Invalidity and Termination of Treaties: The Role of National Courts

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1. A problem the legal literature does not so far seem to provide much clarity about is whether, and when, the causes of invalidity or termination of a treaty operate automatically. The problem is generally presented as follows: when a cause of invalidity or termination arises, does the cause operate *automatically*, in the sense that *anyone* called upon to apply the treaty may judge whether the treaty is invalid or has been terminated and hence it is not to be applied, or is an international act of denunciation or some other equivalent international act necessary on the part of the state that intends to invoke the cause?

The answer to this question is unclear. There are certainly some causes of invalidity or termination about which there are not and cannot be any doubts. For instance, no one can doubt that a convention which is concluded for a specified time period terminates when the period expires, so that *anyone* nevertheless called upon to apply it may refuse to do so. Likewise, it is clear that a treaty which provides contracting states with the possibility of denunciation or withdrawal, perhaps on a set timetable, is not rendered inapplicable until a state has exercised its option in accordance with the treaty provisions. But ideas become uncertain and positions taken in the literature diverge with respect to many of the causes of invalidity and termination, especially with regard to those that can be found only by ascertaining situations of fact or law. In relation to such causes, there is the impression that the choice between the thesis that the causes operate automatically and the thesis that invalidity or termination may only constitute the object of denunciation or of an equivalent international act is generally an arbitrary one, and that non-automaticity is preferable the more difficult the causes of invalidity or extinction involved are hard to ascertain and thus more open to abuse.

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The positions put forward by contemporary legal scholars with respect to customary law, that is, in areas where the Vienna Convention on the Law of Treaties does not apply, confirm that non-automaticity is the preferred course. As far as customary law is concerned, there are no disputes as to the automatic nature – apart from expiration of the time – of *original* impossibility of performance, the emergence of a resolutive condition, or the extinction of a contracting state (unless succeeded by a new state). Similarly, legal scholars are fairly unanimous in holding that a denunciation or an equivalent act is needed where invalidity or termination stems from error, fraud, breach by a party or fundamental change of circumstances. There is, however, no agreement as to whether or not a violation of internal norms on treaty-making power, coercion of the state representative or a violation of *jus cogens* have an immediate impact on a treaty's validity; similarly, scholars disagree as to whether or not *supervening* impossibility of performance or war operate automatically.[1]

1 As far as customary law is concerned, see Dubouis, 'L'erreur en droit international public', *Annuaire Français de droit international* (1963) 205; Saulle, 'Errore – diritto internazionale', 15 *Enciclopedia del diritto (ED)* (1966) 313; B.P. Sinha, *Unilateral Denunciation of Treaty because of Prior Violations of Obligation by other Party* (1966) 83, 206; G. Morelli, *Nozioni di diritto internazionale* (1967) 281 (incompetence), 283 (coercion of a state representative, error, fraud), 327 (breach), 330 (change of circumstances); Morelli, 52 *Annuaire de l'Institut de Droit International* (Vol. II) (1967) 325 (impossibility of performance, resolutory condition, breach); R. Quadri, *Diritto internazionale pubblico* (1968) 77 (termination for change of circumstances, breach), 204 (war), 171 (*jus cogens*), 193 (resolutory condition); C. Rousseau, *Droit international public* (Vol. I) (1970) 208 (resolutory condition, expiry); Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law', 20 *Österreichische Zeitschrift für öffentliches Recht (ÖZ)* (1970) 26, 63 (breach); Capotorti, 'L'extinction et la suspension des traités', 134 *RCDI* (1971) 471 and 537 (breach, change of circumstances), 473 (expiry), 492 (abrogation), 531 (supervening impossibility), 557 (war); R. Monaco, *Manuale di diritto internazionale pubblico* (1971) 114 (error, fraud, coercion of a representative); A. Oraison, 'Le dol dans la conclusion des traités', 75 *RGDIP* (1971) 658, 668; A. Oraison, *L'erreur dans les traités* (1972) 206, 218; G. Haraszti, *Some Fundamental Problems of the Law of Treaties* (1973) 322 (breach), 409 (change of circumstances), 424 (supervening impossibility); E. Back Impallomeni, *Il principio rebus sic stantibus nella Convenzione di Vienna sul diritto dei trattati* (1974) 39; Morelli, 'Aspetti processuali della invalidità dei trattati', *Rivista di diritto internazionale (RDI)* (1974) 5 (incapacity of the subject, original impossibility of performance, vices of consent); Bernardini, 'Qualche riflessione su norme internazionali di *jus cogens* e giurisdizione della Corte nella Convenzione di Vienna sul diritto dei trattati', 14 *Comunicazioni e studi (CS)*, (1975) 90, 94, 97; Haraszti, 'Les traités et le changement fondamental de circonstances', 146 *RCDI* (1975) 79; G. Napoletano, *Violenza e trattati nel diritto internazionale* (1977) 451, 560; Przetacznik, 'The Clausula rebus sic stantibus', *Revue de Droit International, de Sciences Diplomatiques et Politiques* (1978) 194; Giuliano, Scovazzi & Treves, *Diritto internazionale* (Vol. I) (1983) 483 (causes of invalidity and termination); L. Sico, *Gli effetti del mutamento delle circostanze sui trattati internazionali* (1983) 178, 207; R. Pisillo Mazzeschi, *Risoluzione e sospensione dei trattati per inadempimento* (1984) 9, 62; A. Vamvoukos, *Termination of Treaties in International Law* (1985) 198 (change of circumstances); L. Ferrari Bravo, *Lezioni di diritto internazionale* (1986) 199 (invalidity, expiry, resolutory condition, extinction of the parties, supervening impossibility, change of circumstances, breach).

It should be noted for the sake of completeness that where denunciation or an equivalent act is considered necessary, disputes also arise as to the consequences deriving from the denunciation itself; thus scholars debate whether invalidity or termination operate by effect of the denunciation alone, or only after they have been ascertained by an international judge or by an agreement with the other contracting parties, or when any attempt to reach an agreement has failed.[2] These debates are, however, beyond the scope of this article; this paper is confined to the question of whether or not causes of invalidity or termination operate automatically.

2. Uncertainties and differences of opinion also arise in the literature dealing with the question of the automaticity of causes of invalidity and of termination in connection with the interpretation of the Vienna Convention on the Law of Treaties.

It must be frankly recognized that the norms of the Vienna Convention governing the matter do not lend themselves to a sure solution. If one considers Articles 46-64, the provisions regulating the individual causes of invalidity and termination, the problem would seem to be solved: some of these provisions use expressions (like "A treaty ... shall be without any legal effect", or "A treaty is void...", or again "A treaty shall be considered as terminated...") which seem to start from the position that the causes of invalidity or termination referred to may be found by anyone called upon to apply the treaty, and hence may operate automatically. Others, use the formula "A state may invoke...", which seems instead to presuppose that the cause must in any case be invoked at the international level in order for it to be operative. But everything is thrown into debate again by Articles 65-68, from which one derives the impression that automaticity is excluded *in every case*.

Articles 65-68, as we know, lay down a complex international procedure for ascertaining the invalidity or termination of a treaty. The procedure begins with notification when one contracting state notifies the other contracting states of its intention to avail itself of a cause of invalidity or of termination (Article 65) and, if there is opposition by the other states, concludes either with a non-binding decision by the Conciliation Commission provided for by the Annex to the Convention or else, in cases where invalidity stems from a conflict with *jus cogens*, with a binding decision by the International Court of Justice (Article 66). Although the wording of Article 65(1) might lead one to think that this procedure applies only to some of the causes of termination or invalidity,[3] it in fact seems to concern *all* causes of invalid-

2 See (among the works cited in the preceding note) Dubouis (1963) 205; Sinha (1966) 79; Simma (1970) 31, 38, 82; Capotorti (1971) 562; Monaco (1971) 114; Oraison (1971) 668; Oraison (1972) 206, 218; Haraszti (1973) 411; Morelli (1974) 5; Haraszti (1975) 83; Przetacznik (1978) 194; Sico (1983) 207; Pisillo Mazzeschi (1984) 58; Vamvoukos (1985) 210

3 Art. 65 states: "A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim." The fact that Art. 65 refers to the state which "invokes" a cause of nullity or termination might make one think that the international procedure is to be considered as

ity and termination, not only those which in the light of the provisions cited above seem not to be automatic in nature. This must be the case, otherwise there is no way to explain why Article 66 explicitly mentions *jus cogens*, the cause of invalidity and termination which by the tenor of Articles 53 and 64 ought more than any cause, operate automatically. The truth is that Articles 65-68, taken together with the articles on the individual causes of invalidity and termination, leave one full of uncertainty and doubt. Nor can illumination be derived from Article 69ff. regarding the "consequences" of invalidity and termination, since these articles speak of invalidity and termination that are "under" or "in accordance with the present Convention", and since, as the preparatory work shows,[4] this means under or in accordance with both the provisions regarding the individual causes and those contained in Articles 65-68!

