PART I

INTERNATIONAL LAW IN GENERAL

IV.—Relation to Municipal Law

International law in general—Relation to municipal law—Charter of United Nations—Resolution of Security Council requesting Member States to take action against Rhodesian régime under Article 41 of United Nations Charter—Whether Charter binding upon persons in Australia as part of Australian law—Whether resolution of Security Council forms part of Australian law—Whether resolution of Security Council confers additional powers on Australian executive—The law of Australia

BRADLEY *v.* COMMONWEALTH OF AUSTRALIA AND ANOTHER

Australia, Full Court of High Court of Australia
10 *September* 1973

(Barwick C. J., McTiernan, Menzies, Gibbs and Stephen JJ.)

SUMMARY : *The facts:*—The plaintiff, a South African national, was employed in Sydney, Australia by the Rhodesian Department of Information under the registered name of "Rhodesian Information Centre". He rented a telephone from the Australian Postmaster General's Department, was the tenant of a mailbox at a local post office, sent and received letters and telegrams through the postal services and distributed a publication called "The Rhodesian Commentary" which was registered with the Postmaster General's Department as a newspaper for postal transmission. In April 1973, the Australian Postmaster General directed that all postal and telecommunication services for the Rhodesian Information Centre be withdrawn forthwith. This direction was made with a view to implementing Resolutions of the Security Council of the United Nations and in particular the Resolution of 18 March 1970. This Resolution called on Member States to take all appropriate measures to ensure that any act performed by officials and institutions of the Rhodesian régime should not be accorded any recognition and, furthermore, requested Member States to take all possible further action under Article 41 of the Charter of the United Nations.[1] The Postmaster General's Department dis-

[[1]Article 41 provides: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations".]

connected the plaintiff's telephone, changed the lock on his box at the local post office, stopped mail and telegrams passing to and from him and deregistered the publication "The Rhodesian Commentary".

The plaintiff instituted proceedings against the Commonwealth of Australia and the Postmaster General seeking, *inter alia*, a declaration that the actions taken against him were unlawful, an injunction and damages. The defendants argued that they were under no common law or statutory duty to provide any person in Australia with postal or telecommunications facilities and that the Postmaster General had an absolute and unfettered power to deprive any person of such services. They argued, furthermore, that if they were wrong on those points, the Court, in the exercise of its discretion, should refuse to grant the relief sought because, *inter alia*, the defendants were implementing a Resolution of the Security Council.

Held:—The judgments turned largely on the scope and proper construction of the Australian municipal legislation relating to posts and telecommunications. A majority of the Court, Barwick C. J., Gibbs and Stephen JJ. held that an appropriate declaration should be made and an injunction issued. Menzies and McTiernan JJ. dissented. Only Barwick C. J. and Gibbs J., in their joint judgment, considered the legal effect of the Security Council Resolution in Australian law.

The following is an extract from the joint judgment of Barwick C. J. and Gibbs J.:

. . . reliance was placed upon the resolutions of the Security Council to which reference has already been made. These resolutions are, in their terms, addressed to Member States who, by art 25 of the Charter, have agreed "to accept and carry out the decisions of the Security Council in accordance with the present Charter". However, resolutions of the Security Council neither form part of the law of the Commonwealth nor by their own force confer any power on the Executive Government of the Commonwealth which it would not otherwise possess. The Parliament has passed the Charter of the United Nations Act 1945 (Com) s 3 of which provides that: "The Charter of the United Nations (a copy of which is set out in the Schedule to this Act) is approved". That provision does not make the Charter itself binding on individuals within Australia as part of the law of the Commonwealth. In *Chow Hung Ching v R* (1948) 77 CLR 449, at 478; [1949] ALR 29, at 46,[1] Dixon J said: "A treaty, at all events one which does not terminate a state of war, has no legal effect upon the rights and duties of the subjects of the Crown and speaking generally no power resides in the Crown to compel them to obey the provisions of a treaty: *Walker v Baird* [1892] AC 491", and a similar view was expressed by Latham CJ in *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, at 644; [1936] ALR

[1] 15 *Ann. Dig.* 147.]

