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CURRENT LEGAL DEVELOPMENTS

High Hopes, Scant Resources: A Word of Scepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties

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Abstract
Focusing on some undertheorized aspects of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, the present article aims to reassess critically the anti-fragmentation function generally assigned to this provision. The high hopes associated with the harmonizing potential of Article 31(3)(c) are usually based on a reading of this provision as requiring the interpreter to take into account not only rules applicable between all of the parties to the treaty, but also those applicable only between some of the parties. However, this reading does not seem to be confirmed by the interpretive approach suggested in this article. On the other hand, the use of Article 31(3)(c) in judicial settings raises a structural problem inherent in the international judiciary. The analysis undertaken along these lines suggests that the optimism that Article 31(3)(c) has recently provoked should be qualified in some important respects.

Key words
Article 31(3)(c); judicial interpretation; jurisdiction; public order in international litigation

1. INTRODUCTION

Writing in 1991, Hugh Thirlway expressed doubts about the utility of Article 31(3)(c) of the Vienna Convention on the Law of Treaties in the process of treaty interpretation.[1] Commenting on the same provision in 2005, another author characterized it as having 'the status of a constitutional norm within the international legal system'.[2] There are certainly objective reasons for such a tremendous discrepancy in the appraisal of Article 31(3)(c). First, recent debates about the fragmentation of

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1 H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989 Part Three', (1991) 62 BYIL 1, at 58.

2 C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', (2005) 54 ICLQ 279, at 280.

international law[3] have generated a renewed theoretical interest in this interpretive tool, which came to be characterized as 'the master key'[4] to the whole house of international law. Second, the remarkable increase in the number of courts and tribunals operating on the international scene has given rise to the hope that Article 31(3)(c) can be used in real-world situations, enhancing the systemic nature of international law.

Despite the renewed interest that it has attracted,[5] Article 31(3)(c) seems to be far from having yielded all its secrets. A quick glance at its wording could suggest that the provision in question can be understood fairly easily. After all, a text stating that 'There shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties' does not seem terribly ambiguous. This first impression is, however, highly misleading, given that almost every term that the provision contains calls for some degree of clarification. What does the 'taking into account' imply? What kind of rules could be considered in this context? How should the relevance of a rule be assessed? These are some of the questions that Article 31(3)(c) raises on its face and about which much has been written. The goal of the present study is, however, not to provide a new comprehensive analysis of Article 31(3)(c). Such an analysis would be largely redundant given that, as noted above, Article 31(3)(c) has been a frequent focus of scholarly writings in the past few years. Focusing only on some undertheorized aspects of Article 31(3)(c), the present article aims instead to reassess critically the anti-fragmentation function generally assigned to this provision and thus to contribute to its proper understanding. To achieve this task, two main lines of inquiry will be followed. First, the high hopes associated with the harmonizing potential of Article 31(3)(c) are usually based on a reading of the term 'rules of international law applicable in the relations between the parties', which is designed to make room for taking into account not only rules applicable between all of the parties to the treaty, but also those applicable between some of the parties. This reading does not seem to be confirmed by the proper interpretation of Article 31(3)(c). Second, the use of this interpretive tool in judicial settings raises a structural problem inherent in the international judiciary that does not yet seem to have received proper thought, and this problem imposes drastic constraints on the harmonizing potential of Article 31(3)(c). The analysis undertaken along these lines in the present article suggests that there is some truth in the scepticism expressed by Thirlway if Article 31(3)(c) is to be judged with regard to the high expectations it has recently provoked in the ongoing debate about the fragmentation of international law.

3 See, e.g., Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by M. Koskenniemi, UN Doc. A/CN.4/L.682 (2006).

4 The expression is attributed to Xue Hanqin, currently judge at the ICJ; see McLachlan, *supra* note 2, at 281.

5 See, among others, P. Sands, 'Treaty, Custom and the Cross-Fertilization of International Law', (1998) 1 Yale HRDLJ 85; McLachlan, *supra* note 2; D. French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules', (2006) 55 ICLQ 281; P. Merkouris, 'Debating the Ouroboros of International Law: The Drafting History of Article 31(3)(c)', (2007) 9 *International Community Law Review* 1.

This article proceeds as follows. The next section briefly examines the question of how to proceed to interpret Article 31(3)(c). The focus of the third section is the interpretation of the term 'parties' in Article 31(3)(c). The fourth section undertakes to show that the application of Article 31(3)(c) raises peculiar questions in judicial settings. The fifth section offers a new reading of Article 31(3)(c), which could reconcile this provision with the structural limitations of international judicial bodies.

