Human Rights Responses to Climate Change: Complicit with Colonialism

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Introduction

For over half a century, Royal Dutch Shell ('RDS') have been undertaking acts of oil and gas exploration, extraction and flaring in Nigeria. As a result, for over half a century Nigerian communities have been plagued with pollution, health problems, dissociation from financial revenue associated with their own natural resources and a lack of economic sovereignty.[1] The Ogoni people of the Niger Delta, a region driven by the interests of a federal government and foreign corporate interests, are mostly living with no electricity or running water.[2] Exploited, deprived and at risk of enduring some of the most drastic effects of climate change-related environmental degradation, groups such as the Ogoni people seek some sort of legal protection and vindication of their human rights in these times of climate crisis. Such vindication will not be provided by the decision of *Milieudefensie v Royal Dutch Shell* which holds RDS responsible for its emissions and intrusions with the human rights of Dutch citizens.

This essay will explain how the subjugation of colonised groups in the Americas, Africa, and Asia by European powers led to climate change and dictated which populations would be the most vulnerable to its catastrophic effects. This history must inform human rights responses to climate change. To quote Kyle Whyte, "anthropogenic climate change is an intensified repetition of anthropogenic environmental change inflicted on Indigenous peoples via colonial practices that facilitated capitalist industrial expansion."[3] Contemporary climate change academics assume that the relevant time period for assessing climate change issues begins with 18th-century industrial capitalism.[4] However, that excludes consideration of the foundational role legality played through the domination of colonised people.[5] Therefore, this essay evaluates how the Doctrine of Discovery operated as a tool of law to legitimate colonial

[1] "Gas Flaring" Oil Change International < http://priceofoil.org/thepriceofoil/human-rights/gas-flaring/>; Boris Holzer "Framing the Corporation: Royal Dutch/Shell and Human Rights Woes in Nigeria: Journal of Consumer Policy" (2007) 30 281 at 287.

[2] Holzer, above n 1, at 292.

[3] Kyle Whyte "Indigenous Climate Change Studies: Indigenizing Futures, Decolonizing the Anthropocene" (2017) 55 153 at 156.

[4] Bikrum Gill "Beyond the premise of conquest: Indigenous and Black earth-worlds in the Anthropocene debates" (2021) 18 912 at 917.

[5] Gill, above n 4, at 917.

expansion to non-European lands. As we will see, international legality helped justify a supposedly universalised hierarchy of civilised and uncivilised, which justified colonialism and the subordination of people to European legal orders. As maintained here, these legal structures would later justify domination and subordination through racist logics, which also aids in explaining why we are currently facing climate change. Attending to the role of law in colonialism also enables an evaluation of whether international human rights law can respond to climate change or, instead, furthers the subordination of those who are most at risk according to a modern civilizing discourse.

As such, there are two aims of this essay. First, this essay will provide a legal history of the Doctrine of Discovery to show how legality aided the processes of colonisation which created climate change and the climate apartheid. Second, this essay explains why international human rights law does not, currently, provide an effective response to climate change. The argument is made over three parts. Part I will look at the historical processes of colonisation specifically with reference to the Doctrine of Discovery and its translation to a racist international legal order and the intertwining of capitalist ideology, politics and law. Part II explains how this history of colonisation, racism and capitalism underlies and has created the current climate crisis. Part III uses the case study of *Milieudefensie v Royal Dutch Shell* to demonstrate how a lack of engagement with the content of the first two parts undermines human rights responses to climate change and are thus complicit in the racist and exploitative legal order that created the climate crisis in the first place.[6] Finally, there will be concluding remarks about the need for human rights approaches to articulate the histories of struggle and exploitation that underlie climate change in order to facilitate meaningful change.

Part I

This section begins by outlining the Doctrine of Discovery and the consequent exclusion of colonised people from the domain of law. Following this history, this section explains that law must be conceptualised as enmeshed with imperialism and capitalism and in fact, reproduces their dominance in contemporary society. Exploration of the Doctrine of Discovery and its

[6] *Milieudefensie v Royal Dutch Shell* C/09/571932 / HA ZA 19-379, 26 May 2021.

service of European commercial interests will demonstrate that the law is not apolitical. As a result, the espousal of human rights without a proper grounding in this colonial history will continue to uphold and reify European superiority and hegemony. Furthermore, this section seeks to translate that history of exploitation into an explanation of the climate crisis in part II and demonstrate that climate change is a deeply imperialistic and political issue. This history is necessary but often lacking in contemporary human rights discourse which diminishes their ability to be a tool of anti-imperialism and for climate protection.

A. Colonisation and the Doctrine of Discovery

This section places particular attention on the infusion of the racially charged ideas of civilisation and 'other' that were deliberately crafted to exclude colonised states from the realm of law.

The Doctrine of Discovery was used to impose European legal authority on people to create colonies and then states. Starting in 1240, the Doctrine has its roots in the Church and the related idea of a global papal responsibility for a universal Christian commonwealth.[7] Under this universalised jurisdiction, Pope Innocent IV used his divine mandate to care for the world to justify the practice of Christian invasion into infidel lands and dispossessing them of their sovereignty, property and natural law rights.[8] This idea of a divine mandate is one of the earlier iterations of the Western saviour complex that frequently manifests itself in contemporary international law.[9] Further justifications were violations of natural law that were determined by the Church.[10] Any natural laws of pagans would need to meet those of the Europeans in order to avoid 'just wars'.[11]

[7] Robert J. Miller and others *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, New York, 2010) at 9.

[8] Miller, above n 7, at 9.

[9] Makau Mutua "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 Harvard International Law Journal 201 at 233.

[10] Miller, above n 7, at 9.

[11] Miller, above n 7, at 10.

An interaction between the Portuguese King and the Church over the exploration of the Canary Islands added a new layer to the Doctrine of Discovery – one that contributes heavily to the idea of a non-European 'other' or savage. As we will see in part III, this influences contemporary international human rights discourses, particularly the savage, victim saviour critique.[12] To convince the Church of their right to explore the Islands, the Portuguese pointed to the savage-like existence of the islanders, namely that they lacked a common religion and laws, social structures, material items such as money and European style clothing alongside general animal-like living conditions.[13] In any case, subjecting themselves to Christianity would make them subjects of the Portuguese and thus receive the benefits of civil laws and their conceptions of a politically and legally structured society and consequent 'civilisation'.[14] This is a process of Othering under the guise of liberation and protection from oppression.[15] The Doctrine was understood to have "granted European monarchs ownership rights in newly discovered lands and sovereign and commercial rights over Indigenous peoples due to first discovery by European Christians [and] was now established international law, at least to Europeans."[16] Ultimately, the Doctrine helped the Church expand Christianity, add to its wealth and facilitate Spanish and Portuguese colonial practices that served their economic and political endeavours.[17]

An important development in the Doctrine of Discovery's evolution is Franciscus de Vitoria's contribution. Vitoria rejected the previous conception of the Doctrine as the indigenous people of the America's were free, rational and the owners of their lands according to their natural laws.[18] Vitoria shifted the justification for European claims over colonised lands from being grounded on papal authority to being based on the "universal obligations of a Eurocentrically constructed natural law".[19] This is because, according to Vitoria, if the natives violated European defined natural law principles, this could justify conquering that nation through 'just wars'. While he acknowledged that indigenous peoples have reason, they still did not meet the

[12] Mutua, above n 9.

[13] Miller, above n 7, at 10.

[14] Miller, above n 7, at 10.

[15] Miller, above n 7, at 10.

[16] Miller, above n 7, at 11.

[17] Miller, above n 7, at 11.

[18] Miller, above n 7, at 13-14.

[19] Miller, above n 7, at 14.

standards of civilisation required by natural law and thus required proper government by the Spanish as trustees over the uncivilised Indians.[20] This created a reality where the Indians were children who needed a European guardian.[21] Basically, European 'discoverers' could explore, undertake trade, use and extract profit from the land and natural resources how they pleased, and as indigenous populations were bound by European crafted natural laws, they could do nothing to prevent this.[22] Native rights, Indigenous sovereignty and property interests were trumped.[23] Vitoria in this proclamation essentially shifts European rights to indigenous lands to the realm of 'human law' which would soon develop into a positivist jurisprudence that would racialise the idea of sovereignty.[24]

Through time, European powers adapted the Doctrine to suit their quest to expand their sovereignty, property and commercial interests, which occurred at the expense of indigenous peoples.[25] In employing the Doctrine, colonial states were able to displace indigenous peoples from their land, resources, cultural practices, and ecosystems.[26] Whyte describes the forced separation of colonised peoples and their non-human relatives as away-migration, which also fractured the 'psycho-cultural' relationships that indigenous peoples' customs, protocols and identities had with their environment.[27] In addition, Western education and political systems that taught the English language and related values were imposed upon Indigenous peoples as another method of Indigenous erasure.[28] Through colonial processes, law stripped Indigenous peoples of the ability to provide for and protect themselves according to their previous traditions, but promised them access to a globalized world market, self-determination, and rights to practise their own cultures and traditions.[29]

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[20] Antony Anghie "The Evolution of International Law: Colonial and Postcolonial Realities" (2006) 27 Third World Quarterly 739 at 743.

[21] Anghie, above n 20, at 743.

[22] Miller, above n 7, at 14.

[23] Miller, above n 7, at 15.

[24] Antony Anghie *Imperialism. Sovereignty and the Making of International Law* (Cambridge University Press, New York, 2004) at 41.

