

Document:-
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Summary record of the 2742nd meeting.

Topic:

Extract from the Yearbook of the International Law Commission:-
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how it would present the study of the subject to the Sixth Committee, which would in return give it useful guidance for its work.

56. Mr. MOMTAZ, referring to the first part of the report (“Summary of discussion”), said that, while he welcomed the reference in paragraph 14 to the problem of fragmentation caused by the differing application of rules of law by international judicial institutions, he thought that the explanation given in the second sentence was not clear enough. In his opinion, a distinction must be made between two different situations.

57. The first was when judicial institutions applied different rules of international law to solve the same problem. The International Tribunal for the Former Yugoslavia and ICJ had based themselves on differing criteria, for example, for the attribution of an act to a State.

58. The second situation related to the differences between courts in what they determined to be the applicable rule of law. The decisions of the International Tribunal for the Former Yugoslavia and ICJ differed in that respect as well. With regard to environmental protection, for example, the International Tribunal for the Former Yugoslavia had found that the applicable rule was a customary rule, whereas ICJ had considered that it was a conventional rule.

59. Turning to paragraph 21 of the report, he pointed out that the subject for study proposed in subparagraph (e) (hierarchy in treaty law) actually related to the determination of the rule, which varied from one court to the next.

60. He therefore proposed that the wording of paragraph 14 should be amended to make the meaning of paragraph 21 (e) clearer.

61. Mr. ADDO said that, contrary to what the Study Group stated in paragraph 9 of its report, the term “fragmentation” should be retained in the title of the topic. Not only was that term catchier than those that had been proposed to replace it, but it also corresponded better to the reality. He did not see how the retention of the term could place the study in an unduly negative light. Even if there were negative connotations, the Commission must determine and describe in the text to be adopted what should be done to counter them. In addition, the term was in the title under which the Sixth Committee had approved the study of the topic.³

62. Finally, he requested Mr. Koskenniemi to explain what he had meant when he had spoken of the Commission’s “grandfather rights” over the Vienna Conventions.

63. Mr. MANSFIELD said that, as the Chair of the Study Group had explained, the subject of the fragmentation of international law was different from those the Commission had dealt with in the past, and this could and should affect the Commission’s approach to it. It was un-

necessary to have a fully developed methodology or clear end product before commencing work. A more exploratory approach was appropriate. But the work must above all be of practical relevance and be timely. That was why he entirely endorsed the “toolbox” approach advocated in the report.

64. Mr. KOSKENNIEMI, replying to Mr. Addo’s question, said that he had spoken of the Commission’s “grandfather rights” over the 1969 and 1986 Vienna Conventions because people might ask why the Commission was arrogating to itself the right to take up the question of the fragmentation of international law. The fact that the Commission had drafted the texts of the Conventions was one of the reasons why subjects like that of reservations to treaties had been allocated to it. It could be said that the Commission was the guardian of the Conventions.

65. Mr. KAMTO, endorsing the comments made by Mr. Addo, said he thought that the original title of the topic should be retained for both practical and conceptual reasons. If the term was dropped, the topic would in a sense be deprived of its meaning. The Commission should not be haunted by the negative connotations of the term, which could be countered by giving it a good definition in the body of the text. He could, however, understand Mr. Rodríguez Cedeño’s concerns and could agree to the study’s being entitled “Consequences of the fragmentation of international law”.

66. The CHAIR invited the members of the Commission to think about formal amendments that they might like to make to the report with a view to its adoption paragraph by paragraph at the next meeting.

67. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) requested the members of the Commission to think about questions they might wish to put to the Sixth Committee.

The meeting rose at 12.45 p.m.

2742nd MEETING

Wednesday, 7 August 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr.

³ General Assembly resolution 55/152 of 12 December 2000, para. 8.

Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue.

The fragmentation of international law: difficulties arising from the diversification and expansion of international law (concluded) (A/CN.4/L.628 and Corr.1)¹

[Agenda item 8]

REPORT OF THE STUDY GROUP (concluded)

1. Mr. NIEHAUS recalled that at the previous meeting it had been suggested that questions on the topic of the fragmentation of international law should be incorporated in the report with a view to their consideration by the Sixth Committee at its forthcoming session. He had three questions in mind.

