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

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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

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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.¹ 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.² 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.³ 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.⁴ 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

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¹ 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.


³ 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.

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. 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 or the Charter of the United Nations (UN Charter) 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’, even if, as is argued below, such pointers were given an ontological dimension during the so-called golden age.

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

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5 Bobbio (n 2) xiii.

6 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’).

7 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).

8 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’).

9 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 have created and seek to project on the outside universe has always rested on some anthropomorphic constructions whereby human attributes are projected on the main institutions of international law, i.e. 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.12


[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.

12 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.
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), 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. 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. 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). As is well known, Pufendorf, allegedly borrowing from Francisco Suarez (1548–1617), pushed the Hobbesian human analogy further and constructed an image of the state as endowed with an intellect that is distinct from that of the sovereign. By vesting an intellect—and thus sociability—in the state, Pufendorf can be considered as the founder of anthropomorphic thinking about the state.

Drawing on Pufendorf’s work, Wolff (1679–1754) 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) who most decisively imported Pufendorf’s
anthropomorphism into international legal thought. Indeed, Vattel perpetuated Pufendorf’s understanding of the state as a person possessing intellect.\textsuperscript{23} Drawing on such an anthropomorphic premise, he put forward the first complete set of rights and duties of states.\textsuperscript{24} These rights and duties (Vattel puts more emphasis on the latter)\textsuperscript{25} are grounded in voluntary law, which Vattel distinguishes from natural law as well as customary and conventional law.\textsuperscript{26}

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.\textsuperscript{27} 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.\textsuperscript{28} This charge against Vattel, which can to a large extent be traced back to the misleading terminology of ‘voluntary law’, is itself contentious.\textsuperscript{29} 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.\textsuperscript{30} 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.

\textsuperscript{23} Holland (n 21).
\textsuperscript{24} 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), \textit{Classical Theories of International Relations} (Palgrave Macmillan 1996) 239.
\textsuperscript{26} ibid.
\textsuperscript{27} ibid 161.
\textsuperscript{29} 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).
\textsuperscript{30} 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. At most, its revival can be traced back to the state-centric mindset of international legal thinkers of the time. 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. 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. In contrast, others held these rights to be constitutive elements of statehood. 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

31 cf Neff (n 3).
34 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.
35 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.\textsuperscript{36} For Westlake, there was a ‘logical error’ in drawing an analogy between rights of states and rights of individuals.\textsuperscript{37} 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.\textsuperscript{38} Gilbert Gidel also expressed similar reservations.\textsuperscript{39} 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’.\textsuperscript{40} 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.\textsuperscript{41} 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,\textsuperscript{42} 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 \textit{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


\textsuperscript{38} See Dickinson (n 18) 588, 590–91.

\textsuperscript{39} See Gidel (n 20) 597 (arguing that we should not be obsessed about this doctrine).


\textsuperscript{41} 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’).

\textsuperscript{42} 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 nothes 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’. This prefigured the distinction drawn by Roberto Ago between delict and crime in the framework of state responsibility.

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. For some authors the doctrine of the fundamental rights of states was rather geared towards the peaceful coexistence of states. Others, as is illustrated by Lauterpacht’s reading of Grotius, found in that doctrine a powerful instrument for the development of international law by virtue of the private law analogy.

It remains to note that most authors attributed an ontological and justificatory function to the doctrine of the fundamental rights of states. 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. 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

43 Rivier (n 33) 257.
45 Klüber (n 33) 57, 65–116. For some remarks on Vattel, see also the remarks of Koskenniemi (n 34) 135.
46 von Verdross (n 33) 249–50.
47 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’).
48 For criticism of this use of anthropomorphic thinking, see generally Dickinson (n 18).
49 For discussion of that aspect of the classical doctrine of fundamental rights of states, see ibid 582.
50 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.\textsuperscript{51} 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.\textsuperscript{52}

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.\textsuperscript{53} 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\textsuperscript{54} and culminated with the adoption of the famous 1933 Montevideo Convention on the Rights and Duties of States (Montevideo Convention).\textsuperscript{55} 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.\textsuperscript{56} It is not necessary to discuss

\textsuperscript{51} 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), \textit{International Legal Positivism in a Post-Modern World} (CUP 2014).

\textsuperscript{52} This argument is obviously not new. On the inevitable motions between natural law thinking and positive law thinking, see Koskenniemi, \textit{From Apology to Utopia} (n 34) 1–70. See also Martti Koskenniemi, ‘The Politics of International Law’ (1990) 1 EJIL 4.

\textsuperscript{53} 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).

\textsuperscript{54} ibid (see the account of the inter-American effort).

\textsuperscript{55} Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention).

\textsuperscript{56} 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.\footnote{UNGA Preparatory Study (n 53) 1–5.} 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,\footnote{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.} 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.\footnote{ibid 287–88.} On this occasion, the ILC rejected Lauterpacht’s famous idea of a state’s right to have its existence recognised by other states.\footnote{ibid 289.} 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.\footnote{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.} 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 \textit{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
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. 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, 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. 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. 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.

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

62 ILC (n 58) 287–90.
63 UN Charter, art 51.
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. This is certainly a consideration that informed the making of the Montevideo Convention. 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. 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. It should also be highlighted that the ambition to maintain peace and security was certainly not absent. The vindication of justice was even mentioned, although it is uncertain what this reference actually meant in that context.

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. 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.
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. 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

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75 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 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. 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. The doctrine is far from uncontroversial. 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. 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-

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78 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.


80 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. 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. 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

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82 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.’ 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 and that it was not trumped by the collective security system. 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. 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 or the right to permanent sovereignty over natural resources.

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.

85 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14, 94.
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, i.e. 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.