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*Typeset in Minion Pro.*

ISSN 2050-1706 (Print)

ISSN 2050-1714 (Online)

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This issue should be cited as (2015) 4(3) CJICL.

<http://www.cjicl.org.uk>



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# The Fundamental Rights of States in Neoliberal Times

Sahib Singh\*

## Abstract

This is a critical introduction to the special issue on the fundamental rights of states. Whether such rights exist, the bounds of their existence, or whether they ought to be striven towards are questions of considerable import in the wake of the Greek sovereign debt crisis, or even given the ongoing Palestinian struggle for permanent sovereignty over their natural resources. I briefly outline how we might consider the question: is there any progressive political value in buttressing the state and its autonomy, through the doctrine of fundamental rights, in today's neoliberal world? First, I examine how we may progressively look at fundamental rights—as doctrine, narrative, memory or discourse. Second, I question the extent to which it is useful to see competing subjectivities, ie the maligned state against technocratic institutions, in a time where neoliberal logic has come to structure the workings of the state. It becomes quickly apparent that the discourse of fundamental rights may be used to both resist neoliberalism and enable it.

## Keywords

Fundamental Rights of States, Neoliberalism, Resistance

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We should not speak solely of the *doctrine* of the fundamental rights of states. To insist on such a reduction is to do a disservice to a topic that goes to the heart of international law. This critical introduction to the special issue seeks to broaden the lens with which we may view the subject-matter, urging international lawyers to grasp both the difficult and penetrating questions it unearths as well as their contemporary relevance.

What is the nature of the state? What characteristics or capacities, if any, inhere in the very designation 'state'? Is it possible to speak of the 'fundamental rights of states' as strictly legal *rights*, or is there normative value in seeing it as some other form of legal discourse? What precise notion of order does 'fundamental' entail or what character

\* Post-doctoral Research Fellow, Erik Castrén Institute of International Law and Human Rights, University of Helsinki (Finland). Many thanks to Luca Bonadiman, Paavo Kotiaho and Jean d'Aspremont for their comments. This symposium owes a great deal to the work and organisation of Daniel H Joyner, Marco Roscini and Jean d'Aspremont, the discussions that took place at the University of Alabama School of Law in early 2015, and the intellectual tenacity with which each author approached this collective endeavour—my thanks go out to each one of them.

does this ascribe to the rights themselves? How does the doctrine relate to the weakened autonomy of the state in today's geopolitical landscape? The subject of this special issue presupposes and presents answers to some of these questions, whilst urging us to confront others. From my own perspective there is a key question that brings the topic of fundamental rights of states to contemporary relevance. It is this: is there any political value in buttressing the state and its autonomy, through the doctrine of fundamental rights, in today's neoliberal world?

The state is apparently ailing. Late twentieth century thought in economic, political and legal fields announced its demise. Not to mention that within each field, strands of thought spanning back over two centuries or more have advocated for said demise, if not the state's outright abolition. Contemporarily, it was assailed from the political right by free market ideology and significant challenges to its relative authority by neoliberal international institutions. From the political left, 'progressive' voices continue to be animated by a sentiment articulated by Nietzsche: 'State is the name of the coldest of all cold monsters. It even lies coldly, and this lie crawls out of its mouth: "I, the state, am the people." This is a lie!'<sup>1</sup> It is a thought that has driven important research across social, political, economic and legal fields, all the while intellectually undoing the state's privileged position in certain policy spheres.<sup>2</sup>

No doubt, these broad intellectual trends have helped undermine the autonomy and political authority of the state. But both trends encourage an underlying intellectual stance of functionalism. Here, the state is seen as only *one* actor or mechanism through which the obligations and functions of the state can be fulfilled. Where the state fails, one can defer to the international community or to the market (or to private actors, etc) to fulfil its requisite functions.<sup>3</sup> The state becomes instrumentalised—and sees (and at times, willingly embraces) itself this way—for the fulfilment of particular interests and in the process is reduced to being as much use as any other actor or mechanism. In the words of the political theorist Wendy Brown: '[T]he state must not simply concern itself with the market but think and behave like a market actor across all of its functions, including law.'<sup>4</sup> There is no longer any value that inheres in its capacity to represent diverse groups of peoples, or the manner in which it may conduct this representation. Indeed, the state's capacity to conduct this 'representation' has become seriously curtailed. It is this *transformation* of the state that goes to the heart of the matter. So often, and correctly, considered an oppressor of its 'peoples', it is of little surprise that it has been undone as a potential bulwark against forms of oppression imposed by unaccountable

1 Friedrich Nietzsche, *Thus Spoke Zarathustra* (Adrian del Caro and Robert Pippin eds, Adrian del Caro tr, CUP 2006) 34.

2 For an overview in international legal thought, see Oscar Schachter, 'The Decline of the Nation-State and its Implications for International Law' (1998) 36 *Columbia J Transnatl L* 7.

3 For a recent exploration of this established theme in international legal thought, see Anne Orford, 'Constituting Order' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 271.

4 Wendy Brown, 'Neoliberalism and the End of Liberal Democracy' in Wendy Brown (ed), *Edgework: Critical Essays on Knowledge and Politics* (Princeton UP 2005) 42 (emphasis in original).

international economic institutions or private actors. It is this situation that must be changed.

I do not argue that there is any inherent value in sustaining the state's autonomy. If anything, such advocacy is the precise juncture at which, as history has taught us, healthy scepticism is necessary. Rather, I tentatively suggest that hand in hand with such scepticism, it *may* be politically progressive and necessary in today's neoliberal world to find strategic ways in which to buttress the state's autonomy, and hence its political authority. This position is founded on three beliefs. First, that the state *may* offer greater accountability, participation and processes allowing for change for today's citizens, if contrasted with the technocracy that governs today's international economic and public institutions. Second, that if given the correct tools, it may possibly act as a barricade against greater and perhaps more normalised forms of oppression found in some of today's international institutions. I return to these first two beliefs below. And third, that it is the task of legal thought to change the *status quo*. Not merely to describe it or to evaluate it. The duty of the legal scholar does not lie in positive legal inquiry, but rather to look for spaces for contestation and transformation, whilst not over-determining or under-determining these spaces.

It is with these considerations in mind that we come to the legal discourse of the fundamental rights of states. I have chosen to speak of our subject matter as a legal discourse rather than doctrine for both theoretical and historical reasons. As a matter of theory, international law's normative authority is not strictly and solely limited to and vested in its 'rules' or 'norms'. Rules—whether rights, duties, secondary or primary, specific or of general applicability—may be the *main* currency for international law's normative authority. But they are almost certainly not its only source. It is possible to speak international law in the language of standards and principles. Think of the tired debate regarding soft law, just as large swathes of the field have become established, defined and continue to proliferate with this often vitiatingly vague form of regulation. Here, international law's normative authority is not strictly officiated in the form of an on/off switch.<sup>5</sup> This anti-positivist theoretical stance—namely, the belief that it is possible to speak international law with a degree of normative authority without speaking of strictly legal rules or norms—is further supported by historical practice in the sphere of the fundamental rights of states.

When Ricardo Alfaro gave his Hague Academy lecture in 1959, he noted how specific 'fundamental liberties'<sup>6</sup> were called 'attributes, qualities, competencies, powers, norms or rights.'<sup>7</sup> Up to and beyond this historical juncture, the discourse of fundamental liberties had provided protective umbrage to a number of states that sat at international law's margins (particularly inter-American states) despite—and possibly because of—its vague,

<sup>5</sup> See further Sahib Singh, 'Narrative and Theory: Formalism's Recurrent Return' (2013) 84 BYBIL 304, 334–36.

<sup>6</sup> I borrow this from Stephen C Neff, 'The Dormancy, Rise and Decline of Fundamental Liberties of States' (2015) 4 CJICL 482.

<sup>7</sup> Ricardo J Alfaro, 'The Rights and Duties of States' (1959) II Recueil des Cours 116.

general and indeterminate conceptual character. In the 1930s and late-1940s, there were attempts to develop a positive legal doctrine, attempts that were again taken up post-decolonisation in the 1960s and 1970s. But as both Jean d'Aspremont and Stephen Neff note in this symposium, the protective function and capacity of the discourse was all but 'annihilated' in these attempts to delimit and squeeze it into positive form. In short, the normative legal authority and politically progressive capacity of the fundamental rights of states lay in its discursive flexibility, and its capacity to tap into a political understanding of rights within legal frameworks.<sup>8</sup>

And yet, some contemporary international lawyers are far from optimistic about the contemporary political possibilities of fundamental rights discourse. Antonios Tzanakopoulos, in this special issue, relates the doctrine to the Greek sovereign debt crisis. He demonstrates that there is no positive right, let alone fundamental right, to be free from economic coercion, nor any doctrine of fundamental rights of states 'in any meaningful sense.'<sup>9</sup> Therefore, he concludes that the *legal* doctrine—and the specific rights it may encompass—is of no political relevance to the Greek sovereign debt crisis and the developments that have occurred this year. Rather, 'the way to cure the world of this ill is politics, political struggle in particular. Politics can establish fundamental rights of states as a legal category; political struggle can change the law.'<sup>10</sup> For Tzanakopoulos, law can *only* speak when there is a determinate, positive legal norm that can be identified and posited against another actor. Law only carries normative authority in the form of a legal rule, norm, or in this case, right. And we can only use law to engage in political struggle once it has adopted this strict form, for without it law is incapable, powerless and normatively inert. And in this understanding, politics is cast outside the law—first, before the law (creating it) or under it (where law, once created, can speak to power). For Tzanakopoulos, the 'discussion of fundamental rights of states thus should not be seen as some independent legal category, but *at best* as an argumentative practice or as a narrative of resistance.'<sup>11</sup> Not only is there no place for progressive political struggle *within* the law, enmeshed into the very fabric of how we may speak it, but there is the declaration that, in this context, law cannot speak or be spoken. Not only does this approach suffer from historical amnesia, but it also sustains an ideological approach to law that embeds the *status quo*, forcing the international lawyer towards resigned passivity.

That the inter-American states in the early 1930s and throughout the mid-to-late 1940s and decolonised states in the 1960s and mid-1970s chose to speak the language of fundamental rights of states in a politico-legal discourse—both strategic and argumentatively legal—is beyond doubt.<sup>12</sup> But even if we learn this historical lesson, and

<sup>8</sup> Jean d'Aspremont, 'The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law' (2015) 4 CJICL 501; Neff (n 6).

<sup>9</sup> Antonios Tzanakopoulos, 'The Right to be Free from Economic Coercion' (2015) 4 CJICL 616, 633.

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.* (emphasis added).

<sup>12</sup> See, generally, International Law Commission, 'Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States—Memorandum submitted by the Secretary General' (15 December 1948)

the discourse of fundamental rights can be seen as a *legal* ground from which political struggle may be waged, it does not answer how this discourse may fare in our neoliberal times. Nor should it enshrine an a-critical willingness to support this legal discourse. Even if states can speak in this legal discourse—with its attendant rights, principles, or standards—for what particular purpose, against whom and how is it deployed? In the context of Greece and other states within Europe receiving forms of shock therapy this discourse *may* be used as a form of resistance against the European Central Bank, the International Monetary Fund and the European Commission. But even if it may, in the abstract, allow Greece to speak a legal discourse of resistance, it may also allow other, competing actors to shape the ecosystem in which this speech is rendered inconsequential. A discourse of resistance can, in other's hands, enable repression. Think here of the total disregard for human rights obligations within the same context of Greece;<sup>13</sup> the existence of a right does not render it consequential. In the context of the fundamental rights of states, the very same observation can be made; that we can speak through a legal-political discourse does not necessarily mean that this discourse has purchase.

If this is one way to frame the role of the fundamental rights of states in today's neoliberal times, another way has been alluded to above. Namely, as a legal discourse that may be used to buttress the state and its autonomy against the intrusive political authority of technocratic international institutions. The logical, and political, premise of this frame is that it provides a choice between two competing subject-types and subjectivities; between two different ways of organising the social. The assumption is that in our neoliberal times we ought to provide protective umbrage to the maligned Hegelian state—the one that may represent its people. If the legal discourse of fundamental rights can aid in this venture, then it may be used as a tool for resistance; deployed by the state, through the state, against the hegemony of neoliberal institutions. But this frame and narrative may over-determine the space for resistance, especially for powerless states and any solidarity that may exist between such states.

What if we are to understand neoliberalism as a material political rationality? If it is no longer purely an economic rationality concretised in the Bretton Woods institutions and their successors, but is rather supported, sustained and emboldened by the state? What if we understand the market as no longer controlled by the state, but rather as having become the organising principle of the state? Surely then, to buttress the state's autonomy would be a futile gesture. What if we accept Wendy Brown's contention that 'the health and growth of the economy is *the* basis of state legitimacy?'<sup>14</sup> These sets of questions turn the logical frame in the previous paragraph on its head.

The political stance no longer becomes one of supporting competing subjects and their subjectivities, ie the maligned state against technocratic institutions. The

UN Doc A/CN.4/2, 5–9; (24 October 1970) UN Doc A/RES/25/2625; (17 December 1973) UN Doc A/RES/28/3171.

<sup>13</sup> See Margot Salomon, 'Europe's Debt to Greece' (*EJIL: Talk!*, 24 August 2015) <<http://www.ejiltalk.org/europes-debt-to-greece/>> accessed 28 October 2015.

<sup>14</sup> Brown (n 4) 42.

question that becomes key to progressive politics is: how far has neoliberalism eroded the democratic state? If you believe that the Hegelian state has *entirely* perished in neoliberalism, then to buttress the state would not only be folly, but it would enable the very forms of repression that one may have sought to challenge. From this perspective, the legal discourse of the fundamental rights of states no longer appears to be a space for dissent or transformation. Rather, this legal discourse may simply become another set of regulative principles that are likely to be subordinated to an economic rationality and instrumentalised by a state that marches in service to the market. However, if you believe, as I do, that the state *may* retain an ability to represent its diversity of peoples and shape the social through its mechanisms of liberal democracy, there remains resistive and political potential in buttressing it. The legal discourse on the fundamental rights of states—depending on how it is used, by whom and against whom—may in certain contexts be useful for various forms of transformative politics.

The task of the international lawyer has now become considerably murkier. The legal discourse of fundamental liberties may be used to both resist neoliberalism and enable it. It may be used to strengthen the state. But which contemporary idea of the state is it strengthening? The international lawyer in their pursuit of transformative politics may be required to tread along the psychological lines of Susan Marks' usage of Harold Bloom's 'the anxiety of influence'.<sup>15</sup> It is not out of simple fear of irrelevance that we try and make the legal discourse of fundamental rights relevant to contemporary political issues, but that in this very act that we realise that this legal discourse and other legal discourses may be complicit in the very politics that we are trying to resist.

This critical introduction has sought to be suggestive of inquiry, aiming to provide certain framework considerations. Even if one is pessimistic about the existence of specific fundamental rights of states, as precisely that—fundamental rights—there is no doubt value in understanding them as a form of legal discourse. Whether its vitality can be used against neoliberal political and economic thought is one of the more pressing questions that one can pose. I have attempted to show that, whilst promising, this line of inquiry is anything but easy. But this is merely one of many contexts in which the question of fundamental rights is of contemporary relevance. Think quickly of the Palestinian state and the right to permanent sovereignty over its natural resources and its right to non-interference; think of Iran and the right to peaceful use of its nuclear energy, think of Israel and its right to existence. This handful of examples does not do the vibrancy of the topic justice. The papers that follow are not only doctrinally useful, contemporarily relevant and necessary, but also rooted in some of the more interesting questions that go to the heart and structure of our field.

<sup>15</sup> Susan Marks, 'State-centrism, International Law and Anxieties of Influence' (2006) 19 LJIL 339, 347: 'the anxiety of influence felt by international lawyers is not just a fear of irrelevance but a fear of relevance as well—not just a shock at the recognition of politics in law, but a shock at the recognition of law in politics.'

# Is There Any Room for the Doctrine of Fundamental Rights of States in Today's International Law?

*Daniel H Joyner\** and *Marco Roscini\*\**

## Abstract

This article serves as a general substantive introduction to the special issue on the fundamental rights of states in international law. It introduces the concept in theoretical and doctrinal terms, and lays out the questions that will be addressed by the contributions to the special issue. These questions include: 1) What do attributes like 'inherent', 'inalienable' and 'permanent' mean with regard to state rights?; 2) Do they lead to identifying a unitary distinct category of fundamental rights of states?; 3) If so, what is their source and legal character?; 4) What are their legal implications, eg, when they come into conflict with other obligations of the right holder or with the actions of other states and international organisations?; and ultimately, 5) Is there still room in today's international law for a doctrine of 'fundamental' rights of states? The article reviews the fundamental rights of states in positive law sources and in international legal scholarship, and identifies the reasons for a renaissance of attention for this doctrine.

## Keywords

Fundamental Rights of States, International Law, Positivism, Natural Law, Kelsen

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## 1 Introductory remarks

It is almost a truism to say that states have rights and duties under international law. Indeed, as Hans Kelsen emphasised, '[t]he State is an international personality *because* it is a subject of international duties and rights'.<sup>1</sup> This also means that 'all the principles, norms and rules of International Law resolve themselves into the notion of rights and duties of States'.<sup>2</sup> The question, however, is whether certain of these rights and duties are

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1 Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, The Law Book Exchange 2007) 250 (emphasis added).

2 Ricardo J Alfaro, 'The Rights and Duties of States' (1959) 97 *Recueil des Cours* 116.

of a special, more fundamental character, in the same or similar way as certain rights of individuals allegedly are.<sup>3</sup>

The doctrine of fundamental rights of states is of venerable pedigree in international law and has undergone significant mutation and evolution over time with regard to understood theory, substance and function. Even though the function of the doctrine has changed throughout the centuries—having gone from guaranteeing the domestic jurisdiction of states and their freedom of action, to explaining the foundations of international law and its existence, to preserving the peaceful co-existence of states, and finally to the heterogeneous and diverse functions it presently plays<sup>4</sup>—the concept still permeates present-day international law, if not in name, then in substance and implications.<sup>5</sup>

The starting point of our analysis is not natural law concepts or ‘constitutional’ approaches to international law, but rather the identification, in positivist sources, of certain state rights to which those sources attach special characteristics. Indeed, our interest in this topic originally grew out of our work, both individually and together, in the area of nuclear non-proliferation law. In particular, we have over the years found ourselves discussing in depth article IV(1) of the 1968 Treaty on the Non-proliferation of Nuclear Weapons (NPT), which recognises ‘the *inalienable* right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes.’<sup>6</sup> In the context of the NPT, article IV(1) is an important part of the ‘Grand Bargain’, which the NPT effectively codifies as between its nuclear weapon states parties and its non-nuclear weapon states parties.

In framing this recognition in article IV(1), the NPT drafters chose some rather unique language. All of the states parties to the NPT are recognised as possessing an ‘inalienable right’ to peaceful nuclear energy. This phraseology, which not only expresses this principle as a ‘right’ possessed by all states parties, but even further qualifies it as a right which is ‘inalienable’ in those states, has prompted us to consider deeply the meaning and implications of the idea of rights of states in international law, both in terms of this particular treaty provision, as well as in the broader context of the international legal system. Indeed, as will be seen, article IV(1) is by no means an isolated case.

This has prompted us to ask some important questions about the concept of the rights of states in international law, questions that have not been seriously addressed by legal scholarship in the last 55 years. What do attributes like ‘inherent’, ‘inalienable’ and ‘permanent’ mean with regard to state rights? Do they lead to identifying a unitary distinct category of fundamental rights of states? If so, what is their source and legal character? What are their legal implications, eg, when they come into conflict with

<sup>3</sup> See, eg, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

<sup>4</sup> Jean d’Aspremont, ‘The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law’ (2015) 4 CJICL 501.

<sup>5</sup> Helmut Philipp Aust, ‘Fundamental Rights of States: Constitutional Law in Disguise?’ (2015) 4 CJICL 521.

<sup>6</sup> Treaty on the Non-proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161 (NPT) (emphasis added).

other obligations of the right holder or with the actions of other states and international organisations? And, ultimately, is there still room in today's international law for a doctrine of 'fundamental' rights of states? Taking those questions into account, a number of observations can be made to properly identify the problem and the issues involved.

## 2 The fundamental rights of states in positive sources

One such observation is that the NPT is by no means the only place in the positive sources of international law in which certain rights of states appear to have a special character. The first legal instrument to attempt to address the subject in something of a systematic manner was the 1933 Montevideo Convention on the Rights and Duties of States, signed by 20 North and South American states, including the United States.<sup>7</sup> The Montevideo Convention has come to be best known for its recitation in article I of the definition of a state and its necessary attributes.<sup>8</sup> However, the Convention proceeds to identify certain rights possessed by every state, including in article III:

The right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.

Article III specifies that '[t]he exercise of these rights has no other limitation than the exercise of the rights of other states according to international law'. In article V, the parties to the Montevideo Convention further agree that '[t]he fundamental rights of states are not susceptible of being affected in any manner whatsoever'.

Apart from the Montevideo Convention, the Charter of the Organization of American States (OAS), adopted in 1948, contains a whole chapter dedicated to the fundamental rights and duties of states.<sup>9</sup> Recognitions of the rights of states in international law were also included in the Charter of the United Nations (UN Charter), drafted in 1945.<sup>10</sup> Notably, the UN Charter recognises a particular right of states in article 51, when it provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

<sup>7</sup> Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention).

<sup>8</sup> Montevideo Convention, art I reads as follows: 'The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.'

<sup>9</sup> Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3.

<sup>10</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

As the right in article IV(1) of the NPT includes the adjective ‘inalienable’ in its description, so article 51 of the UN Charter includes the different, yet equally potentially meaningful, adjective ‘inherent’ in its description in English (‘droit naturel’ in French). The significance of this qualification, however, has been too quickly dismissed in the literature.<sup>11</sup>

In addition to the recognition of states’ rights in legally binding instruments, the International Law Commission (ILC) grappled with this subject and in 1949 adopted a draft Declaration on Rights and Duties of States, consisting of 14 draft articles which enunciated, in broad terms, some of the basic rights and duties of states.<sup>12</sup> In his history of the work of the ILC, Sir Arthur Watts commented as follows regarding the draft declaration:

As international law developed in the second half of the nineteenth century and the first half of the twentieth it was thought useful, and perhaps even necessary, to consider whether there were some fundamental legal principles which were inherent in the relations of States as members of the international community. The search for some hierarchical structure to the many particular rules of international law seemed to require no less. The idea grew that there were certain fundamental rights which were essential and self-evident attributes of Statehood, together with certain fundamental duties. This notion was particularly prevalent in the Americas, and manifested itself [in a number of delineated treaties and statements]. Although the general concept was generally accepted, there was no general agreement as to which particular rights and duties fell into this ‘fundamental’ category.<sup>13</sup>

The draft Declaration adopted by the ILC in answer to this need for a general agreement includes a list of ten duties and four basic rights of states, similarly broadly defined.<sup>14</sup> The ILC transmitted its draft Declaration to the UN General Assembly, where for two years it was considered and commented on by states. However, no further official action was ever taken on the Declaration, and it has remained unadopted by the UN General Assembly. Sir Arthur Watts had the following to say about the failure of the draft Declaration to be adopted by the UN General Assembly:

In part this seems to have been due to the inherent problems of this sort of Declaration, drafted as they inevitably are (and as the Commission thought fitting) in very broad, general terms. (...) There were, however, more important factors at work. One was the beginnings of the rapid increase in the number of members of the United Nations, which changed the

<sup>11</sup> See, eg. Albrecht Randelzhofer and Georg Nolte, ‘Article 51’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) vol II. But see Marco Roscini, ‘On the “Inherent” Character of the Right of States to Self-Defence’ (2015) 4 *CJICL* 634.

<sup>12</sup> Kelsen was highly critical of the ILC draft Declaration. See Hans Kelsen, ‘The Draft Declaration on Rights and Duties of States: Critical Remarks’ (1950) 44 *AJIL* 259.

<sup>13</sup> ILC, ‘Report of the International Law Commission on the Work of its 51st Session’ (3 May–23 July 1999) UN Doc A/54/10, 1645.

<sup>14</sup> Draft Declaration on Rights and Duties of States with Commentaries (1949) *Ybk Intl L Com* 287–90. See Kelsen, ‘The Draft Declaration’ (n 12) 265: ‘the principles of international law which the Declaration of Rights and Duties of States intends to formulate could—and should—be formulated only in terms of duties. (...) For the duty is the primary, the right a secondary, legal concept’.

whole social dynamic relevant to any determination of the rights and duties which should be regarded as ‘fundamental’ to the position of States within the international community. A second was the emergence into the forefront of international relations of the communist-capitalist ideological conflict, which again undermined the relevance of the essentially older conceptions of fundamental rights and duties of States which pervaded the outcome of the work done by the Commission.<sup>15</sup>

While the dynamic nature of politics during that time may have made adoption of the draft Declaration impossible, the two phenomena to which Watts refers—the newly independent states created primarily by decolonisation through the 1950–60s and the influence of communism during that period—were not in fact antithetical per se to the concept of the fundamental rights of states in international law. Quite the opposite in fact. Scholars writing in socialist theory and scholars from newly independent states during these decades strongly supported the core concepts of state sovereignty and the existence of certain basic rights of states in international law.<sup>16</sup>

Once somewhat settled, these two forces together were instrumental in the inclusion of article IV in the NPT in 1968—referenced earlier—and in the successful adoption by the General Assembly of a number of resolutions recognising rights of states in international law.<sup>17</sup> The first of these resolutions, which Watts describes as the ‘modern successor’ to the idea of the fundamental rights and duties of states,<sup>18</sup> was Resolution 2625, adopted in 1970 and entitled ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.’ Although primarily expressing the duties of states, the Declaration on Friendly Relations also recognised the following principles, which harken back to the Montevideo Convention’s delineation of states’ rights (note again the use of the adjective ‘inalienable’ in relation to the third right):

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.<sup>19</sup>

<sup>15</sup> ILC (n 13) 1646.

<sup>16</sup> See Malcolm Shaw, *International Law* (7th edn, CUP 2014) 23–25; Stephen C Neff, ‘A Short History of International Law’ in Malcom Evans (ed), *International Law* (3rd edn, OUP 2010) 23.

<sup>17</sup> See Daniel H Joyner, *Interpreting the Nuclear Nonproliferation Treaty* (OUP 2011) 17–20.

<sup>18</sup> ILC (n 13) 1646.

<sup>19</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (adopted 24 October 1970) UNGA Res 2625 (XXV).

Similarly, but addressing a theme made particularly relevant during the 1970s, when nationalisations of foreign oil and other investments occurred with increased frequency in the developing world, in 1973 the General Assembly adopted Resolution 3171, in which it 'reaffirm[ed] the *inalienable* rights of States to *permanent* sovereignty over all their natural resources.'<sup>20</sup> A more systematic and thorough statement of states' rights in the area of economic development and international trade was given by the General Assembly a year later in Resolution 3281, entitled 'Charter of Economic Rights and Duties of States.'<sup>21</sup> This resolution, an outgrowth of the New International Economic Order programme for revising the post Second World War economic system and institutions in favour of developing states, relied heavily on the language of the fundamental rights of states in its provisions and laid out these rights in some detail. The 1981 adoption by the General Assembly of Resolution 36/103 provided a similar assertion of states' rights on the question of the inadmissibility of intervention and interference in the internal affairs of states.

The existence of certain fundamental rules and inherent rights of states was also implied during this period in judgments of the International Court of Justice (ICJ). In the *North Sea Continental Shelf* judgment, for instance, the Court held that:

The doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is 'exclusive' in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.<sup>22</sup>

In the same case, the Court also referred to rules 'having an *a priori* character of so to speak juristic inevitability',<sup>23</sup> although it denied that the equidistance principle was one of those rules.<sup>24</sup>

<sup>20</sup> Permanent Sovereignty over Natural Resources (adopted 17 December 1973) UNGA Res 3171 (XXVIII) (emphasis added).

<sup>21</sup> Charter of Economic Rights and Duties of States (adopted 12 December 1974) UNGA Res 3281 (XXIX).

<sup>22</sup> *North Sea Continental Shelf (Germany v Denmark; Germany v The Netherlands)* (Judgment) [1969] ICJ Rep 3, para 19.

<sup>23</sup> *ibid* para 37.

<sup>24</sup> *ibid* para 46.

In the *Gulf of Maine* judgment, the ICJ found that:

A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.<sup>25</sup>

The Court, therefore, distinguished between two types of customary rules: ‘regular’ ones, and the more ‘limited set of norms’, which are necessary for the co-existence and co-operation within the international community and whose existence is not based on induction from *opinio juris* and state practice.<sup>26</sup>

Finally, in the *Nuclear Weapons* Advisory Opinion, the ICJ referred to the ‘fundamental right of every State to survival’ as the ultimate foundation of the right of self-defence.<sup>27</sup> One possible reading of the Court’s conclusions is that, while the right of self-defence in ‘ordinary’ circumstances may be founded on and limited by positive law, its exercise in extreme circumstances where the very survival of the state is at stake rests on other more fundamental grounds that escape regulation by positive law.

### 3 Rights of states in international legal scholarship

While a number of authors in this special issue will at a much greater depth address the subject of the history of the concept of the rights of states in international law, as well as international legal scholarship on this topic,<sup>28</sup> we would make one further observation. There was, during the classical period of international legal scholarship (1648–1815) and before, a strong tradition of scholarly writing regarding the fundamental rights of states in international law, including in the works of Vitoria, Suarez, Grotius, Wolff and Vattel.<sup>29</sup> Some of the richest scholarly debate on this topic emerged during the latter part of the nineteenth century and through the mid-twentieth century and was joined, among others, by such contemporary scholarly luminaries as Lassa Oppenheim, James Brierly, Charles de Visscher, Elihu Root, Arrigo Cavaglieri, Dionisio Anzilotti, Gilbert Gidel, Alphonse Rivier, Antoine Pillet and Hans Kelsen. If the classical doctrine of the fundamental rights of states saw them as deriving from natural law, scholars in the

<sup>25</sup> *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (Judgment) [1984] ICJ Rep 246, para 111.

<sup>26</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argument* (CUP 2005) 406.

<sup>27</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, paras 96–97, 105(E).

<sup>28</sup> d’Aspremont (n 4); Stephen C Neff, ‘The Dormancy, Rise and Decline of Fundamental Liberties of States’ (2015) 4 CJICL 482.

<sup>29</sup> Alfaro (n 2) 116–30.

nineteenth and twentieth centuries relied on 'logical, historical, sociological or even positive bases'.<sup>30</sup> Otherwise said, they saw the fundamental rights of states as resulting from the very existence and operation of the international society, and not as superior to it.<sup>31</sup>

Ricardo Alfaro provided an in-depth treatment of the subject in his Hague Academy of International Law course in 1959, which appears in the *Recueil des Cours* of that year.<sup>32</sup> His 1959 monograph deserves, in our opinion, to be considered the seminal modern work on the subject of the fundamental rights of states in international law, and appears to constitute the last focused and thorough scholarly treatment of the subject until the present day. Drawing upon his exhaustive review and discussion of literature and legal theory, Alfaro constructs a practical theory and taxonomy of the rights of states in international law. In particular, he identifies two categories of state rights. The first category of state rights, according to Alfaro, consists of subsidiary, or acquired, rights. These rights are obtained by states through the sources of the *jus dispositivum*, and particularly through customary international law or treaty law.<sup>33</sup>

The second category consists of fundamental rights, which in his view are not created by states, but simply exist because states exist—they are 'a direct emanation of the State itself'.<sup>34</sup> In his own words,

Do fundamental rights of the State exist?, asks Le Fur. (...) My answer (...) is unhesitatingly in the affirmative, for I find myself unable to conceive a State divested of the four rights of independence, sovereignty, equality and self-preservation, or any one of them. Whether called attributes, qualities, competencies, powers, norms or rights, the conclusion seems inescapable that these are the fundamental rights of every State, from which emanate all the other rights that have been variously called subjective, eventual, secondary, accessory and, most aptly, *acquired*, since they have been acquired by customs or by treaty.<sup>35</sup>

<sup>30</sup> Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (CUP 2014) 125.

<sup>31</sup> *ibid* 126.

<sup>32</sup> See Alfaro (n 2) 95–117. See also Kelsen, 'The Draft Declaration' (n 12) 259–76; Martti Koskenniemi, *The Gentle Civilizer of Nations* (CUP 2004) 238–45, 281–83; Elihu Root, 'The Declaration of the Rights and Duties of Nations Adopted by the American Institute of International Law' (1916) 10 AJIL 211; James L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Sir Humphrey Waldcock ed, 6th edn, Clarendon Press 1963) 50; Philip M Brown, 'The Rights of States under International Law' (1916) 26 Yale LJ 85; Charles de Visscher, *Theory and Reality in Public International Law* (Percy E Corbett tr, Princeton UP 1968) 16.

<sup>33</sup> Alfaro (n 2) 104.

<sup>34</sup> *ibid* 109.

<sup>35</sup> *ibid* 104 (emphasis in original). Also, at 112:

Sovereignty implies the duty of every State to respect the rights emanating from it, pursuant to international law. Independence imposes on all States the basic duty of nonintervention. Equality creates an obligation for each State to render to every other State on equal terms that which is due to them by reason of their International Personality; and to recognize and accept from each of them all such lawful acts as are equal to those performed by all member of the Family of Nations. Self-preservation rests upon the reciprocal duty of every State not to injure, impair or destroy the integrity of any State nor to violate any of its legal rights.

Several points stand out from Alfaro's analysis. The first is the identification of 'four essential attributes inherent in and inseparable from the conception of the State, namely: sovereignty, independence, equality and self-preservation,'<sup>36</sup> and the recognition that all other legal rights of states emanate from these four fundamental rights and are typically *acquired* by states through the *jus dispositivum* sources of treaty and custom. Alfaro's is therefore a hierarchical system of legal rights grouped into two categories: fundamental and acquired, with acquired rights being grounded in, and subsidiary to, fundamental rights.

The second point emerging from Alfaro's treatment is the identification of legal obligations which necessarily accompany both fundamental and acquired legal rights. Accordingly, a state's possession of a legal right creates in all other states—and one would assume an extension to other actors with more limited international legal personality (ie international organisations)—a corresponding obligation to respect that right, and not to interfere with, or act to prejudice it.

Thirdly, the distinction in the source from which the rights flow has a clear impact on Alfaro's understanding and theory of the nature and implications of those rights. Since fundamental rights are those without which the state would not be a state, Alfaro argues that they are not only inherent, but also inviolable and inalienable.<sup>37</sup> When identifying subsidiary or acquired rights, however, he is clear that these rights are produced through *jus dispositivum* sources. They would thus appear to be non-inherent, subject to modification or even consensual relinquishment, and subject also to the application of interpretive canons when there is conflict between these acquired rights and either obligations of the rights holder or obligations of other states.

One of Alfaro's principles on which Hans Kelsen was in agreement is the principle that all rights of states in international law create obligations of respect for those rights in other states, and by extension in international organisations. Kelsen explains this principle in more theoretical depth:

It is usual to distinguish between a right to one's own behavior and a right to the behavior of another. To say that a (physical or juristic) person has a right to behave in a certain way may mean only that there is no duty of this person to behave in another way. This, however, implies that all the other persons have the duty to refrain from preventing the subject of the 'right' to behave in this way. The right to one's own behavior is always the right to the behavior of others. But we speak of a right that a person has to the behavior of another in a specific sense of the term if a definite other person has the duty to behave in a certain way in relation to the subject of the right. A person has a right to the behavior of another person only if the other person has the duty to behave in this way. Finally, the term 'right' is used in its narrowest, technical sense if it designates the legal power conferred upon a person to bring about, by an action brought before a court, the execution of a sanction provided by the law in case another person violates his obligation to behave in a certain way in relation to

<sup>36</sup> *ibid* 98.

<sup>37</sup> *ibid* 113.

the subject of the right. Hence, the right of one person always presupposes the corresponding duty of another person. In the first two cases mentioned the legal situation is completely described by a statement referring to the duty. The right of the one is but the reflection of the duty of another. Under general international law, only rights in this sense exist, since general international law does not institute courts. (...) The rights of states under general international law are always the reflection of the duties imposed by general international law upon other states.<sup>38</sup>

Kelsen, however, adamantly opposed any naturalistic notion of the existence of fundamental rights possessed by states, insisting rather that rights could only be obtained by a state through the positivistic sources of the *jus dispositivum*, and in particular through customary international law. Kelsen was also not convinced by the alleged link between the fundamental rights of states and the notion of statehood. He chaffed against an overly anthropomorphic view of the state as a unitary actor and holder of both rights and duties. As he explains:

The so-called fundamental rights and duties of the States are rights and duties of the States only in so far as they are stipulated by general international law, which has the character of customary international law. Such rights have been chiefly enumerated as the right of existence, the right of self-preservation, the right of equality, the right of independence, the right of territorial and personal supremacy, the right of intercourse, the right of good name and reputation, and the right of jurisdiction. (...) However, 'international personality of the State' means only that general international law imposes duties and confers rights upon States (and that means upon individuals as organs of the States).<sup>39</sup>

Alfaro, however, is by no means the first or only scholar to see certain rights of states as inherent in statehood.<sup>40</sup> In fact, the vast majority of scholars of the period 1850–1945, which saw the rise and triumph of positivism, linked the doctrine of fundamental rights of states to the notion of statehood.<sup>41</sup> Woolsey, for instance, argues that such rights are 'those necessary for the conception of states, and for their occupying the sphere which the Author of society has marked out for them.'<sup>42</sup> Oppenheim writes that 'under the wrong heading of fundamental rights a good many correct statements have been made for hundreds of years, and (...) numerous real rights and duties are customarily recognised which are derived from the very membership of the Family of Nations.'<sup>43</sup> Gidel also maintains that the fundamental rights of states are:

des droits qui appartiennent à tout État du fait de son existence même, qui sont inhérents à lui et qui présentent le triple caractère d'être absolus, inviolables, inaliénables. Ils sont absolus

<sup>38</sup> Kelsen, 'The Draft Declaration' (n 12) 264.

<sup>39</sup> Kelsen, *General Theory* (n 1) 249–50.

<sup>40</sup> See the references in Alfaro (n 2) 106–08.

<sup>41</sup> d'Aspremont (n 4).

<sup>42</sup> Theodore D Woolsey, *Introduction to the Study of International Law* (5th edn, Charles Scribner & Co 1879) 35.

<sup>43</sup> Lassa Oppenheim, *International Law: A Treatise* (3rd edn, Longmans, Green and Co 1920) vol I, 194.

en ce sens que l'État perdrait ses caractères distinctifs s'ils venaient à manquer et cesserait d'être une 'personne du droit international'.<sup>44</sup>

These views were implicitly upheld by the ILC with its choice to adopt a Declaration on rights and duties of states, and not a convention, as 'the rights and duties of States as such are not created by the text of a treaty or international Convention but are inherent in their quality as States and can only be recognized or stated'.<sup>45</sup>

In our opinion, it is important to emphasise that seeing certain rights as a corollary of statehood does not necessarily imply a fall back upon natural law, as Kelsen argues: in fact, the opposite is true.<sup>46</sup> Indeed, the definition and the elements of statehood itself are identified by positive law, ie in the above mentioned Montevideo Convention and its customary counterpart. Therefore, naturalistic views that see certain rights as primordial and pre-existent of states should be distinguished from more modern understandings that see certain rights to be inherent in statehood *as defined in positive law*. As the notions of state, sovereignty, and even that of international law are the product of historical, political and other forces and are in a constant state of evolution and reconceptualisation, so concepts such as the rights of states that are of long pedigree may be refigured in our understanding of their origin, character and legal implication, to bring them into harmony with modern understandings of legal validity.<sup>47</sup>

#### 4 A needed renaissance of attention

In spite of the above rich scholarly debate, for reasons that are not immediately apparent the subject of the fundamental rights of states in international law has all but disappeared from international legal scholarship over the past 55 years. This turn away from a focus on the rights of states may be explainable not only by present day's dominant opposition to natural law as a source of state rights, but also by the rise in emphasis over the same period upon the development of international human rights law and the right of self-determination of peoples, which some have perceived as, in at least some ways, at odds with conceptions of state rights. Whatever the reasons for this paucity of scholarship over the past half century, we are of the opinion that a number of the characteristics of the modern international legal system, and the present globalised international economic

<sup>44</sup> Gilbert Gidel, 'Droits et Devoirs des Nations, la Théorie Classique des Droits Fondamentaux des Etats' (1925) 10 *Recueil des Cours* 541, 542.

<sup>45</sup> UNGA, 'Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, Memorandum Submitted by the Secretary-General' (15 December 1948) UN Doc A/CN.4/2, 213.

<sup>46</sup> Serge Sur, 'L'inhérence en Droit International' (2014) 118 *Revue Générale de Droit International Public* 785, 786.

<sup>47</sup> *ibid* 795. A similar reconceptualisation of an ancient principle of international law has taken place in our evolved understanding of the concept of customary international law. See Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 *EJIL* 269.

environment, make a renaissance of scholarly attention to the issue of states' rights in international law advisable.

The international legal system has undergone a tremendous and unprecedented substantive and institutional evolution since the end of the Second World War. International legal sources have both broadened in their scope and deepened in their content and application to state behaviour, in ways that were previously unimagined. The rise to prominence in role of international organisations as fora not only for coordination of state action, but also for law-making, monitoring and verification of state conduct, and in some cases adjudication of legal disputes, has made the international legal system a very different, much more complex place than it once was for states, who were once the only and independent actors within it.<sup>48</sup>

This modern structure of the international legal system, in which the legal obligations of states are often made, monitored, adjudicated and enforced through international organisations, has taken on post-Westphalian aspects of constitutionalism and maturity as a legal system that have changed significantly the position of states. Indeed, a number of scholars have recently recognised international organisations as agents in which a decay in the traditional paradigm of state consent in international law-making has taken place.<sup>49</sup>

As the international legal system matures, grows increasingly complex, dense and fragmented, and moves towards a more complete legal system, it would appear to be manifestly sensible and necessary for states, and particularly developing and less powerful states, to have clearly developed understandings not only of their obligations within that legal system, but also of their rights, which can potentially be used as a shield against excessive encroachment upon their sovereign independence by other more powerful actors.<sup>50</sup>

In particular, the UN Security Council is one of the most legally influential of these international organisations (or, in its specific case, one organ of an international organisation). The UN Charter provides in article 25 for the authority of the Security Council to take decisions that are legally binding on all UN member states. The Council's understanding of its role and powers, and the question of the legal limits of those powers under the Charter, is a subject that has been widely debated by international

<sup>48</sup> See, eg, Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (OUP 2007).

<sup>49</sup> See Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 AJIL 1; Laurence R Helfer, 'Nonconsensual International Lawmaking' (2008) 71 U Illinois L Rev 71; Andrew T Guzman, 'Against Consent' (2012) 52 Virginia J Intl L 747; Joel P Trachtman, *The Future of International Law: Global Government* (CUP 2013).

<sup>50</sup> See Ulrich Preuss, 'Equality of States: Its Meaning in a Constitutionalized Global Order' (2008) 9 Chicago J Intl L 17, 46:

A further step in that direction would be the stipulation of a catalogue of fundamental rights of states which would especially protect small states against the disregard of their rights as distinct and constituent members of the international society. While some of these fundamental rights would be immune from any kind of balancing against common interests, others would be subject to balancing under the condition that high standards of justification would have to be met.

legal scholars in recent years.<sup>51</sup> In writing on this subject, one of the current authors has previously argued that the Security Council's understanding of its authority under the Charter has changed significantly since the end of the Cold War, to encompass not only its more traditional executive role in enforcing existing international law, but also an ascending legislative and adjudicatory role that has greatly expanded both the scope and substance of its decisions and has brought its actions into conflict with fundamental principles of international law.<sup>52</sup>

In light of the increased scope of action and self-understanding of authority of the UN Security Council in particular, all UN member states would appear to have a strong self-interest in developing and clarifying the concept of the rights of states in international law—in particular those which can be asserted against and which must be respected by other actors, including the Security Council. This is especially true for smaller and developing states, which are particularly susceptible to economic and financial sanctions imposed by the Security Council, as well as unilaterally by powerful states.

This susceptibility has been significantly amplified in recent decades due to the increased internationalisation of markets and interdependence of national economies, a phenomenon often referred to as globalisation. Globalisation has made developing states more vulnerable than ever before to both unilateral and collective sanctions imposed, and often coordinated between, powerful states, the most powerful of which sit as permanent members on the Security Council. For developing states, therefore, there would seem to be a particular modern imperative to balance the scales of this phenomenon through the development and clarification of, *inter alia*, a right to be free from economic coercion by other actors, which would in turn create in other states and international organisations an obligation to respect this right.<sup>53</sup>

## 5 Structure and content of the special issue

With this introduction to the special issue in place, we will proceed to describe the structure and content of the papers, and the themes/questions uniting them. The topic of the fundamental rights of states can be viewed from at least two different perspectives. One is an ontological consideration of the concept as it has evolved over time, and continues to evolve today. A second perspective is focused not on the broader themes of evolution and theory, but on the practical task of considering how provisions in positive legal sources which attach special characteristics (inherency, inalienability, permanency)

<sup>51</sup> See, eg, Antonios Tzanakopoulos, *Disobeying the Security Council* (OUP 2011); Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004); David Schweigman, *The Authority of the Security Council Under Chapter VII of the UN Charter* (Kluwer 2001).

<sup>52</sup> See Daniel H Joyner, 'The Security Council as a Legal Hegemon' (2012) 43 *Georgetown J Intl L* 225.

<sup>53</sup> See UNGA Res 66/186 (22 December 2011) on unilateral economic measures as a means of political and economic coercion against developing countries.

to certain rights of states should be understood, interpreted, and applied. This is why we have conceived of this special issue as consisting of two sections.

Section one addresses the first, ontological perspective, and may generally be described as setting the historical, theoretical and doctrinal framework for understanding the doctrine of the fundamental rights of states in international law. The first paper will be by Stephen Neff, and considers the history of the concept of the doctrine, stretching back through the classical period of international law, and forward through the mid-twentieth century. This is followed by two papers by Jean d'Aspremont and Helmut Philipp Aust. In these papers the authors consider the theoretical underpinnings of the concept of the fundamental rights of states in international law.

In section one, the contributors consider in their respective chapters the following questions:

1. What is the juridical nature of the concept of fundamental rights of states in international law? Is the idea of fundamental rights of states linked to a particular approach to international law, theoretical or otherwise?
2. Do fundamental rights of states constitute a positively ascertainable and distinct normative category, or are they better described as a method of argumentation and delimitation of the scope of corresponding obligations of others, or in some other manner?
3. What is or what should be considered to be the origin/legal basis of fundamental rights of states within the theory of sources?
4. Is there some kinship between the concept of fundamental rights of states and the *jus cogens* quality of some rules in international law? Or is there a better and distinct way to understand why some rights of states are asserted in legal sources to have qualities including inalienability, inherency or permanency? Could it be claimed, for instance, that they are a corollary of statehood? If so, do such rights of states give content to statehood, or are they rather the consequence thereof?

This macro view of the evolution of the concept of fundamental rights of states can provide important insight into how existing positive law sources should be understood, interpreted and applied.

The six papers comprising section two of the special issue will address a series of case studies of certain rights of states to which positive law attaches special characteristics. The section two authors have researched the discrete asserted right assigned to them and have considered, among other questions:

1. Whether indeed it can be concluded that such a right has a fundamental character and, if so, in what sense;
2. Whether attributes like inherency, inalienability and permanency have legal implications or are only part of the textual package which manifests a narrative of resistance and revindication;

3. What international legal obligations, if any, the right potentially or actually comes into conflict with, and what the understood outcome of this conflict should be.

The six asserted state rights to be considered in section two are:

1. The right to existence (author: Jure Vidmar);
2. The right to non-intervention/non-interference (author: Niki Aloupi);
3. The right to permanent sovereignty over natural resources (author: Yogesh Tyagi);
4. The right to be free from economic coercion (author: Antonios Tzanakopoulos);
5. The right to self-defence (author: Marco Roscini); and
6. The right to the peaceful use of nuclear energy (author: Daniel H Joyner).

It is our hope that the papers in this special issue will provide some clarity concerning the existence, character, meaning and implications of a number of important, asserted rights of states in international law. We further hope that this effort will be the beginning of a more general renaissance of scholarly and practical attention to this long-neglected, yet timely and increasingly important, subject.

# The Dormancy, Rise and Decline of Fundamental Liberties of States

Stephen C Neff\*

## Abstract

Fundamental liberties of states, if they exist, should be seen essentially as analogues of civil liberties in national legal systems, ie, as 'privileges' in the sense in which Hohfeld employed that term. In the natural-law era, there was no room for any conception of fundamental liberties of states, since natural law was basically a law of duties rather than of rights. Only with Hobbes did the idea arise of a rights-based natural law. In the eighteenth century, Wolff and Vattel advanced the idea of a duty of states to strive towards perfection—but this was a duty rather than a liberty. Only in the positivist era of the nineteenth century, with its strongly state-centred ethos and its stress on the independence of states, did a concept of fundamental liberties of states emerge, with various lists proposed by various authors. Even there, the idea was meaningful only in the context of legislative (as opposed to a contractual) picture of customary international law. Various positivist writers advanced lists of fundamental liberties. Some positivist writers, however, such as Westlake, opposed the idea, as did Kelsen later. Nor is there significant support for the idea in state practice. Repudiations of treaties, most notably, have not entailed an invocation of fundamental liberties. Neither self-defence nor non-intervention qualifies as a liberty. Similarly, neither the principle of freedom (from the *Lotus* case), nor the persistent objector principle lend support to the concept of fundamental liberties of states.

## Keywords

Natural Law, Hohfeld, Liberties, Hobbes, Duty of Perfection, Positivism, Persistent Objector, Self-defence, Principle of Freedom, Kelsen

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An assertion of the existence of a body of fundamental rights of states must immediately give rise to a feeling of great ambivalence. On the one hand, it may smack of idealism, in the way that support for fundamental *human* rights has done. At the same time, however, suspicions will immediately arise that the idea would operate to extend the prerogatives of states at the expense of individuals—and thereby constitute a seriously reactionary step, away from the great mission of advancing international human rights. This ambivalence suggests that those who seek to assert the existence of fundamental rights of states have a challenging task ahead.

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The present discussion will not treat that question, but instead will explore the extent to which, over the course of history, support can be found for a concept of fundamental rights of states. There will first be a discussion of what is meant, precisely, by the idea of fundamental rights of states—or liberties, as they will be termed, for reasons to be explained. This will be followed by expositions on why the concept lay dormant for so long a period, only to arise in explicit form in the nineteenth century. It will then be pointed out how and why the idea has largely faded away since the First World War.

## 1 What fundamental rights are—and are not

When we speak of *fundamental* rights of states, we are talking about rights that are, in some fashion, more than mere ‘ordinary’ rights. It is suggested that fundamental rights must be rights which, somehow or other, are protected from being overridden by ‘ordinary’ rules of international law. Furthermore, it is reasonable to suppose that we must be talking about rights to autonomous action on the part of states—the right of states to act, in some (or all) circumstances according to their own unilateral will.

Consequently, the right of a creditor state vis-à-vis a debtor state would not fall into this category because there is no question here of the exercise of unilateral will on the part of the creditor state. The relationship arises by mutual consent between the two parties. What we are seeking is, instead, a right that is, so to speak, ‘free-floating’, ie a right which is not merely the counterpart of some other state’s duty. The reason for insistence on this point is that, in situations in which a state’s right is simply the ‘flip side’ of some other state’s duty, then the discourse can just as easily be about the duty of the one state as the right of the other—and there is, consequently, no reason to focus on rights rather than duties. That is, one could quite as easily devise a doctrine of fundamental duties of states instead of rights. If there is to be a *distinctive* doctrine of rights of states, then there is a need for some kind of legal code which confers freedom of action onto states in specified areas—something analogous, that is, to a bill of rights in a domestic constitutional setting.

A useful distinction in this regard was made by the American legal philosopher Wesley Hohfeld early in the twentieth century.<sup>1</sup> He distinguished between rights in the strict and proper sense, and what he called ‘privileges’ (although ‘liberties’ would probably be a more apt term to use and will be employed here). An ordinary right entitles the holder to compel some identified party or parties to do something or to refrain from doing something (or, alternatively, to obtain money damages for a failure in either of these regards). The philosopher JL Mackie employs the expression ‘claim-right’ to emphasise this core feature of eliciting some kind of act *from* another party.<sup>2</sup> A

<sup>1</sup> Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale UP 1923) 35–64.

<sup>2</sup> JL Mackie, *Ethics: Inventing Right and Wrong* (Penguin 1977) 173–74.

right in this strict sense corresponds to a duty on the part of the other party or parties, so that rights and duties are therefore the ‘flip sides’ or counterparts of one another (Hohfeld called them ‘correlatives’).<sup>3</sup> A classic illustration would be the debtor-creditor arrangement just given, in which the creditor’s right to receive payment is backed by the debtor’s duty to pay—with the right being legally enforceable. In international law terms, an appropriate illustration would be a treaty relation, such as an agreement for the establishment by one state of a military base on the territory of another state. The right of the one state to establish the base is backed by the duty of the other state to allow it. On this analysis, a ‘violation of a right’ can equally well be characterised as the failure on the part of the wrongdoer to perform his duty.

The fundamental ‘rights’ that are of present concern are not, however, of this character. They are what Hohfeld called privileges—and what will here be called liberties.<sup>4</sup> Liberties differ from rights in several important respects. First of all, liberties are in the nature of shields or barriers, protecting a party from interference by outsiders. Within the scope of a given liberty, the holder is free from any obligations to any other parties. A liberty is (in more modern terminology) a juridical space in which the holder of the liberty can freely exercise his unilateral will. In this respect, liberties might be thought of as the opposite of rights, which (as just noted) are, by definition, the ability to interfere with the normal freedoms of others—for example, to compel another party to supply widgets when the general law imposes no such duty. As Hohfeld crisply put it, ‘A right is one’s affirmative claim against another, and a [liberty] is one’s freedom from the right or claim of another.’<sup>5</sup>

More specifically, it may be said that a liberty has two key features. One is that the holder of a liberty is free to exercise it at will. That is to say, he is under no obligation to *refrain* from exercising it. Obligation and liberty, in other words, are mutually exclusive opposites. The second key feature of a liberty is the *absence* of a right on the part of *anyone else* to compel the holder to refrain from exercising his free will. In Hohfeld’s terminology, the counterpart of a liberty is a ‘no-right’ on the part of all other persons in the world.<sup>6</sup> Examples of liberties would include freedom of expression, religious freedom or freedom of movement. It should be noted that, in the case of liberties, persons in the rest of the world (apart from the holder) are not subject to a duty in the strict sense, because the holder of the liberty cannot compel them to do anything. The right to compel is, as just noted, the hallmark of a right, with liability to compulsion being, correspondingly, the hallmark of a duty. For example, a person may have the liberty of free expression, but no one is under a duty to listen. Instead, everyone lacks a right to prevent the speech from taking place.

<sup>3</sup> Hohfeld (n 1) 36.

<sup>4</sup> *ibid* 42–43.

<sup>5</sup> *ibid* 60.

<sup>6</sup> *ibid* 38–50.

It is possible that a person can hold a right against the world in general—or, strictly speaking, against each and every person in the world individually. The law of torts illustrates this point. Person A has, say, a right not to be assaulted; and every other person in the world has a corresponding duty not to assault A. In international law, a state has a right not to have armed force used against it; and every other state has a corresponding duty not to employ such force. These are illustrations of rights and not liberties, because there is always an identifiable party (or parties) who are under a correlative—and enforceable—obligation not to engage in certain conduct. It must be remembered that the essence of a liberty is *not* the right to stop other people from doing things (eg, an aggressor from succeeding in its attack), or to compel other parties to perform their duties (eg, a debtor to pay his debt). It is, instead, the ability to act autonomously without anyone *else* having a right to interfere.

## 2 The dormancy: The era of natural law

The notion of fundamental liberties of states (to keep to the terminology adopted) is of relatively recent vintage. It is a fruit of nineteenth-century positivism. During the Middle Ages, and well beyond, no one had the least idea of the notion, for reasons that will be explained. It was only in the seventeenth century, with the writing of Thomas Hobbes, that a discourse of liberties came into a clear focus for the first time. And even that was largely concerned with liberties of individuals. The potential implications for states were clear to see, but the major eighteenth-century writers still hesitated to draw those clear conclusions, preferring instead to continue thinking along the old lines marked out by natural law thought.

### 2.1 The age of natural law

Medieval writers would have been astonished—not to say appalled—at the very notion of fundamental liberties of states. There were two principal reasons for this. One is that states were regarded as artifacts of human depravity, existing only by virtue of mankind's fall from grace. This fundamentally negative idea of statehood and government as such was a distinctively Christian notion, deriving from the Christian doctrine of original sin.<sup>7</sup> The leading figure in the development of this doctrine was Augustine of Hippo, at the very outset of the Middle Ages. He regarded states as, essentially, bandit organisations on a large and permanent scale, maintained by brute force rather than by any sense of legitimacy. '[W]hat are kingdoms but great robberies?' he asked rhetorically.<sup>8</sup> This attitude, it may be noted, was a striking departure from the classical heritage. According

<sup>7</sup> Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State 1100–1322* (Princeton UP 1964) 496–97, 499–500; Ernst Cassirer, *The Myth of the State* (Yale UP 1946) 108–11.

<sup>8</sup> Augustine of Hippo, 'The City of God' in Whitney J Oates (ed), *Basic Writings of Saint Augustine* (first published c AD 418, Random House 1948) vol 2, 51.

to Aristotle, the state is a natural entity, essential for enabling people to lead the fulfilling life which is (to Aristotle) the basic goal of all persons.<sup>9</sup>

The other factor which made acceptance of the idea of fundamental liberties of states impossible was the nature of the dominant mode of legal thought at the time: natural law. For one thing, natural law focused overwhelmingly on duties rather than rights (or liberties). In addition, natural law was not primarily concerned with states at all. Its primary concern was interpersonal relations between individuals. It is true that, in principle at least, the rules of natural law applied equally to rulers as to ordinary people. In that sense, natural law was relevant to the affairs of states. But it was not directed primarily to issues of relations between rulers, or between states as such, in the manner of modern international law.

The difficulty in finding liberties in natural law is well illustrated by the question of self-preservation. Thomas Aquinas readily recognised this as a fundamental principle of natural law. In a sense, self-preservation was a duty, in that the law of Christianity prohibited persons from taking their own lives. Self-preservation could also be seen, at the same time, as a right, because all other persons were under a duty not to take the lives of others.

An argument could be made, though, for self-preservation as a liberty, at least in the marginal, but intriguing, case of a starving person who wishes to pilfer food from the larder of someone who is better off. If this were allowed, then it could well qualify as a liberty, in that it would be a case of a person being unilaterally able to take certain actions at will. It might be objected, however, that the larder owner does have a legal right to stop the self-help measure; and if this were so, then there would not be a liberty. (At most, there would merely be an immunity from prosecution of the poor person.) There is a liberty to take food only if there is, correspondingly, *no* right on the food owner's part to fend off the starving person. And this is open to considerable debate. Some writers, such as Augustine, dealt with this difficulty by contending that, in such a case of necessity, the food owner's property right vanishes. If that were the case, then—but only then—there would be a true liberty on the starving person's part, since the erstwhile owner's right to stop the food taking would be extinguished. The pauper would possess not merely a right of self-preservation (coupled with a duty on the part of others not to kill him), but also a liberty to do whatever is necessary under the circumstances to stave off death. If, in contrast, the food owner was held to be under a legal obligation to supply sustenance to his unfortunate fellow creature, then of course the starving person would possess a right rather than a liberty.

## 2.2 Hobbes and the birth of 'rights' discourse

It was only in the seventeenth century that natural law thought crossed the conceptual Rubicon of becoming based on liberties rather than on duties. The seminal figure in

<sup>9</sup> Aristotle, *Politics* (first published c 350 BC, Penguin 1962) 56–61.

this important change was Thomas Hobbes. Here too, the basic thinking concerned the liberties not of states, but rather of individuals—and specifically of individuals existing in a state of nature. The Hobbesian state of nature was no paradise—far from it. It was a condition of high insecurity, ever-present danger, and worrisome competitiveness. In Hobbes's famous (perhaps too famous) words, it was a condition in which life was all too likely to be 'solitary, poor, nasty, brutish and short'.<sup>10</sup> In this frightening environment, there was (in Hobbes's view) one basic, fundamental *human* liberty: self-preservation. This was a liberty in the true sense, because Hobbes insisted that, in the state of nature, no one possesses a right to stop anyone else from doing whatever is necessary for self-preservation. In the state of nature, Hobbes maintained, 'nothing is unlawful to any man that tendeth to his own safety or commodity'.<sup>11</sup>

Speaking in sober jurisprudential terms, the Hobbesian state of nature may be characterised as a situation in which there were overlapping liberties—where, in Hobbes's words, there is 'the right of all to all, wherewith one by right invades, the other by right resists, and whence arise perpetual jealousies and suspicions on all hands'.<sup>12</sup> There were no clearly delimited bounds separating one party's freedom of action from that of another. Consequently, there was an ever-present risk, or even reality, of clashing claims. And in the absence of a neutral adjudicator of some kind, these clashes would constantly risk turning violent. Fortunately, a solution was at hand, though a drastic one. That is, that each person, in coordination with all others, would voluntarily surrender his fundamental liberty of self-preservation to a single sovereign power. That sovereign would then proceed to impose and enforce order, and to lay down rules that would delimit the freedom of action of each subject from that of others. In short, a total surrender of liberty would bring peace and security.

Once this act of surrender-and-subjection had taken place, the state would be born. Hobbes supposed that this process would occur separately and spontaneously in local areas all over the earth, with the result that there would be a number of sovereign states. Each sovereign would be supreme in its own jurisdiction. But, vis-à-vis other states, it would be in a state of nature. '[T]hat which is the law of nature between man and man, before the constitution of commonwealth,' asserted Hobbes, 'is the law of nations between sovereign and sovereign, after'.<sup>13</sup> Consequently, the same considerations as before would apply with virtually mechanical exactitude. Self-preservation would continue to be the single supreme liberty. But now—for the first time—it was clearly seen to be a fundamental liberty of *states* as such, rather than of individuals. States, like individuals before them, are entitled, under the Hobbesian approach, to perform whatever acts are

<sup>10</sup> Thomas Hobbes, *Leviathan, or The Matter, Form and Power of a Commonwealth Ecclesiastical and Civil* (first published 1651, Blackwell 1947) 84.

<sup>11</sup> Thomas Hobbes, 'Human Nature' in JCA Gaskin (ed), *The Elements of Law, Natural and Politic* (first published 1640, OUP 1994) 103.

<sup>12</sup> Thomas Hobbes, *De Cive, or The Citizen* (first published 1647, Appleton-Century-Crofts 1949) 29.

<sup>13</sup> Thomas Hobbes, 'De Corpore Politico' (first published 1640) in JCA Gaskin (ed), *The Elements of Law, Natural and Politic* (first published 1640, OUP 1994) 182.

necessary under the circumstances to ensure self-preservation or survival. Other states have no legal right to put a stop to those acts. Other states may, of course, have the material power to interfere with these actions. But they have no legal right to do so.

### 2.3 Wolff, Vattel and the duty of ‘perfection’

In the generations following Hobbes, a split emerged in natural law thinking. The Hobbesian (or ‘naturalist’) school, true to the teachings of their master, tended to emphasise the fundamental liberty of self-preservation. Spinoza, for example, held with Hobbes that ‘men in the state of nature are enemies.’<sup>14</sup> Also like Hobbes, he concluded that persons in this perilous condition possess the liberty to take whatever steps are necessary to attain security and self-preservation.<sup>15</sup>

The predominant strain of natural law thought, however, continued, in the traditional vein, to emphasise duties of states, rather than rights. This was true even in cases in which the prerogatives of states were actually being asserted. Nowhere was this seemingly paradoxical state of affairs better illustrated than in the writings of the eighteenth-century German natural lawyer Christian Wolff, and then of his Swiss follower and populariser Emmerich de Vattel.

Wolff (and Vattel after him) posited the existence of a *duty* on the state’s part to strive for what he called ‘perfection.’<sup>16</sup> This clearly meant something far more than bare survival, although it did include that. More broadly, though, it meant, in Wolff’s rather vague exposition, a duty to do all things necessary to achieve a state’s ‘fitness for accomplishing the purpose of the state.’ For Wolff, a liberty is present here, albeit only as a consequence of the duty: if there is a duty to seek perfection, then there must logically be a liberty to undertake such acts as are necessary to bring that perfection about. As he put it, ‘every nation has the right to those things without which it cannot perfect itself, and its form of government.’<sup>17</sup>

If this duty to seek perfection is to be seen as a duty in the strict sense of Hohfeld, the question would immediately arise: to whom is this interesting duty owed? Wolff had a ready answer: it was owed by the state to *itself*. That is to say, the state was the holder of *both* the right and the duty simultaneously. It is, of course, difficult (to say the least) to see this as a true right in Hohfeld’s sense, since the key hallmark of a right-and-duty complex—enforceability—would seem to be lacking. How can a state (or individual for

<sup>14</sup> Baruch Spinoza, ‘Theological-Political Treatise’ in AG Wernham (ed), *The Political Works* (first published 1677, Clarendon Press 1965) 295.

<sup>15</sup> On Spinoza and natural law, see Jon Miller, ‘Spinoza and Natural Law’ in Jonathan A Jacobs (ed), *Reason, Religion, and Natural Law* (OUP 2012) 201–21.

<sup>16</sup> Christian Wolff, *The Law of Nations Treated According to a Scientific Method* (first published 1764, Clarendon Press 1934) 20–22, 24–28.

<sup>17</sup> *ibid* 25. On Wolff’s ideas about natural law, see Tim Hochstrasser, *Natural Law Theories in the Early Enlightenment* (CUP 2000) 150–86; Knud Haakonssen, ‘German Natural Law’ in Mark Goldie and Robert Wokler (eds), *The Cambridge History of Eighteenth-Century Political Thought* (CUP 2006) 268–78.

that matter) enforce a duty which it owes to itself? This is an instructive indication of the extent to which the traditional natural law tendency to think in terms of duties rather than of rights still exerted a strong hold on European thinkers in the eighteenth century.

Notwithstanding this small difficulty, Wolff was clear on another point: that the duty of perfection—and, more generally, the corpus of duties that a state owes to itself—takes precedence over the duties that it owes to other states. This idea of states owing their primary duties to themselves, and only their secondary duties to other states would be given a new twist in the nineteenth century. But we can see here the germs of the idea of fundamental liberties of states—even though it was ‘disguised’, so to speak, as a duty rather than as a right or liberty.

Vattel endorsed these views of Wolff. But he also went on to posit a concrete situation in which a state would have the right to repudiate a treaty without any breach by the other side, essentially as a matter of inherent right. This was the scenario in which a peace treaty was concluded after a war which was not the outcome of true bargaining, but instead was a mere instance of ‘oppression’ on the part of the triumphant side. ‘If an ambitious and unjust conqueror subdues a Nation’, Vattel explained, ‘and forces it to accept hard, disgraceful, and unendurable terms of peace, necessity may constrain the Nation to submit to them. But this show of peace is not real peace; it is oppression.’ The so-called peace arrangement is, in reality, ‘a yoke which men of spirit will throw off upon the first favorable opportunity’. The sole specific illustrative instance that he gave was the defeat of the Aztec Empire by Hernando Cortés in the early sixteenth century. Vattel was aware that this liberty of repudiating peace treaties could be subject to abuse; but he nevertheless held that the risk should be taken, since natural law ‘does not favor oppressors’.<sup>18</sup>

This example of Vattel is open to conflicting interpretations. On the one hand, it might be contended that the victorious state was in violation of a legal duty under customary law to be moderate in its treatment of defeated opponents. In that case, the defeated state would be asserting a legal right that is correlative to that duty. On the other hand, it might be contended that the victorious state was under no such customary law duty and committed no legal wrong in imposing a harsh peace. In that case, the defeated state would be exercising an *inherent* right of some kind to overthrow or repudiate the harsh arrangement. This would be a liberty in the true sense—provided, of course, that the victorious state had no legal right to stand in the defeated state’s way. This example by Vattel is a very instructive illustration of how difficult it is, in practice, actually to find, or even to imagine, a clear instance of an exercise of a fundamental liberty by a state.

<sup>18</sup> Emer de Vattel, *The Law of Nations, or The Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (first published 1758, Carnegie Institution of Washington 1916) 356–57.

### 3 The rise: Nineteenth-century positivism

In a number of important respects, the positivist legal philosophy of the nineteenth century was more conducive to the idea of fundamental liberties of states than natural law had been.<sup>19</sup> One important reason for this was the increased focus of the positivists on states as the exclusive subjects of international law. Strong support was given to this thesis by the positivist insistence on what was sometimes called the ‘real personality of the state.’<sup>20</sup> The supreme figure behind this insistence on the real personality of the state was the German writer Otto von Gierke, who was a clear heir to the Hegelian tradition.<sup>21</sup> There was widespread agreement, especially among German writers, on this point. The German scholar Heinrich Triepel, a noted constitutional as well as international lawyer, for example, was a strong advocate of the real personality of the state.<sup>22</sup> If ever there was an atmosphere conducive in general to ideas of fundamental liberties of states, it would be here.

Another important attribute of positivism that bolstered the idea of fundamental liberties of states was its principled rejection of the binding authority of natural law. This had the effect of freeing states from their erstwhile servitude to the manifold *duties* which natural law imposed onto them. It thereby cleared the way for the devising of a system of international law that was based on liberties instead. The result of this new way of thinking was to see international law as being man-made, as being the creation of states. Since states were now seen as the creators of international law, then naturally the creators would be expected to have their own interests firmly in mind during the creation process.

Also lending support to the concept of fundamental liberties of states was ready acceptance by positivists of the notion that international law is not necessarily a comprehensive system, ie that certain areas of inter-state relations can be left unregulated by law. This conclusion arises immediately from the positivist view of law as wholly man-made. It is entirely foreseeable that there might be some areas in which no rules had been agreed upon.<sup>23</sup> In such a case, something which the World Court later labelled ‘the principle of freedom’ applied: states are free to do as they wished, if no rule of law existed to constrain their action.<sup>24</sup> ‘Restrictions upon the independence of States’, the Court pronounced, ‘cannot (...) be presumed.’<sup>25</sup>

<sup>19</sup> Stephen C Neff, *Justice Among Nations: A History of International Law* (Harvard UP 2014) 245–47.

<sup>20</sup> George H Sabine and Walter J Shepard, ‘Translator’s Introduction’ in Hugo Krabbe, *The Modern Idea of the State* (Martinus Nijhoff 1922) xi–lxxxii.

<sup>21</sup> On Gierke, see John D Lewis, *The Genossenschaft-Theory of Otto von Gierke: A Study in Political Thought* (University of Wisconsin 1935); David Runciman, *Pluralism and the Personality of the State* (CUP 1997) 34–63.

<sup>22</sup> Janne E Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press 2004) 118–19.

<sup>23</sup> See, to this effect, Lassa Oppenheim, ‘The Science of International Law: Its Task and Method’ (1908) 2 AJIL 313, 335–36.

<sup>24</sup> *SS Lotus Case (France v Turkey)* (Merits) PCIJ Rep Series A No 10.

<sup>25</sup> *ibid* 18.

It might be wondered if this principle of freedom could be an alternate name for fundamental liberties of states. That might be so, in that, in the areas where no rule of law is in force, states have full freedom of action, with no other state having a right to interfere—the hallmarks of a liberty in the strict sense under consideration. It should be appreciated, though, that such a liberty (or set of liberties) is a far cry from a menu of specified rights or a bill of rights. It is merely a negative or residual category of actions outside the purview of the law altogether.<sup>26</sup> It comprises simply whatever the law happens not to cover at any given time. Moreover, the content of this residual category is necessarily in constant flux—ie constantly diminishing—as the body of international law gradually becomes more and more comprehensive.

Some of the variants of nineteenth-century positivism allow for fundamental liberties of states in this very pale and attenuated sense. There is, for example, the version of positivism known as voluntarism, which stressed unilateral self-limitation by states as the essence of international law.<sup>27</sup> The conclusion immediately follows that, in any area in which states have chosen not to accept limitations on their acts, freedom of action remains. There is also the common-will version of positivism, which stressed treaty-making as the source of international legal obligation.<sup>28</sup> Here too, the conclusion immediately follows that, in any area in which states have not entered into treaty obligations, freedom of action remains.

