INTRODUCTION TO SYMPOSIUM ON *THE LAST COLONY*

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In 2019, the International Court of Justice (ICJ) rendered a remarkable Advisory Opinion. In *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court examined the circumstances under which the Chagos Archipelago had been detached from Mauritius to become part of the British Indian Ocean Territory, and declared that "the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968."[1] The Court further found that the United Kingdom's continued administration of the Chagos Archipelago was unlawful, and called upon U.N. member states to aid completion of the decolonization process.[2]

In 2022, Philippe Sands published a remarkable book, *The Last Colony*.[3] In it, Sands skillfully interweaves a series of fascinating and interlocking stories. Drawing on his central role in organizing and strategizing the Chagos litigation, as well as his broad academic and practice experience, Sands has produced an illuminating account not only of the Chagossians at the heart of the litigation, but also of the workings of the International Court of Justice, and international law's long and checkered history on issues of decolonization.

The papers in this special Symposium issue of the *Temple International and Comparative Law Journal* engage, explore, extend, and challenge the arguments presented in *The Last Colony*. These papers were presented at the 2023 Laura H. Carnell Chair Writer's Workshop, where they were the subject of intensive discussion and critique among an outstanding interdisciplinary group of scholars.[4] This Symposium issue represents the latest collaboration among the Carnell Chair, this journal, and Temple Law School's Institute for International Law and Public Policy, which co-sponsored the workshop.

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* Laura H. Carnell Professor of Law, Temple University Beasley School of Law. I benefitted enormously from the invaluable guidance and support of my Temple colleagues Ben Heath, Duncan Hollis, and Jaya Ramji-Nogales during the organization of this event. I am also deeply grateful to Philippe Sands, not only for producing the fascinating book that was the occasion for this project, but also for attending the writer's workshop, and especially for his openness to engaging seriously with searching and, at times, pointed critique of his work. Finally, this event could not have taken place without the steadfast support and encouragement of Temple Law School's Dean, Rachel Rebouché.

1. Legal Consequences of Separation of Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 46 ¶ 174 (Feb. 25).

2. *Id*. ¶ 177, 179.

3. PHILIPPE SANDS, THE LAST COLONY: A TALE OF EXILE, JUSTICE AND BRITAIN'S COLONIAL LEGACY (2022).

4. In addition to those publishing papers in this volume, workshop participants included Laura Bingham, Jacob Katz Cogan, Amy Cohen, Alessandra Gianelli, Ben Heath, Duncan Hollis, Julia Morris, Mae Nguyen, Mark Pollack, and Philippe Sands.

It is entirely appropriate that this Symposium takes as its focus Philippe Sands' most recent monograph. An eminent public international lawyer and academic, Sands is Professor of Public Understanding of Law at University College London, and a practicing barrister at 11 King's Bench Walk. He has often appeared as counsel before the ICJ and other international courts and tribunals, and sits as an arbitrator in international investment disputes. Until recently he served as President of English PEN, and serves on the board of the Hay Festival of Arts and Literature. Over the course of his career, in his scholarly and popular writings and in his legal practice, Sands has worked tirelessly to promote the international rule of law and advance human rights and human dignity.

Symposium authors were not assigned a specific theme or question, but rather invited to draft a short response to *The Last Colony*. Nonetheless, the papers can usefully be divided into five groupings, corresponding to five broad themes discussed in *The Last Colony*. The first group of papers explores the book's treatment of issues of race/erasure and colonialism/coloniality. The second group examines the politics behind the legal disputes that inform the stories presented in *The Last Colony*. The third group of papers investigates positionality, including that of legal counsel, writers, and readers. They discuss issues of voice and genre. The fourth group of papers focuses on the roles, functions, and limits of international courts and international adjudication. A final group of papers addresses outcomes, compliance and (in)justice. Both individually and in the aggregate, the contributions provide incisive and wide-ranging commentary. In the pages that follow, I briefly introduce these papers.