2. How to interpret an interpretive device

It might seem strange that a rule of interpretation could itself be in need of interpretation. How could an interpretive tool possibly guide the interpretive process if the guidance it provides is not immediately clear and ready for use? This problem might seem paradoxical. It has, however, frequently been present in the history of thought, as demonstrated by the famous old enquiry as to 'Who guards the guardians?' (*Quis custodiet ipsos custodes*?).

Nor is the paradox entirely unfamiliar in international law. During the United Nations Conference on the Law of Treaties, the Greek delegation observed that interpretation could not obey hard-and-fast legal rules. According to the Greek delegation, the explanation for this lies precisely in the fact that there is no answer to the question of how to interpret the rules of interpretation:

> If a treaty contained one or more rules as to its interpretation, those rules themselves would need to be interpreted, but at that point no rules of interpretation would be available. Even if a treaty provided rules for the interpretation of clauses regarding interpretation, those provisions would require to be interpreted by means not contained in the treaty. There [is] a vicious circle and thus it would be vain to set down rules about interpretation.[6]

Though theoretically fascinating, the problem does not, however, seem to be as dramatic as the Greek delegation's comment might suggest. In fact, it is perfectly conceivable to apply the general rule of interpretation provided in the Vienna Convention to this rule itself. The reason for this is that most rules of treaty interpretation set forth in Article 31 of the Vienna Convention seem to be dictated by common sense. One could, for instance, hardly imagine a rule of interpretation according to which a treaty should be interpreted in bad faith, without any regard for its context, or its object and purpose.[7] A comment to this effect was in fact explicitly made during the debates within the International Law Commission on the draft rules of interpretation, when Roberto Ago stated that 'if the parties agreed to interpret the treaty in another way, there was nothing to prevent them from doing so; but that would no doubt occur rarely, for those rules were eminently reasonable'.[8]

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6 United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Official Records, Thirty-Second Meeting, 172.

7 See, in this regard, J. Verhoeven, 'Le point de vue des praticiens: Débats', (2006) 2 RBDI 451.

8 1964 YILC, Vol. I, 765th meeting, at 280, para. 78, statement made by R. Ago during the ILC debates devoted to the Law of Treaties.

Such an approach, which points to the self-referential nature of interpretive rules, is explicitly adopted in some national legislative acts.[9] One could also mention the guideline provisionally adopted by the International Law Commission for the determination of the object and purpose of the treaty. According to that guideline, 'The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context'.[10] It is clear that the guideline relies on the framework provided by Article 31(1) of the Vienna Convention, even though the provision in question in turn invites the interpreter to look to the object and purpose of the treaty to shed light on the ordinary meaning of the terms that the treaty contains. There seems, therefore, to be nothing revolutionary about the notion that Article 31(3)(c) is itself subject to the interpretive regime set forth in Article 31 of the Vienna Convention.

3. Why 'the parties' could not mean anything less than 'all of the parties'

The application of Article 31 in order to clarify the meaning of Article 31(3)(c) helps us to better understand the ambiguous aspects of this provision. A good example is the term 'the parties' as used in the provision. There is some debate in the literature as to whether the term 'the parties' mentioned in Article 31(3)(c) refers to all the parties to the treaty under interpretation or only those who are in dispute.[11] This issue has attracted much debate in the context of the interpretation of the WTO Agreements. Some authors have suggested that the term 'the parties' could be interpreted as referring to the contentious context, thus providing the WTO's dispute-settlement bodies with the opportunity to take into account the rules of a treaty applicable between the parties in dispute.[12] This reading was defended in the Report of the International Law Commission's Study Group on Fragmentation of International Law,[13] but explicitly rejected by a WTO Panel in the *EC-Biotech Products* case in which the Convention on Biological Diversity and the Biosafety Protocol – instruments to which all WTO members were not parties – were invoked by the European Communities as sources of 'relevant rules of international law applicable in the relations between the parties'.[14]

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9 A good example is the Interpretation Act of Canada (Interpretation Act, R.S.C. 1985, c. I-21). According to Art. 3(2) of the Interpretation Act, 'The provisions of this Act apply to the interpretation of this Act'. One can also mention Art. 15(1), which states that 'Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation'.

10 Text of the set of draft guidelines constituting the Guide to Practice on Reservations to Treaties, provisionally adopted by the Commission, A/65/10, guideline 3.1.6.

11 For a recent discussion of the question, see U. Linderfalk, 'Who Are "The Parties"? Art. 31, Para. 3 (c) of the 1969 Vienna Convention and the "Principle of Systemic Integration" Revisited', (2008) 55 NILR 343.

