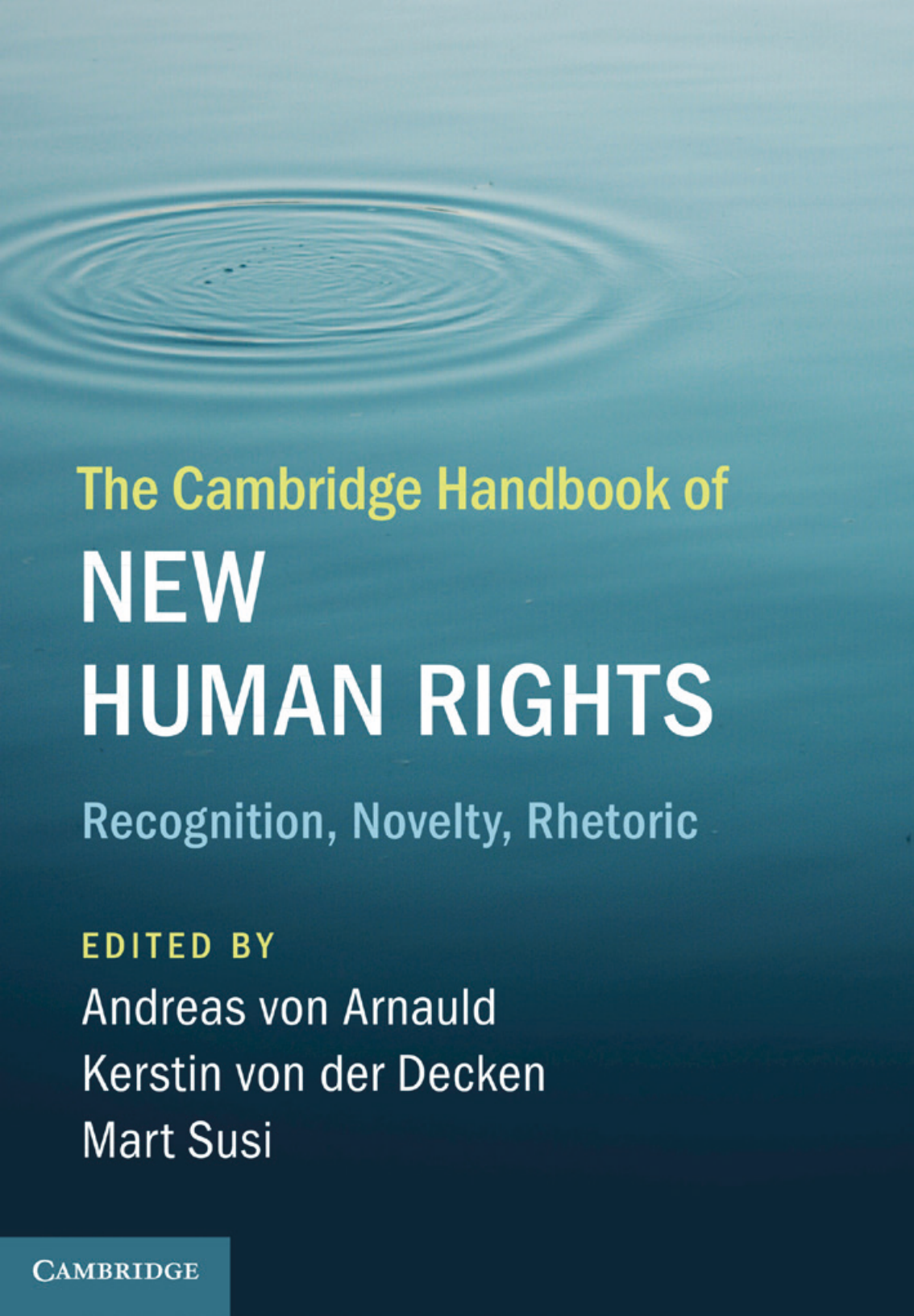
The Cambridge Handbook of
NEW
HUMAN RIGHTS
Recognition, Novelty, Rhetoric
EDITED BY
Andreas von Arnauld
Kerstin von der Decken
Mart Susi
CAMBRIDGE

THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS

This book provides in-depth insight to scholars, practitioners and activists dealing with human rights, their expansion and the emergence of 'new' human rights. Whereas legal theory tends to neglect the development of concrete individual rights, monographs on 'new' rights often deal with structural matters only in passing and the issue of 'new' human rights has received only cursory attention in the literature. By bringing together a large number of emergent human rights that are analysed by renowned human rights experts from around the world, and combining these analyses with theoretical approaches, this book fills the lacuna. The comprehensive and dialectic approach, which enables insights from individual rights to overarching theory and vice versa, will ensure knowledge growth for generalists and specialists alike. The volume goes beyond a purely legal analysis by observing the contestation, rhetoric and struggle for recognition of 'new' human rights, thus speaking to human rights professionals beyond the legal sphere.

ANDREAS VON ARNAULD is Managing Director of the Walther Schücking Institute for International Law at Kiel University, Germany. He is the author of an established German textbook on international law and numerous other publications on human rights law, peacekeeping, armed conflict, dispute settlement, comparative constitutional law and foundations of law.

KERSTIN VON DER DECKEN is Director of the Walther Schücking Institute for International Law at Kiel University, Germany. She does research and publishes extensively on human rights focusing on the comparison of human rights systems. She is Visiting Professor at various universities, including the University of St. Gallen, Switzerland, and Paris-Sorbonne University, Abu Dhabi.

MART SUSI is Professor of Human Rights Law and Head of Legal Studies at Tallinn University, Estonia. He is the editor of several volumes focusing on new media, human rights in the digital domain and philosophy of law. Recently he has proposed the Internet Balancing Formula and has held seminars on the topic of protecting human rights in the digital domain at various universities across the globe.

The Cambridge Handbook of New Human Rights

Recognition, Novelty, Rhetoric

Edited by

ANDREAS VON ARNAULD

Kiel University

KERSTIN VON DER DECKEN

Kiel University

MART SUSI

Tallinn University

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108484732
DOI: 10.1017/9781108676106

First published 2020

Printed in the United Kingdom by TJ International Ltd, Padstow Cornwall

A catalogue record for this publication is available from the British Library.

ISBN 978-1-108-48473-2 Hardback

Contents

Figures

Contributors

Kohki Abe is Professor of Peace Studies at Meiji Gakuin University, Japan and an Emeritus Professor of International Law at Kanagawa University, Japan. He holds a doctorate in law from Waseda University, Waseda University and an LLM from the University of Virginia School of Law. He currently serves as a Refugee Examination Counselor for the Minister of Justice, an associate member of the Science Council of Japan and Vice-President of the Japan Branch of the Asian Society of International Law. He is the founding president of Human Rights Now (a Japan-based international NGO). His publications include *International Law's Stories: A Kaleidoscope of State Functions* (in Japanese, 2019), *Human Rights-ization of International Law* (in Japanese, 2014), 'Implementation of Universal Human Rights Standards in Japan: An Interface of National and International Law, in *The Universalism of Human Rights* (R. Arnold (ed)., Springer, 2013) and *Overview of Statelessness: International and Japanese Contexts* (UNHCR, 2010).

Roberto Andorno is Associate Professor of Biomedical Law and Bioethics at the Faculty of Law, and Research Associate at the Institute of Biomedical Ethics and Medical History of the University of Zurich. He holds doctoral degrees in law from the Universities of Buenos Aires and Paris-Est, both on topics related to the legal aspects of assisted reproductive technologies. From 1998 to 2005 he served as a member of the International Bioethics Committee (IBC) of UNESCO as the representative of Argentina. His research interests include a variety of topics at the intersection of bioethics and human rights. He is the author of numerous books, articles and book chapters on these issues, and notably of *Principles of International Biolaw: Seeking Common Ground at the Intersection of Bioethics and Human Rights* (2013).

Andreas von Arnauld is full Professor of Public Law, Public International and European Law at Kiel University and Managing Director of the Walther Schücking Institute for International Law. Before taking this position (in 2013) he was full professor at Helmut Schmidt University Hamburg (2006–12) and Münster University (2012–13). He holds a Dr. jur. from Hamburg University (1998) and a post-doctoral qualification (Habilitation) from Free University Berlin (2005). Among numerous publications on, inter alia, human rights law, peacekeeping, armed conflict, dispute settlement, comparative constitutional law, legal theory and legal history, he is the author of a prominent textbook on international law (in German, 4th edition 2019) and co-editor of the *German Yearbook of International Law* and of *Die Friedens-Warte: Journal for International Peace and Organization*.

Samantha Besson is Professor at the Collège de France in Paris where she holds the Chair Droit international des institutions, and is Professor of Public International Law and European Law at the University of Fribourg in Switzerland. She has published on a variety of topics in general international law, European public law and democratic theory, with a special interest in human rights law and theory. She is the author and editor of numerous books in English and French, including *Legal Republicanism: National and International Perspectives* (Oxford University Press, 2009) ; *The Philosophy of International Law* (co-edited with John Tasioulas) (Oxford University Press: 2010; and *The Oxford Handbook on the Sources of International Law* (co-edited with Jean d'Aspremont) (Oxford University Press: 2017. She held visiting professorships at Duke, Harvard and Penn Law Schools, and has lectured in various capacities at the Hague Academy of International Law. She was a Fellow of the Wissenschaftskolleg zu Berlin and is member of the Scientific Board of the Institute of Advanced Study in Nantes.

Sigrid Boysen is Professor of Public law, European and Public International Law at Helmut Schmidt University, Hamburg. Before joining Helmut Schmidt University, she was Associate Professor at Free University Berlin. Her research focuses on the theory of international law, transnational resource law and constitutional law. Her recent publications include journal articles on global public goods and various chapters on constitutional rights. She is co-editor of the international law review *Archiv des Völkerrechts*.

Eva Brems (LLM Harvard 1995, PhD KU Leuven 1999) is Professor of Human Rights Law at Ghent University (Belgium), where she founded the Human Rights Centre (www.hrc.ugent.be/). Her research interests include most areas of human rights law, in European and international law as well as in Belgian and comparative law. See also the blog www.strasbourgobservers.com.

Jan-Christoph Bublitz is a post-doctoral researcher at the University of Hamburg, and a fellow of the Center for Interdisciplinary Research (ZiF) in Bielefeld. Much of his research is situated at the intersection of criminal and human rights law, philosophy and cognitive sciences, with a special view on the legal conceptualisation of the human mind, as well as the psychological grounding of legal reasoning. He was one of the Principal Investigators of a multidisciplinary research project on memory, trauma and the law, as well as one on the legal and ethical implications of interfacing the human mind with computers. He has published extensively on matters of bioethics and the law and co-edits the book series Neuroscience, Law & Human Behavior at Palgrave. As a student, he was an intern at the then young Constitutional Court of the Republic of South Africa. More recently, he has been a research fellow of the Uehiro Centre for Practical Ethics at the Faculty of Philosophy at the University of Oxford. His research has won several prizes, among them the Young Scholar Award of the International Association of Legal and Social Philosophy.

Başak Çalı is Professor of International Law and Director of the Centre for Fundamental Rights at Hertie School of Governance, Berlin. She is also a member of the Law School at Koç University, Istanbul where she directs the Center for Global Public Law. Her research spans public international law, international human rights law and European human rights law with a specific focus on legal interpretation, regime interaction and domestic impact. She is the Chair of the European Implementation Network and served as the Secretary General of the European Society of International Law between 2014 and 2018. She has served as a Council of Europe expert on the European Convention on Human Rights since 2002. Her publications include *International Law for International Relations* (Oxford University

Press 2010) and *Authority of International Law: Obedience, Respect and Rebuttal* (Oxford University Press 2015).

Danwood M. Chirwa is a professor and current Dean of Law at the University of Cape Town. He has considerable research and teaching experience in human rights, especially children's rights, socio-economic rights, and business and human rights, on which he has authored and edited several books and journal articles. He has also worked with several international and African non-governmental organisations. A former Secretary-General of the African Network of Constitutional Lawyers, Chirwa has served as a member of the advisory boards for many organisations including the Open Democracy Advice Centre, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) and the Socio-Economic Rights Institute of South Africa (SERI). He is currently a member of the Board of Trustees for the UN Voluntary Trust Fund on Contemporary Forms of Slavery, of the Board of Directors of the Global Business and Human Rights Scholars Association, and a member of a Technical Working Group of the African Partnership to End Violence against Children.

Hugh Corder has been the Professor of Public Law at the University of Cape Town since 1987. A graduate of Cape Town, Cambridge and Oxford, he started his academic career at Stellenbosch. He served as Dean of the Faculty of Law at Cape Town from 1999 to 2008. He has worked in many capacities in community organisations, mainly in the promotion of human rights. He was a member of the committee which drafted South Africa's first Bill of Rights in 1993, and has played a leading role in administrative law reform initiatives since 1992. He has been a Fellow of the University of Cape Town since 2004.

Kerstin von der Decken is full professor of German Public Law, European Union Law and Public International Law as well as a director of the Walther Schücking Institute for International Law at Kiel University in Germany. Before taking this position (in 2011) she was full professor at St. Gallen University in Switzerland (2004–11). She holds a Dr. iur. as well as a post-doctoral qualification (Habilitation) from the University of Trier in Germany. She is co-editor of the *German Yearbook of International Law* and of the scientific board of the Italian *Journal Ordine Internazionale e Diritti Umani*. She does research and publishes extensively on human rights, focusing on the comparison of human rights systems. She has been and is Visiting Professor of Public International Law at various universities, including the Université Paris I – Panthéon Sorbonne and Université Paris II Panthéon-Assas (France), the Georgetown University Law Center, Washington DC (USA), the National University of Tucumán (Argentina), the University of Oviedo (Spain), and Paris-Sorbonne University Abu Dhabi (United Arab Emirates), where she teaches, inter alia, International Human Rights.

Thomas Douglas holds degrees in clinical medicine (MBChB, Otago) and philosophy (DPhil, Oxford) and works in philosophical bioethics. He is currently Senior Research Fellow and Director of Research and Development in the Oxford Uehiro Centre of Practical Ethics, Faculty of Philosophy, University of Oxford; Hugh Price Fellow at Jesus College, Oxford; and Editor of the *Journal of Practical Ethics*. From 2013 to 2019 he led the Wellcome Trust-funded project 'Neurointerventions in Crime Prevention: An Ethical Analysis' and he is currently Principal Investigator on the project 'Protecting Minds: The Right to Mental Integrity and the Ethics of Arational Influence', funded by the European Research Council.

María Clara Galvis Patiño graduated from Law School at Universidad Externado de Colombia, where she is a professor of International Human Rights Law. She teaches Inter-American and

United Nations Human Rights Protection Systems, International Human Rights Law on Enforced Disappearances and Strategic Litigation. She is also a professor of the Academy for Human Rights and Humanitarian Law at the American University, Washington College of Law, where she teaches the United Nations Human Rights System. She was Vice-President and member of the United Nations Committee against enforced disappearances. She is a board member of the International Network for Human Rights (Geneva) and a member of the Consultative Council and the Academic Committee of the Berg Institute (Spain). She has been a senior lawyer for the Center for Justice and International Law (CEJIL) and a senior consultant for the Due Process of Law Foundation (DPLF). She has represented victims of gross human rights violations before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. She has been a consultant for the International Development Law Organization (IDLO) and for inter-governmental organisations at the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations High Commissioner for Refugees (UNHCR), and for cooperation agencies as USAID, GIZ and the Heinrich Böll Foundation. She frequently gives talks and conferences in various countries in Latin America and Europe and has written in the areas of International Human Rights Law, Inter-American Law, Transitional Justice, Enforced Disappearance, Business and Human Rights, Human Rights of Indigenous People and Human Rights of Women.

Janneke Gerards is professor of fundamental rights law at Utrecht University, director of the Montaigne Centre for Rule of Law and Administration of Justice, and Dean of the Legal Research Master. She holds a designated chair in Utrecht University's research programme 'Institutions for open societies' and she is a fellow at the Human Rights Institute (SIM). Since 2015 she has been a member of the Royal Netherlands Academy of Arts and Sciences. Her activities outside the university include being a deputy Judge in the Appeals Court of The Hague and being a member of the Human Rights Commission of the Dutch Advisory Council on International Affairs. The research conducted by Professor Gerards focuses on fundamental rights, judicial argumentation and constitutional law. The interrelation of the European Convention on Human Rights, EU law and national law plays a central role in her research. She is also active in the field of understanding the fundamental rights impact of societal developments and new technologies, ranging from genetic research to algorithms and AI. For more information, please see www.uu.nl/staff/jhgerards.

