 87); Weinrib, ‘Chapter 5—Correlativity’ (n 78); Ernest J Weinrib, ‘Chapter 4 - Gain-Based Damages’ in *Corrective Justice* (Oxford University Press 2012); Robert Stevens, ‘Chapter 8 - Privity’ in *Torts and Rights* (Oxford University Press 2007).

back and ask not what corporations owe as compensation but what normative prescriptions of just corporate conduct are in the globalised world. The reach of corporate harm has permeated borders, but have their responsibilities been able to do the same? Merely the transnational company has now been able to distance itself physically, and legally, from responsibility for human rights impacts — such impacts are now *distant*.⁹⁰

§2.5 Other terms and context

Relational justice, with its particular view of adjudication and private law as above, is not addressed at *ad hoc* encounters, i.e., when the thesis depicts that a relationship is ‘unjust’ it means that the framework cannot tolerate such conduct as a framework of *just* interactions.⁹¹ It signifies that the unjust conduct is not merely that the particular harm arising from the interaction entails responsibility but rather also an implication of the framework in being able to sustain such interactions.⁹²

It might also be useful to state now that the word ‘citizen’ is understood loosely as meaning persons within public jurisdiction, e.g., residents,⁹³ asylum seekers and stateless persons within the jurisdiction of a state are all ‘citizens’ in the thesis in line with its use in relational justice theory, even if perhaps it may be a misnomer. This is solely because of convenience and has no bearing on legal characterisation or implies any normative assertion. Since the thesis addresses people as private individuals, delving deep into the kinds of state relationships is neither necessary nor relevant to the content and argument of the thesis.

Having set out how many terms are used and why, perhaps it is important to flag that certain terminology fundamental to the thesis may deviate from standard usage (like the word ‘citizen’ above), partly due to the choice of relational justice as a framework, which does the same, and

⁹⁰ Ronen Shamir, ‘Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony’ in Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge Studies in Law and Society, Cambridge University Press 2005).

⁹¹ Hanoch Dagan, ‘Liberal Property Theory’ (SSRN Scholarly Paper, 27 October 2022) 13 <<https://papers.ssrn.com/abstract=4260274>> accessed 22 August 2023.

⁹² *ibid.*

⁹³ Dagan and Dorfman, ‘Interpersonal Human Rights’ (n 30) 364 (Dagan and Dorfman also refer to residents as included within their broader meaning of ‘citizen’ but only in passing.).

partly because the thesis treads fine lines between different fields of law and legal scholarship. One can find occasional terminological reminders in the thesis, but it also calls upon the reader to exercise more terminological awareness than otherwise expected.

Another such term that warrants terminological awareness is the term interpersonal. Given the research question, the thesis is limited to the horizontal relationship between corporations (legal persons) and people (natural persons) when it uses the term ‘interpersonal’ but may draw on examples of people-people interactions where relevant. This is both analytical and pragmatic as imposing human rights duties of the same nature as corporations on people would be prohibitively restrictive owing to the fact ordinary persons have resources that are multi-fold lesser in magnitude than that of large transnational corporations to comply with such human rights responsibilities.⁹⁴ Nonetheless, whether *some* responsibilities would lie on persons as well is a question that is separate and would merit independent consideration outside the thesis.

§4 Thesis argument

Now that the broader context of relational justice has been laid out, one may recall that the theory of relational justice does have explicit ambitions to normatively justify the human rights responsibilities of transnational corporations.⁹⁵ This is in tune with global developments of

⁹⁴ Dagan and Dorfman, ‘Just Relationships’ (n 33) 1435.

⁹⁵ Dagan and Dorfman, ‘Interpersonal Human Rights’ (n 30); Dagan and Dorfman, ‘Just Relationships’ (n 33) 1421 (justification in the sense of a normative explanation of ‘why’ it is that rule that one has to follow. It thus concerns normative justifiability within the parameters of the theory and not political or economic justifiability and the like); John Stuart Mill, ‘Essays on Equality, Law, and Education (1825)’ in J. M. Robson (ed), *The Collected Works of John Stuart Mill, Volume XXI* (University of Toronto Press 1984) 262 (in the liberal tradition, Mill says ‘the burden of proof lies on those who contend any restriction or prohibition’); John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed, Harvard University Press 2001) 44; For further discussions on what justification means, see Rainer Forst, ‘The Justification of Basic Rights: A Discourse-Theoretical Approach’ (2016) 45 *Neth J Legal Phil* 7; Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia University Press 2011); Herbert Lionel Adolphus Hart, *The Concept of Law* (OUP Oxford 2012); TM Scanlon, *What We Owe to Each Other* (Harvard University Press 2000); Rainer Forst, ‘Justification Fundamentalism: A Discourse-Theoretical Interpretation of Scanlon’s Contractualism’ in Markus Stepanians and Michael Frauchiger (eds), *Reason, Justification, and Contractualism*, vol 7 (Lauener Library of Analytical Philosophy, De Gruyter 2021); Emil Andersson, ‘Freedom, Equality, and Justifiability to All: Reinterpreting Liberal Legitimacy’ (2022) 26 *J Ethics* 591 (arguing that Rawlsian justifiability means that a rule has to be normatively sound according to general principles which allow people to be free and equal).

