Consequences of the Prohibition of the Use of Force

Comments on Arts. 49 and 70 of the ILC's 1966 Draft Articles on the Law of Treaties

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Two dispositions of the draft convention reflect the impact on the Law of Treaties of the prohibition of the use of force in international relations. One of them may be termed positive (art. 49)[1]), the other negative (art. 70)[2]). On the one hand, art. 49 contains a positive regulation of what the effect of the prohibition of the use of force is: If the conclusion of a treaty has been procured by a forbidden use or threat of force, the treaty is void. Art. 70, on the other hand, only states what the draft does not cover: It does not regulate other consequences which the prohibition of the use of force might have in the area of treaty law.

I. Coercion of a State as cause of nullity

In any developed legal system, where the use of force is a monopoly of the community and is consequently forbidden to the individual members of the community, an expression of consent, which has been procured by such a forbidden use of force, is void or at least voidable[3]). In these legal sys-

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[1]) Art. 49: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations".

[2]) Art. 70: "The present articles are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression".

[3]) Cf. Kelsen, Principles of International Law (1952), p. 326. This principle is embodied in many codifications of civil law, see for instance the Civil Codes of France (art. 1109), Germany (§ 123), Italy (art. 1427), the RSFSR (art. 58); for the anglo-saxon law cf. E. Jenks, English Civil Law, § 184, Williston, A Treatise on the Law of Contracts, §§ 1601 *et seq.*, Parker, Das Privatrecht der Vereinigten Staaten von Amerika, p. 127.

tems, the nullity or anullability of an expression of consent procured by the use or threat of force is – according to the principle *ex iniuria ius non oritur*[4]) – a corollary, a sanction of the prohibition of such use or threat of force.

With regard to international law, the question is whether this legal system has already reached this stage of development. When a prohibition of the use of force was developed in the League Covenant and the Briand-Kellogg Pact, the idea soon emerged that this prohibition should entail the nullity of a treaty procured by the forbidden means[5]). There is also some State practice[6]) and an important resolution of the League of Nations Assembly[7]) to this effect. Nevertheless, this new concept of the prohibition of force cannot be considered as generally accepted between the wars[8]).

The Charter of the United Nations completed and developed the prohibition of the use of force, filling some gaps and providing for a better procedure to sanction it. This interdiction nowadays forms not only part of the law of the United Nations, but of general international law[9]). It has become difficult to contest that this interdiction is, under general international law, sanctioned by the principle that an expression of consent procured by use or threat of force in violation of this interdiction is void. The overwhelming majority of modern doctrine affirms this principle[10]), while the authors who deny the existence of this rule seem, with very few

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[4]) Lauterpacht, YBILC 1953, vol. II, p. 148.

[5]) See for instance F. De Visscher, Revue de Droit international et de législation comparée, vol. 8 (1931), p. 532 *et seq.*

[6]) The most important document in this respect is the famous U.S. note to Japan and China of January 7, 1932, which contains the so-called Stimson doctrine, AJIL vol. 23 (1932), p. 342, and ZaöRV vol. 3 (1933) part. 2, p. 599. For further references of State practice see Lauterpacht, YBILC 1953, vol. II, p. 148, and Vitta, La validité des traités internationaux, p. 138.

[7]) League of Nations, Official Journal 1932, Spec. Supp. No. 101, p. 87, and ZaöRV vol. 3 (1933) part. 2, p. 603 *et seq.*

[8]) Vitta, *op. cit.*, p. 139 with further references. It is interesting to note that two important codification proposals elaborated by the Harvard Law School diverge on this subject. On the one hand, the Draft Convention on the Law of Treaties, AJIL vol. 29 (1935) Supp., p. 657 *et seq.* does not accept coercion against States as a cause which might have an effect upon the validity of a treaty (Commentary to art. 32, *loc. cit.*, p. 1153), while the Draft Convention on the Rights and Duties of States in Case of Aggression, AJIL vol. 33 (1939) Spec. Supp., p. 827 *et seq.* recognizes the voidability of a treaty brought about by an aggressor's use of armed force (Commentary to art. 14 para. 3, *loc. cit.*, p. 895 *et seq.*).

[9]) Dahm, Völkerrecht, vol. 1, p. 200.

