

# THE VALIDITY OF TREATIES CONCLUDED UNDER COERCION OF THE STATE: SKETCHING A TWAIL CRITIQUE

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*The invalidity of treaties based on non-military coercion remains one of the biggest unresolved problems within the law of treaties. It paradoxically combines great certainty and clarity on the side of soft law with uncertainty and indeterminacy on the side of hard law. Unfortunately, the codification undertaken at the Vienna Convention on the Law of Treaties (VCLT) not only did not solve the hard law uncertainties, but also enlarged the cleavage between the perspectives of weak and strong States regarding international relations. By combining legal positivism with Third World Approaches to International Law (TWAIL), this paper suggests that (i) the way Article 52 of the VCLT was drafted had the effect of undermining the concept of consent and paving the way for the entrenchment of power politics, and (ii) that there is some elbow room for trying to consolidate a wider interpretation of the Article. Such an interpretation would allow us to condemn economic and political pressures that amount to true coercion as illegal strategies in treaty negotiations, safeguarding weaker States.*

**Keywords:** Coercion of the State, law of treaties, TWAIL, codification, progressive development, colonialism, true consent, power politics

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## I. INTRODUCTION

The validity of treaties concluded under the influence of non-military coercion is still a sensitive theme in international law. The International Law Commission (ILC) did not come to a lasting solution to this question, despite it having been analyzed by different Rapporteurs, over a span of nearly 20 years. In the end, explicit reference to non-military coercion was simply excluded from the express wording of Article 52 of the 1969 Vienna Convention on the Law of Treaties (VCLT). The drafting history of Article 52 is marked by a clear opposition. On the one hand, many countries, mostly from the (Global) South,<sup>1</sup> intended to expand its scope in order to expressly include economic and political coercion as grounds of the invalidity of treaties. On the other hand, many Northern countries feared that an expanded reading of coercion would open the door to arbitrary allegations. Each side tried its best to arm itself with legal arguments – the latter group maintained that the use of economic and political influence amounted to nothing more than mere pressure, while the former depicted it as a way to depart from customary law constraints and to surreptitiously force peripheral States into contradicting their true will.

The difficulties faced by international lawyers when dealing with this issue become clear when we analyze certain instances of political and economic influence at the international level. Numerous *soft law* instruments condemn economic and political coercion as undue interference in internal affairs.<sup>2</sup> On

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<sup>1</sup> In this brief paper, I will not offer a deep insight into the reach of notions such as the 'Third World' and the 'South', terminologies that are well-addressed by many TWAILers. However, I do suggest that TWAIL use these concepts as open-ended tools, not necessarily determined by geographical considerations. These notions encompass common sensitivities felt by States and groups who suffer from relationships based on domination and powerlessness. For a self-critical analysis of TWAIL on this matter, see Amar Bhatia, 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World' (2012) 14 *Oregon Review International Law* 131.

<sup>2</sup> UNGA Res 2131 (21 December 1965) UN Doc A/RES/20/2131; UNGA Res 2625 (24 October 1970) UN Doc A/RES/25/2625; UNGA Res 3201 (1 May 1974) UN Doc A/RES/S-6/3201; UNGA Res 3281 (12 December 1974) UN Doc A/RES/29/3281; UNGA Res 42/173 (11 December 1987) UN Doc A/RES/42/173; UNGA Res 64/189 (21 December 2009) UN Doc A/RES/64/189.

the other hand, when it comes to *hard law*, customary and conventional law are still unclear on the limits of economic and political coercion.<sup>3</sup> Antonios Tzanakopoulos suggests that there is no customary rule on the right to be free from economic coercion, however desirable it would be. This absence can be explained by two reasons. First, it is a hard task to compile evidence of practice and *opinio juris* in support of a right to be free from economic coercion. Second, it is difficult to draw a clear line between pressure and coercion.<sup>4</sup> Yet, be this as it may, the social consequences which result from political and economic coercion during treaty negotiations are highly visible. Some examples, among many others, illustrate this: The United States used their economic leverage to affect Central American countries' foreign policy during the 1970s and Russia, during the Georgian-Russian crisis, issued embargos as soon as Georgia announced that it would take further steps to join NATO.

Many Third World countries are particularly affected by certain forms of non-military coercion. For example, food security is a sensitive theme in the international arena for India, as the country is highly dependent on a complex and fragile network of internal and international suppliers to provide food to its population. The Greek sovereign debt crisis illustrates a case of economic coercion. The Greek government, threatened by a constrained access to liquidity, was pushed into accepting a reinforced regime of conditionalities, which would not be voted favorably under regular democratic processes. Moreover, institutionalized action like the 'Oil-for-Food Programme'<sup>5</sup> evinces that even economic sanctions and countermeasures applied to enforce international law have their risks and must be cautiously planned in order not to reinforce distributive inequalities. Because economic measures carry risks, grave economic coercion – understood as a practice that is unrelated to the implementation of a legal obligation – should definitely not be tolerated.

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<sup>3</sup> Barry E Carter, 'Economic Coercion', *MPEPIL* (September 2009) <<http://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1518>> accessed 31 March 2017.

<sup>4</sup> Antonios Tzanakopoulos, 'The Right to Be Free From Economic Coercion' (2015) 4 *Cambridge Journal of International and Comparative Law* 616.

<sup>5</sup> UNSC Res 986 (14 April 1995) UN Doc S/RES/986.