There is then no reason to be surprised that a clear solution to the problem of the automaticity of the causes of invalidity or termination cannot be found in the legal scholarship dealing with the Vienna Convention. It may be noted in this connection that the thesis of automaticity meets with unanimity only in regard to abrogation by tacit mutual consent; that the thesis of non-automaticity in connection with violation of internal norms on treaty-making power, error, fraud, corruption, breach of the treaty by the other party, supervening impossibility of performance or fundamental change of circumstances seems generally accepted; and that scholars split on the issue in connection with conclusion of the treaty by an unauthorized person (Convention Article 8), coercion of the representative of the state, coercion of the state, and violation (or supravenience) of a norm of *jus cogens*.[5]

necessary only for causes which, on the basis of the provisions we examined earlier in the text, "may be invoked" by states.

4 See para. 4 of the *Commentary of the United Nations International Law Commission on Art. 39 of the Draft Articles on the Law of Treaties* (corresponding more or less to the present Art. 69 of the Convention) in *United Nations Conference on the Law of Treaties – Official Records – Documents of the Conference*, United Nations, New York (1971) 56.

5 See Capotorti, 'Il diritto dei trattati secondo la Convenzione di Vienna', in *Convenzione di Vienna sul diritto dei trattati* (1969) 51 (causes of invalidity), 59 (breach, supervening impossibility, change of circumstances, supervening *jus cogens*), 66 (causes of invalidity and termination); Simma (1970) *supra* note 1, at 63 (breach); Ago, 'Droit des traités à la lumière de la Convention de Vienne – Introduction', 134 *RCDI* (1971) 318 (corruption, error, fraud, coercion of a representative of a state, coercion of a state); Capotorti (1971) *supra* note 1, at 529 (supervening impossibility), 544 and 569 (change of circumstances), 550 and 569 (breach), 568 (abrogation), 568 (causes of termination); Elias, 'Problems Concerning the Validity of Treaties', 134 *RCDI* (1971) 374 and 410 (fraud), 380 (coercion of a representative of a state), 410 (error, corruption, coercion, *jus cogens*); Nahlik, 'The Grounds of Invalidity and Termination of Treaties', 65 *AJIL* (1971) 746 (incompetence, error, fraud, corruption, coercion of a representative of a state, coercion of a state, *jus cogens*), 750 (breach, supervening impossibility, change of circumstances); Oraison (1971) *supra* note 1, at 658 (fraud); P. De Visscher, 'Cours général de droit international public', 136 *RCDI* (1972) 92 (causes of invalidity); Oraison (1972) *supra* note 1, at 206 (error); Haraszti (1973) *supra* note 1, at 417 and 425 (change of circumstances), 425 (supervening impossibility); Back Impallomeni (1974) *supra* note 1, at 41, 46 (change of circumstances); T.O. Elias, *The Modern Law of Treaties* (1974) 131 (supervening impossibility), 140 and 169 (coercion of a representative of a state), 140 and

Under the Vienna Convention the consequences resulting from an act of denunciation and in particular from a state's notification, pursuant to Article 65, of its intent to invoke a cause of invalidity or termination remain uncertain. Scholars debate whether, during the procedure pursuant to Articles 65-68, a state ought to continue to apply the treaty or it may provisionally suspend its application. In addition, there is disagreement as to whether, if one of the parties refuses to accept the conclusion of the Conciliation Commission, the claim to invalidity or termination remains paralyzed indefinitely.[6] But as we already noted in connection with the debates concerning customary law, these issues are outside the scope of the present study.

171 (coercion of a state), 163 and 204 (fraud), 204 (error, corruption, *jus cogens*); Morelli (1974) *supra* note 1, at 8 (incompetence, error, fraud, corruption, coercion of a representative of a state, coercion of a state, *jus cogens)*; Rozakis, 'The Law on Invalidity of Treaties', 16 *Archiv des Völkerrechts* (1974) 159 (causes of invalidity), 168 (coercion of a representative of a state, coercion of a state), 171 (*jus cogens*); Bernardini (1975) *supra* note 1, at 87 (*jus cogens*); Haraszti (1975) *supra* note 1, at 87 (causes of invalidity and termination, change of circumstances); C.L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976) 109 and 114 (causes of invalidity), 114 and 144 (existing and emerging *jus cogens*); Napoletano (1977) *supra* note 1, at 485, 560 (coercion of a representative of a state and of a state); J.G. Starke, *An Introduction to International Law* (1977) 506 (change of circumstances); Jiménez de Aréchaga, 'International Law in the Past Third of a Century', 159 *RCDI* (1978) 59 (invalidity), 68 (defect of capacity, error, fraud, corruption, coercion of a representative of a state, coercion of a state, *jus cogens*), 72 (change of circumstances), 79 (breach); Ronzitti, 'La disciplina dello *jus cogens* nella Convenzione di Vienna sul diritto dei trattati', 15 *CS* (1978) 266 (causes of invalidity), 276 (causes of termination); I. Brownlie, *Principles of Public International Law* (1979) 616 (supervening impossibility), 618 (incompetence, error, fraud, corruption, breach, impossibility, change of circumstances, coercion of a state, existing and emerging *jus cogens*); M. Akehurst, *A Modern Introduction to International Law* (1980) 132 (cases covered by Art. 8 and 46-53), 136 (breach, supervening impossibility, change of circumstances); Gómez Robledo, 'Le *jus cogens* international: sa genèse, sa nature, ses fonctions', 172 *RCDI* (1981) 140 (incompetence, error, fraud, corruption, coercion of a representative of a state, coercion of a state), 140 and 150 (existing and emerging *jus cogens*); Pisillo Mazzeschi (1984) *supra* note 1, at 114, 124 (breach); I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984) 192 (supervening impossibility); Sur, 'La formation du droit international', in H. Thierry, J. Combacau, S. Sur, C. Vallée, *Droit international public* (1984) 81 (causes of invalidity), 101 (causes of termination); A. von Verdross, B. Simma, *Universelles Völkerrecht – Theorie und Praxis* (1984) 536 (causes of invalidity); P. Reuter, *Introduction au droit des traités* (1985) 156 (change of circumstances); Vamvoukos (1985) *supra* note 1, at 205 (coercion of a representative of a state, coercion of a state, supervening impossibility, breach, change of circumstances); Cahier, 'Le changement fondamental de circonstances et la Convention de Vienne de 1969 sur le droit des traités', in *Le droit international à l'heure de sa codification – Etudes en l'honneur de Roberto Ago* (Vol. I) (1987) 181, 184; Sico, 'Rebus sic stantibus (clausola)', 39 *Enciclopedia del diritto* (1988) 16.

6 On this point see Capotorti (1969) *supra* note 5, at 50, 66; Kearney and Dalton, 'The Treaty on Treaties', 64 *AJIL* (1970) 555; Mosconi, 'La Convenzione di Vienna e le controversie sull'invalidità e l'estinzione dei trattati', *Diritto Internazionale (DI)* (1970) 268; Simma (1970) *supra* note 1, at 81; Capotorti (1971) *supra* note 1, at 575 and note 32; Elias (1971) *supra* note 5, at 404; Oraison (1971) *supra* note 1, at 658; De Visscher (1972) *supra* note 5, at 92; Oraison (1972) *supra* note 1, at 206, Haraszti (1973) *supra* note 1, at 417; Back Impallomeni (1974) *supra* note 1, at 46; Elias (1974) *supra* note 5, at 131, 194; Morelli (1974) *supra* note 1, at 10; Rozakis (1974) *supra* note 5, at 159; Bernardini (1975) *supra* note 1, at 87, esp. 93; Haraszti (1975) *supra* note 1, at 87; Rozakis (1976) *supra* note 5, at 109, 114, 144, 164; Barile, 'La structure de l'ordre juridique international – Règles générales et règles con-

3. In the following pages we seek to resolve the problem concerning automaticity of the causes of invalidity or termination of treaties by considering the case law of the national courts.

Given that the focus here is on case law, automaticity is here seen from the standpoint of the national judge. What we wish to establish, in short, is whether the invalidity or termination of a treaty can be found by any domestic judge called upon to apply it, and when, if ever, it must instead be the object of a formal act of denunciation or an equivalent declaration in international law. What we discover with respect to the competence of the national judge may then be applied to other domestic legal operators (government officials, public bodies, and in general anyone called upon to apply the law or to secure compliance with it within the state).

It should be quite clear that the alternative we posit is between a finding by a domestic judge and a formal act of the state addressed to the other contracting parties. We are not interested here in issues, solved in different ways in the various domestic legal systems, concerning the degree of deference the judiciary affords the Executive when deciding questions of international law.[7] In other words, what we are interested in establishing is whether a domestic judge may find a cause of invalidity or termination irrespective of whether he must, in order to make his decision, ask for a more or less binding opinion from the organs of the Executive.

The consideration of domestic case law we shall engage in is inspired by the thesis, supported for some time now by one of the authors of this article,[8] that the *effectiveness* of international law follows from its application by domestic "legal operators" (as defined above), in particular, national judges, and hence must be founded upon a strengthening of the role of the latter. Understood in this way, our consideration seeks to verify whether domestic case law supports – or at least shows trends in favour of – a working hypothesis based on this theory regarding the need to strengthen the role of national judges.

