



MAX PLANCK INSTITUTE

FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

MPIL RESEARCH PAPER SERIES | No. 2023-12

**International Crimes of Western Colonialism.
Reflections on Philippe Sands' *The Last
Colony: A Tale of Exile, Justice and Britain's
Colonial Legacy***

Julia Emtseva

ISSN 2702-9360

Electronic copy available at: <https://ssrn.com/abstract=4441443>



MAX PLANCK INSTITUTE

FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

MPIL RESEARCH PAPER SERIES

No. 2023-12

**INTERNATIONAL CRIMES OF WESTERN
COLONIALISM. REFLECTIONS ON
PHILIPPE SANDS' *THE LAST COLONY:
A TALE OF EXILE, JUSTICE AND
BRITAIN'S COLONIAL LEGACY***

AUTHOR

Julia Emtseva

EDITORIAL DIRECTORS

Armin von Bogdandy, Anne Peters

EDITOR-IN-CHIEF

Moritz Vinken

TECHNICAL ASSISTANCE

Verena Schaller-Soltau

Angelika Schmidt

ISSN 2702-9360

All MPIL Research Papers are available on the MPIL website at <https://www.mpil.de/en/pub/publications/mpil-research-paper-series.cfm> and on the SSRN at https://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=2765113

Copyright remains with the authors

Suggested citation

Emtseva, Julia, International Crimes of Western Colonialism. Reflections on Philippe Sands' The Last Colony: A Tale of Exile, Justice and Britain's Colonial Legacy (May 2, 2023). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2023-12.

Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4441443

ABSTRACT

Does colonialism still exist in the 21st century? Philippe Sands provides a resounding affirmation to this question in his recent book *The Last Colony*. Sands expounds upon the circumstances surrounding the Chagos archipelago, the most recently colonized territory by the United Kingdom, which triggers further discussions about the ability of international law to address colonial crimes. Sands' tale proves that it is possible to challenge colonisers by using the existing tools of international law. Yet, the efficacy of justice efforts remains inadequate for the victims of colonial crimes. In addition to evaluating the critical contributions of *The Last Colony*, this review essay examines the international crime of forced displacement and how it has been tackled by international courts within other contexts. Drawing on the recent Human Rights Watch report documenting the offenses committed by the UK and US authorities against the Chagossians, the essay assesses which elements of the colonial crime of forced evictions attain the gravity threshold for crimes against humanity. And finally, the essay argues for the need for greater awareness and accountability for such crimes and their lasting effects on individuals and societies.

KEYWORDS:

forced displacement, Chagos, international criminal law, colonialism

International Crimes of Western Colonialism.

Reflections on Philippe Sands' *The Last Colony: A Tale of Exile, Justice and Britain's Colonial Legacy*

By Julia Emtseva*

*"There have never been serious efforts to investigate colonial crimes before national or international courts, nor to punish any of the surviving perpetrators, nor sanction the governments involved or to compensate the victims for the ongoing health problems triggered by the crimes."*¹

A few words about the book

In the aftermath of the Second World War, the word colonialism started to lose its status as the source of pride and glory of the former empires. One of the C words² – colonialism – the likely cause of many modern injustices, is now associated with pain, loss, violence, and for most of us lawyers, with international law. While there are still discussions about the historical legality of colonisation, it is definitely illegal in the 21st century.³ Most agree that colonisation is a serious threat to sovereignty, freedom, and development of states, yet, the exact elements of what makes colonisation so horrible are often overlooked. Philipp Sands, one of the most prominent international lawyers of our days, attempts to show the horrors of colonialism by telling the story of Liseby Elysé – a native Chagossian who is a survivor of forced displacement – a colonial crime that was a trade mark of violent imperial territorial conquests.

The Last Colony offers a powerful account of the development of contemporary international law through the inspiring tale of the Chagossians' quest for justice and the deeply personal odyssey of Liseby Elysé that culminates in a historic ruling of the International Court of Justice (ICJ). It is a book accessible to a wider audience but a must-read for lawyers as it illustrates how we can operate within the limits of international law and politics to remedy, or at least attempt to remedy, situations that impaired so many lives.

