



Adjudicating International Human Rights

ESSAYS IN HONOUR OF SANDY GHANDHI

Edited by

James A. Green and Christopher P.M. Waters

Foreword by Dame Rosalyn Higgins

BRILL | NIJHOFF

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Foreword

It is in every way appropriate that Brill Nijhoff, a leading publisher in international law, should be bringing out this book of essays in honour of Sandy Ghandhi.

Sandy has his BA and MA from New College, Oxford, and then an LLM from King's College London. All of his teaching life he has been at the University of Reading, to which he has given extraordinary service since 1979.

He is, of course, best known to a wider public for his writings on international human rights law, and in particular the law and practice relating to the International Covenant on Civil and Political Rights. I was a Member of the Human Rights Committee under that Covenant from 1985 to 1995 and it was during that time that I first met Sandy. He was then preparing his outstanding book on *The Human Rights Committee and the Right of Individual Communication*, which was published in 1998. I found it exceptional that a book with so much insight and appreciation of the legal complexities could be written by one who was not actually present at the various closed meetings on the case law.

We have been friends ever since and I have seen his many chapters in books covering various aspects of human rights law, often with a special emphasis on the Human Rights Committee. He has also written on *Al-Skeini*, the ICJ *Georgia v. The Russian Federation* case, and family and child rights. From 2000 to 2012 he was responsible for Oxford University Press' *International Human Rights Documents*, essential for students and scholars alike. Less well known are the Reports he has been asked to prepare for the Law Society on different human rights issues. While many academic international lawyers were also active, and highly visible, at the Bar, Sandy has, over the years, given important service to the Law Society.

I think this fact has typified the man. He has never sought to draw attention to himself, leaving his writings to do the talking. That this self-effacing individual is widely appreciated by his peers is evidenced by the distinction of those who have contributed chapters to this volume. The list of contributors, as well as the wide variety of topics within the field of human rights covered, reflect the scholar that they honour.

Not only has this quiet man been appreciated for his work, but also for his qualities of character. He has been an exemplary colleague at Reading, doing everything asked of him, and more. He was a caring and knowledgeable teacher, giving time and all support to his students. He also willingly took on a large number of administrative duties and it is clear that Sandy was very highly regarded by his colleagues, not only for his scholarship but for the exceptional

overall contribution he had made over the years to the Law School and the University.

This kind and gentle man has other qualities which make ever more appropriate this volume to honour him. Family and friendship reflect his nature. He and his wife Jennifer, with her many skills, have throughout the years helped each other and given every support to their children. It is entirely typical that Sandy and Jennifer wish now, in retirement, to help their parents in any way possible. Sandy is also a great nurturer of his friendships. He remains in close touch and readily brings his friends into the news-circle of his many activities.

Dame Rosalyn Higgins

Preface

This volume has been prepared to honour the career of Professor Sandy Ghandhi on the occasion of his retirement. It has been an absolute privilege for me to have been involved as an editor and contributor to this work. Sandy's influence on the field of international human rights law has been immense, and it is only fitting that it be recognised by a collection such as this.

My co-editor, Chris Waters, has examined Sandy's significant contribution to international human rights law in this volume's Introduction, so I will not dwell on that here. I just want to highlight in this preface the fact that Sandy's impact within his profession goes far beyond his contribution to his chosen field, hugely significant though that has been. He has also tirelessly worked to support colleagues and fellow researchers (especially junior colleagues/researchers), striven to continue to improve the Law School at the University of Reading in all respects and – crucially – provided the best possible teaching environment for his students, year-on-year.

Sandy first taught me when I was 18, as an undergraduate student, and he has been a constant positive presence in my life ever since. Following my appointment to the academic staff at Reading in 2006, his mentorship with regard to all aspects of my job has been invaluable to me. His constant support has played a significant role in my development as an academic, and I know that I will continue to benefit from the guidance he has given me in the future. Of course, I am far from alone in this regard; many of the contributors to this volume were also mentored at various stages of their career by Sandy, and there are countless other students and academics that he has similarly supported over the years.

This volume is intended as a tribute to Sandy's work in the field of international human rights law, but Chris and I hope that it also goes some way to thanking him more generally on behalf of all of those that he has helped during a wonderful career.