Our working hypothesis is that automaticity and the power of denunciation are not mutually exclusive, but concurrent. *All* the causes of invalidity and of termination may be invoked by anyone called upon to apply the treaty – and for the purpose that interests us here, by domestic judges – and *all* causes may be the object of a formal act of denunciation or an equivalent act. A domestic judge's finding and a

ventionnelles', 161 *RCDI* (1978) 99; Jiménez de Aréchaga (1978) *supra* note 5, at 59, 72, 81; Ronzitti (1978) *supra* note 5, at 266, 276; Gómez Robledo (1981) *supra* note 5, at 150; Giuliano, Scovazzi and Treves (1983) *supra* note 1, at 490; Pisillo Mazzeschi (1984) *supra* note 1, at 161; Sinclair (1984) *supra* note 5, at 188, 233; Sur (1984) *supra* note 5, at 81, 101; Reuter (1985) *supra* note 5, at 156; Cahier (1987) *supra* note 5, at 184.

7 On this point see Conforti, 'Cours général de droit international public', *RCDI* (1988), forthcoming.

8 B. Conforti, *Appunti dalle Lezioni di diritto internazionale* (1976) 9; B. Conforti, *Lezioni di diritto internazionale* (1982) 8; B. Conforti, *Diritto internazionale* (1987) 8. See also Chapter I of Conforti, 'Cours général', *supra* note 7.

state's denunciation at the international level fulfill different functions and have different effects.

A domestic judge's finding constitutes an integral part of his decision establishing whether a treaty applies to a particular case, a decision which *inter alia* involves the application of all international customary rules relating to the conclusion, modification and termination of treaties. As a Dutch judge called upon to decide whether the Mannheim Convention of 1868 concerning navigation on the Rhine still applied in 1950 to relationships between the Netherlands and the Federal Republic of Germany once stated:

> [S]ince the origin and the cessation of international obligations arising from treaties are governed by customary international law and since the Netherlands courts are competent and therefore obliged to apply that law also, those courts must independently judge the question if and how far the provisions of the Convention of Mannheim apply to a particular case.[9]

The domestic judge's decision, however – and this is the limit of automaticity – only affects *the particular case at issue*. In other words, the judge's finding regarding the treaty's validity or termination may be found not to apply in a different case, just as judicial application of any legal rule, whether international or domestic, may vary from one case to another.

A formal act of denunciation or any such similar manifestation of intent serves a purpose entirely different from that of a domestic court holding. By denouncing a treaty at the international level, a state proclaims its intent to free itself *once and for all* from its contractual commitment. Such a manifestation of intent, when it is not the exercise of a power of denunciation explicitly provided for in the treaty (that is, when it is not itself an independent cause of termination) but is founded on another cause of invalidity or termination, is never indispensable; if a state formally denounces a treaty, it is to bring out certainly and definitely the fact that in its view the treaty is not applicable or no longer applicable as a result of its being invalid or terminated. It is clear, then, that once the state has manifested its intent in this way, its own legal operators, including its own judges, are bound thereby, provided of course that the manifestation of intent emanates from the agencies which have the competence to denounce treaties. It is also clear that the manifestation of intent has no binding effect on either the legal operators or judges of the other Contracting Parties.

This is our working hypothesis. Let the case law now speak.

4. Starting with the causes of invalidity – which for a good proportion of legal scholars do not in principle operate automatically – it seems to us that almost all of the judgments we have considered have actually held just the opposite. In this con-

9 District Court of Rotterdam, 29 December 1950, *The Golden River* v. *The Wilhelmina*, International Law Reports (ILR) (1950) 355.

nection it is important to cite, at the outset, a group of rather significant and emblematic decisions, again Dutch, regarding *coercion of the state*. These decisions, handed down in the 1950's, address the question whether, at the time of the Second World War, Czechoslovaks in the Sudeten territory who had become Germans under the 20 November 1938 Treaty between Germany and Czechoslovakia were to be regarded as enemies. The reply contained in the decisions we are discussing – decisions handed down by the District Court of Arnhem (1952), the Judicial Division for the Restoration of Legal Rights (1956) and the District Court of The Hague (1956) – is indisputably in the negative; the Courts refused to apply the treaty, deeming it the result of coercion of the Czechoslovak State.[10] For example, the Hague District Court stated:

> [The defendant] maintained that the Munich Agreement of September 29, 1938, as well as the German-Czechoslovak Nationality Treaty of November 20, 1938, and the German 'Gesetz über die Wiedervereinigung der sudeten-deutschen Gebiete mit dem Deutschen Reich' of November 21, 1938, were invalid under international law and that, therefore, he could not have acquired German nationality within the meaning of the Netherlands Decree concerning Enemy Property under any of those instruments. The Court agrees with the argument of the defendant. The German-Czechoslovak Nationality Treaty was invalid because it was concluded under clear and unlawful duress – the effect of which Czechs could not escape – exercised by Germany against Czechoslovakia. It must therefore be accepted that the defendant at the moment when the Netherlands Decree concerning Enemy Property entered into force did not possess German nationality in the sense of that Decree.[11]

It should be noted that the Arnhem Court of Appeals made a contrary finding in 1952, reversing the Arnhem District Court's decision.[12] The Court of Appeals found the question of whether treaties concluded under threat of armed force ought to be regarded as "null and void" to be "controversial" and decided that in any case the Treaty of 20 November 1938 had to be taken into account, given that Czechoslovakia had "in fact" complied with the provisions of the Treaty itself. Even though the Appeals Court embraced the thesis still supported by some legal scholars in the 1950's,[13] namely, that duress against the state, as opposed to duress on the state representative, does not constitute a cause of nullity, the appellate judgment con-

10 District Court of Arnhem, 17 January 1952, *Nederlands Beheers-Instituut v. Nimwegen and Männer*, ILR (1951) 249; Judicial Division of the Council for the Restoration of Legal Rights, 29 June 1956, *Ratz-Lienert and Klein v. Nederlands Beheers Instituut*, ILR (1957) 536; District Court of The Hague, 11 December 1956, *Amato Narodni Podnik v. Julius Keilwerth Musikinstrumentenfabrik*, ILR (1957) 437.

11 ILR (1957) 437.

12 Court of Appeal of Arnhem, 18 November 1952, *Nederlands Beheers-Instituut v. Nimwegen and Männer*, ILR (1951) 251.

13 See G. Schwarzenberger, *A Manual of International Law* (1950) 62, and (1952) 66; G. Morelli, *Nozioni di diritto internazionale* (1951) 286, (1955) 270, and (1958) 280; C. De Visscher, *Théories et réalités en droit international public* (1953) 300; Kelsen, 'Théorie du droit international public', 84 *RCDI* (1953) 139.

firms our working hypothesis: It is clearly based on the assumption that the domestic court had the competence to decide the validity of the 1938 Treaty. Moreover, by departing from the other judgments, it highlights the limits that characterize the decision of the judge, or of anyone else called upon to apply the treaty, namely that such decisions, be they right or wrong, are valid only for the specific case.

Apart from a few other verdicts again dealing with coercion of the state as a whole[14] or asserting, in rather general terms, domestic court competence to decide the validity of treaties,[15] particular emphasis should be placed on the decisions affirming domestic court's competence to decide the validity of a treaty said to be *contrary to peremptory rules of general international law (jus cogens)*. Outstanding among these are the judgments of the United States Military Tribunal of Nuremberg of 30 June 1948[16] and the German Constitutional Court of 7 April 1965.[17]

However, the majority of the decisions that can be cited in favour of the power of domestic courts to adjudicate the validity of treaties concern the question of respect for *internal norms on treaty-making power*. In large part, these judgments ask, and answer, the question of whether agreements concluded in simplified form (without ratification), or at any rate concluded without the assent of Parliament, are valid where ratification and assent are provided for by the Constitution. As far as de-

14 In this connection one might cite – apart from evaluations that may be made on the circumstances of the specific case and ... the Court's authoritativeness – the judgment of the People's Court of Germany of 28 October 1940 in the *German Nationality (Alsace-Lorraine)* case (Annual Digest and Reports of Public International Law Cases (AD) (1919-1942) 218, which regards the Treaty of Versailles as invalid because "the German people were forced to accept [it] in consequence of the illegal blockade of starvation [sic!]."

15 See the judgment of the District Court of Utrecht of 20 May 1942 *In re Établissements Strauss v. Vraets Bros.*, AD (1919-1942) 222 which affirmed the applicability of the Treaty on Civil Procedure of 15 July 1907 in relations between France and the Netherlands, after finding that the Treaty had not been denounced by either country, that there was not a state of war and that "there [was] no reason for the supposition that the Treaty ha[d] lost its validity as between France and the Netherlands, in the prevailing circumstances, in virtue of any unwritten rule of international law."
On the question of the validity of reservations see Italy, Court of Cassation (Joint Sessions), 21 October 1977, *Bari Institute of the International Centre for Advanced Mediterranean Agronomic Studies v. Jasbez*, 77 ILR 605.

16 *In re Krupp and Others* AD 15, 626f. The Tribunal stated that a supposedly existing agreement between France and Germany on the use of French prisoners of war in German armament production was "manifestly *contra bonos mores* and hence void."

