Chapter IX

THE FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW

A. Introduction

489. Following its consideration of a feasibility study[406] that had been undertaken on the topic of risks ensuing from the fragmentation of international law, the Commission, at its fifty-second session, in 2000, decided to include the topic in its long-term programme of work.[407]

490. The General Assembly, in paragraph 8 of its resolution 55/152, took note of the Commission's decision with regard to the long-term programme of work, and of the syllabus on the new topic annexed to the Commission's report to the Assembly on the work of its fifty-second session.

491. The General Assembly, in paragraph 8 of its resolution 56/82, requested the Commission to give further consideration to the topics to be included in its long-term programme of work, having due regard to comments made by Governments.

B. Consideration of the topic at the present session

492. At the present session, the Commission decided, at its 2717th meeting, held on 8 May 2002, to include the topic in its programme of work.

493. At the same meeting, the Commission established a Study Group on the topic.[408]

494. At its 2741st and 2742nd meetings, held on 6 and 7 August 2002, the Commission considered and adopted the report of the Study Group as amended (A/CN.4/L.628 and Corr.1), which appears in section C below. In so doing, the Commission decided, *inter alia*, to change the title of the topic to "The fragmentation of international law: difficulties arising from the diversification and expansion of international law".

C. Report of the Study Group

1. Summary of the discussion

(a) *Support for study of the topic*

495. One of the main questions that the Study Group considered was whether the topic of the fragmentation of international law (understood as a consequence of the expansion and diversification of international law) was suitable for study by the Commission. While there appeared to be considerable uncertainty, at least initially, about the potential scope of the topic and the substance and format of a possible final result of the Commission's work, almost all members of the Study Group were strongly in favour of taking up the topic. There was a general feeling that further study of the topic was desirable and that this was an area where the Commission could provide useful guidance, at least in relation to specific aspects of the issue.

496. The Commission recognized from the beginning that this topic was different in nature.[409] However, the unique nature of the topic did not detract from the broad support for the Commission's consideration of it.

497. There was agreement that fragmentation was not a new phenomenon. The view was expressed that international law was inherently a law of a fragmented world. Other members elaborated by stating that an increase in fragmentation was also a natural consequence of the expansion of international law. Therefore, the Study Group felt that the Commission should not approach fragmentation as a new development, as this could distract from the existing mechanisms that international law had developed to cope with the challenges arising from fragmentation.

498. The Study Group took note of the risks and challenges posed by fragmentation to the unity and coherence of international law, as discussed in the feasibility study undertaken in 2000 referred to in paragraph 489 above. The work of the Commission would have to be guided by the aim of countering such risks and challenges. On the other hand, the Study Group also thought it important to highlight the positive aspects of fragmentation. For example, fragmentation could be seen as a sign of the vitality of international law. It was also suggested that the proliferation of rules, regimes and institutions might strengthen international law. The same was true of regional international law and institutions. Attention was drawn to the fact that the increasing scope of international law meant that areas previously unaddressed by international law were being addressed. Similarly, there were advantages in increased diversity of voices and a polycentric system in international law.

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[406] G. Hafner, "Risks ensuing from fragmentation of international law", *Yearbook … 2000*, vol. II (Part Two), annex, p. 143.

[407] See footnote 399 above.

[408] For the membership of the Study Group see para. 10 (*c*) above.

[409] The topic was described in the Commission's report to the General Assembly on the work of its fifty-second session as being "different from other topics which the Commission had so far considered" (*Yearbook … 2000*, vol. II (Part Two), p. 132, para. 731).

(b) *Procedural issues*

499. Regarding procedural issues, some members questioned whether the topic fell within the Commission's mandate. However, most members thought that this concern was unfounded. Some members raised the issue of whether the Commission would have to seek further approval of the General Assembly (see paras. 490 and 491 above) before taking up this topic. However, most members thought that in this case the necessary support of the Assembly could be obtained.

(c) *Appropriate title*

500. It was the general sense of the Study Group that the title of the topic, "Risks ensuing from the fragmentation of international law", was not entirely adequate because it depicted the phenomena described by the term "fragmentation" in too negative a light. However, the Study Group considered that fragmentation might include certain undesirable consequences of the expansion of international law into new areas.