[25] Miller, above n 7, at 22.

[26] Whyte, above n 3, at 155.

[27] Whyte, above n 3, at 155-156

[28] Whyte, above n 3, at 155.

[29] Whyte, above n 3, at 155.

This history becomes important for understanding international legal causes and responses to climate change. The Doctrine of Discovery was a quasi-legal justification for a broader move by European powers to impose a racial and cultural criterion on the concept of sovereignty, which, in time, became international law.[30] Colonial states used the Doctrine to label Indigenous inhabitants as uncivilised savages, incapable of governance and possessing European conceptions of title and rights to land.[31] They were thus expelled from their lands physically and or made incapable of selling or utilising that land for their own sustenance and development.[32] European colonial powers were then able to develop and engage in practices of environmental extraction and exploitation in line with their capitalist ideology and interests to the detriment of states that lacked a voice to change the established international order.

B. Racist International Legal Order

Discussion of the racist international order seeks to draw together the Doctrine of Discovery and related processes of othering to explain how this worked to exclude colonised people from accessing and relying on legal protection from exploitation. Anthony Anghie argues that colonial states utilised positivism to aid their expansion into non-European states and justify their dispossession.[33] Anghie defined positivist jurisprudence as being founded on the primacy of the state as principal actors of international law and whom are only bound to what they have consented to.[34] The sovereign is the highest authority.[35] This is what Vitoria did when he shifted the justification for colonisation from the natural law realm to the human/European law realm. Anghie discusses how this process of attaching law to institutions through positivism "facilitated the racialisation of law by delimiting the notion of law to very specific European institutions".[36] Colonial powers used Western notions of 'civilised' versus 'uncivilised' to justify the imposition of European sovereignty over 'Others', which formed and excluded the

[30] Anghie, above n 20, at 745.

[31] Miller, above n 7, at 5-6.

[32] Miller, above n 7, at 5-6.

[33] Anghie, above n 24, at 33.

[34] Anghie, above n 24, at 33.

[35] Anghie, above n 20, at 745.

[36] Anghie, above n 24, at 55.

Others.[37] Vitoria's work reproduces what happened with the papal bulls but in different terms. Vitoria stated that "although the aborigines in question are (as has been said above) not wholly unintelligent, yet they are a little short of that condition, and so are unfit to found or administer a lawful State up to the standard required by human and civil claims. Accordingly, they have no proper laws nor magistrates, and are not even capable of controlling their family affairs."[38] The practices of colonisation made sovereignty become associated and dependant on particular cultural practices derived from the European experience.[39] Therefore, once colonised peoples were excluded from international law they were incapable of objecting to their dispossession in the sphere of legality. [40] Their distinct legal personality as colonised peoples made them able to be conquered and exploited.[41]

As we will see, this relates to the climate crisis as it demonstrates which nations had the power to define the international legal order, dominant ideologies and practices, and who was passive. Moreover, we will eventually see how anthropogenic climate change is an "intensification of environmental change imposed on Indigenous people by colonialism".[42] Recognising the practices of racism, assimilation and capitalist undertakings that justified the abuse and exploitation of the natural environment will prime what sorts of remedies or solutions we choose in the present.

C. Colonialism and Capitalist Ideology

Colonialism facilitated the spread of capitalism and related economic ideologies.[43] While one can think of capitalism as an economic system where private individuals or businesses own the means of production and where production is dictated by supply and demand rather than via central planning, it is more than that. [44] Capitalism must be viewed as deeply intertwined with

[37] Anghie, above n 24, at 35.

[38] Anghie, above n 20, at 743.

[39] Anghie, above n 24, at 37.

[40] Anghie, above n 20, at 745.

[41] Anghie, above n 20, at 745

[42] Whyte, above n 3, at 153.

[43] Whyte, above n 3, at 154.

[44] "Capitalism" Investopedia <www.investopedia.com/terms/c/capitalism.asp>

colonialism, racism and environmental exploitation.[45] The links begin with 16th-century mercantile capitalism which hinged on the European colonisation of the Americas, Africa and Asia which only continued with the shift to industrial and contemporary capitalism.[46] Practices of colonisation allowed Europeans to transform capitalism into a global economic system, where Europe became the centre power.[47] The European colonies' labour, production of natural resources, goods and services were crucial to the development of mercantile capitalism through to its imperialist stage and resultant empires.[48]

European colonisation occurred through processes of dispossession, military invasion, slavery and settlement, all often under the umbrella of 'discovery'.[49] This incursion was accompanied by acts of environmental exploitation and expropriation such as deforestation, militarization, industrialisation, transportation, building infrastructure and resultant pollution.[50] Whyte contends that such processes drastically altered the "ecological conditions that supported Indigenous peoples' cultures, health, economies, and political self-determination."[51] In her discussion of how the exploitation and abuse of black people through slave labour were vital to the flourishing of the American post-war economy, Nancy Tuana argues that colonial corporate wealth is founded upon racism and environmental exploitation. The harms caused by mining, both environmental and to the health of the Black labourers, saw Black lives sacrificed in the name of colonial corporate wealth. [52]

While a full discussion on colonial capitalism and empire is beyond the scope of this analysis, Onur Ulas Ince provides useful context for understanding climate change as a product of colonialism.[53] Ince explains how colonial capitalism brings to light the "political economic

[45] Nancy Tuana "Climate Apartheid: The Forgetting of Race in the Anthropocene" (2019) 7 Critical philosophy of race 1 at 18.

[46] Gill, above n 4, at 917; Cedric Robinson and others *Black Marxism, Revised and Updated Third Edition: The Making of the Black Radical Tradition* (University of North Carolina Press, 1983).

[47] Digna Castañeda Fuertes "The Haitian Revolution: Legacy and Actuality" (2010) 2 The International Journal of Cuban Studies 286 at 288.

[48] Fuertes, above n 47, at 288.

[49] Whyte, above n 3, at 154.

[50] Whyte, above n 3, at 154.

[51] Whyte, above n 3, at 154.

[52] Tuana, above n 45, at 18.

[53] Onur Ulas Ince Colonial Capitalism and. the Dilemmas of Liberalism (Oxford University Press, 2018).

dynamics that propelled, shaped, and delimited the course of imperial expansion" that is often overlooked in the exploration of liberalism and empire.[54] He discusses the coercive capitalist transformations through "territorial expropriation, social displacement, resource extraction, and bonded labour that typified British imperial expansion and played an essential role in the formation of capital circuits connecting the Americas, Europe, Africa, and Asia."[55] He concludes by saying that colonial capitalism is an institutionalised social order. This historically determinate social order reinforces gender oppression, creates an institutional separation between 'economy' and 'politics' that allows for capital to easily transcend state boundaries and political control and lastly reinforce the human versus nature divide.[56] To understand capitalism as both political and economic in its intertwining with colonialism, racism and environmental exploitation requires attending to the role of legality. Legality, because of its basis in colonialism, is deeply political and biased towards the values of white Europeans.

Kate Miles' work bridges the gap between colonialism, its effect on international law and the creation of the climate crisis and climate apartheid.[57] Miles explains how the colonial encounter influenced the development of international law and international investment law to protect capital-exporting colonial states over host states and Indigenous peoples.[58] Miles clarifies that the principles of international investment law were developed in the context exploitation and imperialism.[59] A shared political and economic base in liberalism among colonial states coupled with the consistent process of 'Othering' allowed those states to articulate the rules of international law and foreign investment.[60] Moreover, these state interests became increasingly bound to private corporate interests which further contributed to the capitalist priority of developing international law.[61] The civilisation narrative justified the application of different

[54] Ince, above n 53, at 18.

[55] Ince, above n 53, at 18.

[56] Nancy Fraser "Behind Marx's Hidden Abode: For an Expanded Conception of Capitalism" (2014) 86 New Left Review 55 at 66.

[57] Kate Miles *The Origins of International Investment Law : Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, New York, 2013).

[58] Miles, above n 57, at 19.

[59] Miles, above n 57, at 32.

[60] Miles, above n 57, at 23.

[61] Miles, above n 57, at 42.

standards of international law and excluded non-Europeans from its jurisdiction and protection due to its investor-state bias.[62] Miles states that "international legal doctrines were developed and moulded to legitimise the use of oppressive techniques by European powers throughout the colonial encounter".[63]

Capitalism does well to convince us that its connection to social relations remains confined to the world of economics, but this is plainly untrue.[64] Nancy Fraser argues there must be consideration of the non-economic background considerations that transform it from a distinct economic system to a broader capitalist society. Therefore, as we have seen, the faux institutional separation between economy and politics also applies to any contention that law is distinct from the political-economy. The very process of colonisation and the development of the Doctrine of Discovery were aimed to tie European and international legal institutions with capitalism. Commercial interests have always been at the heart of European legal systems. The work of Vitoria, who said there is a natural right to trade, demonstrates the vital role of commerce in international law, which would be developed to justify and facilitate European extraction of resources and exploitation of its colonies.[65] The associated processes of Othering and exclusion that began with the Doctrine of Discovery were undertaken to allow European powers to define the international legal order and its ideological basis to the exclusion of these Others. The Doctrine of Discovery allowed law to be used as a justification for imperialism and capitalist practices. There was a reification of law as European domination made it seem like the capitalist basis of law was natural and historically determinate. The infusion of the ideology into law facilitates the perpetuation of capitalism in society as capitalism is not self-sustaining but rather free rides off of social reproduction, in which law has a great role to play.[66] Without any recognition of the history that created this reality, the use of law is likely to be a reproduction of imperialism and capitalism, as we will see in part III.