This article sketches a TWAIL critique of how the VCLT regards coercion of the State as a ground of the invalidity of treaties. It is divided in four parts. First, I will describe and analyze the drafting history of Article 52 of the VCLT – that deals with the ground of invalidity – both within the ILC and at the 1968/69 Vienna Conference on the Law of Treaties, in order to evince the underlying North/South tensions therein. Next, I will describe and emphasize how the choice made by the ILC to favor codification in spite of progressive development stands out as a political choice that bears political consequences, drawing upon reflections from critical legal scholars. Then, I will present some TWAIL readings on the pervasive colonialism in international law as a framework for understanding the consequences of a narrow reading of Article 52. Finally, I will offer some concluding remarks, pointing out that there exists some leeway for consolidating non-military coercion as effective grounds of the invalidity of treaties, linked specifically to parallel procedures and treaty interpretation and that TWAILers should explore this leeway.

## II. THE DRAFTING HISTORY OF ARTICLE 52

The ILC decided at its first session, in 1949, to award priority to the codification and progressive development of the law of treaties. Mr. James Brierly was named the first Special Rapporteur. At the Second Session of the ILC (1950), he submitted a Draft Convention on the Law of Treaties and presented a selection of alternative proposals on this subject-matter.<sup>6</sup> Only two proposals presented by James Brierly included rules on the effects of threats or violence over consent to enter into a treaty: Bluntschli's and Fiore's Draft Codes, both written in the second half of the 19<sup>th</sup> century. The Rapporteur's Draft did not elaborate on this issue. Bluntschli's proposal stated that free will did not exist if the representatives of the state were 'subjected to violence or to grave and immediate threats' (Articles 408-409).<sup>7</sup> Fiore's proposal considered that duress<sup>8</sup> was a ground of invalidity when the

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<sup>6</sup> ILC, 'Report on the Law of Treaties by J.L. Brierly, Special Rapporteur' (14 April 1950) UN Doc A/CN.4/23.

<sup>7</sup> Ibid 246.

<sup>8</sup> Despite the existing differences in other contexts, *duress* and *coercion* were used interchangeably during the discussions on grounds of the invalidity of treaties.

State was subjected to 'physical violence' or when its representatives were led to act based on 'external constraint'. Such external constraint needed to be capable of depriving them 'of all deliberation and freedom of judgment' (Article 758).<sup>9</sup>

The validity of treaties concluded under coercion was only addressed directly by Brierly's successor, Sir Hersch Lauterpacht. In Lauterpacht's first Report on the Law of Treaties,<sup>10</sup> presented at the Fifth Session of the ILC (1953), a provision concerning the coercion of the State was written as follows:

Article 12. Absence of compulsion

Treaties imposed by or as the result of the use of force or threats of force against a State in violation of the principles of the Charter of the United Nations are invalid if so declared by the International Court of Justice at the request of any State.<sup>11</sup>

Nearly thirty years before, in *Private Law Analogies*, Lauterpacht had defended that the use of force and threats of force did not vitiate consent to enter into a treaty because of the underdevelopment of international law, rather than the intrinsic adequacy of these means. The use of force and threats of force were a *malum necessarium* caused by the imperfect structure of the legal sanction in international law and the unorganized character of international society. Their use was widespread and they were accepted as general instruments of international relations, encompassing even treaty negotiations. However, for Lauterpacht, if ever there was a change in political

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Both expressions described a circumstance in which a 'threat or actual harm' was posed against the State or its representatives, so that whoever acted under duress or coercion did not voluntarily agree to the treaty, but was effectively and unwillingly forced to enter into it. Some Rapporteurs and experts opted for *duress*, while others preferred *coercion*, but it is not possible to identify fundamental differences in the *travaux préparatoires*. Resort to the authentic texts of the VCLT in different languages reinforces this perception. When we compare the final versions of Article 52 in English, Spanish and French, each one resorts to terms that are not exact and straightforward translations, despite expressing similar ideas: 'coercion', 'coacción' and 'contrainte'.

<sup>9</sup> ILC, 'Report' (n 6) 247.

<sup>10</sup> ILC, 'Report on the Law of Treaties by Mr. H. Lauterpacht, Special Rapporteur' (24 March 1953) UN Doc A/CN.4/63.

<sup>11</sup> *Ibid* 93.

will, international law could effectively impose constraints on violent actions. Such development would be positive for the law of treaties, as it would allow for the consolidation of true consent as the basis of treaty law, instead of fictitious consent – plugging some holes linked to the previously imperfect private law analogy.<sup>12</sup>

As Special Rapporteur, Lauterpacht identified that this development had already taken place. He affirmed that the legal situation had significantly changed since 1928 (and after the presentation of his doctoral thesis). Firstly, the General Treaty for the Renunciation of War outlawed aggressive war and the use of force as an instrument of foreign policy. Then, the Charter of the United Nations limited the use of force between its members. Once the prohibition of the unauthorized use of force took shape as a rule of customary international law, many countries issued declarations against the recognition of treaties resulting from the unlawful use of force.<sup>13</sup>

For Lauterpacht, the newly imposed limits on the use of force and threats of force meant that the field was wide open for coercion to take hold as a ground of the invalidity of treaties. Whilst designing Article 12, he put the proposal from *The Function of Law in the International Community*<sup>14</sup> into practice – indicating that questions related to coercion should be subjected to the compulsory jurisdiction of the International Court of Justice (ICJ). The ICJ would act as a safeguard against baseless and arbitrary allegations of coercion, which would possibly encompass both direct physical force and forceful menaces:

The article refers to physical force or threats of physical force as distinguished from coercion not amounting to physical force. However, in the case of a State the borderline between these two kinds of coercion is not rigid. In fact, it would appear that direct physical force can be applied only to persons, but not to the collective entity of the State. On the other hand, in

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<sup>12</sup> Hersch Lauterpacht, 'Private Law Analogies in International Law' (PhD thesis, The London School of Economics and Political Science 1926) 70-77 <<http://etheses.lse.ac.uk/664/>>, accessed 31 March 2017. In his thesis, Lauterpacht only refers to 'duress' as a ground of the invalidity of treaties alongside 'error' and 'fraud', making no reference to 'coercion', the expression he favored as Rapporteur.

<sup>13</sup> ILC, 'Report' (n 10) 147-152.

<sup>14</sup> Sir Hersch Lauterpacht, *The Function of Law in the International Community* (first published 1933, Oxford University Press 2011) 431-434.

cases such as attempts or threats to starve a State into submission by cutting off its imports or its access to the sea, although no physical force is used directly against persons it may be difficult to deny that the treaty must be deemed to have been concluded as the result of the use of force or threats of force.<sup>15</sup>

Sir Gerald Fitzmaurice, the third Special Rapporteur, in his third Report on the Law of Treaties,<sup>16</sup> presented at the tenth session of the ILC (1958), denied that duress could affect a State. According to him, duress would only be forbidden by international law when it amounts to a direct physical or mental threat against representatives of the State. Interestingly enough, Fitzmaurice also based himself on a private law analogy to defend this exclusion. In private law, he argued, the question of the validity of contracts is solved with reference to 'individual conscience', as individuals are the only ones who can represent or misrepresent things. According to Fitzmaurice, corporate responsibility has nothing to do with 'corporate consent', but deals merely with questions of entitlement – the definition of who is capable to act in the name of the corporation. As such, corporate entities could hardly be the object of coercion; the only way coercion could take place is through their representatives being forced to act against their will.<sup>17</sup> Hence, for him, traditional international law had correctly repudiated duress as grounds of invalidity applied directly to States. Article 14 of his draft treaty clearly reveals his position by focusing on the representatives of the State rather than on the State:

Article 14. *Duress*

1. Subject to the provisions of paragraphs 2 to 5 below, the conclusion of a treaty brought about by duress or coercion, whether physical or mental, actual or threatened, employed directly and specifically against the persons, of the individual agents, plenipotentiaries, authorities or members of organs engaged in negotiating or signing, or ratifying or acceding to, or any other act of participation in a treaty, vitiates the consent apparently given, and invalidates the act concerned, and consequently the treaty.

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<sup>15</sup> ILC, 'Report' (n 10) 149.

<sup>16</sup> ILC, 'Third Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur' (18 March 1958) UN Doc A/CN.4/115.

<sup>17</sup> *Ibid* 38-39.

[...]

4. Duress for the purposes of the present article means duress addressed to the persons concerned, as individuals, or as members of the negotiating, ratifying or acceding body or organ, and directed to securing the performance of the act of participation. Duress is not constituted by the threat of the consequences that will or may ensue for the State of which those persons are nationals, in the event of their non-compliance (or for themselves as nationals of that State), nor by their fear of such consequences, nor by the existence of any indirect threat to themselves or their relatives or dependents that may arise from the possibility of such consequences.<sup>18</sup>

Sir Humphrey Waldock, the fourth and final Special Rapporteur, devoted meticulous attention to this theme in his Second Report on the Law of Treaties,<sup>19</sup> presented at the fifteenth session of the ILC (1963). Because of diverging opinions from previous Special Rapporteurs, Waldock decided to approach coercion in two different articles of Part II of his draft treaty, which respectively dealt with coercion of representatives (Article 11) and coercion of the State (Article 12).

In Article 11, Waldock opted for a broad definition of coercion. Coercion against the representatives may be 'actual or threatened, physical or mental, with respect to their persons or to matters of personal concern'.<sup>20</sup> Waldock explained that the reference to 'mental coercion' intended to account for all acts that fall outside the scope of the use of physical violence. Besides, he pointed out that the reference to 'matters of personal concern' intended to account for acts that targeted persons who are close to the representative, not only him or herself. He affirmed that international practice provided many examples of treaties that could be annulled due to the coercion suffered by the representative of the State: Japanese pressure on the Emperor of Korea in 1905, North American pressure on the Haitian National Assembly in 1915, and German pressure on the President and the Foreign Minister of Czechoslovakia in 1939.<sup>21</sup> In the final text of the VCLT, Waldock's division into two different articles was kept, but Article 51, which now deals with the

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<sup>18</sup> ILC, 'Third Report' (n 16) 26.

<sup>19</sup> ILC, 'Second report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur' (20 March 1963) UN Doc A/CN.4/156.

<sup>20</sup> Ibid 50.

<sup>21</sup> Ibid 50-51.



coercion of a representative of a State, unfortunately lost all minutiae proposed by the Special Rapporteur, not mentioning coercion to persons who are close to the representative nor making the reference to 'mental coercion' explicit.

