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Business, Human Rights and the Environment—Using Macro Legal Analysis to Develop a Legal Framework That Coherently Addresses the Root Causes of Corporate Human Rights Violations and Environmental Degradation

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Abstract: This article applies 'macro' legal analysis to the challenge of legal reform related to corporate responsibility for human rights violations and degradation of the environment. It recognises that the approaches from different communities of lawyers to the negative impacts on human rights and the environment caused by companies, sometimes operate in isolation from each other, are not always mutually supportive, can lead to a fragmentation of effort, and may not address the root causes of the problem. In particular, this article analyses the extent to which existing approaches tend to address symptoms of the issues, rather than the root causes themselves. It makes the case that in this regard specific root causes exist within the frameworks of corporate law in all jurisdictions and various aspects of international economic law too. To carry out the study, it employs macro legal analysis, a methodology not previously applied in this field, as a means of developing an understanding of the legal frameworks that, it argues, influence corporate decision making that can affect human rights and the environment. It undertakes an analysis that incorporates relevant corporate law, World Trade Organisation (WTO) law, international investment law, the law relating to multilateral development banks (MDBs), and international insurance law. By using this form of anlaysis it is possible to show how legal frameworks can operate in unison, reinforcing each other providing a cumulative effect that can influence corporate decision makers. Finally, based on the results of the analysis, it suggests a possible strategy of macro-level reforms that could be applied to the re-design of relevant legal frameworks to better facilitate the full protection of human rights and to achieve net zero degradation of the environment. As a result it seeks to demonstrate how this approach can be strategically applied by both human rights and environmental lawyers as a common pathway towards effective legal reform.

Keywords: corporate responsibility; environmental; social; governance; business and human rights; macro legal analysis; CSR; human rights due diligence; corporate law; international economic law; WTO law; international investment law; multilateral development banks; international insurance law

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Citation: Turner, S.J. Business, Human Rights and the Environment—Using Macro Legal Analysis to Develop a Legal Framework That Coherently Addresses the Root Causes of Corporate Human Rights Violations and Environmental Degradation. *Sustainability* **2021**, *13*, 12709. https://doi.org/10.3390/su132212709

Academic Editors: Olga Martin-Ortega, Wen-Hsien Tsai, Valerie Nelson, Renginee G. Pillay and Fatimazahra Dehbi

Received: 31 May 2021
Accepted: 12 October 2021
Published: 17 November 2021

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1. Introduction

Within the general field of business, human rights and the environment, a strong body of work over numerous decades has successfully established the causative links between companies and harms suffered by individuals, communities, and the environment. This has involved demonstrating that certain harms can be attributed to the operations of multinational companies (MNC), even where that harm is caused further down supply chains, or through more diffuse corporate or contractual structures. However, problematising the issues at the heart of this phenomenon is more difficult. In fact, identifying the systemic root causes of corporate human rights violations and environmental degradation is still a significant challenge. It can be argued that the international community has focussed a considerable level of attention on addressing the symptoms of the problem, rather than the root causes [1,2]. A significant proportion of research in this arena focuses on the

outcomes of corporate decision making rather than the legal factors that place commercial pressure on companies to make decisions in the way that they do. Without adequately addressing these types of root causes, the international community potentially misses the opportunity to plan and conduct reform which could ensure that all corporate decision making ultimately resulted in 'fully protected' human rights and 'net zero' degradation of the environment. (Naturally the choice of terms 'fully protected'[3] and 'net zero' [4] within these contexts can raise debate. For example, it can be argued that the quality of the environment should be improved rather than merely aiming for 'net zero' degradation. However, these terms are used to indicate the levels of protection that arguably are possible through the types of reform that are ultimately advocated.)

This article seeks to demonstrate how certain root causes of decision making that lead to corporate human rights violations and environmental degradation can be identified, how they act in concert with each other with a cumulative effect, and how they can potentially be addressed. It contends that those root causes can be found within international frameworks of corporate and international economic law, and that it is possible to recalibrate priorities and obligations where they are identified, in order that companies are predisposed to operate towards specific human rights and environmental outcomes. In doing this, it questions the over reliance on some of the existing approaches to the analysis of corporate responsibility. It argues that by focussing exclusively on single areas of law, it is possible that important factors pertaining to other legal disciplines are sometimes overlooked. It therefore seeks to demonstrate that by including the adoption of, what is termed as a 'macro' legal analytical approach [5], fresh perspectives can be discovered which can lead to new evidenced based pathways to reform. In this context, macro legal analysis entails the structured consideration of a of a range of relevant areas of law from different legal disciplines that affect and influence the decision making of companies. It asserts that macro legal analytical perspectives can assist in providing a pathway towards a more coherent reform agenda. With regard to corporate responsibility, it generally represents a departure from existing and orthodox approaches to legal research in this arena which tend to focus on specific legal disciplines and voluntary mechanisms rather than a fuller range of relevant legal disciplines through an inclusive and integrated methodology.

To carry out this study, a three-stage process is undertaken. Firstly, it considers traditional approaches to the issues in question. In other words, it addresses the way that human rights law and environmental law at both the national and international levels interface with the issue of corporate human rights violations and environmental degradation. It analyses the dissimilarities and similarities that they have and the manner in which this affects reform initiatives. It then considers the initiatives that have been taken by the international community to respond to the challenges of corporate human rights violations and environmental degradation. It asserts that the majority (although not all) of the responses that have been adopted address the symptoms rather than the root causes of the issues at hand. This is because they rarely address the underlying corporate law and international economic law frameworks that, this article argues, are largely responsible for predisposing corporate decision-makers to make commercial decisions that can negatively impact human rights and the environment.

This leads to the second stage, which draws on the theory of macro legal analysis, and which has not to date been applied in this context. As macro legal analysis is dissimilar to conventional forms of legal analysis, the article proceeds to explain its operation. It explains that in this context it is a process through which it is possible to assess the different laws from a variety of sources that affect an issue, where that issue is impacted by a number of different legal frameworks. It argues that this method has important application to the field of business, human rights and the environment because corporate decision making is dominated by commercial pressure derived from different legal frameworks that are generally regarded as discrete legal disciplines, but which can have a tendency to reinforce each other when acting in concert. It then explains how the results of macro legal analysis can be used as a way of developing legal and policy responses that coherently address the

range of integrated factors that may be identified. Following this it proceeds to conduct a specific form of macro legal analysis that is applicable to corporate responsibility. To do this, it focuses on specific aspects of corporate law, WTO law, international investment law, the law of multilateral development banks and international insurance law to assess and highlight their individual and cumulative impacts upon corporate decision making.

The third and final stage demonstrates how the results of the analysis can provide strategic and evidence-based pathways to reform that would address root causes that drive corporate decision making. It suggests a coherent and integrated style of reform that would be applicable across relevant legal frameworks and which would complement existing approaches. In doing so, this article questions the way that we tend to consider 'human rights law' and 'environmental law' in this context and suggests that macro legal analysis can operate in tandem with micro legal analysis to enhance approaches to reform. In this sense, it can have ramifications for the way that we learn law and the way that we consider solving legal problems that are associated with more than one international legal framework. In other words, by suggesting that there is a significant and to date unexplored role for macro legal analysis within the context of corporate responsibility, it contends that there are also reforms that potentially need to be made to the way that academic lawyers in certain fields are trained in order that they are adequately equipped to adopt this type of analysis where it is appropriate to do so.

2. Problematising Existing Approaches to Corporate Responsibility within the Context of the 'Root Causes' of Corporate Decision Making

The entry point in any discussion of the effectiveness of efforts to control and constrain the negative impacts that companies have had upon human rights and the environment is to examine existing initiatives. This section does this but includes an analysis of the extent to which those approaches address what this article argues are root causes of corporate decision making that can have negative outcomes for human rights and the environment. In other words, it considers the extent to which those initiatives reform or seek to reform aspects of legal frameworks that can prevail upon companies by making it commercially and legally expedient to reduce financial overheads to the point that human rights and the environment can potentially be negatively impacted. Such legal frameworks may include but are not necessarily limited to those of corporate law, WTO law, international investment law, multilateral development banking law and international insurance law. In doing so, it also comments on some of the main issues that affect the practicality of applying human rights and environmental law directly to corporate decision making in this context.

Ostensibly at least human rights law and environmental law have the most obvious potential application in this context; therefore, it is important primarily to consider why these two branches of law do not necessarily achieve their objectives or operate effectively to modify corporate decision making. Clearly, human rights law and environmental law have developed separately from each other for historical and technical reasons. Human rights law in the contemporary sense began following World War II with the Universal Declaration of Human Rights in 1948 [6]. In the following two decades, the International Covenant on Civil and Political Rights (ICCPR) [7] and the International Covenant on Economic Social and Cultural Rights (ICESCR) [8] were drafted and finally signed in 1966. Therefore, the development of human rights internationally had a significant head start on international environmental law both in terms of theory and practice. Contemporary concern for the protection of the environment did not emerge until the 1960s and 1970s. It was not until 1972 that the United Nations (UN) convened the first major international conference relating to the protection of the environment in Stockholm, the UN Conference on the Human Environment (UNCHE) [9]. Therefore, from these different historical starting points, it is understandable that human rights law and environmental law have developed along different trajectories and have ultimately resulted in different institutions and seemingly different priorities.