[10]) See for example: Oppenheim-Lauterpacht, International Law, vol. 1 (8th ed. 1955), p. 892; Kelsen, Principles of International Law (1952), p. 326; Verdross, Völkerrecht (4th ed. 1964), p. 170 *et seq.*; Wengler, Völkerrecht, vol. 1 (1964), p. 220 *et seq.*; Guggenheim/Marek, Strupp-Schlochauer Wörterbuch, vol. 3

exceptions, not to be aware of recent developments in this field[11]), a fact which adds still more weight to the majority opinion. Since this opinion of the major part of modern authors constitutes "the teachings of the most highly qualified publicists", it must be considered, according to art. 38, para. 1 (d) of the ICJ Statute, as proof that the rule contained in art. 49 of the draft is *lex lata*. This can no longer be denied by arguing the lack of sufficient State practice[12]). The unanimous approval given to art. 49[13]) of the ILC draft by a considerable number of governments in their observations is persuasive proof that States have accepted the principle under discussion as law. Not one State doubts that art. 49 constitutes *lex lata*[14]). There are, it is true, reasonable misgivings and objections against this rule. Its practicability is doubtful[15]). Its application may lead to serious uncertainties[16]). Other objections concern the interdiction of the use of force itself. Due to the insufficient functioning of the United Nations, is deprived of an effective sanction[17]). The use of force in international relations is not effectively replaced – as it is in the developed legal systems of municipal law – by procedures allowing peaceful change and the enforcement of rights through adjudication. These defects diminish the value and weight of the interdiction of the use of force in international law. But it must be concluded from doctrine and practice that positive international law does

(1962), p. 542; François, Grondlijnen van het volkenrecht (1954), p. 323; Quadri, Diritto internazionale pubblico (4th ed. 1963), p. 127; Moreno Quintana, Tratado de Derecho Internacional, vol. 1 (1963), p. 545; Sierra, Tratado de Derecho Internacional Público (1955), p. 387.

[11]) See Cavaré, Le droit international public positif, vol. 2 (1962), p. 64 *et seq.*; Monaco, Manuale di diritto internazionale pubblico (2nd ed. 1960), p. 76 *et seq.*; Podestá Costa, Derecho Internacional Público, vol. 1 (3rd ed. 1955), p. 400; these authors do not even discuss the possible consequences of the interdiction of the use of force, and do not take into account newer developments of the doctrine; it is perhaps significant that the latest work cited by Monaco, *loc. cit.*, p. 76, note 42, dates from 1940. A well-reasoned argumentation against the rule under discussion is given, however, by Dahm, Völkerrecht, vol. 3 (1961), p. 39 *et seq.*, and Brownlie, International Law and the Use of Force by States (1963), p. 405, who acknowledge the weight of doctrine and practice in favour of the nullity theory but are of the opinion that this theory is not yet generally accepted.

[12]) Dahm, *op. cit.*, vol. 3, p. 41.

[13]) Art. 36 of the 1963 draft.

[14]) Waldock, 5th Report on the Law of Treaties, UN Doc. A/CN. 4/183/Add. 1, p. 13. Some States expressly stated that the article is *lex lata, e. g.*, Brazil and Guatemala, summary *ibid.*, p. 6 and p. 7.

[15]) See Fitzmaurice, 3rd Report, Law of Treaties YBILC 1958, vol. II, p. 38.

[16]) See Dahm, *op. cit.*, p. 40. This is particularly due to the fact that the interdiction of the use of force is still not sufficiently defined, see below.

[17]) Cf. Wehberg, Strupp-Schlochauer Wörterbuch, vol. 2, p. 372, who calls this interdiction a *lex imperfecta*. See also Guggenheim/Marek, *ibid.*, vol. 3, p. 542, who doubt the effectivity of the interdiction of the use of force.

not take into account these objections. This being so, the ILC was not able to adopt a solution which corresponded to a more primitive stage of international law, a solution, for example, like that proposed by the previous rapporteur, Sir Gerald Fitzmaurice [18]), which would exclude the nullity of a treaty brought about by coercion against a State. The forthcoming State conference will also, as far as can be foreseen, not be prepared to do so.