Colonial powers used various legal tools at different stages to impose their commercial interests on colonised states and gain commercial benefits from their territories. Friendship,

[62] Miles, above n 57, at 31.

[63] Miles, above n 57, at 31.

[64] Fraser, above n 56, at 66.

[65] Anghie, above n 20, at 744.

[66] Fraser, above n 56, at 70.

commerce, and navigation treaties that granted reciprocal commercial privileges to the investor and host states were the first steps in what would become an intrusive and exploitative European presence in these colonised states.[67] Reciprocity quickly became enforced compliance.[68] Soon colonial states employed unequal or capitulation treaties that used actual or threatened force to bestow themselves with unequal rights to secure financial benefits for themselves and investors whilst displacing and disempowering local authority.[69] Colonial territories were essentially forced into open-market relationships due to lack of choice by the host states in the name of expanding foreign commercial interests.[70] Miles further explains that these treaties and the spread of commercial practices deliberately enmeshed "law, power, and politics within imperial projects".[71] Finally, concessions that granted jurisdictional control over areas with natural resources, rights to natural resource extraction and the ability to build public infrastructure were concluded.[72] These were a huge incursion on host sovereignty as these acts would previously have been in the domain of the host.[73] Ultimately, these tools worked to create a major investor bias in international law, diminish the power and jurisdiction of host states which created favourable conditions for investors and facilitated the expansion of capitalism globally. In the quest to ensure that the host states remain a continued resource for exploitation, there has been serious damage to natural resources and Indigenous peoples.[74]

The colonial encounter and subsequent Othering through the civilising discourse via law, religion, culture, politics and economic systems meant that colonised and host states could technically call upon the protective principles of international investment law. However, they would find that the 'protective principles' of the international legal system facilitated their exploitation or exclusion.[75] The close connection between state and investor interests

[67] Miles, above n 57, at 24.

[68] Miles, above n 57, at 25.

[69] Miles, above n 57, at 25 and 27.

[70] Miles, above n 57, at 25 and 27.

[71] Miles, above n 57, at 27.

[72] Miles, above n 57, at 28.

[73] Miles, above n 57, at 28.

[74] Miles, above n 57, at 45.

[75] Miles, above n 57, at 32; Robert Knox "Civilizing interventions? Race, war and international law" (2013) 26 Cambridge Review of International Affairs 111 at 114.

manifested itself in the nature of the law and whose interests it served.[76] Consequently, Anghie contends that international law seemed "structurally immune from attempts to change its character", particularly in regards to the failure of the New International Economic Order.[77] Anghie further unpacks the imperialist origins of international law and the development of translational law as a tool of multinational corporations to control public international law in Legal Aspects of the New International Economic Order.[78] The Doctrine of Discovery as part of European efforts to spread their capitalist ideologies meant that even legal sovereignty is not equal to economic sovereignty, meaning that newly sovereign states cannot call upon or change customary international law.

Tied to the capitalist colonial history of international law is how colonialism generated an anthropocentric attitude and treatment of the environment as a limitless resource for human use and capital production. This contrasts with viewing nature as inherently valuable in itself, recognising its ecological reproductive capacities and its spiritual or cultural value. The processes of colonisation and dispossession grounded this narrative into reality as lands were taken and commodified to serve liberal and capitalist interests.[79]

Together this history and resulting anthropocentrism explain the global structural order that facilitated environmentally destructive behaviour leading to climate change. Moreover, the ideas of Othering and ethnic hierarchies that came with the Doctrine of Discovery and colonisation informed what groups benefited from exploitation and what groups would be most vulnerable to climate change. These ideas will be explored further in part II.

Part II

A. Climate Change as a Product of Colonialism and Racism

[76] Miles, above n 57, at 42.

[77] Anthony Anghie, "Legal Aspects of the New International Economic Order" (2015) 6 Humanity 145.

[78] Anghie, above n 77.

[79] Gill, above n 4, at 917.

It is a fallacy to believe that climate change is a product of all human existence and impacts all humans equally. The capitalist international system disseminates responsibility among the entire world so that climate change falsely appears to be a product of all of huminites actions.[80] In reality, climate change is a form of structural violence on colonised states and Others that has its foundations in capitalism which cemented itself internationally through the Doctrine of Discovery and infusion into international law.[81] It is clear from the previous analysis that the colonial West developed and furthered capitalism to increase their commercial and political power whilst weakening and disempowering colonised states and its Others. Therefore, in the process of imposing a legal order that redefined rights to land and resources and facilitated extractive and exploitative practices, we are now living in a 'climate apartheid'. This section will focus on how colonisation, related capitalist ideologies and the international legal order have meant that climate change will inflict slow violence on the poorest states, the Third World and Indigenous peoples whilst the colonial West adapts itself out of harm's way. This inequality of burdens is climate injustice. [82] The significance of this is that international human rights responses to climate change need to acknowledge and address these inequalities if they wish to offer protection to the most vulnerable. If not, they uphold and reproduce the structural inequalities already in place.

Climate apartheid is a term that covers both the unequal vulnerabilities to climate change faced by the world's population and the inequitable implementation of solutions and responses to climate change.[83] Apartheid generally describes how systematically held beliefs about Western racial superiority infiltrate themselves into the formation of global institutions such as education, law and politics.[84] Based on the explanations proffered by Ince and Miles, it can be seen how these institutions reproduce these beliefs and give rise to structural inequalities and the systemic subordination and inferiority of the non-Western Other that persist for generations.[85] Eventually, these myths become natural and normal. These myths then translate

[80] Rob Nixon *Slow Violence and the Environmentalism of the Poor* (Harvard University Press, 2011) at 267.

[81] Dennis Soron "Accidental Environments Cruel Weather: Natural Disasters and Structural Violence" (2007) Journal of Media & Culture 1 at 2.

[82] Nixon, above n 80, at 267.

[83] Jennifer L Rice, Joshua Long, and Anthony Levenda "Against Climate Apartheid: Confronting the Persistent Legacies of Expendability for Climate Justice" (2021) Environment and Planning E: Nature and Space 1 at 1.

[84] Tuana, above n 45, at 5.

[85] Tuana, above n 45, at 5.

into inequalities of hard and latent power "as free-market economics that undercut existing state capacity, eradicated traditional protections against food insecurity, and categorically ruled out the type of interventionist social and economic policies that could have substantially alleviated the population's experience of starvation and famine."[86] Because of the legal basis in exploitation, victimisation and racism, host and colonised states had severely limited development of their critical infrastructure, health systems, local industries and scientific development to insulate against climate-related environmental change.[87] Therefore, climate apartheid explains that the impacts of anthropogenic climate change are a result of historically contingent and structurally held beliefs about racial superiority and unapologetic environmental exploitation undertaken by the colonial West.[88] The unequal effects are no accident of history or based on geographical context but rather appear as a result of "socially induced forms of vulnerability that deny people the means to protect themselves and achieve some level of physical and material security in times of crisis."[89]

A clear example of this inequality of climate-related burdens and vulnerabilities is the situation of the Maldives. The Maldives are predicted to be fully submerged due to sea-level rise and thus giving rise to an entire population of approximately 550,000 people worth of climate refugees.[90] This will occur despite the fact that the Maldives have contributed a negligible amount to global GHG emissions and are a low-level hydrocarbon consumer.[91] Wildcat notes that the climate refugee situation is like "déjà vu given that relocation and displacement are part of the history of colonially-induced environmental changes that harmed Indigenous peoples".[92] Nixon accurately describes the situation as being the "poor brown people confronting the threat of having their national territory swamped as a result of a 200-year experiment in hydrocarbon-fuelled capitalism whose historic beneficiaries have been

[86] Soron, above n 81, at 6.

[87] Susan Marks "Human Rights and Root Causes" (2011) 74 The Modern Law Review 57 at 66.

[88] Tuana, above n 45, at 6.

[89] Tuana, above n 45, at 5; Soron, above n 81, at 6.

[90] Nixon, above n 80, at 265.

[91] Nixon, above n 80, at 266.

[92] Daniel R. Wildcat *Red Alert! Saving the Planet with Indigenous Knowledge* (Fulcrum, Golden CO, USA, 2009), at 4.

disproportionately rich and white." The same fate awaits other island nations like Tuvalu and Kiribati.[93]

Adding to the catastrophe is the silence of it and the lack of attention it is receiving on a global scale even though they will be some of the largest natural disasters in history. Climate change is slow violence, where the effects are constant, occurring over years and years at a time, is multiple and occurring globally.[94] Climate change is less easy or desirable to articulate into what we generally perceive as violence, a catastrophe, or a natural disaster.[95] These are normally isolated and immediate with clear actors and something to assign blame to.[96]

The fact that the most vulnerable states are not part of the West contributes to global ignorance of the capacity for destruction that climate change already has. Nixon describes this as 'racialised foreignness' where these disastrous effects are removed from the national consciousness of Western states and individuals, an out of sight out of mind mentality. Bonds says this separation is ideological as the Global North can disproportionately benefit from and preserve the carbon-dependent economy as well as justify militarism and surveillance whilst naturalising conflict in the Global South.[97] This justifies Western humanitarian aid and international human rights which is another variant of the civilising narrative.[98] Racialised foreignness coupled with the drama deficit that is slow-onset environmental degradation all work to reinforce the international legal system that condones and protects Western investor states' capitalist interests to the detriment of host states.