I. RACE/ERASURE; COLONIALISM/COLONIALITY

The Last Colony's subtitle refers to "Britain's Colonial Legacy," and the volume is centrally about the colonial experience. The book foregrounds the voice and experience of Liseby Bertrand Elysé, a Black woman who in 1973 was, without notice or justification, forcibly displaced from her home on an island in the Chagos Archipelago. Years later, Elysé would appear before the ICJ to tell the judges her story of forced exile, and of her passionate desire to return home. Many of the nearly two thousand deported Chagossians were direct descendants of enslaved persons brought to the islands by the French and the British, and Sands repeatedly emphasizes the racialized nature of the colonial enterprise. He likewise explores the erasure of colonized peoples' histories across popular culture, educational systems, and international legal doctrine. The first set of Symposium papers explore these themes.

The Symposium opens with a contribution from Rachel E. López, an Associate Professor at the Thomas Kline School of Law, Drexel University.[5] This paper argues that the Chagos litigation problematizes one conventional dichotomy found in human rights scholarship, which posits an opposition between those who champion human rights law as a powerful tool of liberation for Black and other historically oppressed peoples, and those who view human rights law as furthering global racial

5. Rachel López, *The Heart and Heartbreak of International Law*, 38 TEMP. INT'L & COMP. L.J. 15 (2024). As of July 1, 2024, Professor López will join the Temple Law faculty.

hierarchy. *The Last Colony* problematizes the critique against human rights, as it details how a Black, and previously enslaved, population successfully challenged British control of Chagos, and thus highlights how law can advance accountability against powerful actors in the Global North. At the same time, López, a pioneer in developing a new genre of writing called participatory law scholarship, notes that *The Last Colony*'s stories would have been different, and perhaps even more powerful, had Madame Elysé, one of the book's central protagonists, been an equal partner in their drafting.

The next contribution is from Obiora Chinedu Okafor, the Edward B. Burling Professor of International Law and Institutions at the School for Advanced International Studies, Johns Hopkins University.[6] His paper employs a Critical Third World Approaches to International Law (TWAIL) scholarly framework and sensibility to foreground two dimensions of the contemporary international legal order. Okafor highlights, first, the continuing division of the globe into states, such as the United Kingdom, that can both exercise colonial power and avoid accountability for past or current exercises of this power, and those that cannot do so. Relatedly, Okafor emphasizes the contemporary use of material and ideational power, including international legal power, to maintain this bifurcated global order. Developing these themes, Okafor details the double standards that are applied today to powers in the Global North and Global South, and the dismissal of logics of resistance as consisting merely of emotion devoid of reason. Whereas *The Last Colony* presents itself as telling a story of progressive change in international legal doctrine and practice, Okafor highlights the strong conceptual and doctrinal continuities in international law that are evident from the Chagos saga.

This cluster of papers closes with a contribution from Ayodeji Kamau Perrin, a Sharswood Fellow at the University of Pennsylvania Law School.[7] His paper explores Sands' use of unconventional methodologies, including legal archaeology, ethnography, and narrative legal advocacy to illuminate how legal authority is created and maintained. Like several other Symposium participants, Perrin underscores the ambivalence and paradox embedded within *The Last Colony*'s stories, as the power of international law can be used both to oppress and to liberate. Employing the same autobiographical methods Sands uses, Perrin ties *The Last Colony*'s accounts of marginalized peoples to his own personal story, and concludes by urging the use of scholarly methods and frameworks to advance what he deems perhaps the most important de-colonization, that of the mind.

II. THE POLITICS OF *THE LAST COLONY*

The stories in *The Last Colony* range across space and time, and touch on important political developments including the construction of the post-War international legal order, the Vietnam War, and the era of decolonization. A second cluster of papers addresses the politics of several of the stories Sands tells.

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6. Obiora Chinedu Okafor, The Last Colony? *Coloniality and the Legitimacy Crisis in International Legal Praxis*, 38 TEMP. INT'L & COMP. L.J. 25 (2024).

7. Ayodeji Kamau Perrin, *The Last Colony of the Mind: Narrative, Legal Advocacy, and the Decolonialization of Legal Knowledge*, 38 TEMP. INT'L & COMP. L.J. 37 (2024).

