LIBERAE COGITATIONES

Liber amicorum Marc Bossuyt

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TRAVAUX PRÉPARATOIRES OF HUMAN RIGHTS INSTRUMENTS

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The premier dictionary of the English language, the second edition of the *Oxford English Dictionary*, rather unusually provides a definition of an expression from a foreign language, '*travaux préparatoires*': 'Drafts, records of discussion, etc., pertaining to legislation or a treaty under consideration.'[1] The *Dictionary*, which describes itself as 'the definitive record of the English language', and based upon 'historical principles', also furnishes examples of usage of the words and terms that it defines. It offers several historical examples of use of '*travaux préparatoires*' in English, of which the first is from the *Harvard Law Review* in 1935.[2] There is only a page reference to the *Harvard Law Review* and no author or title is indicated. Serendipitously, the article in question is entitled 'Some Observations on Preparatory Work in the Interpretation of Treaties' and the author is none other than Hersch Lauterpacht, then still a rising star and yet to be named Whewell Professor of International Law at the *University* of *Cambridge*. A footnote to the title of the article indicates that the text is based upon lectures delivered at the Hague Academy of International Law the previous year. The lectures were delivered in French under the heading '*Les Travaux Préparatoires et l'Interprétation des Traités*'.[3]

In his article in the *Harvard Law Review*, Lauterpacht generally opted for the expression 'preparatory work', but in one sentence where French law was being discussed he observed the tendency of French courts 'to limit recourse to *travaux préparatoires*'.[4] It is this use to which the Oxford English Dictionary refers. There

1 *The Oxford English Dictionary*, Vol. XVIII, 2nd ed., Oxford: Clarendon Press, 1989, p. 443.
2 Hersch Lauterpacht, 'Some Observations on Preparatory Work in the Interpretation of Treaties', (1934–1935) 48 *Harvard Law Review* 549.
3 Hersch Lauterpacht, *Les travaux préparatoires et l'interprétation des traités*, [1934] II *Recueil des cours* 709. Also: Hersch Lauterpacht, *Les travaux préparatoires et l'interprétation des traités*, Paris: Recueil Sirey, 1935.
4 Hersch Lauterpacht, 'Some Observations on Preparatory Work in the Interpretation of Treaties', (1934–1935) 48 *Harvard Law Review* 549, at p. 562.

are two other appearances of the term '*travaux préparatoires*' in Prof. Lauterpacht's article. It notes that '[t]he question of *travaux préparatoires* has been described as the principal instance of the divergence between the Anglo-American and Continental schools'.[5] It also considers 'the necessity of deciding on the authority and reliability of the various sources of the *travaux préparatoires*'.[6]

Prof. Lauterpacht was a leading proponent of the significance of *travaux préparatoires* in the interpretation of treaties. Judge Schwebel, in his dissenting opinion in the *Qatar/Bahrain Maritime Delimitation case*, said that Prof. Lauterpacht placed the main emphasis on the intentions of the parties and in consequence 'admitted a liberal recourse to the *travaux préparatoires* and to other evidence of the intentions of the contracting States as means of interpretation'.[7]

That the reference to the Hersch Lauterpacht article by the *Oxford English Dictionary* is the first use of the term '*travaux préparatoires*' in English-language scholarly materials is confirmed by a search in the Google Books database. However, there are a few other examples in publications of the Permanent Court of International Justice. In a 1922 advisory opinion, it used the expression, albeit as a parenthetical translation from the English:

> Since the Court is of opinion that Article 3 is in itself sufficiently clear to enable the nature of the 'decision to be reached' by the Council under the terms of that article to be determined, the question does not arise whether consideration of the work done in preparation of the Treaty of Lausanne (*les travaux préparatoires*) would also lead to the conclusions set out above...[8]

A decade later, in its advisory opinion on the *Convention on Employment of Women during the Night*, the Court referred to a contention that was 'not based on the "preparatory work" or "*travaux* préparatoires"'.[9] In addition, at the oral hearing in the *Territorial Jurisdiction of the International Commission of the River Oder* case, Sir Cecil Hurst used the term '*travaux préparatoires*' on several occasions.[10] But as a general rule, the Permanent Court referred to 'preparatory work' without using the French formulation.[11]

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5 *Ibid.*, p. 570.

6 *Ibid.*, p. 584.

7 *Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, ICJ Reports 1994, p. 112, Dissenting Opinion of Judge Schwebel, p. 128. See, for example, *Aerial Incident of July 27th, 1955 (Israel v. Bulgaria), Preliminary Objections, Judgment of May 26th, 1959*, ICJ Reports 1959, p. 127, Joint Dissenting Opinion by Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender.

8 *Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*, Series B, No. 12, p. 22.

9 *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night*, Series A/B, No. 50, p. 376.

10 *Territorial Jurisdiction of the International Commission of the River Oder*, Series C, No. 17-II, pp. 26, 27.