Another aspect of climate apartheid is the fixation on adaptation over mitigation practices which exemplifies the racist nature of the international legal order. Adaptation focuses on

[93] Jane McAdam "Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer" (2011) 23 International Journal of Refugee Law 2 at 20.

[94] Soron, above n 81, at 3.

[95] Soron, above n 81, at 3.

[96] Soron, above n 81, at 3.

[97] Eric Bonds "Upending Climate Violence Research: Fossil Fuel Corporations and the Structural Violence of Climate Change" (2016) 22 Human Ecology Review 3 at 16.

[98] Roland Burke, Marco Duranti, and A. Dirk Moses "Introduction" in Roland Burke, Marco Duranti, and A. Dirk Moses (eds) *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics* (Cambridge University Press, 2020) 1 at 18.

designing and implementing policies and programs that accept the environmental changes and allow us to continue to live with the inevitable conditions inflicted.[99] On the other hand, mitigation aims to lessen or reverse the effects of climate change.[100] Adaptation is more in line with neoliberal capitalist's goals, who prefer to use their resources to insulate themselves against the disastrous impacts whilst continuing to engage in the exploitative practices that gave rise to the changes in the first place. Nixon uses the example of oil companies who prefer to improvise when disasters strike like major oil spills, than to invest in prevention and clean up technology, typical of neoliberal and anthropocentric short-terminism.[101] As we will see in part III, RDS exhibits this attitude and approach which the Dutch legal order not only condones but aids it.

Another example of this is the situation occurring in Eko Atlantic, the home of wealthy foreign business people, the wealthiest Nigerian's, and the Great Wall of Lagos. As a response to expected storms and rising sea levels, a sea defence barrier is being erected to protect the financial and commercial centre of Nigeria.[102] However, the approximately 600,000 million Nigerians that live in poverty will not have access to the commercial paradise and safe haven of Eko Atlantic which non-Nigerians are expected to make up most of the residents.[103] To explain how this situation arose, Tuana references the complex history of slave trade at Lagos, British colonisation and utilisation of natural resources and subsequent economic sanctions placed on Nigerian's that blockaded Indigenous-led trading.[104] The political and economic interests of Indigenous peoples, communities and ecosystems were destroyed by foreign occupation and commercial interests.[105] Therefore, the erection of this sea-wall protects those that are already benefitting off a history of oppression, racism, exploitation and environmental destruction that they greatly contributed to at the expense of those that are still suffering from that history. Tuana astutely states that "sedimented, systematic beliefs and dispositions

[99] Margaux J. Hall and David C. Weiss "Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law" (2012) 37 Yale Journal of International Law 309 at 315.

[100] Hall, above n 99, at 315.

[101] Nixon, above n 80, at 265.

[102] Tuana, above n 45, at 7.

[103] Tuana, above n 45, at 8.

[104] Tuana, above n 45, at 9.

[105] Tuana, above n 45, at 9.

regarding racial superiority are at the heart of decisions about whose lives and lifeways are worth protecting and whose are expendable".[106]

The explanation thus far has sought to demonstrate how the process of racial Othering in international law has its roots in the Doctrine of Discovery which gave European states a legal tool to take control over non-European lands and natural resources. Post-colonial states and Indigenous peoples lost the ability to determine their own economic and political interests while suffering reduced health and education outcomes as well as cultural assimilation. Moreover, the Doctrine of Discovery and colonisation facilitated the intertwining of European neoliberal capitalism and international law which justifies and encourages environmental exploitation and over-extraction. The European investor bias and racist basis of international law allowed for continued subordination of colonised groups who became unable to draw upon international law to protect their own states and territories from environmental destruction. Such a history thus explains how climate change is a deeply racist issue that will disproportionately impact Indigenous peoples, people of colour, colonised states, host states and the Third World the most – as the victims of colonisation and the racialised international legal system.

Because the 'root' causes are structural, the West will be able to hide behind the accepted and normalised racist international order to avoid mitigation efforts to aid these groups. Secondly, this will explain how human rights have been complicit in this inequitable legal order and the continued exploitation and subordination of these groups. As we will see, the above discussion plainly lacks from contemporary expressions of human rights in law – a racist and ideological omission.

Part III

[106] Tuana, above n 45, at 10.

There is a perception that human rights are a necessary legal tool that brings a needed degree of humanity and accessibility to the overly formalised institution of legality.[107] However, the analysis of *Milieudefensie et al v Royal Dutch Shell* demonstrates that human rights are not the accessible antithesis of standard liability that gives a voice to the powerless. Human rights are not distinct from and a challenge to the status quo when their application is so severely confined and there is a refusal to engage in critical analysis of the structural inequalities that precede them.

In *Milieudefensie,* a group of non-governmental organisations (NGO's) and approximately 17,000 Dutch citizens won its case against RDS in the District Court of the Hague in the Netherlands. The ruling found that RDS must reduce its carbon dioxide emissions by 45% by 2030. Notably, the verdict said that it could be deduced from the UN Guiding Principles on Business and Human Rights (UNGP) and other soft law instruments that companies including RDS must respect human rights.[108] In response to the case, commentators have praised the Court and human rights dimension and considers its infusion into the mitigation of climate change and corporate liability for climate change a ground-breaking step forward.[109] While the ruling appears to have positive ramifications for Dutch citizens, it demonstrates the problem of human rights. The Dutch Court's use of human rights analysis effectively absolves the Dutch of historical and contemporary wrongdoing by condemning, at a surface level, the actions of a singular corporation rather than the structural inequalities that the Dutch legal system continues to benefit from. In this case, the Court does not engage with the history of colonialism and exploitation that underpins the current climate crisis and delineates a restrictive human rights framework that is inaccessible to those most vulnerable to climate-related environmental degradation. Instead, the case makes it appear as though the Dutch, who have benefitted from colonialism, are protectors of human rights for the world. And yet, the case shows that human

[107] Ingrid Leijten "Human Rights v. Insufficient Climate Action: The Urgenda Case" (2019) 37 Netherlands Quarterly of Human Rights 112 at 114; Dinah Shelton "Human Rights and the Environment: Problems and Possibilities" (2008) 38 Environmental Policy and Law 41 at 44 and 46; Weiss 335 and 340.

[108] *Milieudefensie v Royal Dutch Shell* C/09/571932 / HA ZA 19-379, 26 May 2021; John Ruggie *Guiding principles on business and human rights* (United Nations Human Rights Office of the High Commissioner A/HRC/17/31, 2011) ('UNGP').

[109] "The Shell climate verdict: a major win for mandatory due diligence and corporate accountability" (2 June 2021) SOMO <www.somo.nl/the-shell-climate-verdict-a-major-win-for-mandatory-due-diligence-and-corporate-accountability/>

rights operate to protect only the Dutch, not the world. Unless Western courts can engage with and address these complex histories – and they are not designed to do that – their recognition of human rights is a colonising event that perpetuates underlying structures through Othering colonised states and Others while maintaining a paternalistic Western Euro-centricity.

Part III will first explain the facts and findings of the case before delving into positive commentary and responses to the case and the utility of the human rights angle. The next step is a critique of the case that brings to light the dangers of viewing this modern upholding of human rights without a critical and anti-colonial lens.

A. The Case

RDS, headquartered in the Hague, is a public limited company and a legal person that's core business is oil, gas and natural gas.[110] Legal personhood includes the idea of a separate corporate personality whereby individual shareholders are distinct from the company itself and these shareholders have their liabilities limited.[111] RDS is the 19th largest company in the world with a revenue of USD 183 million in 2020, 87,000 employees and is the 9th largest carbon emitter in the world.[112] The Netherlands has a high CO2 emissions rates per capita in comparison to other developed states.[113] RDS regularly monitors and is aware of its CO2 emitting practices.

Milieudefensie Friends of the Earth Netherlands ('Milleudefensie') are a Dutch environmental organisation that run campaigns, launch lawsuits and undertake general environmentally driven lobbying.[114] In 2019, Milieudefensie brought a claim against RDS, claiming that it was bound by an 'unwritten standard of care' which effectively says RDS cannot through its corporate

[110] *Milieudefensie* at [2.5.15].

[111] Rodney Craig *Morison's Company Law (NZ)* (online ed, LexisNexis) at 3.1 and 3.3; *Aron Salomon (Pauper) v Salomon and Company Ltd* [1897] AC 22 (HL).

[112] Global 500 (2021) Fortune < https://fortune.com/global500/2021/search/>; "Carbon Majors" Climate Accountability <https://climateaccountability.org/carbonmajors.html.>

[113] *Milieudefensie* at [2.3.7].

[114] "Friends of the Earth Netherlands (Milieudefensie)" Land Portal <https://landportal.org/node/89589>

policy contribute to dangerous climate change.[115] Sources of law that contribute to this standard of care include the Kelderluik criteria which is precedent from the Dutch Supreme Court that discusses party liability for creating a dangerous situation for others that can and must have been prevented.[116] Additional sources were the right to life and right to family and private life under the International Covenant on Civil and Political Rights (ICCPR), European Convention on Human Rights (ECHR), the UNGP, the UN Global Compact and the OECD Guidelines for Multinational Enterprises.[117] Consequently, RDS would need to reduce their emissions by 45% by the end of 2030 relative to 2019.