This group of papers opens with a contribution co-authored by Diane Orentlicher, a Professor at the American University Washington College of Law, and Morten Halperin, who had a distinguished career in the United States government, and thereafter as a noted analyst of national and international affairs.[8] This paper focuses on a central event in *The Last Colony*, namely a secret decision by the British government to provide the United States with land on Diego Garcia, an island in the Chagos archipelago, to construct a naval base. While Sands focuses on the motivations and actions of the British government, the first part of the Orentlicher and Halperin paper focuses on actions of the U.S. government, and in particular the decision to collude with British officials to dissemble regarding the number and nature of residents on Diego Garcia who would be displaced to build the naval base. The second part of the paper takes the form of a dialogue between Orentlicher, a noted scholar on transitional justice and human rights issues, and Halperin, her husband, who as a U.S. government official was involved in the government's decision to create a base at Diego Garcia. This dialogue addresses the role of international law in decision-making in the U.S. Department of Defense at that time, decision-making processes within large bureaucracies, and the possibility of producing human rights impact decisions in connection with proposals to create new military bases. Significantly, and to his credit, during the conversation Halperin expresses deep regret and an unreserved apology for his role in the U.S. government's decision to establish a base on Diego Garcia.

The next contribution is by Christopher Borgen, a professor at St. John's University School of Law.[9] Borgen situates the U.S. position in the Chagos litigation on the legal status of the right to self-determination at the time the archipelago was separated from the rest of Mauritius within a larger context of U.S. conceptions of national security. He argues that the United States has historically been an imperial power that refuses to self-identify as such, which in turn creates a blindspot regarding the self-determination of other peoples. Additionally, Borgen analyzes the implications of the U.S. practice of expansively identifying its own national security interests, which has the effect of undercutting countervailing narratives and claims based on the individual or collective rights of others. Borgen also emphasizes the use of procedural arguments by powerful actors, such as the United Kingdom and United States, in efforts to prevent domestic and international tribunals from reaching the merits of cases involving purported national security interests, a theme explored in other papers discussed below.

The final contribution to this set of papers is by Peter Danchin, Jacob A. France Professor of International Law at the University of Maryland School of Law.[10] This paper explores the paradoxical relations between sovereignty and self-determination that are not only implicated by the Chagos litigation, but also lie at the center of

8. Diane Orentlicher & Morten Halperin, *"We Did That": The United States' Role in Preventing the Chagos Archipelago From Exercising The Right To Self-Determination*, 38 TEMP. INT'L & COMP. L.J. 51 (2024).

9. Christopher J. Borgen, *National Security's International Empire (or, What We Talk About When We Won't Talk About Self-Determination),* 38 TEMP. INT'L & COMP. L.J. 65 (2024).

10. Peter G. Danchin, *Situating Sovereignty: Judge Donoghue's Lone Dissent in the* Chagos *Advisory Opinion*, 38 TEMP. INT'L & COMP. L.J. 79 (2024).

modern international law's conceptual structure. One puzzle presented by this case is whether the right of self-determination is possessed by the Mauritians, the Chagossians, or both. While the Court never addresses this question, its finding that the Chagos Islands were unlawfully detached from Mauritian sovereignty effectively leaves questions of Chagossian human rights, including a potential right of return, subject to the sovereign will of Mauritius. Yet the emphasis on *Mauritian* sovereignty is arguably in tension with the story told in *The Last Colony*, and in the *Chagos* litigation, which centered the testimony of Madame Elysé and on the violation of *Chagossian* human rights. Likewise, the Court's emphasis on *uti possedetis* and the territorial integrity of non-self-governing territories is arguably in tension with respect for the self-determination rights of peoples within that territory. Danchin suggests, as noted in Judge Donoghue's dissent, that the *Chagos* opinion represents a missed opportunity for the Court to begin to unpack these conceptual and doctrinal puzzles.