But to say that the principle under discussion is *lex lata* does not mean that the inclusion of art. 49 of the ILC draft in a convention on the Law of Treaties must be accepted. Two further questions must be examined: First, is the article adequately worded? Second, are there reasons not to include a disposition like art. 49 in the proposed convention despite the fact that the content is *lex lata?* These two problems are, as will be seen, intricately interwoven.

The acceptance of the rule under discussion as *lex lata* does not mean that there is no other choice but to include a disposition like art. 49 in the convention. If that were the case, there would be no place for the second question. There would only remain the question of adequate wording. But the problem treated in art. 49 is not only a question of the Law of Treaties. It belongs also (and even more particularly) to another subject-matter, that is, the prohibition of the use of force and its consequences. As the ILC did not deal with this thorny problem and its implications, it is at least reasonable to argue – as did Fitzmaurice [19]) – that "it is neither appropriate nor desirable to deal with the question of the effect of force on treaties in isolation and apart from ... (the) connected elements" of the prohibition of the use of force. The prohibition of the use of force being outside the scope of the proposed convention, its impact on the Law of Treaties would in any case not be prejudiced by the silence of the convention, if art. 39 of the draft, which declares the enumeration of the causes of nullity contained in the draft to be exhaustive, were revised. A more cautious approach would be to adopt the same procedure as has been done with other topics whose effects in the field of the Law of Treaties are not meant to be prejudiced, that is, the formulation of a reservation in part VI of the draft. Art. 70 which concerns other consequences of the interdiction of the use of force, could easily be worded so as to cover the question of a treaty procured by coercion against a State. From a systematic point of view it would even be more consistent to deal with all consequences of the interdiction of

[18]) YBILC 1958, vol. II, pp. 26 and 38 *et seq.*

[19]) YBILC 1958, vol. II, p. 39. See also the cautious remarks of Rosenne, YBILC 1963, vol. I, p. 49 (681st meeting).

the use of force in the negative form of a general reservation rather than to deal with one of them in a positive form while leaving the others open.

As already indicated, the problem whether it is advisable to include a disposition like art. 49 in the proposed convention is intricately interwoven with the problem of its adequate wording. The main argument which could be advanced against this article is its lack of precision. There are, above all, two difficult definitional problems in the article: First, what is "force"; second, what kind of use (or threat) of force is allowed because it does not violate the principles of the Charter of the United Nations? The first problem may be reduced to the question whether the term "force" only means "armed force" or "physical force", or whether other forms of pressure (economic, political) are also covered by this concept.

The second problem implies a whole series of further questions. There is a general agreement that the use of force (at least against a member of the UN) is allowed if authorized or undertaken by the competent organ of the United Nations. But which is the competent organ? Under what conditions can a regional agency authorize the use of force or undertake action involving the use of force? And lastly, when is the use of force permitted as a measure of self-defence? Is it only allowed as a reaction against armed attack, or is the concept of self-defence widened according to a widened concept of force (first problem)? Closely interwoven with the question of self-defence is the problem whether peoples under colonial rule are allowed to seek freedom by forcible means.

The ILC did not solve these problems. It deliberately chose an "open-ended" formulation[20]). The article only says that a treaty is rendered void by a coercion which constitutes, according to the definition of the prohibition of the use of force under general international law, a violation of this prohibition. The wording of art. 49 constitutes a correct formulation of this *(lex lata)* principle[21]). The determination of the exact content of the prohibition should be left to the practice[22]). The ILC could, certainly, not go further in attempting to define the extent of the prohibition of the use of force[23]). The definitional problems indicated above were vehemently

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[20]) Waldock, YBILC 1966, vol. I part I, p. 28 (826th meeting).

[21]) Cf. Ago, YBILC 1966, vol. I part I, p. 34 (827th meeting).

[22]) Waldock, *ibid.* and ILC Commentary to art. 49, para. 3 (UN Doc. A/6309/Rev. 1, p. 75).