Sands' tale proves that it is hard to deny that ICJ judges as well as lawyers who help bring the cases before the Court carry their ideologies into the ways they 'lawyer'. For instance,

* Research Fellow/PhD Candidate, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany. I would like to express my deepest gratitude to Kanad Bagchi, Juliette McIntyre, Andrea Maria Pelliconi, Anne Peters, and Moritz Vinken for their valuable comments on the earlier versions of this text.

¹ Kaleck W, 'On Double Standards and Emerging European Custom on Accountability for Colonial Crimes' in Bergsmo M, Kaleck W and Yin Hlaing K (eds), *Colonial Wrongs and Access to International Law* (Torkel Opsahl Academic EPublisher 2020) 12.

² There is a group of 'C words' that I find intrinsically interrelated and arguably equally malicious: colonialism, capitalism, and civilisation (and of course, as some other more established scholars see e.g. Anghie A, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005)).

³ See e.g. Anghie A, "The Evolution of International Law: Colonial and Postcolonial Realities." (2006) 27(5) *Third World Quarterly*, 739–753.

he describes Percy Spender of Australia and Stephen Schwebel of the United States, who respectively served as presidents of the ICJ in the 1960s and 1990s, as examples of the importance of knowing who sits on the bench. In the South West Africa case, when Liberia and Ethiopia brought charges against apartheid South Africa, Spender delivered a verdict in favour of the latter (p. 49). Similarly, in the Nicaragua case, Schwebel was the only judge to dissent, as the Court ruled against the US (p. 97). Both examples show that before starting the litigation, we should thoroughly assess who is going to decide on the case and what their previous positions in relation to similar questions were.

Moreover, the author carefully but unambiguously reminds us that international law is rooted in politics, a reality not to be underestimated. Sands exposes the attempts of the UK and US governments to overcome international treaties and UN resolutions that would prevent them from colonising the Chagos archipelago. Yet, *The Last Colony* shows that it is possible to challenge the 'most powerful' using the existing legal tools. By leading us through his legal journey with the Chagos case that started at the UN, moved to the Permanent Court of Arbitration, and finally landed before the ICJ judges, Sands provides a truthful picture of international legal adjudication. There has to be the right moment, the right place, and the right time to bring the case with a sensitive issue in question before the most important international legal forum. *The Last Colony* is an inspiration for strategic, creative and thorough lawyering and as Emma Nyhan pointed out, a general roadmap for practising international law.⁴

The book's added value also lies in its clear, logical, and easy-to-follow chronology of the colonisation of Chagos. In the 1960s, when several African nations were gaining independence, the Chagos Archipelago was separated from Mauritius by the British government to establish a new colony called British Indian Ocean Territory.⁵ This move allowed the UK together with the US to build a military base on Diego Garcia, one of the Chagos islands, and as a result, the entire population of about 1500 Chagossians, some of them descendants of enslaved plantation workers, were forcefully evicted (p. 4). Madame Elysé, four months pregnant at the time, was among those deported, leaving behind almost all her belongings to board an overcrowded ship to never permanently return home (pp. 6-7).

For the last 40 years, the Mauritian government made continuous efforts to return the Chagos Archipelago, with the help of Philippe Sands serving as their legal representative for the past decade. Yet not only the return of the territory was crucial for this fight. The return of the expelled Chagossians back to their homes was at stake in this complex process of international legal adjudication. As Sands himself described this justice journey:

"The case of Chagos is about ending the British colonisation of Mauritius and Africa. Its beating heart is a continuing act of racial injustice, the deportation and mistreatment of the Chagossians, characterised by the British government itself as 'shameful': it is time to end a grotesque and continuing episode of colonial wrongdoing, to give effect to the rule of law, to allow the Chagossians to

⁴ Emma Nyhan 'Favourite Readings 2022: On the Road' (2022). Accessed <https://www.ejiltalk.org/favourite-readings-2022-on-the-road/> 5 April 2023.