2. The first and most important was whether States considered that the topic was suitable for the Commission's attention or lay outside its mandate. In paragraph 8 of its report on the fragmentation of international law (A/CN.4/L.628 and Corr.1) the Study Group itself expressed doubts in that regard, while paragraph 10 indicated that the subject was not suitable for codification in the traditional form of draft articles. Even though the Sixth Committee was seen as likely to say the topic fell within the Commission's mandate, he thought the question should be asked.

3. Another question was whether States considered that the proliferation of judicial institutions was beneficial or detrimental to their freedom to choose peaceful means of settling disputes. Yet a third question was what solutions should be applied where there were conflicting judicial precedents.

4. Mr. AL-BAHARNA congratulated the Study Group on the Fragmentation of International Law on a comprehensive and lucid report. Under article 1 of its statute, the Commission's primary task was the codification and progressive development of international law. Article 16 of the statute outlined the procedure to be used for achieving that objective, namely the preparation of drafts on topics chosen and approved by the General Assembly. Article 17 further provided that the Commission was to consider proposals and draft multilateral conventions submitted by Members and organs of the United Nations and other official bodies. The Commission's experience with undertaking research studies on international law as suggested in the Study Group's report was, on the other hand, rather limited.

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part Two), chap. IX, sect. C.

5. In his feasibility study entitled "Risks ensuing from fragmentation of international law",² the basis of the present report, Mr. Gerhard Hafner had argued that, since the fragmentation of international law could endanger its stability, consistency and comprehensive nature, it fell within the Commission's purview to address those problems and to seek ways and means of overcoming the possible detrimental effects of such fragmentation. That, however, was an assumption on Mr. Hafner's part, and the fact remained that the research study envisaged in the Study Group's report did not fall specifically within the Commission's objective as specified in article 1 of its statute.

6. In support of his view that the Commission could draw up a report to single out the problems relating to fragmentation and raise the awareness of States about them, Mr. Hafner had referred to a Secretariat report that cited two isolated cases which could serve as precedents. In its work on treaties at its third and fifteenth sessions in 1951 and 1963, the Commission had departed from its practice of producing draft articles and had instead carried out studies, accompanying them with its conclusions.³ Those exceptions should not, however, be taken as precedents for the Commission to undertake a study that did not fit in with its objectives and purpose.

7. He agreed with the view expressed in paragraph 8 of the Group's report that the issue needed specific approval from the Sixth Committee. On the other hand, he endorsed the idea set out in paragraph 17 of organizing a seminar on the issue of fragmentation whose purpose would be to gain an overview of State practice and to provide a forum for dialogue and potential harmonization. The issue could also be taken up at the annual meetings at the General Assembly of legal advisers of ministries of foreign affairs.

8. He wished to draw attention to the statement in paragraph 19 that no agreement had yet been reached on the exact format or scope of any report on the topic, and in his opinion the recommendation in paragraph 21 that a series of studies on specific aspects of the topic should be undertaken was premature. The task would be time-consuming, and it would be more appropriate for the Commission to focus on topics falling within its mandate, as approved by the Sixth Committee at the fifty-sixth session of the General Assembly, in 2001,⁴ and contained in the long-term programme of work, such as responsibility of international organizations and shared natural resources. Paragraph 122 of the topical summary of the Sixth Committee's discussions at the fifty-sixth session of the General Assembly (A/CN.4/521) prepared by the Secretariat indicated that many delegations thought those topics should be given priority.

9. Paragraph 21 of the report said that the purpose of the proposed studies would be to assist international judges and practitioners in coping with the consequences of the diversification of international law. Surely, the judges at ICJ hardly needed to be briefed by the Commission on that issue and were undoubtedly well placed to deal with

² See 2741st meeting, footnote 2.

³ *Yearbook ... 1951*, vol. II, document A/1858, p. 125; and *Yearbook ... 1963*, vol. II, document A/5509, p. 217.

⁴ General Assembly resolution 56/82.

the conflicting rules of international law and the problems arising from them. Mr. Hafner himself, in section F of his feasibility study, had cited Judge Schwebel, former president of the Court, as having suggested that conflicting interpretations of international law might be minimized by enabling international tribunals to request advisory opinions from the Court on issues of importance to the unity of international law. In his own view, the difficulties connected with the diversification of international law arose from State practice, in the sense that the rules of international law were being applied to suit the interests of individual States, something that posed problems of ethics, not of the law.