However, more importantly in understanding the reasons for the different approaches and separation between human rights lawyers and environmental lawyers and their

networks, are the differences in the fundamental precepts that govern and underpin these respective branches of law, and what that means to their development. On the one hand, human rights law is underpinned by principles such as equality, liberty and democracy; on the other, environmental law is underpinned by principles such as precaution, the polluter pays principle and intergenerational equity. Equally, both fields of law are sub-divided into many other categories of specialisation. Human rights lawyers may specialise in areas such as the use of torture, the right to an adequate standard of living, or workers' rights. Environmental lawyers may specialise in areas such as biodiversity, climate change or transboundary pollution. As a result, where the operations of businesses have negative impacts on both human rights and the environment, human rights and environmental lawyers will inevitably use different bases through which to evaluate the issues. For example, if a factory had allowed toxins to leach into a watercourse or a lake negatively affecting a local community, a human rights lawyer might view this through the lens of the right to life, the right to health, the right to water or the right to an adequate standard of living. Conversely an environmental lawyer might analyse it through planning law, the law relating to environmental impact assessments, or water quality law. Both of course would be right to follow those respective approaches, but it illustrates the challenge of developing a coherent language when lawyers are considering the broad topic of corporate responsibility for human rights and the environment.

This example also demonstrates that there is a very strong nexus between many human rights and the environment [10–12]. As a result, certain human rights have been used for the protection of the environment, and new human rights that relate specifically to environmental protection have emerged in many national constitutions and also in a number of regional human rights treaties [13,14]. At the UN level, through the UN Human Rights Council special procedures system, specific work has developed since 2011 to analyse and understand those rights and their development [15]. However, whereas the majority of the issues that they ultimately relate to are involved in addressing the actions or operations of companies, those rights themselves do not directly address companies as non-state actors [16].

This leads to the general point that because public international law does not apply directly to non-state actors, companies are ultimately only legally responsible to comply with the applicable law within whichever jurisdiction they are operating in. Therefore, where States have enacted laws to regulate human rights and environmental issues as a result of international law obligations, or autonomously simply due to their own national policies, companies are of course obligated to comply with them. As such, there are of course many laws such as The Clean Water Act [17] and the Clean Air Act [18] in the United States, the Working Time Directive [19] and the Ambient Air Quality Directive [20] in the EU, the Child Worker Protection Laws in Australia [21–24], and the Canada Labour Code [25] which are consistent with international human rights and environmental law standards. In many countries, especially developed countries these laws may be effectively implemented and enforced. Some countries, however, either have not enacted laws that are consistent with international human rights or environmental standards, or they have enacted such laws but do not implement or enforce them effectively. Where companies operate in those jurisdictions, negative outcomes for human rights and the environment can and often do result [10].

As a consequence, the international community has responded to this issue with a variety of initiatives [26]. Most of them have had some degree of success but it is without doubt that the pace of change still leaves many violations of human rights and degradation of the environment. Relevant initiatives by international organisations can be traced back to the 1970s when the UN started to respond to the unwanted human rights and environmental impacts of trans-national corporations (TNC) [27]. Reports from that period include an attempt to develop an operable code of conduct for TNCs [28]. In 2000, the UN launched its Global Compact [29], a voluntary membership scheme that corporations can subscribe to, which requires that they report on the actions that they have adopted relating

to human rights and environmental issues [29]. It has been widely accepted by many large corporations, states and the NGO community although its non-mandatory nature means that it does have limitations [30].

In 2003, an initiative that was derived from the UN Office of the High Commissioner for Human Rights attempted to create a set of norms that, if accepted by States, would create binding human rights and environmental obligations for TNCs [31]. Whilst those norms did generate significant support from civil society groups, many States and lawyers were critical of the approach that they represented and as a result they were not taken any further [32]. On the back of this attempt to create legally binding human rights and environmental obligations for companies, the UN in 2005 appointed John Ruggie as the Special Representative of the Secretary General (SRSG) to consider how responsibility for human rights issues could be incorporated into business practice [33]. Ruggie's extensive work resulted in a final report which advocated a 'protect, respect and remedy' approach [34]. This confirmed that states are expected to 'protect' human rights, but also that businesses are expected to 'respect' human rights and that greater and more effective judicial and non-judicial remedies should be made available for the victims of human rights violations resulting from business activities. Ruggie's approach successfully brought together states, businesses, and civil society in a consensus that further work was needed to confirm how businesses could 'respect' human rights and this catalysed a range of initiatives and developments that have had significant influence on business practice [35]. Rather than seeking to modify law itself, Ruggie's approach was to develop a sense of international responsibility that all businesses should abide by and which was framed in the UN Guiding Principles on Business and Human Rights [36]. These principles were further developed into processes of human rights due diligence (HRDD) [37] that require businesses to carry out checks into any potential human rights implications of their business undertakings [38], including those relating to their supply chains [39]. These processes do not necessarily impact the root causes of corporate decision making directly but ameliorate the effect that they have on decision-makers, by placing a responsibility on them to take a broader range of factors into account when decisions are made.

An important development in certain jurisdictions over the past fifteen years has been the amendment of corporate law to modify the responsibilities that companies have towards human right and environmental issues [40–43]. These are important initiatives that represent exceptions to the general trend in the field of corporate responsibility for human rights and environmental issues. This is because they represent the partial reform of legal frameworks that this article argues, represent root causes of corporate decision making that can affect human rights and the environment. These reforms are discussed further in the next section.

Another example of an international organisation taking steps to provide clear expectations for companies regarding those stakeholders that are affected by their operations are the initiatives developed by the Organisation of Economic Cooperation and Development (OECD). It has developed a set of guidelines addressed to governments which formalise principles that multinationals should comply with [44]. However, as a non-binding initiative, it does not have any intrinsic impact upon the law or legal frameworks that this article argues are part and parcel of the root causes of corporate decision making that can have negative impacts upon human rights and the environment.

There have also been the numerous interventions of non-governmental organisations (NGOs). In particular, NGOs have publicised those operations of companies that have been prejudicial to human rights and the environment. Additionally, certain NGOs have been active in developing independent non-binding frameworks, guidelines, codes and standards for businesses that are often integral to non-mandatory reporting schemes [45–47]. The advantage for businesses in complying with these types of frameworks is that they can demonstrate transparency and potentially good performance in relation to the environmental, social and governance (ESG) risks associated with their operations and avail themselves of what is sometimes termed as a 'license to operate', which in turn can have a

beneficial impact on their business [48]. (The term 'environmental, social and governance' or 'ESG' tends to be used as a term of reference for investors and businesses to consider environmental, social and governance issues in terms of the risk that they can pose for a business. Therefore, it overlaps with what the academic and international community may refer to as 'corporate social responsibility' [49] or simply 'corporate responsibility' [50] for environmental, social and governance issues, but is not synonymous.)

Many of these initiatives involve multiple stakeholders including companies or associations of companies working in conjunction with NGOs and sometimes governments too. An example of this type of initiative is the Forest Stewardship Council (FSC) [47]. This was developed in conjunction with a number of stakeholders and has resulted in voluntary standards for businesses in the timber industry [51]. Compliance with FSC standards will lead to certification which is internationally recognised [52]. Some customers will ensure that they only purchase timber that is FSC certified and as such there can be a tangible commercial benefit for companies to participate [53]. Another type of scheme is that which some stock exchanges have now developed to rank the ESG performance of listed companies. For example the Dow Jones and FTSE have developed indices and listings for companies that comply with specified ESG reporting criteria [54]. For the purposes of this analysis, it can be emphasised that notwithstanding the immense value of these types of initiatives, they do not intrinsically address what this article argues are some of the root causes of corporate decision making, found in international legal frameworks, that ultimately have negative impacts on human rights and the environment.

In sum, such initiatives tend to provide voluntary incentives for companies to comply with, rather than mandatory legal requirements. Therefore they do not fundamentally change legal frameworks that companies operate under, which include those found in corporate law, WTO law, international investment law, the law relating to multilateral development banks and international insurance law. This article contends that it is necessary to understand the impacts that those legal frameworks have on the decision making of corporate actors to have a clearer picture of the reasons why companies make the types of decisions that that they do vis à vis human rights violations and environmental degradation; it contends that this understanding can be sought and found through macro legal analysis.

3. Using 'Macro' Legal Analysis as a Methodological Approach to Understand the Root Causes of Certain Corporate Decision Making

This section breaks down the rationale for the application of 'macro' legal analysis within the context of the areas of law and practice being analysed in this article. To do this, it explains the justification for the method and what it is able to achieve that is not possible through micro legal analysis (in other words conventional forms of analysis that focus on single legal disciplines) [5]. Whilst the temptation with the impacts of corporations on human rights and the environment is to focus primarily on human rights law, environmental law and the relevant international initiatives discussed in Section 2, it is possible that such approaches may necessarily exclude an overall analysis that includes significant legal drivers that have an important bearing on corporate decision making. If this is the case, resulting initiatives that rely primarily on human rights and environmental law may not necessarily lead to the changes in behaviour that are desired. As macro legal analysis provides an integrated analysis of a range of relevant areas of law from different legal disciplines, it has the potential to bring under scrutiny the effect of those legal frameworks acting in concert and the influence that they have. This is not to suggest that companies lack autonomy in their decision making, but that a range of legal frameworks related to different legal disciplines can create a commercial environment for decision-makers that significantly influence business decisions. The cumulative and co-productive effects of components of different legal frameworks can arguably play a crucial part in providing the conditions through which corporate decision-makers are predisposed to make decisions that externalise human rights and the environment [5]. Clearly, this type of analysis is not possible through micro legal analytical methods which necessarily focus

on individual legal frameworks in isolation. By studying the effect of a range of different legal regimes operating in unison, it is possible to develop a clearer picture of the types of reforms that would be necessary within the global legal architecture to re-design legal frameworks in order that they pre-dispose companies to make decisions that have positive outcomes for human rights and the environment.