11 *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Series B, No. 2, p. 41; *Jurisdiction of the European*

Hersch Lauterpacht again used the term '*travaux préparatoires*' in a document he prepared on behalf of the Codification Division of the Office of Legal Affairs in 1948 as part of the process of establishing the International Law Commission.[12] The International Court of Justice employed the term '*travaux préparatoires*' in 1950 in one of its first advisory opinions.[13] In the early 1960s, when it began work on the law of treaties, the International Law Commission began using the term frequently.[14] Reference to '*travaux préparatoires*' appeared increasingly in English-language reports, judicial decisions and academic writing in the field of international law.

The first English-language book with the formulation '*travaux préparatoires*' in its title was the eight-volume compilation of the preparatory work of the European Convention on Human Rights assembled by the Council of Europe and published by Martinus Nijhoff between 1975 and 1985: *The Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*. The second, published in 1987, also by Martinus Nijhoff, was Marc BOSSUYT's one-volume *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*. Unlike the Council of Europe publication, Prof. BOSSUYT's book is not a collection of documents but rather an extraordinarily detailed analysis of the relevant sources for each provision in the treaty. The early work on the Covenant undertaken by the United Nations largely overlapped with that of the Universal Declaration of Human Rights. Consequently, the *Guide* also provides pertinent information on the drafting of the Declaration. Because it is so thorough and analytical, many legal researchers never even bother to examine the actual documents, such is their confidence in the accuracy of the information provided by Professor BOSSUYT.

One of the huge problems of working with *travaux préparatoires* is their accessibility or, rather, inaccessibility. United Nations documents are widely available in depository libraries and through privately produced microprint or microfiche collections. However, because these materials are not indexed or digitized, a search for a specific point or issue can be a daunting exercise. The researcher who is not intimately familiar with the materials may be unaware of

Commission of the Danube between Galatz and Braila, Series B, No. 14, paras. 28, 29, 31, 32, 35. Also: Dissenting Opinion of M. Negulescu, pp. 95, 116; *S.S. Lotus*, Series A, No. 10, p. 16; *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night*, Series A/B, No. 50, pp. 378, 380; *Interpretation of the Statute of the Memel Territory*, Series A/B, No. 47, p. 249; *Lighthouses case*, Series A/B, No. 20, p. 20.

12 Survey of international law in relation to the work of codification of the International Law Commission, UN Doc. A/CN.4/1/Rev.1, para. 91. See: E. LAUTERPACHT, ed., *Hersch Lauterpacht, International Law, Collected Papers, I. General Works*, Cambridge: Cambridge University Press, 1970, p. 446.

13 *Competence of Assembly regarding admission to the United Nations, Advisory Opinion*, ICJ Reports 1950, p. 4, at p. 8.

14 UN Doc. A/CN.4/SER.A/1963, pp. 103, 116, 117; UN Doc. A/CN.4/SER.A/1963/Add.1, pp. 55, 202; UN Doc. A/CN.4/SER.A/1964, pp. 168, 235, 276, 279, 282–288, 299, 310, 341; UN Doc. A/CN.4/SER.A/1964, pp. 29, 38, 55, 58, 59, 64, 69, 200, 204, 205.

the contribution of different bodies and agencies and, as a result, totally overlook relevant bundles of documents.

The website of the Dag Hammarskjold Library at United Nations headquarters in New York has a section devoted to the *travaux préparatoires* of the Universal Declaration of Human Rights.[15] The documents are available in searchable pdf form but they must nevertheless be accessed individually. Although it does not claim explicitly that the collection is thorough or exhaustive, the Library does not use words like 'selection' or 'sampling' either, and users should be forgiven if they think the materials are complete. In fact, the sessions of the Working Group of the Second Session of the Commission on Human Rights, as well as the sessions of the two Sub-Commissions and the Commission on the Status of Women, are entirely absent.

By presenting the *travaux préparatoires* in analytical fashion, Marc Bossuyt not only compiled but also unlocked the materials for researchers. It is hardly a coincidence that within a few years, the first major monographs on the International Covenant on Civil and Political Rights were published: Dominic McGoldrick's *The Human Rights Committee*[16] and Manfred Nowak's *CCPR Commentary*.[17] In its footnote citations concerning the drafting of the Covenant, Prof. Nowak's *Commentary* provides detailed references to the Bossuyt *Guide*.

Since the publication of Marc Bossuyt's *Guide*, several compilations of the preparatory work of legal instruments in the field of human rights have been published. These have included studies of the Refugee Convention,[18], the Convention on the Rights of the Child,[19] the Convention on the Elimination of Discrimination Against Women,[20] the Slavery Conventions,[21] the Genocide Convention,[22] the amendments to the Rome Statute on the crime of aggression[23] and the Universal Declaration of Human Rights.[24] These books have varying degrees of indexing and annotation. The most recent are available from publishers in searchable electronic form.