10. The Commission should sponsor the publication of a book of articles on the fragmentation or diversification of international law to which its members could contribute. In the past, it had published a similar work, for which Mr. Pellet had served as chief editor. Finally, he hoped Mr. Simma's candidacy for ICJ would not interfere with his assignment to undertake a study on the *lex specialis* rule, as stated in paragraph 22 of the Study Group's report.

11. The CHAIR, speaking as a member of the Commission, said that the progressive development of international law did not mean simply drafting treaties that restated the law in a new or more socially acceptable form: it embraced all forms of concern with the way the law worked and how to make legal systems function more smoothly. He did not see how one could argue that the topic lay outside the Commission's purview, for in paragraph 8 of resolution 55/152 the General Assembly had taken note of the Commission's long-term programme of work, which included the topic of the risk ensuing from the fragmentation of international law. On the other hand, he did agree that the topic covered sensitive areas that would have to be handled with care.

12. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law), summing up the discussion, said it had been agreed that the reference, in paragraph 21 (b) of the Study Group's report, to the *Shrimp Products* case, together with the related footnote, would be deleted. On the other hand, a reference to the specific conflict between human rights norms and extradition treaties would be reintroduced. It had been suggested that the new title of the study should include the word "expansion", so it would now read "Difficulties arising from the expansion and diversification of international law". One member had thought that the word "difficulties" was unduly negative and had suggested that the word "consequences" should be used instead.

13. A number of members had been critical of the idea of organizing a seminar, citing issues such as the cost to the Organization and the necessary input, but it was merely mentioned in the summary of discussion, not as part of the Study Group's recommendations. If the Commission wished to hold a seminar at some later stage, it could do so. One member had been of the view that paragraphs 4 to 7, which dealt with the phenomenon of fragmentation, did not say enough about the positive aspects of fragmentation, including integration.

14. Mr. Niehaus had proposed that certain questions be incorporated, specifically on clarification of the Commission's mandate, although he himself agreed with the Chair's remarks on that point. Another question was whether the subject was suitable for codification in the traditional format of draft articles (para. 10). A third related to the proliferation of international judicial institutions, but he thought that might lead to endless controversy.

15. Ms. Xue took the view that paragraphs 4 to 7 painted the phenomenon of fragmentation in such a positive light that the reader might fail to understand why action was proposed to deal with it. Drafting work might be required to clarify that and other points.

16. The CHAIR invited the Commission to consider and adopt the report of the Study Group paragraph by paragraph.

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

17. Mr. KAMTO drew attention to a mistranslation in the French text: the words *l'examen du sujet par les membres nouvellement élus de la Commission* ("consideration of the subject by the newly elected members of the Commission") did not adequately render the English ("consideration of the topic by the newly elected Commission").

18. After a brief exchange of views, Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) proposed the deletion, in the English text, of the words "newly elected", and in the French text, of the words *les membres nouvellement élus de*.

It was so decided.

Paragraph 2, as amended, was adopted.

Paragraph 3

19. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that the words "During the first half of the session" in the second sentence were inaccurate and should be deleted. The words "at the first two meetings" should be deleted from the third sentence, which should end with the word "discussion". The brackets should be removed from "(Sect. I)", which should form the start of the fourth sentence.

20. Mr. CANDIOTI endorsed those proposals but suggested that the word after "Section I", "including", should read "includes".

Paragraph 3, as amended, was adopted.

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

Paragraph 6

21. Mr. MOMTAZ said that the wording of the first sentence in the French text—and probably also in the English—was most inelegant. The word “phenomenon” would be greatly preferable to the word “development”.

22. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said it had been the very quest for elegance that had led him to use the word “development”: the word “phenomenon” appeared in the last sentence of the paragraph, and he had wished to avoid repetition. He had no objection, however, to using the word “phenomenon” both times.

23. Mr. KEMICHA said that the first sentence was superfluous in any case and could be deleted.

24. The CHAIR pointed out that some members considered that it made an important point. It should perhaps be retained where it was for the sake of emphasis.

25. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) agreed that the fact that fragmentation was not a new phenomenon should be emphasized at the outset. If any change was to be made, he would prefer to delete part of the last sentence, which repeated the same observation.

26. Mr. CANDIOTI said the last sentence of the paragraph in the French text did not tally with that in the English and the Spanish.

27. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed that the word “development” was to be replaced by the word “phenomenon”.

Paragraph 6, as amended, was adopted.