[23]) Verdross, YBILC 1966, vol. I part I, p. 33 (827th meeting). It is at present equally impossible to eliminate the dangers implied in this open-ended formulation by reserving the determination of nullity to an independent tribunal, see the debates of the ILC about art. 62 (former art. 51) at the 845th session and Tunkin, YBILC 1963, vol. I, p. 58 (682nd meeting), Paredes, *ibid.*, p. 61 (683rd meeting).

debated in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States[24]). The Committee, to which reference was made by the ILC in several instances[25]), was unable to reach an agreement on these points. This is certainly in large part due to the fact that behind the different legal positions taken in these discussions there are vital political interests[26]) at stake. The same positions and arguments were repeated in the governments' observations to art. 49[27]). It is obvious that the ILC could not enter into these controversies, which have important political implications. If it had done so, its deliberations would have been deadlocked.

But avoiding these controversies it had no other choice but to create a disposition which was – not without reason – criticized as being "a blank cheque", as involving "a serious risk of instability of treaties"[28]). The decisive question is therefore whether it is advisable to include in the proposed convention a disposition, the exact content of which is admittedly impossible to define at present. At a first glance, one is tempted to think that in view of these difficulties it would be preferable not to deal with any consequence of the prohibition of the use of force in a convention on the Law of Treaties[29]). But the non-inclusion of this item in the convention would not eliminate or reduce, to any extent, these difficulties. At least with the inclusion in the draft of the ILC the problem is placed before the doctrine and the practice of international law, and the prohibition of the use of force will be invoked as cause of nullity of a treaty, whether this principle is or is not included in the final convention. The non-inclusion would probably do more harm than the inclusion. For the non-inclusion would – as was already indicated – require a change of the text of art. 39; the causes of nullity contained in the convention would than no longer be

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[24]) Report of the Special Committee, UN Doc. A/6230, notably pp. 24–156.

[25]) Waldock, 5th Report on the Law of Treaties, UN Doc. A/CN. 4/183/Add. 1, p. 10 *et seq.*, *idem*, YBILC 1966, vol. I part I, p. 29 (826th session); Elias, *ibid.*, p. 30, Yasseen, *ibid.*, p. 32 (827th session).

[26]) For instance, the interest of former dependent countries – seconded by the communist countries – in freeing themselves from some treaty obligations, resented as unjust, *vis-à-vis* former colonial power the interest of the Asian-African countries in having a more solid legal base for the struggle against still existing colonial regimes, the interest of the US in avoiding any legal declaration that could be understood as implying the illegality of its action in Vietnam, the interest of the communist countries in bringing about such a declaration and also the interest of the latter countries in consolidating their position concerning the legal status of Germany.

[27]) See the summary in Waldock's 5th Report on the Law of Treaties, UN Doc. A/CN. 4/183/Add. 1, p. 3 *et seq.*

[28]) Briggs, YBILC 1966, vol. I part I, p. 30 (826th meeting).

[29]) Cf. Briggs, YBILC 1963, vol. I, p. 54 (682nd meeting).

exhaustive. This could be misunderstood as leaving the door open for the "invention" of other causes of nullity, thus creating an additional element of incertitude. Another advantage of the maintenance of art. 49 of the draft would be that it would provide a further impetus to reaching a solution of this problem within the adequate framework of the United Nations[30]).

Attention must further be drawn to a problem of causality which was generally overlooked in the debates concerning art. 49. When is the conclusion of a treaty "procured" by the threat or use of force? Is any conclusion "procured" by coercion for which the use or threat of force constitutes a cause, *i. e.*, any conclusion which would not have occurred if there had not been a use or threat of force? It is clear that a treaty comes under the rule of art. 49 if the coercion is directly intended to bring about the treaty, *e. g.*, if a treaty is concluded by a State giving way to the threat that force will be exercised against it if it does not consent to the proposed treaty. But if a treaty is concluded between two States to clear up a situation brought about by the illegal use of force of one of them, it is not obvious that such a treaty is "procured" by coercion although the coercion is a cause of the treaty, *i. e.*, although the treaty would not have occurred without that coercion. This treaty may be a fair regulation of the tension existing between the States, which does not leave the aggressor any unjust advantage. In this case it is difficult to see why the treaty should be void. On the other hand, the treaty may be aimed at reserving to an aggressor the fruits of his illegal attack. In this case, it seems to be just to consider the treaty as void. A solution of this problem must be found in a reasonable and restrictive interpretation of the word "procure", which interpretation may tentatively be circumscribed as follows: A treaty is only procured by coercion if the use or threat of force is directly intended to bring about the treaty or if the treaty is aimed at maintaining a situation which was created by an illegal use of force. But it seems to be extremely difficult, if not impossible, to formulate a really precise and satisfactory solution to this problem of causality. A bad formulation which could lead to unjust results would be worse than leaving the question open by retaining the present text.