### 3.1 Customary law and fundamental liberties of states

Somewhat more interesting, for present purposes, is the third variant of positivism, the empirical one.<sup>29</sup> This one stressed the formation of customary law through state practice at the heart of international legal doctrine. The rules of international law were seen to arise out of the will of the states of the world; but it is important to appreciate that this meant the *collective* will of the states in general, not the individual, idiosyncratic wills of each state on its own.

Regarding the question of fundamental liberties of states, much depends on which of two rival views of customary law is taken: the legislative or the contractual. According to the legislative view of customary law, customary law rules are rules that are, *per se*, binding on all states, in the manner of legislation in domestic laws, which binds all persons within a given jurisdiction. If the custom comes about through the unanimous practice of states, then there is no difficulty. But if some states dissent from the practice, then they are overruled once the rule of law is established, just as opponents of legislation become subject to a law even if they objected to its enactment.

<sup>26</sup> See, on this point, Neff (n 19) 249.

<sup>27</sup> On the voluntarist version of positivism, see *ibid* 236–43.

<sup>28</sup> On the common-will version of positivism, see *ibid* 231–36.

<sup>29</sup> On the empirical version of positivism, see *ibid* 226–31.

According to the contractual view of customary law, in contrast, the law binds only those states that actually participate in its making, or which actually give their consent. On this view, customary law is simply tacit treaty-making. Just as a treaty binds only the states that are parties to it, so customary law binds only the states that either participate in the relevant practice or which give their consent to the rule. In the nineteenth century, this contractual outlook was the dominant one.<sup>30</sup>

It will be immediately apparent that, if the contractual view of customary law is adopted, then the question of the fundamental liberties of states scarcely arises. More accurately, it should be said that, on the contractual view, there is really only *one* fundamental liberty of states: the liberty to decline to participate in the formation of customary rules. This is, of course, a straightforward analogue of the fundamental liberty of states to decline to become parties to treaties of which they disapprove. It is also, for all practical purposes, simply the principle of freedom in action yet again—though now, states are allowed consciously to choose to reside in the unregulated zone. Like the principle of freedom, this liberty is clearly of a wholly negative nature, quite different in character from menus of liberties which appear in constitutional bills of rights in national legal systems. This solitary fundamental liberty is more in the nature of a freedom to be a hermit. It does not amount to a grant of a body of liberties under the rule of law.

### 3.2 Doctrinal support for the idea

An early supporter of the idea of fundamental rights of states was the German writer Johann Ludwig Klüber. Anticipating Hohfeld, he made the potentially important distinction between fundamental and non-fundamental rights of states—or, in his parlance, between the absolute and the conditional rights of states. The absolute rights were conservation (ie self-preservation), independence and equality with other states. The conditional rights were those that arose out of particular contexts—most obviously out of treaties concluded with other states.<sup>31</sup> Later in the century, in 1885, the French writer Paul Pradier-Fodéré made a similar distinction. He contrasted two categories of states' rights, which he called accidental and inherent. Accidental rights were those which flowed from particular circumstances, such as treaty negotiations. Inherent rights, in contrast, were those which a state possessed as an attribute of statehood as such.<sup>32</sup>

The American author Henry Wheaton, in the 1830s, posited two absolute rights of states: independence and self-preservation.<sup>33</sup> The German scholar and judge Auguste Heffter, perhaps the earliest writer to take a consciously positivist perspective, was

<sup>30</sup> See, eg, Theophile Funck-Brentano and Albert Sorel, *Précis du droit des gens* (2nd edn, E Plon Nourrit 1887) 3; Dionisio Anzilotti, *Cours de Droit International: Introduction—Théories Générales* (Gilbert Gidel tr, Sirey 1929) 73–77, 87–90. See also Neff (n 19) 247–49.

<sup>31</sup> Albert de La Pradelle, *Maîtres et Doctrines du Droit des Gens* (2nd edn, Éditions Internationales 1950) 192.

<sup>32</sup> Paul Pradier-Fodere, *Traité de Droit International Public Européen et Américain: Suivant les Progrès des Sciences et de la Pratique Contemporaines* (A Durand et Pedone-Lauriel 1885) 472–73.

<sup>33</sup> Henry Wheaton, *Elements of International Law* (Carey, Lea and Blanchard 1836) 81–82, 95–129.

especially outspoken on the subject, identifying four fundamental rights of states: free existence and independence; sovereignty; a right to mutual respect from other states; and a right to mutual commerce with other states (including a right to diplomatic relations as well as a right to trade).<sup>34</sup> The Argentine writer Carlos Calvo, one of the foremost writers in this empiricist tradition, insisted on a basic right of ‘conservation’ on the part of state, calling it ‘the first of all permanent and absolute rights’. It was inherent in the fundamental principles of state sovereignty and independence and thereby constituted, in his view, ‘the supreme law of nations’.<sup>35</sup>

At the end of the century, the influential French treatise writer Henry Bonfils, writing in 1894, identified three fundamental rights: conservation; interior sovereignty (meaning autonomy); and external sovereignty (meaning independence). External sovereignty was held, in turn, to comprise three components: the right to equality with other states; the right to respect from other states; and the right to freedom of commerce (ie freedom from economic monopoly claims of third powers).<sup>36</sup> One of the very strongest assertions of the principle of fundamental liberties of states came from the Swiss writer Alphonse Rivier in 1896.<sup>37</sup>

### 3.3 Some doubts

Several important points may be noted about this support for the idea of fundamental liberties of states. One is that it is difficult to see the need for it, given the prevailing view at the time that customary law was contractual in character. So long as states were free to hold back from participating in the formation of customary rules, there would seem to be practically little need (as noted above) for a separate and distinct doctrine of fundamental liberties of states. It is not surprising, therefore, to find that writings on the fundamental liberties of states tended to be somewhat abstract and removed from the concerns of everyday international life.

Nor was support for the idea unanimous even among positivist writers. A notable opponent of the concept was John Westlake, of Cambridge University. Writing early in the twentieth century, he disputed the idea of the real personality of the state, insisting instead that ‘states are nothing more than associations of natural persons’. He went on to assert that ‘it is a logical error to assume, because states are moral persons and therefore capable of rights equally with natural individuals, that they must have the same rights as natural individuals.’ In express criticism of Bonfils and Rivier, Westlake maintained that the nature of the state ‘is not fixed enough to make it wise to endow it with inherent rights’.<sup>38</sup>

<sup>34</sup> August Wilhelm Heffter, *Le Droit International Public de l'Europe* (EH Schroeder 1857) 56–69.

<sup>35</sup> Carlos Calvo, *Le Droit International: Théorie et Pratique* (3rd edn, Pedone-Lauriel 1880) 309–11.

<sup>36</sup> Henry Bonfils, *Manuel de Droit International Public* (1st edn, Rousseau 1894) 123–26, 131–50.

<sup>37</sup> Antoine Rivier, *Principes des Droits des Gens* (Rousseau 1896) 253–407.

<sup>38</sup> John Westlake, *International Law* (2nd edn, CUP 1910) 306–09.

Another cause for misgiving lay in the fact that it was no easy matter devising a plausible scenario where the principle of fundamental liberties of states could have an impact on state practice. One possibility is the situation put forward by Vattel: that a breach of a fundamental liberty by way of a treaty provision would entitle the victim state to repudiate the treaty without any need to show a breach by the other side. It should be noted, though, there is virtually no evidence for such a thesis in state practice. (Even the Aztec Empire did not attempt to reassert its personhood in international law following the Spanish conquest.)

It is true that, on a number of occasions, states have sought to relieve themselves of burdensome obligations under peace treaties. But these have not involved assertions of breaches of fundamental liberties. Instead, the claims have been much more tightly tailored. One instructive instance occurred in 1870–71, when Russia purported unilaterally to denounce the provisions of the Treaty of Paris of 1856, providing for demilitarization of the Black Sea.<sup>39</sup> In doing so, however, it made no attempt to invoke any fundamental liberties of states. Instead it relied on change of circumstances as a justification. The other treaty parties, in the event, agreed to release Russia from its obligation under the Treaty—while at the same time expressly asserting that states do not have a unilateral right to denounce treaties, and that the consent of other parties is necessary.<sup>40</sup>

More instructive was the experience of Germany after the First World War. Among German writers, there were assertions to the effect that the Treaty of Versailles (or at least certain provisions) were invalid because they transgressed certain fundamental principles of international law—specifically the principle of equality of states. Carl Bilfinger, who taught international law at the University of Heidelberg during the Nazi period, was one of the prominent figures in this line of thought.<sup>41</sup> It is notable, however, that this idea was based chiefly on rationalist natural law approaches, and on certain *a priori* ideas about the nature of statehood. It was not so much an assertion of freedom of will of states in certain respects, as of an entitlement to equal respect and treatment by *other* states.<sup>42</sup> It seems, then, more along the lines of a right than of a liberty.

In any event, this idea of a fundamental principle of equality was more evident in the ruminations of scholars than in the practice of states. In 1935, for example, when

<sup>39</sup> General Treaty for the Re-establishment of Peace (adopted 30 March 1856, entered into force 27 April 1856) 114 CTS 409, arts 11–14.

<sup>40</sup> For this declaration, see Foreign Office, *British and Foreign State Papers* (James Ridgeway and Sons 1857) vol 61, 7–11. On this incident, see generally David J Bederman, ‘The 1871 London Declaration, *Rebus Sic Stantibus* and a Primitive View of the Law of Nations’ (1988) 82 AJIL 1.

<sup>41</sup> See Carl Bilfinger, ‘Zum Problem der Staatengleichheit im Völkerrecht’ (1934) 4 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 481, 485. For some frank comments on Bilfinger’s work and beliefs, see the review by Ernst J Cohn in (1956) 19 MLR 231.

<sup>42</sup> Lawrence Preuss, ‘National Socialist Conceptions of International Law’ (1935) 29 American Pol Science Rev 594, 603–05.

Germany repudiated the parts of the Treaty of Versailles dealing with arms control,<sup>43</sup> it did not invoke a purported fundamental liberty on a state's part to provide for its own defence. Instead, the justification, as in the Russian case in 1870, was change of circumstances. Germany contended that the Allied powers were under a parallel obligation to conclude disarmament agreements and had failed to do so. Since the anticipated general disarmament had not occurred, the German restrictions—which were contingent on it—no longer served their originally envisaged purpose.<sup>44</sup>

The same tendency was apparent the following year, when Germany repudiated the Locarno Treaty of 1925, which had safeguarded the country's western frontier arrangements.<sup>45</sup> This act led directly to Germany's remilitarization of the Rhineland (contrary to the Versailles Treaty).<sup>46</sup> In taking these actions, the German government did invoke what it called 'the fundamental right of a nation to secure its frontiers and ensure its possibilities of defence'.<sup>47</sup> The formal legal justification that it put to the international community, however, was a more narrow and traditional one: that France had committed a prior breach of the Locarno Treaty, by concluding a mutual assistance pact with the Soviet Union in 1935.<sup>48</sup> It was not suggested that those treaties were *automatically* void by virtue of incompatibility with any purported fundamental liberties of states.

In this connection, it might be noted that, in the Lockerbie dispute of the 1990s, Libya did not invoke a purported fundamental liberty to decide entirely on its own whether to extradite its own nationals to foreign countries. Instead, it relied, more narrowly, on the terms of the Montreal Convention of 1971<sup>49</sup>—ie on its treaty rights vis-à-vis other treaty parties. In this case, it asserted that Britain and the United States were legally obligated to respect the rights which Libya claimed under the Convention.<sup>50</sup>

Perhaps the most obvious candidate for a fundamental liberty of states is self-defence. But it is actually more properly characterised as a right, in the strict sense, rather than a liberty. It is a right because other states are under a corresponding duty to refrain from aggression. If we are looking for a true liberty, then a more likely possibility

<sup>43</sup> Treaty of Peace with Germany (adopted 28 June 1919, entered into force 10 January 1930) 225 CTS 188 (Treaty of Versailles) arts 159–202.

<sup>44</sup> GA Kertesz (ed), *Documents in the Political History of the European Continent 1815–1939* (OUP 1968) 474–76. On this dispute, see Charles G Fenwick, 'The Denunciation of the Disarmament Clauses of the Treaty of Versailles' (1935) 29 AJIL 675.

<sup>45</sup> Treaty of Mutual Guarantee (adopted 16 October 1925, entered into force 14 September 1926) 54 LNTS 289.

<sup>46</sup> Treaty of Versailles, arts 42–44.

<sup>47</sup> Kertesz (n 44) 486–87.

<sup>48</sup> Statement of Ribbentrop to the League of Nations Council (1936) LNOJ 336. On this dispute, see Quincy Wright, 'The Rhineland Occupation and the Enforcement of Treaties' (1936) 30 AJIL 486; Charles G Fenwick, 'The Relation of the Franco-Soviet Pact to the Locarno Treaty' (1936) 30 AJIL 265.

<sup>49</sup> Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177.

<sup>50</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* [1998] ICJ Rep 9, 23.

might be the somewhat wider principle of necessity, as set out in the International Law Commission's Articles on State Responsibility.<sup>51</sup> But even this is doubtful. The reason is that a state acting under this heading *is*, strictly speaking, under an obligation not to engage in the conduct in question. It is just that the failure to honour that obligation is excused (ie not sanctioned) in necessitous circumstances. In addition, a state whose rights are infringed by acts of necessity probably does have the right to resist. Therefore, neither of the hallmarks of a true liberty is satisfied even in the wider case of necessity.

In this connection, consider the famous *Caroline* incident, which took place in 1837 and led to memorable diplomatic correspondence afterwards between Britain and the United States. The incident is generally held to be a definitive statement of law of self-defence under customary law.<sup>52</sup> But it is more properly considered as an illustration of the principle of necessity. Britain was not, in that incident, repelling an attack launched against it by the United States. Rather, it engaged in what would now be called a cross-border commando raid against non-state actors who were threatening British rule in Canada. The operation was therefore closely akin to the American operation that killed al-Qaeda chief Osama bin Laden in Pakistan in 2011.

There was no doubt, in either of these cases, of the right of the relevant countries (the United States and Pakistan) to territorial integrity. The critical question—in the parlance of article 25 of the International Law Commission Articles on State Responsibility—was whether the cross-border attacks were ‘the only way for the [acting] State to safeguard an essential interest against a grave and imminent peril’. If so, then that fact can constitute a defence to a claim for violation of territorial sovereignty. The important point for present purposes is that a defence to a claim is not the same thing as a liberty. A liberty, as explained above, is an *entitlement* to act at will. There is no suggestion that engaging in military operations on the territories of foreign countries is something that states are entitled to do at will. The highly demanding criteria for the principle of necessity must first be satisfied.

It might be thought that the distinction just made between a fundamental liberty of states and the principle of necessity is overly fine. One of the fundamental liberties of states, it may be asserted, is precisely a right to take steps ‘to safeguard an essential interest against a grave and imminent peril’—steps to be taken at the will of the acting party, provided that the threshold criteria are met. Recall, however, that essential to a liberty is the *absence* of any right on the part of the impacted state to stop the action. It cannot be contended that, in the *Caroline* or the bin Laden raid cases, the territorial states had no right to halt the incursions. On the contrary, the United States and Pakistan

<sup>51</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83, Annex (Articles on State Responsibility) arts 26–30. On necessity in the law of state responsibility, see James Crawford, *State Responsibility: The General Part* (CUP 2013) 305–15; Roman Boed, ‘State of Necessity as a Justification for Internationally Wrongful Conduct’ (2000) 3 Yale Human Rights & Development LJ 1.

<sup>52</sup> Foreign Office, *British and Foreign State Papers* (James Ridgeway and Sons 1857) vol 29, 1129, 1137–38.

would both have been entirely within their rights to have prevented the incursions from taking place, had they been able to do so.

Another possible candidate for a fundamental liberty of states might be the principle of non-intervention. But here too, there are problems. For one thing, the principle of non-intervention is a right, not a liberty. It is a right in the proper sense, because all states are subject to a duty *not* to intervene in the affairs of other states. To identify true fundamental liberties of states, it would be necessary to look behind the 'shield' of non-intervention, to find out just what it is that states are allowed to do without interference by other states—ie to find out what it is that other states have no right to stop a given country from doing. It is conceded that a list of these things would be a list of liberties of states in the true sense of the word. But it should be borne in mind that things that lurk behind the non-intervention shield are, in substantial part at least, matters that are within the domestic jurisdiction of states. In the words of the World Court, the principle of non-intervention concerns 'matters in which each State is permitted, by the principle of State sovereignty, to decide freely'.<sup>53</sup> If fundamental liberties of states means nothing more than the sovereign rights of states over their own jurisdictions, then the idea would seem to add nothing of substance to existing international law.

#### 4 The decline: The twentieth and twenty-first centuries

If, as just observed, there has been no significant support in state practice for a principle of fundamental liberties of states, there has also been a decline in doctrinal support for the idea since the nineteenth century. Several reasons may be adduced to explain this. One is that there was, in the 1930s (also as noted above) a certain uncomfortable association of the idea with Nazi writings. In addition, much greater attention has been focused, since 1945, on fundamental liberties of *individuals*, in the form of the development of international human rights law. Concerns for human rights, at least of the civil and political character, would seem to militate in spirit, if not strictly in letter, against the notion of fundamental liberties of *states*.

Yet another reason for the decline in interest in the idea of fundamental liberties of states is the advent of a different doctrine that is, at least in large part, an effective substitute for it: the doctrine of persistent objection to the formation of customary law. It has been observed above that the idea of fundamental liberties of states only makes sense in the larger context of a *legislative*, as opposed to a contractual, view of customary law. And in the nineteenth century, it was the contractual position, rather than the legislative one, that held predominant sway among legal writers. Consequently, there was no great role for a doctrine of fundamental liberties to play.

<sup>53</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 107–08.

An important change took place in the twentieth century, with the growth of a challenge to the contractual view of customary law. The foremost champions of this change were the members of the Vienna School of the 1920s, whose most prominent figure was Hans Kelsen. Kelsen explicitly rejected the contractual theory of customary law, holding that custom differed from classical legislation in only being a decentralised process.<sup>54</sup> In addition, Kelsen directly opposed the very idea of fundamental rights—or even duties—of states, on the ground that the norms of international law, in his opinion, spoke not directly to states as such, but rather to the individuals who operated the governmental machinery of states. In other words, like Westlake before him, he rejected the idea of the real personality of the state, which was at the foundation of the idea of fundamental liberties of states.<sup>55</sup>

Whether under the influence of the Vienna School or not, support gradually accrued for what was sometimes called a ‘majoritarian’ view of international law, ie for what is here called a legislative picture of customary law.<sup>56</sup> That inevitably gave rise to the predictable fears by some states that rules of law could be foisted on them to which they greatly objected. The way would now seem open for a strong assertion of a doctrine of fundamental liberties of states, when—for the first time in history—it seemed urgently called for as a practical matter. Given the extensive experience of states with domestic protections of civil liberties, it might seem natural that a call might go forth for a doctrine of basic, inalienable liberties to emerge on the international law plane, to counter fears of global mob rule.

This did not happen. Instead, two different strategies have been devised to deal with the problem of the tyranny of majority rule. One is simply to deny the validity of majority rule, *per se*, in the making of customary law and to insist instead on the classical contractual position.<sup>57</sup> More common, however, has been the other strategy: supporting the principle of persistent objection to the formation of rules of customary law. There is much that can be (and has been) said about the persistent objector thesis.<sup>58</sup> Here, it is only necessary to note that this approach does not produce a fixed list of fundamental rights, in the manner of Calvo and the other positivists. Instead, it empowers each individual state, as a matter of unilateral free choice, to pick and choose which rules

<sup>54</sup> Hans Kelsen, *Principles of International Law* (2nd edn, Holt, Rinehart and Winston 1966) 440–41, 453–54. See also Hans Kelsen, *General Theory of Law and State* (Harvard UP 1946) 351–54.

<sup>55</sup> Kelsen, *General Theory of Law and State* (n 54) 341–43.

<sup>56</sup> Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 11. On an analogous tendency in treaty law, see *Reservations to the Genocide Convention* (Advisory Opinion) [1951] ICJ Rep 15, 22.

<sup>57</sup> See, eg, Prosper Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 AJIL 413, 416–20; Gaetano Arangio-Ruiz, ‘The Concept of International Law and the Theory of International Organization’ (1972) 137 *Recueil des Cours* 629, 721–23.

<sup>58</sup> Favourable to the principle are Ted L Stein, ‘The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law’ (1985) 26 *Harvard Intl LJ* 457; Maurice H Mendelson, ‘The Formation of Customary International Law’ (1998) 272 *Recueil des Cours* 155, 227–44. Skeptical of it are Anthony D’Amato, *The Concept of Custom in International Law* (Cornell UP 1971) 233; Jonathan I Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’ (1985) 56 *BYBIL* 1.

of international law will apply to it—and, more importantly, which will not. It does not produce anything like a true doctrine of fundamental liberties of states, but instead is a doctrine of self-dispensation from individual laws, selected at the respective wills of the various individual objecting states.

The difference between the persistent objector principle and a doctrine of fundamental liberties of states has not been the subject of much (or any) exploration. One important difference is that, under the fundamental liberties approach, there does not need to be any active objection by any state to the rule. The supposed customary rule will be automatically inapplicable simply by virtue of its incompatibility with a relevant fundamental liberty. States might be able to waive their liberties if they so choose. But states electing to stand on their fundamental liberties would not need to take any special action. The persistent objector principle, in contrast, requires some affirmative exertion on the part of the objecting state. But it has the crucial advantage of enabling the objecting states to object to *any* customary rule, entirely at its own choice—provided, of course, that the objection is sufficiently timely and emphatic. A doctrine of fundamental liberties of states, in contrast, is (presumably) a fixed list of liberties, which states are not free to expand at their own unilateral election.

Speaking more broadly, it may be said that the persistent objector principle and a doctrine of fundamental liberties of states, even if both function as weapons against majoritarian tyranny, are radically different in spirit from one another. The idea of fundamental liberties has an aura of idealism and grandeur to it. It connotes an overriding sense of justice. The persistent objector principle, in sharp contrast, has little (or nothing) of the clarion call about it. Compared to a doctrine of fundamental liberties of states, it is a rather simpering, furtive thing. It is a sort of *ad hoc*, do-it-yourself means by which states can preserve what they regard as fundamental rights. It is, in the words of one commentator, a device for achieving ‘[t]he reduction of custom to a question of special relations’ between states,<sup>59</sup> ie for reverting, in effect if not (quite) in name, to the contractual view of customary law.

There is a rich irony here. An acceptance of the validity of the persistent objector principle has given rise, in its turn, to some worries of abuse. If states have an absolutely free hand to stop any nascent rule of customary law from applying to them, then states could possibly escape the reach of some highly important rules of law. This fear has given rise, not surprisingly, to a search for rules of law that are outside its reach—ie for rules of law that cannot be disclaimed by states under any circumstances whatever. This becomes, in effect, a doctrine of fundamental *duties* of states—the very opposite of fundamental liberties. These fundamental duties are, of course, the peremptory norms of international law, of which both the Vienna Convention on

<sup>59</sup> James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 28.

the Law of Treaties (1969) and the International Law Commission's Articles on State Responsibility (2001) speak.<sup>60</sup>

## 5 Final remarks

The ups and downs of the concept of fundamental liberties of states provide a useful index to the nature of international law, as it has been perceived at different times in history. In particular, it sharply illustrates the distinction between the natural law period, with its focus on the duties of individuals, and the positivist era of the nineteenth century, with its stress on the prerogatives of states.

It is suggested that the concept of fundamental liberties of states is, in reality, simply an alternate—and confusing—label for what are better described as the set of things which fall into the domestic jurisdiction of states, and which consequently are protected by the 'shield' of the principle of non-intervention. But this is an unnecessarily confusing way of putting the matter. For one thing, rights which fall within the domestic jurisdiction of states are not necessarily fundamental. Some are, in fact, quite trivial (such as rules about procedures to be followed in property transfers). More importantly, the set of things which fall into the category of domestic jurisdiction of states (ie within the purview of state sovereignty) is far from immutable. On the contrary, it is in constant flux, subject to the changing conditions of international life. For example, the fixing of rules about the conduct of criminal trials or the punishment of speech critical of governments were once considered to fall within the domestic jurisdiction of states. But, with the advance of international human rights law, that is no longer so.

Consequently, it would appear that no prerogatives of states can be considered fundamental, in the sense that they are fixed or inalienable or inherent in the concept of statehood as such. The domestic jurisdiction of states (ie the juridical space accorded to state sovereignty) is not a fixed, unalterable menu of fundamental liberties. Rather, it is a residuary category, comprising areas of action that happen *not* to be regulated by international legal norms at any particular, given time. As such, the category is constantly subject to attrition in accordance with the collective needs of the international community over the course of history. It may be contended that there are certain areas which are not subject to this attrition. But no significant evidence supports that view. For better or worse, there is no theoretical or principled limit to the reach of international law, comparable to the privileged categories of liberties that exist in national constitutions. The age of doctrinaire positivism has passed.

<sup>60</sup> See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 CTS 331, art 53; International Law Commission, Articles on State Responsibility, arts 40–41.

# The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law

Jean d'Aspremont\*

## Abstract

This article recalls the various manifestations of the anthropomorphic doctrine of the fundamental rights of states with a view to critically examining the various functions of anthropomorphic thinking in international law. This allows the article to provide some critical insights on the remnants of the doctrine of fundamental rights of states and the role played by those anthropomorphic residues in contemporary international law. This article is built on a diachronic examination of the functional changes which the doctrine of fundamental rights of states underwent since its origin. This article, after some introductory considerations on the relations between rights and anthropomorphic thinking, examines how anthropomorphic thinking materialised in the form of a doctrine of fundamental rights of states and came to thrive in international legal thought. The article then turns to the manifestation of the doctrine of fundamental rights of states in the inter-American and United Nations contexts with a view to shedding light on the functions that such positive rules pertaining to the fundamental rights of states were meant to play in the international legal order. The article subsequently discusses the demise of the classical doctrine of fundamental rights of states and the foundering of the codification process in order to examine the role that the remains thereof are meant to play in contemporary international law. It ends with a few concluding remarks on the ubiquity of anthropomorphic thinking about international law. Throughout this examination of the functions of the anthropomorphic doctrine of fundamental rights of states, this article espouses the view that, in contemporary legal argumentation, the notion of fundamental rights of state does not constitute any autonomous construction to which specific legal effects are ascribed but rather a textual package of protest or resistance.

## Keywords

Rights, Anthropomorphism, Theory of International Law, Statehood, Human Rights, *Jus Cogens*, Self-defence, *Opinio Juris*, Persistent Objector, Legal Positivism, Codification, International Law Commission, Pufendorf

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## 1 Introduction

The concept of rights is a linchpin of many rules of international law. This is certainly conspicuous since the belated advent of the international protection of individuals by human rights law.<sup>1</sup> Yet, contrary to some common beliefs, the development of the protection of individuals through obligations formulated in human rights terms certainly does not constitute the first serious systematisation of the concept of rights in international law. Indeed, in international legal thought, the concept of rights first thrived in relation to the idea that states enjoy fundamental rights. In other words, it is in relation to the state, and not individuals, that the concept of rights made its first serious appearance in international law. This article explores the concept of fundamental rights in international law through the prism of the doctrine of states' rights.

The concept of rights has been the object of a flourishing and sophisticated literature in jurisprudence and legal theory.<sup>2</sup> If transposed to international law, such jurisprudential constructions would probably lead one to use the concept of rights with the greatest care and maybe some scepticism.<sup>3</sup> The present article does not, however, seek to achieve such a transposal. This would constitute a vain exercise for a series of reasons. First, it must be preliminarily acknowledged that the debate on the concept of rights of states can appear purely semantic. Indeed, in diplomatic practice as well as in the literature, the invocation of rights of states often constitutes a mere narrative of resistance or protest and is commonly not meant to refer to any positive rule of international law.<sup>4</sup> Second, and more fundamentally, it can be argued that even if supported by a rule of positive law, the concept of rights of states does not constitute an autonomous and self-sufficient notion which would carry specific legal effects in international law.

The fluctuating functional variations outlined in this article will show that the resort to the terminology of rights is often nothing more than a strategy of definitional and symbolic convenience. From the perspective of the lawmaker, for instance, the concept of

<sup>1</sup> For some critical remarks on the belated and tepid turn to an international legalisation of human rights, see Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press 2012) 176–211. He argues that '[o]nly the passing of the anticolonialist moment in human rights history and the surprising reclamation of human rights in their antitotalitarian guise in the 1970s led international lawyers to reevaluate their long-confirmed positions in this regard': at 179.

<sup>2</sup> See Noberto Bobbio, *The Age of Rights* (Allan Cameron tr, Polity Press 1996); Kenneth Campbell, 'Legal Rights' in *The Stanford Encyclopedia of Philosophy* (Fall edn, 2013) <<http://plato.stanford.edu/archives/fall2013/entries/legal-rights/>> accessed 6 June 2015.

<sup>3</sup> For instance, it might be questioned whether such rights of states constitute 'rights' in the first place as it cannot be excluded that most of them constitute 'privileges' since they do not create a creditor-debtor relationship. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale UP 1920) 35–64. This has been insightfully explored in relation to the rights of states in Stephen C Neff, 'The Dormancy, Rise and Decline of Fundamental Liberties of States' (2015) 4 CJICL 482.

<sup>4</sup> See, eg, UNGA Res 3281 (12 December 1974) UN Doc A/RES/29/3281. On this idea of the narrative of resistance behind the idea of rights, see Jean d'Aspremont, 'Droit International et Développement: Les Instruments et les Sources' in Stéphane Doumbé-Billé and Kiara Neri (eds), *Droit International et Développement* (Pedone 2015).

rights is a textual tool to describe a standard of behaviour in a way to put greater emphasis on the positive side—or the benefit—of that rule. From the perspective of the law-taker, it is an argumentative tool of protest meant to claim the benefit of certain existing rules. In that sense, the concept of rights of states is often nothing more than a textual container of a standard of behaviour and, irrespective of whether a rule is described or invoked in terms of rights, it can always be reduced to a standard of behaviour.<sup>5</sup> This means that, despite the anthropomorphic traces still found in international legal argumentation and which are partly inherited from the doctrine of the fundamental rights of states, there is not such a thing as a positively ascertainable distinct category of rights which would come with a distinct regime or distinct legal effects. There are simply rules that are described or invoked in terms of rights. Even the references to rights of states that are found in some treaties in force like the Treaty on the Non-Proliferation of Nuclear Weapons<sup>6</sup> or the Charter of the United Nations (UN Charter)<sup>7</sup> should not be approached at face value. The notion of rights in these contexts constitutes a mere textual tool to designate a certain rule of international law by emphasising the benefits that it creates. The same holds for their ‘fundamentality’ or ‘inalienability’,<sup>8</sup> even if, as is argued below, such pointers were given an ontological dimension during the so-called golden age.<sup>9</sup>

The foregoing explains why this article does not approach the concept of fundamental rights as an autonomous and self-sufficient notion and deems it more relevant to focus on the function of the idea of states’ rights in international legal thought. More specifically, it approaches states’ fundamental rights as an anthropomorphic construction and seeks to distil the functions which this doctrine was designed to perform. In doing so, this article gives a historiographical account of the variety of functions allegedly performed by the invocation of the doctrine of the fundamental rights of states and those associated with the contemporary remnants of such constructions.

After some introductory considerations on the relations between rights and anthropomorphic thinking (section one), this article examines how anthropomorphic thinking materialised in the form of a doctrine of states’ fundamental rights (section two) and came to thrive in international legal thought (section three). The article then turns to the manifestation of the doctrine in the inter-American and United Nations contexts with a view to shedding light on the functions that such possible positive rules

<sup>5</sup> Bobbio (n 2) xiii.

<sup>6</sup> Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161 (Nuclear Weapons Treaty) art 4(1) (which recognises ‘the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes’).

<sup>7</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 51 (referring to the inalienable rights of self-defence).

<sup>8</sup> A similar argument has been made with respect to human rights in general jurisprudence. See Bobbio (n 2) xii ([t]alk of natural, fundamental, inalienable or inviolable rights may represent a persuasive formula to back a demand in a political publication, but it has no theoretical value, and is therefore completely irrelevant to human rights theory’).

<sup>9</sup> See section three below on ‘The Rise of classical anthropomorphic thinking and the foundations of the doctrine of the fundamental rights of states’.

on the fundamental rights of states would have played in the international legal order (section four). The article subsequently moves to an examination of the alleged demise of the classical doctrine of the fundamental rights of states and the foundering of the codification process in order to examine the role that the remains thereof are meant to play in contemporary international law, without such traces undermining the existence of any overarching autonomous notion to which specific legal effects are attached (section five). It ends with a few concluding remarks on the ubiquity and resilience of anthropomorphic thinking about international law (section six).

An important terminological caveat must be formulated at this stage. This article will continuously refer to the doctrine of the fundamental *rights* of states. This, however, should not obfuscate the fact that some variants of the doctrine came to be inclusive of a series of states' *duties*. This means that even when the doctrine under discussion includes an enunciation of both rights and duties, it is, for didactic reasons, still referred to as the doctrine of the fundamental *rights* of states.

## 2 Rights and anthropomorphic thinking in international law

The idea of the state having human attributes and being capable of human behaviours is well entrenched in the consciousness of international lawyers. Indeed, the world of ideas which international lawyers<sup>10</sup> have created and seek to project on the outside universe<sup>11</sup> has always rested on some anthropomorphic constructions whereby human attributes are projected on the main institutions of international law, ie the state. This is not to say that anthropomorphic thinking has always been uniform and consistent. As will be discussed in this article, its degree and manifestations have fluctuated over time. It is against the backdrop of the constant variations of anthropomorphic vocabularies in international law that this article revisits the doctrine of the fundamental rights of states, which arguably constitutes the pinnacle of anthropomorphic thinking in international law.<sup>12</sup>

<sup>10</sup> On the relation between international law and ideas and the power of ideas, see Philip Allott, 'The True Function of Law in the International Community' (1998) 5 *Indiana J Global Legal Studies* 391. See also Philip Allott, 'The Concept of International Law' (1999) 10 *EJIL* 31.

<sup>11</sup> See Jean d'Aspremont, "Effectivity" in International Law: Self-Empowerment against Epistemological Claustrophobia' (2014) 108 *ASIL Proceedings* 165; Nicholas Onuf, 'Law-making in the Global Community' in Nicholas Onuf (ed), *International Legal Theory: Essays and Engagement, 1966–2006* (Routledge-Cavendish 2008) 88. Onuf writes (emphasis in original):

[W]hat international lawyers care to describe as international law is their own invention. It builds the illusion there is an international *legal* order and that they are in charge of it. They see their rules of law as the specific, tangible instrumentalities by which states are made a part of that order and their behavior governed by it. (...) In this view law is little more than a set of artifacts. They appear to be germane to international life simply to fulfill their illusory function for lawyers. For their part, lawyers made their artifacts as realistic as possible.

<sup>12</sup> It is noteworthy that Lauterpacht explicitly denied that considering the state as a person denotes any

The fluctuations of anthropomorphic thinking about the state, on which this article is premised, can be sketched out as follows. After Hobbes and Spinoza paved the way for a human analogy, Pufendorf ascribed an intellect to the state and created anthropomorphic vocabularies and images about the main institution of international law, the state. Such anthropomorphism was later taken over by Vattel—not without adjustment—and subsequently translated into the classical positivist doctrine of states' fundamental rights which contributed to the consolidation of modern international law in the nineteenth century. The idea was then reclaimed in the late nineteenth and early twentieth centuries by American states to promote their independence and was subsequently brought to the United Nations to be subjected to a universal public codification process. This is also where the construction finally dispersed and gradually fell into oblivion, as the idea of human persons having individual rights simultaneously made its way into positive international law. However, the demise of the doctrine of the fundamental rights of states did not mean an end to anthropomorphic thinking about international law. The argument put forward in this article is built on the fact that it is amidst the ruins of the doctrine of the fundamental rights of states that the remnants of anthropomorphic thinking can still be observed in positive international law.

In such a fluid intellectual environment, it will not come as a surprise that the doctrine of the fundamental rights of states, while being itself merely a variant of anthropomorphic thinking, was subject to a significant degree of variation. Indeed, before thriving in the nineteenth century, the classical doctrine of international legal scholarship had to emancipate itself from the conceptualisations put forward by Pufendorf and Vattel. Likewise, the codification of the doctrine witnessed in the inter-American context or in the United Nations fundamentally altered understandings that had prevailed until then. For the sake of the argument made in this article, it is important to emphasise that these variations observed in the doctrine and in anthropomorphic thinking which it epitomised were not only of a substantive and conceptual character. They were also functional. In other words, it is not only the way in which the doctrine was construed and designed that changed over time. It is also the functions bestowed upon it by international lawyers that came to fluctuate significantly. This is why this article, after recalling the various manifestations and designs of the anthropomorphic doctrine of the fundamental rights of states, zeroes in on the functional fluctuations at the heart of anthropomorphic thinking in international law and looks at the various functions that the doctrine has allegedly played in international legal thinking over the last three centuries. This allows the article to provide some critical insights into the remnants of such anthropomorphic constructions and their role in contemporary international thought.

anthropomorphism. See Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 BYBIL 1, 27. The denial by Lauterpacht of the anthropomorphism of the doctrine of the fundamental rights of states can be explained by virtue of his specific understanding of the state. Drawing on Grotius, he thought that, because states are composed of individuals, they are the actual subjects of rights and duties.

### 3 The rise of classical anthropomorphic thinking and the foundations of the doctrine of the fundamental rights of states

Although often associated with Hobbes (1588–1679),<sup>13</sup> anthropomorphic thinking is not a brainchild of early modern political thinkers. It is true that the image of the human analogy permeated medieval and Renaissance political theory.<sup>14</sup> Yet, thinkers of that time did not use an anthropomorphic language to describe the state, for the state was not construed as a biological body but remained an artefact produced by humans.<sup>15</sup> This does not mean, however, that the contribution of early modern political thinkers should be belittled. Although they continued to see the state as a human product, they inevitably paved the way for the anthropomorphic vocabularies.

The rupture from the mechanical understanding of the state as a human artefact famously came from Pufendorf (1632–94).<sup>16</sup> As is well known, Pufendorf, allegedly borrowing from Francisco Suarez (1548–1617),<sup>17</sup> pushed the Hobbesian human analogy further<sup>18</sup> and constructed an image of the state as endowed with an intellect that is distinct from that of the sovereign.<sup>19</sup> By vesting an intellect—and thus sociability—in the state, Pufendorf can be considered as the founder of anthropomorphic thinking about the state.<sup>20</sup>

Drawing on Pufendorf's work, Wolff (1679–1754)<sup>21</sup> blazed the trail towards the doctrine of the fundamental rights of states by proposing for the very first time the idea that states have rights (and duties). His contribution should certainly not be underestimated. Yet, it is Vattel (1714–67)<sup>22</sup> who most decisively imported Pufendorf's

<sup>13</sup> Thomas Hobbes, *Leviathan* (Edwin Curley ed, first published 1651, Hackett 1994); George Catlin, 'Thomas Hobbes and Contemporary Political Theory' (1967) 82 *Pol Science Q* 1.

<sup>14</sup> Michael Nutkiewicz, 'Samuel Pufendorf: Obligation as the Basis of the State' (1983) 21 *J History Phil* 15, 15.

<sup>15</sup> *ibid* 15–16.

<sup>16</sup> *ibid* 16.

<sup>17</sup> Francisco Suarez, *On Efficient Causality: Metaphysical Disputations 17, 18 and 19* (Alfred J Freddoso tr, Yale UP 1995).

<sup>18</sup> For a discussion of the argument that Pufendorf remains primarily Hobbesian, see Fiammetta Palladini, 'Pufendorf Disciple of Hobbes: The Nature of Man and the State of Nature: The Doctrine of Socialitas' (2008) 34 *History European Ideas* 26. For some critical remarks on this analogy, see Edwin De Witt Dickinson, 'The Analogy between Natural Persons and International Persons in the Law of Nations' (1917) 26 *Yale LJ* 564, 571.

<sup>19</sup> Ben Holland, 'Pufendorf's Theory of Facultative Sovereignty on the Configuration of the Soul of the State' (2012) 33 *History Pol Thought* 427, 429.

<sup>20</sup> See also Gilbert Gidel, 'Droits et Devoirs des Nations, Théorie Classique des Droits Fondamentaux des États' (1925) 10 *Recueil des Cours* 537, 554.

<sup>21</sup> Wolff had already followed Pufendorf in the idea that states are moral persons and took over the distinction between perfect and imperfect duties from Pufendorf: see Ben Holland 'The Moral Person of the State: Emer De Vattel and the Foundations of International Legal Order' (2011) 37 *History European Ideas* 438, 441. On the influence of Wolff on Vattel in relation to the fundamental rights of states, see Gidel (n 20) 565. For a criticism of the analogy, see Dickinson (n 18) 574.

<sup>22</sup> Emer de Vattel, *The Law of Nations or The Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Charles G Fenwick tr, Carnegie Institution of Washington 1916).

anthropomorphism into international legal thought. Indeed, Vattel perpetuated Pufendorf's understanding of the state as a person possessing intellect.<sup>23</sup> Drawing on such an anthropomorphic premise, he put forward the first complete set of rights and duties of states.<sup>24</sup> These rights and duties (Vattel puts more emphasis on the latter)<sup>25</sup> are grounded in voluntary law, which Vattel distinguishes from natural law as well as customary and conventional law.<sup>26</sup>

It is important to note that the first systematisation of the doctrine of the fundamental rights of states that was initiated by Grotius and Wolff and came to fruition in the work of Vattel aimed to guarantee the personal space of each state and its freedom of action.<sup>27</sup> The doctrine was thus geared towards the subjectivisation and individualisation of the international legal order. This exposed the doctrine to some severe criticism in the early twentieth century, since some authors saw it as the foundation of a purely voluntaristic order.<sup>28</sup> This charge against Vattel, which can to a large extent be traced back to the misleading terminology of 'voluntary law', is itself contentious.<sup>29</sup> It would be of no avail to discuss it here. What matters is to highlight that the construction of a set of rights (and duties) of states was originally directed at the consolidation of a vision of an international society whose main units are abstract entities. Those units all ought to have their minimal space and freedom for such an international society to be viable and credible. These were the functions informing the anthropomorphic moves found in international legal thought.

#### 4 The golden age of the doctrine of the fundamental rights of states

It is noteworthy that, after Vattel, the image of states having rights (and duties) was left in limbo and did not benefit from any new major intellectual input.<sup>30</sup> Indeed, it was not until the second half of the nineteenth century that the idea was resuscitated and then came to thrive in the first half of the twentieth century. This new period (1850–1945) is called here the golden age of the doctrine of the fundamental rights of states.

<sup>23</sup> Holland (n 21).

<sup>24</sup> On Vattel and the ideas of rights and duties of states, see Lauterpacht (n 12) 27; Andrew Hurrell, 'Vattel: Pluralism and its Limits' in Ian Clark and Iver B Neumann (eds), *Classical Theories of International Relations* (Palgrave Macmillan 1996) 239.

<sup>25</sup> See Emmanuelle Jouannet, *Emer de Vattel et L'Émergence Doctrinale du Droit International Classique* (Pedone 1998) 160.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.* 161.

<sup>28</sup> Georges Scelle, *Cours De Droit International Public* (Les Cours de Droit 1948) 44; Charles Rousseau, *Principes Generaux du Droit International Public* (Pedone 1944) 23; James L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (OUP 1928) 40–41; Paul Guggenheim, *Emer de Vattel et l'Étude des Relations Internationales en Suisse* (Georg et Cie 1956) 17–18.

<sup>29</sup> See Jouannet (n 25) 162 (arguing that Vattel's doctrine of rights and duties of states cannot be read as underpinning a voluntaristic system but, on the contrary, as preserving a natural law approach).

<sup>30</sup> On the idea that the doctrine was dormant until the nineteenth century, see Neff (n 3).

A preliminary remark on the concomitance between the flourishing of the doctrine of the fundamental rights of states and certain simultaneous developments in international legal thinking must be formulated. Interestingly, the revival of the idea of the rights (and duties) of states coincided with the rise of legal positivism as the dominant approach to the study of international law and, thus, the displacement of natural law. This is somewhat ironic given the natural law ancestry of the doctrine of the fundamental rights of states. It is argued here that, despite such concomitance, it does not seem possible to establish a clear causal link between the dominance of legal positivism and the resurrection of the idea of states having rights and duties.<sup>31</sup> At most, its revival can be traced back to the state-centric mindset of international legal thinkers of the time.<sup>32</sup> It is clear, however, that the dominance of legal positivism then explains why the resurgence of the idea of rights (and duties) came with a forsaking of all the natural law overtones that had shrouded this anthropomorphic construction thus far. Be that as it may, for the sake of this article, it is important to emphasise that the revival of the idea of rights (and duties) of states brought with it an unprecedented sophistication in the early twentieth century. Indeed, refined sets of fundamental rights were produced and, despite some variation among authors, these revolved around the same fundamental rights, namely self-preservation, sovereignty, independence and equality, and commerce.<sup>33</sup> That is not to say that the topic was totally uncontroversial. Discrepancies were observed as regards the relationship between the doctrine of the fundamental rights of states and the concept of statehood. For example, a great majority of authors in the golden age understood these rights as being the consequence of states being states.<sup>34</sup> In contrast, others held these rights to be constitutive elements of statehood.<sup>35</sup> Variations were also witnessed regarding the importance of the doctrine. It is well known for instance that Oppenheim and his successors, although not denying the very idea of rights (and duties) of states, contended that treatises on the Law of Nations should be stripped of discussion of that question, for 'under the wrong heading of fundamental rights a good many correct statements have been made for hundreds of years and that numerous real rights and duties are customarily recognized which are

<sup>31</sup> cf Neff (n 3).

<sup>32</sup> On the distinction between legal positivism and state-centricism, see Jean d'Aspremont and Jörg Kammerhofer, 'Introduction: The Future of International Legal Positivism' in Jörg Kammerhofer and Jean d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014).

<sup>33</sup> Fedor de Martens, *Traité de Droit International* (Alfred Léo tr, Librairie A Marescq Ainé 1883) 187; Johann Ludwig Klüber, *Droit des gens moderne de l'Europe* (Stuttgart 1819) 57, 65–116; Lord Phillimore, 'Droits et Devoirs Fondamentaux des Etats' (1923) 1 RCAD 25; Louis Le Fur, 'La Théorie du Droit Naturel depuis le XVIIe Siècle et la Doctrine Moderne' (1927) 18 RCAD 259, 263–441; Gidel (n 20) 541–99; Alphonse Rivier, *Principes du Droit des Gens* (Rousseau 1896) vol I, 257; Alfred von Verdross, *Völkerrecht* (Springer 1937) 249–50; Ricardo J Alfaro, 'The Rights and Duties of States' (1959) 97 RCAD 91, 108.

<sup>34</sup> de Martens (n 33) 187; Klüber (n 33) 57, 65–116; von Verdross (n 33) 249–50; Phillimore (n 33) 59. This has been deemed an ascending type of argumentation by Martti Koskenniemi: see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 134.

<sup>35</sup> Alfaro (n 33) 95–96 ('the fundamental attributes make an entity a state, such an entity being a state because it possesses these attributes').

derived from the very membership of the Family of Nations.<sup>36</sup> For Westlake, there was a ‘logical error’ in drawing an analogy between rights of states and rights of individuals.<sup>37</sup> For Dickinson, the anthropomorphism at the heart of the doctrine of fundamental rights of states was empirically erroneous, an obstacle to real progress towards an international government and a source of impractical classifications.<sup>38</sup> Gilbert Gidel also expressed similar reservations.<sup>39</sup> Notwithstanding such objections, there was broad acceptance of this increasingly sophisticated doctrine.

Three dominant characteristics unanimously ascribed to such rights call for some attention. Indeed, some of these traits prefigured some of the common properties of the international legal order as it is construed in mainstream international legal scholarship. First, the great majority of authors in the golden age construed these rights as being, first, *inherent*. Whilst there were some debates, as highlighted above, regarding whether these rights were inherent to statehood, there was agreement that they were also inherent to international law as a whole. Such an understanding of the structural character of these rights, discussed below, shares some kinship with the idea of ‘general principles of international law’ developed in the second half of the twentieth century distinctly from the ‘general principles of law recognized by civilized nations.’<sup>40</sup> Second, it is interesting to note that the great majority of authors in the golden age held these rights to be inalienable. This meant the inderogability and invalidity of rules contracted in contradiction of such fundamental rights of states.<sup>41</sup> It is true that many authors, while claiming that states’ fundamental rights are inalienable, ventured into creative and eccentric constructions to vindicate the possibility of contracting out,<sup>42</sup> yet the dominant discourse on the inalienability of states’ fundamental rights and the invalidity of rules found in contradiction of them undoubtedly foreshadowed the idea of *jus cogens* that materialised in the second half of the twentieth century. In that sense, as discussed below, there seems to be little doubt that the doctrine of the fundamental rights of states sowed the seeds of the idea of hierarchy of norms (rather than hierarchy of sources) that is so

<sup>36</sup> Arnold Duncan McNair, *Oppenheim’s International Law* (4th edn, Longmans, Green and Company 1928) vol I, 235.

<sup>37</sup> John Westlake, *International Law* (2nd edn, CUP 1910–13) vol I, 307.

<sup>38</sup> See Dickinson (n 18) 588, 590–91.

<sup>39</sup> See Gidel (n 20) 597 (arguing that we should not be obsessed about this doctrine).

<sup>40</sup> For a discussion of general principles of international law, see Joe Verhoeven, *Droit International Public* (Larcier 2000) 349–54; Mahmoud Cherif Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1990) 11 Michigan J Intl L 768. For some judicial manifestation of this idea, see *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, 22; *Frontier Dispute (Burkina Faso v Mali)* (Merits) [1986] ICJ Rep 554, 565–66.

<sup>41</sup> Gidel (n 20) 542; Rivier (n 33) 257; de Martens (n 33) 187 (‘où l’on peut trouver l’expression la plus nette de la doctrine classique; “[p]ar conséquent les traités qui les violent ou les anéantissent ne sont pas réguliers et n’ont pas un caractère obligatoire”).

<sup>42</sup> Rivier (n 33) 258 (‘nothing prevents a State from giving up for some time or even indefinitely, in certain circumstances and in favour of one or more States, certain circumstances and in favour of one or more States, certain manifestations of an essential right and to suspend in certain respects the exercise thereof’). Not without contradiction, Gidel nonetheless argues that ‘des obligations juridiques contractées en contradiction avec ces droits sont néanmoins valables’: see Gidel (n 20) 543.

characteristic of contemporary international law. Third, another noteworthy harbinger of the debates of the twentieth century is found in the admittedly more isolated position of some authors that a violation of such fundamental rights of states would constitute a 'crime'.<sup>43</sup> This prefigured the distinction drawn by Roberto Ago between delict and crime in the framework of state responsibility.<sup>44</sup>

Leaving aside those preludes to contemporary international law, a few observations must be formulated as to the functions (and the agenda) envisaged by the architects of the classical doctrine of the fundamental rights of states in the golden age. In this respect, it is apparent that a great diversity of functions were meant to be performed by the doctrine. For instance, one still finds some traces of Vattel's idea of the preservation of state, vital space and private realm.<sup>45</sup> For some authors the doctrine of the fundamental rights of states was rather geared towards the peaceful coexistence of states.<sup>46</sup> Others, as is illustrated by Lauterpacht's reading of Grotius,<sup>47</sup> found in that doctrine a powerful instrument for the development of international law by virtue of the private law analogy.<sup>48</sup>

It remains to note that most authors attributed an ontological and justificatory function to the doctrine of the fundamental rights of states.<sup>49</sup> Indeed for most, this anthropomorphic doctrine provided international law as a whole with stable foundations. According to that view, international law was grounded in these rights (and duties) and could not sustain itself in the absence thereof. Expressed differently, those authors held that the suppression of these fundamental rights would automatically bring about the end of international law itself.<sup>50</sup> That ontological and justificatory function played by the doctrine in the golden age certainly calls for some attention. In an era where natural law had been dismissed as providing the necessary foundation for international law, as well as the necessary methodology to build international legal arguments, legal scholars of the golden age nonetheless deemed it necessary to ground international law in a doctrine that had come with a natural law pedigree. Such a reliance on the doctrine of the fundamental rights of states for ontological purposes also constituted an incongruent return to deductive methods of argumentation whereby some core principles are

<sup>43</sup> Rivier (n 33) 257.

<sup>44</sup> Roberto Ago, 'Le Délit International' (1939) 68 RCAD 415. On this debate, see Allain Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10 EJIL 425; Eric Wyler, 'From "State Crime" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1147.

<sup>45</sup> Klüber (n 33) 57, 65–116. For some remarks on Vattel, see also the remarks of Koskenniemi (n 34) 135.

<sup>46</sup> von Verdross (n 33) 249–50.

<sup>47</sup> Lauterpacht (n 12) 29 ('the door was wide open for the enrichment and advancement of international law with the help of rules of private law').

<sup>48</sup> For criticism of this use of anthropomorphic thinking, see generally Dickinson (n 18).

<sup>49</sup> For discussion of that aspect of the classical doctrine of fundamental rights of states, see *ibid* 582.

<sup>50</sup> von Verdross (n 33) 249–50; Gidel (n 20) 542; Alfaro (n 33) 96, 116, 120 ('[i]t is self-evident that all the principles, norms and rules of International Law resolve themselves into the notion of rights and duties of States').

simply posited.<sup>51</sup> It is as if the dominant positivist paradigm had failed to explain the foundations of international law and called for the help of a doctrine originally inherited from natural law thinkers.<sup>52</sup>

## 5 The modern anthropomorphic thinking: The public codification of the doctrine of fundamental rights of states

Almost at the same time as (Western) scholars were deploying unprecedented aptitude in crafting a sophisticated doctrine of the fundamental rights of states, diplomatic and inter-governmental debates on the American continent witnessed passionate exchanges on the rights (and duties) of states.<sup>53</sup> It is not certain that the two debates—the scholarly and the diplomatic—ever nurtured or influenced one another. Yet, they obviously run in parallel and, most interestingly, proved to be informed by different conceptual designs and agendas.

The debate on the rights and duties of states arose in the inter-American context as early as the late nineteenth century<sup>54</sup> and culminated with the adoption of the famous 1933 Montevideo Convention on the Rights and Duties of States (Montevideo Convention).<sup>55</sup> This instrument, which is usually discussed in relation to questions of statehood, often receives too little attention for its contribution to the doctrine of fundamental rights of states. Indeed, it enumerates a list of rights of states that include political existence (independent of recognition), territorial integrity, independence, self-preservation, jurisdiction and equality. It elevates into duties non-intervention, respect for others' rights, non-recognition of territorial acquisitions or special advantages obtained by force, and, finally, the obligation to resort to pacific means of settling international disputes. It is notable that article V, echoing the inalienability idea found in scholarship of the golden age, provides that these fundamental rights of states are not susceptible to being derogated in any manner whatsoever. The abovementioned mainstream use and significance of this instrument in relation to statehood is well known to all international lawyers, who often refer to it somewhat mechanically.<sup>56</sup> It is not necessary to discuss

<sup>51</sup> This grew very common in the inter-war period. See Richard Collins, 'Classical Positivism in International Law Revisited' in Jörg Kammerhofer and Jean d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014).

<sup>52</sup> This argument is obviously not new. On the inevitable motions between natural law thinking and positive law thinking, see Koskenniemi, *From Apology to Utopia* (n 34) 1–70. See also Martti Koskenniemi, 'The Politics of International Law' (1990) 1 EJIL 4.

<sup>53</sup> UNGA, 'Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States: Memorandum submitted by the Secretary General' (1948) UN Doc A/CN.4/2, 5–9 (UNGA Preparatory Study).

<sup>54</sup> *ibid* (see the account of the inter-American effort).

<sup>55</sup> Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention).

<sup>56</sup> Jean d'Aspremont, 'The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society' (2014) 29 CJIL 201.

it here. It matters more to recall that the Montevideo Convention represents the first expression of the doctrine of the fundamental rights of states in positive international law.

The inter-American ambitions, thanks to the effort of Panama, were imported into the agenda of the United Nations General Assembly.<sup>57</sup> As the mention of the rights (and duties) of states in the UN Charter—subject to article 51, which is discussed below—faltered during the drafting process of the Charter, the General Assembly decided to include the codification of this topic in its agenda, before passing it to the newly created International Law Commission (ILC). Although the ILC deemed that such codification did not fall within the ambit of its two main functions, codification and the progressive development of international law,<sup>58</sup> it eventually pruned the original Panamanian declaration and came up with a very lean declaration of the rights and duties of states, limiting them to four rights and ten duties.<sup>59</sup> On this occasion, the ILC rejected Lauterpacht's famous idea of a state's right to have its existence recognised by other states.<sup>60</sup> The General Assembly never followed suit on the ILC declaration that, as a result, quickly fell into limbo.

It cannot be contested that inter-American efforts to codify the doctrine of the fundamental rights of states constituted the breeding ground for its consecration in positive international law, which culminated in the adoption of the Montevideo Convention and later, its inclusion in the codification agenda of the United Nations. This success is not without irony. Indeed, such move towards the universalisation of the inter-American agenda corresponded with the downfall of the doctrine. More specifically, the failure to universalise the doctrine at the United Nations level lethally damaged it, and it never recovered. Its inscription in the 1948 Charter of the Organization of American States did little to salvage its codification at the universal level.<sup>61</sup> Again, it is not certain that causal relationships can be established with certainty. It cannot be determined, at least not empirically, that the attempt to universalise the inter-American agenda *directly* resulted in the demise of the doctrine of the fundamental rights of states. Yet, it remains that, from a historical perspective, the submission of the doctrine to a public and universal codification process coincided with its demise.

An important remark must be formulated regarding how the doctrine of the fundamental rights of states was formally designed in the United Nations codification process, as one can observe here an interesting parallel between the scholarship of the golden age and that codification enterprise. In the United Nations project, fundamental rights were approached in a way that is reminiscent of the concept of the 'general

<sup>57</sup> UNGA Preparatory Study (n 53) 1–5.

<sup>58</sup> International Law Commission (ILC), 'Summary Records and Documents of the First Session including the Report of the Commission to the General Assembly' (1949) ILC YB 9.

<sup>59</sup> *ibid* 287–88.

<sup>60</sup> *ibid* 289.

<sup>61</sup> Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3, arts 2(b), 3(c), 19.

principles of international law', which became accepted in the second half of the twentieth century. Indeed, in the ILC codification process, fundamental rights were equated to some fundamental legal principles which were inherent in the relation of states.<sup>62</sup> Here too, the doctrine of the fundamental rights of states proved a harbinger of some of the constructions found in contemporary international law, as discussed in the following section.

It must be made clear that the failure of codification at the universal level did not mean the extinction of the idea within the United Nations framework. Not only did the UN Charter continue to enshrine the idea of an 'inherent right' to self-defence,<sup>63</sup> but several initiatives directly linked with decolonisation followed in the 1960s and 1970s which still echoed the doctrine of the fundamental rights of states. The gospel-like Resolution 2625 (XXV), which enshrined states' duties as well as the inalienable right to choose their political, economic and social and cultural systems, perpetuated the doctrine of the fundamental rights of states which had informed the codification process of the late 1940s.<sup>64</sup> In the same vein, Resolution 3171 on the inalienable rights of states to permanent sovereignty over all their natural resources can be seen as a descendent of the doctrine of the fundamental rights of states, whose codification had been attempted 25 years earlier.<sup>65</sup> The same certainly holds for the Charter of Economic Rights and Duties of States and the Declaration on the Establishment of a New International Economic Order.<sup>66</sup>

Here, too, the functions of the doctrine of the fundamental rights of states call for further observations. The codification processes witnessed in the nineteenth and twentieth centuries showed that the doctrine of the fundamental rights of states was meant to have a variety of functions which contrasted with those found in modern political thought, as well as in the golden age of scholarly thinking on the matter. Moreover, although the importation of the doctrine of the fundamental rights of states in the United Nations

<sup>62</sup> ILC (n 58) 287–90.

<sup>63</sup> UN Charter, art 51.

<sup>64</sup> UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625.

<sup>65</sup> UNGA Res 3171 (XXVIII) (17 December 1973) UN Doc A/RES/3171.

<sup>66</sup> UNGA Res 3281 (XXIX) (2 December 1974) UN Doc A/RES/29/3281; UNGA Res 3201 (S-VI) (1 May 1974) UN Doc A/RES/S-6/3201. On the new international economic order, see Kenneth Simmonds, 'The Lomé Convention and the New International Economic Order' (1976) 13 CML Rev 315; Robin CA White, 'A New International Economic Order' (1975) 24 ICLQ 542; Ajit Singh, 'The "Basic Needs" Approach to Development vs the New International Economic Order: The Significance of Third World Industrialization' (1979) 7 World Development 585; Samir Amin, 'After the New International Economic Order: The Future of International Economic Relations' (1982) 12 J Contemporary Asia 432; Dan Sarooshi, 'New International Economic Order' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (OUP 2008); Philip Golub, 'From the New International Economic Order to the G20: How the "Global South" is Restructuring World Capitalism from Within' (2013) 34 Third World Q 1000; RJ Wickes, 'The New International Economic Order: Progress and Prospects' (1980) 34 Australian Outlook 41; Fred Hirsch, 'Is there a New International Economic Order?' (1976) 30 Intl Organization 521; Karl Sauvant, 'From Economic to Socio-Cultural Emancipation: The Historical Context of the New International Economic Order and the New International Socio-Cultural Order' (1981) 3 Third World Q 48; Meghnad Desai, 'The New International Economic Order: Ideology or Reality?' (1993) 5 J Intl Development 145.

codification machinery was the result of inter-American efforts, the two codification processes differed from a functional perspective. A function that was bestowed early upon the doctrine during its inter-American codification pertained to the ambition to keep recognition of states at bay, and in that sense to depoliticise statehood.<sup>67</sup> This is certainly a consideration that informed the making of the Montevideo Convention.<sup>68</sup> Such agenda took a back seat in the United Nations codification process.

Overall, the main contrast between the inter-American and United Nations codification processes lies in the emphasis on non-interference found in the former; the latter being more geared towards effective and peaceful cooperation. In this respect, it is interesting to note that the Soviet member of the ILC objected to the ILC draft declaration because it did not sufficiently protect states from interference.<sup>69</sup> It was not until the adoption of Resolution 2625 (XXV) that the idea of non-interference, which had been less important in the United Nations codification process, returned more explicitly to the United Nations agenda.<sup>70</sup> It should also be highlighted that the ambition to maintain peace and security was certainly not absent.<sup>71</sup> The vindication of justice was even mentioned, although it is uncertain what this reference actually meant in that context.<sup>72</sup>

## **6 The contemporary decline and the remnants of anthropomorphic thinking in twenty-first century international law**

As highlighted above, after the floundering of the United Nations codification efforts, the doctrine of the fundamental rights of states fell into limbo.<sup>73</sup> Again, it is probably difficult to establish the various causes of its demise. It can be speculated indefinitely about the reasons for the disappearance of the doctrine in the aftermath of United Nations codification. This is, however, not a debate that needs to be extensively explored here. It suffices to acknowledge that the rise of the protection of the rights of individuals and the multiplication of formal international legal instruments on this matter probably contributed to the downfall of the doctrine. The growing suspicion of the natural law origins of the doctrine may also have exacerbated its discredit. Others have claimed that the coming into positive law of the doctrine of persistent object annihilated the protective function of the doctrine of the fundamental rights of states and thus contributed to its irrelevance.<sup>74</sup>

<sup>67</sup> Alfaro (n 33) 108.

<sup>68</sup> For a discussion of these dimensions of the doctrine of statehood, see d'Aspremont (n 56).

<sup>69</sup> ILC (n 58) 258.

<sup>70</sup> For some critical remarks, see Monique Chemillier-Gendreau, 'A Propos de la Résolution 2625' (1979) 25 *Revue de Droit Contemporain* 92.

<sup>71</sup> ILC (n 58) 8.

<sup>72</sup> *ibid.*

<sup>73</sup> It is interesting to note that certain proponents of the doctrine during the golden age contended that the doctrine was not imminent; see Gidel (n 20) 597.

<sup>74</sup> See Neff (n 3).

As mentioned in sections two and three above, the doctrine of the fundamental rights of states has been the harbinger of some of the common and uncontested characteristics of the contemporary international legal order. What is more, its downfall in the wake of the failure of the United Nations codification process left behind some residue. The rules and mechanisms which the doctrine prefigured, as well as those that can be deemed remnants thereof are briefly mentioned here, albeit not exhaustively. A few observations suffice.

### 6.1 Non-derogability and hierarchy of norms (*jus cogens*)

As explained above, during the golden age, the doctrine of the fundamental rights of states was often associated with the idea of rules being non-derogable, thereby prefiguring the idea of *jus cogens*. This is not to say that the notion of *jus cogens* has been directly inherited from (or finds its roots in) the doctrine of the fundamental rights of states. Yet, the parallel cannot be ignored. The resemblance is not only one of substance. It is also one of function. In both cases, and despite some creative constructions to the contrary, non-derogability was meant to express a hierarchy of norms in the international legal sphere. An important difference remains, however. The difference is that, as far as the fundamental rights of states are concerned, the scholars of the golden age at least agreed (subject to a few differences) on those rights that are non-derogable.

### 6.2 General principles of international law

Both in the golden age and in the public codification processes, the fundamental rights of states were often equated with principles inherent to the international legal system. In other words, they were considered systemic principles required in order for the whole system to function and which are not necessarily identified by virtue of the sources of international law listed in article 38 of the Statute of the International Court of Justice.<sup>75</sup> The contemporary notion of general principles of international law is, of course, controversial. Indeed, it is a judicial creation not recognised as such in article 38. It is true that, in contrast, the fundamental rights of states were a scholarly creation or the outcome of an exercise of codification. Yet, both the general principles of international law and the fundamental rights of states had a similar function; that of allegedly allowing a better functioning of the international legal system.

### 6.3 The idea that practice can be accepted as law (*opinio juris*)

Although the idea of *opinio juris sive necessitatis* was a notion first developed at the

<sup>75</sup> Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16.

domestic level, its transposition into the sources of international law<sup>76</sup> was made possible by the presupposition that the state is capable of having an intellect, something directly inherited from the doctrine of the fundamental rights of states. The idea that the state is capable of beliefs as to the state of the law is of course not entirely unproblematic. It may actually explain many of the problems associated with the subjective elements of customary international law.<sup>77</sup> This, however, is not a matter for discussion here. Rather, it must simply be emphasised that in customary law, the anthropomorphic idea of *opinio juris* primarily plays a law-ascertainment function, which is alien to the doctrine of the fundamental rights of states by which it is inspired.

#### 6.4 The persistent objector

The doctrine of the persistent objector made its way into positive international law in the second half of the twentieth century, allegedly under the impulse of Gerald Fitzmaurice.<sup>78</sup> The doctrine is far from uncontroversial.<sup>79</sup> The kinship between the persistent objector doctrine and the doctrine of the fundamental rights of states has been discussed elsewhere and it is not necessary to explore it in depth here.<sup>80</sup> It is noteworthy, however, that like the anthropomorphic idea of *opinio juris*, the idea that the state can consciously oppose the formation of a customary rule of which it was made aware was inherited from the doctrine of fundamental rights of states. In the same vein, the doctrine of the persistent objector is also reminiscent of the right to self-

<sup>76</sup> François Géný, *Méthode d'Interprétation et Sources en Droit Privé Positif* (Chevalier-Marescq 1899) 319–24, 360. See also Peter Benson, 'François Géný's Doctrine on Customary Law' (1982) 20 Canadian YB Intl L 267.

<sup>77</sup> See Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2011) 148–74. See also Jean d'Aspremont, 'Customary International Law as a Dance Floor: Part I' (*EJIL: Talk!*, 14 April 2014) <<http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/>> accessed 8 June 2015; Jean d'Aspremont, 'Customary International Law as a Dance Floor: Part II' (*EJIL: Talk!*, 15 April 2014) <<http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/>> accessed 8 June 2015. For earlier criticism, see Anthony D'Amato, *The Concept of Custom in International Law* (Cornell UP 1971) 73.

<sup>78</sup> For an exposition of his understanding of the concept, see Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 RCAD 1, 49–50. See also *Fisheries Case (United Kingdom v Norway)* (Merits) [1951] ICJ Rep 116, 131; *Asylum Case (Colombia v Peru)* (Merits) [1950] ICJ Rep 266, 277–78.

<sup>79</sup> Patrick Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59 ICLQ 779; Pierre-Marie Dupuy, 'A Propos de l'Opposabilité de la Coutume Générale: Enquête Brève sur l'Objecteur Persistant' in *Le Droit International au Service de la Paix, de la Justice et du Développement: Mélanges Offerts à Michel Virally* (Pedone 1991) 257–72. See also Jonathan Charney, 'The Persistent Objector Rule and the Developments of Customary International Law' (1985) 56 BYBIL 1; Pierre-Marie Dupuy, 'L'unité de l'Ordre Juridique International: Cours Général de Droit International Public' (2002) 297 RCAD 9, 174; Olivier Barsalou, 'La doctrine de l'objecteur persistant en droit international' (2006) 19 RQDI 1; Hilary Charlesworth, 'Customary International Law and the Nicaragua Case' (1984–87) 11 Australian YB Intl L 1, 3; Curtis A Bradley and Mitu Gulati, 'Withdrawing from International Custom' (2010) 120 Yale L J 202.

<sup>80</sup> See Neff (n 3).

preservation that occupied a central place in the doctrine of the fundamental rights of states during the golden age. This is not to say that the doctrine of the persistent objector was directly inspired by the doctrine of the fundamental rights of states, yet they came to play some similar self-preserving functions. The kinship between the contemporary persistent objector doctrine and the old doctrine of the fundamental rights of states should thus not be underestimated.

#### 6.5 The democratic legitimacy thesis and the ostracisation of non-democratic states

Over the last 25 years, contemporary scholarship has witnessed the rise of some scholarly constructions based on the so-called democratic legitimacy thesis and geared towards the exclusion of states whose behaviour or political architecture is found to contradict human rights or democratic legitimacy, respectively.<sup>81</sup> According to the most extreme of these constructions, the ostracisation of states infringing human rights or non-democratic principles would take the form of a deprivation of some of their elementary rights: the right to participation in multilateral fora, the right to non-interference, the right to immunity, the right to existence, etc.<sup>82</sup> These controversial constructions can certainly not be directly traced to the doctrine of the fundamental rights of states. In that sense, they are not descendants thereof. They are, however, clearly based on similar vocabularies. From a functional perspective, it is also obvious that they depart from one another. Indeed, the doctrine of the fundamental rights of states, whether during the golden age or during the codification era, was geared towards the promotion of equality between states which were each seen as being entitled to the same rights. In contrast, the abovementioned contemporary constructions based on democratic legitimacy or human rights are ostracising in nature. They are meant to differentiate between states and to deprive ‘villains’ of their rights. The two constructions could therefore not lie further apart from a functional vantage point.

#### 6.6 Other resemblances: Self-defence, non-interference, peaceful uses of nuclear energy and natural resources

Many other rules of international law could be considered as either reminiscent of the

<sup>81</sup> For a recent variant of the democratic legitimacy thesis, see Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing 2013). For a radical version, see Fernando R Tesón, ‘The Kantian Theory of International Law’ (1992) 92 *Columbia L Rev* 53. For some critical remarks, see Jean d’Aspremont, ‘1989–2010: The Rise and Fall of Democratic Governance in International Law’ in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (Hart Publishing 2012, vol 3). See also Jure Vidmar, ‘Democracy and Regime-Change in the Post-Cold War International Law’ (2013) 11 *New Zealand J Public Intl L* 349; Jure Vidmar, ‘Multiparty Democracy: International and European Human Rights Law Perspectives’ (2010) 23 *LJIL* 209.