17 *Assessment of Aliens for War Taxation* case, 43 ILR 8. The Court found an agreement between Germany and Switzerland on tax matters, involving the subjection of foreigners to charges covering expenses arising as a consequence of war, was not contrary to *jus cogens*.
Also worthy of citation is a 21 March 1957 decision of the same court in the German Assets in *Switzerland* case, ILR (1957) 542. In that decision, the German Constitutional Court found that an agreement between Germany and Switzerland which dealt with immovable propertywas not contrary to an alleged rule of general international law protecting private property.
Again in connection with *jus cogens*, see also the verdict of the Dutch District Court, cited *infra* note 35, a verdict we shall dwell on later in the text.

cisions holding invalidity, or better yet holding inapplicability by reason of invalidity, the following may be cited (in chronological order):

US Court of Appeals for the Second Circuit, 15 January 1919, refusing to apply the Universal Postal Convention since it had been concluded by the Postmaster-General "by and with the advice of the President" instead of "by and with the advice of the Senate";[18] Polish Supreme Court, 10 May 1921, regarding as without binding force the Treaty of St. Germain, as not having been ratified;[19] Tribunal Civil Seine, 28 May 1930, regarding as a "dead letter" (sic!) an agreement on refugees which had been concluded without the assent of the French Parliament;[20] Supreme Court of the Philippines, 31 March 1949, declaring that "The Philippines is bound only by the treaties concluded and ratified in accordance with our Constitution";[21] Court of Appeals of Paris, 28 November 1950, refusing, again for lack of parliamentary assent, to apply a Franco-Belgian exchange of letters of 1946 regarding extradition;[22] US Court of Appeals for the Fourth Circuit, 15 April 1953, regarding as "void" an "executive agreement because it was not authorized by Congress and it contravened the provisions of the Agricultural Act, 1948";[23] Tribunale Livorno, 3 April 1954, maintaining that the provisions governing a United States military base at Livorno had not been regulated internationally since Italy had not "undertaken commitments in conformity with its constitutional law which, to give them binding force, requires (Constitution Art. 87) ratification by the President of the Republic, following authorization by both Houses, in the cases indicated by the foregoing Art. 80";[24] French Cour de Cassation, 6 January 1955, regarding as "not binding on the Courts" an exchange of letters which had not been not published in the *Journal Officiel*;[25] High Court of Justice of Jordan, 27 November 1955, finding that an agreement which had been concluded between representatives of the United States government and of the Hashemite Kingdom, but had not been concluded by the King and confirmed by the Jordan Parliament "was not concluded by the proper authority and hence is not operative";[26] Supreme Court of Bangladesh, 3 September 1974, claiming that a treaty ceding territory could not be "implemented" because that type

18 *Four Packages of Cut Diamonds v. U.S.*, AD (1919-1922) 314.

19 *(Polish) State Treasury v. Archduke Rainer Karl and Land Credit Bank of Lwów*, AD (1919-1922) 318.

20 *Samuel v. Dame Mahokian, Journal du droit international (JDI)* (1931) 391.

21 Cited in the Philippine Government's reply to the United Nations Law Commission questionnaire on the law of treaties (doc. A/CN (23 March 1950) 64.

22 *In re Van Bellinghen*, ILR (1950) 276.

23 *U.S. v. Guy W. Capps, Inc.*, ILR (1953) 414.

24 *Foro Italiano (FI)* (1954) 1357.

25 *Sanzogni v. Caisso*, ILR (1955) 604.

26 *Jabagi v. Minister of Finance and Another and Co-operative Department for Water Resources*, ILR (1955) 618.

of treaty "*can only be concluded* with the concurrence of Parliament by necessary enactment."[27]

Another series of judgments also based on the assumption that domestic courts are able to decide autonomously and also raised in connection with agreements concluded without ratification or assent by Parliament instead confirm the validity and hence the applicability of the agreements examined. Among the various decisions that may be cited in this connection[28]– decisions obviously less important for our purposes than those just mentioned – two deserve particular mention, a 22 June 1922 judgment of the German Federal Court in Civil Matters[29] and a 4 February 1963 decision of the Bologna Appeals Court.[30] Both contain an exact description, and justification, of the phenomenon of agreements concluded in simplified form.

It has been noted[31] that the decisions of domestic courts concerning the breach of constitutional norms on treaty-making power have to do more with the validity or invalidity (and applicability or inapplicability) of treaties from the viewpoint of municipal rather than international law. It seems to us that with the exception of a few rulings *explicitly* containing an indication to this effect – decisions not among those reported so far[32] – the international and municipal law viewpoints are gener-

27 *Kazi Mukhlesur Rahman v. Bangladesh and Another*, 70 ILR 37, esp. 49. For another decision reaching a similar conclusion, see Supreme Court of India, 14 March 1960, *In re The Berubari Union and Exchange of Enclaves*, 53 ILR 203, a *preventive* opinion on the possibility of implementing a treaty of territorial union with Pakistan without proper legislative sanction.

28 See France, Court of Appeal of Paris, 19 July 1934, *P.L.M. Railway Co. v. Société Coopérative Agricole dite "L'Union Maraîchère de Saint-Marcel et Saint Jean des Vignes"*, AD (1933-1934) 420; France, Court of Cassation, 14 May 1935, *Millet v. Dames Siostrzoneck and De Froding*, AD (1935-1937) 416; United States, District Court for the Southern District of New York, 22 December 1944, *Indemnity Insurance Company of North America v. Pan-American Airways, Inc. et al.*, AD (1943-1945) 271; France, Court of Appeal of Paris, 5 December 1947, *Colman Revue critique de droit international* (1947) 435; France, Tribunal of Sarreguemines, 22 June 1948, *Becker v. Préfet de la Moselle, Revue critique de droit international* (1949) 55; Luxembourg, High Court of Justice, 4 July 1951, *Office d'Aide Mutuelle Interalliée (OMA) v. Koerperich*, ILR (1951) 361, on an agreement between Luxembourg and the Allied Supreme Command which the High Court found valid whereas the District Court's had refused to apply it on the grounds that it was "secret"; German Federal Republic, Federal Constitutional Court, 29 July 1952, *Commercial Treaty (Germany)* case, ILR (1952) 461; Luxembourg, High Court of Justice, 3 December 1960, *Loschetter v. Public Prosecutor* 31 ILR 425; South Africa, Supreme Court, 28 September 1967, *State v. Eliasov*, 52 ILR 408; Italy, Court of Cassation, 22 March 1972, *Soc. Unione Manifatture v. Ministero delle Finanze RDI* (1973) 586; United States, Court of Appeals for the Fourth Circuit, 1 February 1982, *United States v. County of Arlington, Virginia*, 72 ILR 655.

29 *Paris Agreement* case, 9 January 1920, AD (1919-1922) 314.

30 *RDI* (1964) 319.

31 L. Ferrari Bravo, *Diritto internazionale e diritto interno nella stipulazione dei trattati* (1964) 232, 284.

32 The judgment of the Austrian Supreme Court of 20 February 1952, *Pokorny and Another v. Republic of Austria*, ILR (1952) 459, explicity mentions "municipal and constitutional law." See also Belgium, Court of Cassation, 27 November 1955, *Belgian State, Minister of National Defence and Minister of Finance v. Leroy*, ILR (1955) 614, according to which a treaty "cannot have binding force in municipal law until it has obtained the assent of Parliament"; Colombia,

ally interwoven to such an extent that they are, more often than not, inseparable. In fact, what is important for national courts to decide is whether a treaty should, despite a procedural flaw in its conclusion, be *applied in the specific case*. And the fact that the courts feel that they are able to take a decision of this type is sufficient to confirm our working hypothesis.

Admittedly, there also are decisions decisively opposed to the notion that domestic courts have the competence to judge the validity of treaties, even despite the fact that domestic judicial decisions are limited to the specific case. Among these are, for instance, the judgments of the Colombian Supreme Court of 6 December 1930,[33] and of the High Court of Calcutta of 11 August 1954.[34] Cases of this type are, however, few and far between.

Finally, special mention should be made of the judgment of the District Court of The Hague of 20 May 1986 in which the court refused to find the Convention regarding the installation of United States cruise missiles in The Netherlands – challenged by 14,774 natural and legal persons – as contrary to international *jus cogens*.[35] The refusal was motivated, among other things, by the court's belief that under international law "the national courts are not designated as the body empowered to assess whether a concluded or ratified treaty or any part of it is void." Is this judgment *clearly* opposed to the viewpoint supported here? Does it also represent a departure from a trend which, as derived from the decisions reported above, finds its strongest support in Dutch case law? An affirmative answer is clearly incorrect if one considers that in the case in point what the court was being asked was not to refrain from applying the agreement on the missiles to a specific case but to declare it void once and for all.[36]

5. Let us now move to the causes of the termination (or suspension) of treaties. For these causes too, as for those of invalidity, the trend that emerges from a consideration of the case law is undoubtedly in favour of the competence of domestic courts to assess whether or not a treaty is terminated (or suspended) and hence whether or not it should be applied in a specific instance. It may indeed be said that this trend towards recognition of domestic court competence is clearly evident with respect to *all* the causes of termination or suspension other than change of circumstances (the

Supreme Court, 25 June 1987, Miguel Romero Gomez, *International Legal Materials* (ILM) (1988) 498, which declares "unenforceable" the law approving an extradition treaty with the United States as being promulgated by an acting President of the Republic with no powers in matters of foreign policy (the same line was taken by the same Supreme Court in a judgment of 12 June 1986, ILM (1988) 503.