As the claim by Milieudefensie was a public interest action, the court found that the interests of current and future generations of Dutch residents and inhabitants of the Wadden Sea area were suitable for bundling to bring the class action.[118] This occurred after the court rejected the bundling of the interests of the current and future generations of the world's population for the class action. While it is in the interests of the entire world's population to prevent further climate change, the timing and severity in which people will experience the effects of global warming are too disparate. Thus the requirement of 'similar interest' could not be met.[119] The Court required a smaller and more distinct group of interests in order to articulate any legal response from them. This is a crucial limitation imposed by the court about who may rely on these rights for protection and which will be returned to later.

In its holding, the court built upon findings from *Urgenda Foundation v State of the Netherlands* where the Netherlands was ordered to reduce its emissions by 25% by 2020 compared to 1990 based on governmental duties to protect human rights. The Court of Appeals

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[115] *Milieudefensie* at [3.2].

[116] "Climate case Milieudefensie et al. – The Hague District Court orders Shell to reduce CO2 emissions" (7 June 2021) Stibbe <https://www.stibbe.com/en/news/2021/june/climate-case-milieudefensie-et-al--the-hague-district-court-orders-shell-to-reduce-co2-emissions>; *The Coca-Cola Export Corporation" v Duchateau* (1965) ECLI:NL:HR:1965:AB7079.

[117] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); European Convention on Human Rights CETS 005 (opened for signature 4 November 1950, entered into force 3 September 1953, art 2 and 8) ('ECHR'); UNGP, above n 108; UN Global Compact and the OECD Guidelines for Multinational Enterprises (UN Global Compact Office and the OECD Secretariat, 2005).

[118] *Milieudefensie* at [4.2.2].

[119] *Milieudefensie* at [4.2.2].

of the Hague found the Dutch Government's actions were insufficient to satisfy their obligations under articles 2 and 8 of the ECHR.[120] The claimants in *Milieudefensie* invoked the rights to life and the right to a private and family life for Dutch citizens and those of the Wadden region. These rights were drawn from articles 6 and 17 of the ICCPR and articles 2 and 8 of the ECHR.[121] Due to the fundamental interest and value of human rights for society, the court went further than in *Urgenda* and factored these human rights, which are only legally enforceable against the state, into the unwritten standard of care aimed at a corporation.[122] The fact that the court extended the applicability of human rights to corporations is significant because it demonstrates a more holistic and flexible approach that has previously been lacking.[123]

The court in *Milieudefensie* also noted that the UN Human Rights Committee and the UN Special Rapporteur on Human Rights and the Environment acknowledge that environmental degradation and climate change do pose a threat to human rights.[124] These rights include rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, self-determination, development and culture.[125] Moreover, the report recognised the realities of the climate apartheid and stated that "Approaching climate change from a human rights perspective highlights the principles of universality and non-discrimination, emphasizing that rights are guaranteed for all persons, including vulnerable groups."[126]

The court also considered the UNGP in its consideration of the unwritten standard. The UNGP is an internationally endorsed 'soft law' instrument that guides states and businesses in meeting their human rights responsibilities. The European Commission has held corporations to these

[120] Leijten, above n 107, at 113.

[121] ICCPR, above, n 117, art 6 and 17; ECHR, above n 117, art 2 and 8.

[122] *Milieudefensie* at [4.4.9].

[123] *Milieudefensie* at [4.4.9].

[124] David R. Boyd *Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment* (United Nations Human Rights. Office of the High Commissioner A/74/161, 2019) at 18.

[125] Special Rapporteur, above n 124, at 18.

[126] Special Rapporteur, above n 124, at 18.

human rights standards in the UNGP since 2011 and were thus an appropriate guideline to consider in the unwritten standard.[127]

Although the Court recognised that the effects of climate change will be felt unevenly and more harshly by certain groups in the world's population, it consistently places particular attention on the serious and irreversible effects that climate change will have on the Dutch and the Wadden Sea citizens.[128] The risks outlined in Intergovernmental Panel on Climate Change (IPCC) reports are found to apply to the Netherlands despite not explicitly mentioning them. Current rates of emissions pose serious risks to these groups including health risks, death, infectious diseases, air quality deterioration, water and food-related diseases and more. The concern about flooding and water issues is particularly worrisome as the Netherlands is a low-lying and relatively flat state. There is the constant recentring of the issue back into the Dutch context by the court. That is what the legal system requires, but that is also why it is so problematic. These efforts and the extrapolation of the IPCC report appear to be the court justifying to itself and the world why its interest group is so narrow.

Therefore, due to the serious human rights risks posed to Dutch residents and inhabitants of the Wadden Sea area, the Court found that RDS must reduce their emissions by 45% by the end of 2030 relative to 2019. Drastic measures and financial sacrifices are expected.[129]

B. Responses and Commentary

Milieudefensie has been described as a "ground-breaking victory against Royal Dutch Shell", an "unprecedented" decision, a "powerful tool to force large polluting corporates to take adequate and timely action to comply with internationally agreed CO2 reductions" and "a major win for mandatory due diligence and corporate accountability" specifically in relation to

[127] "Shell ordered to reduce CO2 emissions | Netherlands" (7 June 2021) ICLG <https://iclg.com/briefing/16465-shell-ordered-to-reduce-co2-emissions-netherlands>

[128] *Milieudefensie* at [4.4.6].

[129] *Milieudefensie* at [4.4.53].

its drawing together of corporate accountability for climate change and human rights.[130] The intertwining and co-dependency of democratic governance and capitalism does make fossil fuel companies like RDS that much more susceptible to political backlash and high-profile human rights cases.

This section will traverse the praise *Milieudefensie* has received before delving into a critical analysis on the deficiencies of its human rights approach. The mediatization of human rights tends to overstate the effects of the decision and overly praise the Dutch legal system while contributing to an ignorance of the exclusionary and limited scope of the case.

Numerous reports on *Milieudefensie* praise the decision as an important step in the "global movement to hold corporations accountable for their impact on the climate".[131] The human rights angle of the case is hugely emphasised by the media as a point difference between other cases against oil majors.[132] Firstly, the case essentially values human rights over the economic interests of RDS. Secondly, the ruling is considered historic due to its reliance on soft law instruments, assigning corporate responsibility to climate change and recognising human rights due diligence throughout their entire value chains.[133] Human rights due diligence is situational and therefore draws attention to real people and their basic dignity and rights to equality in relation to a company's activities and business relationships.[134] Moreover, as RDS is a major player in the worldwide fossil fuel market, more can be expected from their policy-setting body in regard to protecting human rights which could set a global precedent.[135] Ultimately, the case

[130] SOMO, above n 109; Joeri Klein "Ground-breaking victory against Royal Dutch Shell in the Netherlands" (27 May 2021) Deminor <https://drs.deminor.com/en/blog/ground-breaking-victory-against-royal-dutch-shell-in-the-netherlands>

[131] SOMO, above n 109.

[132] John Ruggie "The human rights angle was crucial to the Dutch court ruling against Shell" (24 June 2021) Responsible Investor < www.responsible-investor.com/articles/the-human-rights-angle-was-crucial-to-the-dutch-court-ruling-against-shell>

[133] SOMO, above n 109.

[134] Ruggie, above n 132.

[135] "Milieudefensie et al v. Shell: Climate change claimants prevail again in Dutch court – this time, against corporations" (28 May 2021) White and Case <www.whitecase.com/publications/alert/milieudefensie-et-al-v-shell-climate-change-claimants-prevail-again-dutch-court>

has ignited procedural and legal developments that are bringing climate change disputes to the forefront of conversations.[136]

Climate change litigation based on human rights also allows for claimants to bring claims whilst side-stepping typical barriers to justice which include issues of standing, causation and indeterminacy.[137] For example, causation is difficult to establish given the complex nature of the energy sector and related business models. The gaps between business owners, host states and raw material extraction, suppliers and consumers make causation difficult to establish.[138] These are typically issues when climate change related claims are brought under tort. Moreover, the supposedly global nature of climate change and the inability to attribute direct responsibility on individuals, as everyone has contributed in some way, makes human rights a useful tool to make claims as they are supposedly universal. [139]

Margaux and Weiss outline reasons why it is normatively and legally desirable to apply a human rights framework to climate change. For them, firstly, international human rights law is the most appropriate and effective tool to deal with climate change which is an internationally experienced issue that has direct consequences for all humans.[140] International law obviously has a wide jurisdiction and the ability to develop international solutions. Secondly, it makes sense to use a human rights lens as these will be infringed by climate change. Thirdly, human rights tribunals are better able to strike a balance between limited government resources and human needs. Fourthly, they claim that the human rights framework has established methods for enforcement, although the authors themselves go on to acknowledge that most human rights treaties lack an effective enforcement regime.[141] Lastly, it encourages consistency and clarity in adaptation policies and international standards for policy.

[136] Mark Clarke and others "Climate change disputes: Sustainability demands fuelling legal risk" (18 February 2021) White and Case < www.whitecase.com/publications/insight/climate-change-disputes-sustainability-demands-fuelling-legal-risk?s=Urgenda>

[137] Leijten, above n 107, at 114.

[138] Clarke, above n 136.

[139] Hall, above n 99, at 343.

[140] Hall, above n 99.

[141] Hall, above n 99, at 342.