Paragraph 7

28. Ms. XUE said that, as a member of the Study Group, she fully endorsed its work and generally agreed with many of the comments already made. Nevertheless, additional elements could be inserted in paragraph 7 to justify the Commission’s undertaking future studies. Only the positive aspects of fragmentation were cited, yet the potential negative effects must also be indicated. Language to that effect was to be found in the second sentence of paragraph 14 (“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”), and she proposed that it be transposed to paragraph 7, with the words “judicial institutions” replaced by “different forums”.

29. The CHAIR said that the issue hung on whether fragmentation was a negative effect of an otherwise positive development or a development having both positive and negative aspects, depending on the circumstances.

30. Mr. KATEKA said that Ms. Xue’s concerns, some of which he shared, could be met by adding the words “some of” at the beginning of the first sentence, thus making it clear that the Study Group had not been unanimous in wishing to highlight the positive aspects of fragmentation. It was important for the report to reflect the various shades of opinion within the Study Group.

31. Mr. KEMICHA said that transposing the last sentence of paragraph 14 to paragraph 7 would destroy the balance of paragraph 14, which had its own logic. The Study Group had agreed to avoid referring to any problems in relations between judicial institutions and rather to focus on difficulties that could arise in such matters as the interpretation of the law. He would therefore prefer to add a final sentence to paragraph 7 along the lines of “Nevertheless, fragmentation also has certain negative aspects.”

32. Mr. BROWNLIE said that the Commission was in danger of treating a succinct report as a statutory exercise. Nor should an over-mechanistic approach be adopted, categorizing aspects of law as “positive” or “risky”. Otherwise the effect would be like writing a school paper on the whole of international law, with the teacher’s comments. All that the report was trying to do was to correct the original impression that fragmentation had only negative effects.

33. Although he had not attended all the meetings of the Study Group, to the best of his knowledge there had been no mention of regional international law, nor was there any reference to it in the report. He was not suggesting that the topic need be considered forthwith, but—as in the case of the topic of incompatible decisions by different judicial bodies, which the Commission had rightly decided was a constitutional question and therefore not appropriate for it to consider—the matter could be set aside. The report could state that there had been no desire to discuss the question of regional international law. Certainly, to omit any reference to it would be strange. Opinions concerning the value of regional international law had fluctuated during the course of his career, but at times it had been regarded as particularly significant, while at other times regional differences, such as special elements in Latin American law, as exemplified in the *Haya de la Torre* case, had been accepted more neutrally. It would be a mistake to classify all international law as either healthy diversification or risky fragmentation.

34. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that Ms. Xue and Mr. Kateka had made some valid points. The reason for the positive gloss on fragmentation in the report was that the starting point for discussions had been the feasibility study conducted by Mr. Hafner, in which fragmentation had been shown in a negative light. The report thus faithfully reflected the discussion within the Study Group. He acknowledged, however, that the background might not be clear to members of the Sixth Committee. He would, therefore, after informal consultations with other members of the Commission, propose a text for a sentence to be added at the end of paragraph 7.

35. Mr. KAMTO said that the question of regional international law had indeed been discussed by the Study Group: he himself had offered some examples of contrasts between universal conventions and African regional conventions.

36. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) proposed that the first part of paragraph 7 should be reformulated to read: "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 report by Mr. Hafner referred to in paragraph 1 above. The work of the Commission would have to be guided by the aim of countering these risks and challenges. On the other hand, the Study Group also thought it important..."

Paragraph 7, as amended, was adopted.

Paragraph 8

37. Mr. NIEHAUS suggested that, in order to dispel any doubt as to the need for the Commission to obtain the approval of the Sixth Committee, the paragraph should include a reference to the authorization already granted in 2000.

38. Mr. AL-BAHARNA said that the different views in the Study Group might be more accurately reflected if the last sentence were recast by placing a semi-colon after the word "topic" and making the last phrase read: "it was thought that, in this case, the necessary specific support of the Sixth Committee should be obtained."

39. Mr. TOMKA pointed out that amendments to the report were being proposed by both members and non-members of the Study Group, which he found strange. He wondered whether the report should indeed be regarded as that of the Study Group or of the Commission as a whole.

40. Mr. KATEKA suggested that, in the second sentence, the words "a clear majority of" should be replaced by the word "most"; that was the standard language denoting neutrality. Similarly, the beginning of the third sentence should be amended to read: "Some members raised the issue of whether...", since the concern had not been shared by the whole Study Group.

41. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) expressed doubts about the wisdom of replacing the word "could" by the word "should". The use of "could" contained an implicit reference to the authorization given by the Sixth Committee in 2000, whereas "should" would imply that most members of the Commission thought that renewed assent from the General Assembly would be required.

42. The CHAIR suggested that the phrase "seek the approval" could be replaced by the phrase "seek further approval". In that way, it was possible to safely change "could" to "should".

43. Mr. KOSKENNIEMI said that it was hard to keep track of the various proposals made, apart from the conceptual issue raised by Mr. Tomka concerning the participation of non-members of the Study Group in amending the report. In his view, paragraph 8 should make it clear that only some members had been concerned about whether the topic fell within the Commission's mandate and that most members had considered the concern unfounded. He could recall no suggestion that specific authorization from the Sixth Committee was required; had such a suggestion been made, he would have raised an objection. The Commission should not, however, embark on a discussion of the substantive issue.

44. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that the Commission was both adopting the Study Group's report and simultaneously redrafting the text and making it its own, as was only right if the report was to appear in the Commission's report to the General Assembly. Regarding the question of the need for renewed approval from the Sixth Committee, he distinctly recalled that the issue had been raised by Mr. Sreenivasa Rao. As for the relative merits of the words "could" and "should", he would submit new wording to meet the concerns that had been raised. A reference to the relevant General Assembly resolutions from 2000 might also be worth making.

45. Ms. XUE, supported by the CHAIR, said that the current wording reflected the discussions that had taken place in the Working Group on the long-term programme of work. In determining the new topics to be added to the Commission's agenda, the choice had been made from five topics already discussed by the Commission and the Sixth Committee. The fragmentation of international law was one of those five topics, and thus it already had the Sixth Committee's support.

46. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that, in order to take into consideration the different opinions that had been expressed, the paragraph could be amended to read: "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 Sixth Committee before taking up this topic. However, most members thought that, in this case, the necessary support of the Sixth Committee could be obtained." After the words "further approval", a footnote could be added referring to the relevant General Assembly resolutions.

Paragraph 8, as amended, was adopted.

Paragraph 9

47. Mr. PAMBOU-TCHIVOUNDA said that he failed to understand the *raison d'être* for the paragraph. The first two sentences appeared to set out a similar idea, while the third mentioned the consequences that the work of the Commission should aim to counter. Did that refer to the negative consequences evoked by the word "fragmenta-

tion”, or to the consequences linked to the risks posed by the fragmentation of international law?

48. Mr. NIEHAUS, referring to the change of title, emphasized that the negative aspect most members of the Working Group wished to avoid was contained in the word “fragmentation”, as reflected in paragraph 9, and had nothing to do with the word “risks”, used in the title of the report by Mr. Hafner. The word “consequences” seemed inadequate, because all legal rules had consequences. If the Commission wished to refer to the proliferation or the fragmentation of international law, it should emphasize that a problem was caused by using the word “risk”, or at least “difficulty”. The point was that the title should underscore the element to be studied.

49. The CHAIR said that the key issues were to be found not in section 1 but in section 2 of the document and that the Commission could discuss the matter further when examining this section.

50. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that the point raised by Mr. Pambou-Tchivounda was justified and the text could be improved by making a slight amendment. The first sentence could remain unchanged, while the second sentence could read: “However, the Study Group considers that the term fragmentation does include certain undesirable consequences of the expansion of international law into new areas.” Then, it would become clear that, even though the Study Group considered that the title of the Hafner report depicted the issue too bleakly, fragmentation did include certain undesirable consequences and the purpose was to deal with them.

51. Ms. XUE said that she agreed with the proposal of the Chair of the Study Group. However, paragraphs 7 and 9 outlined contradictory arguments. The latter referred only to the negative aspects of fragmentation, and the former only to the positive aspects. The paragraphs should be reformulated to make them more consistent.

52. Mr. BROWNLIE said he thought the word “fragmentation” had been rehabilitated during the discussion at the previous meeting. He therefore agreed with the amendment suggested by the Chair of the Study Group, but with the inclusion of the word “may”, so that the sentence would read: “fragmentation may denote...”. Then it would not appear that the Commission presumed that there were necessarily undesirable consequences.