<sup>82</sup> For a review of contemporary practice pertaining to each of these rules, see Jean d’Aspremont, *L’Etat Non-démocratique en Droit International: Etude Critique du Droit Positif et de la Pratique Contemporaine* (Pedone 2008).

fundamental rights of states or a derivative thereof. Mention can be made of the right to non-interference in internal affairs that could be interpreted as the state's 'right to private life'.<sup>83</sup> The resemblance is not only in the design. The concept of non-interference also shares certain aspects of the states' rights agenda during the golden age, as well as the inter-American codification process. A similar resemblance can be observed in connection with the wording used in the UN Charter for one of the two main 'limitations' to the prohibition on the use of force: self-defence. By displaying it in the form of an 'inherent right' (*'droit naturel'* in the French text) the UN Charter resuscitated the wording of the fundamental rights of states. It is well known, however, that this particular wording was primarily meant to indicate that the right to self-defence is also vested in states other than United Nations members<sup>84</sup> and that it was not trumped by the collective security system.<sup>85</sup> It cannot be discounted that the doctrine of the fundamental rights of states had a direct impact on the drafting of the UN Charter, for the doctrine still thrived in mainstream international legal discourse and was held in high esteem at that time. It remains, however, that the kinship between self-defence and the doctrine of the fundamental rights of states should not be exaggerated. After all, the right to self-defence functions less as a 'right' than a limitation on the prohibition on the use of force, of which it might even be considered an integral part.<sup>86</sup> In that sense, the wording used in the UN Charter appears misleading. Similarities with the doctrine of the fundamental rights of states can also be observed in the right to the peaceful use of nuclear energy<sup>87</sup> or the right to permanent sovereignty over natural resources.<sup>88</sup>

The point made in the previous paragraphs is simply that the concept of *jus cogens*, the notion of general principles of international law, the doctrine of *opinio juris*, the doctrine of the persistent objector, the democratic legitimacy thesis, self-defence, non-interference, the right to peaceful use of nuclear energy, and the right to permanent sovereignty over natural resources represent some of the manifestations of the fundamental rights of states in contemporary international law. These rules and mechanisms were either prefigured by variants of the doctrine as found in the golden age or in the public codification processes of the twentieth century, or constitute remnants of this vocabulary.

<sup>83</sup> Joe Verhoeven, 'Non-intervention: "Affaires Intérieures" ou "Vie Privée"?' in *Le Droit International au Service de la Paix, de la Justice et du Développement: Mélanges Offerts à Michel Virally* (Pedone 1991) 493–500.

<sup>84</sup> Albrecht Randelzhofer, 'Article 51' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) 1403; Christine Gray, *International Law and the Use of Force* (OUP 2000) 86–87; Lindsay Moir, *Reappraising the Resort to Force* (Hart Publishing 2010) 10–11.

<sup>85</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 94.

<sup>86</sup> For a discussion of that point, see Jean d'Aspremont, 'Mapping the Concepts behind the Contemporary Liberalization of the Use of Force in International Law' (2010) 31 U Pennsylvania JIL 101.

<sup>87</sup> Nuclear Weapons Treaty, art IV(1). See Daniel H Joyner, 'Fundamental Rights of States in International Law and the Right to Peaceful Nuclear Energy' (2015) 4 CJICL 661.

<sup>88</sup> See UNGA Res 3171. See Yogesh Tyagi, 'Permanent Sovereignty over Natural Resources' (2015) 4 CJICL 588.

These contemporary manifestations call for a few functional considerations. Obviously, it would be futile to seek to classify all the functions performed by each of the above rules and institutions. The agendas pursued by each of them, which have been briefly mentioned, are too heterogeneous and diverse. In that sense, it could be said that the disappearance of a unitary and self-standing doctrine of the fundamental rights of states brought about a pulverisation of the agenda of anthropomorphic thinking in international law. From a functional perspective, what can be observed, however, is that with the disappearance of the doctrine of the fundamental rights of states, new functions came to be performed by those rules originating in the doctrine or borrowing its vocabularies, some of which occasionally blatantly contradict the historical functions played by the doctrine of the fundamental rights of states in the golden age or during the codification processes.

Notwithstanding the functional disparity of the contemporary rules and mechanisms listed above, it is noteworthy that they each share at least one trait with the doctrine of the fundamental rights of states, ie a similar anthropomorphic denominator in their design or in their function. This similarity in design or function constitutes an interesting bellwether as to the historical heritage of the doctrine. Indeed, this undeniable kinship shows that the anthropomorphic move at its heart has durably marked the consciousness of international lawyers who continue generation after generation to perpetuate the vocabulary on which the doctrine of the fundamental rights of states was built, and, more fundamentally, how international law is conceived.

## **7 Concluding remarks: The four lives (and sets of functions) of the doctrine of fundamental rights of states**

The above, necessarily cursory, account of the various lives of the doctrine of the fundamental rights of states has shed light on the great variations in the design of anthropomorphic thinking about international law, as well as the functions that such a construction has aimed to perform. As far as the design of the doctrine throughout these various epochs is concerned, the foregoing has shown that there has never been much unity in how such 'rights' have been construed. Although expressed in terms of rights, these constructions have most often looked like 'general principles of international law'. What is more, such principles have not seemed to be subjected to the formation and identification processes put in place by the traditional doctrine of sources. In other words, their emergence and ascertainment have never been approached from the perspective of the traditional sources of international law. They have usually been understood as being inherent in the inter-state international legal order and have been posited according to deductive methodological moves alien to the traditional doctrine of sources.

The lessons learnt from the function of the doctrine of the fundamental rights of states since its inception, which have drawn most of our attention here, are even more remarkable. The diachronic examination carried out in the previous sections has

demonstrated that, during each of the four periods discussed throughout this article, the doctrine of the fundamental rights of states has performed distinct functions (and has thus pursued distinct agendas). As explained in section two, the doctrine of the fundamental rights of states was transposed to international law with the ambition of consolidating the vision of an international society composed of abstract entities which all ought to be endowed with a minimal vital space. As explained in section three, the golden age of the doctrine of the fundamental rights of states primarily served certain ontological functions since it primarily sought to explain the foundations of international law. As discussed in section four, the age of codification witnessed a quest for non-interference as well as peaceful coexistence. Finally, as explained in section five, the contemporary manifestations of the doctrine of the fundamental rights of states, whether they only resemble it or directly originate in it, came to denote a wide variety of sometimes contradictory agendas and showed that the demise of the doctrine of the fundamental rights of states pulverised the agenda of anthropomorphic thinking in international law. This finding does not, however, mean that the type of anthropomorphic thinking conveyed by the doctrine of fundamental rights of states has completely dried out in contemporary international legal thought. On the contrary, the argument could be made that by being nowadays covertly scattered throughout the international legal order, the anthropomorphic constructions on which the doctrine of the fundamental rights of states were erected have become more common and therefore more powerful than ever. In that sense, anthropomorphic thinking has survived the demise of the doctrine of the fundamental rights of states and seems bound to resonate in the consciousness of international lawyers for decades to come.

# Fundamental Rights of States: Constitutional Law in Disguise?

*Helmut Philipp Aust\**

## Abstract

This contribution analyses the development of the doctrine of fundamental rights of states in German international legal doctrine. It shows how the doctrine, despite its natural law origins, was able to adapt and flourish in a more positivist environment in the late nineteenth and early twentieth century. It was highly malleable with respect to the uses to which it was put. Accordingly, it was relied on in order to support National Socialist conceptions of international law as well as to connect with a return to natural law after the Second World War. With a turn to more pragmatist approaches in German scholarship since the middle of the twentieth century, the doctrine seemed to have faded away. However, this contribution argues that it has witnessed a somewhat unexpected comeback. Driven by some functional and constructive analogies with parts of the constitutionalisation literature, it is possible to see traces of the doctrine re-emerging. In this respect, it may even be said to resemble parts of the recent case law of the German Federal Constitutional Court, which has put a strong emphasis on sovereignty and self-determination as limits of international and European integration.

## Keywords

Fundamental Rights of States, German Scholarship on International Law, Natural Law, Positivism, Constitutionalisation

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The doctrine of the fundamental rights of states (FRS) is shrouded in mystery. For quite a long time, it was a building block of international law scholarship, to the extent that it has been argued that more or less all of ‘classical international law’, from its Vattelian origins until the Second World War, was based on this doctrine.<sup>1</sup> Hans Kelsen described the doctrine in this way:

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According to a view prevailing in the eighteenth and nineteenth centuries and maintained even today by some writers, every state has—in its capacity as a member of the family of nations—some fundamental rights. These rights are not stipulated by general customary international law or by international agreements, as the other rights and duties of the states are, but originate in the nature of the state or of the international community. The norms constituting these fundamental rights are supposed to be the ultimate basis and source of positive international law and, consequently, to have a greater obligatory force than the rules of positive international law created by custom and treaties.<sup>2</sup>

Different grounds of this doctrine have been identified. While its roots lie in natural law thinking, the doctrine has also flourished in more positivist times. Over the course of the centuries, the list of the respective candidates for the status of the FRS has remained fairly stable, with the rights to independence, self-preservation, equality, respect—of honour and dignity of the state—as well as intercourse between states being the usual contenders.<sup>3</sup> It is not the purpose of this contribution to assess this or competing catalogues of the individual candidates for being FRS.<sup>4</sup> Rather, this paper will look at the doctrine of the FRS from a historical-doctrinal perspective, assessing how the doctrine has been subject to adaptation and contestation over the years. It is, thus, not so much the content of the FRS, but rather the notion itself to which the following pages are dedicated. In doing so, this paper focuses on the contribution of German international legal scholarship, understood in a wide sense to comprise authors who were trained in a German-speaking legal environment but may have continued their academic careers abroad, especially after the rise of the National Socialists to power, when a large part of the elite of Germany's international legal scholarly community was forced to emigrate.

In any case, it can be said that German international lawyers made significant contributions to the debate on the FRS. Why is this? A first guess would probably be to turn to Hegel and his glorification of the state as the ultimate representative of progress and morality.<sup>5</sup> However, this guess is somewhat misguided. The understanding of international law that Hegel exposed in his philosophy of law is difficult to reconcile with the doctrine of the FRS, at least as it developed in the first place. As is commonly asserted, the FRS doctrine is an offspring of the analogy of states with individuals, both having the same capacity to hold rights and obligations.<sup>6</sup> Hegel was highly critical of

1 Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (CUP 2012) 124.

2 Hans Kelsen, *Principles of International Law* (Rinehart 1952) 148–49.

3 See Ricardo J Alfaro, 'The Rights and Duties of States' (1959) 97 *Recueil des Cours* 91, 95ff; José M Ruda, 'States, Fundamental Rights and Duties' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law, Instalment 10* (North Holland Publishing 1987) 468.

4 For such analysis, see other contributions to this special issue in (2015) 4 *CJICL*.

5 For a nuanced view on Hegel, see Armin von Bogdandy and Sergio Dellavalle, 'Georg Wilhelm Friedrich Hegel (1770–1831)' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 1127.

6 Gilbert Gidel, 'Droits et Devoirs des Nations: La Théorie Classique des Droits Fondamentaux des États' (1925) 10 *Recueil des Cours* 539, 550; Charles de Visscher, *Theory and Reality in Public International Law* (Percy E Corbett tr, Princeton UP 1957) 18; Hans Ulrich Scupin, 'Grundrechte und Grundpflichten

this conception of the state, arguing that: ‘States are not private persons but completely independent totalities in themselves, and so the relation between them differs from a moral relation and a relation involving private rights.’<sup>7</sup>

At the same time, certain connections between Hegelian thinking about ‘the state’ and the category of FRS cannot be overlooked. Hegel’s philosophy of rights discussed questions of international law under the rubric of ‘external state law’, thereby contributing much to later ideas of ‘foreign relations law’ as opposed to international law proper.<sup>8</sup> This engendered an emphasis on independence and sovereignty, all the while acknowledging that ‘a state is as little an actual individual without relations to other states (...) as an individual is an actual person without a relationship to other persons.’<sup>9</sup> However, despite this recognition of interdependence, ‘[t]he people as a state is spirit in its substantial rationality and immediate actuality and is therefore the absolute power on *earth*’.<sup>10</sup> This emphasis on state power might have been a reason why the doctrine of the FRS has fallen out of favour over the last decades. Although Hegel cannot be attributed with a decisive influence on the doctrine of the FRS, his views are at times associated with the glorification of the state which was found to be pre-eminent in German international law scholarship from the late nineteenth to the middle of the twentieth century.<sup>11</sup>

Whatever one sees in the doctrine, it has an immediate bearing on the very structure of international law.<sup>12</sup> It raises a number of doctrinal and theoretical questions and is a prism through which the evolution of international law scholarship can be seen. The following remarks should not be seen as an attempt at a genealogy. Rather, this article enquires into the construction of a doctrinal figure in international law by means of an exposition of key contributions to the academic debate, sometimes linked to developments in the practice of international law or the

der Staaten’ in Hans J Schlochauer (ed), *Wörterbuch des Völkerrechts*, vol 1 (2nd edn, De Gruyter 1962) 726; Wilhelm G Grewe, *The Epochs of International Law* (Michael Byers tr, De Gruyter 2000) 415; Miloš Vec, ‘Grundrechte der Staaten: Die Tradierung des Natur- und Völkerrechts der Aufklärung’ (2011) 18 *Rechtsgeschichte* 66, 72; Jean d’Aspremont, ‘The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law’ (2015) 4 *CJICL* 501. See generally on the problematic tradition of conceiving of states as individuals the recent contribution by John R Morss, *International Law as the Law of Collectives: Toward a Law of People* (Ashgate 2013) 73ff.

<sup>7</sup> Georg Wilhelm Friedrich Hegel, *Outlines of the Philosophy of Right* (TM Knox tr, rev edn, OUP 2008) s 330.

<sup>8</sup> cf Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP 2010) 17–18.

<sup>9</sup> Hegel (n 7) s 331.

<sup>10</sup> *ibid* (emphasis in original).

<sup>11</sup> For a connection between Hegel and the doctrine of the FRS, see, eg, Alfred Verdross, ‘Die Wertgrundlagen des Völkerrechts’ in H Klecatsky and others (eds), *Die Wiener rechtstheoretische Schule*, vol 2 (first published in (1953–54) 4 *Archiv des Völkerrechts* 129 (Europa-Verl 1968)) 2194–95. On the impact of Hegel on German international law scholarship, see also the nuanced treatment in Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2002) 179ff. For a more positive assessment of Hegel, see Morss (n 6) 26.

<sup>12</sup> Erich Kaufmann, *Das Wesen des Völkerrechts und die Clausula Rebus Sic Stantibus: Eine rechtsphilosophische Studie zum Rechts-, Staats- und Verfassungsbegriff* (Mohr Siebeck 1911) 69.

broader political environment in which the discourse took place. It hopes to escape the otherwise inevitable criticism for methodological problems associated with the writing of international legal histories. The ever-present danger of anachronism and a decontextualised presentation of legal principles as concepts falling from the sky should be acknowledged and, as much as possible, avoided.<sup>13</sup> Accordingly, this article will not sketch the development of the doctrine of the FRS as a story of progress in which international law has finally learnt to overcome the doctrine. What this article sets out to do, instead, is to shed light on a somewhat unlikely re-emergence of the doctrine, if not in name, then in substance. I will argue that parts of the recent scholarship on the constitutionalisation of international law have paved the way for this development and that this has gone hand in hand with the case law of the German Federal Constitutional Court on the limits of European and international integration. The doctrine has surfaced, vanished and resurfaced over time and has served different purposes. In order to set the scene for this argument, it will first be necessary to provide a few snapshots on the development of the doctrine in German international legal scholarship. These snapshots are highly selective in nature. They will concentrate on contributions which this author is convinced have had a lasting impact on the development of the doctrine of the FRS. In the following, I will first discuss how the doctrine was developed, flourished and was subsequently abandoned in the time between the early nineteenth and mid-twentieth centuries. In this period, international legal scholarship gradually moved away from natural law thinking towards a more positivist style of reasoning. Accordingly, section two will discuss how the doctrine of the FRS oscillated between these two poles in this period. Following on from that, section three will canvass how the doctrine of the FRS was resurrected, yet abandoned again in the time of National Socialism. Interestingly, the same movement—from reaffirmation to abandonment—can again be detected in the post-Second World War era. As section four demonstrates, a return to natural law thinking in the founding years of the Federal Republic later yielded to a turn to pragmatism which had difficulties in connecting with the doctrine of the FRS. Somewhat unwittingly, we can now—in the post-Cold war era—again detect figures of argumentation which do not in name resurrect the doctrine of the FRS, but resemble certain traits of it. Section five will be devoted to this unlikely comeback. From this *tour d'horizon* it emerges that over the last two centuries, there was constant movement in German international legal scholarship between affirmation and denial of the doctrine of the FRS. It appears, as will be argued in the concluding section, that the doctrine of the FRS is usually invoked in times of upheaval and change.

<sup>13</sup> On these dangers and ways to overcome them, see Anne Orford, 'On International Legal Method' (2013) 1 *London Rev Intl Law* 166; Martti Koskenniemi, 'Vitoria and Us: Thoughts on Critical Histories of International Law' (2014) 22 *Rechtsgeschichte* 119.

## 1 From natural law to positivism

From the late eighteenth until the early twentieth century, the doctrine of the FRS has found different foundations in German scholarship. First identified with natural law thinking, the doctrine managed to survive the rise of positivism, despite growing criticisms about its circularity and heavy blows inflicted by a Kelsenian form of deconstruction.

### 1.1 Natural law origins: The state as individual

At the very roots of the doctrine of the FRS was the analogy between states and natural persons.<sup>14</sup> As Bardo Fassbender has remarked, ‘In the age of enlightenment, the idea of an equality of States was based on an analogy with the “natural” status of men.’<sup>15</sup> This can, to some extent, be seen as a parallel development to the transfer of sovereignty from prince to nation.<sup>16</sup> If, traditionally, the prince had been seen to embody the polity and had possessed certain rights inherent to this position, it was only natural to transfer these rights to states as newly emerging units of political order.<sup>17</sup> Today, this analogy may appear to be misguided. It would be too easy, however, to dismiss it altogether. As Emmanuelle Jouannet has pointed out, this move brought about a new form of thinking of states as equals, whereas previously different polities were generally thought to be unequal.<sup>18</sup> According to Hans Ulrich Scupin, the development of the doctrine was most importantly shaped by Vattel who relied on the works of Christian Wolff. Vattel, however, would have been more ‘consequentialist’ than Wolff, especially in terms of keeping apart the domains of law and ethics.<sup>19</sup> Wolff’s construction of the FRS was anything but straightforward. It, too, was premised on the understanding that nations would be equivalent to individuals in a state of nature.<sup>20</sup> In this state of nature, there would be nothing except natural law.<sup>21</sup> In Wolff’s *civita maxima*, this state of nature was supplemented by the positivist law of nations, comprising voluntary, stipulative and customary law of nations.<sup>22</sup> Wolff then distinguished the duties of nations towards themselves and the duties of nations towards each other. The latter category can be understood as an early emanation of the doctrine of the FRS, as Wolff wrote that ‘[e]very nation owes to every other nation that which it

<sup>14</sup> See, in greater detail on these origins, the contribution of d’Aspremont (n 6).

<sup>15</sup> Bardo Fassbender, ‘Article 2(1)’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd edn, OUP 2012) 133. See also Scupin (n 6) 726.

<sup>16</sup> Morss (n 6) 73.

<sup>17</sup> Fassbender (n 15) 141.

<sup>18</sup> Jouannet (n 1) 36.

<sup>19</sup> Scupin (n 6) 726.

<sup>20</sup> Christian Wolff, *Jus gentium method scientifica pertractatum*, vol II (Clarendon Press 1934) s 2.

<sup>21</sup> *ibid* s 3.

<sup>22</sup> See also Stephen C Neff, *Justice Among Nations: A History of International Law* (Harvard UP 2014) 245.

owes to itself.<sup>23</sup> Chief among the duties of nations towards themselves was the idea of self-preservation: ‘Every nation is bound to preserve itself.’<sup>24</sup>

## 1.2 From natural to inherent rights: The rise of positivism

Natural law thinking fell out of favour with the rise of positivism in international law. One would suppose that this should have rung the death knell for the doctrine of the FRS. After all, how should this doctrine be accommodated in a legal structure, which put a premium on state consent? How could it be possible to argue at the same time that international law knew only a certain number of formal sources, yet hold that some rules would be superior to others and did not depend on the volition of states—in the late nineteenth century arguably the only subjects of international law?<sup>25</sup>

Despite its natural law pedigree, the doctrine of the FRS was able to mutate and adapt itself to more positivist leanings. In this new guise, the doctrine was reframed as ‘deriving, rather, from logical, historical, sociological or even positive bases’, which, as Jouannet rightly notes, ‘made their fundamental character problematic’. She asks, ‘In what respect did such rights remain absolute and fundamental?’<sup>26</sup> Illustrative of the construction of the doctrine of the FRS in positivist writing is the work of Franz von Liszt, author of the leading German textbook on international law at the beginning of the twentieth century.<sup>27</sup>

Liszt argued for the necessity of fundamental rights of states which would not be natural law illusions, but legal norms, the existence of which would derive quasi-automatically from the concept of *Völkerrechtsgemeinschaft* (international law community), without which international law would be inconceivable.<sup>28</sup> It was almost akin to notions of *Begriffsjurisprudenz*—or the infamous heaven of concepts<sup>29</sup>—when Liszt argued that it followed from the very concept of international law as a community of states with equal rights that every member of this community would have a right to equality vis-à-vis all other members of the community—not even to mention the

<sup>23</sup> Wolff (n 20) s 156.

<sup>24</sup> *ibid* s 31.

<sup>25</sup> cf Scupin (n 6) 727.

<sup>26</sup> Jouannet (n 1) 125.

<sup>27</sup> Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer Reinen Rechtslehre* (Mohr Siebeck 1920) 215. See further Florian Herrmann, *Das Standardwerk: Franz von Liszt und das Völkerrecht* (Nomos 2001).

<sup>28</sup> Franz von Liszt, *Das Völkerrecht: Systematisch dargestellt* (11th edn, Springer 1921) 59. A similar form of reasoning can be found in Lassa Oppenheim, *International Law: A Treatise*, vol I (Longmans Green 1905) s 112 (‘it must be taken into consideration that under the wrong heading of fundamental rights a good many correct statements have been made. (...) They are rights and duties which do not rise from international treaties between a multitude of States, but which States customarily hold as International Persons, and which they grant and receive reciprocally as members of the Family of Nations’). The formulation remained virtually unchanged in the later editions prepared by Hersch Lauterpacht, *International Law: A Treatise by Lassa Oppenheim*, vol I (6th edn, Longmans Green 1947) s 112.

<sup>29</sup> See further Karl Larenz, *Methodenlehre der Rechtswissenschaft* (Springer 1969) 17ff.

circularity of reasoning involved here.<sup>30</sup> To Liszt, the community of nations under international law was based on the idea of the parallel existence of different states with well defined zones of authority, with mutually recognised spheres of power. From this basic consideration, a number of legal principles would flow automatically, without a need to ground them in treaty law. They would form the basic stock of unwritten international law and would be its oldest, most important and even holiest part.<sup>31</sup>

Liszt was too much the archetypical positivist to dwell on long philosophical musings about the FRS after this passage. Instead, he delved directly into specific questions of statehood, territory and sovereignty, which he discussed without further references to the category of fundamental rights. This category re-emerges, however, in the next section of his book, which is devoted to the ‘*völkerrechtlicher Verkehr*’, the intercourse between states. In this respect, he accorded the right to intercourse between states prime importance. In the transboundary flow of people, goods and ideas, the idea of belonging to the community of states would materialise. Exclusion of a state from this intercourse would be equivalent to the process of individuals being outlawed in the Middle Ages.<sup>32</sup> Accordingly, Liszt again resorted to the analogy with individuals here. In more concrete terms, he points to the *jus commercii* as an expression of this principle.<sup>33</sup>

### 1.3 Coping with circularity: Jellinek, Kaufmann and self-preservation

With Liszt, it appears as if the heyday of the uncritical affirmation of the doctrine of the FRS was probably reached. The belief in the FRS as a self-evident category of international law was lost and authors began to wonder more regularly how those rights could be constructed. Most writers appeared to be sceptical about their existence in the first place.<sup>34</sup> Yet, there were variations with respect to the resoluteness with which authors refuted the doctrine of the FRS. Georg Jellinek can be counted among the most radical critics. In his 1882 monograph on the system of subjective rights in public law, he included a chapter on the FRS. Whereas in all other parts of law, natural law would have been put to rest, it would ‘continue to indulge in its well-known orgies in international law, only to be vehemently interrupted from time to time by the deniers of international law, then to begin anew afterwards’.<sup>35</sup> In any case, he found the doctrine to be circular in nature, only positing that a state would have a right to be a state and that this right would need to be respected by other states.<sup>36</sup>

<sup>30</sup> von Liszt (n 28) 58.

<sup>31</sup> *ibid* 59.

<sup>32</sup> *ibid* 100. This idea somewhat foreshadows later works by Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia UP 1964) 88ff in which Friedmann wrote about the sanction of exclusion from participation.

<sup>33</sup> von Liszt (n 28) 100.

<sup>34</sup> Scupin (n 6) 726–27.

<sup>35</sup> Georg Jellinek, *System der subjektiven öffentlichen Rechte* (2nd edn, Mohr Siebeck 1905) 311.

<sup>36</sup> *ibid* 314.

To a certain extent, this line of reasoning was also followed by Erich Kaufmann in his notorious monograph on the *clausula rebus sic stantibus*—that is, the possibility of modifying treaty commitments in the case of a fundamental change of circumstances.<sup>37</sup> Quite similar to Jellinek, he remarked that the right to equality would mean nothing more than the concept of legal subjectivity as such.<sup>38</sup> Although his monograph was only concerned with the *clausula*, it dealt a wider blow to the idea of the FRS, but with a twist, as we shall see. Kaufmann engaged in a vast survey of the literature, where the *clausula* is connected to the doctrine of FRS. He drew attention to the diverging strands of argument to be found in these sources. He remarked that some authors would discuss the *clausula* without a reference to the idea of the FRS, despite apparently noticing that there would be a significant overlap of their ideas with this doctrine. Others would equivocate with respect to the precise fundamental right in which the *clausula* would be anchored. Yet others would speak of a fundamental right, yet base it on the volition of the states concerned, thereby implying that it could also be derogated from. And still others would do away with the category of FRS and would import their contents into other legal institutes such as the state of necessity or the defence of *exceptio non adimpleti contractus*.<sup>39</sup> Eventually, Kaufmann seemed to show a considerable degree of scepticism as to whether a category of FRS can exist in the first place without dismantling international law of its quality of law as such. He affirmed that whether the existence of FRS can be affirmed would be a principal problem, which would be closely connected with the very structure of international law as a legal system of ‘individuals’ (*Individualrechtsordnung*). He noted that there would be no right to self-preservation and independence for individuals; and thus, how could there be one for states without doing away with international law as law?<sup>40</sup> With the vanishing away of natural law, any idea of fundamental rights preceding the state would vanish too, he argued. Fundamental rights would always need to be based on positive legislation; they would not be rights inherent to the individual.<sup>41</sup>

So far, Kaufmann’s analysis reads almost Kelsenian. However, Kaufmann takes a somewhat surprising U-turn, decoupling international law from its individualistic thinking. For international law, the idea of a fundamental norm, being placed above treaty relations, would be essential.<sup>42</sup> What did Kaufmann have in mind? Did he aspire to bring all the FRS back in through the rear door? Not at all. He criticised most of them

<sup>37</sup> On Kaufmann and this book, see Koskeniemi (n 13) 179ff. For an in-depth biographical analysis, see Frank Degenhardt, *Zwischen Machtstaat und Völkerbund: Erich Kaufmann (1880–1972)* (Nomos 2008) as well as Reut Yael Paz, *A Gateway between a Distant God and a Cruel World: The Contribution of Jewish German-Speaking Scholars to International Law* (Martinus Nijhoff 2013) 170ff. In contemporary international law, the *clausula* is now set forth in art 62 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331 (VCLT).

<sup>38</sup> Kaufmann (n 12) 195.

<sup>39</sup> *ibid* 68–69. In contemporary international law, this ground would be covered by VCLT, art 60.

<sup>40</sup> Kaufmann (n 12) 69.

<sup>41</sup> *ibid* 194. Similarly on this point, see Viktor Bruns, ‘Völkerrecht als Rechtsordnung’ (1929) 1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1, 14.

<sup>42</sup> Kaufmann (n 12) 194–95.

in a trenchant manner, discarding the right to independence as it would be a negation of international law.<sup>43</sup> The right to equality would be a mere tautology and nonsensical. It would mean nothing more than legal subjectivity.<sup>44</sup> The right to respect—or dignity—could hardly be more than a requirement of *courtoisie*.<sup>45</sup> The right to intercourse would be no right. Instead, intercourse would be a social necessity in order to bring about international law.<sup>46</sup> Yet the right to self-preservation, Kaufmann admonished, was indispensable.<sup>47</sup> Kaufmann conceded that much of the criticism levelled against this right was correct. He reduced it to a core meaning—albeit fairly wide-ranging, one might add—that it would amount only to restoring independence in situations of changed circumstances, thus bringing it wholly in line with the subject matter of his book, the *clausula*.<sup>48</sup> Self-preservation would be a truly fundamental right: it would entitle states to enter into international agreements necessary for their survival, but it would also entitle states to commit extra-contractual acts and terminate agreements. It would be the objective norm against which all state conduct could be measured: self-preservation could not be wrongful.<sup>49</sup> Kaufmann saw the danger that this could be read as a negation of all law. He pointed to the limits in exercising this right, in particular necessity as a limiting factor.<sup>50</sup> In addition, writing in 1911, he saw the high levels of armament among European powers as a guarantee against an abuse of this right.<sup>51</sup> In coining a sentence that made him famous, he furthermore pointed out that in the international law of co-ordination, every state would only be entitled to those acts it could actually carry out.<sup>52</sup>

All in all, self-preservation was conceptualised by Kaufmann as something akin to *jus cogens*. It could not be altered by agreements.<sup>53</sup> However, this kind of non-derogability was not considered in terms of substantive values. Kaufmann rather saw an inherent limit to the will of states at work: agreements would only be entered into under the condition that the fundamental circumstances under which they were concluded would not change in a way that would be incompatible with the right of self-preservation.<sup>54</sup>

#### 1.4 Deconstructing the doctrine

While Kaufmann walked a fine line between doing away with the doctrine of the FRS and re-affirming parts of it—ie the right to self-preservation—other authors were more

<sup>43</sup> *ibid* 195.

<sup>44</sup> *ibid*.

<sup>45</sup> *ibid*.

<sup>46</sup> *ibid* 196.

<sup>47</sup> *ibid*.

<sup>48</sup> *ibid*.

<sup>49</sup> *ibid* 199–200.

<sup>50</sup> *ibid* 200.

<sup>51</sup> *ibid* 201.

<sup>52</sup> *ibid* ('Und endlich ist zu bedenken, daß im Koordinationsrecht jeder nur das darf, was er kann').

<sup>53</sup> *ibid* 204.

<sup>54</sup> *ibid*.

consequentialist in their critique. Viktor Bruns, director of the Kaiser Wilhelm Institute in Berlin, maintained that, while there might be FRS, they would be based on positive law sources. To this extent, however, they would lose their succinct meaning. Writing about the FRS would mean nothing more than sketching the contours of all the existing rights and obligations of states.<sup>55</sup>

Although Bruns was in no respect inspired by Kelsen's *Reine Rechtslehre*,<sup>56</sup> his analysis here reads almost Kelsenian in style. Indeed, Kelsen himself had little sympathy for any attempt to salvage the doctrine of the FRS which was, in his view, tainted by its natural law origins.<sup>57</sup> He found it impossible to deduce from 'nature' any rights.<sup>58</sup> His rejection of the category of the FRS was inextricably linked to his methodological cornerstone of firmly distinguishing between the realm of the 'is' and the 'ought'.<sup>59</sup> Either natural rights would be stipulated by the positive legal order—then the category would be redundant and meaningless—or they would not have been embraced by positive law and a reference to natural rights would then be a call on the legislator to stipulate these rights.<sup>60</sup> He was also not any more welcoming of the idea that the FRS would be inherent to notions of statehood. This idea would only amount to natural law in disguise and could be refuted with the same arguments as above.<sup>61</sup> Also understanding the fundamental rights as integral parts of the legal personality of states would be meaningless. The state would only be an international personality because of it being a subject of duties and rights. In essence, the FRS would ultimately collapse into the specific rights and obligations states have under international law. This would also explain why sovereignty would be nothing more than the sum of all these specific rights and duties. Sovereignty, in other words, was just a symbol for the system.<sup>62</sup> Kelsen saw another problem with the doctrine of the FRS in its personification of the state. The state would be nothing more than individuals in their capacity as organs of the state.<sup>63</sup> If the state came to be identified as a 'super-person' (*Übermensch*) or a super-human organism, this would be nothing else than a hypostatisation of this personification.<sup>64</sup>

<sup>55</sup> Bruns (n 41) 14.

<sup>56</sup> This seminal work, republished in multiple languages several times, was first published as Hans Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (1934 F Deuticke).

<sup>57</sup> Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (n 27) 213–22. See also his later criticism of the International Law Commission's Draft Declaration on Rights and Duties of States: Hans Kelsen, 'The Draft Declaration on Rights and Duties of States' (1950) 44 AJIL 259 (this instrument is, however, more doctrinal in character). On this instrument, see Daniel H Joyner and Marco Roscini, 'Is There Any Room for the Doctrine of Fundamental Rights of States in Today's International Law?' (2015) 4 CJICL 467.

<sup>58</sup> Kelsen, *Principles of International Law* (n 2) 149.

<sup>59</sup> *ibid* 150. See also Hans Kelsen, *General Theory of Norms* (Michael Hartney tr, OUP 1991) 58ff.

<sup>60</sup> Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (n 27) 150.

<sup>61</sup> *ibid* 151.

<sup>62</sup> Hans Kelsen, *Allgemeine Staatslehre* (Springer 1925) 102ff.

<sup>63</sup> Hans Kelsen, 'Souveränität' in Hans J Schlochauer (ed), *Wörterbuch des Völkerrechts*, vol 3 (2nd edn, De Gruyter 1962) 279.

<sup>64</sup> *ibid*. This view was also shared by one of the most important students of Kelsen, Josef Kunz. Kunz drew a direct line from the—in his view—false personification of the state to the doctrine of fundamental rights. Under ancient Greek ideals, the state would have had no aims and purposes of itself, only the protection

## 2 In the name of equality? National Socialism and the fundamental rights of states

It is difficult to assess what role the doctrine of the FRS had to play in National Socialist thinking on international law. To begin with, it is not easy to define the latter. There is no coherent Third Reich philosophy on international law and the uses to which international law was put during the reign of the National Socialists from 1933 to 1945 differed greatly.<sup>65</sup> It is probably fair to make two observations: first of all, international law was held in certain esteem if and to the extent that the new leaders considered it to be useful to the National Socialist regime.<sup>66</sup> Under this guise, the doctrine of the FRS came back into fashion as part of the fight against the allegedly oppressive Treaty of Versailles—an endeavour, however, which had already united large parts of German academia in the Weimar era.<sup>67</sup> Self-determination and equality of states were relied on in order to justify a gradual breaking away from the post-First World War order.<sup>68</sup> Equality was deemed to be the fundamental building block of this critique. As Carl Bilfinger—later to be director of the Kaiser Wilhelm Institute after the death of Viktor Bruns—wrote in an early contribution to this question:

Who denies an independent state the status of equality, denies or negates this states' political independence in the sense of international law. (...) A consequence of equality between states is also an equality of rights, both as a principle and as a concrete demand. The more recent state practice demands under this heading of the equality of states that a state which is deemed to be independent and therefore legally equal with other states—and is being held responsible in this regard—has to be able and entitled to defend its quality with arms.<sup>69</sup>

Bilfinger made it clear that the basis for this fundamental right of states was to be sought neither in natural law thinking nor in its liberal-minded evolution into positivist international law. Rather, he deployed an analysis in tune with more general straits of National Socialist legal theory, somehow blending the German historical school, regarding law as a result of organic evolution<sup>70</sup> with references to the new

of its citizens. Following on from the Renaissance, the state would have turned into a 'Makroanthropos', a Leviathan, with its own goals to be served by the citizens: Joseph Kunz, 'Völkerrecht, allgemein' in Hans J Schlochauer (ed), *Wörterbuch des Völkerrechts*, vol 3 (2nd edn, De Gruyter 1962) 615.

<sup>65</sup> Detlev F Vagts, 'International Law in the Third Reich' (1990) 84 AJIL 661, 686; Michael Stolleis, *A History of Public Law in Germany 1914–1945* (Thomas Dunlap tr, OUP 2004) 410.

<sup>66</sup> Vagts (n 65) 663–64. On the skilful instrumentalisation of the right of self-determination by Hitler, see also Jörg Fisch, *Das Selbstbestimmungsrecht der Völker: Die Domestizierung einer Illusion* (Beck 2010) 182ff.

<sup>67</sup> See John H Herz, 'The National Socialist Doctrine of International Law and the Problems of International Organization' (1939) 54 Pol Science Q 536, 541; Vagts (n 65) 687–88; Stolleis (n 65) 60ff.

<sup>68</sup> See, for instance, Gustav Adolf Walz, 'Das Verhältnis von Völkerrecht und staatlichem Recht nach nationalsozialistischer Rechtsauffassung' (1934) 18 Zeitschrift für Völkerrecht 145, 149; Paul Schoen, 'Erzwungene Friedensverträge' (1937) 21 Zeitschrift für Völkerrecht 277.

<sup>69</sup> Carl Bilfinger, 'Zum Problem der Staatengleichheit im Völkerrecht' (1934) 4 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 481, 481 (translation by author).

<sup>70</sup> On the historical school, see, for instance, Benjamin Lahusen, *Alles Recht geht vom Volksgeist aus: Friedrich Carl von Savigny und die moderne Rechtswissenschaft* (Nicolai 2013) 70–73.

rulers' emphasis on the state as a representation of the people, understood in a racial (*völkisch*) sense.<sup>71</sup> Carl Schmitt identified the equality of states with the doctrine of the FRS. In an exposition of the relationship between National Socialism and international law from 1934, he wrote that without fundamental rights no human community could exist. He was careful to note that these would not need to be fundamental rights akin to the ones known from nineteenth-century liberalism. He was adamant that fundamental rights could also exist in non-individualistic societies. To Schmitt, the doctrine of the FRS was alive as long as there was peace in the relations among European powers, a theme which is well known from his other works on the history of international law.<sup>72</sup> Only in the decades leading up to the 1930s, the FRS had been buried under the 'rubble of positivism' and international pacts. It would be necessary to return to these older categories, especially for those states which had managed to reflect on their proper bases of internal order. National Socialist Germany would belong to these states. The primordial fundamental right would be the right to one's own existence, including the rights to self-determination, self-defence as well as the means of self-defence, again alluding to the limitations of armament, which Germany had to endure as a consequence of the Versailles peace settlement.<sup>73</sup>

This leads to a second observation in this context. What makes it difficult to portray the Third Reich era as a period in which the doctrine of the FRS fully flourished again was a gradual turn away from the state as the primary actor in international law.<sup>74</sup> Although the alternatives put forward varied, thinkers close to the party, the government and the even more radical SS militia put forward the people (*Volk*) or the Reich as ultimately more relevant concepts, which would arguably be more akin to Germanic legal traditions.<sup>75</sup> Also the so-called *Großraumtheorie*, propagated by Carl Schmitt in a 1939 lecture, can be seen in this connection.<sup>76</sup> However, Schmitt himself insisted that states remained the key actors in international law<sup>77</sup> despite his repeated musings about the decline of the state.<sup>78</sup> This theory of legal spaces immune to outside intervention by foreign powers was difficult to reconcile with a doctrine of FRS, presupposing any measure of equality

<sup>71</sup> Bilfinger (n 69) 482–84. On the implied inequalities of National Socialist writings on the equality of states, see also Herz (n 67) 544. On the importance of historical thinking for National Socialist law, see Bardo Fassbender, 'Stories of War and Peace: On Writing the History of International Law in the "Third Reich" and After' (2002) 13 EJIL 479, 496.

<sup>72</sup> Carl Schmitt, *Der Nomos der Erde im Ius Publicum Europaeum* (Duncker and Humblot 1950).

<sup>73</sup> Carl Schmitt, *Frieden oder Pazifismus? Arbeiten zum Völkerrecht und zur internationalen Politik 1924–1978* (Günter Maschke ed, Duncker and Humblot 2005) 392–93.

<sup>74</sup> At the same time, it should not be overlooked that the doctrine of fundamental rights kept constantly reappearing in contemporary writings, with authors often trying to accommodate it within National Socialist ideology: see, eg, Heinrich Korte, 'Lebensrecht und völkerrechtliche Ordnung' (1941) 25 Zeitschrift für Völkerrecht 131.

<sup>75</sup> See, for instance, Walz (n 68) 147. On this development, see Vagts (n 65) 687; Stolleis (n 65) 411.

<sup>76</sup> Carl Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht* (1939, republished Duncker and Humblot 1991).

<sup>77</sup> Schmitt, *Frieden oder Pazifismus?* (n 73) 723.

<sup>78</sup> Carl Schmitt, *Der Begriff des Politischen* (3rd edn, Duncker and Humblot 1963) 10.

among states. This equality no longer played a role in National Socialist thinking as soon as the German Reich had shaken off the chains of the Versailles 'Diktat'.<sup>79</sup>

### 3 Post-Second World War movements

With the collapse of the Third Reich, German international legal scholarship tried in many ways to start anew. These attempts departed on different pathways. First, a return to natural law thinking brought the doctrine of the FRS back into fashion before a turn to pragmatism led to a decline of this category in German academic circles.

#### 3.1 Natural law renaissance

After the Second World War, German international legal scholarship witnessed a brief renaissance of natural law thinking. In fact, this renaissance was not limited to international law, but was rather a broader trend among German jurists.<sup>80</sup> Positivism was accused of having paved the way for Nazi rule.<sup>81</sup> Be that as it may, the return to natural law thinking also brought about a renewed attention to the doctrine of the FRS. As Hans Ulrich Scupin wrote, the outcome of the Second World War had led to a process of transformation in international law. Established conceptions of natural law resurfaced, not in the forms of old theories, but as a fertile ground for the composition of new models of order. Yet again, this 'new international law' was torn by a clash between sovereignty and the demands of the international community.<sup>82</sup>

Evidence of this tendency can be found, for instance, in the work of Ulrich Scheuner, himself not wholly untainted by affiliation with the Third Reich regime, but not to the extent that it would have barred him from having a stellar career in West Germany.<sup>83</sup> In a 1939 lecture at the Hague Academy, Scheuner had been highly critical of the doctrine of the FRS. To him, the doctrine would have represented an unfortunate assimilation of states with individuals. Individualism in general would have had an unfavorable influence on international society. What is more, it would have been wrong to assume that the international community would have subjected states to more and more restrictions. Due to a growing divide among states, the international order would be much less coherent than in previous, natural law-dominated times.<sup>84</sup> Scheuner thus

<sup>79</sup> Vagts (n 65) 688.

<sup>80</sup> On the context of this development, see Lena Foljanty, *Recht oder Gesetz: Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit* (Mohr Siebeck 2013).

<sup>81</sup> For an argument in this direction, see Ulrich Scheuner, 'Naturrechtliche Strömungen im heutigen Völkerrecht' (1950) 13 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 556, 577, 589.

<sup>82</sup> Scupin (n 6) 727 (with an unspecific reference to Scheuner).

<sup>83</sup> Vagts (n 65) 677–78.

<sup>84</sup> Ulrich Scheuner, 'L'influence du Droit Interne sur la Formation du Droit International' (1939) 68 *Recueil des Cours* 95, 188–90.

called for an abandonment of the FRS. All this had changed, apparently, ten years later, when he wrote about the ‘natural law tendencies’ in international law. He underlined that the ‘systematic construction of international law’ would still rest on the FRS, carried forward from natural law origins.<sup>85</sup>

To some extent, Alfred Verdross can also be counted among those who contributed to this natural law renaissance after the Second World War. Verdross was, of course, already a leading international lawyer in the interwar period and probably the most prominent disciple of Kelsen in international law.<sup>86</sup> That said, in methodological terms as well as moral outlook he parted from Kelsen’s strict positivist analysis and embraced natural law as a way to come to terms with the *Grundnorm*.<sup>87</sup> In an article published in the 1953–54 volume of the *Archiv des Völkerrechts*, he wrote about the foundation of values in international law. Verdross was deeply sceptical about the future of international law. A unity of values which underlay international law was gone, he argued. This development was spurred by a number of factors, amongst which he counted the Bolshevik revolution, Nazi rule in Germany—although he wrote that it was too short to leave any lasting impact on international law—and, most importantly, the process of decolonisation. Then asking what defined modern—to him European—international law, he turned to the FRS. The first and foremost value in international law would be the freedom of the respective people and groups of people, finding an expression in internal and external self-government. The mutual recognition of sovereignty would therefore be nothing less than recognition of this fundamental value of freedom and self-government of peoples.<sup>88</sup> Verdross then turned to Hegel and his idea that recognition as a state was a vital requirement, embodying respect by other states for the independence and self-government of the recognised state. To Verdross, this recognition would encapsulate all other fundamental rights of the state, ie respect for their territorial sovereignty and internal order as well as the fundamental right of equality of states, in particular with respect to the exemption of states from standing trial in the courts of other nations.<sup>89</sup>

### 3.2 Pragmatism takes over

Not all writers who were close to the natural law renaissance followed this path. Some were cautious to base the FRS doctrine solely on natural law sources. Gerhard Leibholz, for example, primarily a constitutional law scholar and an influential judge at the Federal Constitutional Court, remarked that the equality of states would be a necessary

<sup>85</sup> Scheuner (n 81) 574.

<sup>86</sup> See, generally, Verdross’ contribution to international law in Bruno Simma, ‘The Contribution of Alfred Verdross to the Theory of International Law’ (1995) 6 EJIL 33.

<sup>87</sup> See on this question von Bernstorff (n 8) 114–16.

<sup>88</sup> Verdross (n 11) 2194–95.

<sup>89</sup> *ibid* 2195.

component of any system of international law organised by way of coordination. Equality would be presupposed and, thus, an inherent part of legal subjectivity.<sup>90</sup>

In that sense, the FRS continued to have an impact on the discourse in Germany.<sup>91</sup> It was, however, mitigated by practical demands—and possibly a wish of reintegration into the international community. Hermann Mosler, for instance, noted a tension between the category of FRS and the ever-growing restriction of the freedom of individual states.<sup>92</sup> The works of Mosler may, to a certain extent, be seen as representative of a broader trend in post-Second World War scholarship in West Germany. Having had the privilege of practical experience through his work for the Federal Government in the early, formative years of the Federal Republic and a later director of the Max Planck Institute in Heidelberg—the successor institute to the Kaiser Wilhelm Institute in Berlin<sup>93</sup>—Mosler's sober approach to international law was typical of German scholarship from the 1960s to the 1980s, which tried to achieve practical progress in the reintegration of Germany into Europe and the broader community of (civilised) states.<sup>94</sup> Mosler's conception of the international legal order is nicely encapsulated in a 1976 article devoted to a re-examination of the questions examined by his predecessor Viktor Bruns in the late 1920s. The doctrine of the FRS is still there, but it hardly plays an independent role. While the state is characterised as the unit for self-preservation of a people,<sup>95</sup> the category of fundamental rights is dissolved into the concept of legal personality. From this subjectivity, certain rights—most importantly the right to existence—would automatically flow.<sup>96</sup> In this respect, Mosler relied on Verdross and his idea that the recognition of a state would automatically entail respect for its existence and independence. However, Mosler did not go all the way towards disposing of the category of fundamental rights altogether. In particular, he insisted that states have a right of personality vis-à-vis the international order; an idea he took up from Bruns. Noticing that Bruns' suggestion was not successful among other authors, Mosler deemed it to be of greater value than the old imagination of the FRS—without however clearly delineating between the two.<sup>97</sup>

More categorical in his rejection of the FRS doctrine was Wilhelm Wengler, in many ways an antipode to Mosler. Difficult to place into the pragmatist mainstream, his work

<sup>90</sup> Gerhard Leibholz, 'Gleichheit der Staaten' in Hans J Schlochauer (ed), *Wörterbuch des Völkerrechts*, vol 1 (2nd edn, De Gruyter 1962) 694.

<sup>91</sup> See, eg, Karl J Partsch, 'Lebensinteressen' in Hans J Schlochauer (ed), *Wörterbuch des Völkerrechts*, vol 2 (2nd edn, De Gruyter 1962) 410.

<sup>92</sup> Hermann Mosler and Hans-Otto Bräutigam, 'Staatliche Zuständigkeit' in Hans J Schlochauer (ed), *Wörterbuch des Völkerrechts*, vol 3 (2nd edn, De Gruyter 1962) 317.

<sup>93</sup> See Felix Lange, 'Carl Bilfingers Entnazifizierung und die Entscheidung für Heidelberg' (2014) 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 697.

<sup>94</sup> cf Georg Nolte, 'Zur Zukunft der Völkerrechtswissenschaft in Deutschland' (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 657, 657–59.

<sup>95</sup> Hermann Mosler, 'Völkerrecht als Rechtsordnung' (1976) 36 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 6, 16.

<sup>96</sup> *ibid* 22.

<sup>97</sup> *ibid* 38–39.

was certainly not characterised by natural law overtones, but rather by a sociological sensibility to a changing international environment.<sup>98</sup> Wengler pointedly inquired into the practical workings of such a doctrine and remarked dryly that a special category of fundamental rights would only be meaningful if there would be special consequences attached to the violation of such fundamental rights or if they would be more difficult to abdicate through law-making between states. Neither would be the case. At most, he wrote, a presumption could be identified that the fundamental rights should not be limited, arguing along the lines of the *in dubio mitius* maxim of interpretation.<sup>99</sup>

It is important to acknowledge the changing normative environment in which these debates took place. Two developments stand out here, both eating away at the core of the doctrine of the FRS. For one, the emergence of international human rights law changed the vocabulary of international lawyers. Whereas the concept of fundamental rights was for a long time only known in international law as being associated with states as rights-holders, this has now changed.<sup>100</sup> To a certain extent, this helped to remedy an anomalous situation, as in general philosophy, the concept of rights was always more clearly associated with the individual.<sup>101</sup> In addition, one might wonder whether the emergence of the principle of self-determination and its gradual strengthening in the context of decolonisation did not also impact on the discussions surrounding the FRS.<sup>102</sup> With this principle, there was a contender for a collective right more directly associated with the people and thus having an immediate democratic appeal—although the principle need not be associated with democracy in the Western liberal tradition. While the FRS were always seen to have a connection with self-determination in a sense of protecting the independence and political integrity of a state, the ‘new’ concept of self-determination had the potential to disintegrate states, by shifting attention to those that would have been previously marginalised and deprived of a possibility of realising fundamental

<sup>98</sup> On Wengler, see further Andreas Zimmermann, ‘International Law Scholarship in Times of Dictatorship and Democracy: Exemplified by the Life and Work of Wilhelm Wengler’ in Peter HF Bekker, Rudolf Dolzer and Michael Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (CUP 2010) 222.

<sup>99</sup> Wilhelm Wengler, *Völkerrecht*, vol II (Springer 1964) 1036. Wengler’s analysis is very topical as many works showed considerable confusion about the categories of responsibility and sanctions. See, for instance, the treatise by the former Austrian Chancellor von Schuschnigg in which it was deemed to be a characterising feature of the fundamental rights that breaches would give rise to responsibility, which was and is however the case for all international law: see Kurt von Schuschnigg, *International Law: An Introduction to the Law of Peace* (Bruce Publishing Company 1959) 109.

<sup>100</sup> This connection is hinted at also by international relations scholar Hedley Bull: ‘Carried to its logical extreme, the doctrine of human rights and duties under international law is subversive of the whole principle that mankind should be organised as a society of sovereign states.’ See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Macmillan 1977) 152.

<sup>101</sup> See also Vec (n 6) 66–67.

<sup>102</sup> On self-determination, see Morss (n 6) 93ff; Daniel Thürer and Thomas Burri, ‘Self-Determination’ in *Max Planck Encyclopedia of Public International Law* (online edn, 2012) <<http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e873?rskey=08kTNn&result=2&prd=EPIL>> accessed 20 November 2015.

rights in the context of statehood.<sup>103</sup> While it is difficult to establish causalities here, I find it plausible that the concomitant rise of human rights and self-determination might have had something to do with the relative decline of the doctrine of the FRS.

Be that as it may, German post-war doctrine has come to shy away from using the terminology of the FRS—interestingly so, however, without abandoning the substance of the concept.<sup>104</sup> Karl Doehring took a somewhat ironic distance from the concept in his treatise.<sup>105</sup> He wrote that a listing of the rights and obligations of states under a discrete heading—such as the FRS—could appear to be useless, as the whole of international law would belong to the rules to which states would find themselves bound. In that sense, one could say that states would have to comply with all rules of international law to which they are bound.<sup>106</sup> Nonetheless, the category of the FRS might fulfil some useful functions. Doehring insisted, however, that the content of these rights should not be developed out of the concept itself, but rather according to the generally recognised methods of the ascertainment of international law, ie through an analysis of state practice, judicial materials and the teachings of international law.<sup>107</sup>

Accordingly, one can see a trend in many German treatises, to rebrand the fundamental rights as fundamental principles of international law.<sup>108</sup> The reason behind this move is lucidly explained by Volker Epping in a leading German treatise. He argues that the use of the concept of the fundamental rights would be problematic. It would allude to these norms having a higher status, in the way that constitutional law would rank higher than ordinary law. In addition, he makes the important point that thinking in terms of fundamental rights would seem to presuppose a tension between the individual sphere of the rights-holder and a super-imposed legal order. Yet, international law would be characterised by the preeminence of states, them being the lawmakers themselves. Until a genuine supranational order is constructed, it would not be warranted to compare the situation of states with that of individuals in a domestic legal order.<sup>109</sup>

<sup>103</sup> As much is hinted at by Scupin (n 6) 724. See also Morss (n 6) 95.

<sup>104</sup> An exception is the treatise by Theodor Schweisfurth, *Völkerrecht* (Mohr Siebeck 2006) 348ff. Similarly, see Torsten Stein and Christian von Buttlar, *Völkerrecht* (13th edn, Vahlen 2012) 179. An interesting case is Bernhard Kempen and Christian Hillgruber, *Völkerrecht* (2nd edn, Beck 2007) 165ff (who include the category of fundamental obligations of states but do not speak of fundamental rights); Wolfgang Graf Vitzthum, 'Begriff, Geschichte und Rechtsquellen des Völkerrechts' in Wolfgang Graf Vitzthum and Alexander Proelss (eds), *Völkerrecht* (6th edn, Walter de Gruyter 2013) 26 (discussing fundamental principles without mentioning the category of fundamental rights).

<sup>105</sup> See his highly interesting autobiography: Karl Doehring, *Von der Weimarer Republik zur Europäischen Union: Erinnerungen* (WJS 2008).

<sup>106</sup> Karl Doehring, *Völkerrecht* (2nd edn, Müller 2004) ss 187–88.

<sup>107</sup> *ibid* s 195. See also Friedrich Berber, *Lehrbuch des Völkerrechts. Erster Band: Allgemeines Friedensrecht* (C.H. Beck 1960) 179–80, 222.

<sup>108</sup> See, eg, Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd edn, Duncker and Humblot 1984) s 451; Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 *Recueil des Cours* 9, 161ff.

<sup>109</sup> Volker Epping, 'Völkerrechtssubjekte' in Knut Ipsen (ed), *Völkerrecht* (6th edn, Beck 2014) 171.

## 4 An unlikely comeback?

Accordingly, it might appear as if the category of fundamental rights has finally been put to rest. However, it might be too superficial to leave it at that. It has been noted frequently that the doctrine of the FRS was known under several headings.<sup>110</sup> They were variably also called fundamental principles, inherent rights, natural rights, etc. They were malleable enough to resurface even after the decline of natural law thinking. Once transformed into a positivist doctrine, they also managed to make it through the more fundamental and foundationalist discussions of the interwar era, only to disappear from the textbook literature after the Second World War. This might incline us to look for modern-day equivalents of this doctrine, or maybe even a re-emergence of the substance of the doctrine which might be cloaked in a different name. Two developments stand out in this regard. In the following, I will argue that modern-day forms of international constitutionalism help to resurrect some form of arguments pertaining to independence and self-preservation of the state which sound familiar if compared to the tradition of the FRS. These arguments no longer aspire to protect ‘the state’ as such, but rather wish to further democracy. This turn is directed towards the international level. In the absence of credible structures of democratic legitimacy at the international level, these arguments are then redirected to the national level in a form of a *Solange* argument.<sup>111</sup> What is more, it can be observed that in the name of democracy and self-determination, the rights to independence and self-preservation have made a comeback through the jurisprudence of the German Constitutional Court on the limits of European and international integration. These two developments are, as will be shown, also discursively connected.

### 4.1 Constitutionalism and the calls for democratic legitimacy

If we return to Epping’s critique, it becomes apparent why we may now witness this somewhat unexpected comeback of the dusty fundamental rights concept. Epping’s central argument against the possibility of a concept of FRS is the fact that international law would be an order of coordination.<sup>112</sup> With this remark, he alludes to the horizontality of legal relations in international law and the lack of a central authority.<sup>113</sup> From this perspective, there is no external authority impacting upon states, which remain free to organise international society as they please. The growing role of international organisations and their law-making powers as well as more generally the emergence of

<sup>110</sup> Vec (n 6) 68.

<sup>111</sup> This refers to a type of argument made in BVerfGE 37, 271; 73, 339 (Federal Constitutional Court of Germany).

<sup>112</sup> Epping (n 109) 171.

<sup>113</sup> Accordingly, his remarks may be concerned primarily with what Friedmann identified as the law of co-existence: see Friedmann (n 32) 89.

a multitude of different forms of global governance have prompted various scholars to question more generally the democratic legitimacy of international law.<sup>114</sup>

Most prominently, these enquiries have been undertaken by those who follow a constitutionalist agenda.<sup>115</sup> The transformation of the ‘old’ inter-state international law into a genuine global order with the individual at its centre is at first sight geared towards making the state redundant and obsolete.<sup>116</sup> The genuine constitution of international law would reside in international law itself. Whether it is in the Charter of the United Nations<sup>117</sup> (UN Charter) or a form of compensatory constitutionalism<sup>118</sup>—where different regimes aspire to fill lacunae in domestic constitutions—most answers to ‘the’ constitutional question are sought at the international level. However, in what one could call a second wave of constitutionalisation literature, the focus has shifted. Whereas conceptual debates about whether or not international law can have constitutional elements seem to have abated in recent years, there is a growing trend to focus on the alleged democratic deficit of international institutions.

The second wave of literature is related to the first wave in so far as it takes certain elements of the first wave for granted. The debates about the constitutionalisation of international law have made it far more difficult to argue that forms of international cooperation could do with a different form of democratic legitimacy, that such forms of international cooperation may have a legitimatising virtue in themselves. Instead, what happens now is the transposing of domestic concepts of legitimacy to the international level.<sup>119</sup> Where authority is exercised, so the argument goes, a certain level of democratic legitimacy is called for.<sup>120</sup>

<sup>114</sup> See, for instance, José E Alvarez, *International Organizations as Lawmakers* (OUP 2006) 630; Anne Peters, ‘Dual Democracy’ in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 263ff; Samantha Besson, ‘Sovereignty, International Law and Democracy’ (2011) 22 EJIL 373, 376ff; Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2014) 18ff.

<sup>115</sup> On the development of the constitutionalist discourse in international law, see Bardo Fassbender, ‘Grund und Grenzen der konstitutionellen Idee im Völkerrecht’ in Otto Depenheuer, Markus Heintzen and Matthias Jestaedt (eds), *Staat im Wort. Festschrift für Josef Isensee* (CF Müller 2007) 73; Thomas Kleinlein, ‘Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law’ (2012) 81 Nordic J Intl L 79, 81ff. See also for a very useful overview of the existing literature in the field Bardo Fassbender and Angelika Siehr, ‘Forschungsbibliographie zum Themenfeld “Konstitutionalisierung jenseits des Staates”’ in Bardo Fassbender and Angelika Siehr (eds) *Suprastaatliche Konstitutionalisierung* (Nomos 2012) 313ff.

<sup>116</sup> This argument is taken to its extreme in Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2nd edn, Martinus Nijhoff 2013).

<sup>117</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (UN Charter). See generally Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff 2009).

<sup>118</sup> Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 LJIL 579.

<sup>119</sup> For a similar diagnosis, see Karen Knop, ‘Statehood: Territory, People, Government’ in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 112–13.

<sup>120</sup> See, eg, Armin von Bogdandy, Philipp Dann and Matthias Goldmann, ‘Völkerrecht als Öffentliches Recht: Konturen eines rechtlichen Rahmens für Global Governance’ (2010) 49 Der Staat 23.

From this argumentative approach, it would not be a long way to transposing domestic standards of legitimacy to the international level.<sup>121</sup> Yet, as constitutional principles of international law, these principles run into problems of their own: it remains particularly unclear whether they can rely on an international consensus so as to render them customary international law or to make them general principles of law. The limited roots they appear to have in domestic practice rather invites the consideration that we can see here a return of the general principles of ‘civilised nations.’<sup>122</sup> At the same time, constitutionalisation theories run into problems of doctrinal construction, which are similar to the ones encountered by the doctrine of the FRS. How can the special, constitutional status of certain rules and principles be established? What follows from this special status? It is of course possible to point towards certain semblances of hierarchy in today’s international legal order, such as article 103 of the UN Charter and the concept of *jus cogens* in the Vienna Convention on the Law of Treaties.<sup>123</sup> Despite this anchorage of constitutionalist elements in positive international law, the operation of these rules and their exact content and reach remain controversial.<sup>124</sup>

In this light, it is then intriguing to see the category of fundamental rights resurface in newer textbooks as a form of international constitutional law. This move may be seen as both salvaging the doctrine of the FRS from being forgotten and giving the drive towards constitutionalisation a more robust grounding in positive international law. Andreas von Arnould writes, for instance:

The ‘fundamental rights’ and ‘fundamental obligations’ of states comprise, according to a contemporary understanding, the canon of basic legal principles which are indispensable for a peaceful co-existence of states, in some way they are ‘constitutional principles of the international community of states.’<sup>125</sup>

#### 4.2 Democracy as a shield: A view from practice

Nowhere has the impact of international law on states and their domestic law become more palpable than in the context of European integration.<sup>126</sup> It is a matter of longstanding

<sup>121</sup> A significant engagement with the legitimacy concerns can be found in Matthias Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 EJIL 907.

<sup>122</sup> cf Martti Koskeniemi, ‘The Politics of International Law: 20 Years Later’ (2009) 20 EJIL 7, 17.

<sup>123</sup> VCLT, arts 53, 64.

<sup>124</sup> On tendencies towards hierarchy in international law, see Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Springer 2012) 315ff. For canonical criticism, see Prosper Weil, ‘Towards Relative Normativity in International Law’ (1983) 77 AJIL 413. Specifically on art 103 of the UN Charter, see Andreas Paulus and Johann Ruben Leiß, ‘Article 103’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol II (3rd edn, OUP 2012) 2110ff.

<sup>125</sup> Andreas von Arnould, *Völkerrecht* (2nd edn, Müller 2012) 126–27. For a related argument from the interwar era, see Friedrich August von der Heydte, ‘Die Erscheinungsformen des zwischenstaatlichen Rechts; jus cogens und jus dispositivum im Völkerrecht’ (1932) 16 Zeitschrift für Völkerrecht 461, 465–66.

<sup>126</sup> See further Andreas L Paulus, ‘Germany’ in David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (CUP 2009) 209ff.

debate to what extent the European Union (EU) has shaken off its public international law origins.<sup>127</sup> While the EU is in very many senses a special animal,<sup>128</sup> it is not so different from other international organisations that the dynamics between EU law and the domestic legal orders of its member states would be of no interest to the international lawyer. It is in this context that the German Federal Constitutional Court has developed its jurisprudence on the limits of European integration. The relationship of the Court with the broader project of European integration in general, but also with its counterpart in Luxembourg, has been described many times and need not be recounted here in great detail.<sup>129</sup>

What is of interest here, is a certain style of arguing, which has developed in the more recent decisions of the Karlsruhe Court on questions of European integration, starting with the judgment on the German legislation implementing the Lisbon Treaty in 2009 (*Lisbon Treaty* case).<sup>130</sup> As I will argue in this section, this jurisprudence shows certain resemblances to the doctrine of the FRS. At the same time, it can be seen as a correlation to the second wave of constitutionalisation literature. This is not to say that the Constitutional Court was inspired by this literature or that, the other way around, this stream of literature would enthusiastically embrace the findings of the *Lisbon Treaty* case. Yet, if seen together, the recent literature on democratic legitimacy in international law and the jurisprudence of the German Federal Constitutional Court can be seen as two sides of the same coin. Both erect barriers to international and European integration in the name of democracy.

The *Lisbon Treaty* case arose out of a number of individual constitutional complaint procedures as well as disputes between constitutional organs. They all revolved around the question of whether German sovereignty and the rights of the German parliament and its members would be infringed by the Lisbon Treaty which amended the constitutional foundations of the EU. The practical outcome of the case appears to be rather uneventful: the complaints and disputes did not prevent German ratification of the Lisbon Treaty. Instead, the Court held that there was a requirement to pass additional German legislation for accompanying the process of European integration; legislation which was arguably needed in order to make German participation in the EU more democratic and transparent. The real significance of the decision lies, however, in the numerous obiter dicta of the Court in which its broader

<sup>127</sup> For an excellent treatment of this question, see Bruno de Witte, 'The European Union as an International Legal Experiment' in Gráinne de Búrca and Joseph HH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012) 19.

<sup>128</sup> See further Georg Nolte and Helmut Philipp Aust, 'European Exceptionalism?' (2013) 2 *Global Const* 407.

<sup>129</sup> On the most recent developments, ie the reference for a preliminary ruling on certain policies of the European Central Bank together with a contextual analysis of the case law of the Court, see Mattias Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Constitutional Court's OMT Reference' (2014) 10 *Eu Const* 263.

<sup>130</sup> *Lisbon Treaty* decision of Germany's Federal Constitutional Court Judgment, 2 BvE 2/08 (2009) paras 126, 267 (*Lisbon Treaty* case). An English translation of this judgment is available at <[http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html)> accessed 17 November 2015. All subsequent references refer to this English translation.

philosophy of the project of European integration is spelled out in great detail. This philosophy hinges on democratic self-determination and a necessity to preserve a space for democratic deliberation within the German polity.<sup>131</sup> It is in this regard that a connection to the doctrine of the FRS can be drawn. In procedural terms, the cases all hinged on the interpretation of the right to vote and the corresponding legal positions of members of parliament under article 38(1) of the Basic Law of Germany. This guarantee can be invoked by individuals in constitutional complaint procedures under article 93 of the Basic Law and is thus the procedural gateway through which action against new treaty commitments of the Federal Republic can be channelled, presupposing an argument that such new commitments would erode the competences of the German Bundestag.<sup>132</sup> With respect to the right to vote in article 38(1) of the Basic Law, the Federal Constitutional Court held that it establishes a right to democratic self-determination.<sup>133</sup> This idea would pervade the whole constitutional order as ‘citizens are not subject to an inescapable political power, which they are fundamentally incapable of freely determining.’<sup>134</sup> Further, ‘Self-determination of the people according to the majority principle, achieved through elections and other votes, is constitutive of the state order as constituted by the Basic Law.’<sup>135</sup> This ideal of democracy and self-determination would not be open for a balancing exercise with other constitutional values. It would be inviolable and would therefore benefit from the protection of the so-called ‘eternity clause’ in article 79(3) of the Basic Law, which protects the principles laid down in articles 1 and 20 of the Basic Law even against constitutional amendment.<sup>136</sup>

So far, it could be said that this reasoning applies on the level of domestic law only. With Germany generally following a dualist model for the organisation of the relationship between international and domestic law,<sup>137</sup> these dicta would seem to have no relationship to the concept of the FRS, or for that matter the people—as a collective—on the international level. However, this reasoning is too simplistic.<sup>138</sup> It has become

<sup>131</sup> This decision has given rise to a vast array of literature. For further analysis of this decision, see, among others, Daniel Halberstam and Christoph Möllers, ‘The German Constitutional Court Says “Ja zu Deutschland!”’ (2009) 10 German LJ 1241; Christoph Schönberger, ‘Lisbon in Karlsruhe: Maastricht’s Epigones at Sea’ (2009) 10 German LJ 1201; Daniel Thym, ‘In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court’ (2009) 46 CMLR 1795; Matthias Ruffert, ‘An den Grenzen des Integrationsverfassungsrechts: Das Urteil des Bundesverfassungsgerichts zum Vertrag von Lissabon’ (2009) DVBL 1197.

<sup>132</sup> For a critical assessment of this doctrine, see M Nettesheim, ‘Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG’ (2009) NJW 2867.

<sup>133</sup> *Lisbon Treaty* case (n 130) para 208.

<sup>134</sup> *ibid* para 212.

<sup>135</sup> *ibid* para 213.

<sup>136</sup> *ibid* para 216.

<sup>137</sup> *ibid* paras 111, 307, 318.

<sup>138</sup> It can be debated how useful the monism/dualism debate still is: see Armin von Bogdandy, ‘Pluralism, Direct Effect and the Ultimate Say: On the Relationship between Domestic and International Constitutional Law’ (2008) 6 IJCL 397.

almost a trend among domestic—and for that matter EU—courts in recent years, to engage in quasi-review of international law, only to limit the reach of their findings by pointing to them being contained to the domestic level.<sup>139</sup> We have seen this both in the US Supreme Court's *Medellin* case<sup>140</sup> as well as in the decision of the Court of Justice of the European Union in *Kadi I*.<sup>141</sup> Also the recent snub of the Italian Constitutional Court towards the International Court of Justice decision in the *Jurisdictional Immunities* case rests on this line of argument.<sup>142</sup> The *Lisbon Treaty* case follows a similar path of reasoning, being on its face only concerned with the domestic implementation of an international agreement changing the constitutional foundations of the EU. However, the Federal Constitutional Court itself noted the intimate relationship between the German Basic Law and broader international developments of constitutionalism:

Through what is known as the eternity guarantee, the Basic Law reacts on the one hand to the historical experience of a creeping or abrupt erosion of the free substance of a democratic fundamental order. However, it makes clear on the other hand that the Constitution of the Germans, in accordance with the international development which has taken place in particular since the existence of the United Nations, has a universal foundation which cannot be amended by positive law.<sup>143</sup>

This is, of course, also the bridge which allowed the Court to bring in the principle of the so-called 'Völkerrechtsfreundlichkeit', embodying the general openness of the German constitutional order towards international law. Sovereignty and self-determination would not be ends in themselves.<sup>144</sup> Yet, however wide-ranging the powers to participate in processes of European and international integration would seem to be, they are not limitless. EU member states would need to retain their constitutional identity and must not 'lose their ability to politically and socially shape living conditions on their own responsibility'.<sup>145</sup> The Basic Law would not grant 'powers to bodies acting on behalf of Germany to abandon the right to self-determination of the German people in the form of Germany's sovereignty under international law by joining a federal state'.<sup>146</sup> Again, the Court's arguments stray along the boundaries

<sup>139</sup> For a very insightful comparative analysis, see Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51 *Harvard Intl LJ* 1.

<sup>140</sup> *Medellin v Texas* 522 US 491 (2008).

<sup>141</sup> Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR-I 6351.

<sup>142</sup> Sentenza no 238/2014 della Corte Costituzionale, 22 October 2014. An English translation of this judgment is available at <[http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S238\\_2013\\_en.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf)> accessed 17 November 2015. See on this case Stefan Raffaeiner, 'Italien im Dilemma zwischen Verfassungs- und Völkerrechtstreue' (*Verfassungsblog*, 25 October 2014) <<http://www.verfassungsblog.de/italien-im-dilemma-zwischen-verfassungs-und-voelkerrechtstreue-2/#.VHaph8mPcvs>> accessed 27 November 2014. The decision of the International Court of Justice in question is *Jurisdictional Immunities of the State (Germany/Italy, Greece intervening)* (Merits) [2012] ICJ Rep 99.