12 See, e.g., D. Palmeter and P. Mavroidis, 'The WTO Legal System: Sources of Law', (1998) 92 AJIL 398; G. Marceau, 'A Call for Coherence in International Law: Praises for the Prohibition against Clinical Isolation', (1999) 33 *Journal of World Trade* 125.

13 Fragmentation Report, ILC, *supra* note 3, at 237–9, paras. 470–472.

14 Panel Reports European Communities – Measures Affecting the Approval and Marketing of Biotech Products, adopted 29 September 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras. 7.68–7.71. The panel seized of

The interpretation offered by the WTO Panel has been defended on a number of grounds ranging from the definition of parties in Article 2(g) of the Vienna Convention[15] to the contextual arguments taken from the overall structure of Article 31(3).[16] However, few commentators seem to rely on the direct application of the interpretive regime of the Vienna Convention to interpret the term 'the parties' as referring to all of the parties to the treaty. It is our contention that the use of this interpretive regime confirms the accuracy of the reading offered by the WTO Panel in more straightforward terms. Two lines of inquiry could be followed to support this suggestion. First, throughout the Vienna Convention, the term 'parties' refers to the 'parties' to the treaty and, when the context of litigation is specifically intended, a textual specification is provided.[17] On the basis of this, one could argue that a case would need to be made in support of the idea that, in Article 31(3)(c), the meaning of the term 'the parties' differs from its ordinary meaning in the overall context of the Vienna Convention. It seems, therefore, that the question is one envisioned by Article 31(4). According to this provision, 'A special meaning shall be given to a term if it is established that the parties so intended'. This means that proponents of the interpretation of 'the parties' as referring to 'the parties in dispute' bear the burden of proof of the special meaning as provided in Article 31(4). It would, however, be difficult to find any such proof, given that the Vienna Convention is obviously not confined to the context of litigation.[18]

Second, the interpretation of 'the parties' as referring to the parties in dispute before a judicial body would run counter to the very *raison d'être* of the interpretive regime of the Vienna Convention. The logical assumption behind the Vienna interpretive regime is that there is one correct meaning for any treaty provision that is common to all the parties and that this meaning is the one obtained through the application of the rules of interpretation that the Vienna Convention provides. If the interpretation of a treaty comes to vary depending on the identity of those of the parties that are in dispute, then the whole point of the Vienna interpretive regime would be missed. Incidentally, such a result would hardly be a desirable outcome as far as the harmonization of the international legal order is concerned, considering that interpretations of a treaty in harmony with the rest of international law would come at the price of a fragmentation of the treaty itself. In this regard, it is far from convincing to contend that a treaty could well be subject to different interpretations by relying on the possibility of the *inter se* agreements 'to modify multilateral treaties between certain of the parties only' as provided in Article 41, on the differentiation

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an earlier case had decided to leave the question open (Panel Report Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, adopted 3 May 2002, WT/DS207/R, para. 7.85).

15 See, e.g., J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), 257; McLachlan, *supra* note 2, at 315.

16 As suggested by Joost Pauwelyn, the subsequent agreements and the subsequent practice mentioned respectively by Arts. 31(3)(a) and 31(3)(b) are 'only agreements and practice reflecting the common intentions of all parties to the treaty', Pauwelyn, *supra* note 15, at 258.

17 See Art. 66 of the Vienna Convention; see also the Ann. to the Vienna Convention.

18 According to some members of the International Law Commission, the latter was not primarily concerned by the interpretation by dispute-settlement bodies and 'was engaged in drafting a convention between States'; see 1964 YILC, Vol. I, 765th meeting, at 277, para. 34.

of the treaty relationship by virtue of reservations as contemplated by Article 21, or on Article 30(4), which provides that different treaty regimes could apply to different parties, depending on whether or not they participate in the subsequent treaty on the same subject matter.[19] When these events occur, what is at issue is not the interpretation of the *same* treaty along different lines, but the modification of the treaty by the will of some parties. In other words, the very object of interpretation changes because of some acts accomplished *to this effect* by two or more parties, but not by the decision of the interpreter.

4. A STRUCTURAL LIMITATION ON THE OPERATION OF ARTICLE 31(3)(C) IN JUDICIAL SETTINGS

It is commonplace in international law that international judges are not in the same position as their domestic counterparts. The international judge is traditionally said to exist only because and to the extent that he is wanted.[20] The spectacular development of international law since the end of the Second World War has in no way altered the fact that 'no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement'.[21]

The relevance of such a state of affairs for the authority of international courts and tribunals lies not only in the fact that the jurisdiction of these bodies is always consent-based, but also in the limitation of the *jus dicere* power of international courts and tribunals – in other words, their power to say what the law is. Since this often neglected aspect of jurisdiction entails important consequences for the implementation of Article 31(3)(c), some clarification is in order.