53. Mr. KAMTO proposed that the second sentence should be amended to read: “...reflected certain consequences linked to the expansion of international law into new areas. The work of the Commission would have to be guided by the study of these consequences.”

54. The CHAIR said that members of the Commission understandably did not want to imply that “fragmentation” had adverse consequences, but the object of the study was to find ways to improve the negative consequences of fragmentation, while bearing in mind the need to recognize its positive results.

55. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) proposed that, in view of the comments made, the second sentence of paragraph 9 should be amended to read: “However, the Study Group considers that the term fragmentation may include certain undesirable consequences of the expansion of international law into new areas” and that the third sentence should be transposed to the end of paragraph 7.

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

56. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) proposed that, since several members strongly recommended a reference to human rights norms in relation to extradition treaties, the phrase: “for example, extradition treaties and human rights norms,” should be inserted after “conflicting rules of international law existed,” in the second sentence.

Paragraph 11, as amended, was adopted.

Paragraphs 12 and 13

Paragraphs 12 and 13 were adopted.

Paragraph 14

57. Mr. MOMTAZ said that at the previous meeting he had made a linkage between paragraph 14 and the list of proposed topics for possible study. The fragmentation of international law, a result of the case law of international courts, was due not only to a different application of the rules of international law but also to a different classification of the rules of international law. Consequently, the second sentence of paragraph 14 should be amended to read: “or similar rules of international law could be classified or applied differently.”

58. Ms. XUE said that, in view of that amendment, she would withdraw her own proposal regarding paragraph 14, made during the discussion of paragraph 7.

59. Mr. CHEE said that the second sentence of paragraph 14 stated that “international law could be applied differently by judicial institutions”. However, it was judicial institutions that interpreted the law, but it was the executive branch of Government that applied it. Also, there were many law-making bodies in specialized agencies such as ICAO and FAO, so it was not appropriate to confine the reference to judicial institutions. A more inclusive wording such as “law-making body” should be used.

60. Mr. MOMTAZ said that the rationale for paragraph 14 was to emphasize the proliferation of judicial institutions and the Study Group had decided not to deal with

the proliferation as such, but rather with the fragmentation resulting from the case law of judicial institutions.

61. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said he agreed with Mr. Momtaz that the issue of paragraph 14 was the proliferation of judicial institutions; it did not deal with other law-applying or law-making institutions, such as ICAO. In any event, ICJ applied international law to given cases, so he would never have considered that courts did not apply international law.

62. Ms. ESCARAMEIA said that she had drafted the paragraph and had originally referred to “law-enforcement mechanisms”, since it was not only judicial institutions that applied law. However, the matter had been discussed in the Study Group, and it had been pointed out that the issue was simply the judicial institutions and not the mechanisms that applied international law.

Paragraph 14, as amended by Mr. Momtaz, was adopted.

Paragraphs 15 and 16

Paragraphs 15 and 16 were adopted.

Paragraph 17

63. Mr. MOMTAZ said that, in the last sentence, it would be preferable to use the formal title in the reference to the annual meeting of national legal advisers at the United Nations.

64. Ms. XUE said that the meeting of national legal advisers was an informal event that had no specific title. However, it should be specified that the reference was to the annual meeting of legal advisers of States held at the United Nations during the General Assembly.

65. Mr. DAOUDI said that, since the Study Group had agreed that the seminar could be organized at a later stage of the Commission’s work, the beginning of the paragraph should be amended to read: “It was suggested that the Commission organize a seminar at a later stage of its work on fragmentation and that...”, so as not to convey the impression that it was related to the series of studies mentioned in paragraph 21. In his opinion, the seminar should deal with the major reasons for fragmentation, such as the problems of regionalism and the cultural approach to international law.

66. The CHAIR said the English version of the text made it clear that the seminar was simply a suggestion for the time being.

67. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law), responding to Mr. Daoudi, said paragraph 17 simply reflected the ideas that had been aired during the Study Group’s meetings. No reference was made to a seminar in the second part of the report. The matter of the seminar should be taken up at a later stage in the Commission’s consideration of the topic.

Meanwhile, his offer to contribute the first paper to the future seminar held good.

68. Mr. DAOUDI said it should be made clear at the outset that the Commission would organize a seminar “at a later stage”.

Paragraph 17, as amended, was adopted.

Paragraph 18

69. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said that paragraph 18 should logically be the last paragraph of section D (Methodology and format of work), rather than the first paragraph of section E (Suggestions as to the possible outcome of the Commission’s work).