<sup>143</sup> *Lisbon Treaty* case (n 130) para 128.

<sup>144</sup> *ibid* para 220.

<sup>145</sup> *ibid* para 226.

<sup>146</sup> *ibid* para 228.

of domestic constitutional and international law. The Court remarked that an EU constitutional order would remain a derivative one whereas '[i]n contrast, sovereignty under international law and public law requires independence from an external will precisely for its constitutional foundations'.<sup>147</sup> It would not be tolerable that no 'sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions'.<sup>148</sup>

Taken together, the Court has developed out of sparse constitutional wording an elaborate set of limits for international and European integration. These limits resemble in some ways the FRS, in particular the right to political independence. What the Court is arguing for is essentially a right to keep a free hand over association with other states in the EU. This might require reconsidering previous treaty commitments at least in the sense that German state organs would not be mandated to go along with certain developments of EU power—echoing Kaufmann's insistence on the *clausula rebus sic stantibus* as the ultimate rule against which to measure state behaviour.

## 5 Conclusion: Fundamental rights of states in times of upheaval and systemic change

The case law of the Federal Constitutional Court is, of course, not a straightforward embrace of the doctrine of the FRS. However, it has been noted several times that this doctrine has always had an existence under varying names and with different functions. Accordingly, in analysing its current relevance it would be too short-sighted to look only for instances in which it is called by its original name. Somewhat unwittingly, the constitutionalist literature of the last ten to twenty years has helped to reintroduce argumentative patterns not wholly unrelated to the doctrine of the FRS. Yet it needs to be asked openly for whom these fundamental rights exist. A similar debate has developed over the equally contested notion of the international rule of law. Jeremy Waldron in particular has asked whether states should benefit from the rule of law in the way that individuals are protected by it at the domestic level.<sup>149</sup> To a certain extent, this is a parallel discussion to the one concerning the FRS. Waldron was sceptical and reaffirmed what Georges Scelle, Hans Kelsen and others had already found earlier: that states were only trustees for individuals, fulfilling public functions.<sup>150</sup> From this, he extrapolated that states are not in need of protection through the international rule of law.<sup>151</sup> Whereas this may ignore that power relationships among states may very well call

<sup>147</sup> *ibid* para 231.

<sup>148</sup> *ibid* para 249.

<sup>149</sup> Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 *EJIL* 315.

<sup>150</sup> For a related and recent argument, see Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *AJIL* 295.

<sup>151</sup> Waldron (n 149) 327, 341ff.

for some form of rule of law requirements at the interstate level,<sup>152</sup> his note of caution can also be transferred to the discussion on the ongoing value of the category of the FRS.

As it is so often the case, the history of international law does not lend itself to fast and easy conclusions about causalities. Yet, it appears to the present author that the doctrine of the FRS has enjoyed its heyday of popularity in times of upheaval and change. When the foundations of the international legal order—or the role of the state in which international lawyers worked—were shifting and unclear, recourse to the doctrine of the FRS intensified. It would be problematic to propose clear-cut motivations for these moves and to pretend that the development of a complex and varied academic discourse can be reduced to an epiphenomenon of geopolitical change and soul searching about the position of a given state in the international community. Yet, international lawyers are also products of their time and work in specific political and social conditions. Accordingly, it can be asked whether the popularity of the doctrine of the FRS in late nineteenth- and early twentieth-century German academia had something to do with a wish to fortify Germany's ambitions as a latecomer in the concert of European powers. The currency of the doctrine of the FRS after the First World War seems to be related to the widely perceived injustice of the Versailles peace treaty, later blending into early attempts to define a National Socialist international law. The return of the doctrine under the guise of the natural law renaissance after the Second World War goes to show, if anything, the malleability of the doctrine, which was then resorted to in order to find a language for thinking about a new international legal order after the Second World War. In more recent times, it appears as if the insecurities associated with the growing impact of international and EU law on the German constitutional system have paved the way for its unlikely comeback.

The development of international law is in constant flux. Phases of optimism, such as in the aftermath of the Cold War, blend into despair such as in 2003 over the US-led invasion of Iraq.<sup>153</sup> Again some ten years later, the prospects of international law may appear to be bleak, with the situations in Syria and Ukraine as well as the rise of 'Islamic State' seriously questioning the ability of international law to cope with current crises. Yet, at the same time another kind of international law seems to blossom. It is the international law of the bureaucrat, the functionalist machinery of international organisations<sup>154</sup> and, perhaps even more troubling, the informal groupings of states exercising their sweeping powers over weaker states and individuals alike.<sup>155</sup> It is in this

<sup>152</sup> For an argument in favour of an interstate conception of the rule of law, see Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 53ff.

<sup>153</sup> Georg Nolte, 'Persisting and Developing Between Hope and Threat: International Law During the Past Two Decades and Beyond' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law*, vol 3 (Hart Publishing 2010) 75–78.

<sup>154</sup> See Jan Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations' (2014) 25 EJIL 645.

<sup>155</sup> For a recent attempt to make sense of this development, see Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25 EJIL 733.

setting that calls for the democratic legitimacy of international law gain currency. The reaction of the German Federal Constitutional Court also seems to fit into this picture. Here, a return to the category of FRS seems to enjoy an intuitive plausibility, helping to nourish democracy against faceless machineries of bureaucracy and managerialism. Yet, recourse to the ideology behind the fundamental rights of states can, arguably, not be limited to these fields. Rather, it is likely to pervade the whole of international law and risks undermining its often challenged normativity. If this new emanation of the doctrine of the FRS is not to be regarded as a *Sonderrecht* (special law) for Western and liberal democracies, it would also need to be attuned to the sensibilities of other states, which might utilise this doctrine for purposes which would probably decouple the doctrine again from notions of democratic self-government. If that is in the interest of those now putting a premium on the democratic legitimacy of international law is an open question.

# The Concept of the State and its Right of Existence

*Jure Vidmar\**

## Abstract

The right of a state to existence has two aspects: the putative right of an entity to become a state and the right of an existing state not to be extinguished, or territorially diminished. In a world completely divided between states, the two aspects of the right of a state to existence lead to conflicts. Neither aspect of a right is absolute, however. The article considers the various conceptualisations of the state in international law and makes an argument against the anthropomorphic definitions of the state. Statehood is the legal status of a territory under customary international law, and implies the existence of certain rights and duties inherent in this status. A state can also exist as a legal fiction and exercise its rights on the international plane even if it cannot exercise its sovereign powers in its (entire) territory. This is due to the fact that statehood is a concept grounded in law rather than fact.

## Keywords

Right to become a State, Right not to be Extinguished, Concept of the State, Statehood as Legal Fiction

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## 1 Introduction

In the *Reparations* Advisory Opinion, the International Court of Justice (ICJ) established that different types of international legal persons have differing levels of rights and duties.<sup>1</sup> While the Court confirmed that legal personality is also inherent to international organisations, this ‘does not (...) imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane.’<sup>2</sup> It is the level of the rights and duties which distinguishes states from other actors in the international society. Statehood, therefore, ought to imply a certain level of rights and duties inherent only in states.

The existence of a state is closely associated with its territorial and social component, expressed in the well known article 1 of the Montevideo Convention on Rights and

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<sup>1</sup> *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179.

<sup>2</sup> *ibid.*

Duties of States: 'a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.'<sup>3</sup> In his seminal work *Allgemeine Staatslehre*, which preceded the Montevideo Convention, Georg Jellinek conceptualised the state along similar lines: a territory (*Land*), a population (*Volk*), and a sovereign (*Herrscher*).<sup>4</sup> Jellinek presumes that once these criteria have been met, a state exists virtually as a natural person.<sup>5</sup> This is a reflection of what Stephen Neff calls the nineteenth-century positivist perception of 'the real personality of the state'.<sup>6</sup>

Statehood rests on the notion of effectiveness of a government over a certain territory and the population inhabiting that territory. As such, the 'Jellinek/Montevideo understanding' reflects Max Weber's sociological definition of a state as a 'human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory'.<sup>7</sup> As the territorial and social aspects are at the core of the existence of the state, it is not surprising that the principle of territorial integrity of states has developed into one of the core principles of international law.<sup>8</sup> The principle interferes with states' right of existence in two perplexing ways: it protects an existing state from being either extinguished or territorially diminished and, for the same reason, also stands in the way when entities claim their putative right to come into existence as states.

This article seeks to explain the normative structure of the right of a state to exist. For this purpose, the various conceptualisations of the state need to be considered first. Subsequently, the article explains that states have the right not to be extinguished or territorially diminished, but that this right is not absolute. Finally, the article explains that there is no right in international law to come into existence as a state. Although the existence of a state is marked by its territorial imperative<sup>9</sup>—or perhaps because of that—states can sometimes exist, either wholly or partly, as legal fictions.

## 2 Conceptualising the state and its rights

Despite the general attachment of the law of statehood to the Montevideo criteria, it is commonly acknowledged that an entity can become a state without meeting these

<sup>3</sup> Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention) art 1.

<sup>4</sup> Georg Jellinek, *Allgemeine Staatslehre* (2nd edn, O Häring 1905) 137.

<sup>5</sup> See Helmut Philipp Aust, 'Fundamental Rights of States: Constitutional Law in Disguise?' (2015) 4 CJICL 521.

<sup>6</sup> See Stephan C Neff, 'The Dormancy, Rise and Decline of Fundamental Liberties of States' (2015) 4 CJICL 482, 490.

<sup>7</sup> Max Weber, 'Politics as a Vocation' (lecture originally delivered 28 January 1919) 1 <<http://anthropos-lab.net/wp/wp-content/uploads/2011/12/Weber-Politics-as-a-Vocation.pdf>> accessed 25 November 2015 (emphasis in original).

<sup>8</sup> See, eg, Malcolm N Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8 EJIL 478, 483.

<sup>9</sup> Dino Kritsiotis, 'Public International Law and Its Territorial Imperative' (2009) 30 Michigan J Intl L 547.

criteria, and another entity may meet them, yet may not become a state.<sup>10</sup> Before proceeding with the right of a state to exist, it needs to be explained what the state is, and how the existence of a state is determined in international law.

## 2.1 The (ir)relevance of the statehood criteria

Hersch Lauterpacht argued that the adherents of the real personality theory presuppose that fulfilment of the Montevideo criteria is 'self-evident'.<sup>11</sup> We are then forced to accept the rather awkward proposition that 'a State exists in international law as soon as it exists'.<sup>12</sup> In response to this circularity, Lauterpacht proposed that recognition is constitutive but other states have a duty to recognise once the statehood criteria have been met.<sup>13</sup> The problem of this proposition is that such a duty is not supported by international practice.<sup>14</sup> Furthermore, the 'recognition ambiguity' would only be solved if it could be determined objectively when exactly the Montevideo criteria have been met, but this is impossible to determine objectively. Different states could interpret the same factual situation differently, some recognising and others withholding recognition. As a consequence, the objective status of that entity would remain contested.

Lauterpacht's proposition is nevertheless important as it diagnoses the core problem of the Montevideo criteria: they assume that a state exists as soon as it exists.<sup>15</sup> After Lauterpacht, writers developed the concept of the so-called additional statehood criteria. If the Montevideo criteria are based on effectiveness over a territory and its population, the additional criteria are legality-based.

Discussing the legal status of Southern Rhodesia where the Montevideo criteria had been met, James Crawford argues that three interpretations are possible: Southern Rhodesia was a state; Southern Rhodesia was not a state because recognition was collectively withheld; or Southern Rhodesia was not a state because 'the principle of self-determination in this situation prevented an otherwise effective entity from being regarded as a State'.<sup>16</sup> Crawford then argues that in light of international practice, the first possibility needs to be rejected.<sup>17</sup> The second possibility is also rejected with the explanation that recognition is declaratory and therefore Crawford accepts the third option: although the effectiveness-based Montevideo criteria were met, Southern Rhodesia was not a state because it would have emerged in breach of the right of self-

<sup>10</sup> For further discussion on the issue of recognition in international law, see Martin Dixon, Robert McCorquodale and Sarah Williams, *Cases and Materials on International Law* (5th edn, OUP 2011) 158.

<sup>11</sup> Hersch Lauterpacht, *Recognition in International Law* (CUP 2013) 41.

<sup>12</sup> *ibid.* 58.

<sup>13</sup> *ibid.* 66.

<sup>14</sup> See Hans Kelsen, *General Theory of Law and State* (Russell & Russell 1961) 223; Krystyna Marek, *Identity and Continuity of States in Public International Law* (2nd edn, Droz 1968) 137; Stefan Talmon, 'The Constitutive versus the Declaratory Doctrine of Recognition: *Tertium Non Datur?*' (2004) 75 BYBIL 101, 103–04.

<sup>15</sup> Aust (n 5).

<sup>16</sup> See James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 129.

<sup>17</sup> *ibid.*

determination.<sup>18</sup> Crawford thus concludes that, in addition to Montevideo, an additional set of legality-based statehood criteria is also applicable.

This reasoning presupposes that Southern Rhodesia would have been a state had the Montevideo criteria been the only applicable statehood criteria. Since it was not generally considered to be a state, this means that a set of additional statehood criteria must exist beyond Montevideo. This argument is problematic and its logic works *only* if it is accepted that states emerge *automatically* upon meeting the statehood criteria, albeit the statehood criteria are here extended with a set of non-Montevideo ones. Recent practice, however, shows that an entity can meet both sets of criteria and is nevertheless not a state. The concept of the additional statehood criteria is influenced by the zeitgeist of Southern Rhodesia, the South African Homelands, and Northern Cyprus,<sup>19</sup> but it cannot explain why, for example, Somaliland is not a state, nor can it clarify the legal status of Kosovo. Statehood is therefore not a simple question of meeting or not meeting the statehood criteria. What is, in fact, statehood as a concept?

## 2.2 Statehood as customary legal status

Historically, many legal theorists analogised statehood with objects and even people.<sup>20</sup> As noted by Jean d'Aspremont, it is common for international lawyers to equate the attributes of states with those of humans.<sup>21</sup> Aust adds that it was especially significant of German positivism to see states as natural persons of international law.<sup>22</sup> From this line of thought also comes the understanding that states are 'born' as natural persons.<sup>23</sup> Arguably, international law merely issues a birth certificate to 'naturally born states' via recognition.<sup>24</sup> In municipal law, the existence of a natural person does not depend on whether or not a birth certificate was issued. The same ought to hold true in international law with regard to states.<sup>25</sup> Referring to John Westlake, Neff explains that even in positivist scholarship the natural personality theory was not unanimously accepted and the counterargument was that states are not themselves natural persons but rather 'associations of natural persons.'<sup>26</sup> Indeed, how exactly are states born the way children are born?

By analogy to municipal law, it may be possible to compare states to corporations rather than individuals: they are legal persons, not natural ones. Corporations also have

<sup>18</sup> *ibid* 130.

<sup>19</sup> See David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 151–58, building the concept of the additional statehood criteria exclusively on the examples of Southern Rhodesia, the Homelands, and Northern Cyprus.

<sup>20</sup> Jellinek (n 4) 17.

<sup>21</sup> See Jean d'Aspremont, 'The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law' (2015) 4 *CJICL* 501.

<sup>22</sup> See Aust (n 5).

<sup>23</sup> See Stefan Talmon, *Kollektive Nichtanerkennung illegaler Staaten* (Mohr Siebeck 2006) 222.

<sup>24</sup> *ibid* 218–20.

<sup>25</sup> *ibid*.

<sup>26</sup> Neff (n 6).

a visible physical component (eg, buildings), employees, management, and the capacity to conduct business with other corporations. While there exists a physical aspect of corporations, they are legal entities, not natural creatures. The same holds true for states; they are entities that exist in law and, in some borderline examples, in the decentralised system of international law, their legal status can be unclear.

As states are not naturally born creatures but international legal entities, it needs to be asked where states are grounded in international law. If one is not prepared to accept the natural or even metaphysical theories of statehood, this status needs to be grounded in sources of international law, as enumerated in article 38(1) of the ICJ Statute. Sometimes, states are created by international treaties, Austria being one example.<sup>27</sup> In other examples, the existence of a state is accepted by other states in a less explicit way, but in practice states clearly indicate that they are accepting a certain entity as a separate state. The approach is evidently the same as that on the formation of rules of customary international law, which requires a uniform—although not universal—state practice and *opinio juris*.<sup>28</sup> Statehood is thus quite simply customary status under international law. It is not the statehood criteria which are customary, but statehood itself.

Grounding statehood in customary international law also explains the concept and purpose of recognition. In contemporary scholarship, recognition is seen as a declaratory legal act and is supposed to have no constitutive effects.<sup>29</sup> This position is somewhat dogmatic and not entirely in line with state practice. It is true that the constitutive theory is inadequate, as it does not answer how many and whose recognitions are necessary for an entity to become a state.<sup>30</sup> If recognition were constitutive, an entity could be a state for some states but not for others. However, just because the constitutive theory has its flaws, this does not mean that recognition must always be declaratory.

Where independence is declared unilaterally, a state could be created through widespread recognition. As Crawford acknowledges, collective recognition could have the effects of a collective state creation.<sup>31</sup> In the *Quebec* case, the Supreme Court of Canada made the constitutive possibility even more prominent:

The ultimate success of (...) a [unilateral] secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.<sup>32</sup>

<sup>27</sup> See, eg, State Treaty for the Re-establishment of an Independent and Democratic Austria, Official Gazette of the Republic of Austria (30 July 1955), especially art 1 <[https://www.ris.bka.gv.at/Dokumente/BgblPdf/1955\\_152\\_0/1955\\_152\\_0.pdf](https://www.ris.bka.gv.at/Dokumente/BgblPdf/1955_152_0/1955_152_0.pdf)> accessed 25 November 2015.

<sup>28</sup> See, eg, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, 99–100.

<sup>29</sup> See Dixon, McCorquodale and Williams (n 10) 157–63.

<sup>30</sup> See, generally, James L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Clarendon Press 1936) 138.

<sup>31</sup> For further discussion on the creation of states, see Crawford (n 16) ch 12.

<sup>32</sup> *Reference re Secession of Quebec* [1998] 2 SCR 217, [155].

Taking the recent example of Kosovo, one could question whether its recognition indeed was merely declaratory. Or is it rather that Kosovo falls within the meaning of the 'constitutive' paragraph 155 of the *Quebec* case? Where an attempt at secession is unilateral, widespread recognition *can* have constitutive effects. Notably, Kosovo is often described as a *sui generis* situation.<sup>33</sup> Describing a situation with the *sui generis* label merely acknowledges that it does not fit into the existing theories. However, a valid theory needs to withstand scrutiny in difficult situations. Kosovo thus points to the inadequacy of the declaratory theory.

Applying the constitutive theory, one faces an old problem. Using once again Kosovo as an example, is 110 recognitions enough for it to be a state? Is it enough to be recognised by some influential states, such as the United States, the United Kingdom, France, and Germany; but not by other states, such as China, Russia, Spain, South Africa; and, in general, by very few Latin American, Asian and African states?<sup>34</sup> In the end, Kosovo's legal status cannot be explained by the Montevideo criteria and recognition theories, declaratory or constitutive. It is rather that recognition can be seen as an indication of state practice and *opinio juris* in support of an entity's status of statehood under customary international law.

The making of international customary law requires state practice and *opinio juris* that are *sufficiently* uniform, but do not need to be entirely universal.<sup>35</sup> Recognition that is sufficiently uniform can be indicative of the status of statehood under customary international law. Even those writers who defend the declaratory theory of recognition indeed admit that universal or *near* universal recognition could have the effects of collective state creation.<sup>36</sup> This is, in fact, uniform state practice and *opinio juris*. Recognition is, however, only one mode of expression of state practice and *opinio juris*. Other examples exist where states have refused to recognise but nevertheless treated an entity as a state through their practice.<sup>37</sup>

### 3 Do states have a right not to be extinguished?

Thus far, this article has taken a stance against the anthropomorphic view of statehood. Statehood is the customary international legal status of a certain territory. As we are dealing with legal status rather than physical fact, in some borderline examples, statehood can be ambiguous and impossible to determine objectively. In the *Nuclear Weapons*

<sup>33</sup> See UNSC Verbatim Record (18 February 2008) UN Doc S/PV.5839, 14.

<sup>34</sup> See 'Who Recognized Kosova as an Independent State' <<http://www.kosovothankyou.com>> accessed 25 November 2015.

<sup>35</sup> See *Nicaragua v United States of America* (n 28) 99.

<sup>36</sup> See, eg, Crawford (n 16) ch 12.

<sup>37</sup> A good example is Macedonia which remained for a period of time near-universally unrecognised due to its dispute with Greece over the name 'Macedonia', but was nevertheless treated as a state. For a thorough analysis, see generally Matthew C R Craven, 'What's in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood' (1995) 16 Australian YB Intl L 199.

Advisory Opinion, the ICJ established that there existed ‘the fundamental right of every State to survival’,<sup>38</sup> but linked the notion of survival to the ‘right to resort to self-defence, in accordance with Article 51 of the Charter.’<sup>39</sup> Self-defence is conceptualised as an inherent right where a state is presented with an armed attack.<sup>40</sup> Does a state, however, have a right to survival even outside of the self-defence context and without there being an armed attack? Nowadays, the surface of the earth is entirely divided between states.<sup>41</sup> There are only a few exceptions (eg, Antarctica) where a territory does not belong to a certain state. As a consequence, if a state emerges, it can only emerge at the expense of another state’s territory.<sup>42</sup> Claims for statehood therefore clash with an existing state’s claim for territorial integrity.

### 3.1 The principle of territorial integrity

The principle of territorial integrity is elaborated in the Declaration on Principles of International Law:

Nothing in the foregoing paragraphs [concerning the right of self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.<sup>43</sup>

This elaboration uses neutral wording. Independence is not *authorised* or *encouraged*, yet it is not illegal or prohibited. In the process of decolonisation, the understanding was that territorial integrity could not be claimed with regard to colonial possessions but only within the metropolitan territory. Decolonisation thus granted to colonies the right to become states, but statehood was not achieved at the expense of the territories of the *existing* states. For example, when British India was decolonised, this did not happen at the expense of the territory or the overall existence of the United Kingdom. On the other hand, Scotland could only become independent at the expense of the existing territorial integrity of the United Kingdom.<sup>44</sup> In the *Quebec* case, the Supreme Court of Canada

<sup>38</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 263.

<sup>39</sup> *ibid.*

<sup>40</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter) art 51.

<sup>41</sup> Anne Peters, ‘Statehood after 1989: “Effectivités” between Legality and Virtuality’ in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (Hart Publishing 2012) vol 3, 171, 179.

<sup>42</sup> *ibid.*

<sup>43</sup> UNGA Res 25/2625 (24 October 1970) UN Doc A/RES/25/2625, para 1.

<sup>44</sup> See, generally, Agreement between the United Kingdom and the Scottish Government on a Referendum on Independence for Scotland (Edinburgh, 15 October 2012) <<http://www.gov.scot/Resource/0040/00404789.pdf>> accessed 25 November 2015.

strongly reaffirmed the difference in the scope of the right of self-determination in non-colonial as opposed to colonial situations:

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through *internal* self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to *external* self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.<sup>45</sup>

International law does not grant a right to independence or statehood. The Supreme Court of Canada left open the possibility of the so-called doctrine of remedial secession, but even that was phrased carefully and as an obiter dictum. At the same time, secession from an existing state is not explicitly prohibited in the sources of international law. Secession is an internationally neutral act.<sup>46</sup> A territorial entity is not precluded from becoming a state, albeit unilaterally; but there is no entitlement to statehood, even if the Montevideo criteria have been met. Since there is no positive entitlement, international law puts the burden of changing the territorial *status quo* on the independence-seeking entity. This makes success of unilaterally declared independence very unlikely and, in this sense, the rules of international law favour the existence of states within their present boundaries. The rules of international law, however, do not preclude the emergence of a new state within the territory of an existing one.

<sup>45</sup> *Reference re Secession of Quebec* (n 32) [126] (emphasis in original).

<sup>46</sup> The argument in favour of international legal neutrality was advanced in a number of pleadings before the ICJ in the *Kosovo Advisory Opinion: Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403. Consider the following illustrative arguments: 'A declaration of independence (...) constitutes a *purely internal legal act* and not an international legal act': ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (public sitting held 4 December 2009) CR 2009/28, 27 (argument of Jean d'Aspremont on behalf of Burundi, emphasis in original); 'A declaration [of independence] issued by persons within a State is a collection of words writ in water. (...) What matters is what is done subsequently, especially the reaction of the international community': ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (public sitting held Thursday 10 December 2009) CR 2009/32, 47 (argument of James Crawford on behalf of the United Kingdom); 'State practice confirms that the adoption of a declaration of independence, or similar legal acts, frequently occurs during the creation of a new State. As such, this very act—the act of declaring independence—is legally neutral': ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (public sitting held Monday 7 December 2009) CR 2009/29, 52 (argument of Andreja Metelko-Zgombić on behalf of Croatia). A different argument was, however, made on behalf of the United States, for example, where it was acknowledged that declarations of independence do not entirely fall outside of the purview of international law. The United States' representative stated, 'We do not deny that international law may regulate particular declarations of independence, if they are conjoined with illegal uses of force or violate other preemptory norms, such as the prohibition against apartheid': ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (public sitting held Tuesday 8 December 2009) CR 2009/30, 30 (argument of Harold Hongju Koh on behalf of the United States).

### 3.2 State practice on unilateral extinguishing or diminishing of states

In international practice, states have either extinguished themselves consensually (eg, Czechoslovakia)<sup>47</sup> or agreed to the secession of their constitutive units (eg, Eritrea, South Sudan).<sup>48</sup> As Crawford argues, secession may be seen as a form of a waiver,<sup>49</sup> that is, a state may waive its claim to territorial integrity or even decide in an internal political process that it no longer wants to exist. In the anthropomorphic language, international law allows a state to commit suicide or amputate its body parts. The legal situation is more complicated where no internal consensus exists on 'state suicide' or 'amputation'. The default setting of international law is *status quo*, but this can be changed, as the *Quebec* case suggests, through international interference.<sup>50</sup>

Widespread recognition of a unilateral attempt at secession can have state-creating effects, although it is not possible to pinpoint precisely how many recognitions would suffice. The episode with Bangladesh (East Pakistan) between 1971 and 1974 reveals ambiguity similar to that of present-day Kosovo, but the Bangladesh statehood ambiguity is often forgotten, as it was resolved within a relatively short period of time. Upon declaring independence in 1971, Bangladesh received recognition that was relatively widespread, but not universal.<sup>51</sup> In 1974, Pakistan recognised Bangladesh and only then did it become universally recognised and a member of the UN.<sup>52</sup> Scholarly commentators frequently explain the episode by stating that in those three years Bangladesh's territorial status had to be clarified. We are now reading history backwards and rationalising the events in the critical period of three years with the final outcome in mind. If we were asked in 1972, the status of Bangladesh would be *objectively* ambiguous, as is the present status of Kosovo. Furthermore, over a period of time the legal status can also be 'clarified' in the other direction, as was in the instances of Katanga and Biafra.<sup>53</sup> Such an ambiguity arises relatively rarely, where an entity is claiming independence unilaterally and receives a notable number of recognitions. While the situation lasts, the entity's legal status cannot be determined objectively; for some states it is a state, for others it is not, and the dilemma is similar to that of a glass which may be perceived as being either half empty or half full.

The dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) is an even better example of reading history backwards, rationalising political developments with legal concepts, and bringing states into existence through administrative decisions. The crucial element in the SFRY's disintegration was the finding of the Badinter

<sup>47</sup> See Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 190.

<sup>48</sup> *ibid* 72–77.

<sup>49</sup> Crawford (n 16) 158.

<sup>50</sup> *Reference re Secession of Quebec* (n 32).

<sup>51</sup> See Crawford (n 16) 141.

<sup>52</sup> *ibid* 393.

<sup>53</sup> *ibid* 404–06.

Commission on 29 November 1991 that Yugoslavia was in the process of dissolution.<sup>54</sup> The Commission recalled that several constitutive units had declared independence and that the federation was no longer functioning.<sup>55</sup> In so doing, the Badinter Commission saved the secession-seeking republics from the ‘curse’ of unilateral secession. By deciding that the SFRY was in the process of dissolution, the Badinter Commission presumed that this state no longer had the right to exist, that its counterclaim to territorial integrity was inapplicable, and that, in the absence of such a claim, its constitutive republics became states. Most unilateral claims for independence are unsuccessful because the parent state does not agree. The trick of the Badinter Commission was that it removed the parent state and its rights from the equation. In the anthropomorphic language, the SFRY was euthanised by the Badinter Commission.

Subsequently, the Badinter Commission needed to identify for state succession purposes the precise dates when new states were created. In its opinion, Croatia and Slovenia became states on 15 October 1991 (when the European Council-imposed ban on secession activities had expired),<sup>56</sup> Macedonia on 17 November 1991 (when the new constitution was promulgated),<sup>57</sup> Bosnia-Herzegovina on 6 March 1992 (when the independence referendum results were declared),<sup>58</sup> and the Federal Republic of Yugoslavia (FRY) on 27 April 1992 (when the new constitution was promulgated).<sup>59</sup> This is when the former Yugoslav republics started to exist as states in law, but in all these situations the critical date to start to exist as a state was arbitrary and without much support in factual developments.

As noted earlier, the real critical date was in fact 29 November 1991 when the Badinter Commission reclassified the chain of unilateral attempts at secession into a dissolution. As statements of political leaders demonstrate, it was not until December 1991 when Croats and Slovenes became assured they would get independence.<sup>60</sup> Yet, according to a subsequent Opinion of the Badinter Commission, Croatia and Slovenia were allegedly states already on 15 October 1991, when they did not function more or less as states as on 14 October 1991.<sup>61</sup> Bosnia-Herzegovina was an even more complicated example as its central government did not exercise effective control over large parts of the territory and nevertheless became a state. Finally, the FRY did not even claim that it was a new state and it never declared independence. Instead, it claimed continuity with the SFRY’s international personality.<sup>62</sup> It was nevertheless regarded as a newly created state.

<sup>54</sup> Badinter Commission, Opinion No 1 (29 November 1991) reproduced in (1993) 92 ILR 233, para 3.

<sup>55</sup> *ibid* para 2.

<sup>56</sup> Badinter Commission, Opinion No 11 (16 July 1993) reproduced in (1995) 96 ILR 719, para 4.

<sup>57</sup> *ibid* para 5.

<sup>58</sup> *ibid* para 6.

<sup>59</sup> *ibid* para 7.

<sup>60</sup> Richard Caplan, *Europe and Recognition of New States in Yugoslavia* (CUP 2005) 105–06.

<sup>61</sup> Badinter Commission, Opinion No 11 (n 56).

<sup>62</sup> See Roland Rich, ‘Recognition of States: The Collapse of Yugoslavia and the Soviet Union’ (1993) 4 EJIL 36, 53.

It is further important that new states emerged over a period of time and not in one particular moment. The dissolution of the SFRY, and extinguishing of its international personality, was a process. On 4 July 1992, the Badinter Commission made the final observation: '[T]he process of dissolution of the SFRY (...) is now complete.'<sup>63</sup> This again proves that the process of state-creation and state-extinguishing is a political process. International law does not give states an absolute right not to be diminished or even extinguished, but there is a strong presumption in favour of the territorial *status quo*. It should also be noted that the Opinions of the Badinter Commission were not legally binding. It was rather set up as a body which advised European Council member states on the legal issues associated with the developments in the SFRY. In the end, its Opinions were widely followed in the practice of states and UN organs. The Badinter Commission was thus not a body which would have a direct legal authority to act, but rather a body which paved the path for new state practice. The episode with the SFRY thus again affirms the customary nature of the statehood status.

### 3.3 The right to territorial integrity and legal fiction

It has been established that the principle of territorial integrity does not generate an absolute right of states not to be diminished or extinguished. Under some circumstances international law will nevertheless establish a legal fiction that a state still exists in its former boundaries, even if the effective situation suggests otherwise. What are these circumstances and how are they different from the general doctrine discussed thus far?

The ICJ has been heavily criticised for taking a rather narrow approach in the *Kosovo* Advisory Opinion.<sup>64</sup> The declaration of independence was essentially seen as merely a document, while the effects of this document were not thoroughly considered. Despite such a narrow approach, the ICJ nevertheless made an important pronouncement on the illegality of a declaration of independence:

[T]he illegality attached to [some other] declarations of independence (...) stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).<sup>65</sup>

The ICJ thus affirmed that under some circumstances international law is not neutral with regard to secession. A declaration may be illegal where it tries to consolidate a situation created in violation of a *jus cogens* norm. The doctrine conceptually overlaps with the concept of the additional statehood criteria and is based on the practice

<sup>63</sup> Badinter Commission, Opinion No 8 (4 July 1992) reproduced in (1993) 92 ILR 199, para 4.

<sup>64</sup> For a discussion on the ICJ's approach to the question posed to it, see generally Hurst Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?' (2011) 24 LJIL 155.

<sup>65</sup> *Kosovo* Advisory Opinion (n 46) 437.

developed with regard to Turkey's forceful creation of Northern Cyprus,<sup>66</sup> declarations of independence of Southern Rhodesia,<sup>67</sup> four South African Homelands,<sup>68</sup> and South Africa's illegal presence in Namibia.<sup>69</sup> An earlier example includes the Stimson doctrine of non-recognition after Japan's invasion of Manchuria and the creation of Manchukuo.<sup>70</sup> The territorial illegality in these circumstances was not created by the unilateral character of declarations of independence (ie without approval of parent states), but by the fact that these entities intended to become states as a result of illegal use of force or in pursuance of apartheid.

Although a number of Security Council resolutions were adopted to condemn the illegal pursuits of independence, only Resolution 277 on Southern Rhodesia was adopted under chapter VII of the UN Charter. In addition, condemnation came from a number of General Assembly resolutions which are not legally binding *per se*, but can be indicative of state practice. The duty of non-recognition did not draw normative force from the Security Council's chapter VII powers; it is rather that states believed such a duty applied under general international law. The duty to withhold recognition has been confirmed by articles 40 and 41 of International Law Commission Articles on State Responsibility.<sup>71</sup> Article 41(2) defines the obligation to withhold recognition as an obligation *erga omnes* and provides that '[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of (...) [*jus cogens*], nor render aid or assistance in maintaining that situation.'

Applying the theory of statehood and state existence to the contemporary situation in Crimea, states are under the obligation to withhold recognition of the shift of territorial sovereignty. Crimea may be incorporated into Russia in fact, but it is not in law. Law and fact, however, do not always overlap. States and their boundaries can thus exist as legal fiction. For more than two decades, Somalia has existed virtually as a legal fiction, while Somaliland has functioned like a state, but has not acquired this status in law.<sup>72</sup> Ukraine's sovereignty over Crimea is also legal fiction, as is Cyprus as a unitary state. Indeed, Cyprus even entered the European Union as a whole and, although the factual

<sup>66</sup> See UNSC Res 541 (18 November 1983) UN Doc S/RES/541.

<sup>67</sup> See UNGA Res 1747 (XVI) (28 June 1962); UNSC Res 202 (6 May 1965) UN Doc S/RES/202; UNGA Res 2022 (XX) (5 November 1965); UNGA Res 2024 (XX) (11 November 1965); UNSC Res 216 (12 November 1965) UN Doc S/RES/216; UNSC Res 217 (20 November 1965) UN Doc S/RES/217; UNSC Res 277 (18 March 1970) UN Doc S/RES/277.

<sup>68</sup> See UNGA Res 2671F (XXV) (8 December 1970); UNGA Res 2775 (29 November 1971) UN Doc A/RES/2775; UNGA Res 31/6A (26 October 1976) UN Doc A/RES/31/6; UNSC Res 402 (22 December 1976) UN Doc S/RES/402; UNSC Res 407 (25 May 1977) UN Doc S/RES/407; UNGA Res 32/105 N (14 December 1977) UN Doc A/RES/32/105; UNGA Res 34/93 G (12 December 1979) UN Doc A/RES/34/93; UNGA Res 37/43 (3 December 1982) UN Doc A/RES/37/43; UNGA Res 37/69A (9 December 1982) UN Doc A/RES/37/69.

<sup>69</sup> See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16.

<sup>70</sup> See Crawford (n 16) 132.

<sup>71</sup> *Responsibility of States for Internationally Wrongful Acts*, UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83, arts 40, 41(2).

<sup>72</sup> See Vidmar (n 47) 41.

situation suggests otherwise, a legal fiction has been established that Cyprus as a whole is a single state.<sup>73</sup>

In order to protect a state's right to exist in its present borders and prevent an illegal shift of territorial sovereignty, international law can establish a legal fiction that the state in question still exists within its factually previous boundary arrangement. Shifting territorial sovereignty is illegal only where associated with a breach of a particularly fundamental norm of international law; most commonly this is associated with the concept of *jus cogens*. Where an attempt is unilateral, no illegality is committed, but foreign states are rarely willing to accept the emergence of a new state in such circumstances. While the right of a state to exist is not absolute, there is a right not to have statehood extinguished or territory dismembered by an outside use of force. In this sense, one should also read the relevance for the present context of the right to survival invoked in *Nuclear Weapons*. The right is subordinated to self-defence and thus forms a part of the law governing the use of force.<sup>74</sup> Where a state could be dismembered by an external armed attack, the right of survival serves as an absolute shield and even legal fiction can be established for this purpose. This is not the case where survival of a state is threatened by internal developments.

### 3.4 Withholding statehood or withholding the rights stemming from statehood?

When clarifying the effects of an illegal state creation for the entity's legal status, it is of central importance to consider the purpose of the collective withholding of recognition on legal grounds. Namely, the advocates of the additional statehood criteria argue that an illegally created effective entity is not a state. At the same time, the illegality underlying the additional statehood criteria triggers an obligation to withhold recognition under general international law.<sup>75</sup> If an illegally created effective entity is not a state and yet it is subject to collective withholding of recognition, the interpretation could follow that the purpose of non-recognition is preventing this entity from becoming a state. This interpretation is not easy to square with the prevailing view in contemporary international law of recognition being a declaratory, not a constitutive act.<sup>76</sup>

Advocates of the declaratory theory who adopt the concept of the additional set of legality-based statehood criteria argue that the purpose of collectively withholding recognition to illegally created entities is not that recognition could constitute statehood of such an entity but that recognition would merely affirm a legally non-existent situation. One such argument is well captured in the following paragraph:

<sup>73</sup> See European Union, 'Cyprus' (2016) <[http://europa.eu/about-eu/countries/member-countries/cyprus/index\\_en.htm](http://europa.eu/about-eu/countries/member-countries/cyprus/index_en.htm)> accessed 25 November 2015.

<sup>74</sup> See *Legality of the Threat or Use of Nuclear Weapons* (n 38).

<sup>75</sup> See *Responsibility of States for Internationally Wrongful Acts*, art 41(2).

<sup>76</sup> See David Harris and Sandesh Sivakumaran, *Cases and Materials on International Law* (8th edn, Sweet and Maxwell 2015) 126–40.

[T]he obligation of non-recognition has a declaratory character in the sense that States are considered to be under a legal obligation not to recognise a specific situation which is *already* legally non-existent. Thus, the obligation of withholding recognition is not the cause of the fact that an illegal act does not produce the intended results, that is, legal rights for the wrongdoer. Non-recognition merely declares or confirms that fact and the obligation not to grant recognition prevents the validation or ‘curing’ of the illegal act or the situation resulting from that act.<sup>77</sup>

Such an argument presupposes that a breach of certain fundamental norms of international law *automatically* results in this entity not being a state. The argument is paradoxical as this school of thought denies the automatic effects (ie state-creative) of the Montevideo criteria, yet presupposes the automatic effects (statehood-denying) of the additional statehood criteria.<sup>78</sup> In other words, an entity does not become a state automatically upon meeting the Montevideo criteria, but a violation of the additional statehood criteria automatically results in this entity not being a state.

Another problem of the explanation is, as Stefan Talmon argues, that the call for collective non-recognition of an illegally created effective entity implies only that such an entity could become a state through recognition and proponents of the declaratory theory do not adequately prove that this is not so.<sup>79</sup> Indeed, illegality being ‘cured’ through recognition is just a way of saying that recognition could create a state by taking a detour through an ambiguous term which is not a term of art in international law. It is simultaneously proposed that an illegal state creation triggers an obligation to withhold recognition, and that the underlying illegality *automatically* results in this entity not being a state. The territorial illegality ought to trigger an obligation to withhold recognition of an entity which is not a state in the first place. Why would that be necessary if recognition could not constitute a state? One then needs to accept either that recognition may constitute a state or that the illegally created effective entities are, in fact, states and non-recognition has no bearing on the legal status.

The view of treating illegally created effective entities as states and preserving the declaratory nature of recognition is very prominently advocated by Talmon, who argues that ‘[t]he collectively non-recognized States may be “illegal States”: [but] they are nevertheless still “States”’<sup>80</sup> and that ‘the additional criteria of legality proposed are not criteria for statehood but merely conditions for recognition, *viz* reasons for not recognizing *existing States*’.<sup>81</sup> This explanation thus introduces the concept of ‘illegal states’ which employs the word ‘states’ and thereby accepts that collectively non-recognised ‘illegal states’ are *prima facie* states. Since they are already states, no constitutive effects are ascribed to the act of recognition. In other words, non-recognition only interferes with the adjective ‘illegal’ and not with the noun ‘state’.

<sup>77</sup> Raič (n 19) 105 (emphasis in original).

<sup>78</sup> *ibid.*

<sup>79</sup> Talmon (n 14) 138.

<sup>80</sup> *ibid* 125.

<sup>81</sup> *ibid* 126 (emphasis in original).

The qualification with the adjective 'illegal', however, makes these states somewhat different from states which are not illegal. This is problematic because the concept suggests that a (non-recognised) 'illegal state' does not have all the rights stemming from statehood, ie it does not have all the attributes of statehood.<sup>82</sup> It is rather difficult to accept that there exist two types of states in international law, those with and those without the rights and duties stemming from statehood. Kelsen argues that '[t]he State is an international personality because it is a subject of international duties and rights.'<sup>83</sup> Furthermore, '[t]he rights of states under general international law are always the reflection of the duties imposed by general international law upon other states.'<sup>84</sup> As follows also from the *Reparations* Advisory Opinion, the concept of statehood implies the existence of certain rights and duties inherent only in statehood.<sup>85</sup> We cannot have a state with rights and duties of statehood withheld.<sup>86</sup>

The concept of 'illegal states' does not even solve the problem of ascribing constitutive effects to recognition via the obligation to withhold it. Indeed, unlike 'states', 'illegal states' in this perception do not have the full attributes of statehood. By holding that non-recognition *only* withholds 'the rights inherent in statehood', it is actually implied that recognition could endow an 'illegal state' with the full attributes of statehood. Constitutive effects of recognition are then admitted through the backdoor and the problem merely pushed to another level: it is not a state itself which could be constituted by recognition; 'only' the rights and duties of statehood could be constituted if recognition were not withheld.

The concept of 'illegal states' thus falls close to Oppenheim's understanding that a state emerges as a matter of fact, yet it does not acquire an international personality by its 'natural birth' but rather by recognition.<sup>87</sup> As Lauterpacht notes, such an explanation adopts the 'confusing distinction between (natural) statehood, which is independent of recognition, and membership of the international community (or full international personality), which alone is a source of rights and which is dependent on recognition.'<sup>88</sup> Lauterpacht continues:

<sup>82</sup> Talmon argues: 'The creation of a State cannot be undone by non-recognition alone, and so non-recognition cannot have *status-destroying* effect either. What can be done, however, is to withhold the rights inherent in statehood from a new State. To that extent, non-recognition has a negatory, ie a *status-denying*, effect' See Talmon (n 14) 180 (emphasis in original).

<sup>83</sup> Hans Kelsen, *Principles of International Law* (Rinehart 1952) 152.

<sup>84</sup> Hans Kelsen, 'The Draft Declaration on Rights and Duties of States: Critical Remarks' (1950) 44 AJIL 259, 264.

<sup>85</sup> See *Reparation for Injuries Suffered in the Service of the United Nations* (n 1).

<sup>86</sup> In a state-centric legal system, the full international personality is derived from statehood. This includes the ability to join certain international organisations where membership is open only to states, the protection of art 2(4) of the UN Charter, the exercise of the right of self-defence under art 51 of the Charter, the enjoyment of immunities, and participation in certain international treaty regimes open to states exclusively. It is not the purpose of this piece to cover generally the nature and extent of the rights of states.

<sup>87</sup> See Lassa Oppenheim, *International Law* (Longmans 1905) 264.

<sup>88</sup> Lauterpacht (n 11) 38.

The distinction seems to be of little value. There is, in law, no substance in the assertion that a community is a State unless we attach to the fact of statehood rights and competencies, within the internal or international sphere, which international law is ready to recognise. It seems irrelevant to predicate that a community exists as a State unless such existence is treated as implying legal consequences.<sup>89</sup>

The only plausible explanation of the purpose of the obligation to withhold recognition is thus that universal recognition of an illegally created effective entity would have state-creative effects. As explained earlier, it would provide for state practice and *opinio juris* that such an entity is a state. The obligation to withhold recognition therefore seeks to prevent the result that an illegally-created entity would become a state. When adjectives are attached to the noun 'state', the rights and duties stemming from statehood cannot depend on this adjective. They must be inherent in statehood itself. Statehood is a unitary legal concept and there cannot be varying degrees of it. The concept of 'illegal states' needs to be rejected, as it implies the existence of 'states' without the rights and duties stemming from statehood. However, as follows from the *Reparations* Advisory Opinion, it is precisely such rights and duties that make a state a state and thus different from other persons under international law.<sup>90</sup>

#### 4 The putative right to come into existence as a state

Thus far, it has been argued that statehood is a particular legal status of a territory and implies the existence of certain rights and duties inherent *only* in states. The right of states to exist is closely associated with the principle of territorial integrity and this right is not absolute in nature. While international law stands on the position of *status quo*, states *can* be territorially diminished and even extinguished. It is illegal to achieve this by an outside use of force, however. At this point, the article turns to the absence of a right to come into existence as a state. Such a (putative) right is usually associated with self-determination. It clashes, however, with the right of the existing states to continue in existence in their full territorial extent.

In his Separate Opinion in *Western Sahara*, Judge Dillard wrote that '[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people.'<sup>91</sup> This may sound like a reasonable proposition, but it needs to be properly qualified. Writing in 1956, Ivor Jennings no less famously pronounced that the right of self-determination looked like a very reasonable idea: let the people decide, yet the people cannot decide before someone decides who are the people.<sup>92</sup> Self-determination is a legal right, codified by human rights treaties, in the common article 1 of each of the International Convention of Civil and Political Rights and the International

<sup>89</sup> *ibid* 38–39.

<sup>90</sup> See *Reparation for Injuries Suffered in the Service of the United Nations* (n 1).

<sup>91</sup> *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 122 (Separate Opinion of Judge Dillard).

<sup>92</sup> Ivor Jennings, *The Approach to Self-Government* (CUP 1956) 55.

Convention on Economic, Social and Cultural Rights.<sup>93</sup> It also forms a part of customary international law,<sup>94</sup> but claims for self-determination are nevertheless often utopian and even emotional.

The language of democracy and democratic decision-making can be dangerous if presented as being creative of absolute entitlements, and not contextualised properly with the applicable norms of international law. In the context of Crimea, President Putin used the rhetoric of a champion of democracy and self-determination. The principle of self-determination has a long history of rhetorical utopia and misuse in *realpolitik*. Its two conceptual fathers, Woodrow Wilson and Vladimir Lenin, could not look more different, but they both proved that there is a great discrepancy between the utopian conceptualisations of self-determination and its realistic application.

As a theorist, Lenin wrote that people have the right to determine their future legal status democratically and even possessed the right to secession,<sup>95</sup> but in practice he vigorously defended the ceding of Belarussian and Ukrainian territories to Germany, and subsequently adopted the policy of systematic denial of self-determination to Soviet people.<sup>96</sup> Wilson wrote that the will of the people was the superior international norm, but he himself called for the invasion of Haiti.<sup>97</sup> His insistence on holding territorial referendums after the First World War proved to be no panacea; the referenda created false expectations and left many groups disillusioned.<sup>98</sup> Subsequently, the maxim of 'let the people decide' was grossly abused when it served as an excuse for territorial annexations by Nazi Germany and Fascist Italy.<sup>99</sup>

Self-determination has thus always been a concept that worked better rhetorically than practically. Crimea is not the first instance where a ballot was (mis)used to redraw boundaries. The repeating history of self-determination proves that international law simply cannot accommodate the will of the people as a superior, absolute principle that trumps all other principles. In the *Western Sahara* Advisory Opinion, the ICJ pronounced that 'the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'.<sup>100</sup> Such an expression is usually formalised through referenda on the future legal status of a territory. In the aftermath of the First World War, several referenda on the legal status of European territories took

<sup>93</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 1.

<sup>94</sup> Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 ICLQ 857, 858.

<sup>95</sup> Vladimir Ilich Lenin, *Questions of National Policy and Proletarian Internationalism* (Progress Publishers 1970) 135.

<sup>96</sup> See Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 18–19.

<sup>97</sup> See Michla Pomerance, 'The United States and Self-Determination: Perspectives on the Wilsonian Conception' (1976) 70 AJIL 1, 22.

<sup>98</sup> *ibid.*

<sup>99</sup> See Angelo Piero Sereni, 'The Status of Croatia under International Law' (1941) 35 American Pol Science Rev 1144. See also Angelo Piero Sereni, 'The Legal Status of Albania' (1941) 35 American Pol Science Rev 311.

<sup>100</sup> *Western Sahara* (n 91) 32.

place under the auspices of the League of Nations.<sup>101</sup> Referenda were also held in the process of decolonisation after the Second World War.<sup>102</sup> The post-Cold War period saw the emergence of a number of new states and independence referenda were held in the territories of the Soviet Union, the SFRY, Eritrea, East Timor, Montenegro and South Sudan.<sup>103</sup>

As independence is not an entitlement, holding a referendum is only a necessary—but not a sufficient—requirement for independence. Recent practice indeed saw a number of referenda in favour of independence which did not, however, result in creation of a new state.<sup>104</sup> Under international law, independence referendums are not binding on the central government. This needs to be qualified with the pronouncement of the Supreme Court of Canada in the *Quebec* case. Referring to the principle of democracy entrenched in Canadian constitutional law, the Court established that in a democratic state an expression of the will of the people in favour of independence cannot be ignored.<sup>105</sup> An obligation would be put on both sides to negotiate the future legal status of the independence-seeking territory.<sup>106</sup> The Supreme Court of Canada made it clear, however, that such negotiations would not necessarily lead to independence.<sup>107</sup>

It follows that referenda generally do not have direct or self-executing legal effects. At best, they can trigger negotiations but do not create a right to independence. The central government can nevertheless commit itself in advance to respecting the outcome of the vote, as in the referendum in Scotland. But in general, the principle of territorial integrity of states prevails over the principles of self-determination and democratic decision-making. It is not illegal for a territorial entity to emerge as a state, but no such right or entitlement exists in international law.

## 5 Conclusion

Statehood is a legal status of a certain territory grounded in customary international law. The status of statehood implies the existence of certain rights and duties inherent in this status. Among those is the right to exist as a state, which is reflected in the principle of territorial integrity. Nowadays, the world is completely divided between states and new states can only emerge at the expense of the territory of another state. Territorial entities thus do not have a right to emerge as states. At the same time, the right of the

<sup>101</sup> Henry Brady and Cynthia Kaplan, 'Eastern Europe and the Former Soviet Union' in David Butler and Austin Ranney (eds), *Referendums around the World: The Growing Use of Direct Democracy* (Macmillan 1994) 175.

<sup>102</sup> Russell A Miller, 'Self-Determination in International Law and the Demise of Democracy' (2003) 41 *Columbia J Transnatl L* 601, 612; Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (Nijhoff 1994) 91.

<sup>103</sup> Vidmar (n 47) 176–96.

<sup>104</sup> For a comprehensive overview, see Crawford (n 16) 403–15.

<sup>105</sup> *Reference re Secession of Quebec* (n 32) [87].

<sup>106</sup> *ibid* [88].

<sup>107</sup> *ibid* [91].

existing states to territorial integrity is not absolute. It would be illegal for a new state to emerge in the territory of another state as a result of an outside use of force (eg, the recent example of Crimea), but it is not illegal to seek independence unilaterally, without the consent of the parent state but also without an outside intervention. When this nevertheless happens, international law resorts to the use of legal fiction: effective territorial possession does not necessarily overlap with legal possession. The right of states to exist is strong enough that effective possession will not automatically shift the territorial status in law, but the right is not absolute and such a shift cannot be absolutely prevented.

# The Right to Non-intervention and Non-interference

Niki Aloupi\*

## Abstract

According to the common narrative, the right to non-intervention, concerning the state's territorial integrity, and the right to non-interference, concerning the matters which are not regulated by international law and in which the state has maintained its discretionary power, qualify together as one of the fundamental rights of states in the international legal order. This article examines the scope, meaning and legal implications of the non-intervention and non-interference principle and makes the argument that, despite its great importance as a rule of international law, its qualification as 'fundamental' adds nothing of substance to existing positive law. It is shown, on the one hand, that this right is not autonomous (as a liberty would be) since it is inevitably accompanied by a correlative duty of non-intervention and non-interference and, on the other, that the examined principle is entirely inherent in statehood. However, such inherence to statehood has no specific legal implications per se and does not establish an independent normative category which would allow one to distinguish between 'fundamental' rights or rights 'inherent to statehood' and the rest of states' 'ordinary' rights. Thus, in order to apprehend the normative status of the non-intervention/non-interference principle in current international law, the only important question is whether it constitutes a *jus cogens* norm. The international law and practice examined show that only the core of the principle entailing the prohibition of an intervention or an interference with threat or use of illegal force is of a *jus cogens* order, whereas an intervention or interference without use of force does not violate *jus cogens*.

## Keywords

Non-intervention, Non-interference, Rights of States, Fundamentality, Autonomy

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## 1 Introduction

The so-called right to non-intervention and non-interference— notions being here used interchangeably—is often considered to constitute a classic manifestation of the doctrine of the fundamental rights of states. According to this common narrative, the right to non-intervention and non-interference qualifies as one of the fundamental rights of states in the international legal order. Yet, as is argued in this article, a closer look at the non-intervention and non-interference principle reveals numerous grey

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areas concerning not only its exact scope and meaning, but, above all, its autonomous existence as a fundamental right.

It is submitted here that the autonomy of the right to non-intervention and non-interference is open to doubt for several reasons. In its first section, this paper argues that there seems to be no autonomy of such a right per se, and that in the current state of positive international law its qualification as ‘fundamental’, in Stephen C Neff’s terms, as opposed to ‘ordinary’, ‘add(s) nothing of substance to existing international law’.<sup>1</sup> Nonetheless—as will be shown in the second section—the right to non-intervention and non-interference remains a well-established principle of international law, imposing not only duties upon all states, but also corresponding rights. The scope of the respective duties and rights of non-intervention and non-interference are gaining increasing importance in light of the fact that the legality of intervention and interference by certain states in the affairs of others will depend precisely on the definition and meaning of the principles examined in the present article. Subsequently, in the second section, the exact content of both norms within contemporary positive international law will be examined. In its final section, the article will offer insights on the right’s normative authority, its legal implications, possible permissible derogations and exceptions and the consequences of its violation.

## **2 The autonomous and fundamental nature of the right to non-intervention and non-interference**

The autonomy of the right to non-intervention and non-interference is open to challenge given its articulation along with other existing states’ duties as well as states’ constitutive elements and attributes. Two main challenges can be raised against this claim of autonomy, both of which shall be examined in the present section. By describing a given right as ‘autonomous’, what is meant is the degree to which it enjoys self-standing existence as a rule: does the principle constitute an independent rule that produces general legal effects irrespective of other rules of international law? Importantly, the autonomous character of a principle does not necessarily prejudice its fundamental character, as a right can be autonomous while still being fundamental in nature.

### 2.1 First challenge to the autonomy of the right: Correlative duties and absence of a clearly identified liberty

First of all, the right to non-intervention and non-interference is ‘merely the counterpart of some other state’s duty’,<sup>2</sup> as is illustrated by the United Nations General Assembly’s

<sup>1</sup> Stephen C Neff, ‘The Dormancy, Rise and Decline of Fundamental Liberties of States’ (2015) 4 *CJICL* 482, 497.

<sup>2</sup> *ibid* 483.

Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.<sup>3</sup> This is of course, strictly speaking, the case for all rights: they are never entirely autonomous given their correlative international obligations. Only a state's liberty, in Hohfeld's terminology,<sup>4</sup> can be considered as being a truly autonomous rule producing legal effects independently from any other rule of international law. Certainly, if a state's internal affairs are defined as the sum of the matters regarding which a state is free to exercise its own unilateral will in a discretionary manner without outside interference, it would seem *prima facie* that non-interference constitutes a liberty (as opposed to a right). However, this is a false assumption. Indeed, such a liberty would exist only if it were possible to materially define and determine a 'reserved domain', that is, if there were a list of the matters that are by nature within the domestic jurisdiction of states.<sup>5</sup> As will be demonstrated below, and as has been affirmed by Neff,<sup>6</sup> such a list does not exist. As discussed further below, any matter, internal or international, subject to the state's exclusive or concurrent jurisdiction can be subtracted from the residual liberty of a state that assumes an international engagement regarding it. The European Union is a topical illustration of this point: within the Union, sovereign states have transferred numerous powers and competencies to a *sui generis* international organisation, including some that are traditionally considered as domestic matters—most notably the economic domain.

The point that the right to non-interference is neither autonomous nor a liberty as such is evident from the negative formulation of the right. Consequently, the fact remains that the right to non-interference does not have autonomous content independent from the correlative prohibition, and is not materially defined in a positive manner as a liberty. Non-intervention/non-interference is a right and not a liberty and, as such, it constitutes merely the 'flip side' of other states' correlative duties. Therefore, it seems that the formulation 'right to non-interference', instead of 'duty of non-interference' or 'principle of non-interference', has perhaps a purely semantic or symbolic value and does not establish a distinctive legal category with legal implications other than those already existing in contemporary positive international law.

## 2.2 Second challenge to the autonomy of the right: Derivation from statehood

It is submitted here that the right to non-intervention and non-interference is inherent in statehood<sup>7</sup>—perhaps even within the logic of the international legal order<sup>8</sup>—and thus that its autonomy as an independent fundamental right is difficult to appreciate. Indeed, it

<sup>3</sup> UNGA Res 36/103 (9 December 1981) UN Doc A/RES/36103.

<sup>4</sup> Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and other Legal Essays* (Yale UP 1923) 38–50; Neff (n 1) 483–84.

<sup>5</sup> Neff (n 1) 497.

<sup>6</sup> *ibid.*

<sup>7</sup> On rights inherent to statehood, see generally Jean d'Aspremont, 'The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law' (2015) 4 *CJICL* 501.

<sup>8</sup> See generally Raymon John Vincent, *Nonintervention and International Order* (Princeton UP 1974).

can be considered to be the ‘mere legal illustration’ of the factual elements that constitute the conditions for the existence of any state.<sup>9</sup> Non-intervention is the legal guarantee of the state’s territory—its integrity, inviolability and subjection to the exclusive jurisdiction of the state—whereas non-interference is inferred from political independence, both internal and external.<sup>10</sup> Thus, non-intervention and non-interference are implied by two of the state’s constitutive elements, and are correlatives to its essential attribute, sovereignty, which in turn is logically inferred from statehood as its necessary legal implication.<sup>11</sup> Article 2(1) of the Charter of the United Nations (UN Charter),<sup>12</sup> which establishes the principle of sovereign equality between its members, is often considered as closely related to the non-intervention/non-interference principle. Sovereignty entails independence and obliges third states to respect the exclusive jurisdiction a state exercises on its own territory as well as its political autonomy. In a way, the principle of non-interference is the juridical mirror image of the factual existence and legal sovereignty of states.<sup>13</sup>

### 2.3 Challenging its qualification as a ‘fundamental’ right

One must also wonder whether the qualification of the right of non-intervention/non-interference as fundamental would be of any use to existing international law.<sup>14</sup> As was argued in the previous section, the right to non-intervention and non-interference clearly lacks autonomy. It is hard to see how asserting the status of the right as fundamental could give it any superior normative authority which is not based on the system of positive sources of international law without resorting to naturalistic considerations. Ricardo J Alfaro suggests that the fundamental character of certain rights may be due to the fact that these rights are not created by states, but simply exist because of their inherence and close relation to statehood, and are therefore ‘a direct emanation of the State itself’.<sup>15</sup>

<sup>9</sup> Florence Poirat, ‘La Doctrine des “Droits Fondamentaux” de l’État’ (1992) 16 *Droits: Revue Française de Théorie Juridique* 83, 89.

<sup>10</sup> *ibid*; Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law*, vol 1 (9th edn, OUP 2008) 428; Ricardo J Alfaro, ‘The Rights and Duties of States’ (1959) 97 *RCADI* 91, 112. For the distinction between non-intervention *stricto sensu* and non-interference *lato sensu*, see below section 2.1.

<sup>11</sup> Poirat (n 9) 89. See also Henry Bonfils, *Manuel de Droit International Public* (3rd edn, Rousseau 1901) paras 237, 126: without fundamental rights ‘l’État n’existerait pas comme entité politique indépendante’.

<sup>12</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 *UNTS* XVI (UN Charter).

<sup>13</sup> Poirat (n 9) 89. See also the reasoning of the Constitutional Court of Ukraine in *On Conducting All-Crimean Referendum*, Decision No 2-rp/2014 (14 March 2014); *On the Declaration of Independence of the Autonomous Republic of Crimea and the City of Sevastopol*, Decision No 3-rp/2014 (20 March 2014). Territorial integrity and inviolability are considered by the Court to be the necessary and logical corollaries of state sovereignty.

<sup>14</sup> For a discussion of what the fundamental rights of states are, see Daniel H Joyner and Marco Roscini, ‘Is There Any Room for the Doctrine of Fundamental Rights of States in Today’s International Law?’ (2015) 4 *CJICL* 467.

<sup>15</sup> Alfaro (n 10) 109.

Such inherence in statehood, however, has no specific legal implications and cannot per se establish an independent normative category, which would allow distinction between rights fundamental or inherent in statehood on the one hand, and the 'ordinary' rights of states on the other. In other words, an unlawful intervention or interference is first and foremost a violation of a state's sovereignty, but has no legal specificity as such.

Even if one links the fundamental character of the right in question to *jus cogens*, it would be difficult to conclude *sic et simpliciter* that the right to non-interference and non-intervention is a fundamental one. Indeed, violations of this right constitute a violation of a peremptory norm of general international law only when, and to the extent that, such a violation of a state's sovereignty constitutes an unlawful use of armed force. *Jus cogens*, therefore, will not be deemed to have been violated every time that the non-intervention/non-interference principle is itself violated. Furthermore, as it will be shown in section three, attenuations of, or derogations from, the non-intervention/non-interference prohibition indeed exist and are quite numerous.

Any fundamentality of the right to non-intervention and non-interference, then, would derive from the respect due to the state's constitutive elements, but neither from its particular nature as a special category of rights nor from the concept of *jus cogens* as such. The qualification of this right as a fundamental one would thus have no added value for positive international law and could only lead to erroneous assumptions or confusions. Hence there is no need to refer to an independent fundamental right to non-intervention and non-interference. There is, however, great need for identification and definition of the principle's scope and meaning.

### 3 Meaning and legal regime of the right to non-intervention and non-interference

Even though the customary status of the principle of non-intervention/non-interference seems uncontroversial,<sup>16</sup> its exact content is far from obvious. Indeed, although this principle appears in several international instruments<sup>17</sup> and the case law of the

<sup>16</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 106 (*Nicaragua*): "The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law."

<sup>17</sup> Amongst others: Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art 8 ('No state has the right to intervene in the internal or external affairs of another'); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625 (Friendly Relations Declaration), art 1 (concerning the third principle, "The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter", and stating that "[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference

International Court of Justice (ICJ),<sup>18</sup> it remains unclear what is included in this right or, inversely, what is covered by such a prohibition. If the core of the principle can be considered certain, its limits and precise extent are very much open to debate.

As enshrined in various international instruments and customary international law, the non-intervention/non-interference principle seems to include at least two different categories of rights and duties, each revealing a different side of the principle, and each being implied by a different attribute of sovereign states. This dichotomy is clear in the United Nations General Assembly's Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.<sup>19</sup> Indeed, after stating in article 1 that '[n]o State or group of States has the right to intervene or interfere in any form or for any reason whatsoever in the internal and external affairs of other States', the Declaration provides in article 2 a long list of rights and corresponding duties of states comprising the non-intervention/non-interference principle, before affirming in article 3 that '[t]he right and duties set out in this Declaration are interrelated and are in accordance with the Charter of the United Nations'.

In fact, notwithstanding the scholarly debate about the exact contours of the principle, two main—similar but not identical—aspects of non-intervention/non-interference can be identified. Even though both of these elements appear to be directly implied by the principle of equal sovereignty, they derive from different principles of international law. Each corresponds to a different constitutive (factual) element of the state. The first facet

or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law'); Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) OAU Doc CAB/LEG/23.15, art 4(g) (setting out the principle of 'non-interference by any Member State in the internal affairs of another'); Final Communiqué of the Asian-African Conference of Bandung (24 April 1955) pt G ('Declaration on the Promotion of World Peace and Co-operation') principle 4 ('Abstention from intervention or interference in the internal affairs of another country'); International Law Commission (ILC), 'Draft Declaration on Rights and Duties of States' (1949) ILC YB 287, art 1; Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3, arts 3(e) ('Every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State. Subject to the foregoing, the American States shall cooperate fully among themselves, independently of the nature of their political, economic, and social systems'), 13, 15, 17, 19 ('No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements').

<sup>18</sup> See primarily *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, 35; *Nicaragua* (n 16) 106–08 ('[The Court] has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention'); *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168, 227.

<sup>19</sup> UNGA Res 36/103 (9 December 1981) UN Doc A/RES/36103, recalling in its preamble the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, UNGA Res 2131 (XX) (21 December 1965) UN Doc A/RES/20/2131.

of non-intervention/non-interference derives from the principle of territorial integrity and inviolability and prohibits certain actions on foreign soil, whereas its second facet derives from the principle of a state's independence and prohibits any interference in a state's domestic affairs.

Such a distinction between non-intervention (territorial integrity) and non-interference (independence and autonomy) seems theoretically clear. Nevertheless, the lines are blurred by the fact that a third principle is closely interrelated with the previous two, making the contours of each right and correlative duty difficult to establish. The customary prohibition of any threat or use of force against the territorial integrity or political independence of any state, as codified in article 2(4) of the UN Charter, is often intrinsically linked to the non-intervention/non-interference principle. This association raises the question whether, and to what extent, acts constituting interference without the use of force can be covered by the non-intervention/non-interference principle.

### 3.1 Non-intervention against the territorial inviolability and integrity of a state

The principle of territorial inviolability and integrity primarily entails that all intervention—meaning here any material, physical action by a third state—on foreign soil, without the territorial state's consent, is illegal under international law.<sup>20</sup> The non-intervention principle thus comprises, first of all, the right of any state and the correlative duty of all other states to respect the exclusivity of the territorial state's jurisdiction and its exclusive right to exercise operational powers on its territory.<sup>21</sup> United Nations General Assembly Resolution 3171 of 17 December 1973 expressly links the non-intervention principle to the principle of territorial integrity.<sup>22</sup> In this regard, being beyond any doubt that all action on foreign soil comporting unlawful use of force constitutes a prohibited intervention,<sup>23</sup> it is also certain that even other actions not including the use of force by a third state's authorities on foreign soil can be covered by the territorial integrity principle and by the non-intervention prohibition.<sup>24</sup> Indeed, United Nations practice and ICJ jurisprudence have shown that it is not only the direct occupation of a state's territory

<sup>20</sup> Unless of course there is an authorisation by the Security Council or the state acts in self-defence, as it will be argued further in this article.

<sup>21</sup> Jean Combacau and Serge Sur, *Droit International Public* (10th edn, Monchrestien 2012) 264.

<sup>22</sup> UNGA Res 3171 (XXVII) (17 December 1973) UN Doc A/RES/3171, para 6: 'Emphasizes the duty of all States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the territorial integrity of any State and the exercise of its national jurisdiction' (emphasis in original).

<sup>23</sup> Lawful use of force in conformity with general international law and the UN Charter would of course not constitute a prohibited intervention: cf n 19.

<sup>24</sup> *Case of the SS 'Lotus' (France v Turkey)* (Judgment) PCIJ Rep Series A No 10, 18–19: 'Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.' See also *Corfu Channel Case* (n 18) 35.

that constitutes a violation of its territorial integrity, but also indirect involvement by other states in its internal affairs, such as the provision of material aid to rebels to gain control of a part of its territory.<sup>25</sup> However, the latter is closely connected to the second aspect of the non-intervention/non-interference principle.

### 3.2 Non-interference against the independence and autonomy of a state

Another facet of non-intervention/non-interference is that it ‘forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States.’<sup>26</sup> These ‘affairs’ are defined—in a tautological manner—as all ‘matters in which each State is permitted, by the principle of State sovereignty, to decide freely.’<sup>27</sup> The non-interference right derives this time from state independence (the corollary of external sovereignty) and autonomy (the corollary of internal sovereignty). Third-party states should in fact not interfere with whatever matter falls within the ‘sphere of residual liberty’<sup>28</sup> of a sovereign state. As such, this principle, which the ICJ recognised as customary in nature in the *Nicaragua* case, is reaffirmed inter alia in the 1970 Friendly Relations Declaration,<sup>29</sup> as far as inter-state relations are concerned, and in article 2(7) of the UN Charter, as far as relations between states and the UN are concerned.<sup>30</sup> Even though there is no doubt as to the existence of such a principle of non-interference, it remains to be seen what is covered by it. In this regard, one must first examine which are the matters ‘in which each state is permitted to decide freely’ or, in other words, according to the UN Charter, ‘which are essentially within the domestic jurisdiction of any state.’<sup>31</sup>

As regards this inquiry, there is a common doctrinal confusion<sup>32</sup> between different terms and notions revolving around the same concept: *domaine réservé* or ‘reserved domain’, ‘private life’,<sup>33</sup> ‘internal affairs’, ‘matters within the domestic jurisdiction of any

<sup>25</sup> *Nicaragua* (n 16) 124–25.

<sup>26</sup> *ibid* 108.

<sup>27</sup> *ibid*.

<sup>28</sup> Jean Combacau, ‘Pas une Puissance, une Liberté: La Souveraineté Internationale de l’État’ (1993) 67 *Pouvoirs* 47, 53, 57–8 (translated by author).

<sup>29</sup> Friendly Relations Declaration, art 1, principles 3, 5(1).

<sup>30</sup> According to article 2(7) of the UN Charter, ‘Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.’

<sup>31</sup> UN Charter, art 2(7).

<sup>32</sup> cf Lino Di Qual, *La compétence liée* (LGDJ 1964) 581–91; Charles Rousseau, ‘L’indépendance de l’État dans l’ordre international’ (1948) 73 *RCADI* 167, 234–49; Charles Rousseau, ‘L’Aménagement des Compétences en Droit International Public’ (1930) 37 *RGDIP* 420, 446–59; Georges Scelle, *Précis de Droit des Gens: Principes et Systématique* (Bibliothèque Dalloz 2008) 90–94; Georges Scelle, ‘Règles Générales du Droit de la Paix’ (1933) 46 *RCADI* 327, 365–94.

<sup>33</sup> Joe Verhoeven, ‘Non-intervention: “Affaires Intérieures” ou “Vie Privée”?’ in *Le Droit International au Service de la Paix, de la Justice et du Développement: Mélanges Michel Virally* (Pedone 1991) 493.