The absence of centralized power structures on the international scene is a well-known reality in international society. One of the consequences of this situation is the power of auto-interpretation[22] held by states: states are judges in their own cases, each state having the power to determine for itself the content of its rights and obligations.[23] This means that the judicial determination of the content of states'

19 See, for such an argument, B. McGrady, 'Fragmentation of International Law or "Systemic Integration" of Treaty Regimes: EC-Biotech Products and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties', (2008) 42 *Journal of World Trade* 589, at 601–2.

20 J. Verhoeven, 'Conclusions', in C. Leben (ed.), *Le contentieux arbitral transnational relatif à l'investissement: Nouveaux développements* (2006), 365.

21 *Status of Eastern Carelia*, Advisory Opinion of 23 July 1923, PCIJ Rep. Series B No. 5, at 27. See also *Rights of Minorities in Upper Silesia (Minority Schools)*, Judgment of 26 April 1928, PCIJ Rep., Series A No. 15, at 22; *Corfu Channel (United Kingdom v. Albania)*, Judgment of 25 March 1948, [1948] ICJ Rep. 15, at 27; *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Judgment of 22 July 1952, [1952] ICJ Rep. 93, at 103; *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America)*, Judgment of 15 June 1954, [1954] ICJ Rep. 19, at 32; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment of 21 March 1984, [1984] ICJ Rep. 3, at 22; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, Judgment of 13 September 1990, [1990] ICJ Rep. 92, at 133; *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, at 101.

22 On this concept, see L. Gross, 'States as Organs of International Law and the Problem of Autointerpretation', in G. A. Lipsky (ed.), *Law and Politics in the World Community* (1953), 59.

23 See *Lake Lanoux* case (France/Spain), Award of 16 November 1957, RIAA, Vol. 12, 281, at 310; *Air Service Agreement of 27 March 1946 (United States of America/France)*, Award of 9 December 1978, RIAA, Vol. 18, 417, at 483.

rights and obligations can, as a matter of general international law, only occur as a result of a delegation on the part of states concerned. In other words, judicial pronouncements on a rule of international law produce legal consequences for states concerned not because they are made by a judicial body – they could equally be made by any other third party empowered to do so – but because those states delegate their *potestas interpretandi* to the international judge, renouncing this power on a general basis or on the occasion of the particular case submitted to the judge. Of course, as a matter of fact, judicial pronouncements produce effects well beyond individual cases. But this sociological fact has no bearing on the accuracy of the legal analysis along the lines just presented as a structural reality of international law.

This point can be illustrated by a well-known example. It is generally assumed and officially confirmed that the advisory opinions of the ICJ are not binding.[24] This may come as a remarkable surprise if one confines one's analysis to the fact that an advisory opinion of the ICJ is as much grounded on legal materials as a judgment in a contentious case. How can an opinion grounded on international law be said to be 'advisory', but not mandatory as a matter of international law? The only satisfactory answer is that, while a contentious case implies a delegation of interpretive power on the part of states parties to the dispute, the advisory jurisdiction involves no such thing. Another relevant example to the same effect is Article 63(2) of the Statute of the ICJ, which provides that, outside the circle of the states in dispute, the interpretation of a multilateral treaty given in a judgment of the Court would be binding only on those of the parties that exercise their right of intervention. This shows that, as a matter of official doctrine, the authoritativeness of an interpretation is a function of legal 'conventions', without being automatically attached to an interpretation because of its judicial nature.

As acknowledged by one author, such limitations on the power of international tribunals to say what the law is are a matter of public order in international litigation.[25] The judicial power to determine the meaning of the law is thus intimately linked to the jurisdiction of the international judge, as suggested by the very terminology used to refer to it (*juris dictio*).[26]

It cannot be disputed that Article 31(3)(c) is subject to such a structural limitation in judicial contexts. First, the limitation in question can be considered one of 'inherent limitations' by which the judicial function in international law is 'circumscribed'.[27] Second, applying the interpretive rule contained in Article 31(3)(c) to this rule itself, one could argue that the limitation in question can be seen as a rule of general international law relevant for the purposes of Article 31(3)(c). It is

24 See *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, Advisory Opinion of 23 October 1956, [1956] ICJ Rep. 77, at 84; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62, at 77. For a recent discussion, see C. N. Brower and P. H. F. Bekker, 'Understanding "Binding" Advisory Opinions of the International Court of Justice', (2002) *Liber Amicorum Judge Shigeru Oda* 351.

