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Report of the Study Group on Fragmentation of International Law

Introduction

1. In the course of the last quinquennium, the Commission's Working Group on the long-term programme of work identified the topic "Risks ensuing from fragmentation of international law" as a subject that might be suitable for further study. The topic was assigned to Mr. Gerhard Hafner to conduct a feasibility study in order to determine the potential of the topic for inclusion in the long-term programme of work of the Commission.

2. After consideration of the feasibility study,[1] the Commission decided at its fifty-second session (2000) to include the topic in its long-term programme. The study by Mr. Hafner subsequently formed the starting point for consideration of the topic by the newly-elected Commission at its fifty-fourth session (2002).

[1] G. Hafner, "Risks Ensuing from Fragmentation of International Law", *Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10* (A/55/10), annex.

3. At its current session, the Commission established a Study Group on the Fragmentation of International Law chaired by Mr. Bruno Simma.[2] During the first half of the session the Study Group met four times: on 29 May 2002, 4 June 2002, 30 and 31 July 2002. This report summarizes the discussion at the first two meetings (Part I), including an overview of the practical suggestions that were put forward in the Study Group in relation to the role of the Commission and the potential result of its work on the subject. Part II contains the recommendations of the Study Group.

I. SUMMARY OF DISCUSSION

A. Support for study of the topic

4. One of the main questions that the Study Group considered was whether the topic of 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.

5. The Commission recognized from the beginning that this topic was different in nature.[3] However, the unique nature of the topic did not detract from the broad support for the Commission considering it.

6. There was agreement that fragmentation is not a new development. The view was expressed that international law is inherently a law of a fragmented world. Other members elaborated by stating that an increase in fragmentation is also a natural consequence of the

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[2] The members of the Study Group are: E. Addo, I. Brownlie, E. Candioti, C. Dugard, P. Escarameia, G. Gaja, Z. Galicki, M. Kamto, J. Kateka, F. Kemicha, M. Koskenniemi, W. Mansfield, D. Momtaz, B. Niehaus, G. Pambou-Tchivounda, A. Pellet, P. Rao, R. Rosenstock, B. Sepulveda, B. Simma, P. Tomka, H. Xue, C. Yamada, V. Kuznetsov (*ex officio*).

[3] The topic was described in the Commission's 2000 report as being "different from other topics which the Commission had so far considered" (*Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10* (A/55/10), para. 731).

expansion of international law. Therefore, the Study Group felt that the Commission should not approach fragmentation as a new phenomenon, as this could distract from the existing mechanisms that international law has developed to date to cope with the challenges arising from fragmentation.

7. The Study Group also thought it important to highlight the positive aspects of fragmentation. For example, fragmentation can 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. Attention was drawn to the fact that the increasing scope of international law means that areas that were previously unaddressed by international law are now being addressed. Similarly, there are advantages in increased diversity of voices and a polycentric system in international law.

B. Procedural Issues

8. Regarding procedural issues it was questioned whether the topic fell within the Commission's mandate. However, a clear majority of members thought that this concern was unfounded. There was an issue of whether the Commission would have to seek the approval of the Sixth Committee before taking up this topic, although it was thought that in this case the necessary support of the Sixth Committee could be obtained.

C. Appropriate Title

9. It was the general sense of the Study Group that the title of the Hafner report, "Risks Ensuing from Fragmentation of International Law" was not adequate because it depicted the phenomena described by the term "fragmentation" in too negative a light. The Study Group considers that the term fragmentation denotes certain undesirable consequences of the expansion of international law into new areas. The work of the Commission would have to be guided by the aim of countering these consequences.

D. Methodology and format of work

10. 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.

11. One suggested approach to the topic would be to focus on specific subject areas or themes. Along these lines it was recommended that the Commission identify certain areas where conflicting rules of international law existed, and, if possible, develop solutions for these

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.

12. 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.

13. 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.

14. There was agreement in the Study Group that the Commission should not deal with questions of the creation 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 applied differently by judicial institutions, problems that may arise from such divergencies should be addressed.

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

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

17. It was suggested that the Commission organize a seminar in order to address fragmentation and that it take a role as either participant or moderator of such a seminar. The purpose of the seminar would be to gain an overview of State practice as well as to 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 Group that such an undertaking would be consistent with Chapter Three 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 there was similar practice already existing, for example the meeting of Chairpersons of Human Rights Treaty Bodies and the annual meeting of national legal advisers at the United Nations.

E. Suggestions as to the possible outcome of the Commission's work

18. It was proposed that research into existing coordination mechanisms, such as those referred to in paragraph 17 above, by way of a questionnaire, would be desirable.

19. The prevailing view in the Study Group was that the final 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.

II. RECOMMENDATIONS OF THE STUDY GROUP

20. In light of the discussion in the Study Group regarding the title of the topic (see paragraph 9 above), the Group proposes that it be changed to "Difficulties arising from the diversification of international law".

21. The Study Group recommends 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 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and "contemporary concerns of the community of nations"(*Shrimp Products Case*[4]);

(c) The application of successive treaties relating to the same subject matter (Article 30 of the Vienna Convention on the Law of Treaties);

(d) The modifications of multilateral treaties between certain of the parties only (Article 41 of the Vienna Convention on the Law of Treaties);

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[4] *United States - Import Prohibition of Certain Shrimp and Shrimp products, WTO Appellate Body*, 1998, Case No. AB-1998-4 (document WT/DS58/AB/R), at para. 129.

(e) Hierarchy in treaty 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 the responsibility of States for internationally wrongful acts. Thus, similar to the approach currently 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 what could be called a "toolbox" designed to assist in solving practical problems arising from incongruities and conflicts between existing legal norms and regimes.

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