To me, he has been a teacher and a mentor, and will always remain a great friend.

James A. Green

Contributors

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Tawhida Ahmed is an Associate Professor in the School of Law, University of Reading. She specialises in human rights protection and the EU. She has written widely on a range of human rights issues, including the EU's relationship with international and European law, minority rights protection in EU and international law, as well on topics such as cultural rights, linguistic rights and the freedom of religion. Tawhida is the author of *The Impact of EU Law on Minority Rights* (Hart, 2011). She is Associate Fellow of the Human Rights Consortium, University of London and is a founding member of the UK Network on Human Rights and Minority Groups.

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Craig Barker took up a Chair in Law at the Sussex Law School, University of Sussex in 2004 where he served as Head of Department from 2009–2012. Previously he was Lecturer and then Senior Lecturer in the School of Law at the University of Reading (1993–2004). He has written extensively on immunities from jurisdiction, including two monographs on diplomatic immunity, as well as a number of articles on the Pinochet litigation. Craig has also written a monograph examining the relationship between international law and international relations and is co-author of *The Encyclopaedic Dictionary of International Law* (Oxford University Press, 3rd edition, 2009). More recently he has been writing about the *Germany v. Italy Immunity Case*, as well as the concept of responsibility to protect. He is International Tribunals editor of the *International and Comparative Law Quarterly* and book reviews editor of the *British Yearbook of International Law*.

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Applying the Law of State Responsibility and the Due Diligence Principle (TMC Asser Press, 2008) and editor of *The Liberal Way of War: Legal Perspectives* (Ashgate Publishing, 2013). His next monograph, which is provisionally entitled *Self-Determination, Statehood, and the Law of Negotiation: The Case of Palestine*, will be published in 2015 by Hart Publishing.

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Professor Malcolm D. Evans

Malcolm D. Evans, OBE, is Professor of Public International Law at Bristol University. He has worked in the area of torture prevention for over 20 years. He has written widely on the work and practice of the European Convention for the Prevention of Torture; since 2009 he has been an elected member of the UN Subcommittee for the Prevention of Torture (the SPT) and since 2011 has been its Chair. He is currently Vice Chair and Chair-elect of the Meeting of Chairs of Human Rights Treaty Bodies. He also works extensively on issues concerning the international protection of the freedom of religion or belief and since 2010 has been a member of the UK Foreign Secretary's Human Rights Advisory Group. He is the author or co-author of several books on the subject of torture, including *Preventing Torture* (Oxford University Press, 1997), *Combating Torture in Europe* (Council of Europe, 2001); and *The Optional Protocol to the UNCAT* (Oxford University Press, 2011), as well as many articles and chapters. He is also editor of *International Law* (4th edition, Oxford University Press, 2014) and General Editor of the *International and Comparative Law Quarterly*.

Dr James A. Green

James A. Green is Associate Professor of Public International Law at the University of Reading, where he has been a member of staff since 2006.

Previously, he studied for his doctorate at the University of Nottingham and, in 2005, was a visiting research scholar at the University of Michigan. He is the author of *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009), which was the winner of the Francis Lieber Prize, awarded by the American Society of International Law's Lieber Society, as well as the co-editor of *Conflict in the Caucasus: Implications for International Order* (with C.P.M. Waters, Palgrave, 2010). He has published numerous articles on international law in leading journals. James is co-editor-in-chief of the *Journal on the Use of Force and International Law* and is a member of the International Law Association Committee on the Use of Force. His next monograph, *The Persistent Objector Rule in International Law*, will be published in 2015 by Oxford University Press.

Dame Rosalyn Higgins

Rosalyn Higgins, DBE, QC, is the former President of the International Court of Justice (member 1995–2009; President 2006–2009). She was previously professor of international law at the University of London (1981–1995), and prior to that held positions at the Royal Institute of International Affairs, the London School of Economics and the University of Kent. Dame Rosalyn practiced public international law and petroleum law in the English courts and before various international courts and tribunals. Having held numerous adjudicative, academic and professional roles in an illustrious career, it is of particular note in the context of this volume that she was a member of the Committee on Human Rights under the International Covenant on Civil and Political Rights, including acting as its Special Rapporteur for new cases (member, 1985–1995; Special Rapporteur, 1989–1991). Dame Rosalyn has published numerous seminal works and articles on various aspects of public international law. She is the President of the British Institute of International and Comparative Law and, in October 2009, was appointed advisor on international law to the UK government's inquiry into the Iraq war ('Chilcot Inquiry').