State' or even 'jurisdiction which, in principle, belongs solely to the State (...) [being] exclusive jurisdiction'.<sup>34</sup> In this regard, it must be emphasised that, contrary to what was asserted up until the nineteenth century, there are no matters that are domestic by nature.<sup>35</sup> Consequently, there is no pre-determined list of what rests within the domestic jurisdiction of a state.<sup>36</sup> Indeed, the 'reserved domain' of a state consists of all matters for which this state has not yet undertaken any international commitment and thus it remains free not only to exercise (or not) its unilateral will, but also to determine the way in which it will exercise it. Therefore, it is not the exclusivity of the state's jurisdiction that determines the matters covered by the principle of non-interference. What matters most, in fact, is the discretionary nature of its powers and jurisdiction.<sup>37</sup> In fact, the matters on which a state can exercise its discretionary powers are those not limited in any way<sup>38</sup> by customary or conventional international law.<sup>39</sup> It is precisely these matters that are covered by the non-interference principle. Thus, they are by definition relative and contingent depending on the choices that each state makes at any given time as regards its international engagements. These international engagements can even be taken on concerning what is usually considered, in the words of article 2(7) of the UN Charter, to fall within 'matters of (...) domestic jurisdiction', namely the 'political, economic, social and cultural system, and the formulation of foreign policy',<sup>40</sup> since there are no 'domestic matters' by nature as already mentioned.

The sole limitation—though it is an unclear and ambiguous one—to this relativity as to what constitutes a state's reserved domain would be the extent to which the state can limit its discretionary powers and initial residual liberty without giving up the very essence of what makes it a state.<sup>41</sup> Or, put it another way, can a state maintain its status as sovereign if it renounces part of its prerogative powers? The question is largely theoretical, but it does not lack interest. The answer might allow for the identification of

<sup>34</sup> *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) PCIJ Rep Series B No 4, 24.

<sup>35</sup> See Verhoeven, 'Non-intervention' (n 33) 499 ('Ce n'est pas qu'il y ait quelque sphère "privée", c'est-à-dire des affaires "intérieures", qui serait soustraite au droit des gens'); Combacau (n 28) 53 (le domaine réservé ne l'est pas 'par nature, mais parce que l'État visé l'inclut encore dans l'enceinte de sa liberté résiduelle'). See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, 440 ('At the same time, the Court observes that the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international, law') (emphasis added).

<sup>36</sup> cf Neff (n 1) 482.

<sup>37</sup> Combacau and Sur (n 21) 265.

<sup>38</sup> There is a sole potential (and uncertain) exception regarding the international prohibition on abuse of rights.

<sup>39</sup> See Institute of International Law (IDI) Aix-en-Provence Resolution, 'La Détermination du Domaine Réservé et ses Effets' (1954) 45 *Annuaire IDI* 292, art 1 ('Le domaine réservé est celui des activités étatiques où la compétence de l'État n'est pas liée par le droit international').

<sup>40</sup> *Nicaragua* (n 16) 108.

<sup>41</sup> See Combacau (n 28) 57–8; Poirat (n 9) 90–91; Helmut Philipp Aust, 'Fundamental Rights of States: Constitutional Law in Disguise?' (2015) 4 *CJICL* 521.

a core of matters that must remain within the discretionary powers and competence of the state for it to go on being considered as one. However, it must be noted that such a potential list of matters would not be one of matters domestic by nature as for example the (very short) list of the legal implications of the factual constitutive elements that allow a state to come into existence.<sup>42</sup> In any case, it should be borne in mind that it is an attribute of the sovereign state to decide the termination of its own existence. If it renounces one or more of its constitutive elements, it does not commit an internationally wrongful act, nor does it violate any *jus cogens* norm. In one author's words, 'Because it is sovereign, a state has a right to commit suicide!'<sup>43</sup>

Whatever the answer to this last, largely theoretical and hypothetical, question may be, it is now clear that two separate aspects of the non-intervention/non-interference principle have been identified, namely non-intervention concerning territorial integrity, and non-interference concerning matters which are not regulated by international law and in which the state maintains its discretionary power. If these definitions are accepted, non-interference can be considered a wider notion than non-intervention, the latter's scope being limited solely to the exclusivity of a state's territorial jurisdiction.<sup>44</sup> Consequently, intervention can be seen as a form or modality of interference, but intervention does not exhaust the scope of interference. There is thus no automatic and integral assimilation between the two, even though they mostly overlap. They can be analysed as either constituting two separate but concomitant rights or, more precisely and preferably, as one right to non-interference *lato sensu* which includes—in its core—the right to non-intervention *stricto sensu*, and is thus referred to in this article as the non-intervention/non-interference principle.

If the meaning of non-intervention/non-interference is thus identified, its legal regime—notably the conditions under which an intervention or interference would be prohibited as illegal or unlawful under international law—remains unclear. Indeed, all intervention—and *a fortiori* all interference—does not necessarily violate international law, not only because of the exceptions to the principle, which will be examined under section three, but also because some conditions have to be met in order for an interference to be unlawful. Indeed, the illegality of the interference is undoubtable when it constitutes a use of force not allowed by international law, since in such a case the acts constituting an intervention/interference are simultaneously prohibited by article 2(4) of the UN Charter. However, it is far more delicate to determine to what extent acts not involving unlawful or unauthorised use of force can be characterised as an illegal intervention or interference. In this regard, the exact content of the principle is still open to important doubts, which are further reinforced by recent state practice, as will be argued in section three.

<sup>42</sup> See *infra*.

<sup>43</sup> Poirat (n 9) 91 (translated by author).

<sup>44</sup> cf Raphaële Rivier, *Droit International Public* (2nd edn, Themis 2014) 258.

### 3.3 Non-intervention/non-interference and the use of force

The principle of non-intervention has always been closely linked to article 2(4) of the UN Charter, dealing with the prohibition of the threat or use of force. Unlawful threat or use of force against the territorial integrity or political independence of any state violates simultaneously both the prohibition of use of force and the proscription on illegal intervention. However, does this mean, *a contrario*, that interference with no threat or use of force is not illegal under international law? According to the ICJ in the *Nicaragua* case:

Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.<sup>45</sup>

We can deduce from this statement that intervention or interference can be illegal under international law even when there is no unlawful use of force implicated,<sup>46</sup> provided that the element of coercion is present. According to *Oppenheim's International Law*, 'intervention is forcible or dictatorial interference by a state in the affairs of another state, calculated to impose certain conduct or consequences on that other state', and the principle of non-interference prohibits interference that is 'forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question.'<sup>47</sup>

It is of course obvious that there is always coercion when there is the use of force. Nevertheless, it is far more complex to determine whether there would be coercion in the absence of a threat or use of force. It would seem for instance that simple verbal declarations or recognitions, even commenting on matters that fall within a third state's 'reserved domain', for example encouraging a secession or condemning a state's internal politics, would not automatically constitute an illegal interference, since the element of coercion may be considered absent or insufficient.<sup>48</sup> However, unlawful interference can still be triggered even by verbal declarations aiming at influencing a third state by putting it under pressure or by other non-material and non-forcible actions. This appears to be the case particularly in two extreme hypotheses.<sup>49</sup>

First, whenever the actions or declarations in question aim at intentionally affecting the stability of a government. Such actions, even non-material, could be considered as coercive *per se* and thus illegal. Therefore, encouraging a secession with the intention

<sup>45</sup> *Nicaragua* (n 16) 108 (emphasis added).

<sup>46</sup> As the ICJ stated the *Nicaragua* case, the principle of non-intervention prohibits a state 'to intervene, directly or indirectly, *with or without armed force*, in support of an internal opposition in another State': *ibid* 108 (emphasis added).

<sup>47</sup> Jennings and Watts (n 10) 430, 432.

<sup>48</sup> See Olivier Corten, 'Déclarations Unilatérales d'Indépendance et Reconnaissances Prématuurées: Du Kosovo à l'Ossétie du Sud et à l'Abkhazie' (2008) 112 RGDIP 721.

<sup>49</sup> On these two hypotheses, see Combacau and Sur (n 21) 266.

to destabilise the existing government, even in a solely verbal way with no concrete action undertaken other than declarations, might qualify as an illegal interference. It has even been argued that mere premature recognition of a declaration of independence following a secession would constitute a coercive and thus unlawful interference.<sup>50</sup> Nonetheless, such a prohibition does not seem to be accepted in the current state of positive international law, recognition remaining a discretionary power of all states, only partially and lightly limited by the so-called ‘obligation of non-recognition’.<sup>51</sup>

Second, whenever the immaterial non-forcible actions in question result in depriving a state of a legal right to which it was entitled. However, in that case the illegal interference consists simultaneously of the violation of a previous international obligation by the interfering state and thus has no autonomy.

That being said, there is still great uncertainty regarding the element of coercion and its definition as regards illegal interference. It is indeed extremely difficult to draw a clear line between what constitutes internationally lawful political or economic<sup>52</sup> pressure against a third state, and what is qualified as coercion and thus as unlawful interference. In any case, the relationship between the prohibition on the threat or use of force and principle of non-intervention/non-interference reveals once again—and from yet another point of view—the limits of an autonomous right to non-intervention and non-interference. It is indeed obvious that, when the illegality of an intervention or interference consists of the threat or use of force against the territorial integrity or the political independence of a state, there is no autonomy of the non-intervention/non-interference prohibition and no need to consider that a fundamental right has been violated as such. Still, the legal consequences of such a violation, as well as the exceptions to such a prohibition, need to be addressed.

#### 4 Exceptions to and sanction of prohibition of non-intervention and non-interference

The derogability of the non-intervention/non-interference prohibition and the consequences of its violation are dependent on its normative authority—that is, on whether

<sup>50</sup> See Joe Verhoeven, ‘La Reconnaissance Internationale: Déclin ou Renouveau?’ (1993) 39 AFDI 7, 21. See also arguments made by Serbia, ‘Letter dated 6 March 2008 from the Chargé d’Affaires ai of the Permanent Mission of Serbia to the United Nations Addressed to the President of the Security Council’ (6 March 2008) UN Doc S/2008/162 (concerning the recognition of Kosovo’s declaration of independence); and by Georgia, UNSC Verbatim Record (28 August 2008) UN Doc S/PV.5969 (on the recognition of Abkhazia’s and South Ossetia’s independence). For a different perspective on this matter, see Corten, ‘Déclarations Unilatérales d’Indépendance et Reconnaissances Prématurées’ (n 48). Arguing that premature recognition is an unlawful interference, see John Dugard and David Raič, ‘The Role of Recognition in the Law and Practice of Secession’ in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (CUP 2006); cf Eric David, ‘Portée et Limite du Principe de Non-Intervention’ (1990) 2 RBDI 351.

<sup>51</sup> See *infra*, in section three.

<sup>52</sup> See Antonios Tzanakopoulos, ‘The Right to be Free from Economic Coercion’ (2015) 4 CJICL 616.

it has achieved the status of *jus cogens* in positive international law. Unfortunately, there is great uncertainty in this regard.<sup>53</sup> However, it seems plausible that, in the current state of positive international law, only an intervention involving an unlawful threat or use of force would be a violation of *jus cogens*,<sup>54</sup> with other forms or modalities of interference not having hitherto been identified by international practice and case law as a violation of a peremptory norm of international law. Thus, the question of the accepted derogations or exceptions from the right to non-intervention and non-interference as well as the legal implications of its violation bears consideration.

#### 4.1 Derogations from the right to non-intervention and non-interference

The issue of derogations from the right to non-intervention and non-interference (meaning the possibility of an interference without unlawful use of force)<sup>55</sup> is mainly raised in relation to two separate hypotheses: firstly, regarding the ‘intervention upon invitation’ hypothesis, notably with the consent or upon request of the territorial state; and secondly, with regard to the so-called ‘humanitarian intervention’ hypothesis.

With regard to the first, intervention—even a military one—is not in principle unlawful if the territorial host state has given its consent in due form.<sup>56</sup> If the principle is clear, its implementation can nevertheless be delicate and open to abusive behaviour. For instance, if the requesting government is not in effective control of the territory of the state at the time it makes the request, if it does not have the legal authority and popular support to issue such a request, or if it is engaged in a civil war and requests a third state’s intervention in order to suppress the opposition, the actual legality of the ‘intervention upon invitation’ principle can be doubtful, especially if the people are allegedly exercising their right to self-determination or to rebel against an oppressive regime. In this regard it must be noted that according to the General Assembly’s Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States:

Nothing in this Declaration shall prejudice in any manner the right to self-determination, freedom and independence of peoples under colonial domination, foreign occupation or racist regimes, and the right to seek and receive support in accordance with the purposes and principles of the Charter of the United Nations.<sup>57</sup>

<sup>53</sup> cf Anthony D’Amato, ‘There is No Norm of Intervention or Non-Intervention in International Law’ (2001) 7 Intl Legal Theory 33.

<sup>54</sup> On the qualification of the prohibition of illegal use of force as a *jus cogens* norm, see *Nicaragua* (n 16) 100–01.

<sup>55</sup> The right of self-defence or the authorisation of use of force by the UN Security Council are not exceptions to this peremptory norm, but its mere legal corollaries.

<sup>56</sup> See Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 317; Louise Doswald-Beck, ‘The Legal Validity of Military Intervention by Invitation of the Government’ (1986) 56 BYBIL 189; Malcolm N Shaw, *International Law* (7th edn, CUP 2014) 834. See also *Nicaragua* (n 16) 126: ‘intervention (...) [is] allowable at the request of the government of a State’.

<sup>57</sup> UNGA Res 36/103 (9 December 1981) UN Doc A/RES/36103, para 4.

However, intervention in order to restore or establish democracy is by no means permitted under international law.<sup>58</sup> For the intervention upon invitation to be in conformity with international law, the form and validity conditions of the consent or the request are also open to discussion. The recent example of the Arab League's military intervention in Yemen on 25 March 2015, following a letter sent by embattled President Abed Rabbo Mansour Hadi to the United Nations Security Council, shows exactly how intricate such issues may be in practice. Another question is raised by the possibility of an 'intervention upon invitation' in a state which has no effective government capable of issuing such a request (an example being so-called 'failed' states). Whatever the case may be, when the 'intervention upon invitation' consists of military assistance by a third state, even following an explicit request of the territorial state in order to support the latter in its struggle against non-state actors or individual persons within its territory, any such assistance should be offered with full respect for human rights, fundamental freedoms and humanitarian law.<sup>59</sup>

This last principle underlines the growing importance of human rights protection under contemporary international law. It is this same preoccupation that leads to considerations about an allegedly lawful humanitarian intervention and, more recently, about a responsibility to protect. These notions—which are far from being identical—may counterbalance the right to non-intervention and non-interference and, depending on the point of view adopted,<sup>60</sup> can be considered as being in conflict with, or more precisely, as providing lawful exceptions to, this right. They would thus constitute the second case of derogation from the right to non-interference.

As far as humanitarian intervention is concerned, it has been argued that prior illegal government action against a minority group may render unilateral intervention, either by a third state or by an international organisation or a group of states, acceptable and render interference in internal affairs, which would have otherwise been considered unlawful, lawful. International instruments that include clauses with regard to the respect of the non-intervention/non-interference principle sometimes specifically mention that these are only valid for states respectful of the right to self-determination of their people and not responsible for discriminatory policies or violations of the aforementioned right.<sup>61</sup> The *Institut de Droit International* Santiago de Compostela Resolution (1989)

<sup>58</sup> This was notably one of the grounds given for the invasion of Panama in 1989 by the United States. According to Shaw, 'such a proposition is not acceptable in international law in view of the clear provisions of the UN Charter': Shaw (n 56) 840. See also Oscar Schachter, 'The Legality of Pro-Democratic Invasion' (1984) 78 AJIL 645.

<sup>59</sup> IDI, 'Present Problems of the Use of Force in International Law: Sub-Group on Intervention by Invitation' (2011) 74 *Annuaire IDI* 179, 179–363. For the resolution adopted on military assistance on request, see the same document at 360, art 2.

<sup>60</sup> cf Patrick Daillier, 'La responsabilité de protéger, corollaire ou remise en cause de la souveraineté?' in *La Responsabilité de Protéger: Colloque de Nanterre* (Pedone 2007) 41–58; Olivier Corten, 'Droit d'Intervention versus Souveraineté. Actualité et Antécédents d'une Tension Protéiforme' (2012) 56 *Droits: Revue Française de Théorie Juridique* 33.

<sup>61</sup> Friendly Relations Declaration, art 1, principle 5(7); Definition of Aggression, UNGA Res 3314 (XXIX) (14 December 1974) annex, art 7.

on The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States states in article 2(2) that:

Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations in case of violation of the obligations assumed by the members of the Organization, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any other State which has violated the obligation set forth in Article I, provided such measures are permitted under international law and do not involve the use of armed force in violation of the Charter of the United Nations. *These measures cannot be considered an unlawful intervention in the internal affairs of that State.*<sup>62</sup>

Indeed, it appears generally accepted—even if the debate is not absolutely closed—that humanitarian interference, that is, an intervention, which could be considered as coercive (and thus in principle unlawful), but without any use of force and military action, and *a fortiori* humanitarian assistance, should be considered lawful under international law.

However, this does not seem to be the case as far as humanitarian intervention coupled with the threat or use of force is concerned. For the latter type of intervention, with regard to intervention involving use of force, there is no overall acceptance of its lawful character; quite the contrary. Indeed, such an intervention would potentially enter into conflict with a *jus cogens* rule and therefore could only be justified by another general international legal principle allowing the use of force as a corollary of the prohibition of the use of force principle. Thus, only invocation of the right of self-defence or authorisation by the Security Council under Chapter VII of the UN Charter can justify a lawful intervention with use of force. State practice up until the 1990s was relatively clear in this regard. Cases which might have been seen as humanitarian interventions (India-Bangladesh; Tanzania; Uganda; Vietnam-Cambodia; Russia-Georgia) were justified by intervening states on other grounds, claiming notably that their actions were in self-defence, allegedly including the rescue of nationals when the territorial state is unable or unwilling to do so, and that this does not infringe the principles of non-interference and the prohibition of the use of force. The intervening states did not therefore invoke any right, or *a fortiori* any obligation, of humanitarian intervention. Even after the precedents of Northern Iraq (in 1991) and Kosovo (in 1999),<sup>63</sup> there remains an aversion to invoking humanitarian intervention as a justification for such conduct. Indeed, NATO's action in Kosovo was not based on a right to humanitarian intervention but on a very extensive (and highly controversial) interpretation of related

<sup>62</sup> IDI, 'The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States' (1990) 63 *Annuaire IDI* 339, 343 (emphasis added).

<sup>63</sup> With regard to northern Iraq and Kosovo, it must be noted that the United States has not explicitly accepted any right to a humanitarian intervention. It justified its actions to protect the Kurds in the north of Iraq and the Shia in the south, as well as the NATO action over Kosovo, on grounds other than humanitarian intervention and did not invoke humanitarian intervention when arguing that military action in Syria was necessary even without the approval of the Security Council. Humanitarian intervention was not invoked either for the airstrikes in Iraq in 2014 nor for those in Syria in 2014 and 2015 (see nn 64, 70, 71, 73; see also W Michael Reisman, 'Report of the 10th Commission on "Humanitarian Intervention" and Plenary Discussion of the 25th of August 2015' (2015) 77 *Annuaire IDI* (forthcoming)).

Security Council resolutions. Moreover, no cases of humanitarian intervention without international authorisation, invoked and admitted as such beyond any controversy, have been witnessed in the past decade.<sup>64</sup> International action in Somalia (2005–07<sup>65</sup> and 2011),<sup>66</sup> Libya (2011),<sup>67</sup> Ivory Coast (2011),<sup>68</sup> Mali (2013),<sup>69</sup> Syria (2013<sup>70</sup> and 2014–

<sup>64</sup> Only the United Kingdom mentioned briefly ‘humanitarian intervention’ in connection with the intervention in Syria, but did not follow through with any action in this regard up until August 2015: see Office of the Prime Minister (United Kingdom), ‘Chemical Weapon Use by Syrian Regime: UK Government Legal Position’ (29 August 2013) <<https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/html-version>> accessed 2 May 2016. The targeted airstrike in Syria in late August 2015 was nevertheless justified on grounds of self-defence and not of humanitarian intervention: see Patrick Wintour, ‘UK Forces Kill British Isis Fighters in Targeted Drone Strike on Syrian City’ *The Guardian* (London, 7 September 2015) <<http://www.theguardian.com/uk-news/2015/sep/07/uk-forces-airstrike-killed-isis-briton-reyaad-khan-syria>> accessed 2 May 2016.

<sup>65</sup> On 14 July 2015, the President of the Security Council issued a statement commending the Intergovernmental Authority on Development (IGAD) and the African Union (AU) for their support for the Transitional Federal Government and the deployment of the IGAD Peace Support Mission in Somalia (IGASOM): see UNSC Presidential Statement 32 (2005) UN Doc S/PRST/2005/32. It is unclear whether IGASOM would have been deemed lawful without this statement. In December 2006, Security Council Resolution 1725 authorised the deployment of IGASOM: see UNSC Res 1725 (6 December 2006) UN Doc S/RES/1725. When, after the failure of the IGASOM initiative, Ethiopia intervened unilaterally, it justified its actions invoking self-defence and the consent of the Transitional Federal Government (TFG). Its intervention was nevertheless condemned by the international community. In February 2007, the Security Council authorised the AU to take ‘all necessary measures’ in order to protect the TFG: see UNSC Res 1744 (20 February 2007) UN Doc S/RES/1744, para 4.

<sup>66</sup> In September and October 2011, Kenya sent troops into Somalia as a reaction to terrorist attacks originating in Somalia. Kenya justified this intervention on the basis of self-defence and, implicitly, consent of the TFG. See, eg, the quotations in Will Ross, ‘Kenya’s IncurSION into Somalia Raises the Stakes’ *BBC News* (17 October 2011) <<http://www.bbc.co.uk/news/world-africa-15337464>> accessed 2 May 2016. The UN Secretary General did not condemn nor endorse the Kenyan operation, but the Kenyan troops soon integrated AMISOM.

<sup>67</sup> See below n 81.

<sup>68</sup> UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975, para 6 reiterates the authorisation for the UN Operation in the Ivory Coast to ‘use all necessary means (...) to protect civilians under imminent threat of physical violence’.

<sup>69</sup> In December 2012, United Nations Security Council Resolution 2085 authorised the International Support Mission in Mali (AFISMA) to take ‘all necessary measures’ to recover the northern territories of Mali from the armed rebels: see UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085, para 9. Since AFISMA could not be deployed immediately, on 10 January 2013, the Security Council called on member states to provide assistance to the Malian Forces. The following day, France launched military operations against the rebels invoking, in order to justify the intervention, the Security Council authorisation, the host state’s consent and self-defence. The Security Council endorsed the French intervention: see UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100.

<sup>70</sup> In August 2013, both the United Kingdom and the United States argued that a humanitarian intervention in Syria was necessary, even without authorisation by the Security Council. See White House, ‘Statement by the President on Syria’ (31 August 2013) <<https://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>> accessed 2 May 2016; Office of the Prime Minister (United Kingdom) (n 64). Several other states expressed support for US military action. However, the Joint Special Representative of the United Nations and the League of Arab States for Syria stated that a Security Council authorisation was necessary: see, eg, Secretary-General of the United Nations, ‘Remarks Made by Lakhdar Brahimi, the Joint Special Representative for Syria, Following his Meeting with Russian Foreign Minister Sergey Lavrov’ (6 September

15),<sup>71</sup> Central African Republic (2013)<sup>72</sup> and Iraq (2014)<sup>73</sup> support this affirmation. The most recent example to date, namely the United Kingdom's targeted airstrikes in Syria in August 2015, justified on grounds of self-defence and not of humanitarian intervention, also supports this affirmation. The *Institut de Droit International* considered in 2007, 2013 and once again in August 2015, after thorough examination of state practice (including the examples cited above),<sup>74</sup> that there were no grounds to adopt a resolution on the lawfulness of humanitarian intervention not authorised by the United Nations and involving military actions.

In sum, a unilateral (individual or collective) right of humanitarian intervention with use of force invoked independently of the other grounds justifying a lawful use of force (notably on the basis of consent of the host state, authorisation by the Security Council or self-defence) has not achieved the status of positive international law. That being said, self-defence and, mostly in practice, authorisation by the Security Council can justify the use of force and, consequently, a so-called 'humanitarian intervention' involving the use of force. In this regard, recent Security Council practice shows a tendency to 'humanise'<sup>75</sup> the 'threat to international peace and security' as conceived under Chapter VII of the UN Charter, assimilating the distress of civil populations and the flagrant and systematic violation of human rights (in other words, any overwhelming humanitarian crisis) to a threat to international peace and security.<sup>76</sup>

2013) <<http://www.un.org/sg/offthecuff/index.asp?nid=2976>> accessed 2 May 2016. Although Russia and China have vetoed any resolution authorising military intervention, no unilateral action has taken place.

<sup>71</sup> In September 2014, the United States launched airstrikes on Islamic State of Iraq and the Levant (ISIL) targets in Syria. The legal justification invoked by the United States in order to justify the attacks was not humanitarian intervention but individual and collective self-defence under art 51 of the UN Charter, see White House (n 70).

<sup>72</sup> In July 2013, the AU authorised the deployment of the African-led International Support Mission in the Central African Republic (MISCA) and four months later it urged the Security Council to adopt a resolution. The Security Council adopted Resolution 2127 on 5 December 2013, authorising MISCA and France to take 'all necessary measures' to protect civilians and stabilise the country: see UNSC Res 2127 (5 December 2013) UN Doc S/RES/2127, para 28.

<sup>73</sup> In August 2014, after thousands of Yazidis had fled to Mount Sinjar, the Security Council issued a press statement calling on the international community to support the Government and people of Iraq attacked by ISIL: UNSC, 'Security Council Press Statement on Iraq' (7 August 2014) UN Doc SC/11515-IK/683. The same day the USA government authorised airstrikes against the ISIL. The legal justification invoked by the United States was self-defence on the one hand ('targeted airstrikes to protect our American personnel') and Iraqi consent on the other hand; humanitarian intervention was not invoked as such, since the operation 'to help Iraqi civilians stranded on the mountains' was conducted with the permission and 'at the request of the Iraqi government': see White House, 'Statement by the President' (7 August 2014) <<https://www.whitehouse.gov/the-press-office/2014/08/07/statement-president>> accessed 2 May 2016.

<sup>74</sup> Reisman (n 63).

<sup>75</sup> cf Linos-Alexandre Sicilianos, 'L'Influence des Droits de l'Homme sur la Structure du Droit International: Première Partie: La Hiérarchisation de l'Ordre Juridique International' (2012) 116 RGDIP 5; Linos-Alexandre Sicilianos, 'L'Influence des Droits de l'Homme sur la Structure du Droit International: Deuxième Partie: Les Conséquences Structurelles de la Hiérarchisation' (2012) 116 RGDIP 241.

<sup>76</sup> cf Mathias Forteau, 'Le Conseil de Sécurité des Nations Unies est-il Soustrait à l'Emprise du Principe de Non Intervention?' (2013) 57 *Droits: Revue Française de Théorie, de Philosophie et de Culture Juridique* 119.

The 2005 World Summit Outcome<sup>77</sup> and the advent of the responsibility to protect principle reinforces both the above mentioned statements: namely the absence of any unilateral right to humanitarian intervention involving a use of force, and the Security Council's 'humanisation' of the notion of international peace and security threats. Indeed, moving away from a doubtful right of humanitarian intervention and towards a concept more respectful of state sovereignty and of the right to non-interference, the Heads of State and Government noted in the 2005 World Summit Outcome that '[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.<sup>78</sup> They went on to say that '[t]he international community, through the United Nations' also has the responsibility to use appropriate means and that:

In this context, we are prepared to take collective action, in a timely and decisive manner, *through the Security Council, in accordance with the Charter, including Chapter VII*, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, *should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity*.<sup>79</sup>

Thus, the responsibility to protect concept as outlined in the 2005 World Summit Outcome establishes a subsidiary right for the international community to intervene in order to protect civilian populations, when the territorial state is failing to do so (meaning that is unable or unwilling), even without the latter's consent. It also confirms that enforcement action to protect human rights is within the Security Council's powers under Chapter VII. It remains to be seen if such a principle will become part of positive international law as an autonomous right, the 2005 World Summit Outcome having no binding legal authority per se. This is far from being the case. Article 4(h) of the Constitutive Act of the African Union consecrates a right of intervention of the African Union based on the concept of responsibility to protect. Still, it must be noted that recent practice shows that the African Union in most cases seeks Security Council authorisation before itself authorising, or in any case before deploying, an intervention.<sup>80</sup> Furthermore, despite the silence of the UN Charter on the matter, the Security Council has already used the concept of the responsibility to protect to authorise use of force to avert or put an end to several humanitarian crises. Even though it failed in 2007 to adopt a resolution dealing with Myanmar, because it was vetoed by two permanent members of the Council, namely China and Russia, since 2009 several General Assembly and Security Council Resolutions have expressly or implicitly invoked the concept of the responsibility to protect.<sup>81</sup> This was notably the case in Resolution 1973 of 17 March 2011 dealing with

<sup>77</sup> UNGA, '2005 World Summit Outcome' (20 September 2005) UN Doc A/60/L.1.

<sup>78</sup> *ibid* 138.

<sup>79</sup> *ibid* 139 (emphasis added).

<sup>80</sup> See above nn 65, 72.

<sup>81</sup> The first to do so was UNGA Res 63/308 (14 September 2009) A/RES/63/308. For Security Council resolutions (either authorising use of force or recognising a threat to international peace and security), see

the Libyan crisis, in which the Security Council referred to the responsibility to protect concept in order to allow member states to take ‘all necessary measures.’<sup>82</sup> However, the consent of the local authorities minimises the authority of such a precedent. Moreover, the NATO operations were heavily criticised by the international community for having overstepped the United Nations mandate and the scope of Resolution 1973.

In any case, as long as the subsidiary right deriving from the responsibility to protect does not offer grounds for a unilateral action but only invites the international community as a whole to intervene—probably solely upon authorisation of the Security Council whenever a potential use of force is at stake—one can argue that such a principle does not bring any substantial modification to international law.<sup>83</sup> Still, it is often contended that the responsibility to protect concept offers additional grounds for a right of the General Assembly to authorise an intervention in case of humanitarian crisis whenever the territorial state is unwilling or unable to put an end to it and the Security Council is paralysed because of the permanent members’ vetoes,<sup>84</sup> or that the Security Council authorisation/validation might be retroactive or informal. Nevertheless, such possibilities are not generally accepted and it remains highly doubtful if they are allowed by the UN Charter and by positive international law.

Despite the numerous aforementioned grey areas, it seems quite clear that whenever derogations from the right to non-intervention and non-interference are admitted by positive international law, the phenomenon in question is that of an exception or a corollary to the above said right or, in other words, an application of the *lex specialis derogat generalis* principle. Thus, the ‘intervening’ or ‘interfering’ state is not faced with two contradictory international obligations equally enforceable upon it, and does not find itself in a legal impasse leading it to violate one of the two and therefore to necessarily engage its international responsibility. In fact, a lawful interference does not violate the prohibition on non-intervention/non-interference and, if the particular conditions already examined are met, even the use of force can be deemed lawful. In any case, it must be stated that even if a doctrine of a right—or even a duty—of humanitarian intervention was admitted in international law, it should not be considered as such contrary to state sovereignty and corollary fundamental rights.<sup>85</sup> Indeed, all

UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706 (Darfur); UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894 (establishing the normative context of the responsibility to protect); UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 (Libya); UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (Libya); UNSC Res 1975 (Ivory Coast); UNSC Res 2127 (Central African Republic). See Sandra Szurek, ‘La Responsabilité de Protéger: Du Prospectif au Prescriptif ... et Retour. La Situation de la Libye devant le Conseil de Sécurité’ (2012) 56 *Droits: Revue Française de Théorie Juridique* 58.

<sup>82</sup> UNSC Res 1973, para 4: ‘Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi’ (emphasis added). See also UNSC Res 1970.

<sup>83</sup> Olivier Corten, *Le droit contre la guerre* (Pedone 2008) 766–74.

<sup>84</sup> See IDI, ‘Authorization of the Use of Force by the United Nations’ (2011) 74 *Annuaire IDI* 365, 365–484.

<sup>85</sup> Corten, ‘Droit d’Intervention versus Souveraineté’ (n 60) 37–38.

the hypotheses of such an intervention are founded on the absence of the territorial state's exercise of sovereignty and on the necessity to protect the human rights of its population. That being said, the right to non-intervention and non-interference can be—and is in fact often—violated when the invocation of a lawful derogation to it (such as consent, self-defence or authorisation by the Security Council), in order to justify an intervention, is proving to be abusive, fallacious or overstepping the mandate authorised by the Security Council. The examples of states, groups of states or even international organisations having violated other states' right to non-intervention and non-interference are numerous. The possible legal consequences of such violations shall thus be the last point examined by this article.

#### 4.2 Legal implications of the violation of the right to non-intervention and non-interference

The consequences of a violation of the right to non-intervention and non-interference will of course be those determined by general international law. Therefore, the legal implications of such a violation will be examined here briefly, since it suffices to refer to the general international law of state responsibility and the validity of international legal acts. However, it must be emphasised that the consequences of the violation of the right to non-intervention and non-interference depend first of all on whether the violated rule has gained the status of *jus cogens*. Indeed, the implications of the violation of a peremptory international norm are partially different from those of the violation of other norms. Hence, the hypothesis of an unlawful interference or intervention with illegal threat or use of force is to be distinguished from the hypothesis of an unlawful interference or intervention without use of force.

As far as the latter is concerned—a coercive but non-military illegal interference in the internal affairs of a state—there seems to be no violation of a *jus cogens* norm. Thus, the legal implications of such an interference will be nothing more than the common consequences of any violation of conventional or customary international law, meaning the engagement of the interfering state's (or international organisation's) responsibility, its secondary obligation for reparation of the prejudice caused to the damaged state (in the sense of article 31 of the Articles on Responsibility of States for Internationally Wrongful Acts, drafted by the International Law Commission (ILC)),<sup>86</sup> and the eventual possibility of the latter to adopt countermeasures.<sup>87</sup>

Turning now to the first—and relatively more complex—hypothesis, if the intervention or interference constitutes simultaneously a violation of the prohibition on the threat or use of illegal force and thus violates *jus cogens*, its consequences will be those of any violation of a peremptory norm of international law. Therefore, the

<sup>86</sup> ILC, Articles on Responsibility of States for Internationally Wrongful Acts, adopted through UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83 (Articles on State Responsibility).

<sup>87</sup> *ibid* arts 49–51.

legal implications of such an unlawful interference or intervention would be twofold, in terms of validity of certain legal acts on the one hand and in terms of international responsibility on the other.

In fact, according to the law of treaties, an international treaty is null and void if it is procured in violation of the prohibition on the threat or use of force or if it conflicts with a peremptory norm of international law.<sup>88</sup> Thus, an illegal coercion against a signatory state, meaning any threat or use of force against it,<sup>89</sup> suffices to invalidate the treaty in question. Consequently, whenever the violation of the right to non-intervention and non-interference involves the threat or use of force, any treaty signed or ratified by the 'victim' state would be null and void *ex tunc*. *Mutatis mutandis*, unilateral acts that constitute a violation of the right to non-interference and—at the same time—of the prohibition of threat or use of force should be considered null and void and thus deprived of any legal effect *ex tunc*. This is obviously the case as far as annexation is concerned (for instance, the Security Council has declared that the annexation of Jerusalem by Israel, and of Kuwait by Iraq, were null and void). However, even other unilateral acts of states, not materially implicating the use of force per se but constituting an illegal threat of use of force as well as a wrongful interference in the internal affairs of a state (a premature recognition following secession, for instance, doubled by an international promise to use force against the state opposed to the secession) can be considered as null and void because of their contrariety to a peremptory norm of international law.

Moreover, any situation resulting from an unlawful intervention or interference with the threat or use of force would be covered by the obligation of non-recognition stipulated in article 41 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts.<sup>90</sup> Finally, in terms of international responsibility, an interference that violates the

<sup>88</sup> Vienna Convention on the Law of the Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 52–53 (VCLT).

<sup>89</sup> It is doubtful whether art 52 of the VCLT covers solely the illegal threat or use of force or other forms of coercion as well. It seems, in the actual state of positive international law, that only a use of force or coercion implicates the nullity of the treaty. In this regard, it must be noted that the 'Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties' concerning the adoption of international treaties is annexed to the Final Act of the VCLT but does not have binding legal authority. Article 52 appears therefore to only cover the hypothesis of illegal threat or use of force and the international practice supports this affirmation. On the interpretation of art 52, see Olivier Corten, 'Article 52' in Olivier Corten and Pierre Klein (eds), *Les Conventions de Vienne sur le Droit des Traités: Commentaire Article par Article*, vol 2 (Bruylant 2006) 1667–900, notably 1873–85; Sir Humphrey Waldock, 'Fifth Report on the Law of Treaties' ILC YB 1966/II(1) 21.

<sup>90</sup> ILC, Articles on State Responsibility. On this question, see Joe Verhoeven, *La Reconnaissance Internationale dans la Pratique Contemporaine: Les Relations Publiques Internationales* (Pedone 1975) 227; Verhoeven, 'La Reconnaissance Internationale: Déclin ou Renouveau?' (n 50) 39; Stefan Talmon, *La Non-reconnaissance Collective des États Illégaux* (Pedone 2007) 113; Stefan Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers 2006); Théodore Christakis, 'L'Obligation de Non-Reconnaissance des Situations Créées par le Recours Illicite à la Force ou d'Autres Actes Enfreignant des Règles Fondamentales' in Christian

prohibition of threat or use of force and thus a peremptory norm of international law will entail all legal consequences of such a violation codified notably in article 40 of the same ILC Articles. In addition to the aforementioned obligation of non-recognition, these legal implications include the possibility for a 'State other than an injured State' to invoke the interfering state's international responsibility in the conditions specified by article 48 of the ILC Articles.

## 5 Conclusion

In conclusion, even though, according to a common narrative, the right to non-intervention and non-interference is often portrayed as a fundamental right of states, it appears, as this article has argued, that it is more so in name than in substance. As was argued above, both the autonomous existence of this right as an independent rule (that is, a liberty) and its fundamental character can be seriously questioned. More worthy of examination are its scope and legal implications. In this respect, it has been shown that the most important question is probably whether this right has achieved the status of a *jus cogens* norm. The international law and practice examined in this article show that this is not the case. Only the core principle of the right entailing the prohibition of an intervention or an interference with the threat or use of illegal force is of a *jus cogens* order. It remains, as was argued here, that this superior normative authority does not warrant any alleged fundamental character of the right to non-intervention and non-interference per se.

# Permanent Sovereignty over Natural Resources

Yogesh Tyagi\*

## Abstract

Emerging from the North-South struggle of the 1960s and 1970s, the principle of permanent sovereignty over natural resources is a fundamental right of states, as well as of peoples. Both the principle and the right represent the resolve of developing countries to attain economic independence and to assert the authority of domestic law, albeit with a conflict of perceptions about the role of international law in this scheme. The principle is widely accepted, whereas the right is frequently contested. In the field of international human rights law, the peoples-oriented character of the right has shown its potential to outshine its state-centric nature. In the twenty-first century, the debate over the permanent sovereignty over natural resources has resurfaced especially as a reaction to the litigious record of international investment law. As a result, the principle of permanent sovereignty over natural resources has once again become the rallying point for introducing reform in international investment law. The process of reform is taking different forms, such as states changing their model bilateral investment treaties (unilateralism) or renegotiating their existing bilateral investment treaties (bilateralism), although multilateralism continues to be neglected. This process needs to accompany a new kind of North-South dialogue to secure its wider acceptance in order to ensure a healthy development of the principle/right of permanent sovereignty over natural resources.

## Keywords

Sovereignty, Resources, Self-determination, Economic Independence, International Investment

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## 1 Introduction

According to the 1933 Montevideo Convention on the Rights and Duties of States,<sup>1</sup> as adapted by the Badinter Arbitration Committee in 1991,<sup>2</sup> sovereignty is one of the

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1 Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention).

2 Alain Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1992) 3 EJIL 178, 182.

essential attributes of statehood, and territory is another.<sup>3</sup> Following the Montevideo-Badinter definition of 'state', the concept of permanent sovereignty over natural resources (PSNR) seems to combine these two attributes of statehood. However, the combination of 'the sovereignty of States and the self-determination of peoples' has instead been given credit for the germination of the concept of PSNR.<sup>4</sup> Although a wide range of rights relate to PSNR, the sovereign right of the state to possess, use, dispose, regulate and nationalise or expropriate natural resources in view of its national policies is the most important one.<sup>5</sup> Likewise, a number of correlative duties exist,<sup>6</sup> but the most important one is that the right to PSNR must be exercised in the interest of the national development and well-being of the people of the state concerned.<sup>7</sup>

The catalogue of rights, and that of duties, relating to the principle of PSNR remain uncertain, although the core rights and duties have more or less been identified. Besides other variables, changing national development policies and progressive development of international law would not easily allow for a final listing of the rights and duties. Furthermore, all the rights and duties flowing from PSNR are not equally recognised in international law. Certainly, not all rights and duties have clear content or precise meaning, or are of a uniform national priority. Moreover, the balance between the rights and the correlative duties is not accepted by all.<sup>8</sup> Following the changing balance of economic power in the world, which is likely to witness the emergence of new haves and have-nots, a renewed interest in the concept of PSNR is inevitable. In spite of its considerable influence on international political economy, however, the concept has not attracted the attention of many international relations scholars.

The present study provides an overview of the legal status of PSNR and its state practice in two fields: international human rights law and international investment law. It enquires into the journey of the concept of PSNR to its recognition first as a principle, and then as a right. It attempts to identify various challenges in balancing the rights and duties of states, peoples and individuals in the given fields of study. And it will consider how the concept/principle/right of PSNR keeps the interests of the sovereign state at its core, yet remains sensitive to the interests of others. The paper will begin with a general review of the history of PSNR in international law. The second section

<sup>3</sup> While 'sovereignty' is implicitly expressed in terms of 'government' with 'capacity to enter into relations with the other states', 'territory' is qualified as 'a defined territory', implying some degree of certainty and permanence. See Montevideo Convention, art 1.

<sup>4</sup> See, among others, Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP 1997) 368.

<sup>5</sup> While in 1997 Schrijver identified five 'widely acknowledged' rights and five 'controversial' claims to rights (ibid 391), in 2009 Hofbauer listed only three: see Jane Hofbauer, 'The Principle of Permanent Sovereignty over Natural Resources and its Modern Implications' (LLM thesis, University of Iceland 2009) 13–29.

<sup>6</sup> In 1997, Schrijver identified four duties: see Schrijver, *Sovereignty over Natural Resources* (n 4) 391–92.

<sup>7</sup> Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962) UN Doc A/RES/1803(XVII) (1962 Resolution) para 1.

<sup>8</sup> For instance, unlike Schrijver, *Sovereignty Over Natural Resources* (n 4), Chimni is not satisfied with the balance between rights and duties. See Bhupinder S Chimni, 'The Principle of Permanent Sovereignty over Natural Resources: Toward a Radical Interpretation' (1998) 38 *IJIL* 208, 213–14.

will then focus on PSNR and its development in the specific context of international human rights law. The third section will chart the development and status of PSNR in the context of international investment law, where it has arguably received the highest level of attention. Finally, we will ask whether PSNR can be accurately characterised as a fundamental right of states in international law.

## 2 Legal development and status of PSNR

While the concept of sovereignty has existed for centuries, PSNR as a legal concept has relatively recent origins in international law. Initially appearing as a recommendation for 'concerted action for economic development of economically less developed countries',<sup>9</sup> PSNR found its first concrete expression in 1962 when the United Nations (UN) General Assembly almost unanimously adopted its resolution on Permanent Sovereignty over Natural Resources (1962 Resolution). Since then, a number of developments in various fora have contributed to the growth of PSNR as a legal concept. While a few advocates of PSNR want it to acquire the highest legal status, some of its detractors consider it no more than a political manifesto.<sup>10</sup>

Besides its different legal connotations, PSNR has been a dynamic concept to help assert state authority in time of legal uncertainty. PSNR has sought to achieve in the economic field what the right to self-determination has considerably accomplished in the political field: national independence. It provides a principled support to economic nationalism. PSNR finds its place in both international law and domestic law, although its international law dimensions generally dominate the discourse on the subject.

Being the first concrete expression of the principle of PSNR, the 1962 Resolution recognises the right of peoples and nations to permanent sovereignty over their natural wealth and resources, and the entitlement to exercise it 'in the interest of their national development and of the well-being of the people of the State concerned'.<sup>11</sup> It further recognises the right of the host state to nationalise or expropriate the property of the foreign investor, provided that 'appropriate compensation' is paid in accordance with the applicable rules of domestic law and international law.<sup>12</sup> It seeks to balance the rights of the host state with its duties. It contains provisions to protect the rights of the foreign investor, but it hardly has any space for listing the duties of the investor. Thus, the 1962 Resolution is not a radical departure from traditional international law.<sup>13</sup>

<sup>9</sup> See Concerted Action for Economic Development of Economically Less Developed States, UNGA Res 1515 (XV) (15 December 1960) UN Doc A/RES/1515(XV) para 5.

<sup>10</sup> See, eg, as advocate, Chimni (n 8); as detractor, Schrijver, *Sovereignty over Natural Resources* (n 4).

<sup>11</sup> 1962 Resolution, para 1.

<sup>12</sup> *ibid* para 4.

<sup>13</sup> Chimni (n 8) 208.

The 1974 UN General Assembly Declaration on the Establishment of a New International Economic Order (NIEO Declaration)<sup>14</sup> reaffirmed the principle of PSNR without mentioning the 1962 Resolution as such.<sup>15</sup> In the NIEO Declaration, the principle of PSNR stands along with the principle of sovereign equality of states,<sup>16</sup> which is one of the principles of the UN Charter.<sup>17</sup> However, this normative affinity is rather misleading; a principle enshrined in the UN Charter cannot be equated with a principle merely recognised by a resolution of a political organ of the UN.

Interestingly, although the NIEO Declaration aimed at establishing a new world order, developed countries did not consider it a radical statement in international law. As part of their diplomacy, these countries did not have much difficulty in sympathising with the legitimate aspirations of developing countries without recognising them as legal rights. That is why developed countries did not vote against the adoption of the NIEO Declaration. Contrary to the lip service of most of the developed countries to the cause of economic justice, however, developing countries wanted to transform their legitimate aspirations into realities by evolving new standards of international law. Armed with their voting power in the UN General Assembly, these countries believed in the legitimacy of their cause.

Also adopted by the UN General Assembly following the 1972 initiative of the President of Mexico at the UN Conference on Trade and Development (UNCTAD),<sup>18</sup> the 1974 Charter of Economic Rights and Duties of States (CERDS)<sup>19</sup> sought to supplement the 1962 Resolution by presenting the principle of PSNR in the language of rights and duties. It recognised the rights of states, especially when a foreign investor is involved. It emphasised the primacy of domestic law in regulating foreign investment without rejecting the relevance of international law in this regard, although developed countries have read it differently.<sup>20</sup> Since its balance of the rights and duties of states neither reinforces the *status quo* nor refers to international law, the CERDS appears to

<sup>14</sup> Declaration on the Establishment of a New Economic Order, UNGA Res 3201 (S-VI) (1 May 1974) UN Doc A/RES/S-6/3201.

<sup>15</sup> *ibid* para 4(e).

<sup>16</sup> *ibid* para 4(a), 4(e).

<sup>17</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter) art 2(1).

<sup>18</sup> At the third session of UN Conference on Trade and Development (UNCTAD), held in Santiago, Chile, from 13 April to 21 May 1972, President Luis Echeverría of Mexico proposed the adoption of a Charter of Economic Rights and Duties of States, and UNCTAD decided to establish the Working Group on the Charter of the Economic Rights and Duties of States. Once the Working Group finalised the draft Charter, the Trade and Development Board of UNCTAD transmitted the draft to the UN General Assembly in September 1974.

<sup>19</sup> Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974) UN Doc A/RES/29/3281.

<sup>20</sup> However, the Reporters of the US Restatement of the Foreign Relations Law note that in case of expropriation of property of a foreign national, the CERDS requires payment of 'appropriate compensation' in accordance with 'the law of the expropriating state, rejecting by implication any obligation of compensation under international law'. See *Restatement (Third) of the Foreign Relations Law of the United States*, vol 2 (American Law Institute 1987) 206.

be a radical statement, and the international law orthodoxy did not like it.<sup>21</sup> That is the reason for the Western chorus that the CERDS has no legal value. In the same vein, the Sole Arbitrator in the *Texaco Arbitration* observed that the CERDS ‘must be analysed as a political rather than as a legal declaration.’<sup>22</sup> However, if a unilateral declaration may have legal effects in international law,<sup>23</sup> it must be wondered why an international instrument adopted by the preponderant majority of the UN General Assembly has no legal value.

The use of the term ‘Charter’ in the CERDS is a misnomer—it indicates the ambitions of the drafters of the Charter, not its legal character. Like the 1962 Resolution, the CERDS is a resolution of the UN General Assembly. Unlike the former, however, the latter has been keenly contested on account of its textual radicalism, legal significance and political legitimacy. While some developed countries perceive the CERDS as a ‘fundamental departure from the traditional rules of contemporary international law,’<sup>24</sup> developing countries do recognise the same Charter as ‘a legally binding instrument imposing rights and obligations on states.’<sup>25</sup> Since it was supported primarily by all developing countries and secured little support from developed countries,<sup>26</sup> the CERDS does not represent a consensual growth of the principle of PSNR. Though built on the same premise, the CERDS basically differs from the 1962 Resolution with regard to the applicability of international law, particularly in its emphasis on the domestic law of the host state for the settlement of disputes between the foreign investor and the host state.<sup>27</sup> Thus, in comparison to the 1962 Resolution, the CERDS is a stronger statement of PSNR, with lesser global support.

The legal status of PSNR in international law can be assessed to some extent by evaluating the legal significance of resolutions of international organisations, in general, and the 1962 Resolution and the CERDS, in particular. Although resolutions of international organisations are not generally recognised as a formal source of international law under article 38 of the Statute of the International Court of Justice (ICJ),<sup>28</sup> such resolutions indeed can ‘contribute to the crystallisation or formation of new customary

<sup>21</sup> See, eg, Franz Xavier Perrez, ‘The Relationship between “Permanent Sovereignty” and the Obligation not to Cause Transboundary Environmental Damage’ (1996) 26 *Environmental L* 1187.

<sup>22</sup> *Texaco Overseas Petroleum Company v California Asiatic Oil Company and the Government of Libyan Arab Republic (Compensation for Nationalised Property)* (Award on the Merits) (1977) (1978) 17 *ILM* 1 (*Texaco Arbitration*) para 88.

<sup>23</sup> See, eg, *Legal Status of Eastern Greenland (Norway v Denmark)* [1933] *PCIJ Ser A/B*, No 53, 71; *Nuclear Tests (Australia v France)* (Judgment) [1974] *ICJ Rep* 253, paras 43–45; *Nuclear Tests (New Zealand v France)* (Judgment) [1974] *ICJ Rep* 457, paras 46–48; *United States—Sections 301–10 of the Trade Act 1974 (European Union v United States)—Report of the Panel* (22 December 1999) *WT/DS152/R*, paras 7.118, 7.121–7.123.

<sup>24</sup> Perrez (n 21) 1197.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

<sup>27</sup> Jeswald W Salacuse, *The Law of Investment Treaties* (2nd edn, OUP 2015) 68–74.

<sup>28</sup> Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 *UNTS* 16.

law.<sup>29</sup> As for the 1962 Resolution, its acceptance came with a preponderant majority, including both developing and developed countries, and without the opposition of the leading capital-exporting countries.<sup>30</sup> Further, the principle of PSNR was codified first in the common article 1(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR)<sup>31</sup> and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>32</sup> and subsequently in several other treaties.<sup>33</sup> Moreover, the principle was applied in respect of the natural resources of Namibia even before its independence,<sup>34</sup> thus demonstrating its applicability in both colonial and non-colonial situations.

The 1970 UN General Assembly Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration) recognises the right to self-determination as a principle of international law,<sup>35</sup> but it does not incorporate the principle of PSNR. This means that the principle of PSNR does not always appear as an essential corollary of the principle of self-determination. If one reads the Friendly Relations Declaration along with the NIEO Declaration, PSNR emerges as a principle, not a general or fundamental principle, of international law. This draws attention to a rather flexible use of the term 'principle' in international law. It conveys that not all

<sup>29</sup> International Law Association (ILA), *Statement of Principles Applicable to the Formation of General Customary International Law* (Final Report of the Committee, Committee on the Formation of Customary (General) International Law, Report of the 69th Conference, London 2000) 56.

<sup>30</sup> It was adopted by a vote of 87 to 2 (France and South Africa) along with 12 abstentions (including the United Kingdom and the United States).

<sup>31</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>32</sup> International Covenant on Economic, Cultural and Social Rights (adopted 19 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>33</sup> See, eg, Vienna Convention on Succession of States in respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3, art 13; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 21; United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396, art 193; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (adopted 7 April 1983, opened for signature 8 April 1983) Official Records of the UN Conference on Succession of States in Respect of State Property, Archives and Debts, vol II (UN Publication 2005) arts 15(4), 38(2); United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, preamble; Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, preamble, art 3; Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95, art 18(1).

<sup>34</sup> In the 1960s, intensive foreign mining operations carried out in Namibia forced the UN Council for Namibia to enact Decree No 1 for the Protection of the Natural Resources of Namibia. Pursuant to that Decree, 'no person or entity could search for, take or distribute any natural resources found in Namibia without the Council's permission'. It was made clear that '[a]ny person or entity contravening the Decree could be held liable for damages by the future government of an independent Namibia': see UN, 'Namibia—UNTAG—Background' <<http://www.un.org/en/peacekeeping/missions/past/untagS.htm#UNTAG>> accessed 17 November 2015.

<sup>35</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625, principle 5.

principles of international law have equal legal status: some may reach the status of *jus cogens*, while others may remain as principles in common parlance. As for the principle of PSNR, it has been treated as a *jus cogens* by some,<sup>36</sup> and merely as a principle by many others.<sup>37</sup> A view has been expressed that the principle of PSNR is one of the elements of the principles of the sovereign equality of states and of non-intervention,<sup>38</sup> both of which find expression in articles 2(1) and 2(4) of the UN Charter, respectively. The provisions of the UN Charter enjoy special status by virtue of its supremacy clause under article 103.<sup>39</sup> Since the meaning and scope of article 103 of the UN Charter remain imprecise and inconclusive,<sup>40</sup> it would be difficult to conclude that the principle of PSNR enjoys the benefit of the supremacy clause of the UN Charter by virtue of being an element of its articles 2(1) and 2(4). By the same logic, one cannot completely rule out the possibility of the entanglement of the principle of PSNR with those UN Charter obligations that are considered supreme beyond any doubt in some specific situations.

Unlike the CERDS, the NIEO Declaration was adopted without any opposing vote, implying that developed states had no objection to the characterisation of PSNR as a principle of international law, but they were reluctant to recognise the same principle as an inalienable right of states, peoples or individuals. Even the end of the Cold War has not constrained developed countries from maintaining their stand towards PSNR as a principle in international law. This is evident from the 2008 UN General Assembly Resolution titled 'Strengthening Transparency in Industries', which recalls the 1962 Resolution and reaffirms that 'every State has and shall freely exercise full permanent sovereignty over all its wealth, natural resources and economic activities'.<sup>41</sup> It is also noticeable from the 2008 UN General Assembly Resolution, as well as the 2013 General Assembly Resolution,<sup>42</sup> titled 'The Law of Transboundary Aquifers', which recalls the 1962 Resolution and recognises each aquifer state's 'sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory'.<sup>43</sup> Both the 2008 and

<sup>36</sup> Eduardo Jiménez de Aréchaga, François Ernest Robert Rigaux and Subrata Roy Chowdhury are the prominent proponents of the thesis that the principle of PSNR is *jus cogens*: see Schrijver, *Sovereignty over Natural Resources* (n 4) 375. Also, among others, Ian Brownlie and Alexander Orakhelashvili consider that the principle is of a peremptory character. See, respectively, Ian Brownlie, 'Legal Status of Natural Resources in International Law' (1979) 162 *Recueil des Cours* 245, 255, and Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008) 52–53.

<sup>37</sup> See, eg, Schrijver, *Sovereignty over Natural Resources* (n 4) 377.

<sup>38</sup> Margot E Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice' (2013) 62 *ICLQ* 31, 33.

<sup>39</sup> Among the 'Miscellaneous Provisions' of the UN Charter, art 103 enshrines the supremacy clause thus: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

<sup>40</sup> See, among others, Rain Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 *ICLQ* 583.

<sup>41</sup> UNGA Res 62/274 (11 September 2008) UN Doc A/RES/62/274, preamble.

<sup>42</sup> UNGA Res 68/118 (16 December 2013) UN Doc A/RES/68/118.

<sup>43</sup> *ibid* art 3.

2013 UN resolutions on the law of transboundary aquifers require each aquifer state to exercise its sovereignty 'in accordance with international law and the present articles' of the respective Resolutions.<sup>44</sup> These Resolutions seek to balance the rights of each aquifer state by imposing a duty to utilise transboundary aquifers or aquifer systems according to the principle of 'equitable and reasonable utilisation',<sup>45</sup> which is reminiscent of the principle of sustainable development.

On a few occasions, the UN Security Council has taken serious note of the violations of the principle of PSNR in specific countries, although without mentioning the 1962 Resolution as such. For instance, the UN Security Council has adopted resolutions against the violations of the principle of PSNR in the Democratic Republic of the Congo (DRC)<sup>46</sup> and Liberia.<sup>47</sup> Keeping in view the findings and recommendations of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo,<sup>48</sup> the UN Security Council has taken a host of measures to re-establish the sovereignty of the DRC over its natural resources.<sup>49</sup> In the process, an unprecedented international architecture has emerged to redress the serious violations of the principle of PSNR in the Great Lakes Region. Even the most ardent supporters of the 1962 Resolution perhaps did not imagine at the time of its adoption that the violations of the principle of PSNR would one day prompt the UN Security Council to take enforcement measures under chapter VII of the UN Charter.

Besides its expression in a number of resolutions of international organisations and texts of several multilateral treaties in the fields of the environment, human rights, state succession, law of the sea, international energy and investment law, PSNR has found its recognition in quite a few awards and decisions of international adjudicatory bodies.<sup>50</sup> In the *Texaco Arbitration*, for instance, the legal significance of various resolutions on the NIEO Declaration, as well as the possible existence of a customary norm resulting from those resolutions, were considered by the arbitral tribunal. The Sole Arbitrator concluded that the 1962 Resolution reflected the state of existing customary international law,<sup>51</sup> thus recognising the principle of PSNR outlined in the 1962 Resolution as a customary norm of international law. However, the Sole Arbitrator did not hold the same for the CERDS. Similarly, according to the three-member tribunal in the *Aminoil Arbitration*, the 1962 Resolution enshrines '[t]he most general formulation of the rules applicable for

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid* art 5.

<sup>46</sup> UNSC Res 1457 (24 January 2003) UN Doc S/RES/1457.

<sup>47</sup> UNSC Res 1521 (22 December 2003) UN Doc S/RES/1521.

<sup>48</sup> Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, 'Final Report' (16 October 2002) UN Doc S/2002/1146.

<sup>49</sup> UNSC Res 2198 (29 January 2015) UN Doc S/RES/2198, paras 20–26.

<sup>50</sup> Nico Schrijver, 'Fifty Years Permanent Sovereignty over Natural Resources: The 1962 UN Declaration as the *Opinio Iuris Communis*' in Marc Bungenberg and Stephan Hobe (eds), *Permanent Sovereignty over Natural Resources* (Springer 2015) 15–28, 24–26.

<sup>51</sup> *Texaco Arbitration* (n 22) para 87.

a lawful nationalisation' whereas the CERDS contains the 'most disputed clause' on the same subject.<sup>52</sup>

Unlike the international tribunals in the *Aminoil Arbitration* and the *Texaco Arbitration*, the ICJ in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* did not dissociate the 1962 Resolution from the CERDS.<sup>53</sup> It recalled that the principle of PSNR is expressed in the 1962 Resolution and 'further elaborated' in the NIEO Declaration and the CERDS.<sup>54</sup> Thus, without underlining the differences between the 1962 Resolution and the CERDS, the ICJ sought to settle the issue of legal significance of PSNR, '[w]hile recognising the importance of this principle, which is a principle of customary international law'.<sup>55</sup>

The scope of the principle of PSNR was also at stake in the case of *Armed Activities on the Territory of the Congo*, where the core issue was whether 'illegal exploitation, plundering and looting of the DRC's natural resources' by the Ugandan military forces constituted violations by Uganda of 'the sovereignty and territorial integrity of the DRC, more specifically of the DRC's sovereignty over its natural resources'.<sup>56</sup> While recognising the importance of the principle of PSNR as part of customary international law, the ICJ held that said principle was 'not applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State'.<sup>57</sup> Accordingly, the principle of PSNR was not contemplated to serve as a guiding post in all kinds of situations, and its limitations become evident at the time of its application.

### 3 PSNR in the context of international human rights law

After the adoption of the Universal Declaration of Human Rights in 1948,<sup>58</sup> the UN Commission on Human Rights (the predecessor of the UN Human Rights Council) began drafting the ICCPR and the ICESCR (together, the International Covenants on Human Rights). During this process, the members of the Commission had discussions about the right to self-determination. In this regard, Chile proposed that the right of the peoples to self-determination should also include PSNR.<sup>59</sup> Western countries opposed the Chilean proposal on the ground that the Commission on Human Rights was not

<sup>52</sup> *Award in the Matter of an Arbitration between Kuwait and the American Independent Oil Company (AMINOIL)* (1982) 21 ILM 976 (*Aminoil Arbitration*) paras 143–44.

<sup>53</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168.

<sup>54</sup> *ibid* para 244.

<sup>55</sup> *ibid*.

<sup>56</sup> *ibid* para 226.

<sup>57</sup> *ibid* para 244.

<sup>58</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

<sup>59</sup> Schrijver, *Sovereignty over Natural Resources* (n 4) 49.

competent to deal with the rights and duties of the state.<sup>60</sup> But the former Soviet Union supported the Chilean proposal, claiming that those who were opposing the proposal were either under the fear of losing colonial domination or wanted to perpetuate the economic exploitation of the territories under their control.<sup>61</sup>

Even after the acceptance of the Chilean proposal, which found expression in the 1952 UN General Assembly Resolution on the 'Inclusion in the International Covenant or Covenants on Human Rights of an Article relating to the Right of Peoples to Self-Determination',<sup>62</sup> developed and developing countries continued to debate the subject of peoples' and states' right to PSNR. In 1954, the debate at the Commission on Human Rights culminated in the formulation of the common article 1 of the two Draft International Covenants on Human Rights.<sup>63</sup> The common article 1 read as follows:

1. All peoples and all nations shall have the right of self-determination, namely, the right freely to determine their political, economic, social and cultural status.
2. All States, including those having responsibility for the administration of Non-Self-Governing and Trust Territories and those controlling in whatsoever manner the exercise of that right by another people, shall promote the realisation of that right in all their territories, and shall respect the maintenance of that right in other States, in conformity with the provisions of the United Nations Charter.
3. The right of peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources. In no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States.

The recognition of the right to PSNR as part of the right to self-determination was contested by Western countries because for them the principle of self-determination had nothing to do with control over natural resources, which was an attribute of sovereignty. According to the opponents, if the principle of PSNR were accepted as a right in a treaty, it would be 'a potential threat to foreign investment and international co-operation for the economic development of the under-developed areas'.<sup>64</sup> However, this opposition could not withstand the advocacy of the right to self-determination, including PSNR, by both developing countries and socialist countries. These countries emphasised that the proposal for the incorporation of the right to PSNR into the human rights Covenants 'was not intended to frighten off foreign investment by a threat of expropriation or

<sup>60</sup> *ibid.* 50.

<sup>61</sup> *ibid.*

<sup>62</sup> UNGA Res 545 (VI) (5 February 1952) UN Doc A/C/3/SR.399.

<sup>63</sup> Draft International Covenants on Human Rights: Report of the 3rd Committee (29 November 1954) UN Doc A/2808.

<sup>64</sup> Schrijver, *Sovereignty over Natural Resources* (n 4) 58–59.

confiscation; it was intended rather to warn against such foreign exploitation as might result in depriving the local population of its own means of subsistence.<sup>65</sup>

The incorporation of the principle of PSNR into the Draft International Covenants on Human Rights in 1954 was followed by the establishment of the Commission on Permanent Sovereignty over Natural Resources by the UN General Assembly in 1958.<sup>66</sup> In May 1959, Chile advanced its view that '[f]reedom and independence counted for nothing if they had no economic basis.'<sup>67</sup> Chile and the former Soviet Union also submitted that the right of peoples and nations to PSNR 'must be exercised for the benefit of the people of the State concerned.'<sup>68</sup> On the other hand, the opponents maintained that 'self-determination was recognized as a "principle" and not as a "right" in the UN Charter and that it was doubtful whether the legal concept of "permanent sovereignty over natural wealth and resources" did in fact exist in international law.'<sup>69</sup> Obviously, the opponents were reluctant to accept any change in the old body of international law. Interestingly, the opponents found that 'the existing international law on foreign investment was for most investors incomplete, vague, contested and without an effective enforcement mechanism,'<sup>70</sup> but they saw no problem with the same law in respect of the host state.

The adoption of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples without opposition came as a turning point in the history of the UN.<sup>71</sup> It encouraged the adoption of the 1962 Resolution on PSNR without much opposition. Four years later, the UN General Assembly also adopted the International Covenants on Human Rights with the common article 1 on the right to self-determination, including PSNR.<sup>72</sup> In the process, the UN General Assembly also embedded in the International Covenants on Human Rights a common provision that '[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources.'<sup>73</sup> Common article 1(2) of the International Covenants qualifies the exercise of the right to PSNR 'without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law', whereas the common provision under article 25 of the ICESCR and article 47 of the ICCPR does not contain such a qualification. This may give rise to the impression that PSNR appears

<sup>65</sup> Annotations on the text of the Draft International Covenants on Human Rights (1 July 1955) UN GAOR 10th Session, UN Doc A/2929, 15.

<sup>66</sup> Recommendations concerning International Respect for the Right of Peoples and Nations to Self-determination, UNGA Res 1314 (XIII) (12 December 1958) UN Doc A/RES/1188, para 1.

<sup>67</sup> Schrijver, *Sovereignty over Natural Resources* (n 4) 60.

<sup>68</sup> *ibid* 65.

<sup>69</sup> *ibid* 68.

<sup>70</sup> Salacuse (n 27) 86.

<sup>71</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples (14 December 1960) UNGA Res 1514 (XV).

<sup>72</sup> ICCPR, art 1; ICESCR, art 1.

<sup>73</sup> ICESCR, art 25; ICCPR, art 47.

at two places in the ICCPR, as well as in the ICESCR,<sup>74</sup> without textual consistency. However, the drafting history of the International Covenants does not uphold the impression of inconsistency in their PSNR-related provisions. While the common article 1(2) was drafted in the language of rights, the common provision under article 25 of the ICESCR and article 47 of the ICCPR was incorporated to reiterate a principle of international law. There was no intention to codify PSNR inconsistently.

In this way, the recognition of the right of peoples exercising permanent sovereignty over their natural resources came first from the 1954 Draft International Covenants on Human Rights, and then from the 1962 Resolution on PSNR. The Commission on Human Rights made as much of a contribution to the recognition of PSNR as a right as the Commission on Permanent Sovereignty over Natural Resources did for presenting this right as a principle. Like the right to self-determination, the right to PSNR establishes a bridge between economic, social and cultural rights and civil and political rights. It provides a common ground for first- and second-generation human rights. Further, it illustrates that all human rights are interdependent and interrelated. Consequently, the denial of the principle/right of PSNR violates not only the economic right of the peoples and the nation but it is also contrary to human rights.

While the right to self-determination, including PSNR, is a stand-alone right in the common part I of the International Covenants on Human Rights, the right to PSNR is one of the mainstream human rights under article 21 of the 1981 African Charter on Human and Peoples' Rights (African Charter). In fact, without its merger with the right to self-determination, the right to PSNR as such appears under article 21 of the African Charter thus:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

<sup>74</sup> Salomon (n 38) 44.

This goes well beyond the common article 1(2) of the International Covenants on Human Rights. It embodies one of the ‘third-generation rights’<sup>75</sup> and its violations have been taken seriously by the monitoring bodies of the African Charter.<sup>76</sup> As a result, the African Charter has not only helped establish the peoples-oriented right to PSNR as an integral part of international human rights law but it has also provided this right its own identity.

The adoption of the 2007 Declaration on the Rights of Indigenous Peoples (2007 Declaration) introduced a new thrust into the principle of PSNR.<sup>77</sup> Like the CERDS, the 2007 Declaration did not get the support of some of the developed states at the time of its adoption by the UN General Assembly.<sup>78</sup> However, the widespread support for the rights of indigenous peoples suggests that the opposition of a few states does not necessarily affect the legal significance of these rights. Without recalling the 1962 Resolution, the 2007 Declaration articulates the rights of indigenous peoples to their natural resources thus:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.<sup>79</sup>

The 2007 Declaration further provides that ‘[i]ndigenous peoples shall not be forcibly removed from their lands or territories’ and that ‘[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and

<sup>75</sup> African Commission on Human and Peoples’ Rights, *Antonie Bissangou v Republic of Congo*, Communication No 253/02 (15–29 November 2006), Decision adopted at the 40th session (Merits) para 80.

<sup>76</sup> In the case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, for instance, the African Commission on Human and Peoples’ Rights found, inter alia, a violation of art 21 of the African Charter because the Nigerian government had ‘facilitated the destruction of Ogoniland’ and allowed ‘private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis’. See African Commission on Human and Peoples’ Rights, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication No 155/96 (13–27 October 2001), Decision adopted at the 30th ordinary session (Merits) para 58.

<sup>77</sup> United Nations Declaration on the Rights of Indigenous People, UNGA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 (2007 Declaration).

<sup>78</sup> The 2007 Declaration was adopted by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions. While the CERDS was opposed by the leading capital-exporting states on ideological grounds, the 2007 Declaration was opposed by those developed states that had a significant population of indigenous peoples.

<sup>79</sup> 2007 Declaration, art 26.

after agreement on just and fair compensation and, where possible, with the option of return.<sup>80</sup> In other words, the state has been subjected to certain unprecedented duties towards indigenous peoples. Contrary to the perceptions of the parochial state actors, this extraordinary regime strengthens the principle of PSNR by focusing on the well-being of the people. The principle necessarily includes the obligation to respect and protect the rights of peoples over their natural resources, and recognises that indigenous peoples deserve special consideration because of their vulnerability.

In addition to the rights of indigenous peoples in respect of their natural resources, the 2007 Declaration recognises their right to development ‘in accordance with their own needs and interests.’<sup>81</sup> It further provides that ‘[i]ndigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.’<sup>82</sup> In the *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, for instance, the Inter-American Court of Human Rights (IACtHR) asked the government of Nicaragua to ‘invest, as reparation for immaterial damages (...) in works or services of collective interest for the benefit of the Mayagna (Sumo) Awas Tingni Community’ and ‘to create an effective mechanism’ to protect ‘the property of indigenous communities, in accordance with their customary law, values, customs and mores.’<sup>83</sup> While recognising the wide-ranging rights of indigenous peoples, the 2007 Declaration articulates the corresponding duties of states, thus adding a new category of jural correlatives that bring a new challenge to the balancing of the rights and duties of states, peoples, communities and individuals. Since some indigenous communities have a transnational presence in Africa,<sup>84</sup> in particular, trans-border balancing of the rights and duties of these communities, the states concerned, and other stakeholders is a challenging task. In brief, the 2007 Declaration presents a special package of the rights to self-determination, development and PSNR; it highlights the peoples-oriented character of the principle of PSNR; and it successfully challenges international law orthodoxy.

Obviously, the human rights dimensions of the principle of PSNR are broader than those anticipated by the advocates of this principle in the 1960s and 1970s. Since the protection of the rights of foreign investors is part of the principle, the cases of violations of their rights may also attract the application of a human rights treaty if such violations affect the provisions of the treaty. In the case of *OAO Neftyanaya Kompaniya Yukos v Russia*,<sup>85</sup> for instance, the European Court of Human Rights held that the Russian

<sup>80</sup> *ibid* art 10.

<sup>81</sup> *ibid* preamble, para 6, art 23.

<sup>82</sup> *ibid* art 20(2).

<sup>83</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 79 (31 August 2001) (*Mayagna (Sumo) Awas Tingni Community*) para 173.

