Aspects of the Law of Treaties

Kenneth. J. Keith

Introduction

One good thing that has happened in international law in recent years has been the comprehensive review undertaken by the International Law Commission (ILC) under the misnamed “fragmentation” topic.1 “Misnamed” because what that study clearly reaffirmed, in its first conclusion, is that international law is a legal system, not a random collection of rules and principles. Those rules and principles act in relation to, and should be interpreted against the background of, other rules and principles. The reasons for undertaking that work, the studies which went into it, the accompanying academic and other commentary and the conclusions drawn all recognize the great variety of situations which international law covers these days, as a result of its “diversification and expansion” to quote another expression from the title of the topic. That expansion is to be seen in terms of the opinion given by the Permanent Court of International Justice (PCIJ) over 90 years ago: whether a matter is solely within the jurisdiction (reste dans le domaine juridique) of a state is essentially a relative one; it depends on the development of international relations.2 Such diversification and expansion of law is not peculiar to international law. It is also to be observed in many modern nations (along with the shrinking of the areas characterized as “domestic,” as meaning beyond the scope even of national law). That national experience, which also includes growing specialization and debates about that development and the alleged lack of an overall coherence of the national legal system, provides lessons for international lawyers. But in these busy days of specialization how often do they look to relevant national experience? Are they wrong not to do so?


2 Nationality Decrees Issued in Tunis and Morocco on 8 November 1921, PCIJ, Advisory Opinion of 1923 ser. B no. 4 Feb. 7.
85 years ago a future Judge and President of both the International Court of Justice (ICJ) and the European Court of Human Rights provided an excellent example of the value of the wider and comparative view. He begun by expressing his belief that inadequate attention had been given to the widely differing functions and legal character of instruments customarily comprised under the term “treaty.” The internal laws of the modern state, Arnold McNair continued, provide its members with a variety of legal instruments for the regulation of life there: the contract; the conveyance of property; the promise; the private Act of Parliament creating a corporation; legislation of many types; and constitutional documents. No one would say that all these transactions are governed by rules of universal or even general application and yet, he says, such is the underlying assumption of international lawyers in dealing with the only and sadly overworked instrument – the treaty.

In this tribute to a very good friend and outstanding scholar I try to apply some of Professor Soons’ rigor to the question whether some present day scholarship concerning the law of treaties sufficiently takes this diversity into account. I do that by reference to state practice, including the preparation of the Vienna Convention on the Law of Treaties 1969, and judicial decisions relating to different categories of treaties.

The Vienna Convention on the Law of Treaties

I begin with the 1969 Convention. The third Special Rapporteur on the law of treaties, Sir Gerald Fitzmaurice, in 1956 included in his first report, among draft introductory articles stating “fundamental principles of treaty law,” one laying out a classification of treaties

Treaties may, on grounds of practical convenience and for certain procedural purposes, be classified in various ways, according to their form, subject matter or object, and according to whether they are bilateral, plurilateral, or multilateral contractual (traités-contrats) or law-making or “normative” (traités-lois). However, subject to the provisions of the present Code, there is no substantial juridical difference between any of these classes of treaties as regards the legal requirements governing their

3 A. McNair “The Functions and Differing Legal Character of Treaties” (1930) 11 British Yearbook of International Law 100.