Chapter X

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

A. Introduction

407. The Commission, at its fifty-second session in 2000, following its consideration of a feasibility study[498] that had been undertaken on the topic entitled "Risks ensuing from fragmentation of international law", decided to include the topic in its long-term programme of work.[499]

408. 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 report of the Commission to the Assembly on the work of its fifty-second session.

409. 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.

410. At its fifty-fourth session, in 2002, the Commission decided to include the topic in its programme of work and established a study group on the topic. It also decided to change the title of the topic to "The fragmentation of international law: difficulties arising from the diversification and expansion of international law".[500] It also agreed on a number of recommendations, including on a series of studies to be undertaken, commencing first with a study, to be undertaken by the Chairman of the Study Group, entitled "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

411. The General Assembly, in paragraph 2 of its resolution 57/21, took note, *inter alia*, of the decision of the Commission to include the topic in its programme of work.

B. Consideration of the topic at the present session

412. At the present session, the Commission decided, at its 2758th meeting, held on 16 May 2003, to establish an open-ended study group on the topic and appointed Mr. Martti Koskenniemi as Chairman, to replace Mr. Bruno Simma who was no longer a member of the Commission, having been elected as judge to ICJ.

413. The Study Group held four meetings on 27 May and 8, 15 and 17 July 2003. Its discussions were focused on setting a tentative schedule for work to be carried out during the remaining part of the current quinquennium (2003–2006), on distributing among members of the Study Group work on studies (*b*)–(*e*) decided in 2002,[501] on deciding upon the methodology to be adopted for that work and on a preliminary discussion of an outline by the Chairman of the Study Group of the question of "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" (topic (*a*), decided in 2002).

414. At its 2779th meeting, held on 23 July 2003, the Commission took note of the report of the Study Group (A/CN.4/L.644), which is reproduced below.

C. Report of the Study Group

1. General comments

415. During an initial exchange of views, the Study Group proceeded on the basis essentially of a review of the report of the 2002 Study Group;[502] and the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-seventh session (A/CN.4/529, sect. F).

416. Commenting on the background to the topic and approaches to be followed, it was noted that an examination of the various statements and written works on the subject of fragmentation revealed that a distinction ought to be drawn between institutional and substantive perspectives. While the former focused on concerns relating to institutional questions of practical coordination, institutional hierarchy, and the need for the various

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[498] G. Hafner, "Risks ensuing from fragmentation of international law", *Yearbook ... 2000*, vol. II (Part Two), annex, pp. 143–150.

[499] See footnote 14 above.

[500] *Yearbook ... 2002*, vol. II (Part Two), p. 97, paras. 492–494.

[501] The following topics were included in 2002:

(*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" (art. 31, para. 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 (art. 30 of the Convention);

(*d*) The modification of multilateral treaties between certain of the parties only (art. 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.

(*Ibid.*, pp. 98–99, para. 512)

[502] *Ibid.*, pp. 97–99, paras. 495–513.

actors—especially international courts and tribunals—to pay attention to each other's jurisprudence, the latter involved the consideration of whether and how the substance of the law itself may have fragmented into special regimes which might be lacking in coherence or were in conflict with each other.

417. It was observed that such a distinction was important especially in determining how the Commission would carry out its study. An analysis of the Commission's discussion at its fifty-fourth session (2002) seemed to reveal a preference for a substantive perspective. In the report of the Commission to the General Assembly on the work of its fifty-fourth session,[503] there was agreement that the Commission should not deal with questions concerning the creation of, or the relationship among, international judicial institutions. In other words, the Commission was not being asked to deal with institutional proliferation.

418. The Sixth Committee of the General Assembly seemed to agree with the Commission in this regard. It transpired from paragraph 227 of the topical summary that several delegations agreed that the Commission should not for the time being deal with questions of the creation of or the relationship among international judicial institutions and from paragraph 229 that the Commission should not act as a referee in the relationships between institutions.

419. In dealing with the substantive aspects, it was observed that it would be necessary to bear in mind that there were at least three different patterns of interpretation or conflict, which were relevant to the question of fragmentation but which had to be kept distinct:

(*a*) Conflict between different understandings or interpretations of general law. Such was the scenario in the *Tadić* case.[504] In its judgement, the Appeals Chamber of the International Tribunal for the Former Yugoslavia deviated from the test of "effective control" employed in the *Military and Paramilitary Activities in and against Nicaragua* case[505] by ICJ as the legal criterion for establishing when, in an armed conflict which is *prima facie* internal, an armed military or paramilitary group may be regarded as acting on behalf of a foreign power. Instead, it opted for an "overall control" test. In that particular case, the Tribunal examined the Court's and other jurisprudence and decided to depart from the reasoning in the Court's judgment;