3.1. The Theory of 'Macro Legal Analysis'

To justify the use of 'macro' legal analysis as opposed to 'micro' legal analysis in this context, it is necessary to define both approaches and also the types of results that they respectively achieve. It is contended that the majority of analysis conducted by legal scholars per se can be described as 'micro' legal analysis. This is because it is analysis which focuses primarily on single disciplines and the relationship that those disciplines have with legal outcomes, society itself or societal standards. For example, lawyers may specialise in disciplines such as criminal law, contract law, employment law, human rights and public law. Each one of those subject areas represents a single discipline and the analysis of the associated areas of law become 'micro' in content because they focus on that discrete body of law rather than a range of different disciplines acting in conjunction with each other. As an example, textbooks relating to criminal law will necessarily focus solely on criminal law, notwithstanding the fact that references may be made within that discipline to other areas of law such as international law and human rights law.

'Macro' legal analysis by comparison, in the context of this article, is a form of legal analysis that does not focus on a single legal discipline in its application to a particular societal issue or set of actors; it engages with a range of legal disciplines that have an impact on the outcomes concerned, with a view to understanding the overall cumulative effect of that broader legal architecture and the relevant relationships, if any, that those disciplines have with each other. As such, a different set of results and insights will be achieved when compared to the use of micro legal analysis. However, this type of approach can be counter-intuitive to a legal researcher, in the sense that conventional legal training requires lawyers to focus on single disciplines to a high level of detail rather than to consider the landscape of legal architecture consisting of a range of laws from a variety of different legal disciplines to understand how they interconnect. This can lead to the argument that macro legal analysis does not provide the level of detail that micro legal analysis contains, and that it is less rigorous by nature [5]. Equally, a proponent of macro legal analysis can argue that micro legal analysis can fail to take into account important aspects of law that are fundamental to the outcomes relating to the subject in question and leave blind spots in our understanding [5]. Prior to discussing the type of macro legal analysis that arguably should be applicable to the issues of business impacts upon human rights and the environment, the following discussion will contextualise macro legal analysis by considering those areas where it has already been used and why it is far less common than micro legal analysis.

'Macro legal analysis' or 'macro-level analysis' has been used and referred to in various types of legal research. In some forms of comparative legal analysis, a 'macro' comparison may be used to analyse the differences between legal systems [55] and 'micro level' analysis can be used to highlight differences between different legislative instruments from different jurisdictions [56]. Similarly 'macro-level analysis' may be used to consider societal approaches to forms of legal regulation, whereas 'micro level analysis' may consider the differences in approach of specific legal institutions in different countries [57]. Forms of macro legal analysis are also used to contextualise specific types of legal examination. For example, Abraham refers to macro legal analysis when considering a report relating to Indian environmental jurisprudence [58]. In governance systems such as water governance, authors have referred to 'macro' aspects of legal systems. For example, Fisher has used the term to make the distinction between values, outcomes, objectives and principles on the one hand that would represent the 'macro' level, and legal standards on the other that in contrast would represent the 'micro' level [59]. What is clear is that the terms 'macro legal

analysis' and 'micro legal analysis', or variations of those terms, are used to differentiate between different forms of legal analysis in different ways depending on the context [60,61].

The proclivity of micro legal analysis within legal research generally reflects the way that law is taught and understood through legal training. This is necessarily linked to the way that law is practiced, and as such the requirements of legal training. Legal practitioners tend to specialise in specific areas of law such as family law, criminal law, insolvency, or intellectual property law. This reflects the way that law is treated by national institutions, which sometimes have specific court systems to deal with discrete areas of law, such as family law and criminal law. As a result, although some legal practitioners become experts in a number of different areas of law [62], most specialise and practice within specific areas [63]. Therefore, as the exigencies of legal training tend to be focussed on the training of legal practitioners, it is no surprise that those trained in law, including those that become legal researchers, ultimately are grounded in techniques of micro legal analysis rather than macro legal analysis. As a general rule, this makes a lot of sense as it can be argued that for many legal or societal issues, micro legal analysis can be the most appropriate approach.

At the international level, similar forms of compartmentalisation of legal disciplines and focus have taken place [64]. It has already been noted that international human rights law and international environmental law evolved independently from each other and as a result tend to be treated as separate legal disciplines in the ways that they are understood, learned, taught, and practiced. This separation of disciplines and practice has influenced the development of institutions at the international level [65]. Many of these institutions have developed over the last century and they include the UN Office of the High Commissioner on Human Rights (OHCHR), the UN Human Rights Council, the UN Environment Programme (UNEP), the UN Environment Assembly (UNEA), and the World Trade Organisation (WTO) as examples. What this means is that at the international level there are individual international organisations that are involved with the development of bodies of law which have specific objectives. Sometimes the objectives of different institutions and bodies of law can conflict or overlap, and then the relative strength of both the institutions and the law itself become important factors in determining the outcomes for stakeholders involved [66]. In terms of the legal analysis and practice in these areas too, lawyers have a tendency to specialise and as a result tend to conduct micro rather than macro legal analysis.

Whereas at the national levels, the compartmentalisation of law into different categories and disciplines is generally considered to be uncontroversial as it leads to certain efficiencies within institutions and legal practice, the compartmentalisation within international law has received more critical attention. This so-called 'fragmentation' of international law has been critiqued both in negative [64] and positive terms [67]. It is not the purpose of this article to debate the merits and disadvantages of fragmentation in international law but to emphasise the different objectives and sometimes conflicts between international law's different branches which can lead to an incoherence within international policy-making [68,69]. Whilst international law itself has developed mechanisms to deal both with fragmentation and treaty congestion [70], and some convergence takes place between regimes [67], the underlying point is that for corporate decision making relating to human rights and the environment, there are ultimately a range of legal regimes along with their associated academic disciplines that have an influence on outcomes. Therefore, seeking to treat each of them discretely runs the risk of failing to take fully into account any common priorities that they may represent, the way they may mutually reinforce, any contradictions between them and crucially a picture of the overall legal architecture that includes those individual regimes as component parts. Therefore, whilst it may be natural to take the default position of adopting micro legal analysis, it is argued that such an approach can potentially fail to provide results that expose all of the legal influences that ultimately shape the decision making of companies in terms of their impacts upon human rights and the environment.

3.2. The Application of 'Macro' Legal Analysis to Corporations in the Context of Environmental Harm and Human Rights Violations

As has been noted, macro legal analysis or 'macro-level' analysis has been used by different types of lawyers and social scientists in a variety of ways to achieve different types of insights and has not previously been applied to companies within the context of the business, human rights and the environment debate. Therefore, the specific type of application within this context requires consideration, if workable and useful results from the analysis are to be obtained.

For this purpose, aspects of the process are categorised in terms of the 'macro' element and the 'legal analysis' element. As has already been alluded to in the foregoing discussion, the 'macro' element, would need to include the range of different legal disciplines that are applicable to, or have the potential to significantly affect corporate decision making in terms of its impact on human rights and the environment. Therefore, it would need to include not just the law that is designed to protect human rights and the environment but also others that may not on the face of it have a direct relationship with those issues. As stated for the purposes of this analysis, the following areas of law are selected as they represent law that is influential in this regard: corporate law, WTO law, multilateral development banking law, international investment law and international insurance law. These areas of law are chosen as they represent legal frameworks that have a significant relationship with human rights and the environment and the way business is conducted; however, they do not represent an exclusive list as other disciplines such as intellectual property law could also be included. However, for the purposes of this study, they represent a significant body of distinct legal frameworks that can be analysed to demonstrate the functioning of macro legal analysis in this context, and through which tangible research findings can be achieved. The analysis that follows will not include human rights law and environmental law as they have already been discussed in Section 2 and do not, prima facie at least, represent 'root causes' of negative impacts upon human rights and the environment.

Secondly, within the 'legal analysis' element of this method in addressing the different legal disciplines that are applicable to corporate responsibility, the elements of the law that could comprise the 'root causes' [1,2,16] of human rights violations and environmental degradation need to be properly identified. This may require an analysis that considers the core purposes of legal frameworks, and the way that they can create priorities for decision-makers in companies [71]. By placing the focus on those core purposes, the analysis does not engage directly with individual cases within the legal regimes that are under scrutiny; such an approach is generally more applicable in micro legal analysis. In this context, in the analysis of corporate law, WTO law, multilateral development banking law, investment law and insurance law, the focus is on identifying those features (or lacunae) within legal regimes that potentially have the effect of predisposing corporations towards decision making that ultimately 'externalises' rather than 'internalises' negative impacts upon human rights and the environment. In other words, are there core components of those legal regimes that constitute root causes of corporate decision making relating to human rights and environmental issues? Finally, and importantly, the analysis needs to consider how those legal regimes operate together, how they may contrast or mutually reinforce each other, and what this potentially means for the development of reform trajectories.

To do this, the analysis of corporate law, WTO law, international investment law, multilateral development banking law, and international insurance law focuses on four key questions relating to the obligations that they create, which are as follows:

(i.) Do the obligations that they create for decision-makers in companies prioritise commercial or trade maximisation above human rights and environmental interests?
(ii.) Are the obligations that they create, legally binding upon companies and are there legal enforcement mechanisms to ensure that they are complied with?
(iii.) Can it therefore be deduced that those obligations place commercial pressure on companies in relation to the decisions that they make and as such potentially amount to 'root causes' of human rights violations or negative impacts upon the environment?

(iv.) When the legal regimes in question are considered acting in concert, what influence does this have on corporate decision making?