similar ambitions of transnational corporate responsibility, including for human rights impacts arising in downstream supply chains. Supply chain responsibility as (would be) articulated in relational justice can be visualised in these developments, as a depiction of what ideal relational justice stands for, and not only for the theory to be relevant to developments.

The argument in this thesis is that the relational justice theory of Dagan and Dorfman, can sustain a conception of corporate responsibility for negative effects on human rights along the supply chain in a way that is echoed in legal developments in corporate responsibility. In so doing, the normative argument in this thesis proceeds in two parts: (1) that there is a cascading responsibility of transnational corporations to take into account effects on human rights in the supply chain, and (2) that human rights due diligence, which, as is explained before, is an *ex-ante* ascertainment of negative effects on human rights in a relationship, is an inherent necessity of just relationships.⁹⁶

Currently, Dagan and Dorfman's articulation this theory of relational justice is unable to explain two important factors of supply chain responsibility. First, how a transnational corporation can be responsible for human rights impacts in its supply chains (recall the legal distance formulation mentioned earlier). Second, that of considering human rights impacts in the *formation* of business relationships, as an *ex-ante* requirement independent of the question of remediation of harm which is an *ex-post* consideration. Nonetheless, what Dagan and Dorfman's theory does explain, as seen above, is how these private law duties exist independent of *state jurisdiction* to apply to a *transnational* corporation which exists in multiple state jurisdictions.

For the first explanation on a cascading responsibility of transnational corporations: if business relationships between a corporation and its supplier result in the relationship between the supplier and, for example, its worker to be unjust (e.g., by disregard of labour rights), the relationship between the corporation and its supplier is itself unjust. For the second

⁹⁶ The thesis focuses only on business relationships to ascertain what corporations owe to natural persons. See §2.5.

explanation, the argument is that human rights due diligence is an inherent necessity of just relationships; for without it, there can be no *a priori* distinction between arbitrary terms of relationships and just terms of relationships unless there is an *ex-post* evaluation, perhaps by a court, upon a harm having occurred. Both these explanations are based on internal perspectives of the law, i.e., they use the relational justice view of private law as its basis of justification of corporate supply chain responsibility.

This enables the theory to fully address the modern challenges of human rights in a globalised world, congruent with the UN Guiding Principles, developing case law on corporate responsibility, and human rights due diligence legislation. In each of these three circumstances, it is demonstrated in the thesis how the instruments or cases are good illustrations of what is otherwise theoretically advanced as a justification of corporate supply chain responsibility. The research question is, therefore, *how is Dagan and Dorfman's theory of relational justice able to normatively justify corporate human rights responsibility for distant impacts through human rights due diligence, if so, and how is this normative justification reflected in relevant case law and legislation?*

As Dagan and Dorfman put it, relational justice

is an interpretive theory of private law in a liberal legal order. It builds on existing practices and thus reaffirms some parts of contemporary law. *But an interpretive theory is not a descriptive task.* Rather, it provides an account of our legal practices and, in that, creates a new perspective on the law. Although interpretive legal theories are falsifiable, their falsifiability is typically not an easy task. Thus, one could perhaps imagine a liberal society in which some of the implications of relational justice are missing. (...) The fact that the theory's falsifiability is not easy, however, is a virtue because it allows the theory to serve as a normative ideal. *It is the compass that provides internal resources of critique for lawyers who are loyal to their responsibility to push the law to comply better with its commitment to justice.*⁹⁷

⁹⁷ Dagan and Dorfman, 'The domain of private law' (n 35) 210 (emphasis supplied).

More on what is an interpretive, ideal, and liberal theory follows in Chapter 1. However, what is important to flag here is that the thesis does not concern an attempt at falsification of relational justice—the critique is aimed at refining the ideal, which, as the thesis argues, should include supply chain responsibility. Dagan and Dorfman’s theory of relational justice does not engage with either the legislations or the cases mentioned in this introduction or address the specific aspect of transnationality as regards legal distance that is crucial to supply chain responsibility. Furthermore, human rights due diligence or any *ex-ante* processual element remains unexplored in relational justice, making the claim of remedy as a backup mechanism in private law underdeveloped, at least regarding corporate human rights responsibility.