III. STORIES, NARRATIVES, GENRES, VOICE

The Lost Colony explicitly states that it will recount a series of interlocking stories, and a third group of papers explore the interconnected themes of narratives, stories, genres, and voice. The first paper in this group is by Diane Marie Amann, Regents' Professor of International Law and Emily & Ernest Woodruff Chair in International Law at the University of Georgia School of Law.[11] Amann's paper notes international law's dramatic trajectory from addressing only relations between states to a discipline that meaningfully involves international organizations, individuals, and a variety of other non-state actors. Thus, Madame Elysé's story—which lies at the heart of Sands' volume—would not have been legible to earlier generations of international lawyers. Yet using Madame Elysé's individual story to illuminate more abstract stories and claims risks instrumentalizing that story. Amann, who has written about the largely overlooked roles of women lawyers at Nuremberg and other postwar trials, emphasizes the authorial qualities of empathy, candor, and humility as strategies for avoiding or minimizing the risks associated with this form of storytelling; doing so can enhance the odds of fulfilling the emancipatory promise of this form of storytelling.

The next paper is by Jonathan H. Marks, a Professor of Bioethics, Humanities, Law, and Philosophy at Pennsylvania State University.[12] Marks invokes several fictional works, including by Daniel Defoe, Edgar Rice Burroughs, George Orwell, and Alejandro Zambra, to reflect on the nature of fiction, and in particular on how states construct narratives and fictions of erasure. Marks emphasizes the colonial fictions associated with the Chagos saga, including that the archipelago was not meaningfully populated. How can these fictions be countered? Marks contrasts the United Kingdom's efforts at erasure with the decision to present a video of Madame Elysé's testimony to the ICJ during the oral hearing; he understands this testimony

11. Diane Marie Amann, *What Figures Lurk on Madame Elyse's Path? Reflections on Philippe Sands'* The Last Colony, 38 TEMP. INT'L & COMP. L.J. 91 (2024).

12. Jonathan H. Marks, *The Art of Fiction: Neocolonialism, Narrative Redress, and International Law*, 38 TEMP. INT'L & COMP. L.J. 103 (2024).

as offering a counternarrative to the colonial narratives offered by the British government. While this is a successful litigation strategy, Marks paints a more nuanced picture, noting that any (re)telling of a story necessarily implicates the reader or listener in an author's exercise of narrative control.

The next paper is by Sebastian von Massow, a researcher at the European University Institute.[13] He notes that *The Last Colony* presents a progress narrative, with international law promoting a slow, steady progress towards justice, including its role in the demise of colonialism. Yet von Massow seeks to problematize this vision. Like Danchin, von Massow raises difficult and troubling questions about the relationship of the distinct legal claims of Mauritius and the Chagossians. But whereas Danchin emphasizes the conceptual and doctrinal aspects of these relationships, von Massow foregrounds questions of voice. Can or should the Mauritius legal team advocate for the Chagossians? What, exactly, is the relationship between the Mauritian claim of self-determination and the Chagossian grievance of exile, and who should speak to this issue? Von Massow suggests that Mauritius's litigation position not only instrumentalizes Chagossian suffering for its own purposes, but also obscures the Mauritian role in Chagossian expulsion and exile. Finally, von Massow suggests that the internal contradictions in the Mauritian litigation posture reveals how contemporary international law is simultaneously colonial and anti-colonial, both advancing self-determination claims of some marginalized actors, while eliding more complex claims of others.

My symposium contribution explores three sets of questions raised by *The Last Colony*'s interlocking stories.[14] First, international courts and judges are central protagonists in Sands' narrative. Yet the book recounts a series of ethical lapses and doctrinal failures that could lead one to wonder why states would entrust matters of substantial political, economic or legal significance to these bodies, or whether they should do so. Relatedly, the book presents contrasting stories of international law. One the one hand, *The Last Colony* presents a progress narrative, highlighting international law's capacity to correct past mistakes and advance substantive justice. On the other hand, the book highlights international law's unpredictability and contingency. The book does not adequately address the tension between these two presentations of international law. Finally, I juxtapose *The Last Colony*'s account of the Chagos litigation with Hannah Arendt's account of the Eichmann trial to examine how the author's positionality vis à vis the legal proceedings they analyze both enriches and limits the stories that they are able to tell.