33 *In re Constitutionality of Law 55 of 1925*, AD (1929-1930) 338.

34 *Union of India v. Jain and Others*, ILR (1954) 256. See also, on duress and fraud, United States (1935) *The Crow Nation or Tribe of Indians of Montana v. United States* (G.H. Hackworth, *Digest of International Law* (Vol. V) (1943) 159.

35 *Stichting Verbiedt de Kruisraketten and 14,774 Natural and Legal Persons v. The State of the Netherlands*, *Netherlands Yearbook of International Law (NYIL)* (1987) 417.

36 *Id.*

principle of *rebus sic stantibus)* and breach of the treaty (the principle of *inadimplendi non est adimplendum*).

The competence of domestic courts is, firstly, clearly affirmed by the many judgments concerning *succession to treaties*, that is, judgments dealing with the question of whether or not the extinction of a state (and the consequent formation of a new state) or a radical change in government, brings about the termination of the treaty. The question has been resolved in various and contradictory ways by the courts of various countries – it is enough to recall the question of the "revival" of Austria after the Second World War, solved in different ways in Austria, France and Italy[37] – but always on the basis of the power to decide in connection with the specific case.[38]

37 According to the Court of Appeal of Turin (Italy), 14 June 1950, *Z. v. B.* 1 *FI* (1951) 486 and ILR (1950) 312, "[A]s a result of the revival of the Austrian Republic after having been incorporated in the German Reich, the treaties concluded by the Austrian Republic prior to the annexation have again come into force." The same line was taken in France, Tribunal de Commerce of the Seine, 12 November 1954, *Heller v. La Soie de Paris*, ILR (1954) 263. *Contra* Austria, Administrative Court, 16 February 1955, *Re Nijdam, Deceased*, ILR (1955) 530 and 2 October 1956, *Double Taxation Agreement (Austria)* case, ILR (1956) 123; Austria, Supreme Court, 21 February 1961, *Service of Summons in Criminal Proceedings (Austria)* case, 38 ILR 135.

38 See Germany, Reichsgericht, 12 May 1922, *Fontes Iuris Gentium, Series A-Sectio II (FIG)* (Vol. I) 142, and 3 December 1942 *FIG* (Vol. II) 135; Switzerland, Court of Appeal of Zürich, 1 December 1945, *Occupation of Germany* case (Zürich), AD (1946) 187; Holland, Special Court of Cassation, 27 June 1949, *In re Flesche*, AD (1949) 267; Holland, Court of Appeal of The Hague, 27 October 1950, *Valk v. Kokes*, ILR (1950) 357; Egypt, Tribunal of Port Said, 26 November 1950, *Arab Bank v. Ahmed Abou Ismail*, ILR (1950) 313; Holland, District Court of Rotterdam, 18 January 1952, *Gevato v. Deutsche Bank*, ILR (1952) 30; South Africa, Supreme Court, 11 November 1966, *State v. Bull*, 52 ILR 84. See also the case *S. v. Eliasov*, 52 ILR 85; Italy, Tribunal of Genova, 21 June 1967, *Soc. Alpina and Others v. Samband Islenzkra Samvinnufelaga , RDI* (1969) 90; Federal Republic of Germany, Federal Patent Court, 27 September 1967, *Trademark Registration* case, 59 ILR 492; Italy, Court of Appeal of Genova, 26 June 1971, *Lourrain e Touya v. S.p.a. Industria Armamento ed altri, Rivista di Diritto Internazionale Privato e Processuale (RDIPP)* (1972) 797; Netherlands, Supreme Court, 31 August 1972, *D.C. v. Public Prosecutor, NYIL* (1973) 392 and 73 ILR 39; Scotland, Court of Session, Outer House, 30 January 1976, *Masinimport v. Scottish Mechanical Light Industries Limited*, 74 ILR 559; Italy, Court of Appeal of Rome, 17 October 1980, *Bottali, Italian Yearbook of International Law (ItYIL)* (1985) 168 and 78 ILR 105.
It is worth noting that two old judgments of the Swiss Federal Tribunal refused to decide autonomously on problems of state succession (27 January 1919, *Buergi-Gassmann v. Stein et Président du Tribunal Supérieur du Canton de Thurgovie*, and 25 October 1919, *In re Fassbender* reported in *Répertoire Suisse de Droit International Public (RS)* 1291; recently, however, the same Federal Tribunal has held the opposite opinion: see the judgments of 21 September 1979, *M v. Federal Department of Justice and Police*, 75 ILR 107, and of 22 April 1981, *Dharmarajah v. Ministère public fédéral et Office fédéral de la police, Annuaire suisse de droit international* (1982) 128.

There are also many judgments relating to the effects of *war* on treaties, which can be interpreted as clearly supportive of domestic courts' power to decide the question of termination of treaties.[39]

In connection with judgments on war, one fact of considerable importance for our purposes should be noted. As we know, the traditional thesis, namely that war causes the termination of treaties, supported for instance by German case law after the end of the First World War,[40] has not been followed in case law subsequent to 1945. The idea that has instead made headway – affirmed from the end of last century in American case law – is that only those agreements which due to their nature, the subject they deal with and the interests they protect are *incompatible* with the state

39 Among those so interpretable are: United States, New York Court of Appeals, 8 June 1920, *Techt v. Hughes*, American International Law Cases (AILC) (F. Deak ed. 1975) 19, 95 and AD (1919-1922) 387; Germany, Reichsgericht, *Immovables (Aliens in Germany)* case, AD (1919-1922) 242, 27 June 1923, 14 November 1923, 15 December 1923, *FIG* (Vol. I) 162-164, 23 May 1925, *Russian-German Commercial Treaty* case, AD (1925-1926) 438; United States, Supreme Court of Kansas, 10 April 1926, *State ex Rel. Miner, County Attorney v. Reardon et al.* AD (1919-1942) 238; United States, Supreme Court of Nebraska, 10 January 1929, *Goos v. Brooks et al.* AD (1929-1930) 475; United States, Supreme Court, 8 April 1929, *Karnuth v. United States*, AILC 19, 49; Belgium, Court of Cassation, 3 March 1930, *Attorney-General of the Court of Appeal of Brussels v. Litner Aron*, AD (1929-1930) 47; The Netherlands, Supreme Court, 3 April 1941, *Hecht* case, AD (1919-1942) 243; France, Court of Cassation, 5 November 1943, *Bussi v. Menetti*, AD (1943-1945) 304; France, Court of Appeal of Agen (19 November 1946, *C.A.M.A.T. v. Scagni*, AD (1946) 232; United States, District Court for the Eastern District of Pennsylvania, 4 June 1947, *Ex parte Zenzo Arakawa: Zenzo Arakawa v. Clark*, AD. (1948) 508; United States, Supreme Court, 9 June 1947, *Clark, A.-G. v. Allen et al.*, AD (1947) 174; France, Court of Cassation, 10 February 1948, *Artel v. Seymand*, AD (1948) 437; France, Court of Cassation, Pl. Sess., 22 June 1949, *Lovera v. Rinaldi*, AD (1949) 381; Holland, District Court of Dordrecht, 19 April 1950, *The Maas*, ILR (1950) 125; Holland, District Court of Rotterdam, 29 December 1950, *The Golden River v. The Wilhelmina*, ILR (1950) 355; United States, California, District Court of Appeal, Second District, 3 December 1951, *In re Meyer's Estate*, ILR (1951) 499; Holland, District Court of Rotterdam, 18 January 1952, *Gevato v. Deutsche Bank*, ILR (1952) 29; France, Court of Cassation, 11 March 1953, *Gambino v. Consorts Arcens*, ILR (1953) 599; Holland, District Court of Rotterdam, 14 January 1954, *Nederlandsche Rijnvaartvereeniging v. Damco Scheepvaart Maatschappij*, ILR (1954) 277; United States, California Court of Appeal, 21 June 1954, *Brownell v. City and County of San Francisco*, ILR (1954) 432; Canada, Exchequer Court, 4 August 1954, *Francis v. The Queen*, ILR (1955) 591; Italy, Court of Appeal of Genova, 13 May 1955, *Rancillo v. S.A. Fornaci di Stazzano*, RDI (1957) 255; Italy, Court of Cassation, 3 May 1957, *Soc. Fornaci Stazzano v. Rancillo*, RDI (1959) 122; United States, District Court for the Southern District of New York, 4 October 1959, *In re Extradition of D'Amico*, 28 ILR 602; Italy, Court of Appeal of Bologna, 11 January 1963, *Kröger*, RDI (1964) 318 and Picone/Conforti, *Repertorio della Giurisprudenza di Diritto Internazionale Pubblico – 1960-1987* (1988) 944; Italy, Court of Appeal of Milan (19 May 1964, *Shapira v. Soc. Fratelli Viscardi*, RDI (1965) 290 and Picone/Conforti, 945; Federal Republic of Germany, Federal Patent Court, 27 September 1967, *Trademark Registration* case, 59 ILR 490; Italy, Court of Appeal of Milan, 30 October 1970, *Barnatan Levy and Suster Brucker, RDIPP* (1972) 107; Italy, Court of Cassation, 8 November 1971, *Lanificio Branditex v. S.r.l. Azais & Vidal, RDIPP* (1972) 808; *IYIL* (1975) 233 and 71 ILR 595; The Netherlands, District Court of Amsterdam, 25 November 1975, *A.B. v. H.H.B.*, 74 ILR 114.