<sup>84</sup> African Commission on Human and Peoples’ Rights, *Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples*, Opinion adopted at the 41st ordinary session (16–30 May 2007) para 30.

<sup>85</sup> *OAO Neftyanaya Kompaniya Yukos v Russia* App no 14902/04 (European Court of Human Rights, 20 September 2011) (*OAO Neftyanaya*).

Federation had violated, inter alia, the right to a fair hearing (under article 6(1) of the 1950 European Convention on Human Rights and Fundamental Freedoms)<sup>86</sup> of the applicant company by resorting to unfair use of the legal and tax system of the state.<sup>87</sup> Later, the European Court asked the Russian Federation to pay US\$2.51 billion in damages to the shareholders of OAO Neftyanaya Kompaniya Yukos,<sup>88</sup> the company which had gone bankrupt.

While the *Awes Tingni Community* case<sup>89</sup> applied the principle of PSNR as enshrined in the Draft Declaration on Discrimination against Indigenous Peoples<sup>90</sup> to enhance the rights of individuals/communities against the state concerned, the *Yukos* case rendered the corresponding rights of the state concerned subservient to the human rights of the complaining individuals. If these cases are read together, one may observe that the principle of PSNR has contributed more to the development of the rights of individuals/communities than those of states. Consequently, the principle has as much potential to protect the rights of individuals, communities and foreign investors, including both natural and juridical persons, as that of states. This indicates an increasing engagement between international human rights law and international investment law. Also, it signifies a change in the balance of rights and duties of states. Now, in the field of human rights, states are endowed with a larger number of duties and can no longer claim to be the chief beneficiaries of the right to PSNR.

#### 4 PSNR in the context of international investment law

The movement for the development of the principle of PSNR during the 1950s–1970s was essentially a collective response to the experiences of developing countries in the field of international investment law. With its colonial legacy, the traditional international investment law contained some controversial features, especially concession agreements and the Hull formula, which proved to be detrimental to the interests of these countries.<sup>91</sup> Also, despite the Calvo doctrine, developing countries remained exposed to traditional

<sup>86</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5.

<sup>87</sup> *OAO Neftyanaya* (n 85).

<sup>88</sup> *ibid.*

<sup>89</sup> *Mayagna (Sumo) Awes Tingni Community* (n 83). In this case, the IACtHR found the government of Nicaragua in violation of arts 21 (the right to property) and 25 (the right to judicial protection) of the American Convention on Human Rights in respect of the Mayagna (Sumo) Awes Tingni Community (American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123). It therefore asked the government 'to create an effective mechanism' to protect 'the property of indigenous communities, in accordance with their customary law, values, customs and mores' (*Mayagna (Sumo) Awes Tingni Community* (n 83) para 173).

<sup>90</sup> Draft Declaration on the Rights of Indigenous Peoples, UN Res 1995/32 (3 March 1995) UN Doc E/CN.4/2006/79.

<sup>91</sup> See, among others, Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 28.

international law and procedure for the settlement of their disputes with foreign investors that were essentially a matter of domestic jurisdiction.<sup>92</sup> Since developing countries wanted to assert their national sovereignty over the persons and their acts and assets within their jurisdiction, in 1961 the Asian-African Legal Consultative Committee emphasised the primacy of domestic law in the Principles Concerning Admission and Treatment of Aliens.<sup>93</sup> Ramcharan, a distinguished international lawyer from the Caribbean, summarised the situation thus:

The approach of the Asian-African Legal Consultative Committee was similar to that of the Inter-American Juridical Committee inasmuch as it regarded the traditional laws on State responsibility as products of Western Europe, as being unfair, and as not being binding on the new States of Asia, Africa and Latin America. The Committees also shared a wish to re-write and reshape the traditional law.<sup>94</sup>

The 1962 Resolution came in the background of this cry for change. The principle of PSNR as found in the 1962 Resolution upholds the ‘inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests.’<sup>95</sup> It recognises the right of a state to nationalise or expropriate the property of a foreign investor. At the same time, it provides that ‘the owner *shall be paid appropriate compensation*, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and *in accordance with international law*’.<sup>96</sup> In case of a dispute over the question of compensation, the 1962 Resolution stipulates the exhaustion of local remedies and contains the possibility of settlement of the dispute through arbitration or international adjudication if sovereign states and other parties concerned agree to invoke this mechanism.<sup>97</sup>

The 1962 Resolution contained a compromise ‘between respect for national sovereignty and other rights and obligations under international law’.<sup>98</sup> It sought to satisfy developing countries by referring to domestic law on issues such as compensation to be paid for expropriation of foreign investment. Likewise, it attempted to assure developed countries by making reference to international law and to international adjudication to settle disputes pertaining to compensation for expropriation. It envisaged the standard

<sup>92</sup> *ibid.*

<sup>93</sup> According to the Asian-African Legal Consultative Organisation, Principles Concerning Admission and Treatment of Aliens (25 February 1961) <<http://www.refworld.org/docid/44eae2224.html>> accessed 17 November 2015, the right of an alien to acquire, hold and dispose of property is ‘[s]ubject to local laws, regulations, and orders and subject also to the condition, imposed for his admission into the State’ (art 11). Also, the Principles envisaged thus: ‘The State shall, however, have the right to acquire, expropriate or nationalise the property of an alien. Compensation shall be paid for such acquisition, expropriation or nationalisation in accordance with local laws, regulations and orders’ (art 12).

<sup>94</sup> Bertrand G Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (Martinus Nijhoff 1977) 184.

<sup>95</sup> 1962 Resolution, preamble.

<sup>96</sup> *ibid* para 4 (emphasis added).

<sup>97</sup> *ibid.*

<sup>98</sup> Schrijver, *Sovereignty over Natural Resources* (n 4) 70.

of 'appropriate' compensation, not 'prompt, adequate and effective' compensation. However, the 1962 Resolution left scope for a conflict of interpretation. For instance, in 1962 itself, the United States declared that in its view the word 'appropriate' was the equivalent of 'prompt, adequate and effective'.<sup>99</sup> That is why the 'appropriate' standard of treatment as well as the reference to international law was gradually diluted in two subsequent resolutions on the same topic.<sup>100</sup> There was greater focus on domestic law to decide questions related to expropriation and compensation to be paid in case a foreign investment was expropriated. The NIEO movement sought to intensify efforts to give primacy to domestic law over international law in regulating and protecting foreign investment, and the CERDS came as a part of this process.

The CERDS seeks to address some of the inequities of traditional international investment law. In the spirit of the Calvo doctrine, article 2(2)(a) of the CERDS gives every state the right to regulate foreign investment in accordance with its domestic law and national priorities. Sensitive to the legitimate aspirations of developing countries, not all developed countries opposed the CERDS. For instance, in spite of voting against the 1962 Resolution, France voted in favour of the CERDS. However, other developed countries either abstained or voted against the CERDS.<sup>101</sup> In particular, the leading capital-exporting countries opposed article 2(2)(a) of the CERDS because 'they wanted host countries to treat foreign investments as per what they thought to be their international obligations'.<sup>102</sup> Similarly, the leading capital-exporting countries were unhappy with article 2(2)(b) of the CERDS, which gives every state the right to regulate and supervise the activities of transnational corporations (TNCs) within its domestic jurisdiction in accordance with its laws and national priorities. On the other hand, for developing countries, this provision was essential in the absence of any international code of conduct on TNCs.

Article 2(2)(c) of the CERDS recognises the right of every state to expropriate foreign investment and determine the amount of compensation according to its domestic law and national priorities. It further stipulates that any dispute over the question of compensation shall be decided by the national courts applying national law. Unlike the 1962 Resolution, the CERDS does not meet 'the demand of developed countries that the question of compensation should be decided according to the principles of international law',<sup>103</sup> for 'developing countries denied the existence of any such principle'.<sup>104</sup> In other

<sup>99</sup> Frank G Dawson and Burns H Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation? (1962) 30 *Fordham L Rev* 727; *Restatement (Third) of the Foreign Relations Law of the United States* (n 20) 206.

<sup>100</sup> Permanent Sovereignty over Natural Resources (25 November 1966) UNGA Res 2158 (XXI); Permanent Sovereignty over Natural Resources (17 December 1973) UNGA Res 3171 (XXVIII).

<sup>101</sup> The six opponents were: Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom and the United States.

<sup>102</sup> Prabhash Ranjan, 'India and Bilateral Investment Treaties—A Changing Landscape' (2014) 29 *ICSID Rev* 419, 424.

<sup>103</sup> *ibid* 425.

<sup>104</sup> *ibid*.

words, while developing countries deployed the principle of PSNR to strive towards their economic independence by challenging their subordination in the name of the established rules of international law, developed countries sensed dangers to their economic dominance by the primacy of domestic law. For these reasons, generally, developed countries attach no legal value to the CERDS.<sup>105</sup> Indeed, the principle of PSNR was the bone of contention between developed and developing countries. The CERDS led to their showdown, and the North-South conflict pushed developing countries closer to socialist countries. This contestation prompted developed countries to promote a new architecture of international investment law by resorting to bilateral diplomacy with little risk of confronting the combined strength of developing countries and socialist countries.

#### 4.1 Proliferation of bilateral investment treaties in the 1990s and departure from PSNR principles

While developing countries as a group were trying to get rid of the colonial yoke by invoking the principle of PSNR, most of them were also ‘competing intensely with each other to attract foreign investment’,<sup>106</sup> and a few of them were entering bilateral agreements with developed countries not only to attract foreign investment but also to ensure protection of the investment. In other words, developed countries—West European countries to start with—designed the instrumentality of bilateral investment treaty (BIT) to bind developing countries in international treaty obligations to protect foreign investment because the traditional international protection, under existing international law, was under threat from the multilateral initiatives such as the CERDS and the NIEO.<sup>107</sup> One can learn from the following comment of the reporters of the *Restatement (Third) of the Foreign Relations Law of the United States* that the capital-exporting countries have deployed BITs to make developing countries accept ‘all or some of the terms’ of the Hull formula:

The United States Government has consistently taken the position in diplomatic exchanges and in international fora that under international law compensation must be ‘prompt, adequate and effective’, and those terms have been included in United States legislation. (...) That formulation has met strong resistance from developing states and has not made its way into multilateral agreements or declarations or been universally utilised by international tribunals, but it has been incorporated into a substantial number of bilateral agreements negotiated by the United States as well as by other capital-exporting states both among themselves and with developing states.<sup>108</sup>

<sup>105</sup> Salacuse (n 27) 84.

<sup>106</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 236.

<sup>107</sup> According to Salacuse (n 27) 84–85, the CERDS ‘served to undermine the solidity of the traditional international legal framework for foreign investment and led both investors and their home countries to search for means to strengthen it in order to protect their economic interests in a new era.’

<sup>108</sup> *Restatement (Third) of the Foreign Relations Law of the United States* (n 20) 198.

In this way, BITs became part of the strategy of developed countries to check multilateral economic diplomacy, where these countries had a comparative disadvantage. Although the first BIT came into existence in 1959,<sup>109</sup> when the principle of PSNR was struggling to get recognition in international law, such treaties did not become very popular until the mid-1990s. This is evident from the fact that only 200 BITs existed in 1980 and only 500 or so in 1990, whereas by the end of April 2015, this number reached more than 3200.<sup>110</sup> The increasing number of BITs, which contained broad rules for protection of foreign investment, meant that developing countries were more and more willing to accept international law as the framework for regulation of foreign investment. This indicated a significant departure from the principle of PSNR in two ways. First, developing countries, by and large, accepted that the principle of paying compensation for expropriation of foreign investment should be guided by the principles laid down in the BIT, not domestic laws. Second, developing countries accepted that foreign investors could initiate international arbitral proceedings against their sovereign action under the BIT without necessarily exhausting local remedies. Since BITs sought to prune PSNR and subvert CERDS, these treaties represent the rise of the rights of foreign investors against sovereign rights in the name of widespread international investment law. It is an open secret that 'BITs give guarantees to investors but do not normally address obligations of investors.'<sup>111</sup> The unequal nature of BITs is reminiscent of unequal treaties,<sup>112</sup> although a few commentators observe that 'the reality is little more nuanced than this.'<sup>113</sup> Since BITs are the mainstay of modern international investment law, there is a crisis of confidence.

#### 4.2 Are PSNR principles re-surfacing in international investment law?

Treaties bring their signatories together with the prospects of international cooperation in the given fields, but their potential to create conflicts cannot be ruled out. BITs are no exception. The increase in the number of BITs in the last two decades or so (essentially,

<sup>109</sup> See Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes) (Federal Republic of Germany-Pakistan) (adopted 25 November 1959, entered into force 28 April 1962) 457 UNTS 23.

<sup>110</sup> This includes 2926 stand-alone investment treaties or BITs and 347 investment chapters in free trade agreements or international investment agreements. See UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (UN Publications 2015) 106.

<sup>111</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 25.

<sup>112</sup> See, among others, Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2010) 39, 178–79, 188, 430.

<sup>113</sup> For example, Ranjan draws attention to the fact that today there are a number of BITs signed between developing countries (eg, the 2011 Agreement between the Government of India and the Government of Nepal for the Promotion and Protection of Investments), where both countries seek to protect foreign investment. Ranjan also points out that, in several instances, BITs are being used by developing countries to protect their investment in developed countries. For example, in 2014, 40 per cent of BIT cases were brought against developed countries (see UNCTAD, *World Investment Report 2015* (n 110) 112). Ranjan's comments are available on file with the author.

1995–2015) has been followed by a corresponding increase in the number of disputes between foreign investors and host states. The number of known investment treaty disputes under arbitration has increased from little more than 50 in 1996 to 608 by the end of 2014.<sup>114</sup> These disputes have meant that foreign investors, using BITs, have been able to challenge a wide array of sovereign regulatory measures. In other words, investment treaty arbitration (ITA) tribunals have decided whether these sovereign regulatory measures breach host countries' BIT obligations. This could have an adverse impact on a large part of the population of a host state and may involve the award of substantive damages to foreign investors, resulting in diversion of taxpayer's money to foreign investors. This has generated a backlash or contestation against international investment law<sup>115</sup> to the extent that Sornarajah, a leading expert on international investment law, calls the present system 'a fraudulent system.'<sup>116</sup>

The argument is that a small number of arbitrators from developed countries dominate the ITA world, and determine the public interests of the countries (which some say are mostly developing) involved in international investment disputes, and often apply controversial principles such as 'the fair and equitable treatment standard' as established jurisprudence.<sup>117</sup> The democratic deficit of international investment law has become a matter of concern.<sup>118</sup> Considering that international investment arbitration is an expensive procedure<sup>119</sup> that may indeed produce awards of damages as high as US\$1.061 billion (*à la* the *Oxy* case)<sup>120</sup> or even US\$50.2 billion (*à la* the *Yukos* case),<sup>121</sup> the price of justice through the ITA route is too heavy. One may wonder whether developing countries can afford it.

<sup>114</sup> UNCTAD, 'Recent Trends in IIAs and ISDS' (2015) 1 UNCTAD IIA Issues Note 1 <[http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf)> accessed 5 July 2015.

<sup>115</sup> See, among others, Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50 *Harvard Intl LJ* 491; Louis T Wells, 'Backlash to Investment Arbitration: Three Causes' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

<sup>116</sup> Muthucumaraswamy Sornarajah, 'International Investment Law as Development Law: The Obsolescence of a Fraudulent System' (2015) (forthcoming; on file with author).

<sup>117</sup> In this regard, Sornarajah has observed: 'It is, as if once gunboat diplomacy had failed, investment arbitrators are the insidious troops that are the hidden guardians of foreign investment dressed up in expensive civilian suits instead of military uniform' (*ibid*).

<sup>118</sup> See, among others, Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 *Vanderbilt J Transnatl L* 775; Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatising Public International Law through Inconsistent Decisions' (2004–05) 73 *Fordham L Rev* 1521.

<sup>119</sup> Sornarajah, *The International Law on Foreign Investment* (n 112) draws attention to the fact that over 55 million dollars were spent on the arbitration of *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines* (Award) ICSID Case No ARB/03/25 (16 August 2007).

<sup>120</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador* (Decision on Annulment of the Award) ICSID Case No ARB/06/11 (2 November 2015).

<sup>121</sup> *Hulley Enterprises Limited (Cyprus) v Russian Federation* (Final Award) PCA Case No AA 226 (18 July 2014); *Yukos Universal Limited (Isle of Man) v Russian Federation* PCA Case No AA 227 (18 July 2014); *Veteran Petroleum Limited (Cyprus) v Russian Federation* (Final Award) PCA Case No AA 228 (18 July 2014).

Reacting against international investment arbitration and reasserting their national sovereignty, some states have terminated their BITs and also withdrawn from those multilateral treaties that were used for instituting arbitration proceedings against them. Like the initiative for the recognition of the principle of PSNR, the revolt against BITs and international investment arbitration began in Latin America. In March 2008, Ecuador renounced nine of its BITs<sup>122</sup> and, in July 2009, it served notice to withdraw from the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).<sup>123</sup> Likewise, in May 2008, Venezuela terminated its BIT with the Netherlands because it felt that the treaty in question obstructed policy changes in its energy sector;<sup>124</sup> in January 2012, it withdrew from the ICSID Convention.<sup>125</sup> In July 2009, the Russian Federation terminated the provisional application of the 1994 Energy Charter Treaty.<sup>126</sup> After reviewing its entire BIT programme, in September 2012, South Africa terminated its BIT with Belgium and Luxembourg and then renounced the BITs with Spain and Germany in 2013.<sup>127</sup> Having encountered the arbitration challenge to its Black Economic Empowerment (BEE) programme,<sup>128</sup> South Africa decided to construct domestic legislation for

<sup>122</sup> UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (UN Publication 2013) 108.

<sup>123</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159. For preliminary information on Ecuador's withdrawal from the ICSID Convention, see Joshua M Robbins, 'Ecuador withdraws from ICSID Convention' (*Practical Law*, 12 August 2009) <<http://uk.practicallaw.com/2-422-1266?service=arbitration>> accessed 17 November 2015.

<sup>124</sup> Luke E Peterson, 'Venezuela Surprises the Netherlands with Termination Notice of BIT; Treaty has been Used by Many Investors to "Route" Investments into Venezuela' (*Investment Arbitration Reporter*, 16 May 2008) <<https://www.iareporter.com/articles/venezuela-surprises-the-netherlands-with-termination-notice-for-bit-treaty-has-been-used-by-many-investors-to-route-investments-into-venezuela/>> accessed 17 November 2015.

<sup>125</sup> Elisabeth Eljuri and Ramón J Alvins, 'Venezuela Denounces the ICSID Convention' (*Norton Rose Fulbright*, 24 January 2012) <<http://www.nortonrosefulbright.com/knowledge/publications/62427/venezuela-denounces-the-icsid-convention>> accessed 17 November 2015.

<sup>126</sup> For comments on the Russian termination, see, among others, Amelia Hadfield and Adnan Amkhan-Banyo, 'From Russia with Cold Feet: EU-Russia Energy Relations, and the Energy Charter Treaty' (2013) 1 *Intl J Energy Security & Environmental Research* 1.

<sup>127</sup> Sean Woolfrey, 'Another BIT Bites the Dust' (*Tralac*, 30 October 2013) <<http://www.tralac.org/discussions/article/5342-another-bit-bites-the-dust.html>> accessed 17 November 2015.

<sup>128</sup> In *Piero Foresti, Laura de Carli & Others v Republic of South Africa* (Award) ICSID Case No ARB(AF)/07/01 (4 August 2010) the claimants (seven Italian nationals and one Luxembourg-incorporated company) argued, inter alia: that South Africa's Mining Charter 2004 and the Mineral and Petroleum Resources Development Act 2002 had introduced 'the notion of state custodianship of mineral rights' (para 55); that new public law powers of control by the state were 'incompatible with the common law notion of rights to minerals' (para 55); and that the BEE 'equity divestiture requirements established by the twin operation' of the legislation in question expropriated the minerals and mining rights of the companies in which the claimants had their shares (para 64). Pending the arbitration, South Africa granted new mineral rights in lieu of the old ones to the operating companies and, therefore, the claimants requested the arbitration tribunal to discontinue the arbitration. The tribunal discontinued the case and awarded costs to the respondent.

regulating and protecting foreign investment instead of BITs.<sup>129</sup> Outraged by the ICSID Tribunal's decision in its mining dispute with a British company,<sup>130</sup> in March 2014, Indonesia expressed the intention to terminate all of its 67 BITs,<sup>131</sup> including one with the Netherlands that came to an end on 1 July 2015.<sup>132</sup>

Because of 'a steady increase in foreign investors challenging' national regulatory measures under BITs at international arbitration tribunals, several countries have considered terminating their BITs in the hope that their exit from these treaties will provide 'a high degree of immunity' to national 'regulatory measures impacting foreign investment from being challenged under international law'.<sup>133</sup> Although a number of states have not yet decided to terminate their BITs because of various constraints, the overall support for these treaties has been diluted in those countries. In India, for example, the Ministry of Commerce favoured termination of BITs, but the Ministry of Finance disagreed. The dissatisfaction with BITs is reflected in the 2015 Model Text for the Indian Bilateral Investment Treaty (2015 Model BIT).<sup>134</sup> Like a host of other countries,<sup>135</sup> India wants to revise its BITs primarily due to a number of BIT claims brought by foreign investors.<sup>136</sup> It wishes to retain treaty protection to foreign investment, though in a diluted form in comparison to its existing BITs and rely more on domestic law. Although the 2015 Model BIT contains an investor-state dispute settlement provision, India has its own internal differences on this aspect and prefers to settle its disputes with foreign investors within its own jurisdiction.

<sup>129</sup> Chantall Presence, 'MPs Pass Controversial Investment Bill' (*IOL*, 17 November 2015) <<http://beta.iol.co.za/news/politics/mps-pass-controversial-investment-bill-1946816>> accessed 24 November 2015.

<sup>130</sup> *Churchill Mining Plc v Indonesia* (Decision on Jurisdiction) ICSID Case No ARB/12/14 and 12/40 (24 February 2014).

<sup>131</sup> Herbert Smith Freehills LLP, 'Indonesia Indicates Intention to Terminate All of its Bilateral Investment Treaties?' (*Herbert Smith Freeholds Dispute Resolution—Arbitration Notes*, 20 March 2014) <<http://hsfnotes.com/arbitration/2014/03/20/indonesia-indicates-intention-to-terminate-all-of-its-bilateral-investment-treaties/>> accessed 17 November 2015.

<sup>132</sup> Netherlands Embassy in Jakarta, Indonesia, 'Termination Bilateral Investment Treaty' <<http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html>> accessed 25 November 2015.

<sup>133</sup> Prabhash Ranjan, 'Column: Get a BIT Pragmatic' (*The Financial Express*, 17 July 2014) <<http://archive.financialexpress.com/news/column-get-a-bit-pragmatic/1270640>> accessed 17 November 2015.

<sup>134</sup> Model Text for the Indian Bilateral Investment Treaty (2015) <[https://www.mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf)> accessed 17 May 2016. For a critique of the 2015 Model BIT, see Prabhash Ranjan, 'Comparing Investment Provisions in India's FTAs with India's Stand Alone BITs: Contributing to the Evolution of New Indian BIT Practice' (2015) 16 *J World Investment & Trade* 899.

<sup>135</sup> According to UNCTAD, at least 45 countries and four regional integration organisations are currently revising or have recently revised their model agreement. See UNCTAD, *World Investment Report 2015* (n 110).

<sup>136</sup> For reasons behind India's decision to review its BITs, see Ranjan, 'India and Bilateral Investment Treaties' (n 102). As of 22 November 2015, nine foreign investors have issued investment treaty arbitration notices to India and in some of these cases an arbitration tribunal has been constituted: see the search results generated at <[http://www.italaw.com/search/site/India?f\[0\]=im\\_field\\_case\\_type%3A1090](http://www.italaw.com/search/site/India?f[0]=im_field_case_type%3A1090)> accessed 23 November 2015.

The termination of a BIT implies that the parties to the treaty are no longer bound by its provisions governing regulation of foreign investment, although they will still be bound by the applicable customary rules of international law, general principles of law recognised by civilised nations and peremptory norms of international law. This gives them the right to treat foreign investment essentially according to their domestic laws, and thus go back to the era of the 1960s and 1970s, when developing countries invoked the principle of PSNR and argued for domestic laws as the framework to regulate foreign investment including issues such as compensation for expropriation and challenging the host country's regulatory power before the state's local courts. Since not many developing countries have terminated their BITs and some of them are still keen to enter into new BITs,<sup>137</sup> the argument of PSNR principles re-surfacing through termination of BITs cannot be made for many developing countries. Further, grandfathering provisions or survival clauses in BITs do not allow the terminating/withdrawing state to enjoy freedom from its treaty obligations for quite some time.<sup>138</sup> Thus, the battle of BITs does not reflect the traditional divide between developed and developing countries in the field of international investment law, in general, and the principle of PSNR, in particular.

## 5 Can PSNR be accurately characterised as a fundamental right of states?

The concept of sovereignty is the basic premise of the concept of PSNR. Unlike the former, however, the latter has struggled to achieve recognition in international law. The traditional international law with its Eurocentric nature had no place for the principle of PSNR, thus allowing the growth of colonialism, concession agreements, diplomatic protection, and intervention to protect nationals and their properties abroad. Even if one could trace some elements of PSNR in the traditional international law, only the powerful states had capacity to make use of them. Although the UN Charter introduced a new era, it required a considerable amount of time to find a place for the principle of PSNR in the body of international law. The demand for the recognition of the principle of PSNR came from developing countries after their long exploitation; socialist countries supported it, whereas developed countries either opposed it or gave a lukewarm response. The principle became acceptable to its opponents largely because of its generalities and political legitimacy. A radical change in the balance of voting power at the UN General Assembly catalysed the recognition of the principle. As soon as it started acquiring the status of a legal right, however, the principle encountered a host of challenges. The principle still faces challenges during the course of its application in different fields.

<sup>137</sup> For example, China is keen to conclude BITs with the European Union and the United States.

<sup>138</sup> Under the 1994 Energy Charter Treaty, art 47(3), eg, the withdrawing state remains bound to apply its provisions for as long as 20 years in respect of the investments made prior to the withdrawal came into effect.

A categorical answer to the question whether PSNR can be accurately characterised as a fundamental right of states would amount to an oversimplification of the complex webs of norms that manifest PSNR in different fields. The international debate on PSNR began in the context of the right to self-determination of nations. Later, it moved on to the direction of international economic law. Subsequently, it entered the mainstream of international human rights law. Eventually, it expanded into the fields of international environmental law and international trade law. Since PSNR as a fundamental right of states has not been equally and uniformly developed in all these fields, any generalisation of the status of the said right is bound to conceal more than what it would reveal.

At least five factors appear to be responsible for the underdevelopment of PSNR as a fundamental right of states. First, the focus of the international debate has been on PSNR as a principle, rather than as a fundamental right of states. Secondly, PSNR has not been a beneficiary of enrichment through the well-established mechanisms of progressive development and codification of international law. Thirdly, PSNR has not been a priority of those states that generally shape the international law-making agenda. Fourthly, the PSNR debate has encountered ideological divisions since its inception, which constrained consensual growth of norms relating to PSNR. Finally, after its provocative appearance in the 1960s and 1970s, PSNR was almost forgotten until its revival in the new millennium. In relative terms, PSNR is most accurately characterised as a fundamental right of states in the field of international investment law. It was barely dealt with in the state practice of international trade law until the beginning of the new millennium, and international human rights law has ushered in the transformation of the state-centric nature of the right to PSNR into its peoples-oriented character.

In international investment law, PSNR signifies the fundamental right of the host state to regulate investment and to nationalise or expropriate investment. Although most BITs aim at 'promotion and protection' of investment, the sovereign right to regulate and expropriate investment is reaffirmed by most of these treaties themselves. At the same time, the rights to regulate and expropriate have corresponding obligations towards foreign investors in particular. While these rights are almost frozen, their corresponding obligations have grown by virtue of thousands of BITs and their pro-investor interpretations by a number of commentators and arbitration tribunals. There are quite a few controversial elements of even well-characterised obligations of states. Consequently, the impact of the large quantity and/or controversial elements of obligations of states on their fundamental rights are a matter of debate.

In the field of international human rights law, the initial version of the right to PSNR was designed to uphold the fundamental right of nations over their natural resources, and its subsequent versions underlined the basic rights of peoples in respect of the lands and natural resources traditionally owned/possessed/used by these peoples. By virtue of the 'P' in PSNR, a nation under colonial rule or a non-self-governing territory could not be deprived of its right over its natural resources or wealth by a

colonial ruler or administering authority even if the resources or wealth remained under the ownership and control of the latter for a long time. Later, the 'S' in PSNR was transformed from its traditional tag of 'sovereign authority' to its modern meaning of 'sovereign responsibility'. As a result, the fundamental right to PSNR needs to be exercised in the public interest. In the event of exercising its right to PSNR at the cost of the interests of its people, the state concerned stands in breach of the public trust doctrine (PTD) and remains accountable.<sup>139</sup> The density of the PTD is fairly high in respect of the rights of indigenous peoples, in particular, so much so that these peoples can invoke the right to PSNR against their own state. Consequently, the state-centric right to PSNR coexists with the peoples-oriented right to PSNR; the latter is considerably developed through certain declarations/resolutions of international organisations and the jurisprudence of the African and American human rights bodies in particular; and states feel obligated to modify even their international contractual commitments to meet their human rights obligations.

Since the right to development has matured into the right to sustainable development, international human rights law has come closer to international environmental law. Accordingly, states have 'the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies'.<sup>140</sup> The environment-trade link has enabled states to apply environmental protection standards and exercise their PSNR rights in international trade. It follows that states have a right to use and manage their natural resources for their economic development and to adopt conservation measures, encompassing measures 'to regulate and control' exploitation of those resources 'in the light of their own objectives and policy goals, including economic and sustainable development'.<sup>141</sup> In the *China Rare Earths* case, the use of expressions such as 'the general principle' of PSNR as 'a relevant rule of international law' indicates the constraints in characterising PSNR as a fundamental right of states owing to the weighty obligations of states under the law of the World Trade Organisation (WTO).<sup>142</sup>

Theoretically, rights and obligations as jural correlatives help shape each other. By this logic, since the fundamental rights of states are subject to an increasing number of obligations, the scope of those rights must have been decreased and consequently the accuracy of those rights must have become unsustainable. However, this may not be true in state practice. Moreover, the accuracy of a fundamental right of states does not necessarily determine its legal status. For example, whatever the limitations of the principle of and right to sovereign equality of states in both normative and functional terms, there is no doubt about the status of this fundamental right of states. The same

<sup>139</sup> See, eg, Joseph Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 Michigan L Rev 471.

<sup>140</sup> UNGA, 'Report of the United Nations Conference on Environment and Development: Annex I—Rio Declaration on Environment and Development' (12 August 1992) UN Doc A/CONF.151/26.

<sup>141</sup> *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum—Reports of the Panel* (26 March 2014) WT/DS431/R, WT/DS432/R and WT/DS433/R (*China Rare Earths*) para 7.267.

<sup>142</sup> *ibid* paras 7.262–7.263.

logic applies to the principle of and right to PSNR, although this logic does not find its codified expression as much as the advocates of the said principle/right wish to have in place.

As a whole, there is consensus on the generalities of the principle of, and the right to, PSNR and the specifics of the principle/right have been left to be developed in light of the considerations that are relevant in a specific field. Consequently, the scope and limitations of PSNR as a fundamental right of states are a matter of occasional discussion, which takes a different course in a different context. Like other rights, the right to PSNR is not an absolute right of states and its limitations considerably depend on its context.

The exercise of the right to PSNR occasionally comes into conflict with the rights of other states and entities. For example, most international investment disputes are the result of this kind of conflict. Any normative conflict may be resolved either through an understanding between the parties concerned or an authoritative assessment of the hierarchy of norms applicable in the given case. The *China Rare Earths* case illustrates the implications of the characterisation of PSNR as a right of states and the effects of its application in conflict with the obligations of the right-exercising state and the rights of other states. The WTO Panel in this case sought to determine, inter alia, the extent to which China could exercise its right to PSNR in international trade.<sup>143</sup> The Panel believed that China was not entitled to exercise its PSNR rights in breach of its WTO obligations, especially when the rationale of the trade restrictions in question was not justifiable.<sup>144</sup> In the process, the Panel attempted to strike a balance between (a) the PSNR rights and WTO obligations of states; (b) the WTO rights and obligations of states; and (c) trade and non-trade-related concerns.<sup>145</sup> This was essentially an exercise in assessing normative relativity in the context of international trade, where the authority of WTO law is well established by virtue of its codified expression in the form of covered agreements; the right to PSNR does not have the comparable advantage. Although the trade liberalisation objective prevailed over other non-trade related objectives in this case, the former does not prevent sovereign states from pursuing the latter as a matter of policy. In brief, the right to PSNR remains relevant in any normative balancing.

## 6 Conclusion

The concept of PSNR has a dual legal identity: it is a principle of international law and also a right of states. The journey of the concept of PSNR to its recognition as a principle, and then as a right, is a significant achievement of the dynamic process of progressive development of international law in the post-war period. While the principle is widely accepted, the right is frequently contested. The 1962 Resolution gives expression to the

<sup>143</sup> *ibid* para 7.462.

<sup>144</sup> *ibid*.

<sup>145</sup> *ibid* paras 5.19–5.57.

principle, and the CERDS to the right in its plural form. However, the 1962 Resolution is not the complete expression of the principle, nor is the CERDS the comprehensive statement of the right. While the principle is expanded through a series of developments such as the NIEO Declaration, the right is elaborated with the help of a number of instruments, such as the 2007 Declaration on the Rights of Indigenous Peoples.

A principle of law assumes the form of a legal right when the former is developed in operational terms in specific contexts, including the identifications of the right-holder, the duty-bearer, and their relations *inter se*. The basic difference between a legal principle and a legal right relates to their forms of expression: the former is articulated in an open language to provide a general guidance, and the latter is formulated in relatively more precise language to govern legal relationships in specific contexts. Since the rights emanating from PSNR are not the exclusive advantages of one state, but available to all states and peoples, they represent a general principle of international law. At the same time, the principle of PSNR does not appear in the category of the fundamental principles of international law that find expression, for instance, in article 2 of the UN Charter and the Friendly Relations Declaration. However, one can read this principle within the terms of certain fundamental principles, such as sovereign equality and self-determination.

The adjective 'permanent', attached to the expression 'sovereignty over natural resources', may appear to be a misfit in this ever-changing world, especially when a sovereign state has a right even to cede its territory or part thereof. However, it has a historical significance in the sense that sovereignty over natural resources of nations under the colonial rule was presumed to be permanently vested in those nations, and that their colonial masters were considered to be ineligible to acquire it or alienate it. In the contemporary world, the adjective signifies that the ultimate control over natural resources of a state remains with the state; that national laws remain applicable to those resources even if those resources are subjected to international contracts and owned/possessed by foreign investors; that the state can exercise its sovereign rights over its natural resources any time; and that the state remains entitled to expropriate the assets of foreign investors and regain its control over those resources in accordance with the procedure established by law. While the adjective in the initial version of PSNR was primarily meant to underline the inalienability of sovereignty over natural resources, it serves the purpose of maintaining regulatory control over those resources in the contemporary world.

The recognition of the principle of PSNR in various fields, ranging from human rights to the environment, proves its wider acceptance and general application. The reliance of the 2008 and 2013 UN General Assembly resolutions on trans-boundary aquifers on the 1962 Resolution shows the acceptance of its provisions even in the current context. The human rights dimensions of the principle of PSNR became broader than those anticipated by the advocates of this principle in its initial stage. The growth of the right to PSNR has transformed its character. The peoples-oriented character of the right underlines the responsibility of states towards their peoples in respect of the use

of natural resources. It indicates that in case of a conflict between the sovereign rights of states and the fundamental rights of peoples, generally, the latter deserve protection.

The wider acceptance of PSNR does not mean that it has become an overriding principle in international law. The limitations of the principle of and the right to PSNR come into light at the time of its application in specific contexts, especially in the fields of international trade and investment. Neither the principle of nor the right to PSNR has overriding effects to negate the obligations of states that they have freely assumed under international agreements, although the principle/right remains an important consideration in balancing competing legal interests of the parties involved in a given case. Since the nation-state system remains the bedrock of international law, states continue to enjoy their primordial position and exercise their regulatory powers over their natural resources by virtue of the concept/principle/right of PSNR. Following the emergence of new economies and the decline of some older ones, the revival of the concept of PSNR both as a principle and as a right seems to be a logical phenomenon.

# The Right to be Free from Economic Coercion

Antonios Tzanakopoulos\*

## Abstract

This article seeks to determine if there is a fundamental right of states to be free from economic coercion, against the background of international law permitting economic coercion as a means for its own implementation. After defining coercion and other cognate terms, the article surveys the limits to (economic) countermeasures and (economic) sanctions, and determines that any 'sphere of economic freedom' of states is essentially a relative concept, without an irreducible core. Public international law does not currently establish a fundamental right of states to be free from economic coercion—though one should probably be established.

## Keywords

Fundamental Rights of States, Freedom, Coercion, Economic Coercion, Countermeasures, Sanctions, Intervention

## 1 Introduction

The element of coercion, the coercive sanction, is a fundamental attribute of positive law;<sup>1</sup> its coercive force is what distinguishes law from other normative systems, such as morals.<sup>2</sup> In the highly centralised domestic legal order, it is the state itself that has the power to impose coercive sanctions in accordance with the law. By contrast, in the decentralised international legal orders, the coercive sanction is a faculty left to the (directly or indirectly) injured state to impose.<sup>3</sup> The coercive sanctions of international

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1 See Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (B Litschewski Paulson and SL Paulson trs, OUP 1997) 26.

2 For a thorough, though critical, analysis of Kelsen's approach to the interplay between the national and the international legal order, see generally François Rigaux, 'Hans Kelsen on International Law' (1998) 9 EJIL 325.

3 See, eg, International Law Commission (ILC), Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83 (ILC Articles on State Responsibility) arts 42, 48. The term 'indirectly' injured state is used here to denote art 48's 'State other than the injured State'. See Linos-Alexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127, 1138.

law have, traditionally, been reprisals and war.<sup>4</sup> War, and the use of force in general, have now been blanket-banned by virtue of the Charter of the United Nations (UN Charter)—with the sole exception of self-defence<sup>5</sup>—and thus there may have emerged something like a qualified right to peace.<sup>6</sup>

Reprisals, however, are still around in the guise of countermeasures,<sup>7</sup> and countermeasures are predominantly economic in nature.<sup>8</sup> Although officially their aim is to ‘induce’ a state that has become responsible for a violation of international law to resume compliance with its international obligation(s),<sup>9</sup> such ‘inducement’ does not take place with sweet talk, but with coercive (economic) force.

Already, then, it appears difficult to consider that there is a fundamental right of states to be free from economic coercion. This is because at the very same time there seems to exist a fundamental right (faculty) of states to use economic coercion in order to enforce international law, ie to implement the international responsibility of states that have perpetrated an internationally wrongful act. The aim of such coercive measures is to induce responsible states (to force them, coerce them) to comply with their (secondary) obligations of cessation and reparation. Put differently, international law prohibits forms of (economic) coercion in the guise of primary rules, but precludes the wrongfulness of forms of (economic) coercion in the guise of secondary rules.<sup>10</sup> This apparent contradiction seems non-survivable: at best there may be a qualified, relative right to be free from economic coercion, not a fundamental one. Yet, this may only be an apparent contradiction; it all comes down to what exactly is meant by ‘coercion’.

At the same time, the emergence of international organisations, and in particular the UN, makes it even more difficult to conceptualise a fundamental right of states to be free

<sup>4</sup> See Hans Kelsen, *Reine Rechtslehre* (2nd edn, Franz Deuticke 1960) 324–28. According to Kelsen, war and reprisals are the sanctions which allow international law to qualify as a legal order. See also Hans Kelsen, *The Legal Process and International Order* (2nd edn, Royal Institute of International Affairs 1935) 13 (‘Anyone who rejects the theory of the just war denies, indeed, the legal nature of international law’); Rigaux (n 2) 335.

<sup>5</sup> See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) arts 2(4), 51.

<sup>6</sup> A *qualified* right, given that a state may be subject to measures involving the use of armed force ‘authorised’ by the UN Security Council in accordance with art 42 UN Charter.

<sup>7</sup> For the change of terminology from ‘reprisals’ to the more neutral term ‘countermeasures’, and for a short history of how the term became established through its adoption by arbitral tribunals, the International Court of Justice (ICJ) and the ILC, see, eg, Elisabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Transnational Publishers 1984) xv–xvii; cf Jean-Claude Venezia, ‘La Notion de Représailles en Droit International Public’ (1960) 64 RGDIP 466.

<sup>8</sup> See, eg, UN Charter, art 41. See also ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) ILC YB 2001/II(2) (ILC Articles on State Responsibility Commentaries) commentary to art 30, 89, paras 3, 5, referring to ‘complete or partial interruption of economic relations’ and generally to economic reprisals as the predominant example of countermeasures not involving the use of force.

<sup>9</sup> ILC Articles on State Responsibility, art 49.

<sup>10</sup> cf Linos-Alexander Sicilianos, *Les Réactions Décentralisées à l’Illicite: Des Contre-mesures à la Légitime Défense* (LGDJ 1990) 252.

from economic coercion. Under chapter VII of the UN Charter, and in particular article 41, the UN Security Council may impose ‘sanctions’,<sup>11</sup> or properly so-called ‘measures not involving the use of armed force’ on states (and other actors) in response to a threat to the peace, breach of the peace, or act of aggression determined in accordance with article 39. Of these sanctions, economic sanctions are paradigmatic, and are indeed referred to specifically in the non-exhaustive enumeration of article 41.<sup>12</sup> The power of the UN to impose such economic sanctions, ie to employ coercive economic power against a state, would also contradict a fundamental right of states to be free from economic coercion. And again here the question of the meaning of ‘coercion’ is key.

The first step must be to define the term ‘coercion’ properly, so as to understand what economic coercion means, and so as to distinguish it from other cognate concepts (section two). The next step is to determine whether, and to what extent, states have a fundamental right to be free from economic coercion by looking at how this (for now presumed) right may interact with the faculty of states to take economic countermeasures in order to enforce international law (section three) and with the power of the UN to impose economic sanctions in order to enforce the peace (section four). Section five, then, seeks to determine whether there is any essential and irreducible sphere of freedom of states which contains the right to be free from economic coercion, over and beyond the analysis of the law on countermeasures and sanctions.

## 2 The meaning of (economic) coercion

The problem begins with the use of terms. What is coercion, and how does it differ—if at all—from ‘interference’, for example, or ‘intervention’? How does it relate to ‘sovereignty’ (assuming one understands exactly what sovereignty means) and the ‘*domaine réservé*’,<sup>13</sup> the reserved domain of exclusive jurisdiction of states? How close together, even intertwined, these concepts are is evident in the following quote from the 1970 Friendly Relations Declaration:

<sup>11</sup> The term ‘sanctions’ does not appear in the UN Charter, but it has become commonplace to refer to art 41’s measures as sanctions. ILC Articles on State Responsibility Commentaries (n 8) (the commentary to art 30 acknowledges the use of the term ‘sanctions’ as alternative to the term ‘countermeasures’ in practice); see also *ibid* 128, para 3, where however

The term ‘sanction’ is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the Charter of the United Nations refers only to ‘measures’, even though these can encompass a very wide range of acts, including the use of armed force (Articles 39, 41 and 42).

<sup>12</sup> According to the UN Charter, art 41, the measures not involving the use of armed force that the UN Security Council may impose ‘include complete or partial interruption of economic relations’.

<sup>13</sup> For the concept and definition of ‘*domaine réservé*’, as well as its interrelation with the concept of state sovereignty, see Katja S Ziegler, ‘*Domaine Réservé*’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2012) para 1: ‘the *domaine réservé* describes areas where States are free from international obligations and regulation.’

No State may use or encourage the use of economic (...) measures to *coerce* another State in order to obtain from it the subordination of the *exercise of its sovereign rights* and to secure from it advantages of any kind. Also, no State shall [seek to overthrow the regime] or *interfere* in civil strife in another State. The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the *principle of non-intervention*. Every State has an inalienable right to choose its political, economic, social and cultural systems, without *interference* in any form by another State.<sup>14</sup>

In *Nicaragua*, the International Court of Justice (ICJ) put the terms into some perspective, and it repays quoting the Court at length:

[I]n view of the generally accepted formulations, the principle [of non-intervention] forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.<sup>15</sup>

According to the ICJ, there is a certain sphere of freedom of the state to act in any way that it wishes, which is protected by international law. That sphere of freedom seems to emanate from the sovereignty of the state in a way that is reminiscent of the *Lotus* case: to the extent that a state has not assumed an obligation to act in any particular way, it is free to act in any way that it wants.<sup>16</sup> That sphere includes the free choice of political, economic, social and cultural system, and the formation of foreign policy,<sup>17</sup> presumably because no state has subjected or may subject these to international legal obligations.

<sup>14</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625 (emphasis added). Similar provisions are to be found in further UN General Assembly Resolutions, such as the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, UNGA Res 2131 (XX) (21 December 1965) UN Doc A/RES/20/2131; Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, UNGA Res 31/91 (14 December 1976) UN Doc A/RES/31/91. The Charter of the Organization of American States also includes a relevant provision in art 20, according to which '[n]o State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind': Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 48 (OAS Charter).

<sup>15</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 (*Nicaragua*) 98, para 205; cf 114, para 241.

<sup>16</sup> *SS 'Lotus' (France v Turkey)* (Merits) PCIJ Rep Series A No 10, 18–19: 'Restrictions upon the independence of States cannot (...) be presumed'; 'In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.'

<sup>17</sup> On this, see further section five below.

This is much reminiscent of a concept of ‘*domaine réservé*’ that is defined negatively,<sup>18</sup> ie in a residual manner—that which remains within the sphere of free action of the state is simply that on which the state has not assumed an international obligation to act in any particular way.<sup>19</sup> But a state could assume obligations on any matter, and there are no matters that necessarily fall within some sort of hard core of sovereignty or freedom of action which the state cannot freely dispose of, as the ICJ itself has said in the past.<sup>20</sup> Intervention into this reserved domain is prohibited: a state may not be coerced to act in a particular manner on issues within its sphere of freedom. Coercion is a method of illegal intervention, the ICJ says in *Nicaragua*, but then immediately equates the two: coercion *is* intervention. Seeking to coerce a state within its sphere of freedom is wrongful; it constitutes intervention. Merely interfering with a state’s choices within its sphere of freedom and applying relevant pressure without breaching any obligations is lawful, as long as it does not amount to coercion and, thus, intervention.<sup>21</sup>

<sup>18</sup> Ziegler (n 13) para 2.

<sup>19</sup> Many constitutive instruments of international organisations contain provisions safeguarding the ‘reserved domain’ of states from intrusion by the international organisation, usually by providing that the organisation may not intervene or interfere in matters which are (essentially) within the domestic or internal jurisdiction of the (member) states. See, eg, Covenant of the League of Nations (adopted 28 April 1919, entered into force 10 January 1920) art 15(8); Constitution of the United Nations Economic, Social and Cultural Organisation (adopted 16 November 1945, entered into force 4 November 1946) 4 UNTS 275, art I(3); OAS Charter, art 1(2); UN Charter, art 2(7); Consolidated Version of the Treaty on European Union [2012] OJ C326/15 art 5(3): these articles serve pretty much the same purpose, though implying the principle through the introduction of an exception to it. Nowhere in these texts, however, is it stated what lies ‘essentially’ within the domestic (or internal) jurisdiction of a state. The reason is simple: what lies within that reserved domain is difficult to determine in any way but negatively. What remains within the reserved domain is whatever states have not removed from their (exclusive) domestic jurisdiction by making it subject to conduct regulated by international law; in other words, that on which the relevant state has assumed no international obligations. This is how the Permanent Court of International Justice (PCIJ) approached the relevant terms (‘solely within the domestic jurisdiction’) in *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) PCIJ Rep Series B No 4 (*Nationality Decrees*) 24: ‘The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations’ (emphasis added). The Court then went on to equate this to the concept of ‘reserved domain’ (ibid). For a confirmation by the ICJ, cf *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (New Application, Second Phase: 1962) [1970] ICJ Rep 3, 34–35, para 32.

<sup>20</sup> The PCIJ has found that the assumption of international obligations is an exercise of sovereignty, rather than its denial. See *SS ‘Wimbledon’ (United Kingdom v Japan)* PCIJ Rep Series A No 1, 25:

The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.

See further on this, with respect to the ‘police powers’ doctrine in international investment law, Callum Musto, *States’ Prescriptive Jurisdiction and the ‘Police Powers’ Doctrine* (MPhil thesis, University of Oxford 2015).

<sup>21</sup> In fact the Court in *Nicaragua* (n 15) 96, para 202, equates interference and intervention by stating that ‘[t]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside *interference*’ (emphasis added). In this article, the two are considered to be separate

This brings us no closer to defining coercion (or intervention for that matter) in any way other than negatively and residually. The difficulty, however, in defining coercion in any other way is evident also in the practice of states. Given the importance attached to the assumption of international obligations (as it reduces a state's sphere of freedom), provision should be made so that a state freely assumes any obligations limiting its sovereignty. Article 52 of the Vienna Convention on the Law of Treaties (VCLT) seeks to deal with this precise issue, namely to avoid that a state be coerced into assuming an international obligation.<sup>22</sup> Article 52 specifically deals with the issue of coercion occurring at the time of the conclusion of the treaty, in terms of a direct causal link between the coercion and the conclusion of the treaty. It protects against a treaty being concluded through the threat or use of force.<sup>23</sup> If there was no such safeguard at the level of assumption of obligations, one could, instead of coercing a state to do something that it does not have to do, coerce a state to assume an obligation to do what it does not want to do. From then on, any 'coercion' of the state in the relevant subject-matter would be lawful, as it would merely seek to enforce that which the state had assumed an obligation to do.<sup>24</sup>

But the coercion which renders a treaty void under article 52 VCLT is only coercion by the threat or use of force. These terms, being reminiscent of article 2(4) of the UN Charter, are predominantly interpreted as referring only to armed force, not economic force.<sup>25</sup> Indeed, the International Law Commission (ILC) and the states during the Vienna Conference were deeply divided on whether coercion was limited to military coercion or could also extend to economic and political coercion, and they simply decided not to clearly decide the matter.<sup>26</sup> Corten argues that the broader interpretation, which is not limited to military, but includes also economic and political coercion, has

concepts, interference being lawful pressure applied in order to affect actions within the sphere of freedom of a state, and intervention being the unlawful version of the above (see further section three below).

<sup>22</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 332 (VCLT).

<sup>23</sup> Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 645. See also Kirsten Schmalenbach, 'Article 52. Coercion by a State by the Threat or Use of Force' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 872, where the author states that '[a]rt 52 stipulates that—irrespective of the subject matter—a treaty is void because of the proscribed methods that procured its conclusion. The voidness of the treaty results from the lack of free consent on the part of the coerced State' (original emphasis removed).

<sup>24</sup> cf Jean Combacau, 'Pas une Puissance, une Liberté: La Souveraineté Internationale de l'État' (1993) 67 *Pouvoirs* 47, 52–53.

<sup>25</sup> For a discussion on whether UN Charter, art 2(4), and thus also VCLT, art 52, could and should be interpreted broadly so as to encompass economic coercion, see Villiger (n 23) 638, 642–43; Sicilianos, *Les Réactions Décentralisées à l'Illicite* (n 10) 248. One of the main reasons that an extended definition of coercion was not adopted was the fear that states would use it as 'a pretext to rid themselves from burdensome treaties, or that the efficacy of *pacta sunt servanda* and legal certainty would suffer': see Villiger (n 23) 644.

<sup>26</sup> See on this Olivier Corten, 'Article 52—1969 Vienna Convention' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties—A Commentary* (OUP 2011) 1201, 1205–11.

prevailed nowadays.<sup>27</sup> Be that as it may, the coercion, whether military or economic, must be unlawful in order to lead to invalidity of the treaty under article 52 VCLT.<sup>28</sup> The VCLT thus does not help define coercion in anything other than a relative, residual manner.

Similar problems were faced by the ILC in seeking to establish the responsibility of a state in connection with the act of another state when the former has coerced the latter to perpetrate an internationally wrongful act. The relevant provision is article 18 of the ILC Articles on State Responsibility, according to which '[a] State which coerces another State to commit an act is internationally responsible for that act if: (a) the act would be, but for the coercion, an internationally wrongful act of the coerced State; and (b) the coercing State does so with knowledge of the circumstances of the act'. Effectively the coercing state becomes responsible for the act of another state, the coerced one. So it is not the coercion *per se* that constitutes an internationally wrongful act and that engages the responsibility of the coercing state. Rather, the responsibility that attaches to the act of the coerced state, if that act would have been internationally wrongful for that state, is *allocated* to the coercing state. Indeed, the commentary is at pains to highlight that 'coercion', as meant in article 18 of the ILC Articles on State Responsibility, is not necessarily 'unlawful' coercion.<sup>29</sup> However, the commentary fails to give even a single example of 'lawful' coercion. It merely says that practically most instances of coercion within the scope of article 18 will be unlawful, either 'because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, ie *coercive interference*, in the affairs of another State'.<sup>30</sup> 'Such is also the case with countermeasures', the commentary continues.<sup>31</sup>

Coercion is thus portrayed as an act that is not necessarily unlawful, but the examples given relate to wrongful acts: violation of the prohibition of the threat or use of force, and violation of the prohibition of intervention. The reference to countermeasures is important: the 'coercive' act that countermeasures by definition involve is justified—it is 'de-coerced'—by virtue of the fact that a countermeasure is in the first instance an unlawful act, whose wrongfulness is precluded because it is taken as a response to a prior wrongful act. For this reason also, 'coercing' a state by way of countermeasures to do something would not constitute coercion under article 18 of the ILC Articles on State Responsibility: the 'coerced' state can only be 'coerced' to comply with its international obligations. Otherwise the 'coercive' measure under examination is not a countermeasure, and is thus unlawful in and of itself (unless justified by some other circumstance precluding wrongfulness).<sup>32</sup> Complying with an (already existing) international obligation, on the other hand, is not and would not be an internationally

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

<sup>29</sup> See ILC Articles on State Responsibility Commentaries (n 8) commentary to art 18.

<sup>30</sup> *ibid.* (emphasis added).

<sup>31</sup> *ibid.*

<sup>32</sup> See ILC Articles on State Responsibility, arts 20–25.

wrongful act for the coerced state, and will thus never fulfil the requirements of article 18 of the ILC Articles on State Responsibility.

To cut a very long story perhaps too short, the following observations are in order.

- (a) There is no clarity as to the use of terms ‘coercion’, ‘intervention’, ‘interference’, and so forth. Each entity employing them, whether a state, the UN General Assembly, the ICJ, the Organization of American States, or the ILC, will cast the terms and their relationships to one another in their own special way.
- (b) Having said that, the conception of the various terms by the various actors is not too far apart—there are just little differences, which however make it difficult to know exactly what one is talking about at any given time.
- (c) The best that can be made out of this mess is to assert that coercion is effectively tantamount to intervention (and, if you will, to ‘coercive interference’ in ILC parlance), and is defined by the fact that it is unlawful because it invades a state’s ‘sphere of freedom’. This sphere of freedom, in turn, is defined by the fact that the state has not assumed any international obligations relating to the matters within the sphere. Any invasion into the sphere of freedom constitutes coercion/intervention/coercive interference, namely, an unlawful act. Any other action or omission, however ‘coercive’ it may seem, will be mere pressure or interference, and will be perfectly lawful as long as it does not violate any international obligation of the ‘coercing’ state (for example, the prohibition of the threat or use of force).

This provisional understanding of ‘coercion’ will now be tested against an analysis of the law on (economic) countermeasures (section three) and (economic) sanctions (section four), ‘coercive’ acts par excellence in the international legal system.

### 3 The limits of (economic) countermeasures

The limits of economic countermeasures are the same limits that apply to all countermeasures. They can be distinguished into two categories: substantive and procedural limits. The substantive limits are reflected in articles 49–51 of the ILC Articles on State Responsibility and include: the requirement of standing; the requirement of the proper identification of the target in conjunction with a prohibition on targeting third states; the prohibition of affecting certain specified (groups of) international obligations; the requirement that the countermeasures serve a specified aim; and the requirement that the countermeasures be proportionate to (‘commensurate with’) the injury suffered by the reacting/(indirectly) injured state.<sup>33</sup> Procedural limits of resorting to countermeasures

<sup>33</sup> There are further limits spelled out in the ILC Articles on State Responsibility, art 49(2), such as that countermeasures may not lead to an abdication of the obligation being breached as a countermeasure, but ‘are limited to [its] non-performance for the time being’.

are enumerated in article 52 of the ILC Articles on State Responsibility, under the title ‘Conditions relating to resort to countermeasures’, and do not necessarily reflect customary international law in their entirety.<sup>34</sup>

Regarding the substantive limits enumerated above, it is useful to detail how these are arrived at. Some are indeed enumerated in the relevant provisions of the ILC Articles on State Responsibility explicitly. These are, specifically, the prohibition of countermeasures affecting certain (groups of) international obligations (article 50), and the requirement of proportionality (article 51). According to article 50, obligations regarding the use of force, obligations regarding the protection of fundamental human rights, obligations of a humanitarian character prohibiting reprisals, obligations under applicable dispute settlement procedures, and obligations regarding the inviolability of diplomatic or consular agents, premises, archives, and documents may not be affected by way of countermeasures. However, the list is open-ended: any other obligations under peremptory norms of international law may not be affected by way of countermeasures either.

This substantive limit to countermeasures could have offered an insight as to the existence of a fundamental right of states to be free from economic coercion. However, such a fundamental right or any obligations stemming from its existence is not mentioned in the list explicitly. Rather, there is a renvoi to all obligations under peremptory norms of international law, which accords with the provision of article 26 of the ILC Articles on State Responsibility,<sup>35</sup> and which leaves open the question of whether there is a fundamental right of states to be free from economic coercion that also imposes a correlative *jus cogens* obligation on all states not to intrude in that sphere of freedom of the state, even by way of countermeasures.<sup>36</sup>

The requirement of proportionality relates to the injury suffered by the reacting state, and is thus only a relative limit, not an absolute one, contrary to the limit under article 50, which does not permit countermeasures affecting certain obligations under any circumstances. Assuming severe enough injury to the injured state, the countermeasure will be proportionate even when causing significant harm to the responsible state, including significant economic harm.

Further substantive limits on the taking of countermeasures stem directly from the definition of countermeasures. Since these are to be taken by an injured state, it must be established that the state resorting to countermeasures has been injured by an

<sup>34</sup> See Antonios Tzanakopoulos, *Disobeying the Security Council—Countermeasures against Wrongful Sanctions* (OUP 2011) 186; Linos-Alexander Sicilianos, ‘La Codification des Contre-mesures par la Commission du Droit International’ (2005) 38 RBDI 447, 467.

<sup>35</sup> ILC Articles on State Responsibility, art 26, provides that ‘[n]othing in [the chapter relating to circumstances precluding wrongfulness, of which countermeasures is one] precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law’.

<sup>36</sup> See Sicilianos, *Les Réactions Décentralisées à l’Illicite* (n 10) 252 where, despite arguing that a state’s right to be free from economic coercion is indeed a ‘primary’ rule of international law, he concludes that there is no indication of the *jus cogens* nature of such a rule.

internationally wrongful act of another state. The conditions for a state being considered injured by an internationally wrongful act are spelled out in articles 42 and 48 of the ILC Articles on State Responsibility, and a detailed examination of these provisions would be too difficult within the constraints of this study. However, it should be highlighted that it is article 42 which provides specifically for the invocation of responsibility as an ‘injured’ state and thus permits clearly, in conjunction with the definition in article 49, the taking of countermeasures by states that qualify as ‘injured’ under article 42. By contrast, article 48 refers to invocation of responsibility by states ‘other than an injured State’. This seems to indicate that such states are not permitted to resort to countermeasures as they are not ‘injured’—they are states other than an injured state. However, article 54 of the ILC Articles on State Responsibility, a saving clause, purports to leave open the question of the entitlement of states ‘other than an injured State’ (which may invoke the responsibility of a responsible state under article 48) to also resort to countermeasures. Despite the ILC’s claim in the relevant commentary that state practice as to the taking of such ‘countermeasures in the general interest’, or ‘third State countermeasures’, is embryonic,<sup>37</sup> studies suggest that it is this type of countermeasures that is most prevalent in the practice of states and thus should be considered allowed, even if under strict conditions.<sup>38</sup> In any event, the standing of a state to take countermeasures will hinge on whether that state can demonstrate standing to invoke the responsibility of the responsible state/purported target of the countermeasures, whether under article 42 or potentially also under article 48 of the ILC Articles on State Responsibility.

Since countermeasures are meant to only target a state that is responsible for an internationally wrongful act, third states are protected from potential breaches against them subsequently justified as being a countermeasure. But this does little to support any sort of fundamental right to be free from economic coercion, as the question is primarily with respect to the responsible state. Any third states simply have the right not to be targeted by countermeasures at all, and if they are, they will be able to invoke the responsibility of the state resorting to the countermeasures.<sup>39</sup> An open question remains as to the potential indirect effects of countermeasures taken against a responsible state on the economy of a third state. The former state may have significant economic ties to the latter, and economic countermeasures against the former state may thus have an impact on the latter. However, as long as the responsible state has not violated any obligation it

<sup>37</sup> See the ILC Articles on State Responsibility Commentaries (n 8) commentary to art 48, 129, para 8: ‘Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic.’ See also Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008) 270–72.

<sup>38</sup> See, generally, Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’ (n 3) 1127; Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005); Martin Dawidowicz, ‘Public Law Enforcement without Public Law Standards? An Analysis of State Practice on Third-party Countermeasures and Their Relationship to the UN Security Council’ (2006) 77 BYBIL 333.

<sup>39</sup> See ILC Articles on State Responsibility Commentaries (n 8) commentary to art 49, 131, para 8.

owes to the third state (which could not be justified as a countermeasure), the question will have to be dealt with within the context of proportionality.<sup>40</sup>

Perhaps the only promising limit imposed on resort to countermeasures stems from the definition provided for in article 49(1) of the ILC Articles on State Responsibility in as much as it determines the purpose or aim of countermeasures. These are to be taken ‘only (...) in order to induce [the responsible] State to comply with its [international] obligations.’<sup>41</sup> As such, countermeasures may not be employed in order to ‘induce’ a state to undertake any action which it has not obligated itself to undertake by means of accepting a relevant international obligation. This means effectively that a countermeasure may never cross the line from (economic) inducement to comply with an obligation to (economic) coercion of the target state to do something it is not bound to do under international law. The lack of any clear definitional boundary between inducement and coercion leads to the conclusion that the line between the two is actually drawn by the law: being forced to do something that you have to do is merely an inducement. Being forced to do something that you have no obligation to do is coercion.

The flip side of the coin in this connection is retorsion. An act of retorsion is an unfriendly, but perfectly lawful act, which does not amount to a breach of any international obligation on the part of the state engaging in it towards the target state, even though it may be a response to an internationally wrongful act of the latter.<sup>42</sup> An act of retorsion, such as the withdrawal of voluntary economic aid, or the suspension of trade when there is no international obligation to trade,<sup>43</sup> may clearly have economic consequences and be taken in order to put economic pressure on the target state. However, given that it is a perfectly lawful act, whatever its motivations, it can be taken at any time and without any justification on the part of the state resorting to it.<sup>44</sup> It would then appear that economic retorsion could never amount to economic coercion: it does not in any way interfere with rights of the target state which constitute correlative obligations of the state resorting to retorsion. It is merely an exercise by the latter state of its freedom of action to the extent that it has not undertaken any obligations to give the target state economic aid, for example, or to trade with it.

One could object to this analysis of retorsion by arguing that retorsion must find an ultimate limit when it amounts to economic coercion, ie when it seeks to force the target state to do something that it is not (legally) obligated to do. But since the reacting state is not violating any obligations toward the target state,<sup>45</sup> such an argument just assumes the existence of an obligation not to use lawful means to induce a state to do something that it does not have to do. To say then that the ultimate limit of retorsion must be the point where the action constitutes intrusion into the sphere of freedom of the target

<sup>40</sup> The proportionality calculus could thus be made to include secondary effects on third states.

<sup>41</sup> ILC Articles on State Responsibility, art 49 (emphasis added).

<sup>42</sup> ILC Articles on State Responsibility Commentaries (n 8) commentary to pt three, ch II, 128, para 3.

<sup>43</sup> See *Nicaragua* (n 15) 138, para 276.

<sup>44</sup> ILC Articles on State Responsibility Commentaries (n 8) commentary to pt three, ch II, 128, para 3.

<sup>45</sup> If it were, it would have to justify the breach as a countermeasure or in some other way.

state from economic coercion, which is a fundamental right of states, would be a *petitio principii*. The ultimate limit of retorsion is the crossing into illegal action, the violation of an obligation owed to the target state. Unless the obligation not to coerce the target state is somehow demonstrated as founded in positive law, an act of retorsion can never constitute (economic) coercion.

What this discussion seeks to demonstrate is that, on an analysis of the law on (economic) countermeasures (and the associated law on acts of retorsion), the 'fundamental right to be free from economic coercion' appears to be nothing more than a function of assumed international obligations and correlative rights. A state can never be 'coerced' to do something that it has to do by means of a (lawful) countermeasure, because it has to do it anyway. And a state can never be 'coerced' to do something that it does not have to do by means of an act of retorsion, because the state resorting to retorsion has a right to act in the way that it does. In that, the analysis confirms the distinction drawn above in section two between unlawful coercion/intervention and lawful pressure/interference: the dividing line is determined by the international obligations a state has assumed, which in turn define the scope of its protected sphere of freedom (from economic coercion, among others).

The only way out of the conundrum would be perhaps to rely on the open-ended limit to countermeasures referring to obligations under peremptory norms of general international law, mentioned already above.<sup>46</sup> If a sphere of economic freedom could be established as being protected by such a peremptory norm, incursion into this sphere would never be an act of retorsion, as the norm would impose a correlative duty or obligation on all states to respect the protected sphere of economic freedom. Further, such incursion would never be justifiable as a countermeasure either, as the latter may not affect obligations under peremptory norms of general international law. But this assertion would open a whole other can of worms: the one that involves demonstrating that such a sphere of economic freedom for each state has been 'accepted and recognised by the international community of States as a whole, as a norm from which no derogation is permitted'.<sup>47</sup> This is a different question altogether; before we launch into it (though it is always best to avoid it), perhaps an analysis of the law on economic sanctions may help find some other anchor for the purported fundamental right of freedom from economic coercion.

#### 4 The limits of (economic) sanctions

The UN Security Council may impose (economic) sanctions on a state when it determines the existence of a threat to the peace, breach of the peace, or act of aggression, in order

<sup>46</sup> ILC Articles on State Responsibility, art 50(1)(d).

<sup>47</sup> cf VCLT, art 53.

to maintain or restore international peace and security.<sup>48</sup> Those (economic) sanctions, which may extend (and have occasionally extended) to the ‘complete (...) interruption of economic relations’,<sup>49</sup> may have significant economic effects on the target state, as they did for example in the case of the comprehensive economic sanctions against Iraq following Iraq’s invasion of Kuwait. Determining the limits of such sanctions may help discern a core sphere of economic freedom of the state, intrusion into which would constitute a violation of the state’s fundamental right to be free from economic coercion.

In apparent sharp contradistinction to countermeasures, sanctions are not, strictly speaking, a reaction to illegality, ie a means of law enforcement. The UN Security Council does not impose sanctions in order to enforce the law against a recalcitrant state. It imposes sanctions in order to maintain or restore international peace and security. Indeed the whole of chapter VII of the UN Charter is drafted in such a way as to avoid reference to the target of the measures. The UN Security Council ‘may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.’<sup>50</sup> The only reference to a target state in the whole of chapter VII is in article 50 of the UN Charter, which provides that ‘[i]f preventive or enforcement measures *against any State* are taken by the Security Council, any other State (...) which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.’<sup>51</sup>

If, following the line of thinking presented in the foregoing paragraph, sanctions were not to be considered as a law enforcement tool, they would not be subject to the same limits as countermeasures. However, it could easily be argued that by providing for the imposition of sanctions in response to a threat to the peace, the UN Charter itself turns sanctions into a law enforcement tool. According to Kelsen, the content of a rule is that, the opposite of which is made the condition of a sanction.<sup>52</sup> As the condition of the sanction in the circumstances is posing a threat to the peace, it can be argued that the UN Charter imposes a general obligation on states (but not necessarily exclusively on states) not to act in such a manner as would pose a threat to the peace. The obligation then not to pose a threat to the peace may be conceived as a blanket obligation (Blankettverpflichtung)<sup>53</sup> to be concretised by the UN Security Council in accordance with article 39. If that were the case, then some analogy to the law regulating countermeasures would be permissible.

<sup>48</sup> See UN Charter, arts 39, 41.

<sup>49</sup> *ibid* art 41.

<sup>50</sup> *ibid*.

<sup>51</sup> *ibid* art 50 (emphasis added).

<sup>52</sup> See Kelsen, *Introduction to the Problems of Legal Theory* (n 1) 26–27.

<sup>53</sup> On the concept of ‘blanket obligations’ or ‘Blankettverpflichtungen’, see HG Niemeyer, *Einstweilige Verfügungen des Weltgerichtshofs: Ihr Wesen und ihre Grenzen* (Robert Noske 1932) 41ff.

In any event, the easier way to discern the limits of (economic) sanctions is to look at the obligations incumbent upon the entity that has been conferred with the power to impose them. The UN is an international organisation with ‘a large measure of international [legal] personality’, and indeed objective legal personality.<sup>54</sup> As an international person, it is subject to obligations. These may stem from any valid source of international obligations,<sup>55</sup> including, self-evidently, treaties to which the UN is a party and customary international law.<sup>56</sup> However, international obligations for an international organisation may also stem from its internal law, in particular its constitutive instrument,<sup>57</sup> an international treaty (to which of course the organisation is not a party—but to which it is not really a third party either).<sup>58</sup> A detailed analysis of international obligations stemming from the UN Charter, from general international law and incumbent upon the UN when resorting to sanctions has been undertaken elsewhere.<sup>59</sup> Suffice it to (re-)state here in summary fashion that the relevant obligations include the obligation to determine the existence of a threat to the peace, and the obligation to respect the principle of proportionality (both of which stem from the UN Charter), as well as obligations under customary international law, including obligations arising from peremptory norms of international law and obligations for the protection of human rights.

As in the case of countermeasures discussed in the preceding section, none of these limits seem to refer, *per se*, to any hard core of economic freedom in which the UN Security Council may not intrude. As such, there is no evidence of any fundamental right of states to be free from economic coercion: the UN Security Council may indeed ‘coerce’ them to do almost anything in order to maintain or restore international peace and security, as long as it respects the limits of its own competence (imposed by the UN Charter) and the obligations of the UN under customary international law, including peremptory norms. What is more, according to article 2(7) of the UN Charter, the principle of non-intervention in matters that are ‘essentially within the domestic jurisdiction of any State’ does not apply to the UN Security Council when acting under chapter VII of the UN Charter, including when it is imposing (economic) sanctions. As such, the only potential argument that can be made is that the fundamental right to be free from economic coercion constitutes a peremptory norm of international law, which is absolutely binding on the UN and thus on the UN Security Council when imposing sanctions. But then all this does is open that can of worms that we have been studiously trying to avoid up until now.

<sup>54</sup> *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179.

<sup>55</sup> See Articles on the Responsibility of International Organizations (2011) ILC YB 2011/II(2), art 10; cf ILC Articles on State Responsibility, art 12.

<sup>56</sup> cf Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, art 38(1).

<sup>57</sup> ILC Articles on State Responsibility, art 4.

<sup>58</sup> Elisabeth Zoller, ‘The “Corporate Will” of the United Nations and the Rights of the Minority’ (1987) 81 AJIL 610, 625.

<sup>59</sup> See generally Tzanakopoulos (n 34) ch 3.