Regarding Article 12, unlike Fitzmaurice, Waldock recognized the possibility for a State to be directly coerced. Waldock reaffirmed Lauterpacht's idea that the invalidity of treaties concluded as a result of a State's coercion was *lex lata*. However, he also took into consideration Fitzmaurice's concern for the effectiveness of *pacta sunt servanda* if the grounds of invalidity were too broad. Waldock's middle-ground solution was to take a conservative stance. He limited the scope of the clause only to encompass the illegal use of physical force that could amount to military coercion. Besides, he added a 'procedural brake': after coercion had ceased, the State was only entitled to declare it void if it had never consented to its application:

[...] if 'coercion' were to be regarded as extending to other forms of pressure upon a State, to political or economic pressure, the door to the evasion of treaty obligations might be opened very wide; for these forms of 'coercion' are much less capable of definition and much more liable to subjective appreciations. Moreover, the operation of political and economic pressures is part of the normal working of the relations between States, and international law does not yet seem to contain the criteria necessary for formulating distinctions between the legitimate and illegitimate uses of such forms of pressure as a means of securing consent to treaties. Accordingly, while accepting the view that some forms of 'unequal' treaty brought about by coercion of the State must be regarded as lacking essential validity, the Special Rapporteur feels that it would be unsafe in the present state of international law to extend the notion of 'coercion' beyond the illegal use or threat of force.<sup>22</sup>

Waldock's Draft Articles, adopted provisionally by the ILC in 1965, were sent to governments for commentaries, in accordance with the Statute of the Commission. The ILC discussed them during the seventeenth session, which was conducted in two parts (1965/66) due to the heavy workload. Discussions on the validity of treaties were held in 1966 and were summarized in

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<sup>22</sup> ILC, 'Second Report' (n 19) 52.

Waldock's Fifth Report on the Law of Treaties.<sup>23</sup> Article 36 of the 1965 Draft Articles had the following wording on the coercion of the State:

Article 36. Coercion of a State by the threat or use of force

Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void.<sup>24</sup>

On the one hand, many countries in the so-called global periphery considered the scope adopted by the Special Rapporteur to be too narrow, and called for the inclusion of other forms of coercion. The Communist bloc – alongside some African nations – reiterated its post-war political stance<sup>25</sup> against onerous treaties that link former dependent territories to their colonial authorities and disregard assertions of self-determination.

On the other hand, delegates from the Netherlands, the United States and the United Kingdom opposed proposals for the inclusion of non-military force as a form of coercion. They affirmed that: (i) such an inclusion would create uncertainties that would not only deprive the Article of all effectiveness, but also give rise to 'pretexts for the evasion of treaty obligations'; and (ii) the *lex lata* did not forbid the use of economic and political pressure. According to the Dutch representative, 'however reprehensible' some forms of economic or psychological coercion might be, the risks of drafting too broad a rule outweighed the benefits of including them under the single general rule prohibiting coercion.<sup>26</sup> Some developed countries, like Spain, took a middle course, understanding some forms of non-military influence, such as 'the threat of starvation from economic

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<sup>23</sup> ILC, 'Fifth Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur' (15 November 1965 - 18 January 1966) UN Doc A/CN.4/183 and Add. 1-4.

<sup>24</sup> ILC, 'Draft articles adopted by the Commission' (7 January 1965) UN Doc A/CN.4/L.107.

<sup>25</sup> For further information on this stance, see: Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (first published 1995, Cambridge University Press 2008) 44-47.

<sup>26</sup> ILC, 'Fifth Report' (n 23) 16.

pressure', to be already prohibited by the text of Article 36, under the heading of 'use of force'.<sup>27</sup>

The Special Rapporteur sided with the northern delegates, deciding that his proposal should remain unchanged, and as such should not to include an express provision on economic or political coercion. Indeed, he believed that the Commission's task was to codify the law of treaties by upholding the current doctrine on the limits of the use of force and by simply identifying the *lex lata*, which only amounted to military coercion. To appease the critics, he affirmed that the final formulation, based on the threat or use of force as defined by the principles of the UN Charter, remained sufficiently open-ended:

Under this general formulation the article is, as it were, open-ended: any interpretation of the principle that States are under an obligation to refrain from the threat or use of force in violation of the principles of the Charter which becomes generally accepted as authoritative will automatically have its effects on the scope of the rule laid down in the present article. On the other hand, if the Commission were itself to attempt to elaborate the rule contained in the article by detailed interpretations of the principle, it would encroach on a topic which has been remitted by the General Assembly to the Special Committee and the detailed study of which would seem to belong rather to the topic of State responsibility.<sup>28</sup>

The 1966 Draft Articles, which later on served as the working text at the 1968/69 Vienna Conference, had the following wording on coercion of the State:

Article 49. Coercion of a State by the threat or use of force

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.<sup>29</sup>

During the Vienna Conference, a group of 19 States from the Third World (Afghanistan, Algeria, Bolivia, Congo/Brazzaville, Ecuador, Ghana, Guinea, India, Iran, Kenya, Kuwait, Mali, Pakistan, Sierra Leone, Syria, Tanzania, the United Arab Republic, Yugoslavia and Zambia) proposed an amendment to

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<sup>27</sup> ILC, 'Fifth Report' (n 23) 18.

<sup>28</sup> Ibid 19.

<sup>29</sup> ILC, 'Yearbook of the International Law Commission, 1966, vol. II' UN Doc A/CN.4/SER.A/1966/Add. 1, 183.