40 See the judgments delivered by the Reichsgericht between 1922 and 1925, *supra* note 39.

of war terminate on the outbreak of hostilities. As the American decision *in re Techt v. Hughes* (1920) states:

> International law today does not preserve treaties or annul them regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of the war exact. It establishes standards, but it does not fetter itself with rules... When I ask what that principle or standard is, and endeavor to extract it from the long chapters in the books, I get this, and nothing more, that provisions *compatible* with a state of hostilities, unless expressly terminated, will be enforced, and those *incompatible* rejected.[41]

Or as a judgment of the Italian Court of Cassation of 8 November 1971 explains:

> [A] declaration of war only brings to an end those international conventions, observance of which would become absolutely and finally impossible as a result of the outbreak of hostilities; if, on the other hand, what is involved is merely temporary *incompatibility* limited in time to the duration of hostilities in progress, the result is a more limited one: the effectiveness of the said conventions is simply suspended pending cessation of the state of war and the resumption of normal international relations.[42]

If the observations contained in these two decisions and a few more or less similar cases[43] are correct, it must perforce be concluded, as one of the authors of this article has long maintained and others have begun to maintain recently,[44] that the effects of war on treaties are not of independent significance but instead constitute an application of the principle of *rebus sic stantibus*. This means that the attitude of the national courts, which on the one hand consider that they can autonomously decide the effects of war, while on the other hand tend to maintain as we shall see that the change in circumstances provides only the competence to denounce the treaty at international level, is entirely contradictory.

Similar observations can be made with reference to the case law regarding the termination of treaties because of *supervening impossibility of performance*, if, as we feel is proper, one accepts the thesis that termination for supervening impossi-

41 The judgment is cited *in extenso supra* note 39. Emphasis added.

42 The judgment, no. 3147, is cited *in extenso supra* note 39. Emphasis added.

43 Of the judgments cited *supra* note 39, see United States, Supreme Court of Kansas (1926) *State ex Rel. Miner, County Attorney v. Reardon et al.*; United States, Supreme Court of Nebraska (1929) *Goos v. Brooks et al.*; United States, Supreme Court (1929) *Karnuth v. United States*; France, Court of Cassation (1943) *Bussi v. Menetti*; United States, Supreme Court (1947) *Clark, A.-G. v. Allen et al.*; United States, California, District Court of Appeal, Second District (1951). *In re Meyer's Estate*; Canada, Exchequer Court (1954) *Francis v. The Queen*; Italy, Court of Cassation (1957) *Soc. Fornaci Stazzano v. Rancillo.*

44 See Conforti (1976) *supra* note 8 at 60; (1982) 105; (1987) 129; *American Law Institute, Restatement of the Law (Third)* [hereinafter *(Restatement)*] (Vol. I) (1987) para. 336, Reporter's note 222.

bility again constitutes an application of the principle of *rebus sic stantibus*.[45] The few decisions regarding supervening impossibility clearly start from the premise that a domestic court may judge whether this cause of termination exists in order to decide whether or not to apply the treaty to the case in point. For instance, in refusing to apply the treaty concluded by Prussia and Luxembourg in 1909 for the prevention of double taxation, the German Reichsfinanzhof (judgment of 18 June 1930) decided: "[W]hatever might be the international validity of the treaty in question, it had now lost its object seeing that the Federal State [Prussia] could no longer collect the income tax."[46] Inapplicability of the treaty was also arrived at by the Tribunal de Commerce of Saint-Etienne (France), in a judgment of 17 January 1936, which found that performance, consisting in a movement of currency from Italy, had become impossible because of measures taken by the Italian government in response to sanctions decreed by the League of Nations.[47] Finally, impossibility of performance is dealt with in a recent verdict of the Italian Court of Cassation (14 December 1984 n. 6570) dealing with the limit for compensation for damages provided for by the 1929 Warsaw Convention on international air transport which had been set in "Poincaré gold francs"; the court held that the disappearance of the currency did not result in the inapplicability of the Convention itself.[48]

Another cause of termination of treaties regarding which the attitude in the case law deserves to be highlighted consists in *desuetude* or *tacit abrogation*. Prominent in this connection are: a judgment of the Reichsgericht of 23 May 1925 finding the treaty of Brest-Litovsk terminated by express declaration of the Soviet Government and by the *absence of protest* from the German side;[49] two Dutch decisions, the judgment of the Arnhem Court of Appeals of 23 March 1971 and the administrative decision of the Crown of 22 March 1975, dealing respectively with termination for desuetude and for tacit mutual consent in connection with agreements between the Netherlands and Indonesia unilaterally denounced by Indonesia with subsequent ac-

45 See Conforti (1982) *supra* note 8, at 104; (1987) 128; *Restatement* (Vol. I) (1987) para. 336, Comment sub (b) 219. But see Capotorti (1971) *supra* note 1 at 532 n. 49.

46 *Double Taxation* case, AD (1929-1930) 350.

47 *Bertacco v. Bancel and Scholtus*, AD (1935-1937) 422.

48 *S.p.a. Alitalia v. S.r.l. Salviati e Santori, RDIPP* (1985) 859. It should be noted that in another judgment of the Italian Court of Cassation (27 April 1984, *Comesmar S.p.a. v. A. Carniti & C. S.p.a. and Fallimento Carniti & C. S.p.a. v. Comesmar S.p.a.*, in *RDIPP* (1985) 577 and Picone/Conforti, 951 in a similar case regarding the applicability of Art. 9 of the Brussels Convention on bills of lading, which indicates the limit for compensation for damage in sea transport in gold currency, the court approached the question from the viewpoint of the terminatory effects of change of circumstances as opposed to supervening impossibility and concluded that change of circumstances can be invoked *only* at the international level. This supports what is maintained here, namely that on the one hand the principle of *rebus sic stantibus* embraces that of supervening impossibility and on the other that the case law falls into contradictions if it treats the two causes of termination differently.

49 *FIG* (Vol. I) 161.

quiescence by the Netherlands;[50] a rather interesting judgment of the Austrian Constitutional Court of 1973 which, to demonstrate the abrogation of a treaty between Germany and Austria, refers to both the conduct of the Austrian "administrative authorities" and to the absence of protests by the German government.[51] These holdings deserve emphasis due to the fact that abrogation for desuetude is a rather controversial cause of termination[52] and that ascertainment of the conduct determining abrogation (*facta concludentia*) is a delicate business. Since the judgments do not refrain from declaring the treaties at issue terminated and inapplicable, they are of particular significance.

Finally, the power of domestic courts to decide whether a treaty has been terminated is also affirmed in the case law in connection with *breach of diplomatic relations*[53] and with abrogation because of *incompatibility with subsequent treaties*.[54]

6. As was said, the sole causes of termination or suspension with regard to which domestic courts tend to deny their own power – as long as the state has not seen fit to denounce the treaty or in some way indicate its intent to rid itself of it at international level – are *change of circumstances* and *breach of the treaty*.

50 *Widjatmiko v. N.V. Gebroeders Zomer en Keunings Drukkerij Vada, Binderij en Uitgeversmaatschappij NYIL* (1971) 245 and 70 ILR 439, and *H.R. v. Minister of Justice, NYIL* (1976) 311.

51 Judgment of 13 March 1973, *Land Sale to Alien* case, 77 ILR 433.
On tacit abrogation see also Italy, Court of Cassation, 13 January 1964, *P.G. Corte di Cassazione v. von P. D* (1966) 24 and 6 May 1966, *Pedevilla v. Mair, RDIPP* (1967) 111 regarding a convention between Italy and Austria; United States, Court of Appeals for the Fifth Circuit, 14 August 1980, *Escobedo v. United States and Castillo v. Forshi*, 79 ILR 437.

52 See Vamvoukos (1985) *supra* note 1, at 219. In connection with the thesis denying the abrogatory effect of desuetude or of tacit agreement, a judgment that may be cited, albeit with great caution, is that of the Italian Court of Cassation of 29 December 1965, *In re Komauli v. Ministero dell'Interno*, RDI (1966) 411, esp. 415. The judgment in fact rules out the deduction from parallel and convergent conduct of the parties of tacit "prorogation" of an agreement, but is expressed in such general terms as to make one think that only *explicit* agreement by the parties can modify or terminate a formal agreement.

53 See Egypt, Mixed Court of Alexandria, 22 September 1926, *Herzenstein v. Public Prosecutor of the Native Courts*, AD (1927-1928) 64, which regards the system of capitulations with Russia as abrogated by the rupture of diplomatic relations between Egypt and the Soviet Union; France, Court of Appeal of Paris, 20 March 1944, *Feldman Publishing Company and Antin (ex parte) v. Rigaud*, AD (1943-1945) 278, which regards the agreements between France and Great Britain as not abrogated following the breach of diplomatic relations by the Vichy Government in 1940.