Therefore, the remainder of this section will carry out the macro legal analysis on those aforementioned areas of law in accordance with this process.

3.2.1. Corporate Law

There are three components within corporate law, common to the vast majority of jurisdictions, that can be identified as having a direct influence on decision making relating to human rights and the environment. These are 'separate legal personality', 'limited liability' and 'directors' duties' [48]. Analysis of these aspects of law does shed light on specific underlying drivers that affect corporate decision making. Additionally, the relationship that all three factors operating together can have on ESG strategies is profound and arguably should play a large part in the way that reform related to corporate responsibility in this context is conceived [48].

The origins of separate legal personality, limited liability and directors' duties in this context, can be traced back over 200 years to the American War of Independence. Once independent from Britain, the newly formed states devised new methods of incorporating businesses [72]. Those methods made it simpler and easier for businesses to become incorporated and the popularity of the corporate form as a medium for business spread across the United States. That success led to other countries revisiting the manner in which their businesses could incorporate and this resulted in simpler methods of incorporation being adopted across Europe [48,73–77]. Subsequently, throughout the world through colonisation, transplantation [78], and more recently through globalisation [79] the corporate form became hugely popular as a means for conducting business, owing to specific legal attributes intrinsic in its design. It is now prevalent in virtually all jurisdictions in the world and in all those jurisdictions it includes the core design features of separate legal personality, limited liability and directors' duties which have a significant impact on decision making that can impact human rights and the environment [80].

Dealing with each of these design features in turn, separate legal personality is fundamental to all companies, whatever type they are. In the context of analysis relating to business impacts upon human rights and the environment, it means that each company is a separate legal entity in its relationship with any other company, even those within a corporate group, and it is also legally a separate entity to any of its shareholders [81]. This can have two significant effects. Firstly, it means that any debts of a company are, prima facie at least, those of the company itself and not those of its shareholders (as long as the company is registered as a limited liability company). Secondly, it means that the debts of one company in corporate group, such as a subsidiary, do not necessarily become the debts of the parent company, as the parent company is generally considered to be a separate legal entity. Therefore, separate legal personality is one of the factors that make the corporate form such a popular medium through which business can be undertaken, as it generally has the effect of separating out the liabilities of a business from its shareholders and other companies within a corporate group [81].

Another factor relating to separate legal personality which is fundamental to the manner in which companies operate internationally, is the lack of an international system of registration [82,83]. In other words, in whichever country an MNC operates, it is required to register a separate company (naturally with a separate legal personality), which means that the country in which it operates can then regulate it and tax it accordingly. This makes a lot of sense from an individual governmental perspective but it also means that where an MNC needs to create numerous subsidiaries in the countries in which it operates, each will have separate legal personality to the parent company[26]. There is not currently any requirement for all companies that operate on an international basis to be internationally registered and to comply with internationally accepted human rights and environmental standards to maintain that registration. Some non-mandatory compliance and reporting

systems have been established at the international level which have been discussed in Section 2, but they do not represent a formal international system of company registration.

The vast majority of companies are 'limited liability' companies. The capacity that companies have to limit the liability of their shareholders alongside the design feature of separate legal personality, has the effect of providing a safe-haven for investors and is a major part of the reason why the corporate form is such a popular medium for businesses. It means that the personal liability of any shareholder in relation to debts of the company, is limited to the amount that they have agreed to pay for the purchase of their shares. This means that when a company incurs debts, or liabilities as a result of impacts upon human rights and the environment, shareholders can only be personally liable for the specific amount agreed at the time of share purchase. This can be regarded as a controversial as it means that if a company does not have sufficient funds or capital to cover its liabilities, those creditors or those suffering negative human rights or environmental impacts may not have any recourse to compensation. It is worth noting that both in Britain and the United States, when the idea of introducing limited liability was first introduced in the 19th century, there was widespread debate over the implications that it represented [72,73].

To ensure that companies are required to protect and use the investment of shareholders for purposes that will benefit them, corporate law in all jurisdictions contains strict laws that ensure that the use of company funds and decision making within companies are oriented towards specific objectives. As a result, what are known in some jurisdictions as 'directors' duties' have developed, although different terminology for these obligations are sometimes used in other jurisdictions [74,84]. Provisions in the law relating to these obligations usually ultimately include strict sanctions for any directors that fail to comply [16]. What this means in essence is that corporate decision-making culture is generally oriented towards maximising the interests of the shareholders and as such maximising the commercial aspects of the business [85,86].

As has been alluded to, there have been certain developments in some jurisdictions, that have resulted in direct reforms to those aspects of corporate law which affect decision making that can affect human rights, the environment and other stakeholders. In the United Kingdom, the Companies Act 2006 included a specific section which requires company directors to take certain human rights and environmental considerations into account in their decision making [40]. In India corporate law was reformed to require company directors to act in the best interests of a range of different stakeholders as well as the company itself [41,86]. The French Government introduced the Duty of Vigilance Law in 2017 which is a legal manifestation of the HRDD framework that has developed as a result of the UNGPs [42]. This requires certain companies to undertake due diligence related to human rights and environmental impacts, and to disclose a plan through which this is given effect [87]. More recently in 2019, the French government also amended its civil code relating to companies under its PACTE Law [43]. Although the changes do not specifically require companies to have a purpose which includes 'social and environmental issues' it does leave open the possibility for them to have objectives which go beyond that of being commercially successful. It will take time to determine precisely how effective some of these reforms will be, but it is clear that where they have been introduced, the interests of shareholders must still be protected in order that commercial success can be achieved. Additionally, where the interests of stakeholders other than shareholders are included within the legal responsibilities of corporate decision-makers, the law does not generally provide those other stakeholders with the level of redress that shareholders benefit from [86]. In practice what this can mean for a company is that it will seek to reduce its overheads to maximise profits and this can have impacts upon human rights and the environment [88].

Therefore, for the purposes of this analysis, it is clear firstly that in the vast majority, if not all, jurisdictions in the world, corporate law generally prioritises commercial considerations above human rights and environmental interests (although specific laws related to the protection of human rights and the environment and corporate responsibility itself mitigate

the effect of this). This results from the combination of directors' duties, separate legal personality, the individual corporate registration of subsidiaries in the countries within which they operate, and limited liability, all operating in concert. Secondly, the general obligation on directors to prioritise the interests of their company above other interests is legally binding, as directors are under strict obligations to ensure that they comply with this requirement. A director that failed to comply, might be viewed within a company as having failed in carrying out their duties and sanctions might be applied. As a result and thirdly, it can be deduced that these obligations do place pressure on corporations with regard to decision making and can be seen to be root causes of negative impacts vis à vis human rights and the environment, especially where human rights and environmental laws are limited in scope or are poorly enforced and implemented.

It can be argued that without providing an alternative design concept of the overall legal construct of the company itself and the system through which companies conduct business in multiple jurisdictions, there can be limitations to non mandatory initiatives that have the purpose of protecting human rights and the environment. [89].

3.2.2. WTO Law

WTO law has its roots in historical developments that can be traced back through the centuries [90]. A gradual transition in the last three centuries challenged the 'logic' of trade protectionism and led to a move towards trading relationships that were based on the theory of 'free trade' [91]. The advantages of 'free trade' had been espoused by the economist Adam Smith in the 18th century [90], and further developed by economists such as Ricardo in the 19th century [90]. The importance of trade theory, the associated international legal relationships that it creates and the impact that these have upon the way that companies operate in terms of their impacts upon human rights and the environment cannot be underestimated. This is because the creation of free-trade relationships between countries has the effect of pitting companies in different jurisdictions into competition with each other. Therefore, where labour and manufacturing may be lower in certain jurisdictions, there will be an economic climate that leads to the growth of manufacturing bases in those countries and the reduction of manufacturing bases in jurisdictions where labour and manufacturing costs are higher. As such, if the labour standards in jurisdictions where industry has a competitive advantage do not comply with international human rights standards, companies are sometimes caught in commercial and corporate responsibility dilemmas.

The theory of free trade became particularly controversial in the 1930s and the 1940s in Europe and the United States. During this period, the Wall Street Crash was followed by an economic depression that was accompanied by a series of tit-for-tat protectionist measures taken by the United States and major European trading countries of the time [92]. This resulted in further economic depression and policies of isolationism that some economic historians claim, led to conditions favourable for the rise of fascism in Europe which contributed to the outbreak of World War II (WWII) [93]. In 1941, President Roosevelt (President of the United States) and Winston Churchill (Prime Minister of the United Kingdom) held talks with a view to developing a post-war system of international trade that would not allow a repetition of the circumstances that had played a part in creating such damaging international political and economic relations [90]. Ultimately, following WWII, steps were taken to introduce a new international trading system that was based on the ethos of free trade [91]. When seen from this perspective, it is wholly understandable that the revised trading system should primarily respond to the economic and political exigencies of the time. Therefore, the General Agreement on Tariffs and Trade (GATT) that was promulgated in 1947 by 23 nations had as its focus the establishment of an international trading regime that would maintain stable free trade between participating nations [94]. It did not have as its main or even subsidiary purpose the protection of human rights and the environment. Human rights issues were being addressed separately and were not associated with MNCs; also the globalisation of business and industry as we now

know it, had not yet occurred [95]. Equally, it is understandable that the GATT did not address environmental concerns as they did not gain recognition in the way they are now understood until the 1960s and 1970s.