25 C. Santulli, *Droit du contentieux international* (2005), 333.

26 On this concept, see H. Ascensio, 'La notion de juridiction internationale en question', (2003) *La juridictionnalisation du droit international* 163.

27 See *Northern Cameroons (Cameroon v. United Kingdom)*, Judgment of 2 December 1963, [1963] ICJ Rep. 15, at 30. See also, *Haya de la Torre (Colombia/Peru)*, Judgment of 13 June 1951, [1951] ICJ Rep. 71, at 83.

true that, formally speaking, the rule in question is not applicable in the relations between the parties, but rather to an international tribunal. But it is equally true that a rule with such drastic consequences in terms of states' *potestas interpretandi* can also be characterized as a rule applicable between parties.

Bearing this limitation in mind, it is important to clarify what kind of rules Article 31(3)(c) refers to. It is beyond question that rules of general international law are among those rules. The *travaux préparatoires* of the Vienna Convention provide ample evidence for the notion that rules of general international law are what many members of the International Law Commission had in mind while discussing Article 31(3)(c).[28] Another piece of evidence can be found in the remarks made by the German representative in the Vienna Conference on the Law of Treaties. While the draft text submitted to the Conference did not specify that rules of general international law were what the text was referring to, the German representative asked 'Why should only the rules of general international law applicable between the parties be taken into account?'.[29]

That being said, there is also support for the suggestion that the 'rules of international law' are not confined to general international law. First, some members of the International Law Commission explicitly supported this view.[30] One can also posit that the specification 'applicable between the parties' makes more sense in the case of treaty law than in that of general international law, the latter being, by definition, applicable between the parties, with the possible exception of cases in which there is the problem of persistent objection[31] or in which specific rules of general international law have been contracted out. Finally, the application of the interpretive regime of Article 31 supports the conclusion that rules of international law designate a broader category than general international law. One needs only to mention the ordinary meaning of 'international law' to see that treaty law is also contemplated by Article 31(3)(c).[32]

The fact that Article 31(3)(c) refers to the rules of general international as well as to those of treaty law applicable between the parties does not, however, imply that an international tribunal has a similar interpretive power with regard to these two categories of rules. It seems beyond dispute that an international tribunal has the power to construe general international law given that rules of general international law constitute the normative background of every treaty. One can say that this power is part of the inherent jurisdiction of every tribunal as recently defined by the Special Tribunal for Lebanon.[33] However, one should also pay special

28 See Merkouris, *supra* note 5, at 21.

29 United Nations Conference on the Law of Treaties, *supra* note 6, at 172, para. 10.

30 See Sir H. Waldock, 1964 YILC, Vol. I, at 310, para. 10; Mr Yasseen, 1964 YILC, Vol. I, at 310, para. 11.

31 For recent discussions of this concept, see C. Quince, *The Persistent Objector and Customary International Law* (2010); P. Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited', (2010) 59 ICLQ 779.

32 As an Arbitral Tribunal pointed out, 'international law is a broader concept than customary international law, which is only one of its components', *Pope & Talbor Inc v. Canada*, Award in respect of damages of 31 May 2002, para. 46. A similar point was made within the WTO specifically in relation to the phrase 'rules of international law' used in Art. 31(3)(c), Panel Reports, *supra* note 14, para. 7.67.

33 The Special Tribunal for Lebanon defined 'inherent jurisdiction' as 'the power of a Chamber of the Tribunal to determine incidental legal issues which arise as a direct consequence of the procedures of which the

attention to the fact that treaties are often, by definition, *lex specialis* with regard to general international law. As Richard Baxter once observed, 'the very existence of the treaties may indicate that the parties had assumed duties to which they would not have been subject in the absence of agreement'.[34] The conclusion that follows was clearly stated by the Permanent Court of International Justice: 'A principle taken from general international law cannot be regarded as constituting an obligation contracted by [the parties] except in so far as it has been expressly or implicitly incorporated in the [treaty].'[35] Bearing in mind the relationship between general law and special law, one could lay down the following presumption: whenever general international law is not explicitly or implicitly contracted out, it is subject to the *juris dictio* power of an international tribunal given the fact that every treaty is concluded against the background of general international law.[36]