482.[1] Although, in those passages, mention is made of British subjects, it is clear since *Johnstone v Pedlar* [1921] 2 AC 262; [1921] All ER Rep 176,[2] that an alien, other than an enemy alien, is while resident in this country, entitled to the protection which the law affords to British subjects (see also *Nissan v Attorney-General* [1970] AC 179, especially at 211-2, 232-3 and 235; [1969] 1 All ER 629.[3] Section 3 of the Charter of the United Nations Act 1945 was no doubt an effective provision for the purposes of international law, but it does not reveal any intention to make the Charter binding upon persons within Australia as part of the municipal law of this country, and it does not have that effect. Since the Charter and the resolutions of the Security Council have not been carried into effect within Australia by appropriate legislation, they cannot be relied upon as a justification for executive acts that would otherwise be unjustified, or as grounds for resisting an injunction to restrain an excess of executive power, even if the acts were done with a view to complying with the resolutions of the Security Council. It is therefore unnecessary to consider whether the resolutions of the Security Council, properly construed, would require the Commonwealth as a member nation to take the action that has been taken against the Rhodesia Information Centre.

[Report: (1973) 1 A.L.R. 241, at 259-260; (1972-3) 128 C.L.R. 557, at 582-583.]

International law in general—Relation to municipal law—Southern Rhodesia—Unilateral declaration of independence—Effect in international law—Effect in English law—Validity of judicial acts of judge appointed by usurping government—The law of England

See p. 45 *(Adams* v. *Adams).*

International law in general—Relation to municipal law—Treaty—Municipal legislation enacted to give effect to international convention—Whether permissible to examine convention in order to construe statute—International Convention relating to the arrest of Sea-going Ships, 1952—Administration of Justice Act, 1956—The law of England

See p. 447 *(The Banco).*

[1 8 *Ann. Dig.* 54.]
[2 1 *Ann. Dig.* 231.]
[3 44 *I.L.R.* 359, at 367-9, 385-7, 388-9.]

International law in general—Relation to municipal law—Treaties—Whether enforceable in municipal courts without legislation—The law of South Africa

See p. 422 *(Pan American World Airways Inc.* v. *S.A. Fire and Accident Insurance Co. Ltd.).*

International law in general—Relation to municipal law—Mandate—Whether part of the law of Mandated Territory without proper legislation—Whether restraint imposed by Mandate enforceable in municipal courts without such legislation—Whether the courts can declare any legislation invalid on the ground of contravention of obligation under the Mandate without such legislation—The law of South Africa

See p. 29 *(State* v. *Tuhadeleni).*

International law in general—Relation to municipal law—Immunities of international officials—Determination by Executive certificate—The law of the Philippines

See p. 389 *(WHO and Verstuyft* v. *Aquino).*

PART II

STATES AS INTERNATIONAL PERSONS

A—IN GENERAL

II.—Sovereignty and Independence

iii.—Conduct of foreign relations

States as international persons—In general—Sovereignty and independence—Conduct of foreign relations—Acts of diplomatic agents—Protection of property of nationals—Whether failure of State to give adequate protection justiciable by municipal courts—The law of France

In re SOCIÉTÉ DES TRANSPORTS EN COMMUN DE LA RÉGION D'HANOI

France, Conseil d'État. 28 *June* 1967

SUMMARY : *The facts:*—The Société des transports en commun de la région d'Hanoi, which held a public transport concession from the city of Hanoi which would normally have expired in 1980, was forced after the French withdrawal from Indochina to renounce the concession and sell its installations to the city administration of Hanoi on, the company alleged, unfavourable terms. The company sought to recover compensation from the French State, both in respect of the termination of the concession and on the ground that it had been required by the French authorities to continue operating the transport service beyond the date on which it could have obtained adequate compensation.

Held:—The claim must be dismissed. In the circumstances, the issue raised put directly in question the relations of France with a foreign State and therefore could not engage the responsiblity of the French State. Moreover, there was no right to compensation from the French State for acts of the Vietnamese authorities.

The following is the text of the judgment:

The Société des transports en commun de la région d'Hanoi was the concessionary of the transport service of the city and suburbs of Hanoi until 1980, under a concession agreement concluded with the City of Hanoi and the Protectorate of Tonkin. The concession was the subject of an additional agreement signed on 17 November 1952

with the Mayor of Hanoi. On 31 May 1955 the company signed a protocol of agreement with the Administrative Committee of the City of Hanoi, under which it renounced the right to continue operations until the date provided in the contract and ceded to the City of Hanoi all its installations, material, equipment, supplies and premises in exchange for payment by the City of an annuity of twelve million francs for a period of 25 years. The company asks that the State be required to pay it an indemnity of 9,757,674.04 francs in compensation for the consequent loss 'both inasmuch as it was forced, on the order of the French Government, to continue operating beyond the time when it would have been possible to give up the concession under economically satisfactory conditions, and on account of the pure and simple loss of its right to operate until 1980'. The action for damages brought by the company is based, first, on the fact that in a letter dated 28 September 1954 the Minister for Relations with Associated States required it to continue operating beyond the date fixed by the Geneva Accords of 20 July 1954 for the evacuation of the Hanoi zone by French troops and, secondly, on the fact that the representatives of the French Delegation to the Democratic Republic of Vietnam induced it to sign the protocol of 31 May 1955 with the City of Hanoi.