54 Among many judgments see, e.g., Germany, Reichsgericht, 16 December 1920, *FIG* (Vol. I) 165 and 20 September 1922 *FIG* (Vol. I) 164; United States, Federal Communications Commission, Washington D.C., 23 March 1953, *In the Matter of International Bank for Reconstruction and Development and International Monetary Fund v. All America Cables & Radio, Inc., and Other Cable Companies*, ILR (1955) 711; Greece, Conseil d'Etat (1953) *Compulsory Acquisition (Greece)* case, ILR (1953) 329; Federal Republic of Germany, Kammergericht of Berlin, 2 July 1965, *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)* case, 44 ILR 317.

As far as *change of circumstances* is concerned, the limited case law, with few exceptions, prefers the position taken by the Swiss Federal Court in a judgment of 2 February 1923. Maintaining that domestic courts have no power to declare treaties terminated due to the change of circumstances, the court concluded:

> [T]he state which wishes to avail itself of the right to terminate the treaty must inform the other contracting party of its intention in the form prescribed by international law... and it is only through such notice that a lawful release from the treaty may be achieved.[55]

Even where they do not support this precise position, courts tend to regard as necessary at least an international or domestic act by the state from which the state's intent to free itself of the treaty because of a change in circumstances can be implicitly derived. Accordingly, in a judgment of the Italian Court of Cassation of 6 June 1978,[56] the court maintained that termination of the norms of a multilateral treaty (specifically the Peace Treaty between the Allied Powers and Italy of 1947) resulting from a change of circumstances could be denounced through an agreement subsequently concluded by only some of the parties (specifically the London Memorandum of 5 October 1954 regarding the territory of Trieste). Similarly, the Constitutional Court of Portugal, in several recent decisions, has held that the principle of *rebus sic stantibus* can be regarded as implicitly "invoked" in a law of the state and can subsequently be found by the courts of that state.[57] The decisions we refer to here are those dealing with change of circumstances, as it were, in the pure state. However, what we have had the occasion to illustrate previously[58] is not to be forgotten, namely that both the effects of war on treaties and supervening impossibility

55 *Lepeschkin v. Gossweiler et Cie, RS*, I, 264. For judgments that may be regarded as following the same trend see Switzerland, Federal Tribunal, 25 November 1932, *Deutsche Feuerversicherungs A.-G. v. Lucas und Konsorten, RS*, I, 165 and 288; Switzerland, Court of Appeal of Zürich, 26 March 1941, *Re R.M.*, AD (1943-1945) 279; Switzerland, Federal Tribunal, 22 June 1955, *Stransky v. Zivnostenska Banka*, ILR (1955) 427; Italy, Court of Cassation, 27 April 1984, *Comesmar s.p.a. v. Carniti & C. s.p.a. and Fallimento Carniti & C. s.p.a. v. Comesmar s.p.a.* (cited *supra* note 48).
A decision that runs counter to the common trend would seem instead to be that of the German Reichsfinanzhof, 9 March 1927, *Land Tax Immunities* case, AD (1927-1928) 84.
Not very important for our purposes, but frequently cited in connection with the principle *rebus sic stantibus*, are the judgments of the Swiss Federal Tribunal of 17 February 1882, *Lucerne v. Aargau* (reported in Vamvoukos (1985) *supra* note 1, at 176) and of the German Staatsgerichtshof of 29 June 1925, *Bremen (Free Hansa City of) v. Prussia*, AD (1925-1926) 352.

56 N. 2824, *Cernogoraz v. Istituto Nazionale della Previdenza Sociale* and *Zudich v. Istituto Nazionale della Previdenza Sociale*, RDI (1980) 509.

57 See the 1985 judgments cited in Polakiewicz, 'Völkervertragsrecht und Landesrecht in Portugal', 47 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1987) 274 and n. 51 and 52. See also Supremo Tribunal de Justiça, 8 January 1987, n. 74297 *Boletim do Ministério da Justiça*, n. 363 (February 1987) 229.
It is clear that these Portuguese judgments are fairly close to the thesis that courts may independently find termination of a treaty, so much so, in fact, that the judgments themselves speak of applicability of the principle *ipso jure*.

58 See part 5 above.

of performance are referable to the principle of *rebus sic stantibus* and that with respect to these two causes of termination or invalidity the trend of the case law is clearly in the direction of independence in judicial decision-making. The possibility of independent decision-making is also the line taken by a number of decisions reported by us in connection with succession of states, specifically, in connection with the continuity or otherwise of treaties in the event of major changes in the constitutional structure of a state; these decisions argue in terms fairly close to those used when discussing the principle of *rebus sic stantibus*.[59] All this undoubtedly means, as we have already said, that there is a contradiction between the decisions specifically devoted to this principle and the others. But does it not also mean that the tendency as regards change of circumstances has a very slight, indeed negligible, effect on our claim that domestic courts have the power to decide such issues?

Again, as regards termination (or suspension) of treaties for *breach* by another contracting state (the principle of *inadimplenti non est adimplendum*), the case law is in favour of the state's exclusive power to denounce the treaty, or to take steps toward or have recourse to measures needed to secure its observance.[60] Decisions going in this direction have been handed down in courts of the United States,[61] England,[62] Switzerland,[63] France,[64] Germany,[65] Austria,[66] and Italy.[67] But there

59 Among the judgments cited in note 37 above, see Egypt, Tribunal of Port Said, 26 November 1950, *Arab Bank v. Ahmed Abou Ismail*, at 314 and Scotland, Court of Session, Outer House, 30 January 1976, *Masinimport v. Scottish Mechanical Light Industries Limited*, at 565.

60 The case law we are talking about, which affirms the need for denunciation, or at any rate for some action by the state at the international level, should not be confused with the case law which, due to the judiciary's accentuated dependence on the executive power, refers to the latter to ascertain the conduct of other states; this is the case for the French case law on ascertainment of reciprocity, covered by Art. 55 of the present French Constitution (on this point see D. Carreau, *Droit international* (1986) 477 and 482). On the difference between the one case and the other, see part 3 above.

61 *Ware v. Hylton* (1976) (reported in Sinha, *supra* note 1 at 40; Circuit Court, S.D. New York, 5 November 1874, *In re Thomas* (reported in Sinha, *supra* note 1, at 42; Supreme Court, 24 February 1902, *Terlinden v. Ames* (Sinha, *supra* note 1, at 47; Supreme Court, 10 June 1913, Charlton v. Kelly (Sinha, *supra* note 1, at 48; District Court, Eastern District of New York, 12 April 1965, *Kelley v. Société Anonyme Belge d'Exploitation de la navigation aérienne*, 42 ILR 263; Court of Appeals, Fourth Circuit (1977) *Peroff v. Hylton*, 79 ILR 438, n. 27.

62 Privy Council, 10 February 1922, *The Blonde and Other Ships* case, AD (1919-1922) 413.

63 See Federal Tribunal, 2 December 1932, *Centralbank der deutschen Sparkassen in liq. & Fried v. Schmiedheiny & Franz, RS*, I, 166; Federal Tribunal, 8 November 1935, *Weintraud & Co. v. Sparkasse Willisau A.-G., RS*, I, 164; Federal Tribunal, 16 September 1938, *Dewald v. Veuve Baumann et Baumann, RS*, I, 167; Court of Appeal of Zürich, 1 December 1945, *Occupation of Germany* case (Zürich), AD (1946) 187; Federal Tribunal, 4 June 1952, *Landis & Gyr A.G. v. W.H. Goens & Co.*, ILR (1952) 34.

64 Military Tribunal of Strasbourg, 5 May 1948, *In re Rieger*, AD (1948) 484.

65 Court of Appeal of Frankfurt, 27 March 1950, *Security for Costs (Switzerland)* case, ILR (1950) 310.

66 Constitutional Court, 15 June 1976, *Land Sale to Alien* case, ÖZ (1976) 322.

67 Court of Cassation, 28 July 1986, *Parzinger and Nowak v. Provincia autonoma di Bolzano and Comune di Renon, RDIPP* (1987) 791.

are a few exceptions, like the French judgments of 1916 and 1919 refusing to apply the Hague Convention on Land Warfare of 1907 to Germany on the grounds that Germany violated it,[68] and the Dutch judgments concerning the Convention on the Rhine Navigation, in which the courts of the Netherlands refused to apply the Convention to Germany after 1936 and for a period after the Second World War, because *inter alia* of its non-application by Germany.[69]

The domestic courts' tendency not to apply the principle of *inadimplenti non est adimplendum* – an attitude which can have no other justification than the need to consider the "political" relevance of decisions relating to any type of measure which may be treated as an international reprisal – should in our view be criticized, though it is by far the practice of the majority of courts. It should specifically be criticized from the viewpoint of a "juridical" administration of international law which favors making maximum use of domestic courts when applying international law; from this viewpoint the Dutch case law seems exemplary. A different issue, obviously, is the means by which domestic courts may ascertain another contracting state's breach of a Treaty; in this there is nothing to rule out their availing themselves of the executive's cooperation.[70]

7. At this point it may be said that the consideration of the case law we have carried out supports, with a few (criticizable) exceptions our working hypothesis, namely that domestic judges have the power to adjuge *all* causes of invalidity and termination, with their holdings, of course, being limited to the specific case. From this viewpoint, then, *all* causes of invalidity and termination operate automatically.