When considering the GATT within the context of business, human rights and the environment, there are two factors that need to be highlighted. Firstly, the GATT of 1947 remains the basis upon which the WTO still operates in terms of the core obligations that it creates for member states relating to the trading relationships that they have with one another. Those same obligations are highly influential in the manner in which regional trade agreements also operate [96]. In other words, it creates a number of obligations that States must comply with to enjoy access to the markets of other States (these being 'national treatment', 'most-favoured nation status', and also the requirement not to impose quantitative restrictions) [96]. Secondly, the WTO has not introduced environmental or human rights agreements that member states need to comply with to enjoy the benefits of membership. It has introduced certain additional agreements relating to technical barriers to trade [97]; food, animal and plant safety [98]; and intellectual property [99]. The argument is that as a regime of trade agreements, it is for other specialist branches of the international legal system to undertake the work of protecting human rights and the environment [100]. Whilst this appears to make sense, it fails to take into account the relative strength that the GATT and the WTO system has in comparison to international human rights and international environmental law regimes [10]. By way of illustration, the WTO system includes a binding dispute settlement system that has been used effectively to constrain the trading practices of major economies [90]. In essence the WTO regime has a significant level of economic influence over States in a way that human rights and environmental regimes often do not.

There are also two main points that respond to the analysis required of this study. Firstly, it is understandable from a historical perspective that the regime prioritises commercial and trade maximisation above human rights and environmental interests. All the same, this inevitably places commercial pressure on companies operating in States that are members of the WTO (currently 164 nations) [101] as they do not operate in a commercial vacuum and necessarily have to compete with other businesses from the different jurisdictions that have corresponding market access. This commercial pressure necessarily has an impact on the way that those companies manage overheads and as such can affect externalities related to human rights and the environment. To take a macro legal analytical perspective, when this commercial pressure is seen in conjunction with the pressure that decision-makers within companies are under due to the legal design of the corporation, it is possible to see how the two would work in unison to steer corporate decision-makers towards the reduction of overheads, and this may in certain instances have impacts upon human rights and the environment.

Secondly, the obligations created by the WTO are legally binding. As has been seen, the WTO has a binding system of dispute settlement which places an onus on States to ensure that they comply with the obligations that they accept on becoming members. Whilst this does not place a direct onus on companies to reduce their performance in relation to human rights and the environment, it does mean that if States introduce human rights or environmental regulations that could be interpreted as disguised restrictions on international trade, the DSB could make a binding judgment accordingly [90]. Conversely the WTO does not have requirements for States, and therefore for companies operating internationally to meet minimum human rights and environmental standards. Again, this is an international legal framework that can place companies under intense economic pressure to compete and survive within a highly competitive and sometimes hostile commercial environment. Therefore, it is quite possible that the WTO legal framework can place companies under pressure in relation to the decisions that they make and be regarded as a root cause of negative decisions vis à vis human rights and the environment.

As long ago as 2001, the then Secretary General of the United Nations, Mr Kofi Annan stated that,

> [w]e cannot take the onward march of free trade and the rule of law for granted. Instead, we must resolve to underpin the free global market with genuinely global values and secure with effective institutions. We must show the same firm leadership in defence of human rights, labour standards, and the environment as we already do in defence of intellectual property [102].

The influence of the international trading regime in comparison to regimes for the protection of human rights and the environment was recognised by Ruggie. In 2004, he emphasised that there was a clear perception that, 'rules intended to promote equally valid social concerns, be they labour standards, human rights, environmental quality or poverty reduction, have not kept pace.' [103] Additionally he observed that corporate influence had played a major part in the WTO adopting the TRIPS agreement to protect the intellectual property of businesses [103]. This of course provides a counter-argument to the position adopted by some, that the WTO should not or could not include protection of other interests, such as human rights and environmental matters amongst its covered agreements [100].

3.2.3. Multilateral Development Banks

This section proceeds to consider key components within MDB law. MDBs frequently have a key role to play in the financing of economic and development projects in developing countries and as a result enter into contractual relationships that ultimately result in the funding of work by large corporations. The laws and rules that they operate by are particularly pertinent owing to the potential for such projects to have significant impact upon human rights and the environment.

In assessing the legal obligations that MDBs impose on lendees of projects that they support, specific reference is given to the World Bank (WB) as it is the only truly global MDB, and has been very influential in the development of the other MDBs [104]. Of the other MDBs the main regional development banks include the Inter-American Development Bank (IDB), the Asian Development Bank (ADB), the European Bank of Reconstruction and Development (EBRD), and African Development Bank (AFDB) and they follow a broadly similar model to the WB but have varying regulatory regimes [105]. There are also numerous other development banks which tend to be regional or sub-regional in focus and operation [105].

Although MDBs generally lend to States rather than to companies directly, it is companies that ultimately take up contracts for the related projects. Therefore, within the context of business responsibility for human rights violations and environmental impacts, the loan conditions that are framed within contracts agreed by MDBs are important to the outcomes of associated business and industry. In the context of this article and a framing through a macro legal analytical lens it is important, as with each of the areas of law considered, to understand their origins and purposes, as this assists in understanding the raison d'etre of the applicable law itself and the overall purposes that it is associated with. The WB itself being instituted after WW II, to assist war damaged nations to rebuild, developed a new role in the 1960s as a 'development bank'. As such, it is now understood and has its purpose in providing loans to States for projects that assist with their economic developmental programmes and typically has been involved in supporting large-scale infrastructure projects such as those to construct dams, build major road networks and develop extractive industries [10]. In more recent times, the WB has also become engaged in financing 'non-industrial' projects such as those to develop health and educational infrastructure [10]. Broadly speaking, the other regional development banks have adopted similar approaches. Those approaches have come under widespread scrutiny owing to the legacy of negative impacts that such funded projects have had on human rights and the environment [106].

The WB and the other MDBs are subject to their own articles of agreement or legal charters through which they have been instituted in agreements between States [107]. In the case of the WB it is understandable that its articles of agreement do not mention human

rights or the protection of the environment as it was instituted in 1944 [108]. Those articles of agreement were amended in 1965, 1989 and 2012 but the amendments have not changed its core purposes or introduced references to protection of the environment or human rights [108]. Additionally and probably most fundamentally in terms of human rights violations, the WB continues to operate on the basis that it does not act on political or non-economic considerations as is seen in Article 5(b) which states:

> The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political and other non-economic influences or considerations [108].

Additionally, Article 4 section 10 states:

> The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I [108].

There have been numerous scholars who have argued that the WB has human rights and environmental obligations. Some have argued that international organisations as subjects of international law have concomitant human rights obligations [109]. Equally, it has been argued that the WB as a specialised agency of the UN should be subject to human rights obligations [110]. It is a matter of debate how much these arguments are taken into account in practice and it has to be emphasised that the traditional position adopted by the organisation itself tends to be consistent with its articles of agreement [111]. The articles of agreement or charters of other regional development banks are generally similarly framed, although the Agreement Establishing the EBRD does refer to the obligation to 'promote' sustainable development and environmentally sound activities [112].

The mechanisms that the MDBs use to ensure that the projects that they lend to meet certain standards in terms of their non-economic impacts is through operational policies and procedures [113]. As such, each MDB will include within its policies specific procedures that must be followed and which relate to the social and environmental impacts of proposed loan projects [114]. Therefore, social and environmental impact assessments (SEIA) are required prior to the agreement of any loan that has the potential to cause such negative impacts and the results of those assessments will play an important part in the final decision that is made relating to funding. If funding is granted, those assessments will inform loan conditions that the lendee State will need to comply with. Despite these measures, it has been argued that such procedures, as internal processes, can be insufficient [115]. It can also be argued that the accountability mechanisms that have been developed within the MDBs are weak as those complaining that an MDB has failed to implement its operational policies and procedures properly, cannot ultimately claim compensation for the human rights or environmental harm that has been suffered [116]. The accountability mechanisms are set up as fact finding bodies and associated investigations have the general effect of determining whether the staff at an MDB have complied with internal policies and procedures [117,118].

Applying the tests of this macro legal analysis to MDBs, it can be seen that MDBs do not necessarily prioritise commercial or trade maximisation above human rights and environmental interests. However, when it comes to the integration of human rights and environmental standards, they also do not necessarily have a strong regime for legal enforcement. Whilst it is possible that MDBs can include human rights and environmental conditions within their loan agreements, for those individuals and communities that are negatively affected by poor performance, the accountability mechanisms do not provide redress, only a process through which MDBs can review the level of compliance within their own internal procedures. As such, the performance of companies in relation to human rights and the environment with projects funded by MDBs will vary depending on the operational priorities of the individual bank and the relevant national standards. This

can potentially mean that companies are required to operate to higher standards than would necessarily have been the case if they were solely subject to State law, but it is not necessarily the case [115]. It is harder to make the claim that the rules that MDB's operations and procedures amount to root causes of negative corporate decision making related to human rights and the environment; however, they can create an environment in which third parties find it very difficult to achieve redress where such negative impacts occur and this in itself can undermine the potential of maintaining high human rights and environmental standards. When this legal framework is considered in conjunction with the responsibilities that company directors have (as discussed in Section 3.2.1) it is clear to see why MDB regulations can ultimately provide little help to third parties seeking redress from companies where negative impacts have occurred in relation to human rights and the environment.