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15 Www.un.org/Depts/dhl/udhr/.

16 Dominic McGoldrick, *The Human Rights Committee*, Oxford: Clarendon Press, 1991.

17 Manfred Nowak, *CCPR Commentary*, Kehl/Strasbourg/Arlington: N.P. Engel, 1993.

18 Alex Takkenberg and Christopher C. Tahbaz, *The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees*, Amsterdam: Dutch Refugee Council, 1990.

19 Sharon Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'*, Dordrecht/Boston/London: Martinus Nijhoff, 1992.

20 Lars Adam Rehof, *Guide to the travaux préparatoires of the United Nations Convention on the Elimination of Discrimination Against Women*, Dordrecht: Martinus Nijhoff, 1993.

21 Jean Allain, *The Slavery Conventions: The Travaux préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Leiden: Martinus Nijoff, 2008.

22 Philippa Webb and Hirad Abtahi, *The Genocide Convention: The Travaux préparatoires*, Leiden: Brill, 2008.

23 Stefan Barriga and Claus Kreß, *The Travaux Préparatoires of the Crime of Aggression*, Cambridge: Cambridge University Press, 2011.

24 William Schabas, *The Universal Declaration of Human Rights: the travaux préparatoires*, Cambridge: Cambridge University Press, 2013.

This is evidence of an increasing fascination with the drafting history of international human rights instruments. The general debate about their relevance for treaty interpretation has largely been resolved by Article 32 of the Vienna Convention on the Law of Treaties. But two objections arise to the importance that seems to be attached to the *travaux préparatoires* in the area of human rights law. First, they only constitute a 'supplementary means of interpretation', to be consulted when other approaches do not lead to clarity and otherwise ignored. Second, because they focus attention on the views of the drafters they seem incompatible with the dynamic or 'evolutive' approach to the interpretation of international human rights instruments that international courts and tribunals espouse.[25]

According to Article 32 of the Vienna Convention on the Law of Treaties, '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31'. Article 31 sets out the general rule that a treaty is to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The Convention says that supplementary means, including the *travaux*, may be turned to only when the general rule 'leaves the meaning ambiguous or obscure' or when it 'leads to a result which is manifestly absurd or unreasonable'. The Vienna Convention provisions are often referred to as authoritative even if strictly speaking the Convention does not apply. The International Court of Justice has described Articles 31 and 32 of the Vienna Convention as part of customary international law.[26]

In practice international courts and tribunals rarely turn to the *travaux préparatoires* only after one or other of the conditions for recourse to supplementary means has been fulfilled. As Anthony Aust has explained, invariably 'the parties to a dispute will always refer the tribunal to the *travaux*, and the tribunal will inevitably consider them along with all the other material put before it'.[27] Arnold McNair wrote that it 'would indeed require some courage

25 *Vo v. France* [GC], no. 53924/00, §82, ECHR 2004-VIII. Also: *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, §80, ECHR 2009; *Micallef v. Malta* [GC], no. 17056/06, §81, ECHR 2009; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, §104, 17 September 2009.

26 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment*, ICJ Reports 2007, p. 43, para. 160; *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, p. 174, para. 94; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment*, ICJ Reports 2004, p. 48, para. 83; *LaGrand (Germany* v. *United States of America), Judgment*, ICJ Reports 2001, p. 501, para. 99; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment*, ICJ Reports 2002, p. 645, para. 3.

27 Anthony Aust, *Modern Treaty Law and Practice*, Cambridge: Cambridge University Press, 2000, p. 197.

on the part of a litigant to ignore' the *travaux*.[28] Moreover, far from freezing the interpretation of human rights instruments, courts and tribunals often seem to use the *travaux* to enlarge the scope of provisions.

In 2012 there were three references in the jurisprudence of the Grand Chamber of the European Court of Human Rights to the *travaux* of the European Convention on Human Rights and its protocols. In *Hirsi Jamaa and Others v. Italy*, the Grand Chamber considered the ambit of the prohibition on the collective expulsion of aliens in Article 4 of Protocol No. 4. Without in any way declaring that the general rule of interpretation did not produce a convincing conclusion, the Court turned to the *travaux*. It cited the Explanatory Report accompanying the Protocol as confirmation that the drafters did not intend to limit Article 4 to persons lawfully resident in the State Party but rather to cover 'all those who have no actual right to nationality in a State, whether they are passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality'.[29] In *Sitaropoulos and Others v. Greece*, once again without noting any failure to resolve issues using the general rule of interpretation, the Court invoked the *travaux* in support of extending Article 3 of Protocol No. 1 so as to cover individual rights, including the right to vote and the right to stand for election.[30] Finally, as Judge Pinto de Alburquerque noted in an individual opinion, 'the true intention of the founding fathers [was] to create an instrument for the guarantee of rights that are practical and effective, not theoretical and illusory'.[31]