The damage pleaded by the plaintiff company is in fact due to the fact that the protocol of agreement concluded with the City of Hanoi, the grantor authority, on 31 May 1955 accorded it an indemnity for re-purchase which it considers inadequate.

First, the Minister for Relations with the Associated States, in notifying the Société des transports en commun de la région d'Hanoi in a letter dated 26 September 1954 that it should continue to operate the public service under its charge and that any interruption in the service would run the risk of entailing a measure of cancellation, limited himself to recalling to the company the obligations incumbent on concessionaires of public services, and did not, therefore, commit any fault. Although, in the same letter, the Minister assured the company that the Government would intervene on every occasion to ensure the safety of personnel of French nationality who were required to remain in Hanoi, and would assume the burden of compensating any injuries of which its personnel might be the victims, it appears from the evidence that these promises made to the company have not been kept. Although the Société des transports en commun de la région d'Hanoi also pleads the fact that the representatives of the French Government had not given all the support counted on when it negotiated the protocol of agreement with the City of Hanoi, the performance of the task of protecting the property

of French citizens incumbent on the diplomatic and consular services abroad was, in the circumstances of the time and place where the loss pleaded by the company occurred, inseparable from the exercise of the powers of the French Government in international relations and puts directly in issue the relations of France with a foreign State. It is therefore not capable of engaging the responsibility of the French State on the ground of fault.

Secondly, the letter dated 28 September 1954 pleaded by the plaintiff company must be regarded as constituting, not the behaviour of grantor authority on the part of the French State, but the exercise of the perogative of the public power in order to ensure the maintenance by the French Government, in accordance with the engagement which it had undertaken towards the Democratic Republic of Vietnam on 21 July 1954 at Geneva, of the installations necessary for the operation of industrial public services in the areas from which the troops had withdrawn. The plaintiff company is not, therefore, justified in contending that the responsibility of the French State is engaged on the basis of quasi-contract.

Finally, the damage pleaded by the Société des transports en commun de la région d'Hanoi is imputable to the activities of a Vietnamese public corporation. It is therefore not capable of giving the company a right to compensation from the French State on the basis of risk.

It follows from the foregoing that the Société des transports en commun de la région d'Hanoi is not justified in contending that the Administrative Tribunal of Paris was incorrect in dismissing its claim in the judgement under appeal . . .

[The claim was dismissed with costs.]

[Report: *Recueil des décisions du Conseil d'État,* 1967, p. 279; *Annuaire Français,* 1968, p. 861 (in French).]

States as international persons—In general—Sovereignty and independence—In foreign relations—Effect of conclusion of treaties—Treaty of Rome—Impact on English sovereignty—The Law of England

See p. 414 *(Blackburn* v. *Attorney-General).*

IV.—Recognition of Acts of Foreign States and Governments

States as international persons—In general—Recognition of acts of foreign States and Governments—Nationalization of foreign property without prior fixing of compensation—Property of French nationals in Algeria—Nationalization contrary to French public policy and Evian Agreements—Whether effect to be given to nationalization legislation in France—The law of France

CIE. FRANÇAISE DE CREDIT ET DE BANQUE *v.* ATARD

France, Court of Cassation. 23 *April* 1969

SUMMARY : *The facts:*—In defence to an action in the French courts for payment of a debt contracted in Algeria by an Algerian company, the defendant company and its sureties pleaded that their liability was extinguished in consequence of Algerian legislation nationalizing the company and transferring its debts and assets to an Algerian public enterprise. The Montpellier Court of Appeal held that effect could be given to the nationalization legislation and that the liability of the defendants was extinguished. On appeal to the Court of Cassation:

Held:—The decision of the Montpellier Court of Appeal must be quashed. No legal effect could be given in France to a dispossession effected by a foreign State without the prior fixing of fair compensation.

The following is the text of the judgment of the Court:

Article 545 of the Civil Code together with the Governmental Declaration of 19 March 1962 concerning Economic and Financial Cooperation between France and Algeria have been considered.

No effect in law can be given in France to a dispossession effected by a foreign State without the prior determination of fair compensation.