IV. THE ROLES, FUNCTIONS, AND LIMITS OF INTERNATIONAL COURTS AND TRIBUNALS

The Last Colony devotes substantial attention to proceedings at the International Court of Justice and the International Tribunal for the Law of the Sea, and the next set of papers explores the role and functions of international courts and tribunals. In his contribution, Dan Bodansky, Regents and Foundation Professor of

13. Sebastian von Massow, *Who Gets to Speak? International Lawyering and Chagossian Voices in* The Last Colony, 38 TEMP. INT'L & COMP. L.J. 117 (2024).

14. Jeffrey L. Dunoff, *Storytime*, 38 TEMP. INT'L & COMP. L.J. 129 (2024).

Law at Sandra Day O'Connor College of Law at Arizona State University, explores the potential conflict between achieving substantial justice and upholding procedural legal doctrines such as limitations on jurisdiction and standing.[15] Should courts bend procedural doctrines to reach "better" substantive outcomes? While acknowledging legal realist insights concerning the indeterminacy and manipulability of legal doctrine, Bodansky argues that courts should be judicious in bending procedural rules to achieve substantive justice, in part due to concerns about judicial legitimacy, and in part to concerns over the principle of legality. Bodansky highlights the power of procedure, which limits the powers not only of political actors, but also of international courts and tribunals.

In his paper, Jorge Contesse, Professor of Law at Rutgers Law School, explores different aspects of international courts, and in particular changing roles of the International Court of Justice.[16] First, Contesse suggests that while the ICJ remains a forum for the settlement of inter-state disputes, and issues advisory opinions, elements of its proceedings are akin to those of a human rights court. Thus, in the Chagos litigation, it received testimony from Madame Elysé and considered violations of Chagossian human rights. Second, the seemingly sharp distinction between the Court's judgments in contentious disputes and its issuance of advisory opinions has become somewhat porous. Thus, while advisory opinions address broad topics, such as self-determination, they also in effect produce rulings on concrete matters that are in dispute between

states. Moreover, while advisory opinions do not qualify as "decisions" under the ICJ Statute and are technically non-binding, they nonetheless have legal effect, as an ITLOS opinion in a dispute over the maritime boundary between Mauritius and Maldives explicitly found. Finally, in the *Chagos* litigation, Contesse sees an instantiation of larger trends in international litigation, specifically including a recalibration of the architecture of the post-1945 international order and an increasing use of international tribunals by less powerful actors against more powerful actors.

The final contribution to this set of papers is by Elizabeth Chinenyenwa Nwarueze, a lawyer with particular expertise in the law of the sea.[17] This paper focuses on the concept and doctrine of legal personality. Building on insights from sociological approaches to law, which emphasize that law is a complex social practice that structures human interaction, Nwarueze argues that limited understandings of legal personality in international law have stultifying effects on the development, interpretation and application of legal doctrine. She argues for a more expansive and more flexible approach to legal personality, which can give international law a human face and, in turn may permit international courts to more effectively advance international justice. This paper can be usefully juxtaposed with

15. Dan Bodansky, *Nitpicking Justice*, 38 TEMP. INT'L & COMP. L.J. 141 (2024).

16. Jorge Contesse, Chagos *and "The Intelligence of a Future Day*," 38 TEMP. INT'L & COMP. L.J. 149 (2024).

17. Elizabeth Chinenyenwa Nwarueze, *The Participant and Personality of International Law: A Reflection on* The Last Colony – A Tale of Exile, Justice and Britain's Colonial Legacy *by Philippe Sands*, 38 TEMP. INT'L & COMP. L.J. 159 (2024).

Bodansky's; whereas Bodansky suggests that international judges avoid the temptation to bend extant procedural rules to advance substantive justice, Nwarueze urges reform to procedural rules, such as those on legal personality and standing, that have historically been used to frustrate efforts to advance substantive justice.