Nora Honkala

Nora Honkala is a final-year PhD candidate at the University of Reading. Sandy Ghandhi was one of her supervisors until his retirement in September 2013. Nora's thesis examines the extent and the ways in which the domestic application of international law plays a role in the protection of the rights of asylum seeker women in forced marriage cases. Her doctoral research is funded by the Economic and Social Research Council. She holds an LLB from University of Melbourne (2006) and an LLM in International Law and World Order from University of Reading (2009).

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Javaid Rehman is a Professor of Islamic Law and Muslim Constitutionalism at Brunel Law School. He obtained an LLB (Hons) from the University of Reading and was then awarded LLM and PhD degrees from the University of Hull. He is a former Head of Brunel Law School, Brunel University, London (2009–2013) and currently directs the Brunel University Research Centre of Security, Media and Human Rights (SHRM). Professor Rehman is a member of the International Law Association (ILA) and is the co-rapporteur of the ILA's *Islamic Law and International Law Committee*. Professor Rehman has been invited to provide legal opinions in a number of high profile cases involving Islamic law, international terrorism and human rights law. He has written extensively on the subject of Islamic Law, international human rights and minority rights, with over one hundred publications. His recent works include *International Human Rights Law* (Longman, 2010); *Islamic State Practices, International Law and the Threat from Terrorism* (Hart Publishing, 2005); and *Religion, Human Rights and International Law* (with S.C. Breau, Brill, 2007).

Professor Sir Nigel Rodley

Nigel Rodley, KBE, PhD (Essex), is Professor of Law and Chair of the Human Rights Centre at the University of Essex where he has taught since 1990. He is the current Chairperson of the UN Human Rights Committee (member since 2001) and a former UN Special Rapporteur on Torture (1993–2001). He is President of the International Commission of Jurists. The Chair of the Board of Trustees of the International Centre for Prison Studies, he is also a Patron of the Freedom from Torture (former Medical Foundation for the Care of Victims of Torture and a Patron of REDRESS. He is a member of Foreign Secretary's Advisory Group on Human Rights (established November 2010). Sir Nigel is Co-Editor-in-Chief of the *Israel Law Review*. His publications include the landmark and now standard work *The Treatment of Prisoners under International Law* (with Matt Pollard, Oxford University Press, 3rd edition, 2009).

Professor Christopher P.M. Waters

Christopher Waters is Professor at the Faculty of Law, University of Windsor, Canada. He joined the Faculty in 2007 and served as Associate Dean from 2009–2012. His previous academic post was at the School of Law of the University of Reading. In 2012–2013 he was a visiting scholar at the Centre d'Etudes et de Recherche Internationales et Communautaires at Aix-Marseille Université. Dr Waters teaches and researches on various aspects of public international law, with an emphasis on international humanitarian law. His publications include the following books: *A Guide to International Law Careers* (with A. Smit, British Institute of International and Comparative Law, 2nd edition, 2014); *Conflict in the Caucasus: Implications for International Order* (with J.A. Green, Palgrave 2010); *British and Canadian Perspectives on International Law* (Martinus Nijhoff, 2006); *The State of Law in the South Caucasus* (Palgrave, 2005); and *Counsel in the Caucasus: Professionalization and Law in Georgia* (Martinus Nijhoff, 2004). He has extensive field experience with international organizations in Eastern Europe and the former Soviet Union.