## 5 An essential and irreducible freedom from economic coercion?

The existence of a fundamental right of states to be free from economic coercion, if it is to have any real content and purchase, cannot be defined purely negatively and residually.<sup>60</sup> A residual right cannot be a fundamental right, as it has no stable ('hard') core, it is subject to constant readjustment, and it is relative even between different states (depending on the different international obligations they have undertaken). The right must be shown to be part of the 'sphere of freedom' that states enjoy, ie that essential and irreducible sphere which is somehow related to sovereignty and thus may be positively defined—though it does not appear that anyone, as of yet, has managed to properly positively define it to general satisfaction (and acceptance).

A review of the sources on the issues of essential and/or irreducible and/or exclusive sphere of freedom of states, whether called 'jurisdiction' (domestic or internal, and external), 'sovereignty', or '*domaine réservé*', does not help. For every utterance of, say, the ICJ on the reserved domain, confirming that it is to be seen as residual and relative, there will be one other utterance of the same Court that will seem to imply that there is some sort of irreducible core of sovereignty which the state cannot dispose of. These two utterances can be found in the *Nationality Decrees* and *Nicaragua* cases, respectively.<sup>61</sup>

The law seems to comport with this: an analysis of the law on countermeasures and sanctions (and their respective limits) is barely comprehensible against an assumed fundamental right to be free from economic coercion with a positive, objectively definable content. In fact, states may be coerced as much as the coercing state(s) or international organisation(s) like, including economically (and even militarily), as long as the 'coercion' does not otherwise constitute a breach of an international obligation, such as the one prohibiting the use of force. Even if it does violate an international obligation, coercion will still not be unlawful if it is justifiable under international law, in particular as a countermeasure (or through some other circumstance precluding wrongfulness).

Now the obvious problem here is the prohibition of intervention. The 'coercive' measure might breach the prohibition of intervention, thus rendering coercion unlawful. So any measure that constitutes intervention will be unlawful coercion, and vice versa. Didn't the ICJ say so in *Nicaragua* after all (while also implying that there might be some minimum positive content in the concept of the 'sphere of freedom' of states)?<sup>62</sup> Let us take a closer look at what the ICJ said there:

A prohibited intervention [as opposed to a permitted one, one wonders?] must accordingly be one bearing on *matters on which each State is permitted*, by the principle of State sovereignty,

<sup>60</sup> See also the contribution by Stephen C Neff, 'The Dormancy, Rise and Decline of Fundamental Liberties of States' (2015) 4 CJICL 482.

<sup>61</sup> *Nationality Decrees* (n 19) 24; *Nicaragua* (n 15) 98, para 205.

<sup>62</sup> See *Nicaragua* (n 15) 98, para 205.

to decide freely. One of these [matters] is the choice of a political, economic, social, and cultural system, and the formulation of foreign policy.<sup>63</sup>

The ICJ seems to identify at least part of the core area of matters on which a state 'is permitted, by the principle of State sovereignty, to decide freely'.<sup>64</sup> That part is the one referring to the 'choice of a political, economic, social, and cultural system, and the formulation of foreign policy'.<sup>65</sup> So, is this part of the irreducible core of the sphere of freedom of the state, which the state cannot dispose of even in the exercise of its sovereignty? And does it imply that we may be able to find other parts of the core of that sphere?

The answer, I am afraid, is 'no', and the ICJ, if its judgment in *Nicaragua* is read in the way the preceding paragraph suggests, is wrong. This is because even the matters of choice of a political or economic or social or cultural system, and of formulation of foreign policy may be regulated by international law, and thus be put outside the sphere of freedom of the state. Can a state adopt a foreign 'policy of force'? Not according to *Corfu Channel*,<sup>66</sup> and not according to the UN Charter.<sup>67</sup> Can a state adopt a political, social, and cultural system based on racial discrimination? Clearly not.<sup>68</sup> There are even claims that new states can no longer emerge unless they are democratic, and that democratic governance is arising as an obligation under international law.<sup>69</sup> And so states are not free to choose their political or economic or social or cultural system, or to formulate their foreign policy. They are only free to do so to the extent that they have not assumed obligations, in one way or another, not to do so.

A striking case study could be the Greek sovereign debt crisis and the battle of the Greek state with the troika of creditors, the International Monetary Fund, the European Central Bank, and the European Commission. The Greeks, having assumed international obligations to impose harsh austerity in the form of loan agreements and associated 'memoranda of understanding' between 2010 and 2015, were quite openly coerced by the institutions into complying with these obligations in full, even when this made little economic or other sense.<sup>70</sup> When the left wing SYRIZA party was elected to form

<sup>63</sup> *ibid* (emphasis added).

<sup>64</sup> *ibid*.

<sup>65</sup> *ibid*.

<sup>66</sup> See *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, 35.

<sup>67</sup> UN Charter, art 2(4).

<sup>68</sup> See International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 212 (regarding the prohibition of racial discrimination as a *jus cogens* rule, see also Orakhelashvili (n 37) 53ff, 268–70); International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243.

<sup>69</sup> For a discussion of an allegedly emerging right of democratic governance, see generally Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46.

<sup>70</sup> See, eg, Paul Krugman, 'Killing the European Project' *New York Times* (12 July 2015) <<http://krugman.blogs.nytimes.com/2015/07/12/killing-the-european-project/>> accessed 16 November 2015; Simon Shuster, 'Joseph Stiglitz to Greece's Creditors: Abandon Austerity or Face Global Fallout' *TIME* (29 June 2015) <<http://time.com/3939621/stiglitz-greece/>> accessed 16 November 2015.

a government in January 2015 on a platform that pledged to end the harsh austerity measures demanded by the creditors, the creditor institutions progressively turned off the liquidity tap,<sup>71</sup> forcing the Greek state to eventually impose capital controls at the end of June 2015.<sup>72</sup> Ultimately, the SYRIZA government had to request a new bailout, and it was forced to backtrack in a showdown 17-hour long negotiation in Brussels on 12–13 July 2015 under threat of being ejected from the Eurozone, and facing a default coupled with a financial and banking meltdown. In so doing, it accepted some rather burdensome international obligations, including an obligation to ‘consult and agree’ with the institutions on all draft legislation (on fiscal and other relevant matters) before submitting the legislation to the Greek parliament.<sup>73</sup> The harsh demands that Greece was made to accede to were widely seen, including on Twitter worldwide,<sup>74</sup> as an attempt at regime change.<sup>75</sup> And yet, there does not seem to be an implication that the creditors have acted illegally in these circumstances—stupidly, perhaps, or rightly, or even (im) morally (depending on who you ask), but arguably not illegally. They were, in the first instance, merely seeking to induce Greece to comply with the obligations it had assumed (notably, under a different government), and then they were simply negotiating a new agreement using as much leverage as they could muster (and they could muster a lot), almost crushing the country in the process.

Things would be different if it could be shown that states possess a certain bundle of inherent rights which they are not entitled to dispose of freely in the exercise of their sovereignty. This would be difficult to argue in view of the fact that a state is entitled, after all, to even commit ‘suicide’.<sup>76</sup> Statehood does indeed bestow upon states a certain set of ‘rudimentary’ rights, ie rights the states inherently possess merely by virtue of being states.<sup>77</sup> These include the right of a state to political independence, including the right to choose any political, economic, social, and cultural system, the right to exercise jurisdiction, ie to organise itself as it sees fit, to legislate upon its interests, administer its services, and so forth, as well as certain other rights regarding participation in customary

<sup>71</sup> See Claire Jones, ‘Greek Stand-off Puts Draghi on the Political Stage’ *Financial Times* (2 February 2015) <<http://www.ft.com/intl/cms/s/0/f8525fbc-aaf6-11e4-91d2-00144feab7de.html>> accessed 16 November 2015.

<sup>72</sup> See Brian Blackstone, Nektaria Stamouli and Charles Forelle, ‘Greece Orders Banks Closed, Imposes Capital Controls to Stem Deposit Flight’ *Wall Street Journal* (28 June 2015) <<http://www.wsj.com/articles/SB11064341213388534269604581075703841095260>> accessed 16 November 2015.

<sup>73</sup> Euro Summit Statement (12 July 2015) SN 4070/15 <<https://www.consilium.europa.eu/en/press/press-releases/2015/07/pdf/20150712-eurosummit-statement-greece/>> accessed 16 November 2015.

<sup>74</sup> The relevant Twitter hashtag is #ThisIsACoup. On the night of 12–13 July 2015, the hashtag was trending in the top three in most European capitals, the United States and worldwide. See ‘Why Was #ThisIsACoup Trending?’ *BBC News* (13 July 2015) <<http://www.bbc.com/news/world-europe-33505622>> accessed 16 November 2015.

<sup>75</sup> Robert H Wade, ‘EU Attempts a Coup d’État by Stealth in Greece’ *Financial Times* (17 June 2015) <<http://www.ft.com/cms/s/0/95afe0c6-14ea-11e5-a51f-00144feabdc0.html>> accessed 16 November 2015.

<sup>76</sup> Florence Poirat, ‘La Doctrine des Droits Fondamentaux de l’Etat’ (1992) 16 *Droits: Revue Française de Théorie Juridique* 83, 91.

<sup>77</sup> Stefan Talmon, ‘The Constitutive Versus the Declaratory Theory of Recognition: *Tertium Non Datur?*’ (2004) 75 *BYBIL* 101, 148.

law creation, granting of nationality, determining the breadth or declaring the existence of certain maritime zones, and reacting against violations of its rights.<sup>78</sup> At any rate, even these rudimentary rights that inhere in statehood may be both limited in the exercise of sovereignty and denied to the state by way of countermeasures.<sup>79</sup>

This means that there are barely any fundamental rights of states in any meaningful sense, let alone any fundamental right to be free from economic coercion. All is relative. This may sound extremely downbeat and disappointing. But it is not. These are the possibilities and limits of positive law: if we are not to slip into naturalism (and that is a dangerous route indeed), some perspective is direly needed. Positive law is not here to cure the world of its ills. It is mostly here to reflect those ills, and it does so in particular when it comes to ‘fundamental rights’ of states. Any discussion of fundamental rights of states thus should not be seen as some independent legal category, but at best as an argumentative practice or as a narrative of resistance. As Lowe has said,

Lawyers have a contribution to make. They offer one way of going about resolving some of the most crucial problems that face the world. *But it is only one way among many. There are many times when it is much better to call upon a politician, or a priest, or a doctor, or a plumber.*<sup>80</sup>

Indeed, the way to cure the world of this ill is politics, in particular, political struggle. Politics can establish fundamental rights of states as a legal category; political struggle can change the law. And the people can change politics, even if with great difficulty. But in the meantime, labouring under the illusion that the law poses some outer limit to evil in this case merely deflects our energy from where it is needed: political activism and political struggle. You want to know if there is a fundamental right of states to be free from economic coercion? There is not, unless you can identify some specific obligation that has been breached on the part of the reacting state or international organisation. This is not surprising, mind you, in a world where (casino) capitalism reigns supreme.<sup>81</sup> Do you want there to be a fundamental right of states to be free from economic coercion? Splendid! Go out there and make one.

<sup>78</sup> *ibid* 149–51.

<sup>79</sup> *ibid* 153ff.

<sup>80</sup> Vaughan Lowe, *International Law* (OUP 2007) 290 (emphasis added).

<sup>81</sup> That is really the only kind of capitalism there can be. I thank Haris Triantafyllidou for bringing this obvious point to my attention.

# On the 'Inherent' Character of the Right of States to Self-defence

Marco Roscini\*

## Abstract

While there is no lack of studies on the use of armed force by states in self-defence, its qualification as an 'inherent right' in article 51 of the Charter of the United Nations has received little scholarly attention and has been too quickly dismissed as having no significance. The present article fills this gap in the literature. Its purpose is *not* to discuss the limits to which article 51 or customary international law submit the exercise of the right of self-defence by states, but to examine what its 'inherent' character means and what legal consequences it entails. The article advances two main arguments. The first is that self-defence is a corollary of statehood as presently understood because it is essential to preserving its constitutive elements. The second argument is that the *exercise* of the right of self-defence must be distinguished from the *right* itself: it is only the former that may be delegated to other states or submitted to limitations under customary international law and treaty law. The *right* of self-defence, however, cannot be alienated and it takes precedence over other international obligations, although not over those specifically intended to limit the conduct of states in armed conflict or over non-derogable human rights provisions.

## Keywords

Inherent Right, Inalienable Right, Fundamental Right, Self-defence, Collective Security, Use of Force, Natural Law, Positivism, Article 51, United Nations Charter, *Jus ad Bellum*, Self-preservation, International Law

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## 1 Introduction

My starting point is that, while there is no self-standing distinct category of 'fundamental' rights of states ontologically different from or hierarchically superior to other non-

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fundamental rights, there are treaty and customary rules, framed in terms of rights and duties, which attach special characteristics to certain rights and duties. The problem, therefore, is essentially one of interpretation, ie to establish the meaning of adjectives like 'inalienable', 'permanent' or, in our case, 'inherent' as used in treaty and/or customary law provisions.

While there is no lack of studies on the use of armed force by states in self-defence, its qualification as an 'inherent right' in article 51 of the Charter of the United Nations (UN Charter) has received little scholarly attention and has been too quickly dismissed as 'merely a remnant of the natural law origin of the concept of self-defence'.<sup>1</sup> The present article intends to fill this gap in the literature. Its purpose is *not* to discuss the limits to which article 51 or customary international law submit the exercise of self-defence by states, but to examine what its 'inherent' character means and what legal consequences, if any, it entails. This article advances two main arguments. The first is that, whichever approach one takes to international law (naturalistic or positivistic), *self-defence is a corollary of statehood as presently understood*, and is as such inalienable. The second argument is that the *exercise* of the right of self-defence must be distinguished from the *right* itself: it is only the former that may be submitted to limitations or delegated to other states.

To demonstrate these arguments, this article proceeds as follows. It starts with an account of the history of the right of states to self-defence. It then discusses the meaning of 'inherent right' as used in article 51 of the UN Charter. Finally, it examines the possible consequences arising from such inherent character, in particular its inalienability and its prevalence over other international obligations, as well as its relationship with the collective security system under chapter VII of the UN Charter. One point on terminology: whether self-defence is a right *stricto sensu*,<sup>2</sup> a privilege or liberty,<sup>3</sup> a circumstance precluding wrongfulness of conduct,<sup>4</sup> a principle or a general principle of law,<sup>5</sup> a limitation to the prohibition of the use of force of which it forms an integral

<sup>1</sup> Tom Ruys, *Armed Attack' and Article 51 of the UN Charter* (CUP 2013) 66; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter). See also Albrecht Randelzhofer and Georg Nolte, 'Article 51' in Bruno Simma and others (eds), *The Charter of the United Nations—A Commentary*, vol 2 (3rd edn, OUP 2012); Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2011) 191, who qualifies the expression as 'an anachronistic residue from an era in which international law was dominated by ecclesiastical doctrines'.

<sup>2</sup> Stephen C Neff, 'The Dormancy, Rise and Decline of Fundamental Liberties of States' (2015) 4 CJICL 482.

<sup>3</sup> Derek W Bowett, *Self-Defence in International Law* (Manchester UP 1958) 8–9, 269.

<sup>4</sup> International Law Commission (ILC), Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83 (ILC Articles on State Responsibility) art 21. Thouvenin argues that self-defence is a circumstance precluding wrongfulness in relation to conventional obligations other than art 2(4) of the UN Charter, but is a subjective right when it entails the use of armed force: Jean-Marc Thouvenin, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Self-Defence' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of State Responsibility* (OUP 2010).

<sup>5</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (*Nuclear Weapons*) 308–309 (Judge Fleischhauer); Shabtai Rosenne, 'Self-Defence and the Non-Use of Force: Some Random Thoughts' in Arthur Eyffinger, Alan Stephens and Sam Muller (eds), *Self-Defence as a Fundamental Principle* (Hague Academic Press 2009) 64.

part,<sup>6</sup> or a *de facto* condition<sup>7</sup> is in the end a question of little practical relevance,<sup>8</sup> and would be of no avail to discuss it here. This article, therefore, will descriptively refer to self-defence as a right, as does article 51 of the UN Charter.

## 2 A brief history of the right of states to self-defence

The right of states to individual and collective self-defence has developed by analogy from the right of individuals to defend themselves and others under criminal law.<sup>9</sup> The classical scholars of international law saw it as a right conferred by nature not only upon individuals, but also upon states.<sup>10</sup> Reacting against aggression, or against a threat thereof, was consistently considered a cause for just war when waged both by princes and by individuals.<sup>11</sup> Vitoria relied on the writings of Augustine and Thomas Aquinas to argue that ‘a wrong received’ is the ‘single and only just cause for commencing a war.’<sup>12</sup> Similarly, Ayala found defensive wars ‘open to any one by the law of nature.’<sup>13</sup> For Gentili, ‘necessary defence’ is ‘the most generally accepted of all rights’ both for individuals and states: ‘All laws and all codes allow the repelling of force by force. There is one rule which endures for ever, to maintain one’s safety by any and every means.’<sup>14</sup>

<sup>6</sup> Hans Kelsen, ‘The Draft Declaration on Rights and Duties of States: Critical Remarks’ (1950) 44 AJIL 259, 265; Jean d’Aspremont, ‘Mapping the Concepts Behind the Contemporary Liberalization of the Use of Force in International Law’ (2009–10) 31 U Pennsylvania J Intl L 1089, 1106.

<sup>7</sup> Roberto Ago, ‘Addendum to Eighth Report on State Responsibility’ ILC YB 1980/II(1) 53.

<sup>8</sup> See, eg, Dinstein (n 1) 189–90.

<sup>9</sup> On the interactions between self-defence in domestic criminal law (both in civil and common law jurisdictions) and in international law, see George P Fletcher and Jens D Ohlin, *Defending Humanity: When Force is Justified and Why* (OUP 2008). On anthropomorphic thinking in international law, see Jean d’Aspremont’s and Helmut Philipp Aust’s contributions to this special issue: Jean d’Aspremont, ‘The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law’ (2015) 4 CJICL 501; Helmut Philipp Aust, ‘Fundamental Rights of States: Constitutional Law in Disguise?’ (2015) 4 CJICL 521.

<sup>10</sup> The right of states to self-defence had a broader content than the right of individuals, as it allowed a forceful reaction against attacks that were not only ongoing, but also imminent, and even against those that had already occurred in order to prevent further attacks and punish the enemy. See, eg, Emer de Vattel, *The Law of Nations, or, the Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (first published 1758, Béla Kapossy and Richard Whatmore eds, Liberty Fund 2008) book 2, ch IV, 289, para 50; Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (first published 1764, Joseph H Drake tr, Wildy & Sons 1964) vol 2, 129, para 272.

<sup>11</sup> Peter Haggemacher, ‘Self-Defence as a General Principle of Law and its Relation to War’ in Arthur Eyffinger, Alan Stephens and Sam Muller (eds), *Self-Defence as a Fundamental Principle* (Hague Academic Press 2009) 21. The medieval notion of ‘war’ included not only that waged by the emperor or independent princes, but also by private individuals (ibid). The *jus bellandi* of private persons was famously rejected in Jean-Jacques Rousseau, *Du Contrat Social* (first published 1762, reprinted in Jean-Jacques Rousseau, *The Social Contract and The Discourses* (George D H Cole tr, D Campbell Publishers 1993)) book I, ch IV, 187.

<sup>12</sup> Francisco de Vitoria, *De Jure Belli* (first published 1539, reprinted in Ernest Nys (ed), *De Indis et de Jure Belli Relectiones* (Carnegie Institution of Washington 1917)) 170.

<sup>13</sup> Balthazaris Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri III* (first published 1582, John Westlake ed, The Lord Baltimore Press 1912) vol II, 9.

<sup>14</sup> Alberico Gentili, *De Jure Belli Libri Tres* (first published 1598, John C Rolfe tr, Humphrey Milford 1933) book I, ch XIII, 59.

Suárez also viewed self-defence as a 'natural and necessary' right, to be exercised with moderation.<sup>15</sup> According to Grotius, defence was one of the three just causes for public war together with recovery of property and punishment.<sup>16</sup> In his view, the 'right of self-defence (...) has its origin directly, and chiefly, in the fact that nature commits to each his own protection, not in the injustice or crime of the aggressor.'<sup>17</sup> Vattel emphasised that '[e]very nation, as well as every man, has (...) a right to prevent other nations from obstructing her preservation, her perfection, and happiness—that is, to preserve herself from all injuries'.<sup>18</sup> He referred to this right as the 'right to security' (*droit de sûreté*).<sup>19</sup> In Wolff's view, 'The right belongs to every nation to defend itself and its right against another nation. For the right of self-defence belongs to everybody.'<sup>20</sup>

Until the beginning of the twentieth century, however, self-defence was largely identified with the broader right of states to self-preservation, which was in turn based on the right of states to existence.<sup>21</sup> The two terms, therefore, were often used interchangeably.<sup>22</sup> Self-preservation was closely linked to the doctrine of necessity and was thus a much broader right than self-defence, as it included the right to use forcible measures to react not only against an attack but in any situation where the security of the state was threatened.<sup>23</sup> The confusion between self-preservation and self-defence is still evident in the letter dated 6 February 1838 sent from the British Ambassador in Washington, Fox, to the US Secretary of State, Forsyth, where he justified the sinking of the *Caroline* on the basis of the 'piratical character of the steamboat "Caroline" and the

<sup>15</sup> Francisco Suárez, 'The Three Theological Virtues: On Charity' in Gwladys L Williams, Ammi Brown and John Waldron (eds), *Selection from Three Works of Francisco Suárez*, SJ (first published 1621, Humphrey Milford 1944) vol II, Disputation XIII, 803–04, ss I(4) and I(6).

<sup>16</sup> Hugo Grotius, *De Jure Belli ac Pacis* (first published 1625, Francis W Kelsey tr, Wildly & Sons 1964) book II, ch 1, 171, para II.

<sup>17</sup> *ibid* 172, para III.

<sup>18</sup> Vattel (n 10) 288, para 49.

<sup>19</sup> *ibid*.

<sup>20</sup> Wolff (n 10) 139, para 273.

<sup>21</sup> Pierluigi Lamberti Zanardi, *La Legittima Difesa nel Diritto Internazionale* (Giuffrè 1972) 9; Stanimir A Alexandrov, *Self-Defense against the Use of Force in International Law* (Kluwer Law International 1996) 23. Fenwick identifies the right of self-preservation with the right of existence and sees self-defence as an 'inferential right associated with it': Charles G Fenwick, *International Law* (2nd edn, George Allen & Unwin Ltd 1924) 142. According to the Greek delegate at the ILC, 'The right to exist implies the right to maintain existence': ILC, 'Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, Memorandum Submitted by the Secretary-General' (15 December 1948) UN Doc A/CN.4/2, 49. On the right of states to exist, see Jure Vidmar's article in this special issue: Jure Vidmar, 'The Concept of the State and its Right of Existence' (2015) 4 CJICL 547.

<sup>22</sup> Ian Brownlie, 'The Use of Force in Self-Defence' (1961) 37 BYIL 183, 186, 189; Stephen C Neff, *War and the Law of Nations* (CUP 2005) 241. Self-preservation should be distinguished from self-help: 'While self-preservation has a mainly defensive connotation, self-help is distinctly active since it aims at the pursuit of a right': Hagenmacher (n 11) 9. See also Lamberti Zanardi (n 21) 35–36. Bowett also distinguishes self-defence from self-help: although they both imply a previous illegal act by the state against which they are directed, the former has a defensive function, while the latter has a 'remedial or repressive character in order to enforce legal rights': Bowett (n 3) 11. In contrast, see Ago (n 7) 56–57. The legality of coercive self-help measures has been rejected by the International Court of Justice (ICJ). See *Corfu Channel (UK v Albania)* (Merits) [1949] ICJ Rep 4, 35.

<sup>23</sup> Brownlie (n 22) 185.

necessity of self-defence and self-preservation'.<sup>24</sup> In his letter addressed to Fox, the new US Secretary of State, Webster, also employed the self-defence/self-preservation language interchangeably when he stated that '[a] just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both'.<sup>25</sup> Even in the UN Charter era, references that mixed self-defence with self-preservation have not disappeared.<sup>26</sup> In its statement before the Security Council in relation to the destruction of the Osirak nuclear reactor in Iraq in 1981, for instance, Israel claimed that it

performed an elementary act of self-preservation, both morally and legally. In so doing, Israel was exercising its inherent right of self-defence as understood in general international law and as preserved in Article 51 of the Charter of the United Nations.<sup>27</sup>

Self-defence/self-preservation was consistently seen as a 'fundamental right' of states. In the Hobbesian state of nature among sovereigns, the absence of a supreme authority made self-preservation, as provided by natural law, the most important principle.<sup>28</sup> Locke refers to self-preservation as a 'fundamental law of Nature' that prevails over any other duty towards others.<sup>29</sup> After the advent of positivism in the nineteenth century, scholars continued to see it as a fundamental right. For Wheaton, self-preservation, of which self-defence is a subsidiary right, is 'one of the most essential and important' among the 'absolute international rights of States' and 'that which lies at the foundation of all the rest'.<sup>30</sup> Rivier maintains that self-preservation is 'le premier des droits essentiels; il les résume tous'.<sup>31</sup> Similarly, Calvo identifies in the 'right of conservation' '[u]n des droits essentiels inhérents à la souveraineté et à l'indépendance des États' and qualifies it as 'le premier de tous les droits absolus ou permanents'.<sup>32</sup> According to Hall, 'In the last resort almost the whole of the duties of states are subordinated to the right of self-preservation'.<sup>33</sup>

It should be noted that, in the pre-Charter era, self-preservation/self-defence was often seen not only as a fundamental right, but also as a duty. Vattel, for instance, states that '[s]elf-defence against unjust violence is not only the right but the duty of a

<sup>24</sup> Robert Y Jennings, 'The *Caroline* and *McLeod* Cases' (1938) 32 AJIL 82, 85.

<sup>25</sup> *ibid* 91.

<sup>26</sup> In literature, see for instance Bin Cheng, who includes self-defence in the chapter on the principle of self-preservation: Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius Publications Ltd 1987) 29ff.

<sup>27</sup> UNSC Verbatim Record (12 June 1981) UN Doc S/PV.2280, reprinted in (1981) 20 ILM 970. However, the operation was generally condemned, including by the UN Security Council: UNSC Res 487 (19 June 1981) UN Doc S/RES/487 (adopted unanimously).

<sup>28</sup> Thomas Hobbes, *Leviathan* (first published 1651, CUP 1904) 81–86. See Neff, *War and the Law of Nations* (n 22) 133.

<sup>29</sup> John Locke, *Two Treatises of Civil Government* (first published 1690, JM Dent & Sons 1924) book II, ch III, 125, s 16.

<sup>30</sup> Henry Wheaton, *Elements of International Law* (6th edn, Little Brown & Co 1857) 86–87.

<sup>31</sup> Alphonse Rivier, *Principes du Droit des Gens* (Arthur Rousseau Éditeur 1896) vol I, 257.

<sup>32</sup> Charles Calvo, *Le Droit International Théorique et Pratique* (2nd edn, Durant et Pedone-Lauriel—Guillaumin 1870) vol I, 258.

<sup>33</sup> Alexander P Higgins (ed), *Hall's International Law* (8th edn, Clarendon Press 1924) 322.

nation, and one of her most sacred duties'.<sup>34</sup> Similarly, according to Wolff, 'Every nation is bound to save itself by the law of nature itself'.<sup>35</sup> For Wheaton, self-preservation is a duty that a state owes not only to other states, but also to its own members, and the most solemn and important.<sup>36</sup> The *Virginius* correspondence also emphasised that 'the right of self-preservation and of self-defence (...) is a right with respect to other countries, and one of the most solemn and sacred of the duties of any state with relation to its citizens'.<sup>37</sup>

With the progressive restriction of the broader right of self-preservation, that culminated with the adoption of the UN Charter, the narrower right of self-defence came to have its own separate identity and to be seen as the only admissible form of self-preservation, ie as a defensive measure against an unlawful use of force.<sup>38</sup> If, in the classical era, self-preservation was a ground for a *just war* and, with the abandonment of the *bellum justum* doctrine in the 1800s, an essentially political justification for a *de jure* war and one of the grounds for adopting 'measures short of war',<sup>39</sup> then, with the consolidation of a prohibition on the use of force in the first half of the twentieth century self-defence became the only basis for a *lawful use of force* under customary international law. Writing as early as 1905, Oppenheim recalls that '[s]uch acts of violence in the interest of self-preservation are exclusively excused as are necessary in self-defence'.<sup>40</sup> Westlake confirms that 'the true international right of self-preservation is merely that of self-defence'.<sup>41</sup> For Kelsen, self-defence is a lawful form of self-help against a specific violation of international law, ie an illegal use of force.<sup>42</sup> The affirmation of a prohibition on the use of force also determined that self-defence came to be regarded not only as a right, but also as a circumstance precluding the wrongfulness of conduct.<sup>43</sup>

<sup>34</sup> Vattel (n 10) book III, s III, para 487, 35; book I, ch II, 87, para 16.

<sup>35</sup> Wolff (n 10) para 23, 31.

<sup>36</sup> Wheaton (n 30) 86.

<sup>37</sup> *Virginius* Correspondence No 46 from Mr Cushing to Mr Fish (5 December 1874) 109.

<sup>38</sup> Brownlie (n 22) 203, 210–11 ('it is difficult to assume that States individually continued to equate the right of legitimate defence with self-help at a time when the illegality of self-help was increasingly apparent'); Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (OUP 1963) 216. As Dinstein notes, 'The evolution of the idea of self-defence in international law goes hand in hand with the prohibition of aggression': Dinstein (n 1) 189. For Jennings, 'it was in the *Caroline* case that self-defence was changed from a political excuse to a legal doctrine': Jennings (n 24) 82. Haggemacher, however, sees the *Caroline* incident as a manifestation of self-help, although he acknowledges that the involved parties saw it as a case of self-defence and self-preservation: Haggemacher (n 11) 10–11.

<sup>39</sup> Dinstein (n 1) 188; Carlo Focarelli, *Introduzione Storica al Diritto Internazionale* (Giappichelli 2012) 345–46; Bowett (n 3) 117; Lamberti Zanardi (n 21) 7–8, 18–20, 40; Arthur Eyffinger, 'Self-Defence or the Meanderings of a Protean Principle' in Arthur Eyffinger, Alan Stephens and Sam Muller (eds), *Self-Defence as a Fundamental Principle* (Hague Academic Press 2009) 123–24.

<sup>40</sup> Lassa Oppenheim, *International Law: A Treatise*, vol 1 (Longmans Green and Co 1905) 178.

<sup>41</sup> John Westlake, *International Law* (CUP 1904) pt I, 312.

<sup>42</sup> Hans Kelsen, 'Collective Security and Collective Self-Defence under the Charter of the United Nations' (1948) 42 *AJIL* 783, 783–84.

<sup>43</sup> Thouvenin (n 4) 460.

The gradual emergence of restrictions to the use of armed force by states, then, did not impair the right of states to self-defence. Although it did not contain a general prohibition of the use of armed force but merely submitted it to procedural conditions, the 1919 Covenant of the League of Nations implicitly recognised the right of a state to use defensive force in article 8, which allowed states to maintain armaments to the level ‘consistent with national safety’.<sup>44</sup> It also provided for a collective self-defence mechanism in article 10. The first multilateral treaty codification of the right of self-defence is in article 2 of the 1925 Locarno Pact, according to which the non-aggression obligation contained therein does not prejudice

[t]he exercise of the right of legitimate defence, that is to say, resistance to a violation of the undertaking contained in the previous paragraph or to a flagrant breach of articles 42 or 43 of the said Treaty of Versailles, if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarised zone immediate action is necessary.<sup>45</sup>

In 1928, the General Treaty for the Renunciation of War as an Instrument of National Policy (Pact of Paris) was signed.<sup>46</sup> Although its article 1 provides that ‘[t]he High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another’, the treaty does not contain any provision on self-defence. In ratifying it, however, France maintained that ‘each country should retain the right of legitimate defence.’<sup>47</sup> The British, Irish, Japanese and South African governments made similar declarations, with South Africa explicitly referring to legitimate self-defence as a natural right.<sup>48</sup> In response to these concerns, the US Note of 23 June 1928 stated as follows:

<sup>44</sup> Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 195.

<sup>45</sup> Treaty of Mutual Guarantee and Final Protocol of the Locarno Conference (adopted 16 October 1925, entered into force 14 September 1926) 54 LNTS 291 (Locarno Pact). 1924 Geneva Protocol for the Pacific Settlement of International Disputes, art 2 also exempted the ‘case of resistance to acts of aggression’ from the signatories’ commitment not to resort to war against one another or against a state that had accepted the Protocol obligations. See Geneva Protocol for the Pacific Settlement of International Disputes (opened for signature 2 October 1924) 1008 LNOJ 1521, Doc No C.606.M.211.1924.IX. The Protocol, however, never entered into force. Other treaties also expressly mentioned the right of self-defence. The 1937 Saadabad Treaty of Non-Aggression between Iran, Iraq, Afghanistan and Turkey, art 4, for instance, expressly excluded that ‘the exercise of the right of legitimate self-defence, that is to say, resistance to an act of aggression’ amounted to an act of aggression itself. See Saadabad Treaty of Non-Aggression between Iran, Iraq, Afghanistan and Turkey (adopted 8 July 1937, entered into force 25 June 1938) 190 LNTS 21, art 4.

<sup>46</sup> General Treaty for the Renunciation of War as an Instrument of National Policy (adopted 27 August 1928, entered into force 24 July 1929) 94 LNTS 57 (Pact of Paris).

<sup>47</sup> Quoted in Rosalyn Higgins (n 38) 205, fn 78.

<sup>48</sup> Brownlie (n 22) 205–06. In response to a questionnaire prepared by the Secretariat of the League of Nations in relation to a possible amendment to the Covenant to harmonise it with the Pact of Paris, Germany also pointed out that ‘[t]hough mentioned neither in the Covenant nor the Pact, the right of a nation to defend itself against attack was indisputable. It derived from a natural law which had *greater force than any convention*’: LNOJ, Special Supplement No 94, 41 (emphasis added).

There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence. If it has a good case, the world will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provision can add to the natural right of self-defence, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defence since it is far too easy for the unscrupulous to mold events to accord with an agreed definition.<sup>49</sup>

The Note was sent to fourteen states,<sup>50</sup> which accepted or noted the interpretation of the Pact of Paris purported therein, and the treaty was eventually signed without reservations.<sup>51</sup> The Note is significant not only because it reflects the consensus of fifteen powers of the time, but also because it qualifies the right of self-defence as 'inalienable', 'natural' and, for the first time, 'inherent', an adjective that would eventually find its way into article 51 of the UN Charter.

Article 3 of the 1933 Montevideo Convention on the Rights and Duties of States also reaffirmed the right of a state 'to defend its integrity and independence', a right which by virtue of article 5 is 'not susceptible of being affected in any manner'.<sup>52</sup> Neither the Nuremberg nor the Tokyo tribunals established at the end of the Second World War to prosecute the German and Japanese war criminals questioned in principle the existence of the plea of self-defence, although they rejected its invocation by the defendants.<sup>53</sup> The *Judgment of the International Military Tribunal for the Far East*, in particular, went as far as to say that '[a]ny law, international or municipal, which prohibits recourse to force, is necessarily limited by the right of self-defence'.<sup>54</sup> The Draft Declaration on the Rights and Duties of States, adopted by the International Law Commission (ILC) in 1949, included self-defence in its article 12.<sup>55</sup> In his Hague Academy Course on the rights and duties of states, Ricardo Alfaro, who drafted the ILC Declaration, identifies in self-preservation one of four essential attributes inherent and inseparable from the notion of 'state' together with sovereignty, independence and equality.<sup>56</sup> In his view, the difference between self-preservation and self-defence rests in the fact that the former is 'the

<sup>49</sup> ILC, 'Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, Memorandum Submitted by the Secretary-General' (15 December 1948) UN Doc A/CN.4/2, 206.

<sup>50</sup> Australia, Belgium, Canada, Czechoslovakia, France, Germany, Great Britain, India, the Irish Free State, Italy, Japan, New Zealand, Poland and South Africa.

<sup>51</sup> Brownlie (n 22) 206–07.

<sup>52</sup> Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention).

<sup>53</sup> Ago (n 7) 60; Alexandrov (n 21) 75–76; Bowett (n 3) 140.

<sup>54</sup> *Judgment of the International Military Tribunal for the Far East* (1948) 15 ILR 356, 364.

<sup>55</sup> Draft Declaration on Rights and Duties of States with Commentaries, ILC YB 1949/IV, 288, art 12.

<sup>56</sup> Ricardo J Alfaro, 'The Rights and Duties of States' (1959) 97 RdC 91, 98.

abstract, objective, permanent right of the State to maintain and to develop itself within the international community' while the latter, which derives from self-preservation, is 'the concrete, subjective, eventual and transitory right of the State to use force in order to repel an attack against its integrity and its sovereignty'.<sup>57</sup>

As has been seen, both the naturalistic and positivistic doctrines, at least until the beginning of the twentieth century, saw the right of states to defend themselves as a fundamental one. This fundamental character has found its way into modern codifications. The right of self-defence, for instance, is included in the list of 'fundamental rights and duties of states' contained in Chapter IV of the 1948 Charter of the Organization of American States.<sup>58</sup> More famously, article 51 of the UN Charter qualifies it as 'inherent' and provides that nothing in the Charter can impair this right. The fundamental character of self-defence, however, never entailed that the right was an unfettered one. Necessity and 'moderation' were already emphasised as requirements of the defensive reaction by the classical scholars. Grotius maintained that '[w]ar in defence of life is permissible only when the danger is immediate and certain, not when it is merely assumed'<sup>59</sup> and only if the danger cannot be in any other way avoided.<sup>60</sup> Suárez also argued that the 'natural and necessary' right of self-defence had to be exercised with moderation.<sup>61</sup> Webster's letter to Fox in relation to the sinking of the *Caroline* claims that the extent of the right of self-defence

is a question to be judged of by the circumstances of each particular case, and when its alleged exercise has led to the commission of hostile acts within the territory of a Power at peace, nothing less than a clear and absolute necessity can afford ground for justification.<sup>62</sup>

He then famously subordinated a defensive use of force to 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.<sup>63</sup> In his view, self-defence allows 'nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it'.<sup>64</sup>

### 3 The 'inherent right' of self-defence in article 51 of the UN Charter

The right of self-defence is notoriously codified in article 51 of the UN Charter, which reads as follows:

<sup>57</sup> *ibid* 102–03.

<sup>58</sup> Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 48 (OAS Charter) art 22.

<sup>59</sup> Grotius (n 16) book II, ch I, 173, para V.

<sup>60</sup> *ibid* 175.

<sup>61</sup> Suárez (n 15) Disputation XIII, 804, s I(6).

<sup>62</sup> Letter from Daniel Webster (US Secretary of State) to Henry Fox (British Minister in Washington) (24 April 1841) (1857) 29 BFSP 1129, 1132–33.

<sup>63</sup> *ibid* 1137–38.

<sup>64</sup> *ibid* 1138.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The provision was included late in the negotiations, ie at the San Francisco conference, by the US delegation under pressure from the Latin American states<sup>65</sup> without any debate on the meaning of 'inherent right' or the reasons for adding it.<sup>66</sup> As previously seen, the expression finds its roots in the US Note in relation to the 1928 Pact of Paris.<sup>67</sup> Some commentators maintain that, by including the word 'inherent', the drafters merely wanted to emphasise the fact that the right of self-defence was not created by the UN Charter and was therefore vested also in non-member states.<sup>68</sup> Others see 'inherent' as a reference to the natural law right of self-defence. For instance, in his treatise on the law of the UN, Kelsen argues that article 51 of the UN Charter 'presupposes the existence of the right of self-defence as established, not by positive international law, but by natural law, for it speaks of an "inherent" right'.<sup>69</sup> For Kelsen, however, this reference to natural law has 'no legal importance'.<sup>70</sup> More recently, a commentator has also interpreted 'inherent'

<sup>65</sup> In Dumbarton Oaks, it was believed that there would be no need to explicitly mention the right of self-defence as this would be preserved anyway: self-defence issues, therefore, were not discussed on that occasion. See Murray Colin Alder, *The Inherent Right of Self-Defence in International Law* (Springer 2013) 86; Kinga Tibori Szabó, *Anticipatory Action in Self-Defence* (Asser Press 2011) 102.

<sup>66</sup> There was also no discussion of the discrepancy between the English and French version during the drafting of art 51: Fletcher and Ohlin (n 9) 76.

<sup>67</sup> The word 'inherent' also appears in the 1947 Inter-American Treaty of Reciprocal Assistance, art 3(1), in relation to the rights of individual and collective self-defence. See Inter-American Treaty of Reciprocal Assistance (adopted 2 September 1947, entered into force 3 December 1948) 21 UNTS 77 (Rio Treaty). OAS Charter, art 22, on the other hand, does not qualify the right as 'inherent'. The adjective 'inherent' is also used in human rights treaties. The 1996 UN Covenant on Civil and Political Rights, for instance, refers to the 'inherent right to life' of every human being (art 6(1)) and to the 'inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources'. See Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 47. The ICJ also considered the 'rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea' as 'inherent': *North Sea Continental Shelf (Germany v Denmark; Germany v The Netherlands)* (Merits) [1969] ICJ Rep 3 (*North Sea Continental Shelf*) para 19.

<sup>68</sup> Stefaan Smis and Kim Van der Borght, 'The Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons' (1998–99) 27 *Georgia J Intl & Comp L* 345, 368; Leland M Goodrich and Edvard Hambro, *The Charter of the United Nations* (Columbia UP 1969) 344; Bowett (n 3) 187. See the US legal position in relation to the US intervention in collective self-defence of South Vietnam: Department of State, 'The Legality of the United States Participation in the Defense of Vietnam' in Richard Falk (ed), *The Vietnam War and International Law* (Princeton UP 1968) 583ff.

<sup>69</sup> Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Stevens 1950) 791.

<sup>70</sup> *ibid* 791–92. See also Randelzhofer and Nolte (n 1) 1403: 'Too great a relevance must not be attached to the designation as "inherent", for instance by holding that art 51 refers in a declaratory manner to a right of self-defence existing independently from the Charter under natural law.'

as referring to the natural law conception of the right of self-defence but, unlike Kelsen, has seen this as an explicit incorporation of that right into the UN Charter: ‘natural law *becomes* positive law once it is incorporated into the written provisions of the treaty, although to fix the content of its exact source one needs to consult natural law as an interpretative guide to what the provision means.’<sup>71</sup> In *Nicaragua*, the International Court of Justice (ICJ) famously interpreted ‘inherent’ not as a reference to natural law but to customary international law without entirely clarifying whether the reference is in fact a *renvoi*.<sup>72</sup> Koskenniemi points out, ‘In view of the fact that the Court made no reference to State practice or the *opinio juris* on this point it can only be concluded that its “custom” was in fact no different from a naturalistic principle.’<sup>73</sup> Be that as it may, the ICJ’s interpretation of ‘inherent’ as ‘customary’ does not find support in the letter of article 51 of the UN Charter: a customary right is not ‘inherent’, as it comes into existence only when the two elements of custom have sedimented. Furthermore, none of the expressions used in the authentic texts of this provision (‘inherent right’ (English), ‘droit naturel’ (French), ‘derecho inmanente’ (Spanish), ‘неотъемлемого права’ (Russian), ‘自然’ (Chinese, in pinyin written *ziran*) and ‘يحيى بطن’ (Arabic)) is normally used in their respective languages to refer to customary law, and a special meaning can be given to the terms of a treaty only ‘if it is established that the parties so intended.’<sup>74</sup> There is no evidence of this intention in the *travaux préparatoires* of the UN Charter.

To properly understand the meaning of ‘inherent’, one needs to apply the rules on treaty interpretation contained in articles 31–33 of the 1969 Vienna Convention on the Law of Treaties (VCLT). Even though the Convention does not apply to treaties concluded before its entry into force,<sup>75</sup> the rules on interpretation contained therein are generally considered a codification of pre-existing customary international law and are therefore also applicable to the UN Charter.<sup>76</sup> Article 31 of the VCLT identifies three primary interpretive criteria: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ The contextual approach is not useful to interpret ‘inherent’ in article 51 of the UN Charter: this word does not appear elsewhere in the UN Charter or in agreements and other instruments related to it.<sup>77</sup> The ordinary meaning of ‘inherent’ is, according to the Oxford English Dictionary, ‘existing in something as a

<sup>71</sup> Jens D Ohlin, ‘The Doctrine of Legitimate Defense’ (2015) 91 Intl L Studies 119, 126 (emphasis in the original).

<sup>72</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14 (*Nicaragua*) para 176: ‘The Court (...) finds that Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.’

<sup>73</sup> Martii Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 405.

<sup>74</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 332 (VCLT) art 31(4).

<sup>75</sup> *ibid* art 4.

<sup>76</sup> Stefan Kadelbach, ‘The Interpretation of the Charter’ in Bruno Simma and others (eds), *The Charter of the United Nations—A Commentary*, vol 1 (3rd edn, OUP 2012) 75.

<sup>77</sup> VCLT, art 31(2).

permanent or essential attribute.<sup>78</sup> Black's Law Dictionary sees 'inherent' as synonymous with 'inalienable', which is '[a] right that cannot be transferred or surrendered; esp., a natural right such as the right to own property'.<sup>79</sup>

If one looks at the other authentic texts of article 51 of the UN Charter, both the French and the Chinese versions refer to the 'natural' right of self-defence ('droit naturel', 自然). 'Droits naturels' in the French language are defined as 'droits innés et inaliénables que chaque individu possède par naissance et nature sans avoir besoin de les tenir d'un acte ni pouvoir les aliéner et dont les gouvernants sont tenus d'assurer le respect'.<sup>80</sup> A 'droit naturel', therefore, is inherent, inalienable and inviolable. The Spanish version of article 51 of the UN Charter refers to self-defence as a 'derecho inmanente' ('inherent'),<sup>81</sup> and the Russian expression 'неотъемлемого права' literally translates into English as 'inalienable' right.<sup>82</sup> Finally, the Arabic version of article 51 of the UN Charter employs 'يعي بط', which means not only 'natural' but also 'inherent', a necessary and logical consequence of something.<sup>83</sup>

The above considerations suggest that, in article 51, 'inherent' means that 1) the right of self-defence pre-existed the UN Charter; 2) it belongs to any state, whether or not it is a member of the UN; and 3) no UN Charter provisions can deprive a state of it. This is the interpretation that best reconciles the ordinary meaning of the different adjectives used in the authentic texts of article 51 of the UN Charter.<sup>84</sup> As Ago explains,

the word 'inherent' (...) is intended primarily to emphasize that the ability to make an exception to the prohibition on the use of force for the purpose of lawfully defending itself against an armed attack is a prerogative of every sovereign State and one that it is not entitled to renounce. This signifies (...) that no treaty can 'derogate' from this prerogative manifestly vested in States by an imperative principle.<sup>85</sup>

In his testimony before the Committee on Foreign Affairs, John Foster Dulles also pointed out that in San Francisco

There was no attempt to limit the inherent right of self-defense. (...) I pointed out that there was that inherent right that could not be taken away by implication or even in my opinion expressly, because no individual can give up the right to protect his own life.<sup>86</sup>

<sup>78</sup> Catherine Soanes (ed), *The Compact Oxford English Dictionary* (2nd edn, OUP 2003) 574.

<sup>79</sup> Bryan A Garner (ed), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 1518.

<sup>80</sup> Gérard Cornu (ed), *Vocabulaire Juridique* (PUF 2014) 677–78.

<sup>81</sup> *The New Velázquez Spanish and English Dictionary* (Velázquez Press 2003) pt I, 540.

<sup>82</sup> *Oxford Russian Dictionary* (3rd edn, OUP 2000) 258.

<sup>83</sup> Rohi Baalbaki, *Al-Mawrid Arabic-English Dictionary* (7th edn, Dar El-Ilm Lilmalayin 1995) 722.

<sup>84</sup> See VCLT, art 33(4): 'Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.'

<sup>85</sup> Ago (n 7) 67.

<sup>86</sup> Structure of the United Nations and Relations of the United States to the United Nations: Hearings before the House Committee on Foreign Affairs, 80th Congress, 2nd Session (1948) 298.

But ‘inherent’ in what? Like non-intervention/non-interference,<sup>87</sup> self-defence is an example of what Serge Sur has called in a recent article ‘functional inferences’ (*inhérences fonctionnelles*), ie those which are necessary for the very existence of a state and to the exercise of its competences.<sup>88</sup> Indeed, it is difficult to see how a state could be really independent if it does not possess the right to defend such independence. The requirement of a defined territory as an element of statehood also implies the right to defend sovereignty over that territory. To paraphrase Ago, it is the rightful holder of the subjective right to territorial sovereignty and political independence ‘who is at the same time given the faculty of taking measures for the purpose of safeguarding the right in question.’<sup>89</sup> Legal inference has nothing to do with natural law:<sup>90</sup> on the contrary, ‘elle est un accompagnement nécessaire du droit positif.’<sup>91</sup> As the defence counsel at Nuremberg argued, ‘War in self-defence is permitted as an inalienable right to all states; without that right, sovereignty does not exist.’<sup>92</sup> In his Dissenting Opinion attached to the *Nuclear Weapons Advisory Opinion*, Judge Shahabuddeen also recalls that ‘[s]ince the right of self-defence is “inherent” in a State, it is not possible to conceive of statehood which lacks that characteristic.’<sup>93</sup> Judge Fleischhauer’s Separate Opinion concurs and affirms that ‘the inherent right of self-defence’ is a right ‘which every State possesses as a matter of sovereign equality.’<sup>94</sup> These views find support in the ILC’s choice to adopt a Declaration on rights and duties of states, and not a convention, as ‘the rights and duties

<sup>87</sup> Niki Aloupi, ‘The Right to Non-intervention and Non-interference’ (2015) 4 CJICL 566.

<sup>88</sup> Serge Sur, ‘L’inhérence en droit international’ (2014) 118 *Revue Générale de Droit International Public* 790, 791–92. For this author, ‘La réunion des critères requis pour la naissance d’un Etat entraîne (...) des conséquences inhérentes à cette situation’ (ibid 789); ‘inhérences étatiques’, ‘inhérences fonctionnelles’ and ‘inhérences structurelles’ (ibid 787–89, 790–92, 794–95, respectively). See also Lamberti Zanardi (n 21) 214. The Declaration on Friendly Relations emphasises that the principle of sovereign equality of states entails that ‘[e]ach State enjoys the rights inherent in full sovereignty’ (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625). Some commentators have argued that the right of self-defence, like all other fundamental rights, is inherent not only in statehood or state sovereignty, but also in the international legal order itself and is necessary for the proper functioning of the system: d’Aspremont, ‘The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law’ (n 9) 501 (referring to scholars of the ‘golden age’ of the doctrine of fundamental rights of states, ie 1850–1945); Sergio M Carbone and Lorenzo Schiano di Pepe, ‘States, Fundamental Rights of’ in *Max Planck Encyclopedia of Public International Law*, vol 30 (OUP 2012) para 36. It is worth recalling that in the *Gulf of Maine* judgment, the ICJ identified a ‘limited set of [customary] norms for ensuring the co-existence and vital co-operation of the members of the international community’: *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)* (Merits) [1984] ICJ Rep 246, para 111.

<sup>89</sup> Ago (n 7) 56.

<sup>90</sup> Sur (n 88) 786.

<sup>91</sup> ibid 797. In *North Sea Continental Shelf* (n 67) para 38, for instance, the ICJ found that ‘if it is correct that the equidistance principle is (...) to be regarded as inherent in the whole basic concept of continental shelf rights, then equidistance should constitute the rule according to positive law tests also.’

<sup>92</sup> Cited in Bowett (n 3) 140: the Prosecutor for the United Kingdom did not contest this point and referred to self-defence as a ‘natural right’. The disagreement between prosecution and defence was rather on who is to be the judge that the circumstances of self-defence exist.

<sup>93</sup> *Nuclear Weapons* (n 5) 417 (Judge Shahabuddeen).

<sup>94</sup> ibid 305 (Judge Fleischhauer).

of States as such are not created by the text of a treaty or international Convention but are inherent in their quality as States and can only be recognized or stated.<sup>95</sup>

To be clear, self-defence is a consequence of statehood, and not one of its constitutive elements (which are instead identified in article 1 of the Montevideo Convention): in fact, it is an essential means to defend the constitutive elements. Also, the fact that self-defence is inherent in statehood does not mean that it is an absolute right.<sup>96</sup> Rivier points out that 'l'aliénation complète et définitive d'un [des droits essentiels] serait incompatible avec le maintien de la qualité d'État souverain, personne complète du droit des gens, pair des autres États.' However, 'rien n'empêche qu'un État puisse renoncer pour un temps, même indéfini, dans des circonstances données et en faveur d'un ou de plusieurs autres États, à certaines manifestations d'un droit essentiel, et en suspendre à certains égards l'exercice.'<sup>97</sup> In other words, 'Self-defence is an inherent right, but one which is subject to legal considerations and the violation of one or more of those considerations can divest the state of its right to continue to exercise it.'<sup>98</sup> It is through these lenses that one should read article 51 of the UN Charter, which does not 'impair' the inherent *right* of self-defence (and could have not done so), but submits its *exercise* to certain conditions and requirements in order to adjust it to the collective security system established by the UN Charter.<sup>99</sup> However, no requirement imposed on the *exercise* of the right of self-defence could lead to completely deprive a state of the *right* itself.

It should be noted that, in contrast with the above mentioned classical doctrine that saw self-defence not only as a fundamental right of states but also as a duty, there is no basis for such a duty in article 51 of the UN Charter or customary international law.<sup>100</sup> States may be under a duty to react to neutrality violations under the law of neutrality or a treaty on permanent neutrality, or under a duty to react against armed attacks as provided in mutual defence treaties.<sup>101</sup> Such a duty, however, would be based not on article 51 of the UN Charter or its customary counterpart, but on the law of neutrality, the permanent neutrality treaty or the mutual defence treaty. Outside these situations, a state 'has the right to commit suicide'.<sup>102</sup> Still, the naturalistic notion of self-defence as a duty that a state owes to itself or to its own population has not completely disappeared as a legal narrative. It suffices to remember the ICJ's words in the 2004 *Palestinian Wall*

<sup>95</sup> ILC, 'Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, Memorandum Submitted by the Secretary-General' (15 December 1948) UN Doc A/CN.4/2, 213.

<sup>96</sup> This notion is criticised by Alfaro (n 56) 113–14.

<sup>97</sup> Rivier (n 31) 258.

<sup>98</sup> Terry D Gill, 'When Does Self-Defence End?' in Marc Weller (ed), *The Oxford Handbook on the Use of Force* (OUP 2015) 746.

<sup>99</sup> In particular, it requires that all measures taken in self-defence be reported to the UN Security Council and that measures in self-defence may be taken only until the Council 'has taken the measures necessary to maintain international peace and security' (see below section 6). Whether or not the reference to an ongoing 'armed attack' is a further conditionality imposed by the UN Charter, art 51, on the exercise of the inherent right of self-defence is controversial and is outside the scope of this article.

<sup>100</sup> Brownlie (n 22) 262.

<sup>101</sup> Dinstein (n 1) 191; Brownlie (n 22) 262.

<sup>102</sup> Florence Poirat, 'La doctrine des droits fondamentaux de l'Etat' (1992) 16 *Droits Revue Française de Théorie Juridique* 83, 91.

Advisory Opinion: ‘The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, *and indeed the duty*, to respond in order to protect the life of its citizens.’<sup>103</sup>

One final observation concerns the right of collective self-defence. While article 51 of the UN Charter does not distinguish between individual and collective self-defence and qualifies both as inherent, this is difficult to justify in relation to the latter. Indeed, it does not seem to be a right without which sovereignty cannot exist or an essential means through which to defend the constitutive elements of statehood. The right of the victim state to ask for help may well be inherent, but the ‘right’ of other states to come to its assistance is not: in fact, as will be seen, permanent neutral states have renounced this right.<sup>104</sup> Collective self-defence is not even a right: as the ICJ explained in *Nicaragua*, it is subordinated to the request of the victim state.<sup>105</sup>

If the addition of ‘inherent’ in relation to self-defence is a reminder by the UN Charter drafters that such right is a corollary of statehood, then it remains to be seen what legal consequences, if any, such characteristic entails. This will be explored in the next sections.

#### 4 The inalienable character of self-defence

One of the consequences of the inherent character of the right of self-defence is its inalienability; as Ago puts it, the right of self-defence is a prerogative that a state is not entitled to renounce.<sup>106</sup> This is not contradicted by the status of permanent neutrality that characterises certain states, namely Switzerland and Austria.<sup>107</sup> Such status is normally based on a multilateral or, more rarely, a bilateral treaty and entails an obligation on the state in question not to be involved in armed conflict and not to participate in acts that may lead to that result, for instance participation in military alliances, acceptance of foreign military bases or the passage of foreign troops on its territory. Permanent neutrality, however, never excludes the right of the state to use force in self-defence.<sup>108</sup> As the delegate of the Serb-Croat-Slovene state declared on 12 January 1920 to oppose a proposal for demilitarisation of certain parts of the Yugoslav territory, ‘Even the international conventions, which provided for neutralisation (concerning Belgium and Switzerland, for instance), preserved intact the right of neutral countries to defend their

<sup>103</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (*Palestinian Wall*) para 142 (emphasis added). For this view in the literature, see Rosenne (n 5) 59.

<sup>104</sup> It has been observed that ‘[p]ermanent neutrality means a renunciation of the right of collective self-defence, ie the right to grant assistance, but not a renunciation of the right to accept help from others if the permanently neutral State is itself attacked’: Michael Bothe, ‘Neutrality, Concept and General Rules’ in *Max Planck Encyclopedia of Public International Law*, vol 7 (OUP 2012) 621.

<sup>105</sup> *Nicaragua* (n 72) para 198.

<sup>106</sup> Ago (n 7) 67, fn 263.

<sup>107</sup> Natalino Ronzitti, *Diritto Internazionale dei Conflitti Armati* (4th edn, Giappichelli 2011) 114–15.

<sup>108</sup> Josef L Kunz, ‘Austria’s Permanent Neutrality’ (1956) 50 AJIL 418, 419.

frontiers by force of arms.<sup>109</sup> The judgment in the *High Command* trial also found that a permanently neutral state like Switzerland might use 'her military strength to implement a national policy that seeks peace and to maintain her borders against aggression.'<sup>110</sup> In fact, permanently neutral states normally have not only a right, but also a duty to defend their neutrality.<sup>111</sup>

Apart from permanent neutrality, even 'peace constitutions'<sup>112</sup> like those of Germany and Japan do not rule out the use of the armed forces in self-defence. While article 9 of the Japanese Constitution provides that 'the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes', Japan possesses Ground, Maritime and Air Self-Defence Forces.<sup>113</sup> Article 26(1) of Germany's Basic Law provides that '[a]cts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional'. Article 87(a)(1) of Germany's Basic Law, however, allows the establishment of armed forces for the purposes of defence.<sup>114</sup> Article 2 of the 1990 Treaty on the Final Settlement with Respect to Germany also states that 'the united Germany will never employ any of its weapons except in accordance with its constitution and the Charter of the United Nations', therefore excluding self-defence actions, and the right of Germany to participate in defensive alliances is expressly reaffirmed in article 6.<sup>115</sup>

There are also several present-day examples of states that have entirely entrusted their defence to other states. According to the 2002 Treaty intended to adapt and strengthen friendship and cooperation relations between the Principality of Monaco and the French Republic, for example, the French Republic is responsible for the military defence of the Principality.<sup>116</sup> The Constitutions of Niue and the Cook Islands (1974 and

<sup>109</sup> *Documents on British Foreign Policy, 1919–1939* (First Series, vol 2, no 67, HMSO 1948) 821.

<sup>110</sup> *In re von Leeb et al* (1948) 15 ILR 376, 381.

<sup>111</sup> Kunz (n 108) 424.

<sup>112</sup> Russell A Miller, 'Germany's Basic Law and the Use of Force' (2010) 17 Intl J Global L Studies 197, 199.

<sup>113</sup> Japanese Self-Defence Forces Act, Act No 165 of 1954.

<sup>114</sup> With the 1945 Berlin Declaration, the four Allied Powers assumed 'supreme authority with respect to Germany' and demilitarised the country: Katarina Weilert, 'Germany, Legal Status After World War II' in *Max Planck Encyclopedia of Public International Law* (online edition) para 5 <<http://opil.ouplaw.com/home/EPIL>> accessed 5 July 2015. In that period, it was doubtful that Germany was still a fully sovereign state (ibid para 16). The 1952 Convention on Relations between the Three Powers and the Federal Republic of Germany (adopted 26 May 1952, entered into force 5 May 1955) 331 UNTS 327, as amended by the 1954 Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany (adopted 23 October 1954, entered into force 5 May 1955) 331 UNTS 253, art 1(2) restored to the formerly occupied state 'the full authority of a sovereign State over its internal and external affairs'. See also the Treaty Concerning Relations Between the Union of the Soviet Socialist Republics and the German Democratic Republic (adopted 20 September 1955, entered into force 6 October 1955) 226 UNTS 201.

<sup>115</sup> Treaty on the Final Settlement with Respect to Germany (adopted 12 September 1990, entered into force 15 March 1991) 1696 UNTS 124.

<sup>116</sup> Treaty Intended to Adapt and Strengthen Friendship and Cooperation Relations between the Principality of Monaco and the French Republic (adopted 24 October 2002) Ordinance no 407 of 15 February 2006, art 1 <<http://www.legimonaco.mc/305/legismclois.nsf/db3b0488a44ebcf9c12574c7002a8e84/d1db400fecb1721bc125773f003d3fbb!OpenDocument&Highlight=0,407>> accessed 5 July 2015: 'La République française assure à la Principauté de Monaco la défense de son indépendance et de sa souveraineté et

1965, respectively) provide that New Zealand retains responsibility for the defence of the two states. Title three, article 1, section 311 of the Compacts of Free Association between the Federated States of Micronesia and the United States and between the Republic of the Marshall Islands and the United States also provides that '[t]he Government of the United States has full authority and responsibility for security and defense matters in or relating to' the Federated States of Micronesia and the Republic of the Marshall Islands, which includes 'the obligation to defend the Federated States of Micronesia [and of the Republic of the Marshall Islands] and [their] people from attack or threats thereof as the United States and its citizens are defended'.<sup>117</sup> Similarly, article 1, section 312 of the Compact of Free Association between Palau and the United States provides that the latter 'has full authority and responsibility for security and defense matters in or relating to Palau'.<sup>118</sup> Section 313 of the Compacts with Palau, Micronesia and Marshall Islands adds that the governments of the three states 'shall refrain from actions which the Government of the United States determines, after consultation with that Government, to be incompatible with its authority and responsibility for security and defense matters in or relating to' those states.

The statehood of the above entities is generally not contested. Does this mean that a state can alienate its right of self-defence to another state without losing its statehood? This would seem to be inconsistent with the inherent character of the right of self-defence as described above. Again, one should not lose sight of the distinction between the right itself and the *exercise* of the right. In the above cases, states have not alienated their right of self-defence, but merely delegated its exercise to another state. The Pacific People's Constitution Report adopted by the New Zealand government in 2000 expressly states that '[w]here the New Zealand Government exercises responsibilities in respect of external affairs and defence, it does so in effect on the delegated authority of the Government of Niue'.<sup>119</sup> It is implicit in the notion of delegation (as opposed to that of alienation) that the delegated powers can be revoked. Furthermore, if the state

garantit l'intégrité du territoire monégasque dans les mêmes conditions que le sien'. See also Treaty on the Relations between the Principality and France (adopted 17 July 1918) Ordinance of 14 November 1920, art 1 <<http://www.legimonaco.mc/305/legismclois.nsf/db3b0488a44ebcf9c12574c7002a8e84/cf98c1484c39d9eac125773f003778d0?OpenDocument&Highlight=0,1919>> accessed 5 July 2015: 'Le gouvernement de la République française assure à la Principauté de Monaco la défense de son indépendance et de sa souveraineté et garantit l'intégrité de son territoire comme si ce territoire faisait partie de la France'. See also Peace Treaty of Versailles (adopted 28 June 1919, entered into force 10 January 1920) 13 AJIL Supp 151, 385 (1919) art 436: 'The High Contracting Parties declare and place on record that they have taken note of the Treaty signed by the Government of the French Republic on July 17, 1918, with His Serene Highness the Prince of Monaco defining the relations between France and the Principality.'

<sup>117</sup> Compacts of Free Association Act of 1985 between the Federated States of Micronesia and the United States and between the Republic of the Marshall Islands and the United States, Public Law 99-239, as amended by the Compacts of Free Association Act of 2003, Public Law 108-188. The provisions specify that '[t]he Government of the United States confirms that it shall act in accordance with the principles of international law and the Charter of the United Nations in the exercise of this authority and responsibility'.

<sup>118</sup> Compact of Free Association Act of 1994 between Palau and the United States, Public Law 99-658.

<sup>119</sup> New Zealand Ministry of Justice and Ministry of Pacific Islands Affairs of New Zealand, 'Pacific People's Constitution Report' (2000) 33, s 3.2 <<http://www.justice.govt.nz/publications/publications-archived/2000/pacific-peoples-constitution-report-september-2000>> accessed 5 July 2015.

responsible for the defence of another state does not adequately do so, the latter state could adopt defensive measures with the means at its disposal.

## 5 Does self-defence take precedence over other international law?

The question that this section addresses is whether the inherent character of self-defence makes it supersede any other conflicting obligations incumbent on the state victim of an armed attack.<sup>120</sup> In some cases, the prevalence is expressly stated. The 2013 Arms Trade Treaty, for instance, reaffirms the 'inherent right of all States to individual or collective self-defence as recognized in Article 51 of the Charter of the United Nations' and '[t]he respect for the legitimate interests of States to acquire conventional arms to exercise their right to self-defence and for peacekeeping operations; and to produce, export, import and transfer conventional arms.'<sup>121</sup> In other cases, the prevalence has been considered implicit: in the *Nuclear Weapons* Advisory Opinion, the ICJ did not find that environmental treaties could be interpreted as depriving states of their right of self-defence.<sup>122</sup>

As the ILC Commentary to article 21 of its Articles on the Responsibility of States for Internationally Wrongful Acts observes, however, self-defence does not preclude the wrongfulness of conduct 'in all cases or with respect to all obligations.'<sup>123</sup> The ILC notes that, although the inherent right to self-defence may justify non-performance of certain treaties, this does not apply to 'obligations under international humanitarian law and in relation to non-derogable human rights provisions.'<sup>124</sup> In the *Nuclear Weapons* Advisory Opinion, the ICJ distinguished between obligations of 'total restraint during military conflict', which may 'deprive a State of the exercise of its right of self-defence',<sup>125</sup> and other obligations. The ICJ was ambiguous on the relationship between the *jus ad bellum*

<sup>120</sup> The problem can be seen either as a conflict between primary norms or as the application of a secondary rule precluding the wrongfulness of the violation of a primary rule (on the distinction between primary and secondary rules, see HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 94ff). If the latter, it should be noted that self-defence can work not only as a circumstance that precludes the wrongfulness of an otherwise unlawful use of force, but also of other violations of international law: Lamberti Zanardi (n 21) 129; Bowett (n 3) 270. This view finds support in the ICJ Advisory Opinion on the *Palestinian Wall* (n 103) para 139, where the Court considered the self-defence argument advanced by Israel to justify the construction of the security fence. The argument was eventually not accepted because, according to the Court, the conditions for self-defence, in particular the fact that the armed attack must come from another state, had not been met.

<sup>121</sup> Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) UNGA Res 67/234B, preamble.

<sup>122</sup> *Nuclear Weapons* (n 5) para 30.

<sup>123</sup> ILC, Responsibility of States for Internationally Wrongful Acts—Commentary, ILC YB 2001/II(2) 74, art 21. It should be recalled that self-defence cannot preclude 'the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law' (ILC Articles on State Responsibility, art 26).

<sup>124</sup> ILC, Responsibility of States for Internationally Wrongful Acts—Commentary (n 123) 74.

<sup>125</sup> *Nuclear Weapons* (n 5) para 30. As mentioned, the ICJ concluded that environmental treaties did not belong to this category.

right of self-defence and the obligations of states in the conduct of hostilities under the *jus in bello*: despite concluding that the use of nuclear weapons is ‘generally contrary’ to the law of armed conflict, it did not rule out that the use of nuclear weapons could be lawful ‘in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.’<sup>126</sup>

In Judge Fleischhauer’s view, the inherent right of self-defence trumps the limitations imposed on the use of weapons under the *jus in bello* when negating the use of a prohibited weapon would equate to depriving a state of its right of self-defence.<sup>127</sup> In his view, neither ‘principle’ (the law of armed conflict and the inherent right of self-defence) prevails as they have equal rank,<sup>128</sup> and the conflict must be settled by finding ‘the smallest common denominator between the conflicting principles’, ie by allowing the use of nuclear weapons exclusively when it is the means of last resort against an armed attack that threatens the very existence of the victim state.<sup>129</sup>

These views are rightly criticised by Judge Weeramantry, who passionately maintains that ‘the undoubted right of the State that is attacked to use all the weaponry available to it for the purpose of repulsing the aggressor (...) holds only *so long as such weapons do not violate the fundamental rules of warfare embodied in those rules*.’<sup>130</sup> A different conclusion would undermine the distinction between the *jus ad bellum* and the *jus in bello*: ‘while the *jus ad bellum* only opens the door to the use of force (in self-defence or by the Security Council), whoever enters that door must function subject to the *jus in bello*.’<sup>131</sup> Judge Shahabuddeen concurs and emphasises that ‘it is necessary to distinguish between the inherent right of self-defence and the means by which the right is exercisable’: the latter falls under the scope of the *jus in bello*.<sup>132</sup> Similarly, President Bedjaoui affirms that, in spite of the ‘fundamental’ character of the right of a state to survival, this right

ne peut engendrer une situation dans laquelle un Etat s'exonérerait lui-même du respect des norms ‘intransgressibles’ du droit international humanitaire. (...) On manquerait par conséquent de la plus élémentaire prudence si on plaçait sans hésitation la survie d'un Etat au-dessus de toutes autres considérations, et en particulier au-dessus de la survie de l'humanité elle-même.<sup>133</sup>

<sup>126</sup> *ibid* para 105(E).

<sup>127</sup> *ibid* 307 (Judge Fleischhauer): ‘the denial of the recourse to the threat or use of nuclear weapons as a legal option in any circumstance could amount to a denial of self-defence itself if such recourse was the last available means by way of which the victimized State could exercise its right under Article 51 of the Charter’.

<sup>128</sup> *ibid* 306, 308 (Judge Fleischhauer).

<sup>129</sup> *ibid* 308 (Judge Fleischhauer). His opinion recalls the remarks of US Secretary of State Dean Acheson at the 1963 Conference of the American Society of International Law: ‘law does simply not deal with such questions of ultimate power—power that comes close to the sources of sovereignty. (...) The survival of states is not a matter of law.’ See Dean Acheson, ‘Law and Conflict: Changing Patterns and Contemporary Challenges—Panel: Cuban Quarantine: Implications for the Future: Remarks’ (1963) 57 ASIL Proc 14.

<sup>130</sup> *Nuclear Weapons* (n 5) 514 (Judge Weeramantry) (emphasis in the original).

<sup>131</sup> *ibid* 519.

<sup>132</sup> *ibid* 418 (Judge Shahabuddeen).

<sup>133</sup> *ibid* para 22 (President Bedjaoui).

Means and methods of warfare prohibited under the law of armed conflict, therefore, may never be used, not even in self-defence.<sup>134</sup> This conclusion finds support in the Draft Articles on the effects of armed conflicts on treaties, adopted by the ILC in 2011.<sup>135</sup> The pre-eminence of self-defence over other treaty regimes is stated by draft article 14, according to which

A state exercising its inherent right of individual and collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a Party insofar as that operation is incompatible with the exercise of that right.