⁵ The Economist, 'Britain could soon give up its last African colony' The Economist (13 February 2023) <https://www.economist.com/britain/2023/02/13/britain-could-soon-give-up-its-last-african-colony> accessed 21 March 2023.

return to their homes, to bring to a close a matter that many consider to be a crime against humanity.”⁶

While the book thoroughly transmits the experiences of the interviewed Chagossians in between the explanations of the historical developments and foundations of the legal case of the colonisation of Chagos that ended up in The Hague, Sands does not elaborate on the peculiarities of the crime of forced evictions. In this review essay, I attempt to add a light touch of international criminal law to the tale of the displaced Chagossians and discuss what exactly makes this story a textbook case of an international crime stemming from the imperial ambitions of colonisers.

The past and present of the colonial crimes

I read *The Last Colony* right after I finished Amitav Ghosh's *The Nutmeg's Curse*.⁷ The stories told in the two books are strikingly similar. The difference is, however, that these events took place four centuries apart from each other. The Dutch colonists in the 1600s, guided by the eagerness for profit caused by the popularity of nutmeg, an exquisite spice, attacked Selamon village of the Banda Islands – an Indonesian group of islands, rich in nutmeg trees. Despite the nutmeg trade treaties agreed between the Dutch and the islanders, the former annihilated the village leaders, enslaved the remaining inhabitants and sent them to other islands. Similar happened in the Chagos archipelago in the 1960s and 70s. But instead of murdering village leaders, the British killed the Chagossians' pet dogs. The Chagos archipelago, Britain's most recently created colony was once a home for hundreds, if not thousands of people.⁸ But in the 1960s it changed when the British decided to coordinate with the US Americans to create a new military base. The details of these plans became known only years after their implementation. As seen from the leaked documents, the UK and the US agreed upon securing the territory for the base and displacing the population of this territory.⁹ They had their eyes on Diego Garcia – one of the Chagos archipelago islands.

Both *The Last Colony* and *The Nutmeg's Curse* provide powerful insights into how colonial powers have exploited and oppressed indigenous peoples for their own gain. Sands' meticulous research brings to light the injustices faced by the Chagossians and the ongoing struggle for their right to return to their homeland. Similarly, Ghosh's imaginative retelling of the spice trade reveals the brutalities of colonial expansion and the ways in which indigenous peoples were marginalized and exploited. The two books challenge readers to confront how colonial exploitation continues to shape our world and to consider the moral, ethical, and economical implications of imperialism.

⁶ 'Philippe Sands QC on his new book *The Last Colony*' University of Cambridge Corpus Christi College (March 2021. Accessed <https://www.corpus.cam.ac.uk/articles/philippe-sands-m1979-publishes-new-book-last-colony> 21 March 2023.

⁷ Ghosh A, *The Nutmeg's Curse: Parables for a Planet in Crisis* (Chicago: University of Chicago Press 2021).

⁸ The exact number of the population of the Chagos Archipelago is unknown given the unclear immigration data see Gifford R and Dunne RP 'A Dispossessed People: the Depopulation of the Chagos Archipelago 1965–1973' (Popul. Space Place 2014) 37–49. <https://doi.org/10.1002/psp.1754>.

⁹ Richard Norton-Taylor, 'UK-US embassy cables: live updates' (2013) *The Guardian* <https://www.theguardian.com/world/2013/apr/15/uk-us-embassy-cables-wikileaks> accessed 21 March 2023.

Yet, the difference between the stories about the Banda Islands inhabitants in the 17th century and the Chagossians of the 20th century is that the latter resiliently tried to get justice for their suffering using our modern international legal instruments. Bringing the tangled relationship of law and politics to the masses, Sands masterfully and engagingly leads the readers through the justice project of the Chagossians – their homecoming. Together with his clients, Sands tried to convince the members of the ICJ that this project is worth pursuing and The Hague Court has to help them to successfully complete it. Sands' tale ends in February 2022, exactly three years after the ICJ delivered its Advisory Opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius.¹⁰ The Court deliberated: the detachment of Chagos was unlawful, Britain has to end the administration of the archipelago as quickly as possible, and the UN General Assembly (UNGA) should address the resettlement of Mauritian nationals, including native Chagossians, as a matter of human rights (p. 133).¹¹ Yet, as of February 2023, Diego Garcia still accommodates only American and British military personnel, as well as nearly 2000 civilian contractors in charge of managing the military base.¹² Wealthy yacht owners are the most common non-military visitors to the Chagos Islands, coming there for stunning palm-lined shores and blue lagoons.¹³