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Introduction

Christopher P.M. Waters

1 Ghandhi the Generalist

This book brings together established and emerging scholars to honour Professor Sandy Ghandhi on his retirement. It does so through a series of essays probing the framework and adequacy of international human rights adjudication. Our emphasis on human rights adjudication is inspired by Ghandhi's impressive scholarship, as well as his teaching and advocacy, in this field.¹ However, it should be pointed out that while Ghandhi is best known for his human rights work, he has published in a variety of areas. These areas include general public international law, tort law, damages, European Union law, marital rape, blasphemy, family law, environmental law, highway law, water law and employment law. That Ghandhi's intellectual curiosity has taken him across diverse legal fields is perhaps most evident in the subject matter of a case comment which he co-wrote with his spouse, fellow law professor Jennifer James, on the protection of cultural property. The case involved the recovery of cultural artefacts where one of the claimants was the Sivalingam, "a sculpted stone phallus from a defunct temple."² Though the Sivalingam did not appear in his later scholarship, Ghandhi's generalist base allowed him to draw jurisprudential connections, including in his human rights scholarship, which others might have missed. For example, in a comment on the *Al Skeini* case at the European Court of Human Rights (ECtHR) on the extraterritorial reach of the European Convention on Human Rights (ECHR),³ Ghandhi wrote: "[t]his appears to be a case where the Court, faced with an entirely new factual

1 While this book focuses on Ghandhi's scholarship, we would be remiss in not pointing out that his human rights work also took place in numerous teaching and advocacy fora. At the University of Reading he taught international human rights to countless undergraduate and graduate students and his edited compilation of human rights instruments for law students reached thousands more: Sandy Ghandhi, *Blackstone's International Human Rights Documents* (8th ed., United Kingdom: Oxford University Press, 2012). Many of the contributors to this book are former students or mentees. In terms of advocacy he laboured, without fanfare, with several organisations, including the Human Rights Committee of the Law Society of England and Wales.

2 Sandy Ghandhi and Jennifer James, "The God That Won," *International Journal of Cultural Property* 1 (1992): 369, 370.

3 *Al Skeini v. United Kingdom*, 53 EHRR 18 (ECHR 2011).

matrix, felt bound to find in favour of the applicants on the basis of vulnerability for reasons of broad Council of Europe Public policy by straining both logic and precedent.”⁴ Drawing an analogy to a decision where the English Court of Appeal expanded the notion of negligence on subjective policy grounds (in a manner rejected by the House of Lords in subsequent cases), he added: “[t]he approach of the Grand Chamber to dealing with the role of policy factors in determining liability in novel factual situations is remarkably similar to the approach adopted by Lord Denning MR in *Dutton v. Bognor Regis Urban District Council*...”⁵

2 Ghandhi's Approach to International Human Rights Adjudication

Turning now to the theme of this volume, it is necessary to define the scope of what we intend by the term “adjudication” in the human rights context. Lon Fuller defined adjudication broadly. In a posthumously published paper, he wrote:

[I]t includes a father attempting to assume the role of judge in a dispute between his children over possession of a toy. At the other extreme it embraces the most formal and even awesome exercises of adjudicative power...[I]ts application is not restricted to tribunals functioning as part of an established government. It includes adjudicative bodies which owe their powers to the consent of the litigants expressed in an agreement of submission, as in labor relations and in international law.⁶

Similarly, this book addresses international human rights adjudication in a broad sense. Although, as noted above, Ghandhi had a generalist base, his primary and abiding interest was human rights protection through legal institutions. In particular, he was interested in what remedy would be available when a human rights breach occurred. Dinah Shelton has pointed out that the term

4 Sandy Ghandhi, “*Al Skeini* and the Extra-Territorial Application of the European Convention on Human Rights,” in *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry*, edited by Andrew Burrows, David Johnston and Reinhard Zimmermann (Oxford: OUP, 2013), 575, 582.

5 *Ibid.*, at note 36.

6 Lon L. Fuller, “The Forms and Limits of Adjudication,” *Harvard Law Review* 92, 2 (1978): 353, 353–354.

“remedy” has two meanings, one procedural and one substantive: “[i]n the first sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts administrative agencies, or other competent bodies. The second notion of remedies refers to the outcome of the proceedings, the relief afforded to the successful claimant.”⁷ Gandhi was particularly interested in the first, *procedural*, notion of remedy, although much of his work, including his writing on the death penalty and interim measures of protection, crossed these conceptual boundaries. Throughout his career, Gandhi’s scholarship consistently asked an academic lawyer’s questions: through what mechanism or process can international human rights standards be made real? How can an individual or group access human rights justice?