The situation is altogether different where treaty law is concerned. Unless an extraneous treaty rule is subject to the jurisdiction of the tribunal, the latter does not have the power to say authoritatively what the law of the treaty in question is. Contrary to what some authors suggest,[37] the fact that the applicable law is not limited by the contours of the jurisdiction does not alter the conclusion that the scope of applicable law that an international tribunal can authoritatively determine is closely linked to the scope of its jurisdiction. It is rare to see international tribunals, especially those specialized in specific areas of international law, empowered with the competence to settle a dispute on the basis of international law as a whole. The jurisdiction is often recognized with regard to a clearly specified law and, if this limitation is to have any meaning, it should mean that the law objectively applicable between the parties in dispute is not entirely subject to the judicial cognizance. That is why – to take one example among many – the ICJ was not able to have recourse to the rules set forth in multilateral treaties in the *Nicaragua* case,[38] even though those rules were clearly part of the applicable law between the parties. In other words, the law objectively applicable between the parties in dispute is not judicially cognizable in its totality when the jurisdiction to consider the applicable law is limited. This is

Tribunal is seized by reason of the matter falling under its primary jurisdiction', *Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing*, 10 November 2010, para. 45.

34 R. Baxter, 'Treaties and Customs', (1970/I) 129 RCADI 27, at 81. An ICSID ad hoc Committee has recently made a similar point by stating that 'except where norms of *ius cogens* are involved, a treaty is capable of modifying the rules of customary international law that would otherwise be applicable as between the States parties to the treaty. Indeed, often the very purpose of a treaty is to effect such a modification', *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Annulment Proceeding, Ad hoc Committee, 1 September 2009, para. 90.

35 *Mavrommatis Jerusalem Concessions*, Judgment of 26 March 1925, PCIJ Rep., Series A No. 5, at 27.

36 The famous *dictum* in the *Georges Pinson* case makes exactly the same point: 'Every international convention must be deemed tacitly to refer to general principles of international law for all the questions which it does not itself resolve in express terms and in a different way', *Georges Pinson (France/United Mexican States)*, Award of 13 April 1928, RIAA, Vol. 5, 327, at 422. For a similar statement within the WTO, see Panel Report Korea: Measures Affecting Government Procurement, adopted 1 May 2000, WT/DS/163/R, para. 7.96.

37 See, e.g., L. Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', (2001) 35 *Journal of World Trade* 499.

38 *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, [1986] ICJ Rep. 14.

the case because the authority attached to the judicial determination of the meaning of law is a function of the jurisdiction of the tribunal.

5. An attempt at a meaningful reading of Article 31(3)(c)

The above observations might seem to suggest that Article 31(3)(c) does not have much utility. This conclusion should be resisted, for several reasons. To start with, with the caveats stated above, general international law is always the legal background of any treaty and, as such, subject to the implicit power of *jus dicere* of an international tribunal.

Second, the limitation applicable in judicial contexts has no relevance when states parties to a treaty themselves interpret their rights and obligations under that treaty. To paraphrase an observation made by Robert Jennings in a not-too-dissimilar context,[39] it is perhaps only lawyers who could think that litigation is the only worthwhile aspect of the law. Since the operation of the Vienna Convention is obviously not confined to the judicial context, Article 31(3)(c) cannot be said to be of limited interest.

However, it remains to be seen what use can be made of Article 31(3)(c) in judicial contexts with regard to extraneous treaty rules applicable between the parties when the tribunal has no jurisdiction in relation to those rules. It is not entirely clear that the principle of *effet utile* would require that a treaty provision should be operational in the same way in every conceivable situation. It is nonetheless reasonably safe to assume that to read Article 31(3)(c) as categorically prohibiting judges from taking into account rules contained in a treaty that is not technically part of the applicable law in relation to which they have jurisdiction would deprive the provision of much of its effect.

Several scenarios can be considered in this regard. When the rule contained in the other treaty has been interpreted by the parties in an interpretive agreement or when the meaning of the rule has been otherwise authoritatively established, such as through a consistent practice of a treaty-monitoring body if there is one, the tribunal could arguably take notice of the rule so interpreted without risking the accusation of overstepping its power of *jus dicere*.

If there is neither interpretive agreement nor any other authoritatively established interpretation, a case could be made to support the suggestion that the tribunal could take into account the rule of the other treaty if this means only taking notice of the ordinary meaning of the terms through which the rule is formulated. This condition is crucially important for the tribunal to remain within the limits of its power of *jus dicere*. If the ordinary meaning of the relevant terms of the other treaty is not clear and an in-depth investigation into the object and purpose, the subsequent practice, or the *travaux préparatoires* is required, the tribunal could hardly engage in such an effort, for doing so would be tantamount to determining the meaning of the rule but not taking notice of it – a power that the tribunal does not possess in our

39 R. Jennings, 'The International Court of Justice and the Judicial Settlement of Disputes', in R. Jennings, *Collected Writings of Sir Robert Jennings*, Vol. 1 (1998), 433.