(*b*) Conflict arising when a special body deviates from the general law, not as a result of disagreement as to the general law but on the basis that a special law applies. No change is contemplated to the general law but the special body asserts that a special law applies in such a case. This circumstance has arisen in human rights bodies when applying human rights law in relation to the general law of treaties, particularly in cases concerning the effects of reservations. In the *Belilos* case,[506] the European Court of Human Rights struck down an interpretative declaration by construing it first as an inadmissible reservation and then disregarding it while simultaneously holding the declaring State as bound by the European Convention on Human Rights;

(*c*) Conflict arising when specialized fields of law seem to be in conflict with each other. There may, for example, exist conflict between international trade law and international environmental law. The approaches in the jurisprudence on this matter have not been consistent. The GATT Dispute Settlement Panel in its 1994 report on United States restrictions on imports of tuna,[507] while acknowledging that the objective of sustainable development was widely recognized by the GATT Contracting Parties, observed that the practice under the bilateral and multilateral treaties dealing with the environment could not be taken as practice under the law administered under the GATT regime and therefore could not affect the interpretation of it. In the *Beef Hormones* case,[508] the WTO Appellate Body concluded that whatever the status of the "precautionary principle" under environmental law, it had not become binding on WTO as it had not, in its view, become binding as a customary rule of international law.

420. The above examples were viewed only as illustrative of the conceptual framework in which substantive conflict might arise without passing judgement on the merits of each case or without implying that these were the only ways to understand them. The three situations—conflict between different understandings or interpretations of general law, between general law and a special law claiming to exist as an exception to it, and between two specialized fields of law—were to be kept analytically distinct only because they would raise the question of fragmentation in different ways.

421. Furthermore, it was noted that in paragraph 506 of its report to the General Assembly on the work of its fifty-fourth session, in 2002, the Commission decided not to draw hierarchical analogies with domestic legal systems. Hierarchy was not completely overlooked from the

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[503] *Ibid.*, p. 98, para. 505.

[504] *Prosecutor* v. *Duško Tadić,* International Tribunal for the Former Yugoslavia, case No. IT–94–1–A, judgement of 15 July 1999, ILM, vol. 38 (1999), pp. 1540–1546, paras. 115–145.

[505] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 62–65, paras. 109–116. ICJ observed in that case that there must be "effective control of the military or paramilitary operations in the course of which the alleged violations [of human rights and humanitarian law] were committed" (para. 115). The same test of "effective control" was not utilized by the Court with respect to Nicaragua's other claims.

[506] *Belilos* case (see footnote 456 above), p. 28, para. 60.

[507] ILM, vol. 33 (1994), p. 839. See also ILM, vol. 30 (1991), p. 1594. The 1994 Panel further noted that the relationship between environmental and trade measures would be considered in arrangements for establishing WTO (*ibid.*, vol. 33, p. 899). See also, however, WTO, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, AB–1998–4, report of the Appellate Body (WT/DS58/AB/R) which acknowledged the significance of the need to protect and preserve the environment, including the adoption of effective measures to protect endangered species, and for members to act together bilaterally or multilaterally within WTO or other forums to protect such species. It stressed, however, that any such measures should be applied in a manner that would not constitute arbitrary and unjustified discrimination between members of WTO or disguised trade restrictions (pp. 24–25, paras. 184–186). For references to various environmental treaties, see paragraphs 129–135, 153–155 and 168.

[508] WTO, *EC Measures concerning meat and meat products (hormones)*, AB–1997–4, report of the Appellate Body (WT/DS26/AB/R, WT/DS48/AB/R), paras. 120–125.

Commission's study, however. In the recommendations in paragraph 512 (*e*) of the report of the Commission, "Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules" was identified for further study.

422. The Study Group observed that although some concern had been voiced about the appropriateness for study of the topic of fragmentation, it had received general support from the Sixth Committee of the General Assembly during its fifty-seventh session. The Sixth Committee considered the topic to be of great current interest in view of the possibility of conflicts emerging, at substantive and procedural levels, as a result of the proliferation of institutions that apply or interpret international law. It found that the difference in nature of the topic from other topics previously considered by the Commission warranted the creation of the Study Group. The positive and negative aspects of fragmentation were also highlighted and support was expressed for studies to be carried out and seminars organized.

423. The recommendations made in 2002 by the Commission in its report to the General Assembly on the work of its fifty-fourth session had also been broadly supported in the Sixth Committee. There appeared to be a preference for a comprehensive study of the rules and mechanisms for dealing with conflicts. The Assembly had also endorsed the Commission's view that the 1969 Vienna Convention would provide an appropriate framework within which the study would be carried out. The proposal also to consider the question of the *lex posterior* rule had been made, but it had also been considered that this would take place within the current programme of work.

2. Tentative schedule, programme of work and methodology

424. The Study Group agreed upon the following tentative schedule for 2004 to 2006. It essentially agreed to proceed on the basis of the recommended studies contained in paragraph 512 of the Commission's report to the General Assembly on its fifty-fourth session.