Jérémie Gilbert is Professor of Human Rights Law at the University of Roehampton, United Kingdom. His main area of research is on international human rights law, and more particularly the rights of minorities and indigenous peoples. He has extensively published on the rights of indigenous peoples, looking in particular at their right to land and natural resources. Jérémie has worked with several indigenous communities across the globe and regularly serves as a consultant for several international organisations and non-governmental organisations supporting indigenous peoples' rights. As a legal expert, he has been involved in providing legal briefs, expert opinions and carrying out evidence-gathering in several cases involving indigenous peoples' land rights across the globe.

Günther Handl is the Eberhard P. Deutsch Professor of Public International Law at Tulane University Law School. He holds law degrees from the University of Graz (Dr. iur.), Cambridge (LLB) and Yale (SJD). He is the author of several books and numerous articles on the field of public international law, international environmental law, law of the sea and nuclear energy law. Professor Handl is the recipient of a number of awards, including the Prix Elisabeth

Haub 1997. He has served in an advisory capacity to various governments and international organisations.

Nikolaus Koch is a research assistant and doctoral candidate at the Walther Schücking Institute of International Law at Kiel University, Germany. His doctoral research focuses on the UN Security Council and matters concerning use of force, in particular a state's reporting requirements under the UN Charter in cases of self-defence. Prior to working in Kiel he was a fellow at the Kolleg-Forschungsgruppe 'The International Rule of Law – Rise or Decline?' at Humboldt University, Berlin.

Miloon Kothari is an Independent Expert on Human Rights and Social Policy based in New Delhi, India. He was (from 2000–08) the First Special Rapporteur on adequate housing with the United Nations Commission on Human Rights and the Human Rights Council. During his tenure as Special Rapporteur he led the process that resulted in the UN Basic Principles and Guidelines on Development-based Evictions and Displacement – the current global operational human rights standard on the practice of forced evictions: www.ohchr.org/en/Issues/Housing/Pages/ForcedEvictions.aspx. Mr Kothari is the founder and former coordinator of Habitat International's Housing and Land Rights Network (HLRN) www.hlrn.org/ and founder and former executive director (1999–2013) of the Housing and Land Rights Network, India http://hlrn.org.in/. He is a founding member and former convener of the Working Group on Human Rights in India and the UN (WGHR), India's leading alliance of human rights organisations and independent experts working on the UN's Universal Periodic Review (UPR): http://wghr.org/, and is the President of UPR-Info, the world's leading independent organisation that seeks to promote and strengthen the UPR: www.upr-info.org/en. Mr Kothari has published widely and has lectured and taught at leading academic institutions around the world. In 2013 he was appointed Dr Martin Luther King Visiting Scholar at the Massachusetts Institute of Technology and continued as Distinguished Visiting Scholar with the (MIT) Program on Human Rights and Justice (2014–15). In 2017 Mr Kothari was bestowed with the degree Doctor of Laws.

Holning Lau is the Willie P. Mangum Distinguished Professor of Law at the University of North Carolina School of Law, where he teaches courses on international human rights and comparative constitutional law. In 2018–19 he served as an independent consultant to the International Commission of Jurists and the Danish Institute for Human Rights, supporting their work on sexual orientation and gender identity issues in Myanmar. He previously taught at Hofstra University School of Law, where he co-directed the LGBT Rights Fellowship Program, and at UCLA, where he was a fellow at the Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy.

Fergus MacKay is Senior Counsel at the UK-based NGO, the Forest Peoples Programme. He has litigated several cases before United Nations treaty bodies and the Inter-American Commission and Court of Human Rights, including the *Saramaka People* (2007) and *Kaliña and Lokono Peoples* (2015) cases. He previously served as an expert advisor to the Organization of American States concerning its American Declaration on the Rights of Indigenous Peoples and as a member of the advisory panel to the World Bank's Extractive Industries Review.

Stefan Martini is a post-doctoral researcher at the Walther Schücking Institute of International Law, Kiel University, Germany. He holds a Dr. iur. from Kiel University. He

has published on matters of comparative constitutional law, European law, International law, German domestic law and foundations of law. He is a member of JuWissBlog's editorial board.

Frédéric Mégret is a Full Professor and Dawson Scholar at the Faculty of Law, McGill University. From 2006 to 2016 he held the Canada Research Chair on the Law of Human Rights and Legal Pluralism. Before coming to McGill, he was an assistant professor at the University of Toronto, a research associate at the European University Institute and an attaché at the International Committee of the Red Cross. He is the editor, with Philip Alston, of the forthcoming second edition of *The United Nations and Human Rights: A Critical Appraisal* and the co-editor of the *Oxford Handbook of International Law*. His research interests are in general international law, human rights, the laws of war and international criminal justice.

Sabine Michalowski is professor of law at the University of Essex, UK, holding a German law degree and a diploma in comparative law from the University of Paris 2 (Assas). She is a member of the Human Rights Centre at the University of Essex and the Essex Autonomy Project, and co-director of the Essex Transitional Justice Network. Her work has concentrated, inter alia, on disability rights and on human rights issues around consent, autonomy and physical integrity.

Bucura C. Mihăescu-Evans is a Legal Secretary (référendaire) in the cabinet of Judge P. G. Xuereb at the Court of Justice of the European Union. Previously, she worked as a post-doctoral research associate at the University of Luxembourg, where she was in charge with various EU-related teaching, editorial and publishing tasks. In 2014 as a fellow of the Marie Curie INCOOP Program of the European Commission she defended her PhD on the topic 'The right to good administration at the cross-roads of the various sources of fundamental rights in the EU integrated administrative system' (Nomos, 2015). Prior to joining the University of Luxembourg, she worked for three years in the cabinet of Advocate General Yves Bot at the Court of Justice of the European Union. She graduated in EU Law and Political Science from universities in France, England and Luxembourg.

Kolawole Olaniyan is a Legal Adviser at Amnesty International's International Secretariat, London. Between 2004 and 2007 he was Program Director for Africa. He holds a doctorate in international law on corruption and human rights from the Law School of the University of Notre Dame, South Bend, USA. His areas of expertise include international human rights law, international economic crime law, corruption and human rights, recovery of proceeds of corruption, development and the African regional human rights system. He is a member of the Nigerian Bar Association and has advised governments, inter-governmental organisations and agencies on issues of corruption, economic crime and human rights. His book *Corruption and Human Rights Law in Africa* (Hart, 2014) is a leading authority in the field. His forthcoming book is *Recovery of Proceeds of Corruption under International Law*.

Yoriko Otomo is a Fellow at the Royal Society of Arts, Governor for the Network for International Students, on the Board of Minding Animals International, and runs a consultancy, Write Like a Samurai. Her research examines cross-cultural histories of global governance, focusing on commodities and looking at the ways in which emerging patterns of economic interdependence changed the ways in which we think about gender and nature. A recent project emerging out of this work is *Making Milk: The Past, Present and Future of Our Primary Food* (Bloomsbury

Press, 2017). Yoriko is currently creating a global network for scholars, activists and scientists working on human, animal and plant milks. Her latest monograph, *Unconditional Life: The International Law Settlement* was published by Oxford University Press and she has written various articles on environmental law history and animal law, most recently 'The End of the City and the Last Man: Urban Animals and the Law'.

Tiina Pajuste is a lecturer in international and European law at Tallinn University. She holds a PhD from the University of Cambridge and an LLM from the University of Helsinki. Her research interests focus mainly on the activity of international organisations, examining both practical and theoretical issues that arise in this context. Her current research ventures focus on human rights and the international legal aspects of peace-making. She is also the assistant editor of the *East European Yearbook on Human Rights*.

Tomasz Pietrzykowski is professor of legal theory and philosophy of law at the University of Silesia in Katowice and the Head of the Research Center for Public Policy and Regulatory Governance. He is the author of numerous books and articles on philosophical, scientific and legal aspects of personhood, animal rights, bioethics, legal methodology and problems of interpretation and application of the law. He is also a practising lawyer and former head of governmental administration in the Polish region of Silesia. Currently, he is the chairman of the advisory council of the Silesian Metropolitan Area composed of 41 municipalities around the city of Katowice, as well as the member of several bioethical committees, including the Polish National Ethics Committee on Animal Experimentation. Since 2015 he has been vice-rector of the University of Silesia in Katowice, Poland.

Oreste Pollicino is full professor of constitutional law and media law at Bocconi University, where he teaches courses on transnational constitutional law and internet law and where he is the co-director of the LLM in Law of Internet Technologies. His research activities concern information technology law, constitutional and comparative public law, and privacy and data protection law. Professor Pollicino is regularly appointed as expert and advisor by national and international institutions. He is a member of the High Level Group on Disinformation launched by the European Commission and the co-director of two International Association of Constitutional Law research groups on 'Algorithmic State, Market and Society' and 'Constitutional Law and the Internet'. He is a member of national and international editorial board and co-founder of the law review *MediaLaws*.

Oscar Raúl Puccinelli holds a PhD in Constitutional Law, University of Buenos Aires. He has been accorded honorary PhDs and professorships in other Latin American universities. He is Professor of Constitutional Law and Human Rights and teaches at several public and private universities in his country and abroad. He is the author of numerous publications on data protection, freedom of expression, transparency and access to public information, among which stand out *Habeas Data en Indoiberoamérica* (Temis, Colombia, 1999); *Protección de datos de carácter personal* (Astrea, Buenos Aires, 2003); and *Juicio de Habeas Data* (Hammurabi, Buenos Aires, 2016). Among other non-governmental organisations, he is founder and current Vice-President of the International Academic Data Protection and Access to Public Information Network. He has worked as an independent lawyer and as consultant in various public institutions for the first twenty-three years of his career and since 2009 he has served as a judge at the Civil and Commercial Appellate Court in Rosario, Argentina.

Simon Rice is a Professor of Law at the University of Sydney, Australia. He has been legal adviser to the Australian Parliamentary Joint Committee on Human Rights, Chair of the Law Reform Advisory Council of the Australian Capital Territory, a tribunal member deciding discrimination cases in New South Wales, President of Australian Lawyers for Human Rights and Director of the NSW Law Foundation. He is a co-author of *The International Law of Human Rights* (Oxford) and *Australian Anti-Discrimination and Equal Opportunity Law* (Federation).

Eibe Riedel is emeritus professor of German and Comparative Public Law, European and International Law at the University of Mannheim, Germany, and a former member of the UN Committee on Economic, Social and Cultural Rights, Geneva from 1997–2012. He chaired the Board of Trustees of the German Institute of Human Rights, Berlin, until 2016, served as former Vice-President of Mannheim University, and as a director of the Institute of Medical Law, Bioethics and Public Health of the Universities of Mannheim and Heidelberg. Eibe Riedel was Swiss Chair of Human Rights from 2009–2012 at the Geneva Academy of International Humanitarian Law and Human Rights, and visiting professor from 2013–2017, and Honorary Adjunct Professor at the University of Adelaide until 2018. He has written widely on human rights, inter alia on the Optional Protocol to the ICESCR, in *Essays in Honour of Simma*, Oxford 2011, 574–589; on 'ESC-Rights in Armed Conflict' in Clapham and Gaeta (eds.), *Oxford Handbook of International Law in Armed Conflict* 2014, 441–468.

Luis E. Rodríguez-Rivera (BA, Yale University; JD, Harvard Law School; LLM, University of Cambridge) has been a Professor of International and Environmental Law at the University of Puerto Rico School of Law since 1995, and has lectured at the Faculty of Law, University of Fribourg, Switzerland, and at the University of Barcelona, Spain. His scholarship has focused on the Human Right to Environment, Law of the Sea, Disaster Law, International Environmental Law and Puerto Rico Environmental Law. He served the government of Puerto Rico as Secretary (Minister) of the Department of Natural and Environmental Resources (2002–04), Executive Director of the Solid Waste Authority (2001–02), Executive Director of the Puerto Rico Science, Technology and Research Trust (2006–10), among other roles. He was a member of Puerto Rico's delegation to the United Nations' World Summit on Sustainable Development (UNWSSD) in Johannesburg, South Africa (2002), and presided over the delegation to the Regional Preparatory Meetings for the UNWSSD in Rio de Janeiro, Brazil (2002). He began working on environmental matters as Legal Counsel in the United States Environmental Protection Agency's Region 1, Boston, Massachusetts, USA (1989).

Mindy Jane Roseman, JD, PhD, is the Director of International Law Programs and Director of the Gruber Program for Global Justice and Women's Rights at Yale Law School. Prior to joining Yale Law School, Roseman was the Academic Director of the Human Rights Program, Lecturer on Law at Harvard Law School and an instructor in the Department of Population and International Health at Harvard School of Public Health. Roseman specialises in international health and human rights, particularly as they relate to gender, sexuality and reproduction. Some of her publications include: *Beyond Virtue and Vice: criminalization of sex, gender and reproduction in the age of human rights* (co-edited with Alice M. Miller) (2019, University of Pennsylvania Press); 'International Human Rights and the Mistreatment of Women During Childbirth' (co-authored with R. Khosla, C. Zampas, J. Vogel, M. Bohren and J. Erdman) (2016) 18(2) *Health & Human Rights: An International Journal*; and *Reproductive Health and Rights: The Way Forward* (co-edited with Laura Reichenbach)(2009, University of Pennsylvania Press).

Judit Sándor is a full professor at the Faculty of Political Science, Legal Studies and Gender Studies of the Central European University (CEU), Budapest, Hungary. She has participated in many national and international law and policy-making activities in the field of human rights, biomedical law and bioethics. In 2004–05 she served as the Chief of the Bioethics Section at the UNESCO. She has published eleven books in the field of human rights and biomedical law. Since 2005 she has been a founding director of the Center for Ethics and Law in Biomedicine (CELAB) at the Central European University. Her main research fields include bioethics, biopolitics, human rights, privacy rights, regulating new technologies, anti-discrimination law and women's rights.

Dinah Shelton is the Manatt/Ahn Professor of International Law emeritus at the George Washington University Law School, where she has taught since 2004. She was previously director of the doctoral programme in international human rights law at Notre Dame Law School (1996–2004) and has lectured at universities throughout the United States and numerous other countries. Professor Shelton is the author of three prize-winning books, *Protecting Human Rights in the Americas* (co-authored with Thomas Buergenthal), *Remedies in International Human Rights Law* and the three-volume *Encyclopedia of Genocide and Crimes against Humanity*. She has also authored many other articles and books on international law, human rights law and international environmental law. Professor Shelton is an honorary member of the board of editors of the *American Journal of International Law* and has been awarded the ASIL Goler Butcher Prize in Human Rights Law as well as the WILIG Prominent Women in International Law honour. In 2006 Professor Shelton was awarded the Elisabeth Haub Prize for Environmental Law. She is also the recipient of the Stefan A. Riesenfeld Award in International Law and the Wolfgang Burhenne Award in International Environmental Law. In June 2009 the Organization of American States elected her to a four-year term as a member of the Inter-American Human Rights Commission and in 2010 she served as president of the Commission. Professor Shelton has received the degree of doctor *honoris causa* from the University of Stockholm, Sweden, and the Pazmany Peter University in Budapest, Hungary.

Andrew Spalding is Professor of Law at the University of Richmond (Virginia, USA) School of Law and specialises in international anti-corruption law. He is Senior Editor of the FCPA Blog and a member of the Frequent Visiting Faculty at the International Anti-Corruption Academy (IACA) in Austria. Professor Spalding's scholarship has appeared in the *UCLA Law Review*, *Washington University Law Review* and many other academic venues, and has been covered by the *New York Times*, *Wall Street Journal*, *Economist*, *Atlantic*, *Forbes* and National Public Radio. As Chair of the Olympics Compliance Task Force, Professor Spalding is collaborating with a team of international experts to design the Olympic host-country anti-corruption and human rights legal framework. His book on the topic, *A Governance Legacy*, is forthcoming from Oxford University Press. A JD/PhD, Professor Spalding was previously a Fulbright Senior Research Scholar in Mumbai, India, and was the founding Chair of the American Society of International Law's Anti-Corruption Law Interest Group.

David P. Stewart is Professor from Practice at Georgetown University Law Center, where he teaches public and private international law, international criminal law, international human rights law, and international immunities. He previously served for over three decades in the Office of the Legal Adviser at the US Department of State and, prior to that, practised in general and commercial litigation in New York. He is Chair of the Board of Directors (and former President) of the American Branch of the International Law Association, a member of the

Secretary of State's Advisory Committee on Private International Law and a member of the American Law Institute. He served as a Reporter for the ALI's Restatement (Fourth) Foreign Relations Law of the United States (2019), with particular responsibility for the area of foreign sovereign immunity.