Paragraph 18, as amended, was adopted.

Paragraph 19

70. Mr. MOMTAZ drew attention to a discrepancy between the English title of section E and the French translation.

71. Mr. GAJA proposed deleting the word “final”, which had been rendered redundant by the addition of a second sentence to paragraph 19.

Paragraph 19, as amended, was adopted.

Paragraph 20

72. Mr. PAMBOU-TCHIVOUNDA said that if, as Mr. Brownlie claimed, the term “fragmentation” had been rehabilitated, it should perhaps also be resuscitated. Rather than sacrifice the concept of “fragmentation”, which had been totally obliterated by substituting the term “diversification”, and which, furthermore, the Commission had not even attempted to define, the latter should consider incorporating it in the new title for the topic, in addition to, rather than instead of, the term “diversification”. He also had doubts as to the nature of the “difficulties” referred to in the new title. Were those difficulties conceptual, normative or technical?

73. Mr. KATEKA said that a happy compromise, along the lines of the solution adopted in the case of the topic of international liability, might be to add to the title a subtitle in brackets. The full title of the topic would thus be “Fragmentation of international law (Difficulties arising from the diversification of international law)”. A further alternative would be to replace the word “difficulties” by “consequences”.

74. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said the proposal would be acceptable.

75. Mr. GALICKI, drawing attention to some language used in paragraph 9 of the report, said that a more neutral

and comprehensive formulation for the subtitle proposed by Mr. Kateka would be “Consequences arising from the diversification and expansion of international law”. If the word “expansion” was not acceptable, the word “proliferation” could be substituted as a more neutral near-synonym.

76. The CHAIR said that, perhaps for cultural reasons, to his ear the word “proliferation” had a very different ring.

77. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said he strongly advocated retaining the word “difficulties”. The object of the exercise was not to provide a comprehensive overview, running to several hundred pages, of the consequences—positive and negative—of the fragmentation of international law. It was to offer assistance in overcoming any difficulties encountered—in other words, the “toolbox” approach to which he referred in paragraph 21 of the report.

78. The term “proliferation” was one he associated with nuclear and other weaponry. International law could expand; it could diversify; but it could not proliferate. Objects proliferated—witness the Sorcerer’s Apprentice. Courts, too, could proliferate; however, the mind boggled at the prospect of the Commission drafting a non-proliferation agreement on courts and tribunals. In short, the term “diversification” should be retained, with or without an additional reference to “expansion”.

79. Ms. ESCARAMEIA said that, while she could go along with Mr. Kateka’s proposal, that formulation shifted the emphasis back to the negative aspects of the phenomenon. A more balanced formulation, reflecting also its positive aspects, would be “Fragmentation of international law (Difficulties arising from the diversification and expansion of international law)”.

80. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to adopt the new title of the topic in the wording proposed by Ms. Escarameia.

It was so decided.

Paragraph 20, as amended, was adopted.

Paragraph 21

81. Mr. MOMTAZ, referring to paragraph 21 (e), asked why the hierarchy of norms had been limited to treaty law. Personally, in the interests of consistency with paragraph 14, he would have preferred to see the study deal with the hierarchy of norms in general international law.

82. Mr. KATEKA proposed that the words “and ‘contemporary concerns of the community of nations’ (*Shrimp Products* case)”, together with the footnote, should be deleted from paragraph 21 (b).

83. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law), responding to the question raised by Mr. Momtaz, said that the wording “in gen-

eral international law” seemed to exclude treaties. With regard to Mr. Kateka’s point, the first part of paragraph 21 (b) referred to the existence of “relevant rules” such as the advisory opinion in the *Namibia* case; the latter part, with which Mr. Kateka took issue, reflected a proposal several times made in the Study Group by Mr. Gaja, namely that a phrase should be added to cover the question whether those interpreting a treaty could take into account rules that had developed reflecting a major concern of the international community but to which not all parties to the treaty had expressly bound themselves. He was anxious to see that point reflected somewhere in paragraph 21 (b). However, as a compromise, he proposed, first, deleting the quotation marks from the phrase; second, amending the words “community of nations” to read “international community”; and third, either deleting the reference to the *Shrimp Products* case or consigning it to a footnote.

84. Mr. KATEKA said that the proposal of the Chair of the Study Group involving deletion of the reference to the *Shrimp Products* case would be acceptable.