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[30]) From the viewpoint of the equality of States, it is perhaps advisable or even necessary that no State party (or prospective party) to the Convention on the Law of Treaties is excluded from the elaboration of this solution. So all States invited to or participating at the State conference on the Law of Treaties (whether or not members of the United Nations) should have the opportunity to address observations to the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States which is now charged with the task of elaborating the definition of the prohibition of the use of force.

As in the case of the definitional problems discussed above, retaining the present text, being the lesser evil, is the most advisable solution.

For all these reasons, art. 49 of the ILC draft deserves retention in a convention on the Law of Treaties.

If art. 49, in its present wording, is included in a convention on the Law of Treaties, one might ask what is the destiny of prior treaties concluded under coercion. Thus the question arises whether the article should contain a clarification with regard to this problem. Some governments and delegates in the 6th Committee of the General Assembly stated the question in terms of "retroactivity" [31]). But there are two questions which must clearly be distinguished: The question of a possible retroactive effect of a convention on the Law of Treaties and the question of the date at which rules of customary international law codified in that convention have come into existence. In principle, a treaty does not have retroactive force: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party" [32]). It is obvious that this non-retroactivity of a treaty concerns only the rights and obligations which derive from this particular treaty; it does not preclude the existence of identical rights or duties emanating from other sources of law, particularly from customary law. As shown above, the rule contained in art. 49 of the ILC draft is already *lex lata*. So it is clear that this rule can apply to treaties concluded prior to the entry into force of a convention on the Law of Treaties. But this is not a question of retroactive effect of art. 49 but of the coming into existence of the corresponding rule of customary law. There would only be a question of the retroactive effect of this article if it were the established intention of its draftsmen to supplement this customary rule with a treaty norm with regard to a period prior to the entry into force of the treaty (*i. e.*, the convention on the Law of Treaties) or even to extend the validity of the customary rule into the past. An analysis of the ILC commentary to art. 49 [33]) leads to the conclusion that the Commission understood art. 49 as having a limited retroactive effect. The Commentary says that the rule codified in art. 49 is *lex lata* and must therefore

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[31]) See UN Doc. A/6516, p. 82 and the summary of official comments given by Waldock in the 5th Report on the Law of Treaties, A/CN. 4/183/Add. 1, p. 4 *et seq.*, and particularly the comment of the Netherlands, A/6309/Rev. 1, p. 143 and of the United States, *ibid.*, p. 178.

[32]) Art. 24 of the ILC draft.

[33]) UN Doc. A/6309/Rev. 1, p. 76.

be applied from the date of its coming into force but that it was not the task of the ILC to specify that date. These statements do not imply the retroactivity of the article. But the Commentary further states: "The present article, by its formulation, recognises by implication that the rule which it lays down is applicable at any rate to all treaties concluded since the entry into force of the Charter". This "implied recognition", which is deduced from the reference to the Charter in the text of the article, can properly be considered as adding, from 1945, a further source of validity to the customary rule, or even as extending this rule into the past if the said customary rule came into existence at a later date. So the article under review can be deemed to have retroactive effect, in the sense just described, from October 24, 1945, while the question of the operation of the rule contained in it with regard to treaties concluded prior to that date remains open.

This may be considered a sound solution. It is, however, doubtful whether it is the only possible interpretation of the article with regard to its temporal validity. If the State conference wants to give a conventional foundation to the rule contained in art. 49 with a (retroactive) effect dating from 1945 this should be made clear by adding a second paragraph to art. 49 which could be worded in the following way:

> Without prejudice to the validity or nullity of any treaty concluded prior to the 24th of October, 1945, the present article shall be deemed to have entered into force on that date.

On the other hand, if the State conference prefers to leave to the regulation customary international law the validity of treaties concluded prior to the entry into force of a convention on the Law of Treaties, this should also be expressly stated.