Mart Susi is Professor of Human Rights Law and Head of Legal Studies at Tallinn University. Before taking this position, he held several academic and administrative positions in Estonian and American universities. He was among the intellectuals who established the first private university in the former Soviet Union – the Estonian Institute of Humanities. He has been leading several international research and development projects and has established various academic networks focusing on human rights. He has authored several monographs and more than fifty articles. He is also the editor of several books on the topics of new media, and human rights and the digital society (*Human Rights, Digital Society and the Law: A Research Companion*, Routledge, 2019). Susi has recently introduced and is developing the concept of the Internet Balancing Formula, which was introduced in *European Law Journal Special Issue on Internet and Human Rights Law*, March 2019. A related debate about proportionality in the Internet between Susi and Professor Alexy is featured in the aforementioned ELJ special issue and is translated and published in many languages. Professor Susi is the editor-in-chief of the new human rights journal established with the assistance of the European Commission – *East European Yearbook on Human Rights*.

Jens T. Theilen is a research associate at the Chair for Public Law, especially Public International Law and European Law (Prof. Dr. Sigrid Boysen) at the Helmut-Schmidt-University in Hamburg, a PhD student at the University of Kiel and a legal trainee at the Higher Regional Court of Hamburg (Referendariat). They studied law at Bucerius Law School, Hamburg, and at the University of Oxford, and they were previously employed as a Research Associate at Bucerius Law School, Hamburg, and at the Walther Schücking Institute for International Law at the University of Kiel. Their research interests include trans and intersex rights, constitutional rights and human rights including human rights theory, interactions between law and time, and feminist, queer and post-colonial legal theory. They have published on these fields, for example, in the *Human Rights Law Review*, the *European Human Rights Law Review*, the *European Law Review* and the *German Yearbook of International Law*.

Pierre Thielbörger is Professor of German Public Law and Public International Law at the Ruhr-University Bochum, Germany. He is also the Executive Director of the Institute for International Law of Peace and Armed Conflict (IFHV) in Bochum. He received his PhD in international law in 2010 at the European University Institute (Florence) and in the same year finished a Master's degree in public policy at the Kennedy School of Government of Harvard University. He is the Co-Convener of the European Society of International Law's Interest Group on International Human Rights. Since 2016 he has been the Chairperson of the General Assembly of the Europe-wide Network on Humanitarian Action. He is also Adjunct Professor at the Hertie School of Governance, where he teaches classes on international law. His areas of research expertise include public international law, human rights law, law and governance of climate change, and international criminal law, as well as the law of peace and armed conflict.

Luis Humberto Toro Utillano is a senior legal officer at the Department of International Law of the Secretariat for Legal Affairs of the Organization of American States at its headquarters in Washington DC. He provides advisory services on international law issues to OAS organs, such as the Permanent Council, the Juridical and Political Affairs Commission and the

Inter-American Juridical Committee. He is the treaty officer of the General Secretariat, and as such he oversees all actions concerning the deposit of inter-American legal instruments. He has served in the drafting of various legal instruments and mechanisms in favour of vulnerable groups, such as people with disabilities, the elderly and indigenous peoples, among others. He is also the liaison officer in the field of international humanitarian law and cooperation with the International Criminal Court. He received his LLB at the School of Law of the Université de Montreal in Canada (Faculté de Droit). He holds an LLM in International Law from the Washington College of Law (American University) and a Bachelor in Political Sciences, BSc (Université de Montreal).

A. M. Viens is Associate Professor of Global Health Policy within the Faculty of Health at York University. His research centres on issues at the intersection of moral, political and legal philosophy and public policy, with a particular focus on how human behaviour, social conditions and regulation impact health. This work has been primarily interested in demonstrating the various ways in which philosophical analysis can inform and shape how we should approach different issues within health policy, practice and research. He is an honorary member of the UK Faculty of Public Health and a fellow of the Royal Society of Public Health, and has degrees in philosophy and law from the Universities of Toronto, Oxford and London.

Acknowledgements

This volume is the fruit of a three-year collaboration under the auspices of the project 'HURMUR – HUman Rights: MUtually Raising excellence', funded by the European Union's Horizon 2020 research and innovation programme (grant agreement No. 692143). It builds on discussions held both at a workshop in Kiel and a conference in Tallinn in 2016 and 2017, respectively. It would not have been possible without the help of a dedicated team of people who were involved in organising those encounters in which we were able to develop, shape and discuss our ideas, and without those who took pains to edit the present volume. The editors would like to thank Özgür Baykara and Carsten Wulff from the Tallinn team. We also wish to express our gratitude to Henning Büttner, Sinthiou Buszewski, Clemens Dorsel, Theresa Kändler, Nikolaus Koch, Wiebke Staff, Felix Telschow, Carmen Thies, Samira Wagner, Sylvia Weidenhöfer and Nathalie Zavazava from the Kiel team, with special thanks going to Jens Theilen and Stefan Martini. A final word of thanks is due to Cambridge University Press and its editorial team for their excellent support and care.

Introduction

Andreas von Arnauld, Kerstin von der Decken and Mart Susi

This is not a handbook in the traditional sense. Our aim is not to map the field of 'new' human rights in the sense that we cover all or even the most important 'new' rights under discussion. Rather, we aim at an analysis of unresolved issues surrounding 'new' human rights. That debate was kicked off with Philip Alston's seminal article on 'quality control' for 'new' human rights published in the *American Journal of International Law* of 1984. While the topic has since received academic attention for over three decades, it has only ever been treated directly in fairly short journal articles, or in rather cursory remarks in book-length treatises. Legal theory tends to focus on the human rights project as a whole and to leave the development of individual rights aside. Monographs on individual 'new' rights, on the other hand, usually take up their development and novelty in passing – but whether one is dealing with a much-discussed right, such as the right to water, or a less-examined right, such as the right to gestational surrogacy, the focus is on their substantive problems rather than the temporal rhetoric surrounding them. By bringing together a large number of 'new' rights, looking at them explicitly through the temporal lens and combining the analyses with theoretical approaches in the cross-cutting introductory chapters, we hope to fill these lacunae in current research. In attempting to map these structural questions as comprehensively as is feasible, this volume then really *is* a handbook.

When looking into the phenomenon of 'new' human rights, we necessarily posit that the list of human rights can, in fact, be expanded. We are well aware of the discussion as to whether there is a fixed canon of human rights that leaves no – or little – room for real 'invention'. In our role as editors and for the purpose of this handbook, however, we are agnostic as to whether the 'new' human rights under discussion merely label aspects of existing rights differently, or even whether they represent human rights at all. Thus, we also do not take a stand as to whether a specific right is already recognised or whether it really is 'new'. Neither have we, as editors, prescribed a certain position with regard to a perceived 'rights inflation'. It is the phenomenon of 'new' human rights as such, and the surrounding controversies, that is of interest to us. This 'epistemic agnosticism' is, therefore, necessary for the project as a whole.

The approach is different, however, when it comes to the individual contributions to this handbook. Here, we deliberately commissioned chapters from colleagues who have not only written on theoretical issues or human rights law in general, but who are also recognised experts on a specific right. While to some extent their chapters will map the right in question in substance, the main objective was not to faithfully report every aspect of a given right, but rather to investigate the legal discourse regarding that right with a focus on the handbook's overarching research interest in the right *specifically qua new right*. One basic observation which underlies

the whole concept of this volume is that 'new' rights are intimately connected with the concept of contestation. The controversies surrounding a certain right's alleged novelty, for example, are evidence of this: oftentimes a right can be considered both new and not new at the same time, depending on the perspective taken. While one of those perspectives may be the 'more correct' or 'better' one according to certain standards, the rhetoric of rights and novelty (or lack of novelty) will often be a statement within a process aimed at critically engaging with and developing the status quo. To capture this paradoxical and essentially contested nature of 'new' rights, each chapter is briefly commented on by another expert who takes a different perspective on the right at issue. They might, for example, disagree about the merits of framing the issue as a 'new' human right or with regard to the broader theoretical framework. Rights may, of course, also be recognised to a varying extent in different regional or functional sub-systems of international law. The volume thus refuses to prescribe any one approach, but rather aims to capture the multiplicity of frameworks that exist in practice and therefore must, we believe, be integrated into the analysis of 'new' rights.

From the individual contributions we distilled what appeared to us as the three central topics connected with the phenomenon of 'new' human rights: recognition, novelty and rhetoric. Regarding the *recognition* of new human rights, we focus on the phases of recognition (the idea, emergence and full recognition) as well as on techniques for achieving this (the treaty approach, the customary international law approach and the derivation approach) and propose a new way of looking at the creation of new human rights which we call 'differentiated traditionalism'. As to the dimension of *novelty*, two theses are considered. 'The inadequacy of protection thesis' says that the main reason for the advancement of a new human rights claim is the incapability of established human rights to provide adequate protection for certain vulnerable or marginalised groups in comparison with others, or that novel contemporary conditions challenge the capability of an established human right to provide sufficient protection for an important social value. According to 'the decrease in universality and abstractness thesis', the process of new human rights development is characterised by a decrease in universality of established human rights, and/or by a decrease in the level of abstractness of the respective new human rights claim. As to the *rhetorical* dimension, finally, we are interested in the communicative functions which raising a claim for a new 'human right to …' serves in the triangulation of language, concepts and society – an enquiry framed by a *topical* reconstruction of legal discourse.

By bringing together experts on a large number of 'new' human rights, contextualising and evaluating those rights in detail, and also providing theoretical insights on recognition, novelty and rhetoric of 'new' rights in the first section, this handbook thus aims at a comprehensive analysis of issues surrounding 'new' human rights which is so far lacking. Insights were and will be gained dialectically with regard to both the more specific and the more abstract controversies at issue: the theoretical and comparative framework should advance the understanding of individual 'new' rights and their development, while the consideration of those rights in context provides an opportunity to evaluate and develop the theory in turn.

In order not to exclude part of the picture, from the outset we are deliberately working with a wide and flexible notion of 'rights' and of 'novelty', since the contestation surrounding these concepts forms part of the very discourse on 'new' rights which we are interested in investigating. Though our focus is primarily on international human rights law, we thus include as a 'human right' any norm that has been labelled as such, irrespective of whether it is considered predominantly a legal or a moral right, a human right proper, a fundamental right or any other kind of subjective right – or whether it is a right at all, and not a mere obligation incumbent on states not giving rise to a legal claim on the part of a rights-bearer. For a right to qualify as 'new', we also

content ourselves with the fact that a 'new' rights claim has been raised at some point during the last twenty or so years. Whether a right is intrinsically 'new' or should be seen only as 'expansion' of existing rights is as much a matter of contestation as it might be guided by strategic choices, and could thus be viewed differently, e.g. for different rights, in different contexts, by different actors, and depending on whether a principled, practical or strategic perspective is taken.

In accordance with our overarching research focus, the selection of rights included in this handbook was guided by our wish to include the greatest possible variety. As to their status of recognition, some rights have been established only in regional or discrete legal regimes, others have been recognised in soft law instruments such as General Assembly resolutions (Alston's famous 'appellation contrôlée'), while yet others are still no further on than being campaigned for by interest groups at the international level. As to (perceived) triggers for championing 'new' rights, we selected rights that might be traced back as much to paradigmatic changes of perception (e.g. the right to gender identity) as to political (e.g. the rights to democracy or to good administration) or technological change (e.g. the right to be forgotten or genetic rights). That these developments often interact, however, is witnessed, e.g., by the right of access to reproductive medicine, which is closely linked to the campaign for parenting opportunities for same-sex couples.

As to their claim to novelty, we selected rights that are both at a greater distance from an already recognised, 'canonic', right (such as, arguably, the right to a clean environment) and those arguably closer to such a right (such as the right to water). For a change of perspective, we deliberately also included rights which are not in themselves new (e.g. the rights to health, to housing or to bodily integrity) but that have spurred the development of 'new' rights derived from them. To further inquire into the relationship between human rights norms we included whole sets or bundles of rights (e.g. rights of indigenous peoples, rights of the elderly, or rights related to enforced disappearance) next to (seemingly) free-standing rights.

In a particular attempt to gain further insights into the rhetoric of human rights, we finally looked for rights that attempt to redefine an established body of law from a human rights perspective (such as the right to a clean environment or the right to freedom from corruption), or even to apply the concept of rights to non-humans (animal rights, rights of the environment), thereby overcoming the anthropocentricity of 'human' rights as such. Of course, every selection is to a certain extent contingent and thus open to critique. We could have assembled quite a different set of rights altogether. However, we believe that the selection presented here offers a sound basis for a broad and varied picture of the phenomenon of 'new' human rights.

As the list of authors shows, we included practitioners and the occasional author with a non-legal background in this process, yet this handbook follows a predominantly legal academic perspective. However, given that human rights as a lingua franca bridge the spheres of law, politics and ethics, and given also the need to step out of legal doctrinal research for the cross-cutting issues addressed here under the themes of recognition, novelty and rhetoric, we believe that this volume will be of interest to all those dealing with human rights – whether generalist or specialist, whether lawyer, philosopher or political scientist, whether academic in research or teaching, or practitioner.

PART I

Cross-Cutting Observations

1

Recognition of New Human Rights

Phases, Techniques and the Approach of 'Differentiated Traditionalism'

Kerstin von der Decken and Nikolaus Koch

1.1 INTRODUCTION

This chapter deals with the legal recognition of new human rights in public international law. Human rights activists, non-governmental organisations and scholars worldwide put forward suggestions and demands to widen the realm of protection through human rights beyond – occasionally far beyond – the currently acknowledged areas.[1] The contributions to this volume bear witness to the imagination and creativity of those who seek to improve the living conditions of human beings by enlarging the protective umbrella of human rights. In addition, international tribunals and treaty bodies regularly 'discover' new human rights within those already expressly recognised in international human rights treaties. Thus, it seems fitting to look into the birth process of a new human right until it attains 'full recognition' as part of public international law.

Under public international law, individuals may hold rights that give them a claim on a state to act in a certain way or to omit a certain act. Some of these rights are qualified as 'human rights'; others we may call 'simple' rights.[2] Public international law has taken a rather pragmatic approach in differentiating between these two categories: human rights are those rights that are intimately connected to human existence in dignity.[3] On many an occasion the international community has expressly referred to the 'inherent dignity of the human person' as the ultimate source of human rights.[4] Admittedly, this approach is neither very precise nor exclusionary. Depending on one's understanding of 'human dignity', a wide spectrum of rights may be considered *human* rights. However, certain rights will be excluded from the 'special' status – hence David Stewart's discussion on the status of the right to consular assistance.[5] In any event,

1 H. Hannum, 'Reinvigorating Human Rights for the Twenty-First Century' (2016) 16 *Human Rights Law Review* 409.

2 A. Peters, *Beyond Human Rights* (Cambridge: Cambridge University Press, 2016), p. 436 (speaking of 'simple rights'); C. Tomuschat, *Human Rights: Between Idealism and Realism*, 3rd ed. (Oxford: Oxford University Press, 2014), pp. 3–4 (speaking of 'rights' and 'human rights').

3 Tomuschat, *Human Rights*, p. 10; for alternative criteria see Peters, *Beyond Human Rights*, pp. 438–442.

4 See e.g. the preambles to the UNGA, Resolution 217A on Universal Declaration of Human Rights, 10 December 1948, UN Doc. A/Res/217 (III) (A); the International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171; the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 999 UNTS 3; and World Conference on Human Rights, Vienna Declaration and Programme of Action, 13 July 1993, UN Doc. A/CONF.157/23.

5 D. Stewart, in this volume, pp. 440, 442ff.

the differentiation's legal consequences are not entirely clear: in the absence of a norm hierarchy in international law, human rights would not per se trump 'simple' rights.[6]

What, then, is a *new* human right? We consider *new* human rights to be those rights that, *when first conceived*, are not expressly recognised in any human rights treaty and are not in any other way recognised as rights *in a legal sense*. This understanding implies that, *at first*, new human rights are merely candidates for legal recognition and, *initially*, no more. To reach legal recognition, they must ground themselves in a formal source of public international law. In this chapter we shall shed some light on the path a new human right takes from its intellectual inception to its actual legal recognition.[7] We shall draw examples from the new human rights presented in this book (Section 1.2). We shall then discuss what has been termed the 'exceptionalist approach' occasionally taken towards secondary norms of public international law in the field of human rights law (Section 1.3) and, finally, present our approach: 'differentiated traditionalism' (Section 1.4).