To address these questions, Gandhi took a keen and detailed view of the institutional design and procedures of bodies charged with adjudicating human rights. Procedure is relatively neglected in the legal academy,⁸ but Gandhi was of the view that proper procedures made all the difference when it came to both the protection of an individual complainant and the credibility of the adjudicative body in the eyes of States and other actors. It must be stressed that Gandhi’s view of processes extended beyond the rules of procedure and the working methods of human rights institutions, important as those features are. He was convinced that careful, well-reasoned decision making by human rights bodies, along the lines of a sound common law court’s reasoning, would result in greater long-term compliance by States with their obligations. Accordingly, his analysis would often probe the quality of jurisprudence.⁹ His scrutiny of the jurisprudence was not so much to better understand the normative scope of a particular right, although he was interested in that too, but rather to gauge how well the institution could further human protection within the confines of the relevant treaty or legislation.

7 Dinah Shelton, *Remedies in Rights Law* (Oxford: OUP, 2005), 7.

8 Jeremy Waldron, “The Rule of Law and the Importance of Procedure,” in *Getting to the Rule of Law*, edited by James E. Fleming (New York: New York University Press, 2011), 3–31.

9 For example, in his book, P.R. Gandhi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Aldershot: Ashgate Publishing Co, 1998), 395 [hereinafter *The Human Rights Committee*], Gandhi wrote that, while the Human Rights Committee is not a court, “it is well aware that, for its authority under the O.P. to be respected by both States Parties and authors alike, it must be seen to be acting in a manner which approximates, as nearly as possible to the way in which a court acts, when exercising its functions under the O.P. Accordingly, the Committee strives to make its decisions conform to a judicial pattern, to produce cogent *rationes decidendi* and develop a consistent jurisprudence.”

As is clear from its chapter titles, this volume does not confine itself to the adjudication of human rights in any particular human rights institution or system (such as, for example, that of the United Nations). Rather, it encompasses adjudication emanating from all manner of courts, boards, commissions, and treaty bodies which are charged with interpreting and applying international human rights law. Ghandhi's view has been that human rights protection needs to be pressed on every adjudicative front reasonably available. While cognizant of the concerns about the fragmentation of international law, Ghandhi suggests that human rights adjudication as a part of a global conversation across legal institutions, including within the United Nations system, is a workable way forward.¹⁰

Ghandhi is perhaps best known for his work on the United Nations Human Rights Committee, the treaty enforcement mechanism established under the International Covenant on Civil and Political Rights (ICCPR).¹¹ The Committee, a body of independent experts, considers State reports on compliance with the ICCPR, which currently has 167 parties, and issues General Comments on thematic issues. The Committee also considers individual complaints emanating from the 114 parties to the First Optional Protocol to the ICCPR.¹² The ICCPR system has been described as "the most serious machinery ever for the realization of human rights."¹³ Not surprisingly, therefore, the ICCPR and the Committee have received a great deal of scholarly attention.¹⁴

Although now two and a half decades old, Ghandhi's book, *The Human Rights Committee and the Right of Individual Communication: Law and Practice*, remains a leading text on the Committee and the right of individuals to petition the Committee following the exhaustion of domestic remedies.¹⁵ Various

10 Sandy Ghandhi, "Human Rights and the International Court of Justice in the *Ahmadou Sadio Diallo* Case," *Human Rights Law Review* 11, 3 (2011): 536.

11 Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, adopted by U.N. General Assembly resolution 2200A (XXI), New York, 16 December 1966.

12 Office of the High Commissioner for Human Rights, *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted by U.N. General Assembly resolution 2200A (XXI), New York, 16 December 1966.

13 Alfred de Zayas, "The Potential for the United States Joining the Covenant Family," *Georgia Journal of International and Comparative Law* 20 (1990): 299, 309–310.

14 Two recent studies are Yogesh Tyagi, *The UN Human Rights Committee Practice and Procedure* (Cambridge: Cambridge University Press, 2011); and Jakob Th. Möller and Alfred de Zayas, *The United Nations Human Rights Committee Case Law 1977–2008: A Handbook* (Kehl: N.P. Engel, 2009).

15 *The Human Rights Committee*, *supra* note 9. For a recent study citing Ghandhi's book see Tyagi, *supra* note 14, 4, at note 20.