85. Mr. KAMTO said a proposal he had made in the Study Group had been ignored. A subparagraph (f), on interaction and conflicts between the various judicial decisions, should be added to the list of topics for study.

86. Mr. MOMTAZ supported the proposal.

87. Mr. PAMBOU-TCHIVOUNDA said that a subparagraph (g) was also needed, to take account of regional developments.

88. Mr. SIMMA (Chair of the Study Group on the Fragmentation of International Law) said he had several problems with the two most recent proposals. If those proposals were adopted, first, the choice of topics to be studied would no longer be guided by earlier work done by the Commission, as was currently stated in paragraph 21; nor would those topics be compatible with the “toolbox” approach he advocated. Second, paragraph 14 currently stated that the Commission should not deal with questions of the creation of or relationship among international judicial institutions. If the proposals were adopted, the “toolbox” approach would cease to be applicable, and the Commission would be unable to avoid becoming involved in the “proliferation” issue. A short reference to the Commission’s awareness of regional developments, and to its intention not to address that issue in the short term, could be included somewhere in the report, though not in the section setting out recommendations. He would prepare an appropriate sentence, together with a proposal for its location, in time for the Commission’s next meeting.

89. The CHAIR asked whether, given that the language of the paragraph referred very loosely to “the following topics, among others”, the Commission could agree to adopt paragraph 21 as a whole, on the understanding that the Chair of the Study Group would produce an acceptable formulation on the question of regional developments in time for the Commission’s next meeting.

Paragraph 21 as a whole, as amended, was adopted on that understanding.

The report of the Study Group on the Fragmentation of International Law, as a whole, as amended, was adopted.

The meeting rose at 1 p.m.

2743rd MEETING

Thursday, 8 August 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (A/CN.4/L.627)¹

[Agenda item 6]

REPORT OF THE WORKING GROUP

1. The CHAIR informed the members of the Commission that Mr. Sreenivasa Rao had agreed to continue as Special Rapporteur for the second part of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, which was international liability for failure to prevent loss from transboundary harm arising out of hazardous activities.

2. Mr. Sreenivasa RAO (Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law), introducing the report of the Working Group (A/CN.4/L.627), said that in its report the Working Group was proposing

some guidelines for the Commission's work on the second part of the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

3. Some basic ideas were set out in the introduction. First, it had been considered useful to indicate what the relationship of the current endeavour would be to the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session.² In the Working Group's opinion, the State's failure to perform the duties of prevention assigned to it under the draft articles on prevention of transboundary harm arising out of hazardous activities adopted by the Commission at its fifty-third session³ would entail its responsibility. Furthermore, since harm could occur, even though preventive measures had been taken, it seemed that the core issue consisted in allocating the loss among the different actors involved in the activities that had caused the harm. Even though States should generally be free to authorize desired activities within their own territory, they should ensure that, if harm occurred, some form of relief was available to the victims. Without that assurance, States that could be harmed and the international community might insist that the activities in question should be prohibited.

4. The Working Group had recommended that the scope of the topic should be limited to the activities covered in the part on prevention. In that connection, the question arose of the threshold that would trigger the application of allocation of loss. For some members of the Working Group, the threshold agreed for the articles on prevention ("significant harm") could also be useful for the second part of the topic. However, as was reflected in the footnote corresponding to paragraph 7 of the report, some members of the Working Group had considered that a higher threshold was necessary in order to exclude a multiplicity of small and trivial claims and focus the regime on large-scale harm, which could result in substantial claims for restitution and compensation. It had been felt advisable to seek comments from States on that important point. It had also been decided that the study would deal with losses to persons, property (including elements of State patrimony and the national heritage), and the environment within the national jurisdiction.

5. The next part of the report dealt with the roles of the operator and the State in assuming the loss. The Working Group had agreed that, in principle, the innocent victim should not be left to bear the loss alone; that any regime on allocation of loss must ensure that there were effective incentives for all involved in a hazardous activity to follow best practice in prevention and response; and that such a regime should, in addition to the States concerned, also cover the different elements involved, such as the private sector, insurance companies and funds pooled by the industrial sector.

6. The Working Group had considered that the operator, who had direct control of the activities, should bear the primary liability in any loss allocation regime, since it was

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part Two), chap. VII, sect. C.

² See 2712th meeting, footnote 13.

³ See 2724th meeting, footnote 2.