Article 49 of the 1966 Draft Articles. Their aim was to include economic and political pressure within the scope of the threat or use of force: 'A treaty is void if its conclusion has been procured by the threat or use of force, including economic or political pressure, in violation of the principles of the Charter of the United Nations'.<sup>30</sup> Due to the great reluctance of some negotiators, especially on the part of the US representative, the alternative wording was not pressed to a vote, and it was alternatively proposed that a declaration be adopted on the theme.<sup>31</sup> The *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*<sup>32</sup> was the outcome of this process. After negotiations, Article 52 of the VCLT was then approved with minor changes:

Article 52. Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

### III. THE POLITICS OF CODIFICATION/PROGRESSIVE DEVELOPMENT AT THE ILC

In spite of Waldock's response that the interpretation of the notion of 'threat or use of force' was open-ended and could change over time, one question looms large over the action of the ILC: why not opt for progressive development in drafting Article 52? The mandate of the ILC is not limited to the codification of international law. The ILC is also entrusted with the progressive development of international law.<sup>33</sup> The Rapporteur's choice to

<sup>30</sup> UN Doc A/CONF.39/C.1/L.67/Rev.1/Corr.1. Available in UN, 'Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions (Documents of the Conference)' (26 March – 24 May 1968 and 9 April – 22 May 1969) UN Doc A/CONF.39, 172.

<sup>31</sup> Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 642; Georges Ténékidès, 'Les effets de la contrainte sur les traités à la lumière de la Convention de Vienne du 23 mai 1969' (1974) 20 *Annuaire français de droit international* 79, 89-93.

<sup>32</sup> Doc. A/CONF.39/20. Available in UN, 'Official Records' (n 30) 285.

<sup>33</sup> In 1981, after a period where the ILC's usefulness was called into question due to the growing trend of States pursuing codification and progressive development through *ad hoc* bodies, a United Nations Institute for Training and Research

limit his inquiry to elements which undoubtedly formed the *lex lata* and not to encompass further developments in Article 52 stands as a political choice. This does not mean that this choice is inherently bad or good, but only that it can be linked both to a set of value-laden premises and a set of political consequences. When Special Rapporteurs expressly take sides with codification, they act in favor of the *status quo* – using an apologetic language ('the law as it is') to displace further utopian projects ('the law as it should be'). According to Koskenniemi, codification relies on a seemingly neutral and objective process that is supposedly immune to political pressures, but in reality, it also brings about political consequences.<sup>34</sup>

Hersch Lauterpacht, in the 1949 *Survey of International Law in Relation to the Work of Codification of the International Law Commission*,<sup>35</sup> noted that codification within the ILC must not be interpreted as mere registration, or otherwise it would effectively act as 'a brake upon progress'.<sup>36</sup> According to him, codification must entail harmonizing the available sources in order to achieve a systematic and comprehensive final proposal. Therefore, the ILC should not restrict its activities to the search for the least common denominator. According to Lauterpacht, existing practices should be considered *as a whole* in order to bring about a regulation which was neither fragmentary nor incompatible with 'a peaceful and neighbourly intercourse

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(UNITAR) working paper made similar points to the ones I intend to raise in this part of the article. First, the paper identified that there were important ideological discrepancies within the ILC that led to it being too conservative, in such a way that its final drafts only reflected the minimal content of international obligations. Moreover, it suggested that the ILC was not giving proper attention to progressive development, which was all the more needed in newer international regimes that relied on extensive cooperation. The ILC, therefore, was traditionally resorting to a narrow view of codification, which led it not to address certain issues properly. Mohamed El Baradei, Thomas M Franck and Robert Trachtenberg, *The International Law Commission: The Need for a New Direction*, UNITAR Policy and Efficacy Studies no. 1 (1981).

<sup>34</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argument* (first published 1989, Cambridge University Press 2005) 20.

<sup>35</sup> ILC, 'Survey of International Law in Relation to the Work of Codification of the International Law Commission' (10 February 1949) UN Doc A/CN.4/1/Rev.1.

<sup>36</sup> *Ibid* 7-11.

of States'.<sup>37</sup> When Special Rapporteur Waldock remarked that some 'unequal' treaties lacked essential validity,<sup>38</sup> but chose not to delve further into this, he opted for a narrow view of codification. By filtering out some practices, he merely consolidated certain existing situations, instead of fully grasping the principles underlying the rule in order to reach the protection of true consent.

The final text of Article 52 of the VCLT is also hampered by the 'framing effect': the content of Article 52 is inherently linked to the way the issue was initially framed by the ILC. Discussions on the use of force are very important when it comes to fully grasping the idea of coercion. However, they are not sufficient to deal exhaustively with the issue of coercion. Coercion, corruption, error and fraud are linked to the duty to conduct negotiations in good faith.<sup>39</sup> Whilst error and fraud deal with cases in which a party has imperfect will, corruption and coercion deal with cases in which a party goes against its own will. In coercion cases, a party contradicts its own will due to physical or psychological constraints imposed by the other party. These constraints, mainly psychological ones, are imposed by different means that are not adequately summarized by the idea of the use of force, which is linked to materialistic pressures, mainly of a military nature. The final wording of Article 52 of the VCLT demands the difficult process of translating economic menaces into the language of the use of force. Thus, it ignores that the reasoning in these cases may be quite different.