Using his investigatory skills in historical research that already characterizes his previous books, Sands also illuminates how deportation became a matter of international law. He argues that the focus on the interests of colonised people led to the emergence of a new human rights system in international law, which included the right not to be forcibly relocated (p. 34). The concept of crimes against humanity (CAH) arose in response to the brutal actions of National Socialism and its idea of Lebensraum (pp. 34-35). As we also know from Sands' *East West Street*, CAH were promoted by Hersch Lauterpacht, whose ideas influenced the creation of the Universal Declaration of Human Rights (UDHR) (p. 34) and were reflected in the statute of the Nuremberg Tribunal, where deportations were recognized as one of the acts that could constitute a crime against humanity. The UDHR, adopted in 1948, also recognized the right of individuals to return to their country as well as the European Convention of Human Rights of 1953 in one of its protocols, which the UK never signed (p. 37).

But what exactly was the ICJ implying when it recommended that the UNGA should examine the resettlement of the Chagossians as a matter of human rights protection? The Court's side-lining of the issue of displacement has been subjected to critique based on the missed opportunity of the ICJ to offer guidance on how exactly human rights violations of the Chagossians could be remedied.¹⁴ Sands does not elaborate on this particular matter in his book either. I would like to take advantage of this opportunity and discuss the colonial crime of forced displacement – a crime that has been present for

¹⁰ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) 2019. ICJ Reports 2019 95.

¹¹ Which the UNGA did in its May 2019 resolution concerning the ICJ Advisory Opinion. "General Assembly Welcomes International Court of Justice Opinion on Chagos Archipelago, Adopts Text Calling for Mauritius' Complete Decolonization," UN press release, GA/12146, May 22, 2019, <https://www.un.org/press/en/2019/ga12146.doc.htm>.

¹² Laleh Khalili, 'Guano to Guns' (2023) London Review of Books vol 45, no 4.

¹³ <https://www.lrb.co.uk/thepaper/v45/n04/laleh-khalili/guano-to-guns> accessed 21 March 2023.

¹⁴ *ibid.*

¹⁴ See e.g. Allen S, "Self-Determination, the Chagos Advisory Opinion and the Chagossians" (2020) 69 International & Comparative Law Quarterly 203.

several centuries – experienced by the indigenous peoples on the Banda islands and the Chagos archipelago.

Colonial crimes and modern international criminal law

In February 2023, Human Rights Watch (HRW) published a 106-page report titled “‘That’s When the Nightmare Started’: UK and US Forced Displacement of the Chagossians and Ongoing Colonial Crimes.”¹⁵ The report documents the forceful eviction of the Chagossians in the 1960s-70s by the US and UK authorities, which further barred the native population from returning.¹⁶ The lead author of the report argues that “The UK is today committing an appalling colonial crime, treating all Chagossians as a people without rights.”¹⁷ So what exactly makes forced displacements a crime and a gross violation of human rights?

The case of the forceful eviction of the Chagossians might not be the most brutal exercise of colonial violence in the history of colonial demographic engineering,¹⁸ and still, it left at least several hundred traumatized, living on the verge of poverty, without knowing the whereabouts of their family members. Starting from the early 1960s, the British authorities employed various methods to compel the native Chagossians to leave their homes.¹⁹ Initially, they used covert tactics like preventing people from returning home after leaving Chagos for vacations or family emergencies. Later, the British resorted to direct intimidation by ordering or coercing the remaining population to leave, which included killing their pet dogs.²⁰ By 1973, there was no Chagossian left on the islands of Diego Garcia, Salomon, and Peros Banhos – once the home of Sands’ protagonist Liseby Elysé.