3.2.4. International Investment Law

There is no single coherent system of international investment law. There are instead, a significant number of bilateral investment treaties and free trade agreements made between states that are designed to regulate the investment relationships between contracting host states (those that are in receipt of the investment) and home states (those from which the investment is derived, either from state or private sources) [119]. There are currently 2843 Bilateral Investment Treaties (2290 in force) and 420 Treaties with Investment Provisions (324 in force) in the world [120]. In terms of the relationship between business and both human rights violations and degradation of the environment, these treaties are significant as they have the potential to affect the level of protection that states afford to those externalities and as a result have an effect on the levels of protection that companies are legally obliged to comply with in the jurisdictions concerned. International investment agreements (IIA) are of course crucially important for the economic welfare of many countries and this can particularly be the case for developing countries where they not only represent opportunities for the development of economies but also the transfer of technology and the training and development of labour forces. In 2019, the level of foreign direct investment globally was USD 1.5 trillion although the levels did drop subsequently during the period of the COVID-19 pandemic [121].

There are commonly two types of rules that IIAs utilise to achieve a stable regulatory environment. Firstly, there are rules that place a prohibition on acts by a host State to interfere with the investment (or to take steps that could 'expropriate' it) [119]. Such clauses include 'stabilisation clauses', which make it difficult for host states to change or amend regulatory law that would affect the investment [119]. As such, this can mean that there is some restraint on the capacity of host states to regulate in matters related to human rights and the environment. Secondly, there are rules which prohibit acts or measures that could amount to 'unfair treatment' [119]. What makes these agreements so important within the context of the operations of businesses operating under their cover, is that they typically also provide 'choice of law' clauses and dispute settlement clauses which enable investors to litigate against host states within agreed fora outside of the host State's jurisdiction [122]. The result is that States are almost always the respondents in claims and not the claimants [123]. In practice this means that States, even in those instances in which they are found not to be culpable in claims against them, can incur significant costs [124]. ICSID and UNCITRAL are commonly used in such litigation and as such a significant body of case law has developed as a result [96]. Although in recent years decisions have demonstrated greater flexibility in the award of costs, the financial burden for developing countries particularly can be significant, and some governments have suspicion that arbitral tribunals exercise bias in favour of businesses [90]. This has a two-fold effect, it can increase a form of regulatory chill where IIAs are operative and from a practical perspective it can also leave the State concerned facing considerable financial costs and potentially also awards of compensation against them where they make regulatory changes that activate legal challenges from companies.

Assessments relating to the impact that IIAs have had on both human rights and the environment have observed that although international investment is often beneficial to the economies and the development of developing countries, the manner in which IIAs currently operate can and does lead to regulatory chill [125] which has negative impacts [126]. For example, a study by Ruggie found that, 'of the stabilization clauses examined, a majority of them from countries outside of the Organisation for Economic Cooperation and Development (OECD) were drafted in a way that can either insulate investors from having to implement new environmental and social laws or to provide investors with the opportunity to be compensated for compliance with such laws' [126]. Alam states that there are certain realities reflected in IIAs and one of them is that, 'social and environmental measures are generally a secondary concern for foreign firms, while other factors—such as the location of resources and associated labour and capital costs—are of primary importance in ensuring a competitive return on investment' [127]. Subedi states that,

> [i]t is ironic that whether it is BITs, FTAs, WTO agreements or customary international law, the overall objective of all of these instruments is to impose obligations on states. There is no single, legally binding, international instrument which imposes corresponding obligations on foreign investors or powerful MNEs. This has been left to the governments themselves of the countries concerned [119].

Recognition of these issues and the fact that international investment law is made up of a fragmented system of treaties that lacks coherence, has led different quarters of the international community at different times to seek the development of a multilateral system that could have global application. In the 1990s, under the auspices of the OECD efforts were made unsuccessfully to develop a Multilateral Investment Agreement (MIA) [128]; similar types of efforts through the WTO system also failed, with a wide divergence of views making progress difficult [129,130]. Certain more recent initiatives are playing an important role in supporting developing countries in their negotiation of IIAs with developed countries. These include guidance that seeks to ensure that provisions of IIAs are consistent with the UN's Sustainable Development Goals [131]. However, given the economic balance of power between developed and developing countries and the necessary caution that is taken in making significant investment in foreign jurisdictions, the status quo will not necessarily be easily shifted.

Therefore, to place this legal framework within the process of macro legal analysis, it can firstly be seen that as a general rule international investment law does prioritise commercial and trade interests above human rights and environmental interests. This reduces pressure on companies to observe high human rights and environmental standards. Secondly, the fact that the obligations that are created by IIAs are binding upon host States and can be directly enforced, means that companies can legally challenge changes in regulations that could result in the imposition of higher human rights and regulatory standards than had been anticipated at the time of making the investment. Thirdly, when these provisions are seen in conjunction with the commercial pressure that companies are under through trade liberalisation (as seen in Section 3.2.2 above) and the requirement under corporate law for company directors to make decisions that respond most favourably to the commercial interests of the company itself (as seen in Section 3.2.1 above), then it can be deduced that the legal obligations found in IIAs can place commercial pressure on companies to take out litigation against host States that make or seek to make regulatory changes that could potentially impose financial risks upon them. Therefore, in this respect, the legal frameworks found within IIAs can amount to root causes of corporate decision making that has negative impacts upon human rights and the environment.

3.2.5. International Insurance Law

This section considers the development of insurance law nationally and internationally in terms of the levels of protection that it provides to victims of human rights violations and also the protection it provides in instances of environmental degradation, caused by

companies. There is currently no international treaty that requires States to ensure that companies operating in their jurisdictions have insurance policies in place to cover these types of risks. As has already been alluded to, there has been and continue to be many situations in which individuals, communities and the environment are negatively affected by the operations of companies where it has been particularly difficult to make claims for damages and compensation. In particular, there are difficulties for claimants as a result of the parent/subsidiary relationship and the principle of 'separate legal personality' in corporate law (as noted in Section 3.2.1 above), the frequent requirement for claimants to exhaust potential remedies at the national level prior to seeking compensation from parent corporations in their home jurisdictions [71], the failings of the legal systems in many developing countries, the disparity of financial resources available to claimants and respondents, and the length of time that it can take for legal proceedings to take place [87]. Therefore, the question of the adequacy of insurance cover to enable the 'remedy' that is expected under the 'protect, respect and remedy' HRDD framework becomes particularly poignant.

It can of course be argued that insurance should not be used as a mechanism to compensate individuals and communities in instances where human rights violations have occurred. This is understandable as ultimately the goal of the international community should of course be to eliminate human rights violations rather than to accommodate and commoditise them through financial or any other type of compensation. Those who support the further development of adequate insurance regimes to provide redress for victims of human rights violations and damage to the environment do not suggest the repeal of laws that penalise or criminalise human rights and environmental violations, but seek to respond to the need for adequate redress in instances where they occur [16]. There are incidences of poor and negligent industrial practices that have resulted in the suffering of individuals and communities, that can be categorised as human rights violations, where the failure of national and international systems to provide adequate redress and compensation has compounded the suffering of victims. Examples include the victims of the Bhopal disaster [132] and those of the toxic discharges caused by oil pollution in the Niger delta [133].

Equally, there are numerous examples at national levels, within certain jurisdictions, where insurance and compensation regimes already exist to provide redress where human rights are violated, not through the actions of States but through the actions of individuals or organisations. Virtually all jurisdictions in the world mandatorily require drivers of motor vehicles to take out insurance that will at a minimum provide redress for third parties in the event that an accident is caused through their negligence or criminal fault. In this way, States provide a mechanism through which victims can seek compensation for harm caused, including those instances where loss of life has occurred. This mechanism is in addition to any criminal prosecution that the State may take in relation to the actions of the driver concerned. Similarly, it is common within many jurisdictions that professional indemnity insurance is required. For example, a legal practitioner can cause damage to a client through negligence and as such, systems of mandatory insurance are in place in many of jurisdictions in the world to ensure that victims of harm are able to seek compensatory redress [134,135]. Another example of a type of insurance that companies have to take out in certain jurisdictions, is that which is not mandatory but which becomes a contractual necessity within specific business settings. For example, in the United Kingdom construction companies and building firms are required to take out public liability insurance under standard construction contracts [136]. This has the ultimate effect of providing third parties with a route through which they can access adequate redress in the event of an accident caused through a building project.

The paucity of development at the international level to integrate systems within business and industry to ensure that victims of harm can seek redress where necessary is punctuated by certain developments that have occurred in certain industrial sectors. This has been the case with international law that has developed surrounding nuclear

accidents and oil spills, where treaties provide pathways for individuals to make claims for compensation. Where nuclear accidents occur, victims are able to make claims in the jurisdictions which are responsible for the harm [137,138]. With respect to oil pollution, the relevant regimes enable victims to claim redress in any contracting state where an accident has resulted in damage through pollution [139,140].

In the European Union, a significant development has taken place through the Environmental Liability Directive [141]. Although this does not mandate the requirement of a specific type of insurance for companies, the liability regime that it frames, necessarily places a commercial case for many industries to ensure that the risks that they run vis à vis the environment should be insured [142]. This has resulted in an increase in the availability of insurance products that are designed to protect companies from those risks [142]. The requirement for mandatory insurance relating to environmental liability has, however, begun to take root in a number of jurisdictions. For example, South Korea has introduced not only an environmental liability regime but also the requirement of mandatory environmental insurance for companies in specific sectors [143]. This type of landmark development demonstrates the way that insurance can potentially be used. The recognition of mandatory insurance as a tool for redress and compensation comes hand in hand with the recognition that as a financial mechanism, it has the potential to steer corporate behaviour in a positive way. This is due to the commercial risk that insurance premiums under mandatory insurance regimes will inevitably rise in instances where companies have track records of a increased number of past claims or where they are unable to demonstrate effective and active due diligence in relation to the human rights and environmental aspects of their operations [144].