Waldock's final decision to remit questions over economic coercion to the preferential analysis of the Special Committee on State Responsibility, under the heading of the limits of the use of force, does not make his position politically neutral. The work of the ILC on the topic of State responsibility was in a state of slumber since 1961. Thus, by indicating that the Special Committee on State Responsibility would better address these issues, Waldock's decision ended up 'freezing out' these controversial discussions. Moreover, the limits of economic and political coercion ended up not being properly studied by the Special Committee on State Responsibility. After

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<sup>37</sup> ILC, 'Survey' (n 35) 9.

<sup>38</sup> ILC, 'Second report' (n 19) 52.

<sup>39</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (first published 1953, Cambridge University Press 2006) 106-109.

limiting the scope of its mission to examining secondary norms, following Special Rapporteur Roberto Ago's proposal, the Special Committee on State Responsibility set aside all further discussions on the concept of the use of force, considered by it to be a primary norm.

By leaving the wording of Article 52 of the VCLT interpretively open, one may think that the ILC created a level playing field for case-by-case interpretive disputes. However, the solution to leave the determination of other means of coercion to State practice and to case law is an imperfect solution. It is extremely difficult to depart from the starting point described by Special Rapporteur Waldock, which is not conducive to outlawing economic and political coercion. The procedure of Articles 65 and 66 of the VCLT, unlike the one proposed by Lauterpacht, is weak, as it: (i) only refers to Article 33 of the UN Charter on the pacific settlement of disputes and (ii) at most provides States with non-binding decisions by the Conciliation Commission, according to paragraph 6 of the Annex to the 1969 Convention. Moreover, one should hardly expect UN organs (and even less so the Security Council) to address these questions directly through an authoritative source and not only through *soft law*.

The final decision of the Vienna Conference to condemn 'the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty' in *soft law*<sup>40</sup> does not suffice to give effect to those pressing needs. If it were clear, as the wording of the declaration points out, that such acts violate good faith and sovereign equality,<sup>41</sup> why not strive to include them in

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<sup>40</sup> *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*, (Doc A/CONF.39/20). Available in UN, 'Official Records' (n 30) 285.

<sup>41</sup> The Preamble is written as follows: 'The United Nations Conference on the Law of Treaties, Upholding the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith, Reaffirming the principle of the sovereign equality of States, Convinced that States must have complete freedom in performing any act relating to the conclusion of a treaty, Deploing the fact that in the past States have sometimes been forced to conclude treaties under pressure exerted in various forms by other States, Desiring to ensure that in the future no such pressure will be exerted in any form by any State in connexion with the conclusion of a treaty'.

the final text? By coupling soft law with soft enforcement,<sup>42</sup> the symbolic message of the declaration may only shine as fool's gold.

#### IV. CREEPING COLONIALISM

The political question which should be brought to the limelight is this: who is favored by the maintenance of the *status quo*?

Since the 1990s, a growing body of literature on the history of international law has pointed out the maintenance of colonial arguments in contemporary international law.<sup>43</sup> As Matthew Craven has shown, a stereotypical depiction of colonialism simply as colonial annexation, which was supposedly brought to an end by the era of decolonization, will do us no favor. Most colonial structures intend to keep advancing free trade and economic exploitation under the color of equality and objectivity. 'It is in the idea of informal empire [...] that a critique of colonialism might retain an enduring value for the current project of international law'.<sup>44</sup>

This was also a common change for TWAILers. The transition from TWAIL I to TWAIL II added new layers of complexity to the depicting of colonial structures.<sup>45</sup> It effected the transition from what James Thuo Gathii calls the *weak* form of anti-colonial scholarship to the *strong* form of anti-colonial scholarship.<sup>46</sup> Acquiring sovereignty was no longer seen as the final answer to colonialism, since informal mechanisms of empire continued to pervade many dealings between sovereign States.

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<sup>42</sup> Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *International & Comparative Law Quarterly* 901.

<sup>43</sup> Eg Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005); Martti Koskenniemi, 'Empire and International Law: the Real Spanish Contribution' (2011) 61 *University of Toronto Law Journal* 1.

<sup>44</sup> Matthew Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74 *Nordic Journal of International Law* 335, 342.

<sup>45</sup> Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77, 79-86.

<sup>46</sup> James Thuo Gathii, 'International Law and Eurocentricity' (1998) 9 *European Journal of International Law* 184, 187-189.



Anne Orford points out that it is important to ask whether and how far the decolonization project has gone. Finding an answer to this question demands attention to the role of the past in shaping the present.<sup>47</sup> The universalist project constantly rewrites its tradition and displaces its forefathers and turning points from one context to another. Drawing from Orford's analysis, one may notice that simply relying on codification and setting aside attempts of progressive development is a 'politics of time': it boils down to mimicking the past, and to fostering the project of historical continuities.

The modernization of colonial legal technologies<sup>48</sup> and their coupling to an ever-renewing universalism is also a theme of great interest to critical international lawyers, not necessarily linked to TWAIL scholarship. A good example of this is David Fidler's depicting of Structural Adjustment Policies (SAPs).<sup>49</sup> According to him, SAPs resemble the classical system of capitulations. Both instruments impose harmonization in order to foster a supposedly advantageous legal, economic and political environment, but essentially rely on unequal relations, which are concealed behind managerialism.