Yet, the suffering of the displaced Chagossians did not stop when they reached their “new imposed homes” – Mauritius and Seychelles. The British authorities promised housing and employment for the forcefully exiled Chagossians, but these promises were not fulfilled.²¹ HRW’s interviewees shared that their living conditions were reduced to a state of extreme poverty, which included experiencing severe hunger that resulted in the loss of family members.²² Moreover, those who were sent to Seychelles reported that it

¹⁵ Human Rights Watch, ‘UK, US Expelled Islanders 50 Years Ago: Crime Against Humanity’ (*Human Rights Watch*, 15 February 2023) <https://www.hrw.org/news/2023/02/15/uk-us-expelled-islanders-50-years-ago-crime-against-humanity> accessed 21 March 2023.

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ Demographic engineering is a term “that indicates the authority-sponsored alteration of the demographic composition of a territory” coined by Andrea Pelliconi in the context of international law. See e.g. Andrea Maria Pelliconi, ‘The UNGA Request for an ICJ Advisory Opinion on Palestine: The Role of Demographic Alterations in the Process of De Facto Annexation and Legal Consequences under International Law’ (*City Law Forum*, 22 February 2023) <https://blogs.city.ac.uk/citylawforum/2023/02/22/the-unga-request-for-an-icj-advisory-opinion-on-palestine-the-role-of-demographic-alterations-in-the-process-of-de-facto-annexation-and-legal-consequences-under-international-law/> accessed 21 March 2023.

¹⁹ Human Rights Watch, “‘That’s When the Nightmare Started’: UK and US Forced Displacement of the Chagossians and Ongoing Colonial Crimes” (*Human Rights Watch*, February 2023).

https://www.hrw.org/sites/default/files/media_2023/02/chagos0223web_0.pdf accessed 21 March 2023. p. 29.

²⁰ *ibid.*

²¹ *ibid.* 34.

²² *ibid.*

was hard to obtain identification and travel documents which made not only the movement but also the integration into the new society complicated.²³

HRW identified at least three crimes against humanity (CAH) committed against the native population of Chagos by the UK and US authorities. These include forced displacement or deportation (depending on the destination of the forced exile – within Mauritius or abroad (Seychelles or later the UK)), prevention of return, and persecution on the grounds of race and ethnicity.²⁴

Article 7 of the Rome Statute defines crimes against humanity as certain acts when committed as part of a “widespread or systematic attack directed against any civilian population, with knowledge of the attack.”²⁵ Article 7 (1) lists eleven distinct acts that fall under CAH, including paragraph (d) deportation or forcible transfer of population, (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender and other grounds, and (k) other inhumane acts.

The Rome Statute entered into force almost 30 years after the last forced displacement of the Chagossians took place. But the ICC case on the Rohingya issue gives hope that it would be possible to prove that the crime of deportation or forcible transfer of a population is by its nature an ongoing crime as long as those displaced are barred from returning to their homes. Global Rights Compliance argued in its amicus brief for the ICC that:

“[d]eportation must be assessed as a continuous crime [...] the aggravated harm that deportation prohibits, namely the removal into another State, persists until the victims are permitted to return. [...] The harm caused to the victims continues to be inflicted upon them and accumulates over time. The victims often end up living in significantly worse conditions than they enjoyed before their enforced displacement across a State border. Accordingly, the actus reus of the crime of deportation is prolonged through the continuing conduct of the perpetrator that maintains the forced removal of the victims from their homelands. As long as the victims are prevented from returning to their homes, through acts contingent upon the will of the perpetrator, the crime continues.”²⁶

With respect to the right to return home, the ICC Pre-Trial Chamber found that the prevention of the exercise of this right can amount to the CAH of other inhumane acts. The ICC acknowledged the allegations of appalling living conditions of the Rohingya people in Bangladesh as well as the alleged impediment of their return to Myanmar. And if established, such conduct could fall within Article 7 (1) (k).²⁷

Concluding remarks

As seen and felt through Sands’ written story of Liseby Elysé, as well as her family members and friends, it has become evident that the UK government implemented

²³ *ibid.* 35.

²⁴ *ibid.* 90-91.