1.2 PHASES OF RECOGNITION

The recognition process follows no centrally devised action plan or procedure. We nonetheless propose that, looking at how new human rights do come about, the process may, idealistically, be divided into three phases each bearing its own characteristics ('the idea', 'the emergence' and 'full recognition').[8] Alas, it won't always (or even regularly) be possible to definitively determine in which phase a new human right is situated at any given point in time. The lines between the phases will remain blurred and, hence, so will any claim at 'localising' a right subject to dispute. Furthermore, not all human rights go through all phases: some may be brought to full recognition directly (e.g. by a groundbreaking judgment and thus, more or less, skipping the 'phase of emergence', as seen with the right to be forgotten as developed by the European Court of Human Rights (ECtHR)). And, of course, others (or maybe even most new human rights) may get stuck at any point along the process without ever achieving legal recognition – they may then indefinitely dwell in the phase of idea or emergence (as seen, arguably, with the right to development or the right to democracy), or may simply fall into oblivion (in 1977 Johan Galtung und Anders Wirak put forward an extensive list of new human rights, most of which are not considered candidates for legal recognition today, e.g. the right to identify with one's own work or the right not to be exposed to unnecessarily boring work but rather to work that requires creativity[9]).

[6] One possible legal consequence has been put forward by Germany in the *LaGrand* case before the International Court of Justice (ICJ): Germany argued that the human rights character of the provision allegedly breached by the United States 'renders the effectiveness of this provision even more imperative'; the ICJ, however, did not pick up on this argument. See ICJ, *LaGrand case (Germany* v. *United States of America)*, verbatim record 2000/27 of the public sitting held on 13 November 2000, p. 12. However, consequences do occur following adoption of a constitutionalist approach to international law: see Peters, *Beyond Human Rights*, section 14.

[7] For another account see V. Tzevelekos, 'The Making of International Human Rights Law', in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham: Edward Elgar Publishing, 2016), pp. 329–353.

[8] For another arrangement see J. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press, 1987), p. 28; for a political science perspective see M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887 at 894–905.

[9] See J. Galtung and A. Wirak, On the Relationship between Human Rights and Human Needs, 1978, UNESCO Doc. SS-78/CONF.630/4, para. 48 as cited in P. Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 *American Journal of International Law* 607 at 610.

Another layer of complexity is added when we take into account regional divergences: it may well be that a new human right is fully recognised within a region, but still be in an earlier phase of recognition at the global level (e.g. rights related to enforced disappearances were recognised in a regional treaty by the Organization of American States (OAS) some time before a UN convention on the topic was adopted).

1.2.1 *Phase 1: 'The Idea'*

The first phase is governed not by legal but by political and intellectual activity undertaken by human rights activists and scholars (so-called 'norm entrepreneurs'[10]). This phase usually starts with discussions based on the assumption that the law must be developed to better protect certain human interests. The need for more protection may arise from the development of new technologies (e.g. in the field of genetics[11]) or emergence of new threats (e.g. emanating from a deteriorating environment[12]), changed societal conditions (e.g. an increasing number of older persons[13]), changed societal perceptions (e.g. an increased sensitisation for gender-related issues[14]) or an increased understanding of a problem's root causes or its impact on victims (e.g. regarding enforced disappearances[15]).

Human rights activists will raise public awareness of what they consider to be an underrated human interest in order to, inter alia, generate pressure on decision-makers (one might speak of a phase of *political recognition* occurring within the idea phase). They may, however, also lobby those who more immediately partake in (international or national) law-making: international organisations (to adopt resolutions in human rights-based language), governments (to support the recognition of a new human right on the international plane) or legislatures (to adopt national legislation granting the new human right). By means of strategic litigation, they may gauge the judiciary's 'weak spots', aiming at an extensive interpretation of existing human rights. Scholars in turn flesh out any newly proposed human right: what will the content of the newly proposed human right be? What obligations ensue and for whom? How may the new human right be properly fitted into the existing legal system?[16]

Consider the actions by those advocating the recognition of animal rights. The Great Ape Project[17] pressures national legislatures to grant basic legal rights to primates (the right to life and personal freedom) as well as the UN to adopt a declaration to the same end. An approach via the judiciary is taken by the Non-Human Rights Project, which regularly petitions for release orders on the basis of habeas corpus on behalf of chimpanzees kept in captivity, thus seeking to achieve implicit recognition of them as rights-holders.[18] Both organisations, along the way, stir up public opinion. Thomasz Pietrzykowksi, as a legal scholar, conceptualises the notion of 'animal rights', e.g. by drawing attention to the distinction between 'will rights'

[10] Finnemore and Sikkink, 'International Norm Dynamics', 896–901.
[11] R. Andorno, in this volume.
[12] G. Handl, in this volume.
[13] L. H. Toro Utillano, in this volume.
[14] H. Lau, in this volume.
[15] M. C. Galvis Patiño, in this volume.
[16] A conceptualisation might help avoid what is often perceived as an 'inflation of rights'; see Nickel, *Making Sense of Human Rights*, pp. 27–35.
[17] For more information see www.projetogap.org.br/en.
[18] For more information see www.nonhumanrights.org/litigation/.

and 'interest rights' (only the latter to be granted to animals) or by discussing the notion of 'animal subjecthood'.[19]

A list of other new human rights discussed in this volume that are currently in this early phase might include (according to our judgment) the right to mental self-determination, the right to be free from corruption, the right to access of law as well as the rights *of* nature, that is that nature itself holds certain rights.

1.2.2 *Phase 2: 'The Emergence'*

The second phase is that of 'emergence', which we shall subdivide into the 'early' and the 'advanced' phase. What marks the phase of emergence – from an international lawyer's perspective – is the occurrence of activity of more immediate relevance to the formation of new norms of public international law. Noticeably, new actors will appear on the stage: in particular, states (governments, legislatures and domestic courts), international organisations, human rights tribunals and treaty bodies. Of course, political activity carries on throughout this phase; in particular, lobbying remains important for driving forward the process of recognition:[20] Dinah Shelton highlights indigenous peoples' own efforts in bringing about the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[21] Scholarly work remains crucial, too: as Günther Handl points out, making the right to a healthy environment workable will require far more conceptualising, as even more so will the notion of rights *of* nature, that is that nature itself actually holds certain rights.[22] However, the distinctive feature of the phase is the occurrence of action by the above-mentioned actors.

1.2.2.1 The Early Phase

In the early phase some of the aforementioned actors will take into account the ideas and a 'puzzle of action' will emerge: a government might talk of the new human right, while a treaty body might state that the new human right is already implied in an existing treaty. Often, soft law instruments, such as resolutions by international organisations, will be the first to mention any new human right. Over time, several soft law instruments may be adopted on the same issue, becoming ever more precise and thus paving the way for drafting a convention. Consider the Inter-American Convention on Protecting the Human Rights of Older Persons which was opened to state accession in 2015: a first set of recommendations on the issue was adopted at a world summit meeting as early as 1982, followed by the UN Principles on Older Persons in 1991 and another set of recommendations in 2002. Several resolutions by the OAS ensued.[23]

1.2.2.2 The Advanced Phase

As activity increases, the new human right, in order to progress towards recognition, must move towards a formal source of public international law. How this more advanced stage will look very much depends on the specific source. We shall, therefore, look at them separately.

[19] T. Pietrzykowksi, in this volume, pp. 243ff.
[20] U. Oberdorster, 'Why Ratify? Lessons from Treaty Ratification Campaigns' (2008) 61 *Vanderbilt Law Review* 681.
[21] D. Shelton, in this volume, p. 225 on UNGA, Resolution 61/295 on Declaration on the Rights of Indigenous Peoples, 13 September 2007, UN Doc. A/RES/61/295.
[22] Handl, in this volume, pp. 138 and 148.
[23] For an overview of these soft law pronouncements see Toro Utillano, in this volume, pp. 169–170.

We shall first look at the source of treaties ('The Treaty Approach') and shall then turn to customary international law ('The Customary International Law Approach'). A potential 'short-cut' to recognition is offered by the possibility of deriving a new human right from one (or several) already existing human right(s) ('The Derivation Approach'). As we do not consider the source of 'general principles of law' a workable source for the recognition of new human rights, we shall consider it when elaborating on 'human rights exceptionalism' (Section 1.3.1.2).

THE TREATY APPROACH The standard approach to establishing new human rights is the adoption of a new treaty (or an optional protocol to be annexed to an already existing treaty).[24] The downside of this approach is, of course, that states have to consent to any new treaty and ratify it before it may enter into force. Even if widely ratified, the treaty may still be riddled with reservations; also, the risk that states will withdraw from the treaty remains.[25] But there are several advantages, too. First, a new treaty offers the strongest form of consensual basis – states will have a hard time 'wiggling' themselves out of obligations expressly undertaken in treaty form. Second, the new human right may be shaped so as to meet actual needs (and also the limits of states' willingness to accept any new human rights). A regime surrounding the new human right may be devised including limitations, justifications to interventions, procedural safeguards and a treaty body monitoring implementation, rendering interpretations and receiving inter-state complaints or even communications from individuals. Third, a new treaty will provide the highest degree of legal certainty. States will know the obligations they undertake when ratifying the treaty and may direct their implementation efforts accordingly. Likewise, individuals awarded protection will know their rights and may hold a state accountable upon failure of implementation. Fourth, a large number of states may easily accede to the new treaty, giving rise to a greater degree of uniformity in the understanding of human rights between states and, hence, undermine arguments of cultural relativism.[26] Finally, by applying techniques of 'evolutionary interpretation', a treaty's protective force may even be updated over time.[27]

Accordingly, new human rights treaties are proposed on an almost annual basis.[28] Turning to this volume: David Stewart, for example, recommends an optional protocol to the Vienna Convention on Consular Relations[29] to more clearly lay out states' obligations regarding the right to consular assistance and to establish procedural safeguards (in the alternative, he suggests the development of a model law).[30] Oreste Pollicino, regarding the right to internet access, also believes it to be 'essential' that a human right is contained in a treaty that not only provides 'for its exercise, but also ensure[s] its enforcement.'[31]

[24] C. Chinkin, 'Sources', in Daniel Moeckli et al. (eds.), *International Human Rights Law*, 3rd edn (Oxford: Oxford University Press, 2018), pp. 65–70; E. Riedel, 'Rethinking Human Rights – Real Reforms in Procedure and Substance?', in Jost Delbrück et al. (eds.), *Aus Kiel in die Welt: Kiel's Contribution to International Law* (Berlin: Duncker & Humboldt, 2014), p. 428; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2012), p. 638.

[25] Although few such withdrawals actually occur: T. Christakis, 'Human Rights from a Neo-voluntarist Perspective', in J. Kammerhofer and J. d'Aspremont (eds.), *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), pp. 446–447.

[26] Chinkin, 'Sources', pp. 67–68.

[27] T. Thienel, 'The "Living Instrument" Approach in the ECHR and Elsewhere: Some Remarks on the Evolutive Interpretation of International Treaties', in J. Delbrück et al. (eds.), *Aus Kiel in die Welt: Kiel's Contribution to International Law* (Berlin: Duncker & Humboldt 2014), p. 165.

[28] Rather critical of this development, see Riedel, 'Rethinking Human Rights', p. 428.

[29] Vienna Convention on Consular Relations, Vienna, 24 April 1963, in force 19 March 1967, 596 UNTS 261.

[30] Stewart, in this volume, pp. 451–452.

[31] O. Pollicino, in this volume, p. 266.

One subset category of human rights treaties are those 'tailored' to the needs of a specific vulnerable group. Therein, existing human rights are somewhat refashioned to address the specific threats a certain group is susceptible to; additionally, new human rights may be introduced. Consider again the Inter-American Convention on Protecting the Human Rights of Older Persons: the right to health is specified so as to include, inter alia, palliative treatment and treatment for diseases that create special dependency (such as dementia or Alzheimer's disease) (Art. 19). Another newly established right is the right to community integration (Art. 8). Dinah Shelton, too, considers, *de lege ferenda*, the usefulness of a tailored treaty for indigenous peoples' rights, pointing out that these might require specific rights being 'particularly vulnerable to human rights abuses'.[32]

In the genesis of a treaty, it is important to realise that states will usually not immediately opt for a new treaty. Eibe Riedel has developed an idealised model for the coming about of new treaties (in some ways corresponding to our three-phase model). At first, states will only accept non-binding instruments serving as incentives on the domestic plane. Next, a state might consent to 'promotional obligations'[33] (organising expert meetings and educational programmes, and applying public relations methods) or 'norms of aspiration'. Only eventually and over time might a government commit to a new treaty. Riedel has described this process (which may come to a halt at any point) as the unfolding of a 'legislative cascade'.[34]

The process of actual treaty drafting is, once again, marked by flexibility. Often, drafting will occur under the auspices of an international organisation – next to the UN, the OAS has been particularly productive of late.[35] Within the UN the preparatory work may be undertaken by varying committees. Eventually, it is mostly the General Assembly that decides on any draft, opening it to signature (or not).[36]

THE CUSTOMARY INTERNATIONAL LAW APPROACH Opinions as to the relevance of customary international law in the field of human rights law vary considerably.[37] In any event, this approach is of less relevance than that of the treaty approach. For customary international law to develop, there has to be a general practice combined with acceptance of that practice as law (state practice and *opinio iuris*).[38] As both may arise in a great variety of forms,[39] it is difficult to generalise on how the development of a customary human rights norm will look. Any customary norm will emerge from the above-mentioned puzzle of action, if, indeed, sufficient activity accrues (we will expound on the requirements and their relative importance shortly). The customary

[32] Shelton, in this volume, p. 232.

[33] J. Delbrück, *Die Rassenfrage als Problem des Völkerrechts und nationaler Rechtsordnungen* (Frankfurt: Athenäum 1971), pp. 108–109.

[34] E. Riedel, 'Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?' (1991) 2 *European Journal of International Law* 58 at 71–72.

[35] For one drafting process within the OAS see Toro Utillano, in this volume, pp. 167ff.

[36] On the process within the UN see B. Ramcharan, 'The Law-Making Process: From Declaration to Treaty to Custom to Prevention', in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), p. 506.

[37] Crawford speaks of 'secondary' importance; see *Brownlie's Principles*, p. 638. Thirlway claims that there are no customary human rights norms; see Hugh W. A. Thirlway, 'Human Rights in Customary Law: An Attempt to Define Some Issues' (2015) 28 *Leiden Journal of International Law* 495 at 497. Tzevelekos again stresses the importance of customary law; see 'Making of International Human Rights Law', pp. 331–338. Tomuschat also seems to do so; see *Human Rights*, pp. 42–44.

[38] See e.g. Art. 38(1)(b) ICJ Statute and UNGA, Report of the International Law Commission, 2016, UN Doc. A/71/10, Chapter V: Identification of customary international law, conclusion 2.

[39] See ILC, Report: Identification of customary international law, conclusions 6 and 10.

international law approach offers certain specific advantages over the treaty approach: new norms may be established without express consent by *all* states; *general* practice carried by *opinio iuris* will suffice to bind *all* states; arguably, customary human rights norms may even bind international organisations (a quite important feature).[40] Furthermore, many national constitutions incorporate customary norms directly into domestic law, making them actionable on the domestic plane despite lacking treaty ratification (accordingly, customary human rights norms were mostly argued for in the United States due to its somewhat deplorable treaty ratification record[41]). Occasionally, customary norms will even be ranked above national statutory law – a priority which is less often given to international treaty obligations.[42] However, the authors of this book only rarely rely on customary international law. David Stewart briefly touches upon it when discussing the right to consular assistance.[43] Sigrid Boysen mentions a line of thought that claims a 'customary obligation to be democratic'.[44] That authors prefer to avoid this formal source may be due to the weaker consensual basis it provides compared to that of an international treaty. Also, due to the ambiguity in the source's requirements, it is rather difficult to convincingly argue the customary status of a human rights norm; it will not be too difficult for a state to offer an equally convincing counter argumentation. Arguing customary human rights norms may therefore be a frustrating undertaking.

THE DERIVATION APPROACH Deriving new human rights from already existing ones, that is identifying previously unarticulated aspects of old human rights, is an established practice in public international law (which does not hold true equally for all legal systems[45]). Derivation is achieved by means of interpretation.[46] In order to derive a new human right, the tribunal (or treaty body) must show that the new right is somehow 'implied' by or 'inherent' in one or several[47] existing human rights. The way to argue this implication (or inherence[48]) differs as to the relationship between the 'parent right'[49] and the offspring right. Moving from a general parent right to a specific offspring right, one may argue that the latter is fully encompassed in the former's scope. The new human right may then, of course, be no more encompassing than the parent right; the new right remains limited by the old right. Recognising this downside, Simon Rice argues only alternatively for deriving a right of access to law while preferring a free-standing right.[50] Similarly, Oreste Pollicino seeks to emancipate the right to internet access from the freedom of expression.[51]

[40] J. Klabbers, 'International Institutions', in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), p. 235.