As a result of the many developments that have occurred within the field of corporate liability relating to human rights and the environment, non-mandatory ESG insurance has developed over recent years [145]. However, it is clearly an emerging trend, and the lack of an associated international regime means that it responds mainly to the risks of business and industry and not to the interests of third parties affected by their operations. All the same, recognition of the importance of insurance within this space has led UNEP-FI to produce a set of non-mandatory principles of sustainable insurance [146], which provides a basis upon which companies can develop insurance and financial strategies to mitigate ESG risks [147]. It is also worth noting that certain reform initiatives have begun to consider the value of a requirement for human rights liabilities to be insured. For example, in 2014 the United Nations Office of the High Commissioner for Human Rights set up an open-ended working group to consider the elaboration of an international legally binding instrument to regulate, in international human rights law, the activities of TNCs and other business enterprises [148]. The third draft of the proposed treaty includes a provision in the section related to legal liability that would require States to ensure that companies establish financial security, 'such as insurance bonds or other financial guarantees to cover potential claims of compensation' [149].

Therefore, analysis of insurance law at the international level recognises that there is no globally applicable international system or framework that requires companies to ensure that cover is in place to which third parties can be provided redress in the event of valid claims of human rights violations or environmental degradation. In this sense, commercial interests are prioritised over human rights and the environment, and this contributes to the difficulty that third parties have in making claims in countries that either have weak national legal regimes or where the company at fault has limited resources with which to cover such claims. When this framework of law is seen in the context of a corporate law system that makes it very difficult for third parties to take legal action against the parent companies of subsidiaries at fault and when it is seen in conjunction with a system of WTO law and international investment law which similarly prioritises commercial and trade maximisation above human rights and environmental interests, the absence of such an international regime can be seen as all the more poignant. It can also be seen that the absence of such a regime, places commercial pressure on companies as

competition in the marketplace provides a disincentive for businesses to respond further than necessary to human rights and environmental interests. It can therefore be argued that this lacuna does amount to a root cause of corporate decision making that can have negative impacts on human rights and the environment.

In all the areas analysed through this process, there is the potential for a re-framing of a legal architecture at the international level to prioritise human rights and environmental interests in order that adequate protection can be provided. There is also the argument that such a reframing should be undertaken in a coordinated manner that takes into account the relationship that each legal framework has with each other. As such, the following section considers the implications of adopting such an approach.

4. Implications and Conclusions of the Results of Macro Legal Analysis in the Context of Business, Human Rights and the Environment

This section considers the implications and conclusions that can be drawn from the results of the foregoing analysis in the context of developing pathways for coherent integrated approaches to the issue of corporate human rights violations and environmental degradation. It does this by firstly addressing the differences that the results of macro legal analysis have with micro legal analysis within the same context and what this can mean in terms of the practice of research related to business, human rights and the environment. Secondly, it draws on the analysis undertaken to provide a series of possible pathways to reform that could respond to the root causes that were identified.

4.1. Implications of the Results of Macro Legal Analysis in the Context of Business, Human Rights and the Environment

The analysis demonstrates that there is a range of legal frameworks that directly impact the outcomes related to human rights and the environment within the context of the operations of companies. Whilst it is outside of the scope of this article to investigate the definition of what we mean by 'human rights law' [150] and 'environmental law' [151], the results of the enquiry potentially raise questions that relate to the ongoing changes and developments that have occurred in the field of human rights [152] and environmental law [153] since their contemporary emergence. As the analysis has shown, it is certainly the case, that the relationships that these regimes have with corporate law (across jurisdictions) and international economic law have been studied extensively. However, it can be argued that frameworks of law that have a significant influence on the way that decisions are made, that impact human rights and the environment, are themselves forms of human rights and environmental law, even if their influence is a negative one. In relation to international environmental law, Bodansky says the following:

> [i]f international environmental law is to address not merely the surface manifestations but the root causes of environmental degradation, then our understanding of what constitutes an environmental issue must grow to encompass economic, social, and trade policy. Indeed, if, as some claim, everything is connected, then everything becomes an environmental problem. For now, however, this kind of integration is still more of an aspiration than a reality [1].

Whilst it is not the purpose of this article to engage in that debate, it does assert that the process of 'macro legal analysis' assists in developing a realistic understanding of the way that the law within the context of business, human rights and the environment could be logically and efficiently developed by drawing on a broad evidence base of all of the frameworks of law that potentially influence outcomes for human rights and the environment.

The macro legal analytical approach in practice can be contrasted with the orthodox micro legal analytical approach in the contexts of reform related to business and human rights and international environmental law. For example, the Open Ended Intergovernmental Working Group (OEIGWG) mandated by the UN Human Rights Council [148], which is drafting a human rights treaty to address transnational corporations has broken

new ground. Its third draft contains a range of provisions that require States to regulate businesses in specific ways in accordance with human rights standards [149]. However, in spite of the advances that it represents, it does not extend to the wider legal frameworks that this research suggests represent root causes of negative impacts upon human rights and the environment.

Similarly, within the field of international environmental law, major steps have been taken by international environmental law jurists to develop a 'global pact for the environment' [154]. This important work resulted in a draft of such an instrument which was presented at an event at the Sorbonne in Paris in 2017 [155]. Although in a follow up process at the UN level, some limited reference is made to the effect of trade law, investment law, intellectual property law and human rights law on the environment, those areas of law are not explored in great depth [156]. Indeed, the draft global pact that was produced focuses mainly on existing environmental law and its principles rather than on the root causes of environmental problems, which this article argues can be exposed through the macro legal analysis of relevant legal frameworks [155]. Although it must be argued that micro and macro legal analysis should ultimately be conducted together, it is crucial in the development of reforms that have the capacity to address the root causes of human rights violations and environmental degradation that macro legal analysis forms part of the evidence base.

It is argued that over-reliance on micro legal analysis can potentially generate blind spots in the results of research and as such lead to a failure to adequately take into account the range of different factors that affect the conduct of the actors in question. This can be associated with the challenge of making assumptions about legal constructs and frameworks that have significant impacts upon the outcomes of decision-making processes [5]. It can be assumed that legal frameworks are benign in terms of the influence that they have on corporate decision making that impacts human rights and the environment. By focussing the majority of attention on the outcomes of business decision making in terms of the impacts that they have on human rights and the environment and viewing the actor concerned purely as a subject that should comply with human rights and environmental norms, there is the risk of making assumptions about the extent to which companies and their agents have freedom to make human rights based and environmentally based decisions in the way that a natural person can [48]. In essence, failing to take into account the legal architecture that the legal construct of the company is subject to, can mean that incorrect assumptions about its decision-making capacity, when operating under commercial pressure can easily be made.

If as is suggested macro legal analysis is adopted as part of the examination of the legal relationships and responsibilities between businesses, human rights and the environment, there remains the question as to how that analysis can be used to develop future approaches. It has already been seen that different types of results have been produced from the use of 'macro legal' or 'macro-level' analysis as it has been applied within different research contexts (Section 3.1). The results from the foregoing macro legal analysis do suggest that potentially, significant developments relating to aspects of the corporate and international economic legal frameworks would need to be considered if some of the root causes of corporate decision making that cause harm to human rights and the environment are to be adequately addressed. The legal frameworks that have been highlighted, demonstrate an interconnectedness and a consonance of priorities that may not be adequately or efficiently addressed through discrete modifications within each of them on an individual basis. As has been illustrated in Section 3 there is an intertwined relationship between human rights law, environmental law, corporate law, WTO law, MDB law, international investment law, and international insurance law which suggests the need for a coordinated re-design of those regimes in order that they are able to respond as a coherent system to the challenges in question.

Certain scholars such as Koskenniemi have argued that lawyers should have the capacity to work across these different legal sub-systems and frameworks as it is then that

some of the conflicts of priorities can be more adequately addressed [64]. He urges what he describes as 'cosmopolitanism':

> a professional sensibility that feels at home in all regimes, yet is imprisoned in none of them. This would be what cosmopolitanism can be today: the ability to break out and connect, participate in the politics of regime definition by narrating regimes anew, giving voice to those not represented in the regime's institutions [64].

Some research has already begun to apply aspects of macro legal analysis to global environmental governance [5,16], but it has not to date been systematically applied to the challenges faced in the field of business, human rights and the environment. It is not the purpose of this article to provide a fully-fledged, re-designed international framework of the type alluded to. However, what it will proceed with are examples of the ways that macro legal analysis in this context could be used to conduct a re-design to address the existing root causes detailed in Section 3. Such processes enable the possibility of drawing on the relational characteristics described above to conduct structural reform that would provide greater consistency of purpose across all the relevant legal frameworks and to integrate the objectives of the international community vis à vis business, human rights and the environment in a coordinated and efficient manner.

4.2. Proposed Key Features of a Re-Designed International System of Responsibility of Businesses Based on the Macro Legal Analysis Undertaken

Drawing on the foregoing analysis, it is possible to begin the consideration of an international framework of corporate and international economic law that would have the effect of addressing the significant imbalance which has been exposed through the macro legal analysis undertaken. The key purpose is to respond to lacunae in the existing law in an integrated manner and redress imbalances where human rights and the environment are not given adequate prioritisation. Whilst the commentary that follows, does respond in this way it is important to take into account two caveats. Firstly, the framework suggested is one possible alternative to the existing status quo and there may be others that equally could be drawn from the results of the analysis; secondly, as the analysis itself is 'macro' in nature, so too are the conclusions and hence the framework suggested. Therefore, its purpose is not to provide detail, but a broad architects outline of the building blocks that would be required to develop a legal framework that responds to the challenge in hand. Therefore, based on the analysis undertaken, it can be argued that the following features could or should form cornerstones of a re-designed international system to address the root causes of corporate human rights violations and degradation of the environment.