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hypothetical case because of 'the jurisdictional restraints on [its] freedom of treaty interpretation, given the consensual nature of [its] jurisdiction'.[40]

Whatever the scenario, it seems reasonable to assume that the rule of the other treaty could only be used as an interpretive working presumption to be confirmed by the 'internal materials' of the treaty under interpretation itself. If the rule in question is used not as a working hypothesis to be confirmed by the internal elements of the treaty under interpretation, but as *a decisive factor* for selecting a particular interpretation, the tribunal would overstep its authority, since the latter does not include the power to decide what the true meaning of the rule contained in the other treaty is.

This last point is also confirmed by the structure of Article 31 as it is interpreted in international practice. It is true that the International Law Commission did not mean to establish any hierarchy among different elements of this article.[41] As the Special Rapporteur, Sir Humphrey Waldock, put it in his commentary, the very fact that the provision in question is entitled 'General Rule of Interpretation' and not 'General Rules of Interpretation' suggests that the interpretive process guided by this provision is to be seen as a single process involving all the various components it contains.[42] That being said, it is also clear that Article 31 implies what the Special Rapporteur termed 'a logical order'.[43] Despite the unity of the interpretive process suggested by the International Law Commission, practice shows that paragraph 1 of Article 31 enjoys an undeniable priority in the sense that the basic rule seems to be that 'Interpretation must be based above all upon the text of the treaty'.[44] The proposed reading of Article 31(3)(c) would thus be in line with the general philosophy of Article 31, which is dominated by the 'ordinary-meaning' approach.

This, however, raises a question about the possible added value of Article 31(3)(c) given that extraneous instruments are used in practice on the basis of Article 31(1). By way of an example, one could mention the *US-Shrimps* case, in which the Appellate Body of the WTO interpreted the phrase 'exhaustible natural resources' employed in Article XX(g) of the GATT in light of some environmental treaties that were not binding on all the members of the WTO in an attempt to determine the ordinary meaning of the term 'exhaustible natural resources' – in other words, using the interpretive device contained in Article 31(1).[45] The latter provision might seem even more attractive given that the limitation related to the identity of the parties applicable in the context of Article 31(3)(c) has no relevance here: recourse may be

40 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, [2003] ICJ Rep. 161, at 281, para. 28 (Judge Buergenthal, Separate Opinion).

41 Reports of the Commission to the GA, 1966 YILC, Vol. II, at 219–20, para. 8.

42 Ibid.

43 United Nations Conference on the Law of Treaties, *supra* note 6, at 184, para. 72. See also, 1966 YILC, Vol. II, at 220, para. 9.

44 *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, [1994] ICJ Rep. 6, at 22, para. 41; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Judgment of 15 December 2004, [2004], ICJ Rep. 279, at 318, para. 100. See also, *Case Concerning the Audit of Accounts between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976*, Decision of 12 March 2004, RIAA, Vol. 25, 267, at 297, paras. 65–66.

45 Appellate Report United States: Import Prohibition of Certain Shrimp and Shrimp Products, adopted 12 October 1998, WT/DS58/AB/R, paras. 128–134.

had to other treaties merely to clarify the ordinary meaning of the provision under interpretation in light of what are considered to be relevant indicia extracted from extraneous legal materials. One could therefore wonder what Article 31(3)(c) could possibly add if the option of taking into account extraneous rules is already available on the basis of Article 31(1).

A possible answer could be that, while Article 31(1) does not mandate the use of extraneous materials, Article 31(3)(c) is part of the 'common disciplines [imposed] upon treaty interpreters'.[46] In other words, Article 31(3)(c) contains a mandatory disciplining rule whose use is not left to the discretion of the interpreter when the conditions of its application are met.[47] In addition, focusing specifically on extraneous rules applicable between parties, Article 31(3)(c) provides room for the application of the presumption of non-conflict.[48] In this regard, it is interesting to note that the rule according to which 'A text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it'[49] was qualified by the ICJ as 'a rule of interpretation'. Whenever it seems possible, an international tribunal should thus follow the assumption that the parties to the treaty did not want to undertake conflicting obligations.[50] It could be argued that the presumption of non-conflict is a logical implication of the presumption of good faith: responsible governments are thought to take special care to avoid any conflict between their different obligations and one cannot presume that, in a particular case, they have not done so.[51] By pointing to the extraneous rules, Article 31(3)(c) could, thus, be considered as inviting the interpreter to take the presumption of non-conflict seriously and to make every reasonable effort to give it a meaningful effect. One should, however, bear in mind that the primary purpose of Article 31(3)(c) is not to bring coherence to the world of international legal rules, but to offer interpretive guidance. The very fact that the norms of conflict resolution are offered in Article 30 shows that the main task of Article 31(3)(c) is not to provide a solution to conflicts between different rules of international law. Even the assumption of non-conflict

46 Appellate Report United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, adopted 24 July 2001, WT/DS184/AB/R, para. 60.