[41] B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1988–1989) 12 *Australian Yearbook of International Law* 82 at 86; R. Lillich, 'The Growing Importance of Customary International Human Rights Law' (1995–1996) 25 *Georgia Journal of International and Comparative Law* 1 at 3–7.

[42] Simma and Alston, 'Sources of Human Rights Law', 84–88.

[43] Stewart, in this volume, p. 451.

[44] S. Boysen, in this volume, pp. 465–466.

[45] See the discussion on 'unenumerated rights' in US constitutional law in M. McConnell, 'Ways to Think about Unenumerated Rights' (2013) 5 *University of Illinois Law Review* 1985.

[46] On the technique of derivation see P. Thielbörger, *The Right(s) to Water: The Multi-level Governance of a Unique Human Right* (Berlin: Springer 2014), pp. 109–111; from a philosophical perspective see Nickel, *Making Sense of Human Rights*, pp. 100–105.

[47] One human right that may be derived from several parent rights is the right to water; see Thielbörger, *The Right(s) to Water*, pp. 64–75 and 112–120.

[48] The two terms seem to put a different emphasis on the State Parties' original intent.

[49] Terminology used, e.g., by Thielbörger, *The Right(s) to Water*, p. 64.

[50] S. Rice, in this volume, pp. 541, 548–554.

[51] Pollicino, in this volume, pp. 263ff.

Still, on occasions there are good reasons for deriving new human rights. The limited mandate of tribunals (and treaty bodies) will not allow them to establish new human rights without linking them to the corpus of rights already entrusted to them. When a 'new' situation occurs, one that is not within the scope of any human right (as understood at that point in time) but one that the tribunal nonetheless 'believes' should be covered, then the tribunal may use only the derivation approach to arrive at such coverage. One clear upside of derivation is that any new right will be part of the *lex lata* immediately (as it will be considered part of a binding treaty). Looking at the often decade-long drafting processes of new treaties, the derivation approach will appear quite tempting. In addition, formulating a new right will make it easier for courts and scholars to develop doctrine fitting the new right: e.g. a right to be forgotten may require different doctrine than the more general right to privacy.

When there is no general parent right available, one has to derive the new right from a parent right of equal concreteness. Consider the ECtHR's *Golder* case: Article 6(1) of the European Convention on Human Rights (ECHR)[52] does not (expressly) contain a right to access to courts in civil proceedings. Nonetheless, the ECtHR reasoned that such a right was 'inherent'[53] in Article 6(1) ECHR, arguing (in the main) that that right was *necessary* to the enjoyment of the procedural guarantees contained in Article 6(1) ECHR: 'The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.'[54] The inherence between one specific right and another specific right may thus be shown by arguing a relationship of necessity.[55] The Court seems to have aimed at establishing necessity *in stricto sensu* ('no value at all'). However, it seems fair to assume that a lower threshold will suffice. Gerald Fitzmaurice, for example, has recommended the standard of 'reasonableness', excluding those inferences that merely seem 'possible' or 'desirable' but not really 'compelling'.[56] Simon Rice seems to adopt this approach, arguing that the enjoyment of human rights is based on knowledge of the pertinent national law on that human right (thus establishing a right to access to law).[57]

A considerable amount of interpretation is undertaken by human rights treaty bodies.[58] Although these interpretations are non-binding upon states parties, they nonetheless have an impact on a treaty's interpretation.[59] However, derivations undertaken by treaty bodies hinge on states actually accepting those interpretations (more so than for interpretation by international tribunals whose decisions are legally binding). As stated by Dinah Shelton: interpretations rendered by treaty bodies 'will have persuasive force insofar as the organs retain their independence, deliver reasoned and consistent opinions using accepted methods of treaty interpretation,

[52] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221.

[53] ECtHR, *Golder* v. *United Kingdom* (Appl. no. 4451/70), judgment, 21 February 1975, para. 36.

[54] ECtHR, *Golder* v. *United Kingdom*, para. 35.

[55] G. Fitzmaurice sees a logical fallacy (the 'King of France' paradox) at play in this argument; see his Separate Opinion to ECtHR, *Golder* v. *United Kingdom*, paras. 23–46.

[56] G. Fitzmaurice, 'Hersch Lauterpacht – The Scholar as Judge (Part III)' (1963) 39 *British Yearbook of International Law* 133 at 154, see the note entitled 'philosophy of the inference'; Nickel, *Making Sense of Human Rights*, pp. 100–105.

[57] Rice, in this volume, pp. 551–552.

[58] H. Keller and L. Grover, 'General Comments of the Human Rights Committee and Their Legitimacy', in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies – Law and Legitimacy* (Cambridge: Cambridge University Press, 2012), p. 117 note 8.

[59] The legal methodological explanation of any such impact remains disputed; see Keller and Grover, 'General Comments', pp. 128–133; D. Shelton, 'The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies', in H. Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity – Liber Amicorum Rüdiger Wolfrum*, 2 vols. (Leiden: Martinus Nijhoff Publishers 2012), vol. I, pp. 553–575.

and establish a pattern of compliance by States parties.'[60] Accordingly, the right to water cannot be considered part of *lex lata* 'merely' because it has been derived by the Committee on Economic, Social and Cultural Rights; the Committee's interpretation, however, forms an essential part of the aforementioned 'puzzle of actions'.[61]

1.2.3 *Phase 3: 'Full Recognition'*

The third phase begins when the new human right has become legally binding by any of the means described above. When exactly this moment arrives is, of course, the easiest to identify when it comes to new human rights treaties: once a treaty is in force, the rights contained therein are binding upon all ratifying states; e.g. the Convention on the Rights of Persons with Disabilities[62] has been ratified by nearly 180 states. The new rights contained therein, hence, are fully recognised by those states. When it comes to customary international law, the moment of full recognition becomes far more difficult to determine (a court decision based on a customary human rights norm may be helpful here). For example, the rights of indigenous peoples as contained in the UNDRIP may be on a path to recognition; however, they probably still fall short of full recognition as free-standing customary rights. The right not to be subjected to torture is again considered a customary human rights norm.[63] Rights that have been derived include, e.g., the above-mentioned right to access to courts as derived by the ECtHR in the *Golder* case.[64] As mentioned before, the right to water has been derived, however 'only' by a human rights treaty body; full recognition hence will require more acceptance by states.[65]

It is important to bear in mind, however, that rights may also be fully recognised on a regional level 'only' while still being in an earlier phase of recognition on the global level. For example, the right to sport is expressly contained in the Arab Charter of Human Rights,[66] not, however, in other instruments. The right to be forgotten, which is now contained in Article 17 of the General Data Protection Regulation,[67] is binding on EU Member States only.[68]

1.3 'HUMAN RIGHTS EXCEPTIONALISM'?

There exists a decade-long debate on whether certain secondary norms of public international law have been (or should be) altered in the field of international human rights law.[69] According to those favouring (or identifying) such an alteration – an approach Jean d'Aspremont has

[60] D. Shelton, 'Normative Pronouncements of Human Rights Treaty Bodies', p. 574; for an analysis from a process perspective see Keller and Grover, 'General Comments', pp. 128–133.

[61] D. Chirwa, in this volume, p. 64.

[62] Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, in force 3 May 2008, 2515 UNTS 3.

[63] Crawford, *Brownlie's Principles*, p. 642.

[64] See above at 1.2.2.2 The Derivation Approach.

[65] Ibid.

[66] Arab Charter on Human Rights, Tunis, 22 May 2004, in force 15 March 2008, reprinted (and translated) in (2006) *Boston University Law Review* 147 at 149.

[67] European Parliament and Council of the European Union, Regulation (EU) 2016/79 (General Data Protection Regulation), 27 April 2016, (2016) *Official Journal of the European Union* L 199/1.

[68] M. Susi, in this volume, pp. 294–295.

[69] J. d'Aspremont, 'Expansionism and the Sources of International Human Rights Law' (2016) 46 *Israel Yearbook on Human Rights* 223; P. Alston, 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1 *Harvard Human Rights Yearbook* 3 at 11–13 (speaking of 'specialist isolationism'); A. Pellet, '"Human Rightism" and International Law' (2000) 10 *Italian Yearbook of International Law* 3.

termed 'human rights exceptionalism' – secondary rules of international law remain generally valid, some requirements or modes of legal reasoning, however, cannot be applied as strictly as in other branches of international law. Arguments put forward in favour of this exceptionalism focus on the non-reciprocal character of human rights obligations, their 'constitutional' nature or the 'foundational interests' they protect.[70] The 'opposing' side cautions against a fragmentation of international law that might occur when secondary norms are interpreted differently across the many international legal regimes.[71] Also, they caution against substituting a lack of political will of states by other means (e.g. by a 'softening' of the requirements to the formation of customary international law); eventually, the cause of human rights may suffer as a result.[72] In the following we shall, exemplarily, address some of the exceptionalist claims. We shall first address some claims regarding the formation of new rules of public international law, however, therein limiting ourselves to claims pertaining to the sources of customary international law (Section 1.3.1.1) and general principles of law (Section 1.3.1.2). We shall then look at exceptionalist claims pertaining to the rules on treaty interpretation (Section 1.3.2).[73]

1.3.1 *Exceptionalism and the Requirements for the Formation of New Rules of Public International Law*

1.3.1.1 Customary International Law

Many exceptionalist claims turn on the requirements for the formation of customary international law. Anthea Roberts has coined the terms 'traditional' and 'modern custom'.[74] Traditional custom is focused on the element of state practice; *opinio iuris* serves as a secondary means to exclude 'customary' behaviour that is mere *courtoisie*. The traditional approach is, hence, inductive: a legal rule is inferred from a multitude of state actions. The International Court of Justice (ICJ) took this approach, inter alia, in its *North Sea Continental Shelf* decision.[75]

Those seeking to establish customary human rights norms, however, often face difficulties in identifying sufficient state practice: either there is a lack thereof or, unfortunately, there is even state practice contradicting the newly proposed norm. Another problem is that state practice often does not take place in the international arena but rather within states, and examples are therefore more difficult to detect and gather.[76] What is available to international lawyers, however, is a constant stream of official pronouncements committing to human rights. Many scholars therefore advocate an understanding of customary international law that allows for emphasising

[70] For an overview see d'Aspremont, 'Expansionism'; M. Fitzmaurice, 'Interpretation of Human Rights Treaties', in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), pp. 740–744.

[71] See e.g. UNGA, Second Report on the Identification of Customary International Law, 22 May 2014, UN Doc. A/CN.4/672, para. 28.

[72] See e.g. G. Nolte, 'The International Law Commission and Community Interests', in G. Nolte and E. Benvenisti (eds.), *Community Interest Across International Law* (Oxford: Oxford University Press, 2018), p. 101.

[73] Many questions we shall leave unaddressed, e.g. the matter of reservations to human rights treaties or the relevance of non-state actors and international organisations in the formation of rules of customary international law.

[74] A. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law* 757; see also J. Kammerhofer, 'Orthodox Generalists and Political Activists in International Legal Scholarship', in M. Happold (ed.), *International Law in a Multipolar World* (London: Routledge, 2012), pp. 146–153; J. Wouters and C. Ryngaert, 'Impact on the Process of the Formation of Customary International Law', in M. Kamminga and M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press, 2009), pp. 99–131.

[75] ICJ, *North Sea Continental Shelf (Federal Republic of Germany* v. *Netherlands)*, Judgment, 20 February 1969, ICJ Reports 1969, p. 3.

[76] Tomuschat, *Human Rights*, p. 42.

opinio iuris over state practice. Frederic Kirgis famously placed the two elements on a 'sliding scale' (making it possible to downplay state practice in cases of 'morally distasteful behaviour').[77] Exceptionalists, hence, take a more deductive approach: setting out from the statement of a general rule, they only secondarily ask whether that rule is actually supported by state practice. Opposing state practice may then even be set aside. Oscar Schachter, in his 1982 Hague Lecture, claimed that 'when violations of these strongly held basic rights of the person take place, they are to be regarded as violations, not as "State practice" that nullifies the legal force of the right'.[78] Another strand of exceptionalists has argued that verbal acts – not merely state action 'on the ground' – should be considered state practice.[79] Such a modern understanding of customary international law may take support from the ICJ's *Nicaragua* decision.[80]

The state of the *lex lata* probably lies somewhere in the middle of these two positions. The International Law Commission (ILC), in its current work on the formation of customary international law, has affirmed that the 'two element'–approach applies to all fields of international law.[81] However, it also acknowledged that when ascertaining the formation of customary rules, regard must be had to the 'nature of the rule' and 'the particular circumstances in which the evidence in question is to be found'[82] and thus somewhat allowing for differentiation between the many regimes of international law. The ILC also acknowledged that verbal acts may constitute state practice, in particular 'conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference';[83] however, the ILC repeatedly stressed that such a resolution 'cannot, of itself, create a rule of customary international law'.[84]

We agree with the ILC's approach. In particular, when it comes to General Assembly resolutions one must bear in mind that the General Assembly is first and foremost a *political* organ – words spoken are, accordingly, first and foremost politically, not legally motivated. Accordingly, resolutions must be assessed 'with all due caution'.[85] Looking from the perspective of legal policy, international law must remain responsive to the international community's 'legislative needs'. Blindly adhering to the traditional approach will not satisfy these needs and will eventually undermine international law's credibility as a useful tool in tackling modern-day problems. However, it is equally important that rules of customary international law have a basis in state practice, otherwise states will not feel compelled to adhere to those rules, thus again undermining international law's credibility.

1.3.1.2 General Principles of Law

Another source that is occasionally put forward to ground human rights in law is that of 'general principles of law', as contained in Article 38(1)(c) of the ICJ Statute. What these principles are exactly and how they may be identified is uncertain and disputed.[86] The dominant view holds

[77] F. Kirgis, 'Custom on a Sliding Scale' (1987) 81 *American Journal of International Law* 146 at 148.

[78] O. Schachter, 'International Law in Theory and Practice: General Course in Public International Law' (1982) 178 *Recueil des cours* 21 at 336.

[79] Lillich, 'Customary International Human Rights Law', 12–14 and 18; Wouters and Ryngaert, 'Formation of Customary International Law', p. 115.

[80] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*, Judgment (Merits), 27 June 1986, ICJ Reports 1986, p. 14, paras. 184, 186.

[81] ILC, Report: Identification of customary international law, conclusion 2 and commentary, para. 6.

[82] Ibid., conclusion 3.

[83] Ibid., conclusion 6.

[84] Ibid., conclusion 12(1) and commentary, para. 6.

[85] ICJ, *Military and Paramilitary Activities in and against Nicaragua*, para. 70.

[86] A. Pellet, 'Article 38', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice – A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2012), para. 250.

that the term general principles refers to legal principles (or rules) of a broad nature that have been developed in municipal systems (*in foro domestico*) and that may sensibly be applied on the international plane.[87] Bruno Simma and Philip Alston, however, contest that view: general principles may be established directly on the international plane from where they percolate 'downwards' to the domestic sphere. These principles of *international* law may be inferred from statements of consensus, such as those expressed at global summits or in UN resolutions.[88] The concept of general principles seems rather stretched in this interpretation: designed as a gap-filler to avoid situations of *non-liquet*,[89] it is used by Simma and Alston to do the heavy lifting regarding broad, substantive and often highly contested issues.[90] The same assessment – though with less force – applies to the suggestion made by Jan Wouters and Cedric Ryngeart: accepting the dominant view, they believe that human rights have gathered sufficient support in national constitutions and may therefore (even in the absence of 'strict respect' for them) be 'piggybacked' to the international plane.[91] Anyhow, in the end approaches focusing on this source do not seem to have had a great impact on the development of new human rights;[92] indeed, the authors of this book do not seem to rely on that source (that is, at least expressly[93]).

1.3.2. *Exceptionalism and the Rules on Treaty Interpretation*

When interpreting human rights treaties (including when deriving new human rights from such treaties), tribunals, treaty bodies and scholars sometimes have adopted an interpretative approach that differs from that in general international law or other fields of international law.[94] The approach seems marked by a certain bias towards the protection of human rights.[95] These special interpretative techniques mostly remain within the (rather vague) limits set by the Vienna Convention on the Law of Treaties (VCLT).[96] However, interpreters do make good use of the broadly formulated provisions of the VCLT and strongly emphasise the interpretative element of 'object and purpose'. For example, George Letsas states that the ECtHR 'rejected a view, common amongst many lawyers and judges, that legal interpretation is an inquiry into the linguistic meaning of words'.[97] Furthermore and in particular, originalist approaches

[87] Pellet, 'Article 38', para. 259; H. Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2014), p. 95; Crawford, *Brownlie's Principles*, pp. 34–35.