The right of self-defence, therefore, prevails over other treaty obligations owed by the victim state not only towards the aggressor but also towards other states. According to the Commentary, however, this prevalence does not affect treaties designed to apply in armed conflict, in particular the law of armed conflict.<sup>136</sup>

The exercise of self-defence may also be affected by mechanisms to peacefully settle international disputes. The question has arisen, for instance, of whether a state may resort to self-defence *pendente lite*, in particular after the dispute has been submitted to the ICJ. This is not a real case of conflicting obligations: if the dispute has been submitted to a judicial mechanism, the defensive reaction will normally not be necessary. If the aggressor resumes hostilities, however, the right of self-defence may be exercised again.<sup>137</sup> It is worth recalling that, in obiter dictum, the *Tehran Hostages* judgment stated that the operation carried out by the United States 'in exercise of its inherent right of self-defence with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on Our Embassy'<sup>138</sup> may have undermined 'respect for the judicial process in international relations'.<sup>139</sup>

## 6 Self-defence and the UN Security Council's powers

To what extent, if any, may the UN Security Council limit the 'inherent right' of self-defence of states? The UN Security Council's primacy in the maintenance of international peace and security is affirmed three times in article 51 of the UN Charter. First, states have a duty to report to the Council any measures taken in self-defence. Non-compliance with this requirement does not affect the legality of an otherwise lawful exercise of self-defence. As highlighted by Judge Schwebel in his Dissenting Opinion in *Nicaragua*, '[a] State cannot be deprived, and cannot deprive itself, of its inherent right of individual or

<sup>134</sup> Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 169.

<sup>135</sup> Draft Articles on the Effects of Armed Conflicts on Treaties with Commentaries, ILC YB 2011/II(2). Customary international law is not mentioned because it is outside the scope of the Draft Articles.

<sup>136</sup> *ibid.*

<sup>137</sup> Dinstein (n 1) 236.

<sup>138</sup> *US Diplomatic and Consular Staff in Tehran (United States v Iran)* (Merits) [1980] ICJ Rep 3, para 32.

<sup>139</sup> *ibid* para 93.

collective self-defence because of its failure to report measures taken in the exercise of that right to the Security Council.<sup>140</sup>

Furthermore, the second sentence of article 51 of the UN Charter provides that self-defence measures ‘shall not in any way affect the authority and responsibility of the Security Council (...) to take at any time such action as it deems necessary in order to maintain or restore international peace and security’. The only meaning that this clause could have is that the UN Security Council may take over from states at any time. Therefore, even if states have already reacted, or are reacting, in individual or collective self-defence, they are under an obligation not to impair the Council’s action.

The same point appears in clearer terms in the first sentence of article 51 of the UN Charter, which provides that states may exercise the individual or collective right of self-defence only ‘until the Security Council has taken the measures necessary to maintain international peace and security’.<sup>141</sup> This does not entail, as Schachter argues, that the inherent *right* of self-defence can be taken away from states if and when the Security Council adopts such measures.<sup>142</sup> It is its *exercise* that may be suspended because, like in domestic legal systems, it becomes unnecessary when a public authority takes charge of the protection of the community members. As Neff puts it, ‘The more prompt and effective the UN Security [Council] was, the smaller a part would self-defence naturally play.’<sup>143</sup>

As the *travaux préparatoires* of the UN Charter confirm,<sup>144</sup> not every measure adopted by the Security Council is able to suspend the exercise of the right of self-defence by states, but only those that are adequate to effectively maintain international peace and security.<sup>145</sup> It is only in this case that the exercise of self-defence by states becomes unnecessary. As the Egyptian delegate to the UN emphasised in 1954,

the individual or collective right of self-defence may not be over-ridden in favour of the Security Council except insofar as the States concerned are so well protected by the resources available to the Security Council that the abandonment of their right of self-defence will not harm them.<sup>146</sup>

<sup>140</sup> *Nicaragua* (n 72) para 230 (Judge Schwebel).

<sup>141</sup> See also Rio Treaty, art 3(4).

<sup>142</sup> Oscar Schachter, *International Law in Theory and Practice* (Nijhoff 1991) 403. See also Kelsen, *The Law of the United Nations* (n 69) 797.

<sup>143</sup> Neff, *War and the Law of Nations* (n 22) 327.

<sup>144</sup> Malvina Halberstam, ‘The Right to Self-Defense Once the Security Council Takes Action’ (1995–96) 17 *Michigan J Intl L* 229, 240ff; Terry D Gill, ‘Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter’ (1995) 26 *NYIL* 33, 97.

<sup>145</sup> Jutta Brunnée, ‘The Security Council and Self-Defence: Which Way to Global Security?’ in Niels Blokker and Nico Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality* (Nijhoff 2005) 128; Halberstam (n 144) 240–41. The legislative history of art 51 of the UN Charter reveals that the inclusion of the verb ‘to restore’ was deemed unnecessary, as it would be encompassed by ‘to maintain’. See Carin Kaghan, ‘Jus Cogens and the Inherent Right to Self-Defense’ (1996–97) 3 *J Intl & Comp L* 767, 821–22.

<sup>146</sup> UNSC Verbatim Record (5 February 1954) UN Doc S/PV.658.

The ILC has also stressed that self-defence is allowed 'where (...) the use of force by the agencies of the central authority cannot be resorted to *promptly and efficiently enough* to protect a subject against an attack by another'.<sup>147</sup> In contrast with what is argued by a leading commentator,<sup>148</sup> it is not the type of measure adopted by the UN Security Council that makes the difference. In particular, it is not necessary that the Security Council replaces the right of self-defence 'with its functional equivalent, that is, collective intervention on behalf of the aggrieved state'.<sup>149</sup> What counts for the purposes of suspending the exercise of the right of self-defence by states is that, whatever measures the UN Security Council adopts, it is effective in maintaining international peace and security, which necessarily involves a case-by-case evaluation.<sup>150</sup> The prevalent view is that 'it is not for the state allegedly taking action in self-defence to decide whether the Security Council has taken the measures necessary to secure peace and security, but it is for the United Nations itself to decide'.<sup>151</sup>

The exercise of the right of self-defence by the victim state could be potentially suspended if the UN Security Council imposes a general ceasefire upon the belligerents. In Resolution 598 (1987), for instance, the Security Council ordered a ceasefire between Iran and Iraq and demanded that both belligerents 'discontinue all military actions on land, at sea and in the air, and withdraw all forces to the internationally recognized boundaries without delay'.<sup>152</sup> If both belligerent states comply with the UN Security Council's ceasefire, the exercise of the right of self-defence by the attacked state is suspended as a consequence of the primacy of the Security Council in the maintenance of international peace and security. But if the aggressor state rejects the ceasefire, or resumes the attack after initially complying with it, or does not withdraw its troops from

<sup>147</sup> ILC, Responsibility of States for Internationally Wrongful Acts—Commentary (n 123) 52, art 34 (emphasis added).

<sup>148</sup> Dinstein argues that it is only 'a legally binding decision, whereby the cessation of the defensive action becomes compulsory' that may divest the right of states to react in self-defence (Dinstein (n 1) 239), but this is too narrow a view: other measures may have that consequence as well, including recommendations, if they are complied with and manage to effectively restore international peace and security.

<sup>149</sup> Craig Scott and others, 'A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina' (1994) 16 Michigan J Intl L 1, 69.

<sup>150</sup> Bowett (n 3) 196. It could be, therefore, any of the measures provided in the UN Charter, ch VII, and both recommendations and decisions: Kelsen, *The Law of the United Nations* (n 69) 801–02.

<sup>151</sup> Rosalyn Higgins (n 38) 206; Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (n 144) 96. But, in contrast, see Halberstam (n 144) 244; Scott (n 149) 61–62. Kelsen argues that '[i]t probably was not the intention of the legislator to confer upon the members involved in self-defence the power to decide whether the measures taken by the Council are adequate' and that '[t]he idea was probably that the exercise of the right of self-defence is allowed only until the Security Council has taken the measures which the Security Council deems necessary', but this is not unambiguously stated in art 51 of the UN Charter: Kelsen, 'Collective Security and Collective Self-Defense Under the Charter of the United Nations' (n 42) 793.

<sup>152</sup> UNSC Res 598 (20 July 1987) UN Doc S/RES/598, para 1. Demands for a ceasefire were also made by the Council in the DRC conflict, the Falklands War and the Ethiopia-Eritrea conflict. See Olivier Corten, *The Law against War* (Hart Publishing 2010) 473. Recently, the UN Security Council called for an immediate and unconditional ceasefire in Libya. See UNSC Res 2213 (27 March 2015) UN Doc S/RES/2213, para 1.

territory occupied as a consequence of the armed attack, the victim state may clearly continue to defend itself, or resume to do so.<sup>153</sup>

Similarly, according to the prevailing view, the adoption of sanctions under article 41 of the UN Charter does not automatically suspend the exercise of the right of self-defence of the attacked state.<sup>154</sup> In some cases, the Council's intention not to suspend the exercise of the right of self-defence in spite of its adopting measures has been clearly expressed, as in the case of Resolution 661 (1990): the Resolution reaffirmed 'the inherent right of individual and collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter,' even though at the same time the UN Security Council adopted sanctions against Iraq.<sup>155</sup> In any case, as Iraq did not comply with that Resolution and other resolutions, the right of self-defence of Kuwait and of its allies would have not been affected even in the absence of the reaffirmation of such right in the preamble of Resolution 661 (1990).<sup>156</sup>

When the UN Security Council imposes an arms embargo towards all belligerents in an international armed conflict, this may negatively affect the right of the attacked state to defend itself. Of course, not every arms embargo is necessarily inconsistent with article 51, otherwise the Security Council could never use this measure under article 41.<sup>157</sup> The problem first arose in 1977 when France claimed that an arms embargo on South Africa would breach that state's right of self-defence.<sup>158</sup> More famously, in Resolution 713 (1991), the UN Security Council adopted a comprehensive arms embargo against the entire territory of the former Yugoslavia with the consent of the federal government of Yugoslavia, in order to prevent an escalation of hostilities and to support the negotiation process.<sup>159</sup> The embargo continued to apply even after the break-up of Yugoslavia and the independence of Bosnia and Herzegovina. As the Republic of Yugoslavia (Serbia and Montenegro) continued to provide arms and logistical support to the Bosnian Serbs at least until 1994,<sup>160</sup> in 1993 the Bosnian government asked the UN Security Council to lift the arms embargo that prevented it from acquiring the means to exercise its right to self-defence and from reacting against the armed attack by Yugoslavia and, at least initially, Croatia.<sup>161</sup> In spite of several General Assembly's requests,<sup>162</sup> the Council did not lift the embargo: a draft resolution that exempted Bosnia and Herzegovina from it

<sup>153</sup> Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (n 144) 94; Corten (n 152) 479.

<sup>154</sup> Dinstein (n 1) 238; Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (n 144) 98.

<sup>155</sup> UNSC Res 661 (6 August 1990) UN Doc S/RES/661.

<sup>156</sup> Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (n 144) 99.

<sup>157</sup> Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 127.

<sup>158</sup> *ibid* 126.

<sup>159</sup> UNSC Res 713 (25 September 1991) UN Doc S/RES/713.

<sup>160</sup> Scott (n 149) 45–47.

<sup>161</sup> President Itzebegović of Bosnia and Herzegovina declared that '[t]he arms embargo has deprived Bosnia-Herzegovina of the right of legitimate defense': quoted in Kaghan (n 145) 768.

<sup>162</sup> UNGA Res 47/121 (18 December 1992) UN Doc A/RES/47/121; UNGA Res 48/88 (20 December 1993) UN Doc A/RES/48/88; UNGA Res 49/10 (3 November 1994) UN Doc A/RES/49/10.

'with the sole purpose of enabling [it] to exercise its inherent right to self-defence' was not adopted because of the abstention of nine Council members.<sup>163</sup> The arms embargo was only lifted in Resolution 1074 (1996).<sup>164</sup>

On the other hand, when Rwanda argued that the arms embargo imposed by Resolution 918 (1994) should be lifted because of external threats to the country, the Security Council unanimously adopted Resolution 1011 (1995), by which it suspended the embargo against the Government of Rwanda.<sup>165</sup> Resolutions 1493 (2003), 1596 (2005) and 1807 (2008) also provided for an arms embargo only against non-governmental forces operating in the Democratic Republic of the Congo (DRC) with the support of neighbouring states.<sup>166</sup> In early 2015, the battered Libyan government and Egypt asked the Security Council to lift the arms embargo against all actors in Libya imposed in Resolution 1970 (2011) and reaffirmed in Resolution 2174 (2014)<sup>167</sup> so that the Libyan National Army could receive military *matériel* and weapons to counter the 'rampant terrorism' of the 'Islamic State'.<sup>168</sup> In response, the UN Security Council requested the Sanctions Committee to consider expeditiously requests for such supply to the Libyan Government and emphasised 'the importance of providing support and assistance to the Government of Libya, including by providing it with the necessary security and capacity building assistance'.<sup>169</sup> Although neither the Libyan government nor Egypt expressly referred to the right of self-defence, the latter provided the former with military assistance, and the Arab League also called its members to provide all forms of support to Libya.<sup>170</sup>

The above cases show that the Bosnian precedent should not be given too much significance. Already the classical scholars of international law maintained that 'every nation has the right to those things without which it cannot preserve itself'.<sup>171</sup> Indeed, article 51 of the UN Charter would contradict itself if, on the one hand, it reaffirmed the

<sup>163</sup> UNSC Draft Resolution (29 June 1993) UN Doc S/25997.

<sup>164</sup> UNSC Res 1074 (1 October 1996) UN Doc S/RES/1074.

<sup>165</sup> Gray (n 157) 127; UNSC Res 918 (17 May 1994) UN Doc S/RES/918; UNSC Res 1011 (16 August 1995) UN Doc S/RES/1011.

<sup>166</sup> UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493; UNSC Res 1596 (18 April 2005) UN Doc S/RES/1596; UNSC Res 1807 (31 March 2008) UN Doc S/RES/1807.

<sup>167</sup> After the UN General Assembly accepted the National Transitional Council as the new Libyan Government, the Security Council adopted Resolution 2009 (2011), which allowed the transfer of arms to the new Libyan authorities under the condition that such transfers would be notified to the Sanctions Committee in advance and in the absence of a negative decision by the Committee within five working days of such a notification. See UNSC Res 2009 (16 September 2011) UN Doc S/RES/2009. Resolution 2174 (2014) restricted this regime by requiring that all supplies of arms and related materiel to Libya must be approved in advance by the Sanctions Committee. See UNSC Res 2174 (27 August 2014) UN Doc S/RES/2174; UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

<sup>168</sup> Declaration of the Libyan Delegate at the UN Security Council, UNSC Verbatim Record (18 February 2015) UN Doc S/PV.7387, 5. For the Declaration of the Egyptian Delegate at the UN Security Council, see UNSC Verbatim Record (18 February 2015) UN Doc S/PV.7387, 7.

<sup>169</sup> UNSC Res 2214 (27 March 2015) UN Doc S/RES/2214, paras 7–8.

<sup>170</sup> Declaration of the Egyptian Delegate at the UN Security Council (n 168) 7.

<sup>171</sup> Wolff (n 10) 23–24, paras 32, 34. See also Vattel (n 10) book I, ch II, 88, s 18.

inherent right of self-defence but, on the other hand, it allowed a state to be deprived of the means to exercise it.<sup>172</sup> As has been observed, the UN Security Council

cannot prevent a State which it cannot or will not defend, from defending itself. Neither can the Council prevent a State which lacks the capacity to defend itself, from receiving such assistance from third States as will enable it to defend itself or at least enhance its ability to do so.<sup>173</sup>

An arms embargo adopted by the UN Security Council against all belligerents to prevent an aggravation of the crisis, then, will not be *prima facie* inconsistent with the inherent right of self-defence of the attacked state. But if the UN Security Council's measures have unequal effects and result in depriving a state of its right to defend itself without at the same time providing it with equivalent protection, such measures are superseded by the inherent right of self-defence, which is not 'impaired' by any UN Charter provision, including chapter VII or article 103.<sup>174</sup>

To be clear, the question of whether UN Security Council resolutions may negatively affect the exercise of self-defence by a state arises only in relation to states victims of an armed attack, and not to states responsible for violations of article 2(4) of the UN Charter or a threat to the peace. Resolution 1907 (2009) providing for an arms embargo on Eritrea for its support to armed groups in Somalia, for instance, did not impair the right of self-defence of that country, as it was not the victim of an armed attack.<sup>175</sup> The District Court of The Hague also had to examine the defence invoked by the defendant, the chairman of a Dutch company that had allegedly transported and imported arms in Liberia in 2001–03 on behalf of the Charles Taylor regime, against the charge of the violation of the sanctions regime decided by the UN Security Council in Resolution 1341 (2001) and 1408 (2002).<sup>176</sup> The defendant invoked article 51 of the UN Charter claiming that Liberia had to defend itself against attacks by rebels and that therefore Liberia was entitled to receive the weapons provided by the defendant in spite of the embargo.<sup>177</sup>

<sup>172</sup> As has been seen, however, self-defence does not include the right to use prohibited weapons (see above).

<sup>173</sup> Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (n 144) 103.

<sup>174</sup> The same conclusion would be reached by arguing that the right of self-defence is a *jus cogens* rule or that art 103 limits the prevalence of UN Charter obligations only to conflicting treaty law provisions and does not also extend to customary international law rules like self-defence. See Gaetano Arangio-Ruiz, 'Article 39 of the ILC First-Reading Draft Articles on State Responsibility' (2000) 83 *Rivista di Diritto Internazionale* 747, 752; Karl Zemanek, 'The Legal Foundations of the International System' (1997) 266 *RdC* 1, 232. As far as the former argument is concerned, it can be recalled that, in his Separate Opinion to the ICJ's Provisional Measures Order on the *Application of the Genocide Convention*, Judge Lauterpacht suggests that para 6 of Resolution 713 (1991) is invalid, and therefore not binding on member states, because it was in contrast with the *jus cogens* prohibition of genocide. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Provisional Measures, Order of 13 September 1993) [1993] ICJ Rep 325, para 103 (Judge Lauterpacht). His conclusions could be extended to self-defence if one assumes that this is also a *jus cogens* norm.

<sup>175</sup> UNSC Res 1907 (23 December 2009) UN Doc S/RES/1907.

<sup>176</sup> UNSC Res 1341 (22 February 2001) UN Doc S/RES/1341; UNSC Res 1408 (6 May 2002) UN Doc S/RES/1408.

<sup>177</sup> *Guus Kouwenhoven* case, District Court of The Hague (7 June 2006) Count 5, s 11.

The District Court rejected this plea on the ground that, at the time of the offences, the UN Security Council had already taken measures necessary to maintain international peace and security under Resolution 1343 (2001) also in reaction to Liberia's support for armed groups operating in neighbouring countries, in particular Sierra Leone, which amounted to a threat to international peace and security in the region.<sup>178</sup> As Liberia was responsible for such destabilisation, it was not in a situation of self-defence.

A final point concerns the question whether states have a right of self-defence against UN Security Council authorised enforcement operations. The answer is negative: self-defence only applies to reactions against *unlawful* uses of force.<sup>179</sup> Indeed, unlike a state of necessity, self-defence always implies the commission of an internationally wrongful act, as it is a reaction against a serious violation of article 2(4) of the UN Charter amounting to an 'armed attack'. A use of force authorised by the UN Security Council, however, is not a violation of article 2(4) of the UN Charter. The principle of incompatible rights, ie 'one party's right to act implies a corresponding denial of the right of those who are affected to resist the rightful use of force',<sup>180</sup> applies then not only when a state exercises the right of self-defence,<sup>181</sup> but also when the UN Security Council authorises military intervention under chapter VII. If the operation exceeds the UN Security Council's mandate, however, the right of self-defence cannot be excluded against the actions exceeding it.<sup>182</sup>

## 7 Conclusion

Of all the rights that were once considered 'fundamental', self-defence is probably the one to which states have proved to be most attached. This is demonstrated by its history and by its qualification as an 'inherent right' in article 51 of the UN Charter. This article has applied the interpretive rules contained in the VCLT to determine what the 'inherent' right means in article 51 and what legal consequences this qualification entails. This article concludes that the qualification of self-defence as 'inherent' in article 51 of the UN Charter epitomises the fact that self-defence is a corollary of statehood as presently defined in positive law, as it is functional to preserving its constitutive elements. It has, to use the ICJ's words in the *North Sea Continental Shelf* judgment, 'an *a priori* character of so to speak juristic inevitability'.<sup>183</sup> Self-defence is also an essential means to enforce

<sup>178</sup> UNSC Res 1343 (7 March 2001) UN Doc S/RES/1343.

<sup>179</sup> Lamberti Zanardi (n 21) 124.

<sup>180</sup> Fletcher and Ohlin (n 9) 46–47. See also Dinstein (n 1) 190.

<sup>181</sup> For example, see Bowett (n 3) 53: 'Against the lawful exercise of a right of self-defence there can be no right of self-defence in the state claiming political independence.'

<sup>182</sup> Ilias Bantekas, 'The Permissibility of Defiance and Self-Defence against Chapter VII Authorisations: When and Why' (2007) 12 ARIEL 3, 14–15. This situation may have arisen in Libya in 2011, where Resolution 1973 (2011) only authorised states to use all necessary means 'to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi': UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, para 4.

<sup>183</sup> *North Sea Continental Shelf* (n 67) para 37.

a fundamental provision of the international legal order, ie the prohibition of the use of armed force in international relations.

This article has also demonstrated that, from the inherent character of self-defence, important legal consequences arise: the right of self-defence cannot be alienated and it takes precedence over other international obligations, although not over those specifically intended to limit the conduct of states in armed conflict and over non-derogable human rights provisions. The *exercise* of the right, however, may be delegated to other states or be submitted to limitations under both customary international law and treaty law, but such limitations cannot go as far as to deprive a state of the right itself.

In the end, then, far from being irrelevant, the 'inherent' character of self-defence is a potent reminder of the fact that states still hold a powerful grip on the international legal order.

# Fundamental Rights of States in International Law and the Right to Peaceful Nuclear Energy

Daniel H Joyner\*

## Abstract

This article first discusses the overall theme of this special issue of the *Cambridge Journal of International and Comparative Law* from a legal theoretical perspective, namely, the concept of the fundamental rights of states in international law. It concludes that fundamental rights of states exist in international law as autonomous juridical principles. The article then proceeds to discuss one such asserted fundamental right of states: the right to peaceful nuclear energy, as codified in the 1968 Nuclear Non-proliferation Treaty. It argues that the right to peaceful nuclear energy is indeed a fundamental right of states, and that it has juridical substance, and carries juridical implications, as a rule of law on par with other rules of the *jus dispositivum*.

## Keywords

Fundamental Rights of States, Nuclear Non-Proliferation Treaty, Right to Peaceful Nuclear Energy, Security Council

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## 1 Introduction

In this paper, I will first discuss the overall theme of this special issue of the *Cambridge Journal of International and Comparative Law*—the concept of the fundamental rights of states in international law—from a legal theoretical perspective. I will conclude that fundamental rights of states exist in international law as autonomous juridical principles. I will, then, proceed to discuss one such asserted fundamental right of states: the right to peaceful nuclear energy, as codified in the 1968 Nuclear Non-proliferation Treaty.<sup>1</sup> I will argue that the right to peaceful nuclear energy is indeed a fundamental right of states,

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<sup>1</sup> Treaty on the Non-proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161 (NPT).

and that it has juridical substance, and carries juridical implications, as a rule of law on par with other rules of the *jus dispositivum*.

## 2 Fundamental rights of states in international law

There is no question that states have international legal rights. The primary and secondary sources of international law that were identified in the introduction to this special issue and in section two, consisting primarily of treaties and United Nations (UN) General Assembly resolutions, amply demonstrate that states generally accept as a reality the concept that they have international legal rights in addition to their international legal obligations.<sup>2</sup>

The questions that this special issue has grappled with flow from this initial descriptive observation. These questions include: what, then, is the legal character of these rights? What is their source? What is their juridical nature, and what are their juridical implications?

The concept of states' rights must be understood in a historical context. The papers in section one of this special issue are extremely useful in demonstrating that this concept has been an enduring one in international legal thought, and that in every era of the history of international law, however those eras are defined, the concept of states' rights has been present and has performed a particular function.

The most recent reiteration of and re-emphasis on the concept of states' fundamental rights in international law can be seen to have occurred in the second half of the twentieth century, when most of the primary and secondary sources of international law identifying rights of states were created. There appears to have been a particular concentration of these sources, including both treaties and UN General Assembly resolutions, between the 1950s and the 1970s. These decades were marked by, among other geopolitical developments, the phenomenon of decolonisation, resulting in a wave of new assertions of independence and sovereign prerogative by historically exploited and marginalised developing states in the Middle East, Africa, South Asia, and South America.<sup>3</sup>

These newly independent states were generally keen to make their mark on the international legal system into which they were newly emerging and to reform it from its Eurocentric foundations. In a number of issue areas, notably also including the Law

<sup>2</sup> Daniel H Joyner and Marco Roscini, 'Is There Any Room for the Doctrine of Fundamental Rights of States in Today's International Law?' (2015) 4 *CJICL* 467; Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 *LNTS* 19 (Montevideo Convention); Charter of the Organization of American States (adopted 30 April 1948, entered into force 3 December 1948) 119 *UNTS* 3; Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 *UNTS* XVI (UN Charter); UN, *Yearbook of the International Law Commission 1949* (1956) 287–90; UNGA Res 2625(XXV) (24 October 1970); UNGA Res 3171(XXVIII) (17 December 1973); UNGA Res 3281(XXIX) (12 December 1974); UNGA Res 36/1039 (10 December 1981).

<sup>3</sup> See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) ch 4.

of the Sea, these states worked to re-frame the sources of international law in order to provide for a counterbalancing of leverage and a protection of their interests against the political and economic power of the developed world.<sup>4</sup>

This, then, is the historical context in which so many of the treaties and UN General Assembly resolutions asserting rights of states were created. Again, this concept was not a new one. In fact, it had a long conceptual pedigree. But it was being reinvented at this particular historical moment for this particular political purpose. So what did the states that inserted these provisions espousing states' rights into treaties and UN General Assembly resolutions during this time think that they were doing? Did they think that they were creating, or re-creating, a separate class of international legal norms with an autonomous substance and with real and efficacious juridical meaning and implications? Or were they simply drawing on older language that was intrinsically connected to concepts of natural law and state sovereignty and that had a powerful anthropomorphic connection to human rights, the other ascendant international legal principle of the day? Or was it some combination of these ideas?

This is a difficult question to answer on the basis of records of UN General Assembly statements and the *travaux préparatoires* of the relevant treaties. This is primarily because one finds very little discussion of the concept of fundamental rights of states from a theoretical perspective in these materials. The idea of states having rights has been a basic principle of the international legal system in the consciousness of both diplomats and international legal scholars since the very beginnings of international legal thought, as again demonstrated by the papers in section one of this special issue. Likely because of the self-evident nature of this concept and its long pedigree in conceptions of the international legal order, it appears that when these sources of positive law were being created in the decades following the Second World War, their drafters did not consider it necessary to specify precisely the legal import of the rights they were asserting.

And indeed, the precise juridical nature and implications of rights of states only really 'matter' in a practical sense, in cases in which a right of a state comes into conflict, either with the obligations of the right holder or with the rights or obligations of some other actor in the international legal system. And since those occasions are relatively rare, there has been little focused consideration of these questions by either diplomats or legal scholars.

Another factor in the paucity of serious thinking on this question is, in my opinion, that powerful states, who also tend to have a disproportionate influence either *de facto* or *de jure* in international organisations, typically have little use for 'fundamental rights of states' talk. As a rule, powerful states prefer to focus on international legal duties instead of rights, mostly on the duties of others to be more specific. The idea of inalienable, inherent, fundamental rights inuring in all states is one that can only potentially blunt the legal, political and economic power and influence of powerful states. Rather, these

<sup>4</sup> See Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3rd edn, Manchester UP 1999) 16.

states typically find their interests better served by focusing only on legal obligations and on using their various forms of power to pressure weaker states to accept such obligations in forms advantageous to their own self-interest.

Thus, states' rights talk is generally one sided on the part of developing states. For their part, international legal scholars in developed states often either do not notice such talk when it occurs or instinctively give it little notice, as simply the resistance vocabulary of the disenfranchised.

In my opinion, however, the concept of fundamental rights of states and the questions asked by the papers in this special issue go straight to the heart of the very modern struggle for the soul of the international legal system. They consider both descriptive and normative questions about how we both do and should understand the structure and content of sources of international law, and the legal relations between holders of international legal personality. In particular, as mentioned in the introduction to this special issue, the questions considered herein about the concept of states' rights are vital to our understanding of the legal relationship and authority dynamics between states and international organisations in particular. As such, they tie powerfully into debates concerning the role of international organisations in the international legal system as well as to literature on the constitutionalisation of international law.<sup>5</sup>

Before proceeding further, a semantic issue should be addressed. In historical scholarly literature, the idea of states' rights was typically expressed along with the prefacing adjective 'fundamental'.<sup>6</sup> Other adjectives are also frequently seen in both scholarly literature and positive legal sources to accompany assertions of states' rights. These include inter alia 'inherent', 'inalienable', and 'permanent.' Much could be written about these respective adjectives and the additional meaning they were intended to bestow upon both the essential concept of rights of states and upon discrete assertions of specific states' rights by their authors. While not wishing to diminish the value of such investigations by not engaging with them herein, I am most interested in, and would like to address further in this article, the essential question of rights of states as a concept in and of itself.

With regard specifically to the adjective 'fundamental', this added concept has always been central to advocates of states' rights, in conveying a message about the link between states' rights and the sovereignty of states *per se*. For many historical writers, the 'fundamentality' of states' rights had strong links to their naturalistic conception of the sources and bases of international law.<sup>7</sup> For some writers, including Ricardo Alfaro whose work is discussed in the introduction to this special issue, a distinction

<sup>5</sup> See, eg, José Alvarez, *International Institutions as Law Makers* (OUP 2006); Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009).

<sup>6</sup> See the articles in section one of this special issue of the CJICL.

<sup>7</sup> Georg Friedrich de Martens, *Précis du Droit des Gens Moderne de l'Europe* (Guillaumin et cie Libraire 1858).

was further drawn between fundamental rights, on the one hand, and non-fundamental rights (in Alfaro's terms 'acquired rights'), on the other hand.<sup>8</sup>

While the natural law underpinnings of the concept of rights of states in international law in much of historical scholarship is clear, the concept of rights of states both can and should be viewed in the modern context as one that has its basis exclusively in positivistic sources of international law, in much the same way as customary international law has evolved in our understanding of its juridical nature.<sup>9</sup> The rights of states do not therefore necessarily emanate in a naturalistic fashion from states' sovereignty. Rather, rights should be seen to be created in the same way that obligations are understood to be created, through established sources of international law and in particular through customary international law.<sup>10</sup>

Returning to the question of 'fundamentalness', this additional concept was also used in historical scholarship to identify a few core rights of states that could be distinguished from the concept of the residual *domaine réservé* of states and be viewed as positive, autonomous and independent normative principles that could be asserted by states both as a sword and a shield depending upon context, and that had real and effective juridical implications. In this sense, there remains some usefulness in the added 'fundamentalness' concept for the rights of states. For this reason, and in order not to complicate this analysis by introducing an additional variable of moving away from conventional semantic use, I will retain general use of the adjective 'fundamental' when referring to the rights of states in international law, notwithstanding the fact that there are few other particular benefits, and some possible complications, arising from maintaining its connection to states' rights.

One such complication is the implication arising from the use of this additional adjective, that there is something particularly 'fundamental' about either all rights of states, or only some. This is the distinction and differentiation of juridical nature as between fundamental and acquired rights that Ricardo Alfaro made in his seminal work on the subject.<sup>11</sup> As appealing as Alfaro's taxonomy of states' rights is, I have found it difficult to maintain such a distinction and the normative hierarchy that it implies, while

<sup>8</sup> Ricardo J Alfaro, 'The Rights and Duties of States' (1959) II *Recueil des Cours* 116; Joyner and Roscini (n 1) 467.

<sup>9</sup> See Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 *EJIL* 269.

<sup>10</sup> Hans Kelsen, *General Theory of Law and State* (Harvard UP 1945) 249–50: 'The so-called fundamental rights and duties of the States are rights and duties of the States only in so far as they are stipulated by general international law, which has the character of customary international law.'

<sup>11</sup> Alfaro (n 8) 104, 112 (emphasis in original):

Do fundamental rights of the State exist?, asks Le Fur. (...) My answer (...) is unhesitatingly in the affirmative, for I find myself unable to conceive a State divested of the four rights of independence, sovereignty, equality and self-preservation, or any one of them. Whether called attributes, qualities, competencies, powers, norms or rights, the conclusion seems inescapable that these are the fundamental rights of every State, from which emanate all the other rights that have been variously called subjective, eventual, secondary, accessory and, most aptly, *acquired*, since they have been acquired by customs or by treaty.

keeping to the view that rights of states emanate exclusively from positivistic sources of international law and do not, for example, implicate the principle of *jus cogens*. I will therefore proceed with an understanding that all rights of states are hierarchically equal and are all best described using the conventional, though imperfectly descriptive moniker, 'fundamental rights of states'.

Where a fundamental right of states has been asserted through positive legal sources and where that right has been supported by state practice and *opinio juris* such that it is accepted as a principle of customary international law, it should be understood to comprise an independent rule of international law with juridical implications equal to any international legal obligation. This is the most honest and deferential way to understand what the states who created the treaties and other primary and secondary sources of international law asserting states' rights in the most recent revival of that concept meant to do, and indeed did.

Thus, when the framers of the Charter of the United Nations (UN Charter) in 1945 provided in article 51 that states have an 'inherent right' to self-defence, they were both recognising and creating this right as an autonomous rule of international law, which was then universalised through its acceptance as a rule of customary international law. Similarly, as is discussed in more detail below, when the 190 states parties to the Treaty on the Non-proliferation of Nuclear Weapons (NPT) agreed in article IV(1) that states have an 'inalienable right' to peaceful nuclear energy, they were both recognising and creating this right as an autonomous rule of international law and intended for this rule to have a legal meaning and implication at least on a par with any other obligation created through treaty or customary law. As with the right of self-defence, the right to peaceful nuclear energy became accepted in parallel customary law, and was thus universalised as a right of all states.

One of the questions that has been discussed at length in this special issue is what the idea of fundamental rights of states should be understood to add to the normative functioning of the international legal system. Specifically, should states' rights be understood to have a meaning and function coextensive with the concept of the *Lotus* principle in international law or the concept of the *domaine réservé* of national legal authority? Or, rather, should we understand the concept of states' rights to comprise, as Niki Aloupi has well described in her contribution to this special issue, an 'autonomous existence' as a category of international legal rules that is 'independent of [a] correlative prohibition' and that is separate from yet equal in normative hierarchy to international legal obligations?<sup>12</sup>

The states that negotiated for the recognition of an 'inherent right' of self-defence and an 'inalienable right' to peaceful nuclear energy in multilateral treaties and proclaimed other fundamental rights in UN General Assembly resolutions meant exactly what they were saying and intended these asserted rights to be understood as having an autonomous and efficacious legal character. They did not mean for these recitations to

<sup>12</sup> Niki Aloupi, 'The Right to Non-intervention and Non-interference' (2015) 4 CJICL 566, 567–68.

be understood simply as normatively hollow rhetorical devices, to be used primarily as a method of argumentation and delimitation of the scope of corresponding obligations of others. On this matter, therefore, I very respectfully disagree with those who have maintained some version of this latter argument in their excellent contributions to this special issue—for example with Stephen Neff’s conclusion that ‘[f]or better or worse, there is no theoretical or principled limit to the reach of international law, comparable to the privileged categories of liberties that exist in national constitutions.’<sup>13</sup>

Now, it might be argued that I am here engaged in unsubstantiated speculation about what these states intended. And it is true that very little in the way of records from the *travaux préparatoires* of any of these sources exists to explicitly indicate what the general sense of the drafters of these instruments was on the question of the nature and implications of the fundamental rights they were asserting. Nevertheless, this argument is not baseless. Again, as the section one papers have amply demonstrated, the idea that states have rights in international law is one that has been present in the general conception of international law for centuries, and all of the international lawyers and diplomats who were engaged in the creation of these sources would have regarded this idea as a given aspect of the implications of state sovereignty—one that needed no justification or explanation.

And what was it that they thought such rights meant? While this question is historically debatable in its nuance, as a minimum it must be acknowledged that the concept of states having fundamental legal rights has always carried with it an understanding that these rights had juridical substance and meaning and were not simply rhetorical devices. Jean d’Aspremont in his contribution to this special issue persuasively links the idea of fundamental states’ rights to anthropomorphism and to the concept of individual human or civil legal rights.<sup>14</sup> This being the case, it seems most plausible that, just as individual rights were understood (at least by the late twentieth century) to have independent juridical substance, power and efficacy within their own legal context, so the concept of states’ rights, psychologically related as it was, would have been understood to have meaningful juridical implications, and not to simply exist as the incorporeal shadow of others’ obligations.

To assume that assertions of fundamental states’ rights in the twentieth century treaties and UN General Assembly resolutions under examination represented something less than assertions of autonomous and effective legal rules is to engage in a much more tenuous and unsubstantiated speculative exercise and marginalisation of

<sup>13</sup> Stephen C Neff, ‘The Dormancy, Rise and Decline of Fundamental Liberties of States’ (2015) 4 CJICL 482, 500.

<sup>14</sup> Jean d’Aspremont, ‘The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law’ (2015) 4 CJICL 501. As the author observes (at 507):

What matters is to highlight that the construction of a set of rights (and duties) of states was originally directed at the consolidation of a vision of an international society whose main units are abstract entities. Those units all ought to have their minimal space and freedom for such an international society to be viable and credible. These were the functions informing the anthropomorphic moves found in international legal thinking.

historical context than is represented in these arguments. So again, when an assertion of a fundamental right of states becomes supported by state practice and *opinio juris* and is accepted as a rule of customary international law, it constitutes a rule of international law on full parity with *jus dispositivum* international legal obligations. Furthermore, once established, a right of states in international law creates an obligation of respect for that right in other states, and by extension in international organisations. Hans Kelsen has explained this aspect in more theoretical depth:

It is usual to distinguish between a right to one's own behavior and a right to the behavior of another. To say that a (physical or juristic) person has a right to behave in a certain way may mean only that there is no duty of this person to behave in another way. This, however, implies that all the other persons have the duty to refrain from preventing the subject of the 'right' to behave in this way. The right to one's own behavior is always the right to the behavior of others. But we speak of a right that a person has to the behavior of another in a specific sense of the term if a *definite* other person has the duty to behave in a certain way in relation to the subject of the right. A person has a right to the behavior of another person only if the other person has the duty to behave in this way. Finally, the term 'right' is used in its narrowest, technical sense if it designates the legal power conferred upon a person to bring about, by an action brought before a court, the execution of a sanction provided by the law in case another person violates his obligation to behave in a certain way in relation to the subject of the right. Hence, the right of one person always presupposes the corresponding duty of another person. In the first two cases mentioned the legal situation is completely described by a statement referring to the duty. The right of the one is but the reflection of the duty of another. Under general international law, only rights in this sense exist, since general international law does not institute courts. (...) The rights of states under general international law are always the reflection of the duties imposed by general international law upon other states.<sup>15</sup>

Thus, rights of states should be understood to create in third parties a legal obligation to respect those rights. This means that other states and international organisations are under an international legal obligation not to act in serious prejudice of fundamental states' rights. The precise contours of this obligation will be dictated by the contours of the legal right that has been established.

This aspect of the juridical implications of states' rights is particularly important in areas in which there is not in any other source of positive law an obligation on other states and international organisations to limit or prohibit their actions with regard to

<sup>15</sup> Hans Kelsen, 'The Draft Declaration on Rights and Duties of States: Critical Remarks' (1950) 44 AJIL 259, 264 (emphasis in original). See also Alfaro (n 8) 104, 112:

Sovereignty implies the duty of every State to respect the rights emanating from it, pursuant to international law. Independence imposes on all States the basic duty of nonintervention. Equality creates an obligation for each State to render to every other State on equal terms that which is due to them by reason of their International Personality; and to recognize and accept from each of them all such lawful acts as are equal to those performed by all members of the Family of Nations. Self-preservation rests upon the reciprocal duty of every State not to injure, impair or destroy the integrity of any State nor to violate any of its legal rights.

the subject matter of the right. This subject will be returned to and illustrated with an example in the context of the Nuclear Suppliers Group (NSG).

Finally, as mentioned previously, an understanding of the effectiveness of states' rights as autonomous, independently efficacious rules of international law is most important when a fundamental right of states comes into conflict with an obligation of the right holder or of some other holder of international legal personality. This understanding is particularly important when a fundamental right of states comes into conflict with the actions of international organisations, which are often not a party to multilateral treaties establishing positive legal obligations limiting their actions. I will return to this subject below and provide an example in the context of the UN Security Council's decisions regarding Iran's nuclear programme.

### 3 The right to peaceful nuclear energy

With this consideration of international legal theory on the principle of the fundamental rights of states in place, I will now proceed to consider one specific assertion of such a right—the right to peaceful nuclear energy, as codified in the NPT. As stated in the introduction to this special issue, the right to peaceful nuclear energy, which is recognised in article IV(1) of the NPT, is where my interest in the subject of the fundamental rights of states in international law originated.<sup>16</sup>

On its face, the idea that the right to peaceful nuclear energy should be classified in the same category as principles like self-defence, non-intervention, and permanent sovereignty over natural resources sounds unpersuasive. Frankly, the subject of the asserted right—nuclear energy—just does not sound 'fundamental' enough in the life of a state. Nevertheless, the text of article IV(1) of the NPT does provide as follows: 'Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.'

In the context of the NPT, article IV(1) is an important part of the 'Grand Bargain' which the NPT effectively codifies as between the nuclear weapon states parties to the treaty, and the non-nuclear weapon states parties. Along with article IV(2), which proceeds to place an obligation on advanced nuclear states to assist developing states in their peaceful nuclear endeavours, and article VI, which obligates all NPT parties to move towards complete nuclear disarmament in good faith, the NPT's recognition in article IV(1) is one of the chief concessions sought by developing non-nuclear weapon states in the NPT in exchange for their obligations never to acquire nuclear weapons, and to submit their civilian nuclear programmes to International Atomic Energy Agency (IAEA) safeguards.

<sup>16</sup> Joyner and Roscini (n 1) 467.

The inclusion of a right to peaceful nuclear energy in the NPT text, and its categorisation as an 'inalienable' right must be understood in the context of the time of the treaty's drafting. In the late 1960s, nuclear energy was widely considered to be the answer to the world's energy problems.<sup>17</sup> The perceived potential for nuclear energy was expressed by Lewis Strauss, Chairman of the United States (US) Atomic Energy Commission, in 1955 in the following utopian terms:

It is not too much to expect that our children will enjoy in their homes electrical energy too cheap to meter; will know of great periodic regional famines in the world only as matters of history; will travel effortlessly over the seas and under them and through the air with a minimum of danger and at great speeds, and will experience a lifespan far longer than ours, as disease yields and man comes to understand what causes him to age. This is the forecast of an age of peace.<sup>18</sup>

Not everyone at the time agreed with Strauss' idyllic forecast, but there was a very strong current of opinion, at the highest political levels, that nuclear energy would play an integral role in helping all countries, and particularly developing countries, to meet their increasing energy needs and to facilitate their development and prosperity. It was on the basis of this recognition that US President Dwight Eisenhower proposed the creation of the IAEA in 1958, to act as an international nuclear fuel bank which would serve as an intermediary in providing nuclear fuel to developing countries, sourced primarily from blended down nuclear warhead cores donated by the US and the Union of Soviet Socialist Republics (USSR). Eisenhower referred to this as his 'Atoms for Peace' plan.<sup>19</sup>

At the time of the signing of the NPT in 1968, therefore, much of the world saw nuclear energy as a vital element in their future energy production portfolio, and one that provided unequalled potential in facilitating the development of the poorer regions of the globe. This is why the non-nuclear weapon states parties to the NPT lobbied so hard for the inclusion of article IV in the NPT, a treaty that started out merely as a nuclear weapons non-proliferation treaty masterminded by the two superpowers, the US and the USSR. But in exchange for their promise not to acquire or manufacture nuclear weapons, developing non-nuclear weapon states demanded that their residual ability to fully engage in the peaceful uses of nuclear energy be recognised, particularly by the superpowers, as an inalienable right that could not be taken away from them.<sup>20</sup>

When considering the question of the juridical nature of the right to peaceful nuclear energy, it is important to view this concept in its holistic context and not in isolation. For developing states in the 1960s, as well as for most states at all developmental stages

<sup>17</sup> See Daniel H Joyner, *Interpreting the Nuclear Nonproliferation Treaty* (OUP 2011) 9–11.

<sup>18</sup> See 'Abundant Power from Atom Seen; It will be Too Cheap for our Children to Meter, Strauss Tells Science Writers' *New York Times* (New York, 17 September 1954) 5.

<sup>19</sup> Dwight D Eisenhower, 'Atoms for Peace' (8 December 1953) <<http://voicesofdemocracy.umd.edu/eisenhower-atoms-for-peace-speech-text/>> accessed 3 April 2016.

<sup>20</sup> See Joyner, *Interpreting the Nuclear Nonproliferation Treaty* (n 17) 17.

today, increasing energy needs and strategies for meeting those needs are among the most important public policy priorities. Choices for each state regarding their energy production and trade portfolio are complex and specialised to their own circumstances. But for many states, nuclear energy is still seen as playing an integral part in their long-term energy plan. Both the International Energy Agency and the IAEA's forecasts for the coming decades predict both an increase in overall nuclear power production and an increase in the share of nuclear energy in worldwide electricity production.<sup>21</sup> The growth of nuclear energy is predicted to be greatest in Eastern Europe, the Middle East and East Asia, with India and China both making substantial investments in new nuclear power plants over the next thirty years.<sup>22</sup>

The point is simply that many developing countries continue to see nuclear energy as one necessary element in their energy production portfolio, and as being vital to their development and prosperity. In this sense, there are strong connections between the right to peaceful nuclear energy and other rights and principles that are generally perceived as fundamental to states. For many states, for example, nuclear energy entails their own natural resources, ie uranium, being mined from their own territories and its potential use in nuclear power reactors. This, then, taps into a sense of permanent sovereignty over natural resources and their exploitation—a principle considered more fully by Yogesh Tyagi in this special issue.<sup>23</sup>

For developing states in particular, the right to peaceful nuclear energy also strongly taps into their sense of a right to non-interference in their internal affairs, a principle considered more fully by Niki Aloupi in this special issue, as well as to core considerations of energy security and energy independence, which they associate with their fundamental sovereign rights.<sup>24</sup> There is ample evidence from the diplomatic records of review conferences associated with the NPT that any perceived encroachment upon the freedom of exercise of the right to peaceful nuclear energy has been met with vigorous protestation by the mostly developing states making up the Non-Aligned Movement. The 120 states comprising the Non-Aligned Movement made this point clearly in their August 2012 Plenary Summit Declaration:

All states should be able to enjoy the basic and inalienable right to the development, research, production and use of atomic energy for peaceful purposes, without any discrimination and in conformity with their respective international legal obligations. Therefore, nothing should be interpreted in a way to inhibit or restrict the right of states to develop nuclear energy

<sup>21</sup> International Energy Agency, 'World Energy Outlook 2014 Factsheet—Nuclear Power: Retreat, Revival or Renaissance?' (12 November 2014) <[https://www.iea.org/media/news/2014/press/141112\\_WEO\\_FactSheet\\_Nuclear.pdf](https://www.iea.org/media/news/2014/press/141112_WEO_FactSheet_Nuclear.pdf)> accessed 21 November 2015; Jeffrey Donovan, 'IAEA sees Global Nuclear Power Capacity Expanding in Decades to Come' (8 September 2015) <<https://www.iaea.org/newscenter/news/iaea-sees-global-nuclear-power-capacity-expanding-decades-come>> accessed 3 April 2016.

<sup>22</sup> International Energy Agency (n 21).

<sup>23</sup> Yogesh Tyagi, 'Permanent Sovereignty over Natural Resources' (2015) 4 *CJICL* 588.

<sup>24</sup> Aloupi (n 12).

for peaceful purposes. States' choices and decisions, in the field of peaceful uses of nuclear technology and their fuel cycle policies (...) must be respected.<sup>25</sup>

Viewing the right to peaceful nuclear energy not in isolation, but in its context as an issue-specific manifestation of broader rights and concepts, including the right to permanent sovereignty over natural resources, the right to non-interference and fundamental considerations of energy security and independence, aids in understanding why the states parties to the NPT, now numbering 190, have agreed that all states possess an inalienable right to peaceful nuclear energy.

In this paper, the author would like to focus on the discrete question of the juridical nature and juridical implications of the 'inalienable right' which article IV(1) recognises.<sup>26</sup>

### 3.1 Juridical nature

The states parties to the NPT have uncontroversially recited the text of article IV(1) in their written submissions to NPT Preparatory Committee and Review Conference meetings, and in consensus NPT Review Conference Final Documents, ever since the treaty's coming into force in 1972.<sup>27</sup> While there have been disagreements at these meetings, and as expressed in Conference Final Documents regarding the particulars of scope and application of the article IV(1) text, the text itself has been universally acknowledged and accepted in consensus statements and no serious dissent, in either words or actions, has ever been registered to the article IV(1) text as written.

There is a compelling argument to be made, therefore, that in addition to its provision in the NPT text itself, the fundamental right to peaceful nuclear energy, as expressed in article IV(1) of the NPT, has also passed into parallel customary international law. While the same cannot be said of all of the provisions of the NPT, some of which are not addressed to the universal membership of the NPT (eg, articles I and II), article IV(1) is explicitly addressed to 'all the Parties to the Treaty', and is therefore susceptible to the sort of state practice and *opinio juris* necessary for the establishment of customary law.

One possible caveat to this conclusion is, however, the very fact that the text of article IV(1) does by its terms at least, limit its recognition of the right as being applicable to the parties to the treaty and not to all states whether NPT parties or not. This explicit limitation in the text of article IV may give pause to some in considering whether a right, recognised in a broadly-subscribed-to multilateral treaty, and yet limited by the treaty text to the parties to the treaty itself, can pass into customary international law, and thereby become binding upon all states.

<sup>25</sup> 16th Summit of Heads of State or Government of the Non-Aligned Movement, 'The Final Declaration of the XVI Summit of Heads of State or Government of the Non-Aligned Movement' (31 August 2012) <<http://www.iranwatch.org/sites/default/files/nam-iransummitfinaldocument-083112.pdf>> accessed 3 April 2016.

<sup>26</sup> See, generally, Joyner, *Interpreting the Nuclear Nonproliferation Treaty* (n 17) 78–95, extensively exploring the interpretation and application of art IV(1) in its context within the NPT and in light of the treaty's object and purpose.

<sup>27</sup> *ibid* 83, 121.

Either explicitly or implicitly, any obligation or right established by a treaty applies only to the parties to the treaty. The concept of parallel customary law is that the parties to a treaty, who have taken upon themselves specific obligations or rights through that conventional instrument, can through subsequent parallel state practice and *opinio juris* create in customary law the same obligation or right that is contained in the treaty text.<sup>28</sup> In light of the continuous and widespread acknowledgment of the text of article IV(1) of the NPT outlining a right to peaceful nuclear energy by the parties to the NPT, which comprise 190 states, its frequent assertion in diplomatic communications and the lack of any meaningful dissent in word or action to the principle as contained in article IV(1) by any state since 1972, I would conclude that the principle embedded in that article, defined by the text of article IV(1), has indeed passed into customary international law.

### 3.2 Two interpretive points

I do not wish to go into great detail on issues of interpretation and applied meaning of the article IV(1) right to peaceful nuclear energy. However, it is necessary here to briefly address a couple of interpretive points that have a direct bearing on this present analysis regarding the nature and juridical implications of the fundamental right to peaceful nuclear energy.

The first of these interpretive points addresses the closing words of article IV(1) of the NPT: ‘in conformity with Articles I and II of this Treaty’. This clause of article IV(1) has been interpreted to be best read in accordance with the meaning associated with the phrase ‘as limited by’, by which it is meant that the right to peaceful nuclear energy recognised by article IV(1) must be understood to be limited by the obligation on all NPT non-nuclear weapon states contained in article II of the NPT, not to manufacture or otherwise acquire nuclear weapons.<sup>29</sup>

<sup>28</sup> *ibid* 129ff.

<sup>29</sup> See Joyner, *Interpreting the Nuclear Nonproliferation Treaty* (n 17) 84–87. For a contrary view in which the right to peaceful nuclear energy use in the NPT, art IV(1), is marginalised and stressed to be conditional, see John Duncan, ‘Statement on behalf of China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America to the 2008 Non-Proliferation Treaty Preparatory Committee’ (9 May 2008) <<http://ploughshares.ca/wp-content/uploads/2012/09/NWSStatementMay908.pdf>> accessed 3 April 2016, delivered by Ambassador John Duncan, UK Ambassador for Multilateral Arms Control and Disarmament:

We note that a growing number of States Party is showing interest in developing nuclear programmes aimed at addressing their long-term energy requirements and other peaceful purposes. We are ready to co-operate with States Party in the development of nuclear energy for peaceful uses and we emphasise the requirement for compliance with non-proliferation obligations and for development of research, use and production of nuclear energy to be solely for peaceful purposes. We believe such international co-operation should contribute to the full implementation of the NPT and enhance the authority and effectiveness of the global non-proliferation regime. We welcome the work of the International Atomic Energy Agency on multilateral approaches to the nuclear fuel cycle and encourage efforts towards a multilateral mechanism to assure access for all countries to nuclear fuel services as a viable alternative to the indigenous development of enrichment and reprocessing.

Thus, the fundamental right to peaceful nuclear energy is certainly not an absolute or unqualified right. The final words of article IV(1) of the NPT serve to limit the right to peaceful nuclear energy, ie to applications that do not result in the manufacture or other acquisition of nuclear weapons. Though possibly appearing redundant as a limitation on something already named a 'right to peaceful nuclear energy', this understanding of circumscription of the right is important, firstly, in making the case that it is a sufficiently defined right of states and, secondly, when attention turns to the juridical implications and applications of the right.

The second interpretive point that I would like to briefly address concerns one particular element of the nuclear fuel cycle—uranium enrichment. Enriched uranium, fabricated into fuel rods, is the standard fuel for the most common type of nuclear power reactors (light-water reactors). The enrichment of uranium can be accomplished through a number of different technical processes, but the most common is the gaseous centrifuge method, in which an amount of uranium oxide is spun at high speeds inside of a series of centrifuges, resulting in the separation of uranium isotopes and the concentration in the end sample of the U235 isotope, which is the isotope capable of a sustained fission reaction. For most states that have an indigenous nuclear fuel cycle, uranium enrichment is an essential part of that fuel cycle.

The question has been raised whether the fundamental right to peaceful nuclear energy necessarily includes the right to uranium enrichment as a part of an indigenous nuclear fuel cycle. Opinions on this question have varied, with US officials, on the one hand, arguing that there is no 'right to enrichment' contained in the article IV(1) right. Officials from Iran, on the other hand, have maintained that, since uranium enrichment is a necessary part of a full indigenous nuclear fuel cycle and since the article IV(1) right would be seriously undermined to the point of mootness if uranium enrichment were not included by implication within the broader right it recognises, it must therefore be the case that there is a lesser-included right to uranium enrichment within the article IV(1) right.<sup>30</sup> This latter view expressed by Iranian officials is the more persuasive view.<sup>31</sup> As the text of article IV(1) of the NPT recognises, the scope of the right to peaceful nuclear energy to extend to the development of 'research, production and use of nuclear energy for peaceful purposes', the right to produce nuclear energy would, according to a plain reading, appear to encompass within it all of the fuel cycle steps necessary to the process of nuclear energy production, inclusive of uranium enrichment. While this interpretation has not been met with universal agreement, I will assume *arguendo* for

<sup>30</sup> See Fredrik Dahl, 'Is there a "Right" to Enrich Uranium? Iran Says Yes, US No' *Reuters* (23 November 2013) <<http://www.reuters.com/article/us-iran-nuclear-rights-idUSBRE9AL0R120131123>> accessed 3 April 2016.

<sup>31</sup> Daniel H Joyner, 'Does Iran have a Legal Right to Enrich Uranium? Yes' *Iranian Diplomacy* (21 November 2013) <<http://www.irdiplomacy.ir/en/page/1924877/Does+Iran+Have+a+Legal+Right+to+Enrich+Uranium+Yes.html>> accessed 3 April 2016. For an opposing view, see Michael Makovsky and Blaise Misztal, 'Iran Has No "Right" to Enrich Uranium' *Wall Street Journal* (8 July 2012) <<http://www.wsj.com/articles/SB10001424052702304141204577508442031058860>> accessed 3 April 2016.

purposes of the current analysis that this interpretation of the application of the article IV(1) right is correct.

### 3.3 Juridical implications

This, then, brings me to a consideration of the juridical implications of the right of states in international law to peaceful nuclear energy, as has been argued herein. The first implication, as indicated above, is that this fundamental right of states creates an obligation of respect for the right of third parties, and for the right-holder's exercise of it—ie an obligation not to act in serious prejudice of that right or unduly restrict the right holder's exercise of the right.

This obligation of respect can potentially be seen to have both positive and negative dimensions. For the particular fundamental right of states at issue here, positive dimensions to the corresponding obligation of respect in third states are difficult to envision. For example, it might be argued that one positive dimension to this obligation in third parties would be an obligation on supplier states of nuclear energy technologies and materials to trade freely with all states seeking to acquire these materials and to impose no limitations on that free trade, including limits on private legal persons situated within their territories. On balance, however, this assertion seems excessive in its imposition on supplier states and on their own freedom of choice regarding trading partners in what are, admittedly, sensitive materials and technologies.

Most nuclear technology supplier states have mature export control systems established within their domestic law, and it is through these systems that decisions are made regarding the export of, for example, dual use items—these being items that can be used in both civilian nuclear energy programmes and in nuclear weapons programmes. There is no multilateral treaty governing or setting standards concerning these choices, for the simple reason that at the multilateral level states have never been able to agree on objective criteria to govern dual use export controls. The closest approximation of such a normative regime is contained in the legally non-binding guidelines and trigger list of the plurilateral NSG.<sup>32</sup>

This being said, it is notable that in article IV(2) of the NPT, the following provision appears addressed particularly to nuclear supplier states:

Parties to the Treaty in a position to do so shall also co-operate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world.

<sup>32</sup> See Daniel H Joyner, 'The Nuclear Suppliers Group: History and Functioning' (2005) 11(2) *Intl Trade L & Regulation* 33.

Thus, the drafters of the NPT found no problem with a general positive obligation being placed upon nuclear supplier states to contribute to the development of nuclear energy in the developing world. However, in the context of the NPT, this obligation may be explained by the essential *quid pro quo* nature of the Treaty, and it would seem tenuous to seek to impose this particular positive obligation upon all states, even those not party to the NPT, through the vehicle of the fundamental right of states to peaceful nuclear energy.

While a positive general obligation on all nuclear supplier states to permit unrestricted free trade in nuclear materials and technologies between their exporters and any desiring recipient seems excessive, perhaps a distinguishable yet similar principle can be enunciated in a negative sense, ie perhaps the obligation to respect the right of states to peaceful nuclear energy can be best expressed as a negative obligation in third parties not to unduly restrict, through arbitrary or unreasonable means, the access of states to normal, lawful markets in civilian nuclear energy materials and technologies, through export controls or other means. Cast in this fashion, such an obligation would appear to be a reasonable and proportionate definition of at least one aspect of the obligation of respect created by the fundamental right to peaceful nuclear energy.

Specifically, then, with regard to the NSG, this fundamental right of states to peaceful nuclear energy could be asserted by developing states to create a positive legal obligation for all states, including adherents to the NSG's guidelines, which would prohibit arbitrary or unreasonable restrictions on the supply of nuclear materials and technologies for peaceful nuclear programmes. This obligation would be particularly useful as it would impose a more specific positive legal obligation, tailored to correspond with the particular contours of the fundamental right of states to peaceful nuclear energy, than any that otherwise exists in the sources of international legal obligation relative to peaceful nuclear energy technology trade. The fundamental right to peaceful nuclear energy could thereby be used potentially as a sword to strike down as unlawful actions of supplier states that are not in harmony with this corresponding obligation on third parties.

### 3.4 Conflict with obligations

But what about cases in which the fundamental right to peaceful nuclear energy comes into direct conflict with international legal obligations, either held by the right holder itself or by some other actor? What are the juridical implications of a right of states in such a case?

In the particular context of nuclear energy, this question is not simply hypothetical. Having received a report from the IAEA finding Iran to be non-compliant with its safeguards agreement with the agency on 31 July 2006, the UN Security Council adopted Resolution 1696 in which, acting under article 40 of chapter VII of the UN Charter, it demanded that Iran suspend all uranium enrichment related and

reprocessing activities, and requested a report from the IAEA Director-General by 31 August to confirm this suspension. The Council followed up Resolution 1696 on 23 December 2006 with Resolution 1737, in which it acted under article 41 of the UN Charter and made binding the demands of Resolution 1696.

Iran's failure to abide by the terms of these resolutions, insisting that its activities are firmly within its rights under article IV(1) of the NPT, has led to the issuance of further Security Council resolutions pursuant to chapter VII, including a number of resolutions imposing trade restrictions and other economic sanctions upon Iran and upon specified Iranian individuals and business entities.

This case thus sets up an interesting conflict of norms. Iran essentially claims that it has a fundamental 'inalienable' legal right to peaceful nuclear energy which, for the reasons explained above, includes the right to uranium enrichment. Iran has, therefore, argued that the UN Security Council's command that Iran cease uranium enrichment is unlawful and *ultra vires*.<sup>33</sup>

In contrast, the UN Security Council's view is that its decisions are legally binding on Iran, due to Iran's status as a party to the UN Charter, which so provides in article 25. Thus, in the UN Security Council's view, its command that Iran cease uranium enrichment is lawful and is controlling over any conflicting right or obligation. Apologists for the UN Security Council's view on the matter have also cited article 103 of the UN Charter in support of its position.<sup>34</sup>

So, who is right? As a first analytical step, I would like to quickly dispose of the UN Charter article 103 argument. Article 103 is often misused and misunderstood.<sup>35</sup> Article 103 provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

By the plain meaning of its terms, article 103 applies only to circumstances in which a state's obligations under the UN Charter come into conflict with its obligations under some other treaty. It is a simple conflict of treaty obligations provision that should be read narrowly. The issue under immediate consideration, by contrast, is a circumstance in which a state's obligations (ie Iran's) under the UN Charter have arguably come into conflict with the same state's legal right, not obligation; and furthermore a right that has been established independently in customary international law. Therefore, article 103 of

<sup>33</sup> Permanent Mission of the Islamic Republic of Iran to the Agency, 'Communication regarding the Report of the Director General on Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran' (22 March 2012) INFCIRC/837 (30 March 2012) <<https://www.iaea.org/sites/default/files/publications/documents/infcircs/2012/infcirc837.pdf>> accessed 3 April 2016.

<sup>34</sup> See Ryan Goodman, 'Iran's Purported "Right" to Enrich Uranium, and Alleged Bias at the New York Times' (*Just Security*, 19 November 2013) <<https://www.justsecurity.org/3338/irans-purported-right-enrich-uranium-alleged-bias-york-times/>> accessed 3 April 2016.

<sup>35</sup> See Ryan Goodman, 'Expert Opinion on Iran's "Right" to Enrich Uranium in the Face of Security Council Resolutions' (*Just Security*, 20 November 2013) <<https://www.justsecurity.org/3505/expert-opinion-iran-right-enrich-uranium-security-council-resolutions-1696-1737/>> accessed 3 April 2016.

the UN Charter, according to the plain meaning of its terms, as well as by reference to its *travaux préparatoires*, is simply not applicable to the current matter.<sup>36</sup>

In essence, then, what we are left with is a conflict between, on the one hand, a legal right of a state which creates an obligation of respect to third parties that is based in customary international law—and is therefore binding upon states as well as upon the UN Security Council as an organ of an international organisation—and, on the other hand, a hierarchically equal *jus dispositivum* obligation binding upon the right-holding state (article 25 of the UN Charter).<sup>37</sup>

In the context of an international organisation exercising its authority under a treaty, such as the UN Security Council, the obligation created by the fundamental right of states to peaceful nuclear energy should be understood to create a corollary obligation in the international organisation to respect this right, and specifically not to be arbitrary, unreasonable, or disproportionate in the exercise of its treaty powers relative to this right.

This is a very similar conclusion to what has been argued in the context of the obligations of the UN Security Council relative to international human rights law in the exercise of its treaty powers. There is a solid basis in scholarly literature for the proposition that, notwithstanding that the UN Security Council is not itself a party to international human rights treaties, it is bound by customary international law-based obligations of respect for human rights when it exercises its treaty-based powers, including its powers under chapter VII of the UN Charter.<sup>38</sup> I am essentially making the same argument, only in the context of fundamental rights of states that have created similar customary international law-based corollary obligations in third party holders of international legal personality.

Such an understanding of the obligations incumbent upon the Security Council and other international organisations created by fundamental rights of states would be potentially transformative in the authority dynamic as between such international organisations and particularly developing states. It would provide a justiciable standard against which to measure such international organisations' actions for lawfulness in areas in which states have asserted and have evidenced through state practice and *opinio juris* their acceptance of the existence of fundamental rights of states, including in areas in which such international organisations do not otherwise have legal obligations limiting their conduct with respect to these subject areas. It would give states a basis upon which to potentially challenge actions taken by the Security Council as being in violation of its

<sup>36</sup> See Andreas Paulus, 'Article 103' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (OUP 2012) vol II, 2132–33: 'The wording of art 103 suggests that it only applies to treaties and other agreements, not to customary international law. The *travaux préparatoires* support this view. The drafters refused to adopt a formula that explicitly included customary international law and other legal sources.'

<sup>37</sup> August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 AJIL 851.

<sup>38</sup> See, eg, Reinisch (n 37); Christopher Michaelsen, 'Human Rights as Limits for the Security Council: A Matter of Substantive Law or Defining the Application of Proportionality?' (2014) 19 J Conflict & Security L 451.

obligation to respect the specific rights of states, just as it can be challenged as having acted in violation of specific rules of international human rights law.

So how would this work in the specific context of Iran's asserted fundamental right to peaceful nuclear energy, inclusive of a right to uranium enrichment, versus the Security Council's command through a legally binding resolution that Iran ceases uranium enrichment? The Security Council should be understood to be subject to a customary international law-based obligation to respect Iran's established right, by not acting in a manner that is arbitrary, unreasonable, or disproportionate in the exercise of its treaty powers relative to the right. The legal standard having been established, the question would then become one of application of law to facts, ideally conducted by an international judicial body of lawful jurisdiction, though, in the likely absence of this, by the analyst.

What, then, of Iran's article 25 of the UN Charter obligation to comply with the decisions of the Security Council? It is important to recall that article 25 in fact provides that member states are obliged to 'accept and carry out the decisions of the Security Council in accordance with the present Charter'. This provision has been interpreted by some scholars to require member state compliance only with decisions of the Security Council that are themselves in compliance with the provisions and principles of the UN Charter.<sup>39</sup> This interpretation is strengthened by a view of article 25 in its context within the UN Charter, and in particular by the text of article 24. Article 24 provides that '[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations'.

In article 1 of the UN Charter, one of these purposes is identified as follows:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and *in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.<sup>40</sup>

Thus, the obligation on UN member states to 'accept and carry out the decisions of the Security Council' is intrinsically linked to the UN Security Council itself acting in accordance with the purposes and principles of the UN, one of the foremost of which is to act in accordance with international law. Furthermore, there is, as previously noted, an ascendant understanding by both scholars and international judicial bodies, that the UN Security Council's powers are limited not only by the provisions of the UN Charter itself, but also by customary international law.<sup>41</sup>

<sup>39</sup> See Daniel H Joyner, 'Non-proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council' (2007) 2 LJIL; Anne Peters, 'Article 25' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (OUP 2012) vol I, 807–19.

<sup>40</sup> Emphasis added.

<sup>41</sup> See, eg, Peters (n 39) 819; Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP 2011).

There are several different procedurally-related arguments as to exactly how it should be understood to occur, but on the basis of the foregoing there is an essential ascendant understanding that states party to the UN Charter and to article 25 thereof are at legal liberty not to comply with decisions of the UN Security Council that are themselves in disharmony with its legal obligations under customary international law.<sup>42</sup> According to this understanding, if it were to be determined that the UN Security Council through its decisions violated its obligation to respect Iran's fundamental right to peaceful nuclear energy, Iran would be at legal liberty not to comply with the Security Council's command that it ceases uranium enrichment.

#### 4 Conclusion

It is not the object of the current paper to provide a full analysis of the conflict between Iran and the UN Security Council relative to Iran's uranium enrichment activities. Rather, the object of this article has been to discuss both how the concept of fundamental rights of states should be understood as a matter of international legal theory and how it can be illustrated in essential terms in the particular context of the asserted right to peaceful nuclear energy, as codified in the NPT.

In my opinion, the concept of fundamental rights of states and the questions asked by the articles in this special issue go straight to the heart of the very modern struggle for the soul of the international legal system. Over the past two decades, the rise to prominence in the role of international organisations as fora not only for coordination of state action but also for lawmaking, monitoring and verification of state conduct and in some cases adjudication of legal disputes, has made the international legal system a very different, more complex place than it once was for states who were the only and independent actors within it.<sup>43</sup>

This modern structure of the international legal system, in which the legal obligations of states are often made, monitored, adjudicated, and enforced through international organisations, has taken on post-Westphalian aspects of constitutionalism and maturity as a legal system that have changed significantly the position of states. Indeed, a number of scholars have recently recognised international organisations as agents in which a decay in the traditional paradigm of state consent in international law-making has taken place.<sup>44</sup>

<sup>42</sup> See Tzanakopoulos (n 41); Daniel H Joyner, 'The Security Council as a Legal Hegemon' (2012) 43 *Georgetown J Intl L* 225.

<sup>43</sup> See, eg, Dan Sarooshi, *International Organisations and their Exercise of Sovereign Powers* (OUP 2005).

<sup>44</sup> See Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 *AJIL* 1; Laurence R Helfer, 'Nonconsensual International Lawmaking' [2008] *U Illinois L Rev* 71; Andrew T Guzman, 'Against Consent' (2012) 52 *Virginia J Intl L* 747; Joel P Trachtman, *The Future of International Law: Global Government* (CUP 2013).

As the international legal system matures, grows increasingly complex, dense and fragmented, and moves towards a more complete legal system, it would appear to be manifestly sensible and necessary for states, and particularly developing and less powerful states, to have not only clearly developed understandings of their obligations within that legal system, but also clearly developed understandings of their rights within that system which can potentially be used as a shield against excessive encroachment upon their sovereign independence by other actors.

In particular, the UN Security Council is one of the most legally influential of these international organisations (or, in its specific case, one organ of an international organisation). The Council's understanding of its role and powers and the question of the legal limits of those powers under the UN Charter is a subject that has been widely debated by international legal scholars in recent years.<sup>45</sup> In writing on this subject, I have previously argued that the UN Security Council's understanding of its authority under the UN Charter has changed significantly since the end of the Cold War to encompass not only its more traditional executive role in enforcing existing international law, but also an ascending legislative and adjudicatory role that has greatly expanded both the scope and substance of its decisions, and has brought its actions into conflict with fundamental principles of international law.<sup>46</sup>

In light of the increased scope of action and self-understanding of authority of the UN Security Council in particular, all UN member states would appear to have a strong self-interest in developing and clarifying the concept of the fundamental rights of states in international law—rights which can be asserted against and which must be respected by other actors, including the UN Security Council. This is especially true for developing states, which are particularly susceptible to economic and financial sanctions imposed by the UN Security Council, as well as unilaterally by powerful states.

This susceptibility has been significantly amplified in recent decades due to the increased internationalisation of markets and interdependence of national economies, a phenomenon often referred to as globalisation. Globalisation has made developing states more vulnerable than ever before to both unilateral and collective sanctions imposed by, and often coordinated between, powerful states, the most powerful of which sit as permanent members on the UN Security Council. For developing states, therefore, there would seem to be a particular modern imperative to balance the scales of this phenomenon through the development and clarification of fundamental legal rights, which in turn create in other states and international organisations an obligation to respect these rights.<sup>47</sup>

<sup>45</sup> See, eg, Tzanakopoulos (n 41); Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004); David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter* (Kluwer Law International 2001).

<sup>46</sup> Joyner, 'The Security Council as a Legal Hegemon' (n 42).

<sup>47</sup> See UNGA Res 66/186 (22 December 2011).