Again, according to the working hypothesis put forward, denunciation at the international level or an equivalent act addressed to the other contracting parties is not an alternative to automaticity but rather may be concluded for *all* causes of invalidity or termination so as to allow a state to free itself once and for all of its contractual obligations. Moreover, such declarations, provided they are made in compliance with the internal rules on the power to denounce treaties,[71] bind the courts of the denouncing state; they have no value – unless authorized by the treaty and hence in itself constituting an independent cause of termination – for the courts of other states.

68 Tribunal civil de la Seine, 18 May 1916, *Daude v. Faber and Wilmoth*, *JDI* (1916) 1303; Conseil de Guerre de Paris, 18 June 1919, *Kirgis, Kaltenbach, Toqué, Thomas et al.*, *JDI* (1919) 737.

69 See District Court of Rotterdam, 14 January 1954, *Nederlandsche Rijnvaartvereeniging v. Damco Scheepvaart Maatschappij*, ILR (1954) 276 and 27 September 1957, *In re Petition of Nederlandsche Rijnvaart-Vereeniging and Others*, ILR (1957) 99, with references to the preceding case law.

70 On this point see part 3 above.

71 For an overall picture of the various countries' internal norms on the power to denounce treaties, see G. Ziccardi Capaldo, *La competenza a denunciare i trattati internazionali – Contributo allo studio del treaty power* (1983).

Our hypothesis is confirmed in the case law. For instance, in a 1926 decision the Court of Paris maintained:

> It was the exclusive prerogative of the President of the Republic to denounce or suspend treaties in accordance with the interest of the country. He had the right, when acting as the Chief of the Executive, to delegate his powers to any member of the Government, and in particular to the Minister for Foreign Affairs, and the courts must give effect to any act performed by him in that capacity.[72]

The need for the courts to align themselves on the denunciation or other manifestation of the state's intent at the international level is also supported by the decisions of the Commercial Tribunal of Marseille of 16 November 1934,[73] the Court of Appeals of Celle (British Zone of Germany) of 24 September 1949,[74] the District Court of Connecticut of 15 May 1959,[75] the French Court of Cassation of 8 June 1966[76] and the Dutch Supreme Court of 27 March 1981.[77]

The lack of binding effects of denunciation for the courts of states other than the one denouncing the treaty in cases where denunciation has not been authorized by the treaty[78] is affirmed in the decisions of the District Court of Rotterdam of 6 April 1938 and of the Court of Appeal of The Hague of 9 June 1941,[79] of the Liège Military Court of 28 February 1946,[80] and again of the District Court of Rotterdam of 7 October 1949.[81]

72 Court of Paris, 28 January 1926, *Renault et Société des Usines, Renault v. Société Rousski Renault*, AD (1925-1926) 356.

73 *Lackwerke Hugo Lenssen v. Ravel*, AD (1933-1934) 423. In this case the conduct to which the court bowed consisted first in denunciation and then in annulment of the same.

74 24 September 1949, *Legal Aid* case, AD (1949) 383. Here the court deferred to a Proclamation of the Allied Control Council concerning "the cancellation, re-entry into force, resumption or application of all treaties, conventions and other international agreements concluded by Germany."

75 *Gallina v. Fraser*, 31 ILR 360, where the Court finds among other things that for the purpose of deciding the effect war has on treaties, one ought not to overlook "the conduct of the political departments of the two nations [Parties to a bilateral agreement] with regard to the particular treaty."

76 *In re Bloch*, 47 ILR 240.

77 *X v. Y*, *NYIL* (1982) 377.

78 For an example of non-application of a treaty by the courts of a contracting state (in the specific case Italy) *vis-à-vis* another contracting state that had regularly made denunciation within the terms of the treaty itself (in the specific case Switzerland) see Court of Appeal of Torino, 7 January 1961, *Boringhieri v. Fenoglio*, *DI*, II (1963) 201 and Picone/Conforti 943.

79 Both the judgments relating to the *De Meeuw* case, AD (1919-1942) 227 do not take into account the German government's 14 November 1936 formal declaration that Germany would no longer recognize the binding force of the Treaty of Versailles.

80 *Bindels v. Administration des Finances*, AD (1947) 48, again in connection with the non-binding nature of the Führer's "unilateral abrogation" of the Treaty of Versailles.

81 *In re Tatarko* AD (1949) 315, on the non-binding nature of the Soviet Union's denunciation of the Hague Convention of 1905 on Civil Procedure; the Convention had not been denounced in conformity with the treaty.

8. In light of the observations made so far, one may perhaps give an interpretation of the Vienna Convention on the Law of Treaties which eliminates the contradictions and uncertainties we mentioned earlier, and allows the procedures provided for by Articles 65 ff. of the Convention, namely the procedures through which the state may assert a cause of termination, to be set more exactly in their framework.[82]

Article 65ff. govern the *denunciation* of treaties and the possible disputes that may arise in the event of opposition to the denunciation by the other contracting states and introduce, in derogation from customary law, particular forms, timing and modalities. They deal, in short, with what a state must do at the international level when it intends to free itself *once and for all* from a treaty. From this point of view Articles 65ff. apply to *all* causes of invalidity or termination. Seen this way, they are not in contradiction with the Convention rules governing the individual causes of invalidity and termination, since these rules, over and above the diversity of their wording, deal with the definitive, as it were, invalidity or termination of the treaty, and are hence all subordinate in procedural terms to the international actions of states.

The Vienna Convention does not seem instead to consider the possibility that the causes of invalidity and termination may be ascertained, with effect confined to the individual specific case, by whoever has to apply the treaty and for the point that interests us by the domestic judge. At any rate, the Convention certainly does not forbid domestic courts from deciding the validity of a treaty. It would, in short, be absurd to maintain that the domestic judge of a contracting state to the Convention would be condemned to paralysis as long as his own state had not set the procedures of Articles 65 ff. in motion and, in the event of opposition, until the controversy with the opponents had not been settled. Any blanket condemnation of the competence of domestic courts would have to be derived from an explicit provision of the Convention; it cannot be derived from a system clearly concerned only with disputes arising at the international level.

The interpretation maintained here is not contradicted by the sole domestic court decision known to us that refers to the procedure provided for in Articles 65 ff., specifically, the Dutch judgment previously cited (District Court of The Hague, 20 May 1986)[83] which refused to declare the invalidity of the Convention on Installation of United States Cruise Missiles in the Netherlands. Having maintained that "in the system of international law...the national courts are not designated as the body empowered to assess whether a ... treaty ... is void", the Court went on to state: "This also follows from the Vienna Convention on the Law of Treaties, which prescribes a certain procedure for deciding whether a treaty or treaty provision is void."[84]

82 See *supra* part 2.

83 See *supra* part 4 and note 35.

84 *Id.*, at 422.

This judgment rules out the possibility that a domestic judge may declare the invalidity of a treaty not only on the basis of the Vienna Convention but also on that of general international law; thus, it is contrary to the whole of the case law (particularly Dutch!) discussed above. But, as we have already noted, the decision can be explained by the fact that in the case in point the Court had been requested (by 14,774 natural and legal persons) not to refuse to apply the Convention on the missiles to the specific case but to declare the Convention null and void, once and for all – something which a domestic court cannot do regardless of whether or not the state to which that court belongs is a contracting party to the Vienna Convention.

9. In conclusion, the problem of whether and which causes of invalidity and termination of treaties operate automatically and which do not is ultimately a problem wrongly posed. Automaticity is not an alternative to international procedures aimed at ascertaining whether a given treaty is void or has been terminated. All the causes of invalidity or termination can either be the object of international procedures or be ascertained, with effects confined to the specific case, by whoever has to apply the treaty and, in particular, by national judges. Of course, if a judge's decision (perhaps taken by agreement with the Executive)[85] is wrong, the state to which the court belongs will incur international responsibility, as happens in all cases of domestic decisions contrary to international law; but this will be a responsibility which is itself confined to a specific case.

If this is the way things are, there is no sense at all in speaking, in connection with international treaties as is done with contracts in domestic law, of nullity or annullability, of nullity to be invoked either by anyone at any time or only by those interested and so on. The only important distinction is the one between invalidity or termination operating definitively following denunciation at the international level and invalidity or termination that can be found for the purposes of application of the treaty to the specific case. The fact that all the causes of invalidity or termination can be adjudged by domestic courts contributes to rendering the uncertainty as regards the fate of treaties less bothersome. This uncertainty characterizes international procedures where they do not consist of compulsory arbitration.

The power of domestic courts has been derived here from an examination of the case law. We have seen that this power is not in conflict with the Vienna Convention on the Law of Treaties. Moreover, it is not evident to us that its exercise has ever, *as such*, given rise to protest by states in some way concerned by non-application of a treaty to an individual specific case. Accordingly, it is a power which does not meet with any obstacles at the level of international law.

85 See *supra* part 3 and note 7.