[88] Simma and Alston, 'Sources of Human Rights Law', 102–106. Also stressing the utility of 'general principles', see Riedel, 'Rethinking Human Rights', pp. 430–431; Ramcharan, 'The Law-Making Process', pp. 499 and 514; Tomuschat, *Human Rights*, p. 43.

[89] Pellet, 'Article 38', para. 250.

[90] Pellet, 'Human Rightism', 5–7; Thirlway, *Sources of International Law*, p. 96 note 11.

[91] Wouters and Ryngaert, 'Formation of Customary International Law', pp. 120–122.

[92] Chinkin, 'Sources', p. 74.

[93] Tomuschat points out that lawyers often refer to customary international law when actually moving within the purview of 'general principles', thereby drawing on customary law's 'greater potential of persuasion'; see *Human Rights*, p. 43.

[94] Fitzmaurice, 'Interpretation of Human Rights Treaties', pp. 739–771; Christakis, 'Human Rights from a Neo-voluntarist Perspective', pp. 421–450; G. Letsas, 'Strasbourg's Interpretative Ethic: Lessons for the International Lawyer' (2010) 21 *European Journal of International Law* 509.

[95] E.g. human rights tribunals have, partly, established a de facto hierarchy in favour of human rights; see E. de Wet and J. Vidmar, *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press, 2012), pp. 306–307.

[96] Fitzmaurice, 'Interpretation of Human Rights Treaties', p. 769; Thienel, 'The "Living Instrument" Approach', pp. 174–177. See the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.

[97] Letsas, 'Strasbourg's Interpretative Ethic', 520.

to interpretation (advising judges to 'immerse themselves'[98] in the society which adopted the text) are rejected by interpreters of human rights norms.[99] We may also find this interpretative approach when looking at the chapters of the present book; e.g., when deriving new human rights, the authors mostly advance from a teleological perspective and do not entertain historic or text-oriented arguments.[100]

We would like to recommend taking a cautious approach to deriving new human rights by means of a more generous reliance on a treaty's object and purpose. To any interpreter the derivation technique will seem rather tempting: the new human right will be placed into an existing treaty regime as into the Bosom of Abraham; (more or less) covered by the state party's initial consent to the parent norm, the new right will be part of *lex lata* instantly. The temptation of the derivation approach is further heightened by the fact that (as observed by Cecilia Medina) it is almost impossible to arrive at an outright illegal interpretation.[101] To states as the addressees of any new obligations, however, the procedure might look as though white rabbits were being pulled from empty hats.[102] At some point, accusations of 'judicial activism' may arise, damaging the tribunal's authority and, eventually, that of the human rights cause in general.[103] Beyond the issue of reputation, Günther Handl draws attention to other possible deficiencies of judicial activity, such as the lack of democratic legitimacy and, on occasion, of technical competence.[104]

1.4 OUR APPROACH: 'DIFFERENTIATED TRADITIONALISM'

The lack of any procedure or directing authority for the recognition of new human rights has left some unease in the field of human rights law. In 1984 Alston, inspired by the procedures of the ILC, recommended a corresponding procedure (an "*appellation contrôlée*"[105]) to be set up under the auspices of the UN in order to ensure 'thoughtful consideration' of any new human right.[106] No such procedure came about.

Somewhat sharing in Alston's unease, we propose not a procedure for the further development of human rights but an approach which we shall call 'differentiated traditionalism'. Our approach is 'traditionalist' in so far as we caution against carrying human rights exceptionalism too far – from a legal perspective as well as from the perspective of legal policy (putting forward the above-mentioned arguments). Furthermore, we recommend differentiation when talking about the legal status of any new human right: whether such a human right is recognised 'in public international law' can often not be dealt with in a binary 'yes or no' fashion – rather, one must specify any statement as to the right's content and geographical scope of application. Also, the phases of emergence and the different forms of recognition may serve to further differentiate as to the legal status of any new human right.

[98] P. Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 *Boston University Law Review* 204 at 208.

[99] Letsas, 'Strasbourg's Interpretative Ethic', 512–520.

[100] See e.g. Rice, in this volume, pp. 548–554.

[101] C. Medina, 'The Role of International Tribunals: Law-Making or Creative Interpretation', in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), p. 649.

[102] See the criticism put forward by G. Fitzmaurice against the majority in his separate Opinion to ECtHR, *Golder v. United Kingdom*.

[103] Medina, 'The Role of International Tribunals', pp. 649–670; Christakis, 'Human Rights from a Neo-voluntarist Perspective', pp. 434–437.

[104] Handl, in this volume, pp. 145–146.

[105] In imitation of the review procedures for French wine; see the website of the Institut national de l'origine et de la qualité at www.inao.gouv.fr/eng/.

[106] Alston, 'Conjuring Up New Human Rights', 607 at 618–620.

Taking as an example the 'right to nature', that is a human right to a healthy or clean natural environment, several regional instruments contain rights that may very well be discussed – as in this book – under the common headline of 'right to nature'. However, it is important to differentiate these – as Handl and Rodgríuez-Rivera have done in their respective chapters – as to their regional application and, even more importantly, their precise material content: a right guaranteed in the African Convention on Human and Peoples' Rights[107] may have a different content (either by express formulation or subsequent interpretation) than a 'similar' right within the Inter-American human rights system.[108] Any judgment by the ECtHR on the issue is, in turn, specific to the ECHR (where any such right is not conventionally guaranteed but must be derived and is, therefore, subject to certain restrictions[109]). When talking about a 'right to nature', these differentiations must be kept in mind, in particular when arriving at general conclusions on the current status of international law regarding any such right and its precise content.

Another example, focusing more on the 'traditionalist' element of our approach, may be the rights of indigenous peoples: several authors deem these to be on a path to customary law status. When assessing such a status, it is important to bear in mind general international law on the creation of customary norms. Eventually, one must gather state practice and *opinio iuris* regarding *specific* claimed indigenous rights. Also, it will not suffice to point at the overwhelming majority that voted in favour of the UNDRIP without considering the Declaration's context, its genesis and precise formulation. However, by describing indigenous rights, e.g., as 'emergent' or in an 'advanced stage', the current development in the field of indigenous rights may be acknowledged without losing sight of the fact that the discussed rights may not yet have been 'fully recognised'.

1.5 CONCLUSION

Expanding the human rights regime in order to adapt it to new circumstances as well as changing needs and perspectives is a necessary and worthy endeavour. Human rights law requires an inherent dynamism lest human rights lose their capability to solve the problems that people face in a modern-day world. The expansion of the human rights regime, however, does not constitute an end in itself. Expansion should only be sought if necessary. Human rights (qua legal rights) must remain firmly grounded in law. Finally, expanding the human rights regime may also be a matter of proper timing. International law does not work in a vacuum – the 'political possibilities [of realisation] at a particular juncture of history'[110] must be considered; e.g., in certain times the derivation of a new human right by a tribunal may be more acceptable than in others. Thus, the key challenge is to achieve a balance between 'the integrity and credibility of the human rights tradition' and the 'need to adopt a dynamic approach'.[111] The 'differentiated traditionalism' presented in this chapter may be an approach which helps to strike this balance.

[107] African Charter on Human and Peoples' Rights (Banjul Charter), Nairobi, 27 June 1981, in force 21 October 1986, 1520 UNTS 217, Art. 24.

[108] Art. 11 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), San Salvador, 17 November 1988, in force 16 November 1999, (1988) OAS Treaty Series No. 69.

[109] See above Section 1.2.2.2 The Derivation Approach.

[110] J. Kunz, 'The Swing of the Pendulum: From Overestimation to Underestimation of International Law' (1950) 44 *American Journal of International Law* 135 at 140.

[111] Alston, 'Conjuring Up New Human Rights', 609.

2

Novelty in New Human Rights

The Decrease in Universality and Abstractness Thesis

Mart Susi

2.1 INTRODUCTORY NOTES – ENTERING UNEXPLORED TERRITORY

The element of novelty in relation to new human rights has two main aspects – epistemic and ontic. The epistemic aspect is influenced by time and refers to the process of knowledge development and discursive practice from the introduction of the idea of a new human rights claim, usually reflecting a fundamentally important social value, until sometime after its regional or universal recognition either in human rights positive or soft law, or conversely, its rejection. The claim of 'novelty' starts before and ends after the recognition of a new human right in the family of so-called stand-alone human rights.

The ontic aspect of novelty refers to the conceptualisation of a 'new' human right within the circle of already established human rights. The ontic aspect is about the content of the new human rights claim vis-à-vis established human rights, the latter understood as human rights where no contestation about their existence in principle and their recognition exists. What are the reasons for advancing a new human right claim instead of confining oneself to broadening the scope of an existing human right through dynamic academic or judicial interpretation?

The claim of novelty begins when the idea of a new human right has acquired some academic and/or judicial and/or political articulation regionally or globally. The claim of novelty will wither after this new human right has gained a critical mass of recognition in some formal capacity. Because of the complexity of modern human rights architecture, a new human right can also remain in an ongoing state of contestation, which can lead to international fragmentation on the need for this right or the rejection of the right in the future. Even if a new human right were to be introduced and then accepted via discursively ideal conditions, it could claim novelty for at least some time thereafter. The contestation of a new human rights claim can also lead to this new human right being conclusively viewed as part of an existing right, in which case the term 'new' carries predominantly rhetorical weight.

This chapter reflects on these aspects of new human rights claims, relying upon and generalising the arguments and conclusions from chapters in the present collection. The volume and scope of the new human rights discussed surpasses the critical amount of scholarly evidence necessary for presenting a theoretical framework for understanding why and how new human rights claims emerge, how they develop, what their normative and discursive weight in relation to established human rights is, and lastly, whether the justifications offered are sufficient

to make a case for the new human rights. This chapter will also offer a theoretical response to the rights inflation argument.

Before embarking on the intricacies of the origin and justification of new human rights claims, a caveat is to be noted. The discourse of the element of novelty in new human rights has predominantly remained abstract without much support from concrete examples allowing generalisation. This means that the present chapter takes us to unexplored territory. For example, Bruno Simma and Philip Alston's observation that 'in the development of human rights law principles have always preceded practice'[1] becomes problematic in the light of the chapters in this book, since principles and practice in human rights development are conditional upon one another in both directions. The possibility that practice can precede principles will be shown below through the inadequacy of protection thesis, as insufficient protection of some value or group in practice leads to the articulation of new human rights principles. From the other side, it is because of the principle of equality that the proposition to change such practice emerges in the first place.

2.2 THE JUSTIFICATION FOR NEW HUMAN RIGHTS CLAIMS – THE ONTIC DIMENSION

The primary, if not only, reason for advancing new human rights claims is based on the realisation that present human rights law and practice does not provide adequate protection for some important social, political or other value, or alternatively, does not adequately protect certain vulnerable or marginalised groups. The challenges to the status quo have multiple origins, which, as will be shown below, mostly appear utilitarian. The common characteristic of these challenges to the status quo is the understanding that established human rights are not capable of providing an adequate degree of protection of these values or the groups which claim insufficient protection through established rights. We can label this 'the inadequacy of protection thesis'. This thesis brings under one umbrella the political and naturalist perspectives of human rights development. According to the political perspective, human rights development is justified through the identification of deficiencies of specific rights application dependent on national contexts[2]. This perspective is contrasted by the naturalist perspective, which connects human rights development to the conceptualisation of demands of one human on other human individuals due to their common human characteristics, irrespective of practical conditions[3]. The inadequacy of protection thesis contains both the political and naturalist perspectives, the political perspective being connected to vulnerable or marginalised groups and the naturalist perspective to the aspect of values. The inadequacy of protection thesis shows that the 'contradiction between conceptions of human rights as either inherent in human beings by virtue of their humanity or as benevolently granted by the state'[4] is irrelevant for understanding the process of human rights development. This is because human rights development is not conditional on

[1] B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Ius Cogens, and General Principles' (1992) 12 *Australian Yearbook of International Law* 82 at 107.

[2] For the political perspective on human rights, see for example: C. Beitz, 'What Human Rights Mean' (2003) 132 *Daedalus* 36–46.

[3] See for example T. Dare, What Are Human Rights?' (2017) *Philosophy Now*, available at https://philosophynow.org/issues/118/What_Are_Human_Rights, where he writes: 'But because the political view construes human rights as dependent upon political institutions and practices, it is unlikely to satisfy those attracted to human rights precisely because of their independence from particular political practices.'

[4] P. Alston, 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1 *Harvard Human Rights Yearbook* 3 at 31.

whether a human right is granted by the state or is inherent in human beings. This contradiction is transposed into new human rights as well.

There are two subsequent matters of justification related to the inadequacy of protection thesis: first, how such inadequacy is justified; and second, whether the introduction of a new human right is a justified response to such perceived inadequacy.

2.2.1 *Origins of the Inadequacy of Protection Claim*

There are six origins to the inadequacy of protection claim. The first origin is related to the desire to bring about political change internationally or domestically, either as manifest in an ideal goal or realisable through practical steps. In other words, new human rights are seen as instruments in the service of a political agenda. Should certain new human rights be established and recognised, then the respective political agenda could be realised more fully, the argument says. Hugh Corder stresses the aspirational nature of the very idea of human rights in relation to administrative justice as a new human right.[5] Bucura Mihăescu-Evans seconds by asking whether there is a need for a change of culture towards greater accountability, responsiveness and openness, which can be achieved via recognising a human right to administrative justice.[6] Frédéric Mégret points out that the right to consular protection can help to strengthen the ties to one's country of nationality.[7] Andrew Spalding writes about the dichotomy between corruption and human rights: the anti-corruption conventions do not frame corruption as a rights violation, and human rights instruments do not mention corruption; however, the cause of the anti-corruption movement could be strengthened by a human right to no corruption.[8] Tiina Pajuste predicts that the recognition of the rights of older persons as human rights increases the visibility of that issue and might elicit more action from states.[9] Roberto Andorno reports that UNESCO and the Council of Europe have played crucial roles in human rights strategic development for genetics.[10] Last but not least, Sigrid Boysen hints that a human right to democracy could be used as a legal basis for intervention in countries that lack democratic governance.[11]

The second origin is from the push by civil society or special interest group agendas. Eva Brems writes that new human rights, in particular the right of access to gestational surrogacy, have emerged from the push by people who have been structurally marginalised.[12] Pajuste points to the push for the recognition of the rights of older persons by the advocacy efforts of non-governmental and governmental organisations.[13] Miloon Kothari describes how the right to adequate housing and land has been used as an advocacy tool by social movements and campaigns across the globe.[14] Fergus MacKay points out that sustained and highly effective advocacy by indigenous peoples has been central to the development of indigenous rights.[15]

[5] H. Corder, in this volume, p. 493.
[6] B. Mihăescu-Evans, in this volume, p. 509.
[7] F. Mégret, in this volume, p. 455.
[8] A. Spalding, in this volume, p. 525. Spalding asks: 'Would the global anti-corruption movement be strengthened if we understood corruption as the violation of a human right?'
[9] T. Pajuste, in this volume, p. 184.
[10] R. Andorno, in this volume, pp. 339ff.
[11] S. Boysen, in this volume, p. 466.
[12] E. Brems, in this volume, p. 330.
[13] Pajuste, in this volume, p. 184.
[14] M. Kothari, in this volume, p. 81.
[15] F. MacKay, in this volume, p. 233.