Dinah Shelton presents more reasons to support a human rights approach to climate change in Human Rights and the Environment: Problems and Possibilities.[142] These include raising a clean environment above a policy choice as human rights are a maximum claim on society, that human rights trump conflicting norms due to its position in the legal hierarchy, the subsequent promotion of the rule of law and democracy and the ability to put pressure on states through international petition procedures.[143]

Ingrid Leijten discusses how human rights claims also bring to light the rights of the child and the possibility of the rights of future generations.[144] The rights of the child are important because it recognises that climate change is a burden that will most heavily be felt by children and future generations as the climate worsens over time. Children for obvious reasons such as age, lack of knowledge, and financial restrictions are locked out of climate change litigation and policymaking. In *Juliana v. United States*, 21 young people and Earth Guardians pursued a claim against the state for the government's affirmative actions that have violated constitutional rights to life, liberty, property and a failure to protect essential public trust resources.[145] Whilst a significant case in raising the profile of children's rights on the global climate change agenda, the trust was found to lack standing. The case is a classic example of the procedural roadblocks that are commonplace in climate-related claims in law.

Potentially one of the most powerful uses that human rights have in climate change is bringing public attention to exploitative and destructive practices.[146] Media presence and representation are a vital part of contemporary human rights. Mass public attention to human rights abuses can delay and even stop major destructive projects. Funds can be pooled from all over the globe to support vulnerable groups launching legal proceedings against such actions. It should be remembered that major fossil fuel companies hold extensive political influence and retain strong ties to their respective governments.[147] Claims of human rights breaches is an effective method of tarnishing a company's public image, political power, and ability to undertake

[142] Dinah Shelton "Human Rights and the Environment: Problems and Possibilities" (2008) 38 Environmental Policy and Law 41.

[143] Shelton, above n 142, at 44.

[144] Leijten, above n 107, at 114.

[145] *Juliana v. United States* 217 F Supp 3d 1224 (9th Cir 2016).

[146] Bonds, above n 97, at 17.

[147] Bonds, above n 97, at 13.

exploitative practices as they try to mitigate against backlash and decreases in company profitability.[148] Eric Bonds goes on to say that "if these companies are successfully stigmatized, so the hope goes, they may not have the same capacity to successfully push back on carbon emission limits and other needed environmental reforms."[149]

Clearly, human rights are starting important conversations and bringing important issues to light in the public sphere, however, they do not guarantee any particular outcome to redress the actual issue at hand. The world is fast-moving, human attention is fickle and we are living in the Age of Distraction according to Rob Nixon. Digital and or media coordinated resistance are only effective for as long as people can stay focussed on the issue before something newer and more interesting comes along.[150] An example of the power of public discourse and attention are the protests surrounding the Dakota Access Pipeline (DAPL). Energy transfer Partners invested 3.7 billion into the DAPL.[151] However, the Standing Rock Sioux Tribe contested the development as the pipeline disrupted sacred land and risked contaminating the Tribe's water supply within its claim against the Corps for violations of permitting procedures. While the United States District Court for the District of Columbia ruled in the Corps favour, the Sioux Tribe found success in the major worldwide media coverage of the protests.[152] The protests extended into social media campaigns, petitions, celebrity endorsements and global media coverage.[153]

While the DAPL case is not about human rights specifically, the fact that despite all of the global and political backlash surrounding the DAPL it was still completed shows a major issue with the efficacy of public protest and backlash. Unless a breach of human rights can guarantee a particular outcome and address colonial legacies – which I posit that they rarely do[154] – they

[148] Bonds, above n 97, at 17.

[149] Bonds, above n 97, at 17.

[150] Nixon, above n 80, at 277.

[151] Walter H. Mengden "Indigenous People, Human Rights, and Consultation: The Dakota Access Pipeline" (2017) 41 American Indian Law Review 441 at 442.

[152] Kate Hunt and Mike Gruszczynski "The influence of new and traditional media coverage on public attention to social movements: the case of the Dakota Access Pipeline protests" (2021)24 Information, Communication and Society 1024.

[153] Hunt, above n 152.

[154] See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837.

glorify Eurocentric notions of justice and act as a moral justification for the current legal structure that consequently absolves colonial bodies of responsibility for climate change. In addition, the supposed benefits to a human rights approach as discussed above ought to be tempered against the risks they pose. Such concerns include their acceptance of colonial pasts, their Western hegemonic perceptions of 'human', their inability to guarantee any particular outcome, and insulation of the legal structures from apprehending their role in facilitating underlying exploitation.

Despite all of these positives, climate change is such an unprecedented, unpredictable and large-scale event that current governance systems are likely unprepared to address such issues as easily as suggested above. In addition, the media often presents a very bounded version of human rights, this is why it is so important that these cases have a strong historical and anticolonial grounding, otherwise, the only narrative that disseminates widely into societies are the surface level acknowledgement of human rights that glorify and leave un-examined the coloniality of the Dutch legal system.

C. Critique

In delivering this 'ground-breaking' judgement, the Dutch legal system has become a beacon of hope and a protector of human rights that everyone ought to be grateful for. The current circumstances are dire as we enter the realm of irreversible environmental destruction. Therefore, any movement against fossil fuel companies ought to be praised. The IPCC has stated that without immediate, rapid and large-scale GHG emissions reductions, the ideals of 1.5°C or 2°C warming will be unattainable.[155] Beyond 2°C we will reach new heat extremes that will push health and agriculture tolerance limits to the absolute maximum. Therefore, the order to reduce GHG emissions and the conversations sparked about corporate liability are a win for the fight against climate change.

[155] "Climate change widespread, rapid, and intensifying – IPCC" (9 August 2021) IPCC <https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/>

However, four major criticisms must be made in order to gain an accurate view of what the case is actually doing. Firstly, the case only upholds and protects the human rights of Dutch citizens and the Wadden Sea inhabitants to the exclusion of all others. Secondly, the case does not engage with the history of Dutch colonialism and the racialised legal order that are major causes of climate change. Thirdly, this lack of colonial discussion is demonstrative of the contemporary deficiencies of human rights dialogues to engage with anti-colonial purposes. Lastly, and based on the first three, the decision naturalises and furthers the capitalist ideology that underlies the creation of the climate crisis. Nancy Tuana articulately expresses this when she said that to ignore the fact that corporate wealth is grounded in racism and environmental exploitation "or understand them only as separate and separable phenomena is to overlook the long history of their infusion. No study of the causes of climate change that overlooks the complexity of such lineages will fully understand what is needed for climate justice." Therefore, while *Milieudefensie* looks impressive in its upholding human rights, given the legal structures at play, the case demonstrates a failure to address and remedy coloniality.

1. Human Rights, Anti-racism and Anti-imperialism

Before launching into the critiques, it is important to outline the anti-racist and anti-imperialist approaches to international human rights law that academics such as Burke and Mutua subscribe to. Nelson Maldonado-Torres discusses how various academics are of the view that decolonisation is an integral part of human rights in the 21st century, to which I agree. They discuss that human rights ought to be anti-racist and anti-imperialist if human rights wish to break away from its colonial and oppressive past and delegitimise colonial rule.[156] Therefore, the failure of the court in *Milieudefensie* to engage with these goals and purposes undermines its integrity and the effectiveness of its decision because an anti-imperialist and anti-racist presentation of human rights would do well to address the structural causes of climate change.

The Asian-African Conference in Bandung (1955) that Burke discusses brings to light anti-racism and anti-imperialist goals for human rights as it was "a conference against both

[156] Nelson Maldonado-Torres "On the Coloniality of Human Rights" (2017) 114 Revista Crítica de Ciências Sociais 117 at 127.

imperialism and mere spectatorship".[157] The Spirit of Bandung and the goals of the movement were tied to "the recognition that racism and political, legal, and economic structures of racial difference were an inextricable part of international law and the genealogy of the nation-state".[158] The fuller extent of the Bandung Conference is explained in Spirit of Bandung in Bandung, Global History and International Law.[159] Burke demonstrates that anticolonialism and the struggle for human rights were bound up and leaders used human rights to articulate their anticolonial grievances.[160] Throughout the conference, the issues of racism and colonialism became a part of human rights discussions proving the major fixation the Third World had on these issues and their close relationship in their eyes. This is because the newly sovereign Third World states were recovering from and protecting their sovereignty against foreign domination.[161] The Global South was particularly focussed on human rights as global economic redistribution in the face of transnational capitalism, resource transfers and state-building from wealthy states.[162] They considered human rights to have a strong economic and socially revolutionary capacity following decolonisation.[163]

The attempts to redefine the international legal order, at that time, failed. A classic example is the failure of the New International Economic Order which was a stand against the unjust existing economic order, an attempt to achieve global social and economic justice and to close the gap between the developed and developing countries.[164] Anghie said that international law which had lent itself to the colonial project seemed "structurally immune from attempts to change its character."[165] Failure will continue if there is a continued omission of the anti-racist and anti-imperial discourses arising from the Bandung conference and academics like Mutua and Maldonado-Torres. If human rights cases can engage in the same type of project as seen

[157] Luis Eslava, Michael Fakhri, and Vasuki Nesiah "The Spirit of Bandung" in Luis Eslava, Michael Fakhri, and Vasuki Nesiah (eds) *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press, 2017) 3 at 8.

[158] Eslava, above n 157, at 17.

[159] Eslava, above n 157.

[160] Burke, above n 98, at 14 and 16.

[161] Burke, above n 98, at 20.

[162] Burke, above n 98, at 19 and 20.

[163] Burke, above n 98, at 20.

[164] Burke, above n 98, at 18.

[165] Anghie, above n 77, at 153.

in The Spirit of Bandung, then perhaps we can reclaim the uplifting and life-changing powers we have falsely convinced ourselves that they currently possess. This is what drives the following critique of *Milieudefensie.*

2. Limited Scope of Application

This particular critique argues that, even if human rights are more broadly applicable today than ever before, they promote Eurocentricity. The court's limitation of application only furthers the colour-line that has manifested itself in international law and human rights.