This lack of engagement with the complexities of supply chain responsibility means that the theory, as currently articulated, does not adequately address the unique challenges posed by the legal distance inherent in transnationality of supply chains, nor does it consider the implications of human rights due diligence or other *ex-ante* processual elements. What this thesis demonstrates is that relational justice *can* justify supply chain responsibility for human rights impacts, congruent with legal developments, only that Dagan and Dorfman do not.

§5 Chapters of the thesis

This justification is provided in three primary chapters with the congruence with the UN Guiding Principles, case law and legislation following in the three chapters after that. These six chapters consist of two parts: the first three constitute the normative part and the last three the illustrative part.

Chapter 1 thus lays down the groundwork for the normative approach in the thesis, viz. that of the relational justice theory of Dagan and Dorfman. It explains the fundamental tenets of relational justice theory as a moderate position, between the position that private law should be concerned only with formal equality and independence and the position that substantive equality and self-determination are concerns for all laws, which makes the private-public distinction superfluous. In particular, this chapter explains the horizontality of human rights in the theory as addressing the person, not the citizen, the meaning of self-determination and

substantive equality, and the characteristic of remedy as a backup mechanism. This is followed by contextualising relational justice as a liberal, interpretive and ideal theory of law.

Chapter 2 enunciates how relational justice is able to justify a direct horizontal human rights responsibility independent of the state-citizen relationship through its articulation of *jus gentium privatum*, which is defined as the commonality of all positive laws of nations that are applicable between citizens in states. Nonetheless, this chapter points out the two gaps mentioned above in detail: that of the theory's non-engagement with supply chain structures and non-articulation of *ex-ante* procedural requirements.

Chapter 3 addresses this gap by proposing a cascading responsibility of transnational corporations owing to the fact that relationships are not formed in a vacuum, and their considerations of justness should not be isolated from their effects on other relationships. In effect, relationships are more like a web, which means that the formation of a relationship influences how other relationships in the web are formed. This is why transnational corporations must consider downstream human rights impacts for their relationships to be just. Secondly, human rights due diligence is presented as a necessity for the formation of just relationships, since otherwise there would be no method to know *a priori* what the terms are of a just relationship. Moreover, human rights due diligence necessitates co-authorship of relationships, which safeguards against unilateral imposition of the terms of relationships by the more powerful corporation.

Chapter 4 expands on the notion of supply chain responsibility and human rights due diligence in the UN Guiding Principles. This is intertwined with the demonstration of how the expanded relational justice theory of transnational corporate responsibility is congruent with the understandings of the UN Guiding Principles. It is shown that a cascading responsibility is reaffirmed by the UN Guiding Principles and human rights due diligence, in the UN Guiding Principles, reflects a similar relational framework as that expounded in Chapter 3.

Chapter 5 focuses on demonstrating the congruence of the normative assertions of the thesis in recent case law on transnational corporate responsibility. Given that business and human

rights cases are scarce as regards an actual final decision on liability, this chapter primarily focuses on two cases: *Nevsun v Araya* (Canada) to depict the human rights characteristic of private law claims against transnational corporations,⁹⁸ and *Begum v Maran* (UK) to depict the reflection of a cascading responsibility in tort doctrine.⁹⁹ *Nevsun* is contrasted with the US case of *Nestlé v Doe* which discusses applicability of private law in human rights claims.¹⁰⁰

Chapter 6 is the final chapter that expounds on human rights due diligence legislation as reflecting the relational justice understanding of human rights due diligence expanded upon in Chapter 3. The three enacted laws of the French duty of vigilance law,¹⁰¹ the Norwegian Supply Chain Transparency Act,¹⁰² and the German supply chain due diligence law¹⁰³ are taken as illustrations of how the normative understanding of human rights due diligence as participatory and proactive, as opposed to reactive, is reflected in these recent legislations.

One may notice that the cases involve common law jurisdictions whereas the legislations are from civil law jurisdictions. Despite the distinctness of these legal systems, both precedents from Chapter 5 and legislation from Chapter 6 underpin the commonality of the fundamentals of corporate responsibility for human rights impacts, bolstering their compatibility. This is made visible in the **Conclusion**, which summarises the findings of the thesis, and flags avenues for future research.

⁹⁸ *Nevsun Resources Ltd v Gize Yebeyo Araya et al* [2020] SCC 5.

⁹⁹ *Begum v Maran* (n 21).

¹⁰⁰ *Nestlé USA, Inc v Doe* 141 SCt 1931 (US 2021).

¹⁰¹ LOI n° 2017-399 du 27 mars 2017.

¹⁰² Transparency Act.

¹⁰³ Supply Chain Due Diligence Act.