425. For 2004, it was agreed that a study on the function and scope of the *lex specialis* rule and the question of "self-contained regimes" would be undertaken by the current Chairman of the Study Group on the basis of the outline and the discussion in the Study Group in 2003. This should also contain an analysis of the general conceptual framework against which the whole question of fragmentation had arisen and was perceived. The study might include draft guidelines to be proposed for adoption by the Commission at a later stage of its work.

426. For 2004, it was also agreed that shorter introductory outlines on the remaining studies in paragraph 512 (*b*)–(*e*) of the report of the Commission to the General Assembly on the work of its fifty-fourth session would be prepared by members of the Commission. These outlines should focus, inasmuch as appropriate, on the following four questions: (*a*) the nature of the topic in relation to fragmentation; (*b*) the acceptance and rationale of the relevant rule; (*c*) the operation of the relevant rule; and (*d*) conclusions, including possible draft guidelines.

427. The distribution of work on the preparation of the outlines was agreed as follows:

(*a*) The interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (art. 31, para. 3 (*c*), of the 1969 Vienna Convention), in the context of general developments in international law and concerns of the international community: Mr. William Mansfield;

(*b*) The application of successive treaties relating to the same subject matter (art. 30 of the 1969 Vienna Convention): Mr. Teodor Melescanu;

(*c*) The modification of multilateral treaties between certain of the parties only (art. 41 of the 1969 Vienna Convention): Mr. Riad Daoudi;

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

428. For 2005, the five studies would be completed. The Study Group would also hold a first discussion on the nature and content of possible guidelines and 2006 was reserved for the collation of the final study covering all topics, including the elaboration of possible guidelines.

3. Discussion of the study concerning the function and scope of the *lex specialis* rule and the question of "self-contained regimes"

429. In its discussion of the topic, the Study Group focused on an outline of the study prepared by the Chairman. The Study Group welcomed the general thrust of the outline, which dealt with *inter alia* the normative framework of fragmentation. There was support for the general conceptual framework proposed, distinguishing the three types of normative conflict against which the question of fragmentation should be considered as described in paragraph 419 above. While fragmentation through conflicting interpretations of the general law was not necessarily a case of *lex specialis,* it was considered an important aspect of fragmentation worth further study. Mindful of the sensitivity of addressing institutional issues, it was suggested that such consideration be confined to an analytical assessment of the issues involved, including the possibility of making practical suggestions relating to increased dialogue among the various actors.

430. The Study Group considered the preliminary conceptual questions addressed within the outline relating to the function and the scope of the *lex specialis* rule. The questions focused on the nature of the *lex specialis* rule, its acceptance and rationale, the relational distinction between the "general" and the "special" rule and the application of the *lex specialis* rule in regard to the "same subject matter".

431. There was agreement that the *lex specialis* rule could be said to operate in the two different contexts

proposed by the outline, namely *lex specialis* as an elaboration or application of general law in a particular situation and *lex specialis* as an exception to the general law. A narrower view considered *lex specialis* to apply only where the special rule was in conflict with the general law. It was agreed that the expository study should cover both the broad and narrow conceptions of *lex specialis*, with a view to possibly confining the approach at a later stage. In addition, the situation should be considered where derogation was prohibited by the general rule.

432. It was decided that areas regulated by regional law, which some members thought were conceptually different from *lex specialis,* should be considered within this topic. Similarly, it was considered that questions concerning the measures undertaken by regional arrangements or organizations in the context of a centralized collective security system under the Charter of the United Nations might deserve attention. It was also considered useful to investigate further and expand the general conclusions concerning the omnipresence of principles of general international law against which the *lex specialis* rule applied, taking into account the different views expressed in the Study Group on the subject.

433. The Study Group considered the alleged existence of "self-contained regimes" as discussed in the outline. It was agreed that while such regimes were sometimes identified by reference to special secondary rules contained therein, the distinction between primary and secondary rules was often difficult to apply and might not be required for the study. In reviewing the acceptance and rationale of such regimes as well as the relationship between self-contained regimes and general law, the Study Group also emphasized the importance of general international law within its analysis of the issues. In particular, it was stressed that general international law regulated those aspects of the functioning of a self-contained regime not specifically regulated by the latter, and became fully applicable in case the "self-contained regime" might cease to function.

434. The Study Group agreed that it would be useful to consider *lex specialis* and self-contained regimes against the background of general law. It considered, however, that in elucidating the relations between *lex specialis* and general international law it would be useful to proceed by way of concrete examples rather than engaging in wide-ranging theoretical discussions. It was, for example, probably unnecessary to take a firm stand on the issue of whether or not international law could be described as a "complete system".

435. While the Study Group noted with interest the sociological and historical factors that gave rise to diversification, fragmentation and regionalism, such as the existence of common legal cultures, it stressed that its own study would concentrate on legal and analytical issues and the possible development of guidelines for consideration by the Commission.