Mutua contends that human rights, though well-meaning, are Eurocentric and this is despite a push from the Third World for anti-imperial human rights which is discussed by Roland Burke in Decolonization and the Evolution of International Human.[166] Ultimately, he finds that Third World nations as part of their journey through decolonisation were a major political force in the development of the human rights agenda and the general consensus that human rights were 'universal'.[167] This consensus was lost 20 years later though – which is the current situation we find ourselves in as current human rights articulations have been unable to align with these aspirations.[168] While Third World activists sought to use human rights for anti-imperialist purposes, it cannot be denied that contemporary human rights were formulated, developed and reproduced in a racialised international legal order. As such, the hegemonic ideas of humanity seamlessly became infused into our ideas of the human.

In part I, I argued that the European colonial project undertook a project of Othering that distinguished European and white people from Indigenous people, black people and people of colour. After developing the international legal order through the colonial project, we now live in a world where contemporary human rights discourses and institutions reproduce Eurocentricity. Maldonado-Torres discusses how the idea of a human is coloured by precisely that.[169] For him, the resultant conceptions of 'human' are based on hegemonic Western ideals

[166] Mutua, above n 9, at 204.

[167] Burke, above n 98, at 4 and 19.

[168] Burke, above n 98, at 19.

[169] Maldonado-Torres, above n 156, at 131.

that inherently pose colonial or colour-line whereby groups of superior and inferior humans were created, the latter being 'less human'.[170] If there is no effort by courts to engage in the anti-colonial dialogues that are essential to anti-imperialist and anti-racist human rights, then any affirmation of them only contributes to the white-washing of human rights. For lack of talking to and working with the colonised and the Third World and for lack of portraying their stories and experiences as humans, human rights activists like the Dutch legal system are "denying humanity in the very process of trying to affirm it".[171]

This Eurocentric idea of a human is reproduced in *Milieudefensie* as the Dutch court makes multiple explicit statements about this judgement and the relevant human rights only applying to Dutch citizens and inhabitants of the Wadden Sea area because their interests are suitable for bundling.[172] As a result, the institution of law declares that only this group appear to be truly human. The decision is being praised for the recognition and affirmation of human rights of a generally unoppressed and safe group of mostly white Europeans whose population has contributed disproportionately large amounts to the climate crisis and maintains adequate latent power and infrastructure to protect its population from climate-related risks – to the explicit exclusion of more vulnerable groups in the world.

In addition, the decision to confine human rights to the Dutch facilitates the ability of RDS to continue exploitative practices elsewhere. This is because only when RDS's actions interfered with or threatened Dutch human rights that the Dutch legal system condemned their behaviour. What RDS has done or continues to do in the Niger Delta and how it affects those people was and is not enough. Therefore, within the international legal structure, this decision takes on its own act of Othering. In choosing and confining whose rights to uphold, we actively designate other vulnerable groups as less human, as distinct. This links up with Tuana's discussion of how complex histories of racism and exploitation from colonialism inform ideas of what groups and what natural resources are disposable.[173] The civilised Dutch, privy to the jurisdiction of civilised Dutch law is worthy of protection. The justifications used to create jurisdictional and legal limits by the Dutch courts are based on a racialised logic that's function

[170] Maldonado-Torres, above n 156, at 122, 130-132.

[171] Maldonado-Torres, above n 156, at 132.

[172] *Milieudefensie* at [4.2.2].

[173] Tuana, above n 45, at 22.

is to "create a binary distinction between the civilized and uncivilized."[174] We can see race as core to the use of the law of human rights because supposedly universal human rights are delimited by the Dutch courts to those who fit a particular idea of human. Building on Tuana's conclusions, human rights as employed in *Milieudefensie* are designed to protect what and who is valued.[175] It protects the private rights to life and the right to a private and family life for Dutch citizens, all of whom have benefitted from the Dutch colonial legacy.

While we might believe that using the legal system, the courts and human rights is the only practical, pragmatic and legal approach to the liability, this only contributes to the discourses that praise the Dutch legal system for upholding human rights. Human rights exist within the legal structure of this imperialist capitalist system and thus no longer protect all humans because rights in the international legal system were designed to protect white Europeans and exploit Others. This huge procedural limitation of needing to bundle interests takes pressure away from the courts to actually condemn RDS for its actions against all people and recognise the Dutch and international legal complicity. It uses human rights to condemn RDS for threatening some Dutch lives and dodges the laborious task of reconfiguring the racialised and unequal international legal order. They must succumb to legal rules and regulations, precedent and precision in their application of human rights more so than addressing the causes of the problem at hand.

3. Erosion of Human Rights Dialogues

Another major flaw in the case is the lack of racial, colonial and historical acknowledgement by the court. We only see this case for its revolutionary upholding of a limited sliver of human rights that lacks the requisite vocabulary and critical lens to recognise that this case is only maintaining the status quo of a racialised capitalist legal order. This failure of the court primes a discussion about the maintenance of the status quo but, relevant to this section, suggests the erosion of critical anti-racist human rights dialogues. Perhaps the court recognises that their human rights approaches are colonial and are refusing to engage in those histories as a way to actively take away the tools for criticism of the Dutch legal system. Without this, the case can

[174] Knox, above n 75, at 115.

[175] Tuana, above n 45, at 10.

only really be viewed in a positive light. This section will seek to explain that this omission for the sake of minimising criticism is actively happening.

A truly effective human rights discourse, at least in the case of climate change given its extensive colonial history and racially distorted impacts, is able to engage in those realties and draw critical attention to the structures at play for the purpose of redressing them. This is because at that point human rights become a tool of anti-imperialism and can begin to delegitimise, disempower and dismantle the 'root causes' that are the inequitable legal structures that created the climate apartheid.[176] *Milieudefensie* exemplifies how contemporary human rights discourses have become integrated into colonial legal structures and cannot now engage in anti-colonial dialogues. As a consequence, even critical evaluations of the case lack the substance to fully engage and apply their frameworks because they require the reader to already have that historical, political and economic context in their knowledge, which are excluded from the legal issues any court will consider e.g. litigating Dutch colonialism.

An example of a critical framework is the savage, victim, saviour narrative which could be applied to climate change. Makau Mutua proposes the Savages, Victims, and Saviours (SVS) metaphor to explain how Western states, the United Nations, International Non-governmental Organisations (INGO's) and senior Western academics, as the authors of human rights, construct and consistently reproduce this colonially and racially charged narrative.[177] This is a narrative that only strengthens and reinforces Western supremacy and illegitimate power relations. The victim is made into a helpless party that has had their rights violated and requires protection.[178] The saviour is a heroic and powerful European state founded on democracy "who protects, vindicates, civilizes, restrains, and safeguards".[179] The savage tends to depict a non-white, non-European Other that falls outside of hegemonic Western ideals of the regular man. This reinforces racial Othering that began in with the Doctrine of Discovery. However, Mutua stated in his piece that "the real savage, though, is not the state but a cultural deviation from human rights."[180] In this way whoever promotes and protects human rights is the saviour. When

[176] Maldonado-Torres, above n 156, at 127.

[177] Mutua, above n 9, at 202.

[178] Mutua, above n 9, at 203.

[179] Mutua, above n 9, at 204.

[180] Mutua, above n 9, at 203.

applied to *Milieudefensie*, the narrative form removes racialised and colonial aspects which is, itself, problematic. However, it usefully indicates who the saviour is which, for my purposes, indicates who should shoulder the heaviest burden of correcting these systems.

Drawing back to the case at hand, the application of the SVS metaphor to *Milieudefensie* would be as follows. The saviour, civiliser and redeemer is the Dutch legal system, the institution of human rights and ultimately culturally based norms and practices.[181] The victim, whose human dignity and worth has been violated are the Dutch citizens, the inhabitants of the Wadden Sea area and Dutch generations to come. The savage is RDS, an exploitative driver of capitalism that destroys human rights on its quest for financial gain.

While the metaphor still works, it does so via the omission of critical discussions of race in the creation of the climate crisis as *Milieudefensie* fails to provide any context or history to allow this level of engagement. This is despite the fact that climate change is a deeply colonial and racial issue that has culminated in a climate apartheid as based on the previous analysis in parts I and II. These structures and institutions are the real savages but we are not provided with enough history to articulate such a critical opinion. Legal systems indulging in saviourism have become so used to using human rights as a saving grace for such a wide array of issues without addressing the colonial history that underpinned those issues. It whitewashes human rights, promotes Eurocentrism and upholds it as the manner for solving climate change. The journey away from race in the SVS metaphor whitewashes human rights even more as self-redemption.[182]

By refusing to acknowledge any cultural or racial aspects to climate change, no tools or vocabulary are provided to allow any sort of discussion on the issue. Therefore, our ability to use *Milieudefensie* to actually 'solve' or address the root causes of climate change is stifled. Human rights in climate change discourses are avoiding these issues as a method of protecting the status quo of exploitation that supports the international system's ideology of capitalism and Western hegemony while providing the international community with enough of a 'win' to distract from the sinister reality. Thus it makes sense that the previous commentary and responses to the case only praise the decision and the Dutch legal system as there are no tools

[181] Mutua, above n 9, at 204.

[182] Mutua, above n 9, at 208.

provided for a critical discussion to occur. The next section builds on this section's ideas about human rights lacking a critical lens and how this is part of a wider goal of preserving the inequitable status quo.