II. The general disposition concerning the "case of an aggressor State"

The inclusion of an article concerning an "aggressor State" was inspired by the fear that such a State might invoke certain dispositions of the convention on the Law of Treaties to evade the obligations incumbent upon him as a consequence of his aggression[34]). Is such reservation[35]) necessary? Its necessity is subject to two conditions: First, that there are indeed duties of an aggressor which are incompatible with some rights granted by the Law of Treaties, and second, that these rights granted by the Law of

[34]) See Waldock, UN Doc. A/CN. 4/SR 876 para. 80.

[35]) The content of art. 70 is well described by the term "reservation". Obviously, it is not a reservation in the sense of part II section 2 of the draft.

Treaties would prevail over the duties of the aggressor (or that, at least; this argument could be made with a certain appearance of reason). With regard to the first condition the ILC Commentary cites three dispositions or groups of dispositions of the draft articles on the Law of Treaties which might be considered as conflicting with certain duties of an aggressor: Arts. 30 and 31, which provide that no treaty obligations can arise for a State without that State's consent to be obliged[36]), art. 36 para. 2, which grants the right to participate in the amending process of a multilateral treaty[37]), and the articles concerning the termination and suspension of treaties[38]).

It may be questioned whether these examples are entirely convincing. If obligations are imposed on an aggressor by the competent organ of the United Nations or a regional agency, these obligations are not treaty obligations and the arts. 30 and 31 are of no relevance[39]). But if there is no source of obligation such as the decisional competence of international organizations, a treaty concluded by the victorious victims of aggression does not bind the aggressor unless he has consented to it. Equally, the termination of treaty rights of an aggressor may be derived from art. 57 (as consequence of a breach) or art. 59 (as consequence of a fundamental change of circumstances).

But be that as it may, there remains to be examined the second prerequisite of the necessity of art. 70: That the rights granted by the Law of Treaties would prevail over the duties of the aggressor. One might be tempted to argue that the convention on the Law of Treaties constitutes a *lex posterior* to certain duties of an aggressor deriving from the Charter of the United Nations, from such security treaties as the Rio-Pact or from customary international law. But as already pointed out, the consequences of the use of force do not fall within the scope of the proposed convention on the Law of Treaties. They are *lex specialis* with regard to the Law of Treaties. The Law of Treaties may consequently not be invoked as a regu-

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[36]) Commentary to art. 70, A/6309/Rev. 1, p. 95; see also Waldock, 5th Report on the Law of Treaties, A/CN. 4/186/Add. 2, p. 9 and the observations of Hungary, the USSR, and the USA, *ibid.*, p. 6 and p. 8.

[37]) Commentary to art. 36, A/6309/Rev. 1, p. 63.

[38]) Commentary to art. 70, *ibid.*, p. 95. If a defeated aggressor is coerced by the victorious victim to give his consent to a peace-treaty, the validity of this treaty does not stem from art. 70 but from art. 49, because this coercion would not be in violation of the Charter of the United Nations, provided that the victim does not seek to gain unjustified advantages.

[39]) It seems that Bartoš, YBILC 1966, vol. I part II, p. 182 (869th meeting) saw this difference when he said that the aggressor was not bound to accept the treaty but was bound to accept the obligation.

lation in this domain[40]). As far as obligations contained in the Charter of the United Nations are concerned, this follows also from art. 103 of the Charter.

Strictly speaking, art. 70 is therefore not necessary. But there would be no objection against its inclusion in a convention on the Law of Treaties as a clarifying safeguard against misinterpretation in bad faith[41]), if it did not create further problems.

The first problem is that of the completeness of such safeguards. If a convention on the Law of Treaties contains reservations relating to other subjects which it does not purport to cover, the reservations should be complete. For it could be concluded *a contrario* that other domains of international law not expressly mentioned in the reservation have no bearing in the realm of the Law of Treaties, *i.e.*, that the express reservations are exhaustive. Apart from the reservation relating to aggression, the draft contains another one concerning State responsibility and succession (art. 69). The ILC deliberately omitted a reservation concerning the effect of war and hostilities on the Law of Treaties, although it clearly states in the introduction that this subject was not covered by the draft[42]). There is no reason for this inconsistency. The mention of the question of hostilities in the introduction to the draft articles is only a rather ineffective method of excluding the described *a contrario* argument with regard to the list of subjects not covered by the proposed convention[43]). The present part VI of the draft should therefore be omitted or reshaped so as to include the question of hostilities.