Matthew Craven points out that the disappearance of the discussions regarding unequal treaties has had detrimental effects on our current understanding of international law. As a result, the responses given by the law of treaties to tackle those issues are insufficient.<sup>50</sup> By restraining the discussions on coercion to the threat or use of force, the regime of the VCLT left unanswered some of the most important problems of international politics related to systemic inequalities and vitiated consent. Thereby, it crystallized the North/South cleavage. According to Craven, the analysis of the ICJ in the 1973 *Fisheries Jurisdiction* case constitutes another difficulty for the application of coercion as a ground of the invalidity of treaties. When

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<sup>47</sup> Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' in Mark Toufayan, Emmanuelle Tourme-Jouannet and H el ene Ruiz-Fabri (eds), *Droit International et Nouvelles Approches sur le Tiers-Monde: Entre R ep etition et Renouveau* (Soci et e de L egislation Compar ee 2013).

<sup>48</sup> Anghie, *Imperialism, Sovereignty* (n 43) 107.

<sup>49</sup> David A Fidler, 'A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization' (2000) 35 *Texas International Law Journal* 387.

<sup>50</sup> Craven, 'What Happened to Unequal Treaties?' (n 44).

denying that the presence of naval forces off the coast of the State did not amount to *clear evidence* of a threat of the use of force, the ICJ raised the burden of proof to a nearly untenable standard, which is only clearly met by military attacks.<sup>51</sup> The ICJ's decision to demand strict material evidence was especially troubling since menaces usually do not 'stay on record'. Searching the *travaux préparatoires* or diplomatic exchanges for a clear statement on the issue is hardly successful.

Other of Craven's poignant reflections relate to the negative role that the doctrine of sovereign equality plays in the law of treaties. Indeed, a presumption of equality is usually positive for the *implementation* of the treaty, as it insists on charging both parties with the duty of performance, guaranteeing that whatever was agreed will effectively be implemented. However, this presumption is not particularly useful when it comes to the moment of the *conclusion* of the treaty – it is then that power relations may lead to abusive pressures and unwanted concessions and should therefore be susceptible and subject to legal analysis.<sup>52</sup>

Stanislaw Nahlik noticed that the idea of a presumed consent was not definitely abandoned by the ILC in the discussions on the law of treaties.<sup>53</sup> According to him, Special Rapporteur Waldock waged *pacta sunt servanda* against substantive consent, giving preference to the former in spite of the latter. Waldock constantly emphasized the idea that invalidity is an exceptional condition that should not be easily summoned. Otherwise, it would undermine the sanctity of treaties, which is a necessary condition to general welfare. This inversion appears as an argumentative strategy to contradict the liberal postulates on which the universalist tradition rests – that without free consent, no obligations are born. However, this argument is not convincing as it does not evince which overarching principle would trump other forms of coercion. This tactic echoes Martti Koskenniemi's description of the conundrum of tacit consent: tacit or presumed consent is an international legal argument supposedly based on consent, but that

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<sup>51</sup> Craven, 'What Happened to Unequal Treaties?' (n 44) 373.

<sup>52</sup> Ibid 337-341.

<sup>53</sup> Stanislaw E Nahlik, 'The Grounds of Invalidity and Termination of Treaties' (1971) 65 *American Journal of International Law* 736.

actually supports non-consensual justice.<sup>54</sup> It may be summarized as follows: once the treaty is signed, we *presume* consent and raise the bar for displacing it, instead of primarily considering whether it was signed or not in free will.

The line of reasoning followed by Special Rapporteur Waldock is quite similar to the one followed by the authors who defended the system of capitulations in international law.<sup>55</sup> In both cases, the need to facilitate international relations was summoned to justify greater or lower tolerance towards certain practices. In the case of coercion, the 'normal working of the relations between States' implied that the invalidity of treaties is a last resource; in the case of capitulations, exceptions to the principle of territoriality would 'smoothen' the contacts between non-civilized and civilized nations. The strong presumption against invalidity and the preservation of sacrosanct agreements trample on the question of their regularity.

To conclude this section, I will reply to the question posed at the beginning of it. The maintenance of the *status quo*, in the case of Article 52 of the VCLT, is beneficial to power-relations and hard power in international politics and supports the 'carrots and sticks' model. The lack of a definitive position on the limits of coercion and the idea that these grounds of invalidity should only be summoned as a last resource incentivize the assertion of power in treaty negotiations and poses weak resistance to power politics instruments.<sup>56</sup>

## V. CONCLUDING REMARKS

The invalidity of treaties concluded under coercion must not be taken lightly, considering the risks that the acceptance of economic and political menaces as tools of negotiation brings to international relations. Many underdeveloped countries have a single big commercial partner who is capable of dictating its integration into chains of commerce, and who, by blocking the trade of goods with the weaker State or shunning its access to

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<sup>54</sup> Martti Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4, 20-27.

<sup>55</sup> Charles Henry Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies: 16th, 17th and 18th Centuries* (Oxford University Press 1967) 97-128.

<sup>56</sup> Martin Wight, *Power Politics* (first published 1946, Bloomsbury 2002).

international mechanisms, may lead entire populations to famine. In situations like this, the weak negotiating country has no alternative but to bow down.