The third origin is related to the understanding that present human rights law does not allow sufficient protection towards certain new challenges emerging in the contemporary world. Judit Sándor reflects that a new catalogue of human rights with more specific provisions for genetic rights would offer a better framework for incorporating new rights that may already have emerged in ethical or political debates.[16] David Stewart points out that traditional international law has not conclusively articulated the right to consular assistance as a human right.[17] Andorno reflects upon the new questions which emerge due to genetic research.[18] Oreste Pollicino has the view that something which is not currently guaranteed under other legal systems, namely the possibility to protect citizens against potential backsliding by public authorities, is a justification for the claim that access to the Internet can be labelled as a new human right.[19]

The fourth origin comes from technological and scientific developments. Brems predicts that the appearance of artificial wombs will result in the solidification of a human right of access to (artificial) gestational surrogacy, at least for those for whom this is the only way to reproduce genetically.[20] Tomasz Pietrzykowski points out that recent research has discovered the complexity of animal interactions and sophisticated patterns of behaviour, thus leading to a change in social attitudes.[21] Andorno reflects upon the advances in genetic rights as a consequence of scientific and technological developments.[22] Present-day practices resulting from treatments such as IVF and gestational surrogacy need to be reflected in human rights law, according to Mindy Roseman.[23]

The fifth origin is related to the conceptualisation of moral and social values. Different from the previous four purely utilitarian origins, a conceptual side also exists. Pietrzykowski indicates that animal rights arise out of a moral discourse.[24] Kothari demonstrates that there are social reasons for the development of the right to adequate housing and land.[25] Roseman argues that reconceptualising infertility as a disabling status having biomedical and social/structural causes, coupled with more inclusive norms surrounding family formation, has the potential to recast the human rights obligations of states.[26] Mihăescu-Evans points to the interpretation of existing human rights principles, such as the principle of care.[27] Jérémie Gilbert writes that the current global situation ignores the social, cultural and spiritual importance of land rights.[28] Danwood Chirwa draws from the studies revealing that more than a billion people do not have access to water, and 2.3 billion suffer from water-related illnesses, the cause of the moral duty to recognise the right to water as a human right.[29]

Special attention is given by many authors to the notion of dignity, which is viewed as a source of extending the circle of human rights. Simon Rice draws the right to access to law from the

[16] J. Sándor, in this volume, pp. 356f.
[17] D. Stewart, in this volume, pp. 439f.
[18] For example: under what conditions should personal genetic information be obtained, stored and disclosed? Do people have the right not to know their predispositions to genetically related diseases? Andorno, in this volume, p. 335.
[19] O. Pollicino, in this volume, p. 271.
[20] Brems, in this volume, p. 332.
[21] T. Pietrzykowski, in this volume, pp. 243f.
[22] Andorno, in this volume, p. 335.
[23] M. J. Roseman, in this volume, p. 313.
[24] Pietrzykowski, in this volume, p. 243.
[25] Kothari, in this volume, p. 85.
[26] Roseman, in this volume, p. 314.
[27] Mihăescu-Evans, in this volume, p. 508.
[28] J. Gilbert, in this volume, p. 99.
[29] D. M. Chirwa, in this volume, p. 63.

field of human dignity.[30] Thomas Douglas conceptualises the right to bodily integrity and sees that this is derived from the notion of bodily dignity.[31] Andorno mentions that the notion of human dignity has the potential to help identify claims that deserve to be recognised as human rights.[32]

The sixth origin is purely intellectual and philosophical, and thereby, in contrast with the previous origins, is only conceptual. Chirwa writes that the right to water has a philosophical basis – the understanding that resources on earth are meant for humanity.[33] A specific case is that of the right to mental integrity, which seems to stem from the original intellectual contemplation of the scholar advancing the claim for such a new human right, as seen in the approach of Jan-Christoph Bublitz.[34]

2.2.2 *The Justification of New Human Rights in Response to Inadequate Protection*

All the new human rights discussed in this collection can be traced to some uncontested, globally accepted and long-standing human right norm or multiple norms in conjunction, which can thus be considered an overarching conceptual framework for the emergence of any new human rights claim. The new human right either strengthens a specific aspect of the established human right to the degree that its separation as a new human right is justified, or the articulation of a new human right is due to novel challenges or threats which contemporary societies are facing, and advanced on the basis of some generally accepted international human rights law principle.[35] The following examples illustrate this observation.

Sabine Michalowski writes that Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is interpreted as being too narrow to provide comprehensive protection for the human mind.[36] Bublitz links the right to mental integrity to Article 8 of the ECHR[37] and to the right to be left alone.[38] Gilbert argues that land rights emerge from the recognition of the right to a certain standard of living.[39] Mégret connects the right to consular protection to the right to freedom from arbitrary detention.[40] Mihăescu-Evans ties the right to administrative justice to the right to an effective remedy.[41] Holning Lau writes that the right to gender recognition can be derived from four rights: personal autonomy, informational privacy, health and bodily integrity.[42] Rice connects the right of access to law to the emerging right of access to information.[43] Günther Handl points out that while recognising the

[30] S. Rice, in this volume, p. 541.
[31] T. Douglas, in this volume, p. 378.
[32] Andorno, in this volume, p. 336.
[33] Chirwa, in this volume, pp. 58ff.
[34] J.-C. Bublitz, in this volume, pp. 398ff.
[35] For example, Andorno shows that new socioeconomic factors and technological developments may create new threats to basic human goods and interests – Andorno, in this volume, p. 337. Pollicino indicates that the Internet raises new risks to fundamental rights protection – Pollicino, in this volume, p. 272. Implication can also follow from several constituent rights. For example, Thomas Douglas writes that the concept of the right to bodily integrity is implied by the right to bodily integrity, bodily ownership and bodily autonomy – Douglas, in this volume, p. 379. Likewise, A. M. Viens argues that the right to bodily integrity is understood as an implied right – A. M. Viens, in this volume, pp. 364f.
[36] S. Michalowski, in this volume, p. 405.
[37] Bublitz, in this volume, p. 388.
[38] Ibid., p. 396.
[39] Gilbert, in this volume, pp. 99f.
[40] Mégret, in this volume, p. 455.
[41] Mihăescu-Evans, in this volume, p. 509.
[42] H. Lau, in this volume, p. 194.
[43] Rice, in this volume, p. 549.

difficulties associated with immediate implementation, proponents locate a substantive environmental right among economic, social and cultural rights.[44] Janneke Gerards shows how most, if not all, aspects of the right to access to law are already covered by broadly accepted principles or international law provisions.[45] She writes that both the control and regulatory aspect and the facilitating aspect of the right of access to law form part of several human rights.[46] Kothari makes the case that the right to adequate housing and land is recognised as part of the right to an adequate standard of living.[47] McKay says that it is now common to classify indigenous rights as collective rights that are grounded in and operate within the framework of the right to self-determination.[48] Brems mentions that at the Cairo World Conference 1994, a strategic choice was made not to claim that sexual and reproductive rights are new human rights, but rather that they are/should be read into existing human rights.[49] These examples suffice to demonstrate the connection of new human rights claims with established and recognised human rights.

Consequently, the next step is to ask whether the approach that says only a new stand-alone human right can provide the adequate protection which is not achievable through broadening the scope of or simply interpreting the respective established right is justified. The reason for advancing a new human rights claim is due to the opinion, either theoretical or emerging via explication, that established human rights are either not capable of providing comprehensive protection for a specific social value or interest, or that the practice of implementation of the established human right leaves certain vulnerable groups without a level of protection that is comparable to that of non-vulnerable groups: that is, society at large. We are sometimes told that the emergence of a new human right is necessary to secure sufficient protection for some concrete value, counter a specific threat or secure the rights of vulnerable groups. New human rights can change people's minds and values, writes Brems as an abstract contemplation.[50] However, none of the chapters in the present collection contain evidence that the recognition of a new human right, in addition to explicitly placing certain social values into the framework of established human rights, is actually capable of achieving a higher degree of protection for the respective social value. It is rather the process of articulation, presenting various contesting arguments and using the new human rights claim as an advocacy tool that may lead to increased protection.

There are two distinct categories of new human rights claims. First, there are new human rights claims connected with the incapability of the discursive practice of established rights to provide sufficient protection to certain groups. The aspect of novelty lies in the understanding that the new human rights claim will be capable of doing so. Dinah Shelton indicates that all special texts of indigenous rights expressly recognise that every indigenous person enjoys the civil, political, economic, social and cultural rights guaranteed to all individuals,[51] and this is due to the advancement of the claim of indigenous rights. Lau writes that protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT-specific rights, nor does it require the establishment of new international human rights standards, but simply the application of existing rights without discrimination of LGBT people.[52] Sexual

[44] G. Handl, in this volume, p. 145.
[45] J. Gerards, in this volume, p. 559.
[46] Ibid., p. 556.
[47] Kothari, in this volume, pp. 81f.
[48] McKay, in this volume, p. 236.
[49] Brems, in this volume, p. 328.
[50] Ibid., p. 330.
[51] D. Shelton, in this volume, p. 224.
[52] Lau, in this volume, p. 193.

orientation and gender identity rights are only new in the sense that they are newly recognised aspects of existing rights, Lau adds.[53] Pajuste states that what is new and novel regarding the rights of the elderly is the focus on the issues that the elderly face and the shift in thinking from a policy-oriented approach to a rights-oriented approach.[54] Brems argues that the right of access to gestational surrogacy would be a new human right of a specific nature, claimed and exercised by a very limited number of people.[55] Alternatively, she writes, this could be brought under the right to reproduce or found a family, or the right to health.[56] Roseman concurs by pointing out that since the data indicates that only a small portion of births resulting from ART (assisted reproductive technology) used gestational surrogacy, this would be a right applicable to a small circle.[57] Gilbert asks whether land rights are to be accorded only to indigenous people, small-scale farmers and rural women.[58] Humberto Utillano reviews the Inter-American Convention on Protecting the Human Rights of Older Persons and writes in reference to novel aspects that recognition of the specific needs of the elderly acknowledges the necessity of a human rights approach; it consecrates specific and general obligations.[59] These new human rights are not applicable universally, but can be claimed by the groups in need of enhanced protection. This means that the level of the universality of these rights is lower than that of established rights. We can label this the 'universality decrease thesis'.

Second, there are new human rights claims which are meant to enhance some specific aspect of an established human right. Gerards concurs, and says that most new human rights are refinements of existing rights which somehow have come to be regarded as deserving protection in their own right.[60] Chirwa points to the close nexus which has to exist between a new human right and the right it is derived from.[61] Gilbert concludes that the right to land develops in the shadow of other human rights, such as the right to food, housing and property.[62] At any point in time, the discourse around the novel aspects of new human rights may or may not grow to overshadow the established capabilities usually associated with traditional human rights, leading to the novel aspect 'boiling over' and the new human right being formed, or leading to the expanded interpretation of the established human right. There may also be a related need to formulate specific governmental obligations for the protection of this new human rights claim, since the existing obligations originating from positive or soft law may not meet the standard requirements of effective protection. One example is the extension of the government obligation regarding human rights protection at the national level into the international arena, as is the case with the right to consular protection.[63]

At the new human rights conference in Tallinn in September 2017,[64] I predicted that whatever the result – whether the new human rights claim is sufficiently justified or rejected – at some point the discourse around the established human right returns to a 'normal' status and

[53] Ibid.
[54] Pajuste, in this volume, p. 189.
[55] Brems, in this volume, p. 327.
[56] Ibid.
[57] Roseman, in this volume, p. 318.
[58] Gilbert, in this volume, pp. 100f.
[59] L. H. Toro Utillano, in this volume, pp. 180f.
[60] Gerards, in this volume, p. 555.
[61] Chirwa, in this volume, p. 56.
[62] Gilbert, in this volume, p. 103.
[63] Mégret, in this volume, p. 458.
[64] The new human rights conference held at Tallinn University, where the research leading to the current book was presented and discussed by the majority of authors.

the rhetorical elevation disappears. This may take years or decades. Having studied the chapters in the present collection, I see no evidence to support this prediction. The process of contestation is ongoing in respect of all new human rights claims. Jack Donnelly, writing some thirty years prior to this chapter, termed the evolution of human rights as 'gradual and largely incremental'.[65] The evidence presented in this book fully supports this proposition.

There can easily be a misunderstanding that by definition a new human right necessarily means a self-standing human right. From the epistemic perspective, even under ideal conditions a new human right cannot immediately establish itself as such a self-standing right. Even if it has not yet established itself as a self-standing right, we can still speak of a new human right, and can add the qualification 'under the process of contestation'. Such a process of contestation has led many authors in the present collection to conclude that the case of a concrete new human right as a self-standing autonomous human right is not made, at least for the time being. There is really no such thing as bodily integrity per se, writes Viens.[66] Samantha Besson argues that there should be no human right to democracy, as both human rights and democracy are needed to protect individual equality.[67] Roseman concludes that, as a formal matter, there is no explicit recognition in any international or regional human rights treaty or judicial ruling stating that anyone has a positive right to contract with, or provide services, as a surrogate.[68] Rice writes that the right of access to the law would be available only when necessary to give effect to a substantive right.[69] Pollicino refers to the implication that international law looks at access to the Internet not as an autonomous new right, but as a part of the right to the participation of all citizens in the information society.[70] All new human rights claims discussed in the present collection are more concrete than established human rights. This is sufficient evidence to conclude that, consequently, the level of abstractness of new human rights claims is lower than the level of abstractness of their 'parent' rights. We can identify this as the 'decrease of the abstractness thesis' in new human rights development.

The previous discussion leads us directly to generalise that the process of new human rights development has two directions: either towards the decrease of universality, as is the case with the rights for specific groups, or towards the decrease of abstractness, as is the case with rights derived from or being implied by established rights. We can term this the 'decrease in abstractness and universality thesis'. Such a process goes hand in hand with the increase in the level of concreteness and utility of new human rights. The ontic aspect of new human rights development can be illustrated by the graph in Figure 2.1.

With the increase of the aspect of individuality, at some point the element of universality connected by definition with a human right is lost. Likewise, with the increase of concreteness, at some point the new human rights claim loses the aspect of abstractness associated by definition with any human right. The decrease of abstractness and universality do not necessarily go hand in hand. A human right can retain a strong abstract character and at the same time decrease in universality. The rights of the elderly or the rights of persons with disabilities are examples of this, since the focus is upon granting these groups of people the possibility to fully enjoy the same highly abstract rights as are enjoyed by non-elderly and non-disabled persons. And conversely, a human right can retain a high degree of universality and at the same time

[65] J. Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989), p. 223.
[66] Viens, in this volume, pp. 374f.
[67] S. Besson, in this volume, p. 487.
[68] Roseman, in this volume, p. 319.
[69] Rice, in this volume, p. 554.
[70] Pollicino, in this volume, p. 265.

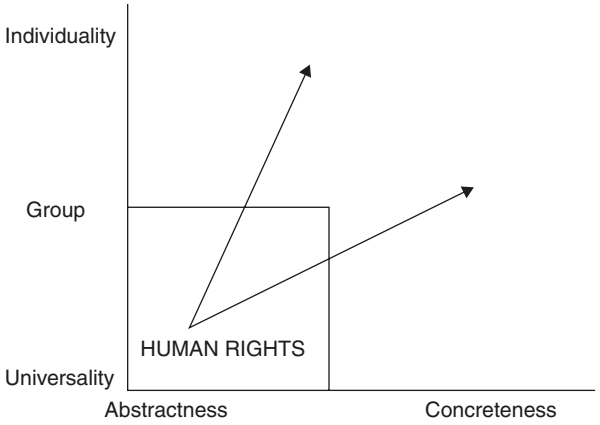

FIGURE 2.1. The ontic aspect of new human rights development

decrease in abstractness. The right to bodily integrity or the right to mental integrity illustrate this proposition, since everyone can claim these rights, yet they are concrete aspects of the right to privacy.

2.2.3 *The Question of Human Rights Inflation*

One of the main objections raised against the emergence of new human rights is that this leads to human rights inflation. If all social causes can be anchored to a new human rights claim, we can ask what remains of human rights. Andorno defines rights inflation as the process where everything that is socially desirable is labelled a human right.[71] Another objection to the growth of human rights is the risk of constitutional collisions, which leads to a decrease in the protection of the rights at stake.[72] Our specific matter of interest is whether the number of human rights can grow indefinitely, or whether there is, *senso strictu*, a closed circle of human rights and we can speak only of the more detailed articulation of long-standing rights.

The proposition of rights inflation is based on the theoretical framework of the utility or practice-dependency of human rights. Philip Alston's proposed quality control approach, where, in order for a human right to qualify as such, certain criteria have to be met, clearly represents the understanding that human rights are defined via explication only. Alston suggests that the criteria for quality control are as follows: a new human right has to reflect a fundamentally important social value; be consistent with, but not merely repetitive of, the existing body of international human rights law; be capable of achieving a very high degree of international consensus; and be sufficiently precise as to give rise to identifiable rights and obligations.[73] James Nickel[74] links the justification of a new human right to its dealing with some very important good and its response to a common and serious threat to that good, as well as it being feasible in

[71] Andorno, in this volume, p. 336.
[72] Pollicino, in this volume, p. 263.
[73] P. Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 *The American Journal of International Law* 607.
[74] Many authors in the present collection rely upon Alston and Nickel's conceptualisation regarding the matter of new human rights development. For example, Bublitz is of the view that the right to mental integrity meets Alston and Nickel's universal appeal of novel rights criteria – Bublitz, in this volume, p. 403.

most countries of the world.[75] Brems conditions the establishment of a new human right to the threshold criterion (a human right should protect interests that are of great importance) and universality criterion (a new human right should be universally valid).[76] The pursuit of this practice-dependent approach to new human rights development does not exclude the possibility that the universe of human rights is endlessly growing, as it is dependent on what states can agree on and what is considered to be socially important at a given time. Under this approach a highly specific right, such as the hypothetical right of all young parents to have time off from work after the birth of a child, could qualify as a human right because it reflects an important value of strengthening the family and would in principle find support in most countries. Yet this hypothetical right is highly individual (as opposed to being universal, since it can only be applied to young parents – not everyone is young and not everyone is a parent) and concrete (as opposed to being abstract, since it relates to a very specific aspect of family life). For those reasons, it should not qualify as a self-standing human right according to the 'decrease of abstractness and universality thesis'. The practice-dependent approach underlying the rights inflation proposition, surprisingly, can in principle be mirrored in the opposite process as well – the deflation of human rights, or the shrinking of the number of human rights, should the global community become tired of the human rights language.