V. OUTCOMES, COMPLIANCE AND (IN)JUSTICE

Notwithstanding Tom Franck's declaration nearly thirty years ago that international law had entered "its post-ontological era,"[18] persistent doubts about international law's effectiveness and enforceability remain. In her paper, Margaret deGuzman, James E. Beasley Professor of Law at Temple Law School, explores whether the ICJ's opinion in fact brings justice to the Chagossians.[19] Observing that negotiations between Mauritius and the United Kingdom have not, to date, borne fruit, deGuzman highlights increasing calls to deploy international criminal law (ICL) as an instrument of change. She notes, preliminarily, that to date there have not been successful prosecutions of a failure to permit people to return to their former homes as "crimes against humanity." Yet she paints a much more nuanced picture of the turn to ICL. Specifically, she argues that calls to expand ICL's scope and application are often not intended to trigger prosecutions, but rather to draw attention to certain situations and to express condemnation of certain policies. Finally, deGuzman notes the danger that "criminalizing" the discourse around the Chagossians may as a practical matter complicate diplomatic negotiations for their eventual return to the islands. For all these reasons, deGuzman suggests that justice for the Chagossians may more readily be achieved through political processes than legal judgments, particularly criminal judgments.

In his contribution, Mark Drumbl, the Class of 1975 Professor of Law at Washington and Lee University, tacks in a different direction.[20] *The Last Colony* is most obviously a story of courts. Yet Drumbl peers between the lines to suggest that it is equally a book about the sea, which "suffuses and infuses the book's plots and pleats."[21] Yet Drumbl emphasizes that the sea is more than a literary device or symbol. He notes the book's discussions of the United Nations Convention on the Law of the Sea, which can be read as a post-colonial instrument, and an arbitral decision involving Mauritius from the International Tribunal for the Law of the Sea following the ICJ's *Chagos* opinion. Thus in *The Last Colony*, the law of the sea becomes a vehicle for human rights on land. Drumbl juxtaposes the story of *The Last Colony* with a play by Aimé Césaire that reworks Shakespeare's *The Tempest*—itself a saga of islands and an angry sea—to underscore that, for Chagos, international law produced some measure of justice.

The final contribution to this group of papers is from Jean Galbraith, a Professor at the University of Pennsylvania Carey Law School.[22] Her paper underscores the

18. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1995).

19. Margaret M. deGuzman, *Justice for the Chagossians: What Role for Criminal Law?,* 38 TEMP. INT'L & COMP. L.J.. 169 (2024).

20. Mark A. Drumbl, *La Cour! La Mer!,* 38 TEMP. INT'L & COMP. L.J. 179 (2024).

21. *Id.*

22. Jean Galbraith, *Two Island Stories*, 38 TEMP. INT'L & COMP. L.J. 185 (2024).

deep ambivalence of *The Last Colony*'s account of international law and international legal proceedings. International law provided an impartial forum for the presentation of Mauritius's claims; yet it also contained extensive doctrinal roadblocks to accessing that forum, and it did not provide a forum for the Chagossians to directly present their claims. Moreover, even if international law eventually pronounced on the illegality and illegitimacy of the UK's actions regarding Mauritius, it has not (yet) generated an effective remedy. For Galbraith, as for many other Symposium contributors, Sands' book teaches important lessons regarding both the promise and the limits of international law, and on the need to reform and revitalize the international legal framework to better advance international justice.

VI. CONCLUSION

When my Temple Law colleagues and I discussed organizing a Symposium on a recent monograph addressing an international legal topic, we quickly identified *The Last Colony* as an accessible yet significant book worthy of sustained attention. We were confident that we could attract an outstanding group of interdisciplinary scholars to reflect upon the text, and we were delighted when Philippe Sands agreed to participate in a writer's workshop where the papers in this Symposium were presented and discussed.

While we were confident that we would host a stimulating and productive workshop, we underestimated the intellectual energy and dynamism that the group would generate and how stimulating the resulting papers would be. Both individually and in the aggregate, these papers do much to explore a number of important themes that *The Last Colony* raises, and to advance debates over the implications of international law's colonialist legacy that *The Last Colony* so skillfully illuminates. This book already stands as the definitive chronicle of an important international judicial proceeding, and the Symposium papers will serve as important contributions to the weighty doctrinal, conceptual, and political issues that are implicated. I am honored to have had the opportunity to organize this project, and am grateful to Philippe Sands for his involvement, and to all of the authors for their efforts.