(d) *Methodology and format of work*

501. Regarding methodology, there were wide-ranging ideas about how to approach such a broad topic. It was agreed that the subject was not suitable for codification in the traditional format of draft articles.

502. One suggested approach to the topic would be to focus on specific subject areas or themes. Along those lines, it was recommended that the Commission identify certain areas where conflicting rules of international law existed—for example, extradition treaties and human rights norms—and, if possible, develop solutions for such conflicts. It was also suggested that the Commission take a more descriptive approach, confining work to an assessment of the seriousness of fragmentation of international law.

503. At the other end of the spectrum, a more exploratory approach was proposed, with the methodology not necessarily having to be clearly established at this stage. It was thought that such an approach was consonant with the unique nature of the topic, where an evolving methodology might be most appropriate.

504. The Study Group identified several areas that were not suitable for study by the Commission. It was stated that the problem could be conceptualized in different ways.

505. There was agreement in the Study Group that the Commission should not deal with questions of the creation of or relationship among international judicial institutions. It was, however, considered that, to the extent that the same or similar rules of international law could be qualified and applied differently by judicial institutions, problems that might arise from such divergences should be addressed.

506. There was also agreement that drawing analogies to the domestic legal system might not always be appropriate. It was thought that such analogies introduced a concept of hierarchy that was not present on the international legal plane and should not be superimposed. It was suggested that there was no well-developed and authoritative hierarchy of values in international law. In addition, there was no hierarchy of systems represented by a final body to resolve conflicts.

507. It was acknowledged that the Commission should not act as a referee in the relationships between institutions, or in areas of conflicting rules. On the other hand, the Commission could usefully address issues of communication among such institutions.

508. It was suggested that the Commission organize, at a later stage, a seminar to address fragmentation and that it take a role as either participant or moderator of such a seminar. The purposes of the seminar would be to gain an overview of State practice and provide a forum for dialogue and potential harmonization. According to another suggestion, the seminar would take place at the beginning of each annual session of the Commission. It was the view of the Study Group that such an undertaking would be consistent with chapter III of the Commission's statute. Another proposal was to go beyond the idea of a seminar in terms of the Commission's role in facilitating coordination. More institutionalized and periodical meetings were envisaged, and it was pointed out that similar practice already existed, for example, in the form of the meetings of chairpersons of human rights treaty bodies and the annual meeting of legal advisers of States held at the United Nations during the sessions of the General Assembly.

509. It was proposed that research into existing coordination mechanisms, such as those referred to in the preceding paragraph, by way of a questionnaire would be desirable.

(e) Suggestions as to the possible outcome of the Commission's work

510. The prevailing view in the Study Group was that the result of the Commission's work should be a study or research report, although there was not yet agreement on the exact format or scope of any such report. On this basis, the Commission would then decide on appropriate action.

2. Recommendations

511. In light of the discussion in the Study Group regarding the title of the topic (see para. 500 above), the Group proposed that it be changed to "The fragmentation of international law: difficulties arising from the diversification and expansion of international law".

512. The Study Group recommended that a series of studies on specific aspects of the topic be undertaken and presented to the Commission for its consideration and appropriate action. The purpose of such studies would be to assist international judges and practitioners in coping with the consequences of the diversification of international law. In this regard the following topics, among others, could be made the subject of study:

(*a*) The function and scope of the *lex specialis* rule and the question of "self-contained regimes";

(*b*) The interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31, paragraph 3 (*c*), of the 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community;

(*c*) The application of successive treaties relating to the same subject matter (article 30 of the Convention);

(*d*) The modification of multilateral treaties between certain of the parties only (article 41 of the Convention);

(*e*) Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations as conflict rules.

The choice of the topics to be studied was guided by earlier work done by the Commission, for instance, in the field of the law of treaties or of State responsibility for internationally wrongful acts. Thus, as in the approach pursued on the topic of reservations to multilateral treaties, these studies would build upon and further develop such earlier texts. The effort should aim at providing a "toolbox" to assist in solving practical problems arising from incongruities and conflicts between existing legal norms and regimes.

513. It was proposed that, as a first step, the Chair of the Study Group would undertake a study on the topic "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".