47 See Panel Reports, *supra* note 14, para. 7.70, stating that 'Article 31(3)(c) mandates consideration of other applicable rules of international law'.

48 On this presumption, see the Fragmentation Report, *supra* note 3, at 25–8, paras. 37–43. See also the following document prepared by the Secretariat of the WHO: Review and Approval of Proposed Amendments to the International Health Regulations: Relations with Other International Instruments, A/IHR/IGWG/INF.DOC./1 (30 September 2004), para. 5; and Panel Report Indonesia – Certain Measures Affecting the Automobile Industry, adopted 2 July 1998, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.28.

49 *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, Judgment of 26 November 1957, [1957] ICJ Rep. 125, at 142.

50 See, in this sense, the remarks of the German representative at the United Nations Conference on the Law of Treaties, *supra* note 6, at 172, para. 10. For a theoretical analysis of this presumption, see J.-M. Grossen, *Les présomptions en droit international public* (1954), 114–17.

51 On the presumption of good faith, see *Lake Lanoux* case, *supra* note 23, at 305. See also, *mutatis mutandis*, *Mavrommatis Jerusalem Concessions*, *supra* note 35, at 43; *Certain German Interests in Polish Upper Silesia*, Judgment on the Merits of 25 May 1926, PCIJ Rep., Series A No. 7, at 30. If the presumption of good faith is taken to be a rule of general international law, one could even say that its use is also dictated by the very logic of Article 31(3)(c), which refers to 'any relevant rules of international law applicable in the relations between the parties'.

could not help to avoid conflicts when the provision under interpretation and the extraneous rule are irreconcilable.

6. Conclusion

It seems reasonable to conclude in light of the above analysis that Article 31(3)(c) is not a powerful remedy to the problem of fragmentation of international law. On the one hand, the 'relevant rules of international law applicable in the relations between the parties' refer only to the rules applicable between all the parties, but not 'the parties in dispute'. This drastically reduces the range of circumstances in which Article 31(3)(c) is relevant outside the hypothesis of customary international law. On the other hand, considering that, in international law, there is an intimate link between the judicial power to determine the meaning of the law and the jurisdiction of the international judge, one should bear in mind the structural limitation on the power of international judges when it comes to their recourse to extraneous rules that are not part of general international law. These remarks do not mean to suggest that Article 31(3)(c) has no practical relevance. As observed above, Article 31(3)(c) is not subject to such a structural limitation when it is the states parties to a treaty themselves who interpret their rights and obligations under that treaty. Furthermore, general international law usually remains the legal background of any treaty and, as such, is subject to the implicit jurisdiction of an international tribunal. That being said, the proposed interpretation implies some scepticism regarding the efficiency of the anti-fragmentation function enthusiastically assigned to Article 31(3)(c) in the recent literature.

However, this conclusion could only surprise those who mistakenly believe that Article 31(3)(c) aims at harmonizing international law. As the *travaux préparatoires* for Article 31(3)(c) unambiguously show, this provision has little to do with the concern for the unity of international law. As Thirlway put it, Article 31(3)(c) 'is a survival in the final text of the Convention of what was originally proposed as a provision concerning the intertemporal principle'.[52] It is only because the International Law Commission found itself unable to provide any guidance on the temporal dimension of treaty interpretation that the final text contains no reference in this regard. To expect this provision to do something for which it was not designed and which it has insufficient resources to provide would therefore be highly misleading.

These remarks apply with particular force in judicial contexts, for one could hardly expect international judges to provide remedies for the disorganized nature of the process of norm-creation in international law. Moreover, such an expectation could lead states to think that they could safely avoid dealing with the serious structural problems of international law by passing them to international tribunals,

52 H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989, Supplement, 2006: Part Three', (2006) 77 BYIL 1, at 70. In support of the same proposition, see also J. Klabbers, 'Reluctant *Grundnormen*: Article 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law', in M. Craven, M. Fitzmaurice, and M. Vogiatzi (eds.), *Time, History and International Law* (2007), 157.

which are neither equipped nor designed for the task. Placing unduly high expectations on Article 31(3)(c) and its judicial implementation could therefore ultimately prove not only frustrating, but also potentially damaging. Fortunately, this outcome can be avoided, and the solution is by no means a radical one. It consists merely in treating Article 31(3)(c) not as a tool aiming primarily at bringing about a harmonized international legal order, but as a rule of interpretation – and that, after all is said and done, is precisely what it is.