1. Since the current domestic and international system of registration of companies (detailed in Section 3), only requires companies to register nationally to be able to function at an international level, a system of international registration should be instituted for all companies that wish to 'operate internationally' [16]. Such a system would have reporting requirements to ensure that human rights are fully protected and that net zero degradation of the environmental is achieved. Failure of a company to satisfy the expected requirements could ultimately result in it having its registration withdrawn.
2. Due to the difficulties for victims of human rights violations and environmental harm to gain redress in many jurisdictions (detailed in Section 3), a mandatory system of insurance should be instituted for all companies registered to 'operate internationally'. Such insurance would be designed and regulated to ensure that third parties had a direct form of redress in the event of a warranted claim. Such insurance would be a mandatory requirement for the international registration of any corporation and would be designed to ensure that human rights were fully protected and that net zero degradation of the environment was achieved.
3. Due to the impact that corporate law has on the decision-making responsibilities of company directors (detailed in Section 3) States should amend the corporate law

within their jurisdictions to ensure that company directors (or the equivalent) have a legal responsibility not only towards ensuring the commercial success of the company but also to ensure that human rights are fully protected and that net zero degradation to the environment is achieved.

4. Due to the lack of integration of human rights and environmental standards within the WTO system (detailed in Section 3), the covered agreements should be amended to include the requirement that all corporations operating internationally are internationally registered (in accordance with para. 1 above), have appropriate insurance cover (in accordance with para. 2 above) and that all member States have appropriate laws incorporated within their domestic corporate law to ensure that all company directors have a legal responsibility to fully protect human rights and require net zero degradation of the environment (in accordance with para. 2 above).
5. Due to the imbalance in the law of IIAs (detailed in Section 3), all bi-lateral and multi-lateral investment agreements should be amended to require companies operating in host countries to be compliant with mandatory insurance (in accordance with para. 2 above).
6. Due to the current lack of an explicit existing duty of MDBs towards human rights and the environment (detailed in Section 3), MDBs would be required to amend their charters to ensure that all of the projects that they fund fully protect human rights and that net zero degradation of the environment is achieved. Additionally, amendments in their charters would require projects to be undertaken with the relevant corporate law regulations and insurance cover (in accordance with paras. 1, 2, and 3, above).

These points are not exhaustive but are provided to illustrate the way that macro legal analysis within the setting of business, human rights and the environment, can be employed to address the broad systemic and infrastructural imbalances that arguably represent a major contributor to the manner in which corporate decision making is ultimately made.

The breadth of the reforms resulting from the macro legal analysis undertaken raise numerous questions themselves that deserve further enquiry and research. For example, the suggestion that an international system of registration for companies could be instituted, is not a proposition that is currently being researched academically and its potential development would require more in-depth analysis to consider how such a body could be instituted, operated and governed. Should such a system be anchored within the UN, or specialised agency of the UN, or possibly the WTO, or should such an organisation be made up of an amalgamation of the corporate registration bodies that exist at national levels and if so, how could it be coordinated? These are questions that would need further in-depth review and analysis. Similarly, the reform suggestion of a global system of mandatory insurance that would provide third party cover relating to human rights violations and environmental degradation, is not one that is currently receiving research attention. Therefore, further research is required to address how such a scheme could be instituted, how it could operate effectively and efficiently, and how it could link with the concept of international corporate registration as has been suggested.

As macro legal analysis leads to different types of results and findings to those derived from micro legal analysis, this can lead to the need for further research. It is this very difference between macro and micro legal analysis that emphasises the potential role that this type of research can play in reforming corporate responsibility. Arguably, it also illustrates the reason why neither micro or macro legal analysis can or should operate in isolation from each other. It is argued that the two forms of analysis are ultimately reliant on each other in this setting, as they both serve distinct but complementary purposes.

5. Conclusions

This article has demonstrated that the law which affects and influences the relationship that companies have with the human rights violations and environmental degradation goes much further than the challenge of the application of human rights and environmental law to non-state actors in jurisdictions that may have fragile and ineffective legal systems. The

common complaint for international lawyers is that public international law does not apply to non-state actors and hence the international system of law has been accused of being 'quasi-feudal' [157] in its nature and that there are questions relating to its adequacy do deal with range of different factors that influence the realities of a globalized world [153]. However, whilst this is true, this article demonstrates that there are other important issues at stake. This is because apart from the lack of direct application of international human rights law and international environmental law to companies, the extant framework of corporate and international economic law has a significant influence on the way that companies make decisions that impact upon human rights and the environment.

The use of macro legal analysis can have the effect of highlighting the relevance and influence of a diaspora of operative law. In this context it includes, but may not be limited to, corporate law, WTO law, the law of MDBs, international investment law and the international system of insurance law. When it is considered that most companies usually operate within highly competitive commercial environments, it is of little surprise that these legal frameworks are highly influential. Macro legal analysis, helps us to develop a clear perspective of the way that these legal frameworks can potentially reinforce each other and create a commercial environment for companies that steers them in the direction of specific priorities. Those priorities become particularly pronounced when profit margins can be slim and the additional costs of going further than basic compliance with regulations relating to externalities can undermine commercial success.

What this can mean for the impasse that sometimes exists between the approaches of human rights and environmental lawyers is ironically that both groups would benefit from looking further than their own specific disciplines and looking at macro legal analysis as a method of finding the commonalities that impact upon both their sets of objectives. This is because by focusing solely on human rights law or environmental law, there is the potential that the broad and very powerful landscape of legal rules that, to a large part, represent the root causes of the ways that companies make decisions in practice, are not factored into reform proposals or as is often the case, get ignored completely. It can be argued that it is in this common ground that both human rights and environmental lawyers can have a unity of purpose and approach.

The specific macro legal analysis that was undertaken led to certain macro level reform proposals to the registration requirements of companies that operate internationally, the insurance requirements for such companies, aspects of corporate law at national levels, and the coordinated integration of human rights and environmental responsibilities within WTO law, IIAs and the charters of MDBs. Whilst some of these reform proposals are novel and could potentially be attributed solely to the process of macro legal analysis, not all of them are. For example the argument that directors duties should be expanded to include responsibilities towards human rights and the environment is by no means new [48]. However, the article has shown that what macro legal analysis is able to achieve is a clearer understanding of the way that different legal frameworks complement each other and cumulatively contribute to the commercial pressure that corporate decision-makers are under to relegate considerations relating to human rights and the environment to the status of secondary concerns, where commercial success in the form of profit maximisation is usually the primary. What it has also shown, is that just as our understanding of the ways that numerous legal frameworks operating in concert can have specific effects on corporate decision-makers, a coordinated programme of reform that addresses all those legal frameworks is more logical than seeking to address each one of them isolation from each other. A coordinated package of reform across all of the relevant legal frameworks can lead to relevant institutional consistency of standards, efficiency and complementarity of purpose. It can also assist in leading to level playing fields for business.

What this article also helps to demonstrate is that there is something profound that needs to be considered in the way that lawyers undertake legal analysis in this context. Law firms in legal practice have individuals specialising in specific sub-disciplines of law as a matter of practical and commercial expediency. This in part contributes to the

way that lawyers are trained in universities. This approach generally also extends to research into law too. As a rule, micro rather than macro legal analysis is favoured as the 'correct' method of assessing the law and pathways to reform. Therefore, there are two obstacles that face academics seeking to undertake macro legal analysis. The first is that this approach is not one that is generally adopted as an accepted practice. It invites the criticism that it does not incorporate the depth of subject matter analysis that micro legal analysis includes. The second is that regardless of the academic merits of utilising macro legal analysis, undergraduate and postgraduate education is not geared to this approach. In other words, there are institutional barriers that are integral to the way legal researchers are trained. The macro legal analytical approach has some overlaps with certain types of comparative research but as a rule, it is not one that many forms of legal education equip scholars to undertake.

It can be argued that for certain issues which have strong intersections with a range of different legal frameworks, especially at the international level, that macro legal analysis should be undertaken. This is particularly the case with complex global issues that involve international economic systems. This is due to the underlying influences that those international economic systems and the law relating to them have on international actors. In this instance macro legal analysis has been applied to business, human rights and the environment, however, it is arguable that it is equally applicable to global environmental governance and climate change too [5]. What the research does not suggest is that macro legal analysis replaces the need for micro legal analysis, it suggests that it has a particular application to certain types of legal problems and in those instances should operate in tandem with micro legal analysis.

In essence, existing approaches to the failure of companies to comply with the human rights and environmental expectations of the international community will continue to have a certain degree of success if they focus on seeking to persuade companies to incorporate ESG concerns into their decision-making. They will succeed as the so-called 'licence to operate' increasingly demands that companies demonstrate that they are good 'corporate citizens' [48]. However, many of the measures that have been taken to date are non-mandatory and do not directly address the root causes of human rights violations and environmental degradation which are in part facilitated by an international system of laws that pre-dispose commercial decision-makers to make decisions that prioritise profit. By addressing that framework of law with the aid of macro legal analysis, it is more than possible to re-design the international legal frameworks within which companies operate, to ensure that the only outcome of the operations of any company is one that fully protects human rights and leads to net zero degradation of the environment.

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Acknowledgments: The author wishes to thank Surya P. Subedi, Onyeka Osuji, Olga Martin-Ortega and three anonymous reviewers for helpful comments on earlier drafts of this article. Any errors are those of the author.

Conflicts of Interest: The author declares no conflict of interest.

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