4. Preservation of the Status Quo

Given that the Dutch legal system is part of a structure founded on colonialism, a condemnation of RDS and upholding human rights could appear to be inherently anti-capitalist. But that is not the case when it is appreciated that capitalism is more than an economic discipline. By upholding human rights in a whitewashed way, the court's use of human rights and condemnation of RDS actually preserves and re-justifies the social relations of capitalism and imperialism through the legal-political-economic system. Based on the explanations in parts I and II, it is clear that the Western world has benefitted from colonialism and the imposition of capitalism upon the world. Refusal to acknowledge the structural inequalities and processes of exploitation that create climate vulnerabilities and the need for human rights then is an attempt to preserve the status quo and racist, ideological international legality.

Consider a different example. Susan Marks discusses the 2010 Haitian earthquakes and the human rights approach to Haitian recovery.[183] The earthquake struck near Port-au-Prince and killed, injured, left homeless, or without access to essential services over one million people. Marks questions the extent to which this natural disaster was actually 'man-made' in reference to Haiti's French Colonial history and its historical context of poverty and discrimination.[184] When the disaster struck, the UN Human Rights Council held an emergency meeting in order to discuss how to deal and assist Haiti. She notes that the Council were aware of and did address the 'root causes' of poverty and discrimination that preceded the earthquake and therefore a human rights approach was needed – in order to address those realities.[185] Nonetheless, acknowledging 'root causes' was a surface level move that did not engage with the knowledge that the poverty and discrimination were the product of structural inequalities and a racialised international order.

[183] Marks, above n 87, at 65.

[184] Marks, above n 87, at 65.

[185] Marks, above n 87, at 65.

Haiti has a complex and deeply colonial history starting with the arrival of the Spanish in 1492 and eventually the British, French, Dutch, Danes and Swedes.[186] As a frontier of these empires, they established plantations and slave labour in Haiti, a form of racial and economic exploitation that laid the foundations for the colonial system that plagues Haiti even after its decolonisation and supposed independence.[187] Eventually Haiti was established as a French colony in the seventeenth century as part of the Frenches journey to explore and exploit foreign nations and culminated in the Haitian slave revolt .[188] While some academics like Digna Castañeda Fuertes praise the Haitian Revolution for standing up against Western colonial rule, marking the beginning of Caribbean humanism and as a victory against racism, the realities that underpin the 2010 earthquake suggest those colonial forces are still very much alive.[189]

Julia Gaffield analyses the Haitian struggle for internationally recognised sovereignty even after declaring its independence due to racially charged conceptions of civilisation and an international racial hierarchy – the full intricacies of which are beyond this piece.[190] She discusses how even after the revolution, Haiti was forced to pay France an extortionate indemnity to compensate for the loss of slaves and colonial property.[191] Alongside the US despot occupation of Haiti and the processes of economic modernisation, this colonial history set in motion a reality of international racial subordination, slum-living and poverty. To quote Marks, "these considerations make it clear that, if nature brought the earthquake to Haiti, the catastrophe it caused was decidedly man-made".[192] Gill also emphasises that the ecocidal logics that plague Earth are not natural or inevitable but rather the result of decisions that have their basis and resonance in colonisation.[193]

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[186] Fuertes, above n 47, at 289.

[187] Fuertes, above n 47, at 289.

[188] "Haiti: A Brief History of a Complex Nation" Kansas University Institute of Haitian Studies <https://haitianstudies.ku.edu/haiti-history>

[189] Fuertes, above n 47, at 296-298.

[190] Julia Gaffield "The Racialization of International Law after the Haitian Revolution: The Holy See and National Sovereignty" (2020) 125 The American historical review 841 at 867; C.L.R. James The Black Jacobins: Toussaint L'Ouverture and the San Domingo Revolution (Secker & Warburg Ltd, 1938).

[191] Marks, above n 87, at 66.

[192] Marks, above n 87, at 66.

[193] Gill, above n 4, at 919; H. Davis and Z Todd "On the importance of a date, or decolonizing the Anthropocene" (2017) 16 *ACME* 76 at 763.

The human rights approach to the disaster posited by the Council does not acknowledge that poverty and discrimination are the outcomes of established international forces. In framing the issue as a 'natural disaster' the Council allows the international order that created these vulnerabilities to continue. Marks notes that there is an active effort to avoid addressing the international lending and aid conditions that forced the Haitian government to limit spending on their infrastructure, health system and local industries.[194] The Council provides no real vindication or protection to those that are most at risk of environmental disasters because it does not address the structural forces that create such vulnerabilities. These same criticisms apply to the case of *Milieudefensie* and climate change.

The court does not reflect on RDS or a Dutch colonial history in *Milieudefensie* because the racial and structural inequalities experienced across the world ultimately work to the benefit of the Dutch. Even if it notes that other people suffer from climate change, 'root level' acknowledgement that fails to address the structural issues that cause those vulnerabilities are still complicit within the oppressive legal order. Marks outlines some important criticisms of human rights, one of which is that effects are treated as causes.[195] This reasoning suggests that the global racial and structural inequalities and environmental exploitation that creates climate vulnerabilities are not caused by racism and Western domination but rather that we are racist and dominating in order to exploit and maintain those inequalities.[196] Every case that does not recognise these realities and that history like *Milieudefensie* becomes "functional to, and hence rational within, subsisting conditions".[197] If these inequalities were recognised it seems difficult to imagine that companies like RDS would still be able to carry out their business as they do. As it stands, RDS will continue exploiting natural resources in Third World states, but in ways that protect the Dutch people. Deliberately omitting these perspectives in the case releases the burden on the Dutch court to condemn RDS's exploitative behaviour beyond the direct effects it has on Dutch citizens and the Wadden Sea inhabitants. While an order to reduce its emissions by 2030 does have utility in slowing the rate of climate change, it does nothing to solve the 'root' causes of it. The inequitable legal structures will persist and RDS and a

[194] Marks, above n 87, at 66.

[195] Marks, above n 87, at 72.

[196] Marks, above n 87, at 72.

[197] Marks, above n 87, at 72.

multitude of other exploitative colonial corporations will continue to reap the benefits of imperialism and exploitation for years to come, even if RDS does have to reconfigure its business model.

Omitting discussion on structural inequalities when addressing 'root causes' of climate change leads us to believe that the solution is more tolerance and to be less racist or to recognise human rights when really the solution is to dismantle the conditions that allow for capitalist class relations and exploitation to persist.[198] We cannot just recognise human rights or tolerate away climate inequality, the solutions will be political choices that demonstrate a shift away from colonialism and capitalist ideologies in international law.

Final Remarks

While a solution to the structural inequalities and internationally practiced ideologies that span centuries is beyond the scope of this dissertation, some concluding remarks about the future of human rights and climate change ought to be drawn. The first remark is that the point of this analysis was not to say that human rights are necessarily an ineffectual tool at addressing climate injustices. The interplay between human rights and modern media is an important relationship that draws critical attention to exploitative practices and challenges the status quo. Therefore, human rights movements and cases have an extremely important role in drawing attention to these disasters and setting an international legal agenda for finding a solution to the issue.

Secondly, even though international law remains structurally bound to imperialism and racism and frequently fails to offer meaningful vindication or change as the world faces unprecedented climate change, we should not be wholly pessimistic. While we cannot undo the past and we cannot separate law from its colonial history, we can use our history to guide our futures and ground legal decision making – which leads to the third conclusion.

[198] Marks, above n 87, at 73.

Finally, if courts and academics continue to use human rights without engaging with the racialized and inequitable structural inequalities within the international legal system, they only uphold and reify European superiority and hegemony. This is why Tuana concludes that the ways forward must weave together the racial and colonial history that abetted the spread of capitalist ideologies.[199] These ideologies that see not just the environment but also certain groups of Others as exploitable and disposable. Only when the structural implications of international law are better seen can we effectively begin to understand how to subvert and redirect international values and practices towards nature and people. Judith Shklar mirrors this conclusion in her statement "Perhaps the best intellectual response is simply to write the history of the victims and victimisers as truthfully and accurately as possible".[200] When it comes to *Miliefdefensie*, some Dutch citizens might be at risk of rising sea levels which is genuinely concerning. And yet, they are not a group that has been colonised, exploited and Othered by imperial forces for generations. Consistently retelling their story in the exclusionary fashion that we have been, once again, is a colonising moment in itself and will only worsen the effects of climate change on oppressed groups.

Milieudefensie is an important case. It brings to light the slow violence of climate change, the idea of corporate liability for environmental destruction and, of course, the idea of human rights in a climate change context. However, its utility and capacity for change require the Dutch courts to engage with Dutch colonisation, with its promotion and protection of commercial capitalist ideologies and the extension of human rights to those who need it most. The Dutch legal system has long condoned and reproduced imperialism, racism and environmental exploitation that has contributed to the climate crisis and it must acknowledge this. Articulating these stories of oppression will be a long, confronting and uncomfortable process but we must be brave.

"No simple story will do. But we must, nonetheless, throw open the shutters and swear by the sunlight."[201]

[199] Tuana, above n 45, at 22.

[200] Catherine Lu "Colonialism as Structural Injustice: Historical Responsibility and Contemporary Redress" (2011) 19 The Journal of Political Philosophy 261; Judith N. Shklar Legalism: Law, Morals and Political Trials (Harvard University Press, Cambridge MA, 1964) at 165.

[201] Tuana, above n 45, at 22.

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