I strongly disagree with Sir Gerald Fitzmaurice's reasoning that private law analogies are not useful in the case of coercion against the State. The private law analogy is extremely useful to point out that international law's response to coercion lags far behind. Unlike international law, most national legal systems have already developed legal mechanisms that provide special protection for the weaker party in excessively unequal negotiations, embedding public law values in private law dealings. Labor law and consumer protection are great examples of these mechanisms. It is extremely important that we take consent seriously in international law, by outlawing the use of other forms of coercion in the conclusion of treaties.

The outcome of the VCLT negotiations is tainted by the decision not to give proper attention to intolerable forms of coercion. As such, it perpetuates the mechanisms of informal empire. The final choice to assert that alternative forms of pressure can be detrimental to good faith and sovereign equality through a *soft law* instrument, that is, the *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*, provides only a minor silver lining to the issue.<sup>57</sup>

As true as these criticisms may be, they do not answer the question of what to do next. TWAILers often face the 'chicken or egg dilemma': should they abandon the whole system due to its problems or should they try to work within the system in order to enhance it? This brings to the fore an already well-established criticism: the first TWAILers generally chose the latter option and were often accused by their younger peers of being too

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<sup>57</sup> Georges Ténékidès suggests that the *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties* be given at least the same value as the preamble of the VCLT in helping assess its meaning, since it was approved at the Vienna Conference and included in its Final Act – Ténékidès, 'Les effets de la contrainte' (n 31) 91. This reading is hardly compatible with the general rules on treaty interpretation, but it is important to emphasize that the *Declaration* may at least be summoned as evidence regarding the 'context' of the treaty (Article 31.1) or as an important part of its 'preparatory work' (Article 32) – Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2010) 79-80.

mainstream and optimistic in that regard; at the same time, many recent TWAILers fall prey to launching empty criticism, as they choose the former option. The choice seems to come down to being too much of a bureaucrat or too much of a utopian.

In cases like the one at hand, we test the limits of TWAIL's division into two – or more – subgroups that supposedly have distinctive characteristics and different approaches.<sup>58</sup> After all, TWAILers from both (or more) generations share the same objective – namely, to build an equal world that is neither insensitive nor negative to the South. In order to achieve this objective, one is not obliged to adopt a sole strategy, and this is all the more true when we think of TWAIL as an interdisciplinary movement. TWAILers should keep on criticizing the colonial traits of international law, but criticism does not preclude effective action under the spaces granted by international law.

As I have pointed out, it is true that the current architecture of Article 52 of the VCLT makes most formal mechanisms for constraining non-military coercion barely useful at most. The criticisms formulated against Article 52 and the demands for its revision are all well-warranted. Political action is still the main mechanism for the outlawing of non-military coercion as an instrument in treaty negotiations.<sup>59</sup> However, TWAILers should not refrain from trying to exploit the small leeway that is available. Shadow reporting to human rights bodies, highlighting the incongruences of traditional institutions of international law, cooperating with non-governmental and civil organizations, using internal mechanisms to report governmental abuse – these are some of the parallel tracks that may be used to mount a challenge against a narrow interpretation of coercion.

Moreover, TWAILers should not refrain from taking up the task of using mainstream reasoning against mainstream actors. The doubts over methodological originality and specificity<sup>60</sup> should not hinder TWAILers in

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<sup>58</sup> George RB Galindo, 'Splitting TWAIL?' (2016) 33 Windsor Yearbook of Access to Justice 37.

<sup>59</sup> Tzanakopoulos, 'The Right to Be Free' (n 4).

<sup>60</sup> Olivier Corten, 'Les TWAIL: Approche Scientifique Originale ou Nouveau Label Fédérateur?' in Mark Toufayan, Emmanuelle Tourme-Jouannet and Hélène Ruiz-Fabri (eds), *Droit International et Nouvelles Approches sur le Tiers-Monde: Entre Répétition et Renouveau* (Société de Législation Comparée 2013) 358-362.

pursuing their objective. TWAILers must wage legal arguments as political instruments to foster dissent and to bring about change in international relations.<sup>61</sup>

In this sense, as the ILC has indicated that Article 52 may embrace other interpretations, TWAILers should strive to make this recognition of an opening pay off. Treaty interpretation, after all, involves its own politics and allows as such for different solutions based on different methods none of which is exclusively correct.<sup>62</sup> Firstly, TWAILers should not fall into the trap of affirming that all exceptions must be interpreted restrictively (*exceptio est strictissimae interpretationis*). It is clear that the clause on coercion of the State should also be given an effective interpretation, as it safeguards fundamental values.<sup>63</sup>

Secondly, TWAILers may subvert the idea of restrictive interpretation in their favor, as it stands as a technique that can safeguard sovereignty. If the right to enter into treaties and to be bound by them amounts to the exercise of a sovereign prerogative, as the *Lotus* and *Wimbledon* cases have pointed out, the right to be bound only by a treaty to which full consent was given is also a sovereign prerogative. In this sense, when Articles 2.1.f and 2.1.g of the VCLT refer to 'a State which has consented to be bound by the treaty', a narrow interpretation would displace cases in which the treaty was effectively imposed.

Finally, a teleological interpretation of Article 52 of the VCLT also evinces the central role that consent plays in the conclusion of treaties, so much so that validity should be considered to depend on it. It should be up to detractors of this view to demonstrate both why setting aside non-military coercion and distinguishing it from military coercion is justifiable and how true consent is preserved in these contexts.

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<sup>61</sup> David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

<sup>62</sup> Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals' in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 3-32.

<sup>63</sup> Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 424-430.