The 'decrease of abstractness and universality thesis' excludes the possibility of the endless growth of human rights. Since the levels of abstractness and universality of any human rights claim by definition cannot fall below certain degrees, it follows that the circle of human rights is not open-ended. It is visible from the graph in Figure 2.1 that an answer to the query of which new human rights could claim the status of a stand-alone human right is relative and depends on where one draws the cut-off on the lines of abstractness and universality. This graph logically supposes that once a new human right has been derived from an existing right, subsequent derivation from the derivate may lead to the loss of the status of human right, provided that the new derivate does not retain the same degree of abstractness and/or universality as the right it is derived from.

2.3 CONTESTATION – THE EPISTEMIC DIMENSION

The claims of new human rights, after being articulated and having gained certain theoretical justification, move to the stage of contestation from the political establishment and academia. This means that the justification of a new human right is countered by arguments why such a claim should not acquire the status of a stand-alone new human right. The following examples from the present collection illustrate this point.

Mégret writes that theoretically there is no good reason why consular assistance needs to be a specific human right.[77] Brems points to the ongoing claims and discussion, but concludes that we cannot say that under international law the right of access to gestational surrogacy exists.[78] Besson argues that if we ask someone about the human right to democracy, the answer would be just as ambiguous as it was thirty years ago.[79] Pollicino makes the case for how the debate among

[75] J. Nickel, 'Human Rights', in E. N. Zalta (ed.), *Standord Encyclopedia of Philosophy*, 2014, available at https://plato.stanford.edu/entries/rights-human/.
[76] Brems, in this volume, p. 329.
[77] Mégret, in this volume, p. 454.
[78] Brems, in this volume, p. 326.
[79] Besson, in this volume, p. 484.

scholars regarding the right to internet access is 'polluted' by the rhetoric of human rights.[80] Roseman shows that courts and commentators have scoffed at the notion that there is any human right to a child.[81] Sándor shows that there are two divergent positions regarding genetic rights.[82] Boysen claims that it is difficult to find a normative argument for democracy.[83] Handl explains that environmental human rights are fraught with difficult questions.[84] Mihăescu-Evans shows the political opposition to the right to administrative justice.[85] Pietrzykowski writes about the ongoing philosophical and legal discourse about the recognition of animal rights.[86] Chirwa tells us about the long, difficult process of obtaining formal affirmation of the right to water in legal instruments, viewing it as part of a constitutional resistance to socio-economic rights.[87] Pajuste points to the economic burden which has led states to contest the recognition of the rights of the elderly as a stand-alone right.[88] Kothari shows that there are widespread state practices opposed to the right to adequate housing.[89] Shelton demonstrates that, since the founding of the UN, debates about the relationship between individual human rights and claims of collective rights have often been contentious, and some states continue to reject the very concept of group rights.[90] Viens argues that the right to bodily integrity remains a contested concept.[91]

Many authors in the present collection refrain from suggesting that the definition of a new human right means that this right is in the process of 'breaking away' or has 'broken away' from an established right and is claiming an autonomous place in the family of human rights. However, a new human right – which is the generalisation from the observations of new human rights in this collection – has the capability to provide protection which cannot be achieved via progressive interpretation and expansion of an already existing human right. The capability criterion is one of degree. A substantial degree means that without the new human right becoming autonomously recognised, the capabilities usually associated with the established human right can become marginalised against the novel challenges facing it. This usually leads to the articulation and subsequent gradual recognition of a new autonomous human right. A minor degree means that the claim of a new human right remains a rhetorical statement without leading to this new right's autonomous recognition, but the scope of the existing human right is broadened. The aspect of rhetoric is not the subject of this chapter, but it suffices to note that the rhetoric around a new human right often ignores conceptual considerations.[92]

The process of contestation can exist endlessly. The phenomenon of historical pedigree associated with the development of various rights supports this observation. Gilbert shows that the difficulty of recognising land rights is based on the normative assumption that land is property.[93] Shelton demonstrates the longevity of debates on how to conceptualise and implement

[80] Pollicino, in this volume, p. 268.
[81] Roseman, in this volume, p. 324.
[82] Sándor, in this volume, p. 350.
[83] Boysen, in this volume, pp. 475f.
[84] Handl, in this volume, p. 138.
[85] Mihăescu-Evans, in this volume, p. 511.
[86] Pietrzykowski, in this volume, p. 244.
[87] Chirwa, in this volume, pp. 57f., 66.
[88] Pajuste, in this volume, p. 186.
[89] Kothari, in this volume, pp. 83f.
[90] Shelton, in this volume, p. 224.
[91] Viens, in this volume, p. 374.
[92] Ibid., pp. 363f.
[93] Gilbert, in this volume, p. 99.

the rights of indigenous people.[94] Articulation of the right to adequate housing and land has been on the agenda of the United Nations throughout the past twenty years, writes Kothari.[95]

The process of the intellectual and political contestation of a new human rights claim may lead to the fragmentation of human rights discursive practice regarding the rights at stake. Mégret writes that the right to consular protection would be counter to the existing human rights framework, since it challenges the premise that human rights are implemented domestically.[96] Douglas predicts that in the context of the development of the right to privacy, this right will be fragmented in reference to bodily and non-bodily aspects.[97] Mégret also warns about the possibility that the emergence of new human rights may unravel the very fabric of the classical international human rights law system.[98] The rights of the elderly are scattered in regional and functional specialist instruments, which makes their realisation difficult, writes Pajuste.[99] Recent scientific research has scattered the clear-cut threshold between persons and non-persons,[100] as becomes evident from the chapter by Pietrzykowski. Chirwa shows that in the Inter-American system the right to water is not expressly recognised, but in Europe it is derived from socio-economic rights.[101] Stewart demonstrates how the right to consular protection is growing slowly, primarily through judicial interpretation.[102] Mihăescu-Evans shows that in Africa the right to good administration is recognised by the courts as a new human right, but in Europe it is a repackaging of existing practice.[103]

The process of contestation, even if it does not lead to the justification of a novel stand-alone human right, obtains at least to two outcomes. First, it enables more profound articulation of the scope and meaning of an existing human right, with a special view towards its applicability in novel circumstances. Besson concurs by saying that we would be better off endorsing the existing international customary principle of democracy without looking for a corresponding legal human right that cannot be morally justified.[104] According to Michalowski's view, there is no sufficient justification for the creation of a new right as long as the relevant rights and interests are already sufficiently protected through existing rights.[105] There is also an objection to the justification of a novel human right that is related to the difficulties which may be associated with its implementation. Gerards argues that if a new human right is accepted but is not a cognisable or discernible part of international or national law, it will be difficult for individuals to know they can claim such a right.[106]

The second outcome is related to the development of the doctrinal side of human rights law. Despite the value-added element of human rights development process,[107] the case of a new human right should be conceptually fully justified before one can advance the claim that a new human right can achieve the status of a stand-alone human right among established

[94] Shelton, in this volume, p. 217.
[95] Kothari, in this volume, p. 81.
[96] Mégret, in this volume, pp. 456, 458.
[97] Douglas, in this volume, p. 383.
[98] Mégret, in this volume, p. 460.
[99] Pajuste, in this volume, p. 186.
[100] Pietrzykowski, in this volume, pp. 250f.
[101] Chirwa, in this volume, p. 64.
[102] Stewart, in this volume, p. 440.
[103] Mihăescu-Evans, in this volume, pp. 511f.
[104] Besson, in this volume, p. 481.
[105] Michalowski, in this volume, p. 409.
[106] Gerards, in this volume, p. 556.
[107] See for example, Roseman, in this volume, pp. 324f.

human rights. Michalowski expresses this point in relation to the importance of clarity. She writes that lack of clarity seems to speak against the creation of a new human right rather than in its favour.[108]

2.4 CONCLUSION

This chapter has coined two theses regarding the development of new human rights. 'The inadequacy of protection thesis' says that the main reason for the advancement of a new human rights claim is the incapability of established human rights to provide adequate protection for certain vulnerable or marginalised groups in comparison with others, or that novel contemporary conditions challenge the capability of an established human right to provide sufficient protection for an important social value. There are six origins for new human rights claims: realisation of some political agenda, pressure from civil society groups, scientific and technological developments, realisation that the existing legal framework does not allow the protection of some aspect of an important social value, conceptualisation of moral and social values, and finally intellectual reasons. The majority of origins of new human rights claims are thus utilitarian.

There are two main groups of new human rights claims, the first being related to the enhanced protection of certain groups using existing human rights, and the second being related to the derivation from or implication of new human rights from established stand-alone human rights. The first process is characterised by the decrease of the universality of established human rights, and the second by the decrease of the level of abstractness of the respective new human rights claim. This is termed 'the decrease in universality and abstractness thesis', which, inter alia, leads to the rejection of the proposition that the universe of human rights can grow endlessly. Because of the elements of abstractness and universality required by definition in all human rights, and since the evidence shows that these elements are decreasing in new human rights claims, the elements of universality and abstractness cannot diminish indefinitely, and at some point new claims cannot surpass the threshold of a human right. Consequently, the process of human rights inflation has limits.

After the idea of a novel human right has reached certain academic and discursive intensity, such a claim enters the stage of contestation. Evidence from the present collection reveals the longevity of such a process. Likewise, there is no evidence that the recognition of a new human right claim as a self-standing right within the family of established human rights will lead to a higher degree of protection of the respective rights-holders. Consequently, it is the process of new human rights articulation and contestation which can produce the utilitarian effect of increased protection, and not the result of the recognition of the new right. Overall, there seems a hesitance on behalf of the authors of this collection to sign up to the statement of justification that the particular human rights discussed here merit characterisation as new autonomous human rights.

[108] Michalowski, in this volume, p. 410.

3

Rhetoric of Rights

A Topical Perspective on the Functions of Claiming a 'Human Right to …'

Andreas von Arnauld and Jens T. Theilen

3.1 INTRODUCTION: WHY RHETORICS MATTER

Within the last twenty or so years we have witnessed the introduction of a sizeable number of 'new' human rights into international law – and many more claims to 'new' human rights have been made. So many, indeed, that the danger of 'human rights inflation' has become a spectre that has haunted the debate for quite some time now.[1] In his seminal article of 1984, Philip Alston had already attempted to prevent such inflation by calling for 'quality control', with the United Nations General Assembly as the institutional gatekeeper.[2] Yet in practice the flood has not been tamed.[3] Apart from the rights covered in this volume, a broad range of 'human rights to …' have been proposed even over the course of only the last few years: a human right to a green future,[4] rights to remain natural, to be inefficient or to disconnect[5] – or, conversely, a right *not* to be left alone[6] – and a human right to exist without a physical or psychological threat from above,[7] to name but a few. A recent publication even argued for a 'right to be loved'.[8] Looking at these examples, there seems to be something inherently appealing in calling for a 'human right to …', or even stipulating its existence *de lege lata*.

In this chapter we are interested in the rhetorical dimension of this phenomenon. In human rights theory and literature 'rhetoric' is often used in a pejorative sense.[9] Human rights are

[1] See e.g. J. W. Nickel, *Making Sense of Human Rights* (Malden: Blackwell, 2007), p. 96; G. Letsas, A *Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), p. 129; M. Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001), p. 90.

[2] P. Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 *American Journal of International Law* 607.

[3] Nor is it likely to be: see C. Bob, 'Introduction: Fighting for New Rights', in Clifford Bob (ed.), *The International Struggle for New Human Rights* (Philadelphia: University of Pennsylvania Press, 2009), p. 11.

[4] R. P. Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge: Cambridge University Press, 2009).

[5] G. Leonhard, *Technology vs. Humanity: The Coming Clash Between Man and Machine* (London: Fast Future Publishing, 2016), p. 140.

[6] L. Grans, 'A Right Not to Be Left Alone – Utilising the Right to Private Life to Prevent Honour-related Violence' (2016) 85 *Nordic Journal of International Law* 169.

[7] N. Grief et al., 'The Airspace Tribunal: Towards a New Human Right to Protect the Freedom to Exist without a Physical or Psychological Threat From Above' (2018) *European Human Rights Law Review* 201.

[8] M. S. Liao, *The Right to Be Loved* (Oxford: Oxford University Press, 2015), on children's rights.

[9] There are exceptions, though. For more nuanced approaches, see e.g. W. S. Hesford, *Spectacular Rhetorics: Human Rights Visions, Recognitions, Feminisms* (Durham, NC and London: Duke University Press, 2011); A. Lyon, *Deliberative Acts: Democracy, Rhetoric, and Rights* (University Park, PA: Pennsylvania State University Press, 2013);

sometimes derided as 'mere rhetorical device[s]',[10] 'empty rhetoric'[11] or, famously, 'rhetorical nonsense, nonsense upon stilts',[12] and the need to transform rights into reality is a familiar trope. There is, however, more to rhetoric than its use as an indicator of the gap between human rights pronouncements and their implementation. This more positive, substantial notion of rhetoric relates to the question of how normative standards are established in the first place, and its implications can best be studied by reference to 'new' human rights, i.e. those cases in which an issue not previously conceived of as a human right, or at least not as a free-standing right, is newly claimed as a 'human right to …'. What is the communicative added value of phrasing a claim in this way, rather than speaking of it in terms of human rights more generally, or by reference to normative languages other than human rights entirely?

Our starting assumption is that the way we phrase certain ideas helps to shape concepts and discourse.[13] Rhetoric therefore serves central functions in the triangulation of concepts, language and society. Thus, the rhetoric of human rights is by no means detached from their development within international law as a global normative practice. While it has been suggested that the utility of a rights perspective in certain contested cases is 'rhetorical rather than juridical',[14] or that the 'normative implications' of a right must be distinguished from its use as a 'rhetorical tool',[15] we will argue that these two dimensions should be viewed in tandem. We will do this against the theoretical background of a topical analysis of law, considering human rights discourse as essentially 'topical'. Section 3.2 will introduce this framework, and Section 3.3 will build on this to discuss various functions of claiming a 'human right to …'.

Two caveats should be made at the outset. First, what we attempt here is a contribution to a communication theory of human rights. In light of this, our position differs from most scholarship on 'new' human rights in that we are not taking a normative stand: we will not judge whether any given 'new' rights claim is well founded or not. While we return to the normative perspective for a brief evaluation in Section 3.4, we are primarily interested in the functions and functioning of the use of human rights language: our standpoint in that regard is what one might call that of 'non-participating observers'. Second, constraints of space require us to conduct this analysis at a high level of generality. We will point towards different forms of rhetoric, different actors and different institutional settings throughout, but more specific studies would be necessary to properly map their particularities. Our implicit focus will be on human rights claims by norm entrepreneurs from civil society, as reflected within (primarily legal) academic commentary.

E. Doxtader, 'The Rhetorical Question of Human Rights – A Preface' (2010) 96 *Quarterly Journal of Speech* 353. More generally on law as a form of rhetoric (although it may mask its own rhetorical nature), see e.g. K. Sobota, *Sachlichkeit, Rhetorische Kunst der Juristen* (Frankfurt: Peter Lang, 1990); G. B. Wetlaufer, 'Rhetoric and Its Denial in Legal Discourse' (1990) 76 *Virginia Law Review* 1545.

[10] S. Marks, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 *Harvard Human Rights Journal* 137 at 167.

[11] For criticism, see Nickel, *Making Sense of Human Rights*, p. 185.

[12] J. Bentham, 'Nonsense upon Stilts, or Pandora's Box Opened', in P. Schofield, C. Pease-Watkins and C. Blamires (eds.), *The Collected Works of Jeremy Bentham* (Oxford: Oxford University Press, 2002), p. 330.

[13] M. A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), p. 11.

[14] A. Boyle, 'Human Rights and the Environment: Where Next?', in B. Boer (ed.), *Environmental Law Dimensions of Human Rights* (Oxford: Oxford University Press, 2015), p. 209.

[15] O. Pollicino, in this volume, p. 263; see also R. Andorno, in this volume, p. 348.