Atard Frères et Cie, a limited company with its headquarters then at Philippeville (Algeria) where it operated a flour mill, on 1 and 30 April 1963 drew two bills in favour of the Cie. Algerienne de Credit et de Banque (subsequently the Cie. Française de Credit et de Banque or C.F.C.B.) the balance of which, 588,525 francs, was not paid when it fell due. The bank sued the company for repayment, together with Roger Atard, Mme. Francoise Atard, Louis Atard and Helène Atard, as sureties for the company under an instrument dated 25 June 1962. The judgment under appeal holds that the debt is extinguished and the sureties discharged, on the grounds that an

Algerian Decree of 22 March 1964, nationalizing flour-mills as well as cereal products and couscous factories, provides for the transfer of all their property, rights and obligations to the national firms which replaced them, and that these transfers give a right to compensation to be paid to the persons entitled in accordance with the measures to be laid down by subsequent decree. Articles 7 to 10 of the statutes of the national company, S.E.M.P.A.C., which were approved by decree on 23 March 1965, set out the method for determining compensation. It follows that the debt in question, having been incurred for the needs of the firm, is included in the rights and obligations transferred to S.E.M.P.A.C. These provisions do not provide for the payment of compensation prior to dispossession in contrast with the provisions of French legislation providing for the nationalization of various industries. They do not offend against present French public policy [ordre public]. And no consideration can be given to the Evian Agreements, because that 'would be to interpret an international agreement, which the Court is not entitled to do'. Finally,

> it is not necessary to examine whether or not the Algerian legislation which decreed the nationalization of the Atard firm is contrary to French public policy [ordre public], since the Court is not asked to apply in France, but to draw consequences in France, and in accordance with French law, from a legal status determined abroad by foreign legislation.

For this purpose 'it is in conformity with the principles on the matter deriving from French law and therefore from French public policy [ordre public] that the debts of nationalized firms follow their assets and are transferred to a new national corporation'. This transfer constitutes in effect a novation which is opposable to a prior creditor, who has no option but to accept the assignment of the debt imposed by law.

The Court of Appeal was, however, asked by the company and by the Atard partners to give the Algerian legislation, in virtue of which the factory in Algerian had been nationalized, effect in France as a release from the obligations in question. It had therefore to ascertain whether or not that legislation offended against French public policy [ordre public].

Now it appeared from Articles 3 and 4 of the Algerian Decree dated 22 May 1964 that an inventory of property and charges transferred was to be drawn up within 12 months of the transfer, and that the modalities of compensation were to be determined by a decree of the Minister for the National Economy. Article 8 of the Decree of 25 March 1965 further provided that compensation would

be paid in accordance with conditions to be fixed by the Minister for Industry and Commerce, and that it would in no case be greater than the liquidation value of the firm, taking into account all its assets. Such dispositions of principle which, after immediate dispossession, leave to the Administration the duty of fixing, within an undetermined and discretionary period of time, compensation, indicating only the sum which is not to be exceeded, are contrary to French public policy [ordre public]. The requirements of French public policy in fact correspond to the Governmental Declarations of 19 March 1962 which were approved in France by the Referendum on 8 April 1962 and in Algeria by the vote on self-determination on 1 July 1962, and it was within the competence of the Court of Appeal to base its decision on them. For, contrary to the view of that Court, their application does not in this case raise any question of public international law and they provide that no one shall be deprived of his rights without fair compensation previously agreed upon. It follows that, by discharging the debtors from their obligations to their creditor in application of foreign legislation contrary to French public policy [ordre public], and thereby ignoring the principle established by Article 2092 of the Civil Code, the Court of Appeal infringed the legislation in question.

[The decision of the Court of Appeal of Montpellier of 4 May 1966 was quashed, and the case referred to the Court of Appeal of Amiens.].

[Report: *Revue critique,* 1969, p.718 (in French).]

States as international persons—In general—Recognition of acts of foreign States and Governments—Foreign exchange control regulations—Transfer of funds from Algeria to France—Violation of Algerian exchange control regulations—International Monetary Fund—Articles of Agreement—Article 8(2)(b)—Whether contract contrary to Algerian exchange control regulations enforceable in France—The law of France

CONSTANT *v.* LANATA

France, Court of Appeal of Aix-en-Provence. 15 *December* 1966

Court of Cassation. 18 *June* 1969

SUMMARY : *The facts:*—Constant brought an action against Lanata in France for payment of an unpaid cheque for 300,000 French francs. This sum was the