²⁵ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

²⁶ ICC, Situation in Bangladesh/Myanmar, “Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute,” Global Rights Compliance, Pre-Trial Chamber 1, May 30, 2018, paras. 81, 87.

²⁷ Freuden S, ‘Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute’ (Int’l Crim. Ct.)’ (2019) 58 International Legal Materials 120, para 77.

policies that led to the expulsion of the Chagossians, their exclusion from returning to their homeland, and discriminatory treatment based on race. And as HRW argues, “[t]he UK and its officials have primary responsibility for the crimes committed against the Chagossians. US officials also bear responsibility for instigating and implementing the forced displacement and assisting and supporting the ensuing crimes against Chagossians that amount to crimes against humanity.”²⁸

The importance of holding the UK to account reads through the whole tale of Sands. Beginning in 1945, he shows how the new world order is being created – starting with a speech given by Ralph Bunche, an African American diplomat, just a few weeks before the work on the drafting of the UN Charter began (p. 13). In Sand’s words: “The modern world has come to the realisation that there is a great moral issue involved in the perpetuation of the colonial system.” (p. 13). Eight weeks later, Chapter XI of the UN Charter saw the light of the day – the door through which he and Madame Elysé passed through on their way to the ICJ (p. 14). But by the very last page of *The Last Colony*, we feel that, despite their achievements in The Hague, the rage caused by visceral injustice is still there: “it [is] hard to repress the sense of fury at the wrongs that have been done here [Chagos]” (pp. 155-156).

Accountability could be one of the cures for the rage. But to achieve it, the language of international law should be utilized to correctly label prosecutable crimes. As the epigraph suggests, there has never been an attempt to prosecute colonial crimes. The ICJ Advisory Opinion was also a missed opportunity to legally interlink the colonial crime of forced displacement and the decolonization process. Despite this, Sand’s take still shows us that existing legal mechanisms exist to acknowledge colonial injustices and maybe if we try harder, we could use these mechanisms to correct these injustices. The case of the Chagossians, horrible in its nature, opens an opportunity to fill this gap and bring the colonisers to accountability. Pursuing accountability for the crimes committed by once-colonial powers is the first step in requesting justice for all those who were forcefully displaced from their homes. As Andrea Pelliconi argues, there is a need to recognise and prosecute demographic alterations as international crimes as it will impact other situations where people are losing their homes because of political and economic reasons -- just as the Chagossians lost their home because of the claimed military security of the UK and US or as the Selamonians because of the eagerness of the Dutch to control the nutmeg’s production.²⁹ We witness these crimes now in the East of Ukraine, Kurdistan areas, Occupied Palestinian Territory and many more. Sands’ *Last Colony* serves us as a reminder that colonialism is not the evil of the past –it is still happening in the 21st century.

²⁸ Human Rights Watch (n 12) 91.

²⁹ Pelliconi (n 13).

Cover: Imbalanced World, 1996, Veronika Dell'Olio (photo: Miriam Aziz)

“Essential to our concept was the establishment of a connection to the work and objectives of the institute. In view of the diversity of the research tasks concerned, we have attempted to highlight an overarching idea that can be understood as the institute’s mission. We see this as the ideal of peaceful relations between peoples on the basis of an internationally validated notion of justice.... The depicted sculpture...[symbolizes] an imbalanced world in which some peoples are oppressed while others lay claim to dominance and power. The honeycomb form of the circular disks denotes the [international] state structure. Glass parts ... [represent] the individual states [The division] of the figure ... into two parts [can] be interpreted as the separation of the earth into two unequal worlds. The scissors-shaped base, on the one hand, makes the gap between them clear, on the other hand, a converging movement of the disks is conceivable.... The sculpture [aims] at what is imagined – the possibility of the rapprochement of the two worlds.”
[transl. by S. Less]

Art in architecture, MPIL, Heidelberg



MAX PLANCK INSTITUTE

FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

Im Neuenheimer Feld 535
D-69120 Heidelberg
Tel.: +49 (0)6221 482 - 1
Fax: +49 (0)6221 482 - 288

www.mpil.de
SSRN@mpil.de