Apart from this question of reshaping part VI of the draft, there remains the question whether the reservation is adequately worded. As the Commission did not treat the legal consequences of aggression and, therefore, could not even try to agree on possible applications of the reservation, its terms had to be very general so as to cover all possible cases where obligations of an aggressor State might be considered as being prejudiced by his rights stemming from the Law of Treaties. But, on the other hand, the

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[40]) See Tsuruoka, YBILC 1966, vol. I part II, p. 181 (869th meeting).

[41]) Probably the article was only meant by the ILC as such a clarifying safeguard, see Waldock, YBILC 1966, vol. I part II, p. 223 (876th meeting).

[42]) A/6309/Rev. 1, p. 9. The special rapporteur had first proposed a reservation which had also covered the question of hostilities, but in view of the opposition of Lachs and Tunkin (who gave no reasons for their position), he dropped this point, leaving this question to the introduction (YBILC 1966, vol. I part II, p. 30, especially paras. 25, 29, 30, 889th meeting).

[43]) Belonging to the *travaux préparatoires*, it will only be a supplementary mean of interpretation (art. 28 of the ILC draft.).

Commission tried to "avoid giving the impression that an aggressor State is to be considered as completely *exlex* with respect to the Law of Treaties" and to include in the article safeguards against "the possible danger of one party unilaterally characterizing another as an aggressor for the purpose of terminating inconvenient treaties" [44]). It is, however, difficult to accept the argument that the text of the Commission reduces these dangers. A State characterizing another one as aggressor will not hesitate to term his own action as "(self-defence) measures taken in conformity with the Charter of the United Nations" [45]). Probably, the ILC embarked on an impossible undertaking when it attempted to formulate a reservation, general enough to cover all possible consequences of aggression in the field of the Law of Treaties, but restricted enough to cover only those consequences which in fact exist and to close the door to the invention of new ones, and all this without having elaborated with a certain degree of completeness what these consequences are [46]). Actually, the ILC gave more weight to the generality of the reservation. This should not be considered as a mistake. The danger of evasion of treaty obligations which might be created by the article under discussion should not be overstressed. As long as the power of the Security Council to determine who is an aggressor is not effective, accusing another State of committing aggression will in any case be a cheap mean in international relations to evade obligations or to press unfounded claims.

The reservation formulated in art. 70 is actually not general enough because its scope of application is limited to the case of aggression. The interdiction of aggression, however, is only one aspect of the interdiction of the use and threat of force [47]). It is difficult to see why the other aspects of the interdiction of the use of force should have no impact on the Law of Treaties. Limiting the scope of the reservation to cases of aggression would

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[44]) Commentary to art. 70, A/6309/Rev. 1, p. 95.

[45]) Verdross, YBILC 1966, vol. I part II, p. 179 (869th meeting) proposed therefore that the reservation should only apply if the Security Council determined the existence of a case of aggression.

[46]) It seems that the objections raised against art. 70 by Tsuruoka, YBILC 1966, vol. I part II, p. 181 (896th meeting) are inspired by considerations of this kind.

[47]) Although it seems sometimes that "forbidden use of force" and "aggression" are used as synonyms, the first notion must be considered as the broader one (see Stone, Aggression and World Order, p. 93 *et seq.*, particularly notes 3, 4, 13). Art. 39 of the Charter speaks not only of "acts of aggression", but also of threats to and breaches of the peace, as other phenomena of the violation of the interdiction of the use of force. All definitions of this interdiction proposed in the Special Committee on the Principles concerning Friendly Relations and Co-operation among States contain items in addition to the condemnation of aggression, items which may not be described as an elucidation of the term aggression (cf. UN Doc. A/6230 paras. 27–29).

have the additional disadvantage of introducing the thorny and controversial problem of the definition of aggression into the draft.

In view of these considerations, the following formulation of art. 70 might be advisable:

> Except as provided in art. 49, the present articles are without prejudice to any consequence in the field of the Law of Treaties, deriving from the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.