Similarly, the International Court of Justice often consults the *travaux* without making a preliminary determination that the general rule of interpretation does not provide an adequate answer. It generally invokes them as 'confirmation' of an interpretation that it has already adopted. For example, in the *Bosnia v. Serbia* case, it referred to the preparatory work of the Genocide Convention in concluding that the definition of the crime was a positive reference to protected groups that could not be applied in a negative sense.[32] Similarly, the *travaux* confirmed a construction of the Convention by which the reference to prevention in Article I has an autonomous meaning.[33] They also supported an interpretation by which cultural genocide was excluded from the

28 Lord McNair, *The Law of Treaties*, Oxford: Clarendon Press, 1961, p. 413.

29 *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, §174, ECHR 2012.

30 *Sitaropoulos and Others v. Greece* [GC], no. 42202/07, §63, ECHR 2012. Following *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §51, Series A no. 113.

31 *Konstantin Markin v. Russia* [GC], no. 30078/06, Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque, ECHR 2012 (extracts).

32 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, para. 194.

33 *Ibid.*, paras. 163–164.

ambit of the Convention.[34] In the *Georgia v. Russian Federation* case pursuant to the International Convention on the Elimination of All Forms of Racial Discrimination, the Court began by noting that it did not need to resort to supplementary means of interpretation such as the *travaux* but then went on to analyse them because of the extensive use made of preparatory work by the parties.[35] It said that 'whilst no firm inferences can be drawn from the drafting history of CERD as to whether negotiations or the procedures expressly provided for in the Convention were meant as preconditions for recourse to the Court, it is possible nevertheless to conclude that the *travaux préparatoires* do not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation'.[36] Judge Cançado dissented, stating that the majority position 'simply begs the question, and does not resist closer examination'; he found useful support for the applicant's position in the *travaux*.[37]

Travaux préparatoires of the Rome Statute are frequently cited by the International Criminal Court for the purposes of interpretation, once again without any real indication that they are only a 'supplementary' source. Several of the judges as well as many professionals employed by the Court were themselves participants in the Rome Conference. They may well have difficulty distinguishing reasonable conclusions derived from the published record from their own recollections. For example, decisions by Pre-Trial Chambers authorizing the Prosecutor to initiate investigations in accordance with Article 15(4) of the Rome Statute have contended that the judicial review mechanism was included by the drafters in order to avoid 'politicization' in the selection of situations for the Court's attention.[38] The contention is not derived from a textual or even a teleological method of interpretation but exclusively by reference to the *travaux préparatoires* of the Rome Statute. It seems that this has been generously enriched by the memories of those who were present at the 1998 Conference. It is not insignificant that both of the Pre-Trial Chambers in the two

34 *Ibid.*, para. 344.

35 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections*, 1 April 2011, para. 142.

36 *Ibid.*, para. 147.

37 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, 1 April 2011, Dissenting Opinion of Judge Cançado Trindade, paras. 97–109. See also: *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, Dissenting Opinion of Judge Cançado Trindade, paras. 67–68, 147, 211, 224, 244.

38 *Situation in the Republic of Kenya* (ICC-01/09), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 18; *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Judge Fernandez de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011.

cases in which the provision has been interpreted and applied have included judges who had, in earlier diplomatic careers, participated in the negotiations at the Rome Conference. Indeed, the decisive amendment to draft Article 15 to which Judge Fernandez made reference in her separate and dissenting opinion in the *Côte d'Ivoire case* was proposed jointly by Germany and Argentina. Judge Hans-Peter Kaul of Pre-Trial Chamber II, who sat in the *Kenya case*, was head of the German delegation to the Rome Conference, Judge Silvia Fernandez of Pre-Trial Chamber III was a member of the Argentinian delegation.[39]

The official records of the Rome Statute are rather sparse, consisting mainly of reports issued at the conclusion of sessions of the negotiations. Summary records were made of the plenary sessions, but there is little trace of the debates in the working groups, where the negotiations mainly took place. To this may be added a variety of documents ranging from 'non-papers' issued by delegations to NGO pamphlets and, after the adoption of the Statute, accounts of the drafting written by interested participants.[40] Whether these materials are properly considered to be part of the *travaux* is a matter of contention. Article 32 of the Vienna Convention on the Law of Treaties does not define the meaning of the term 'preparatory work', apparently quite deliberately, and the scope depends upon 'the circumstances of each case'.[41]

Typically, judges invoke the preparatory work as confirmation of an interpretative approach to which they are already predisposed. But occasionally they single out rather isolated statements by participants in treaty negotiations as evidence of intent. Agreement at a diplomatic conference involves much compromise where those participating in the negotiations concur on a formulation to which they actually ascribe different meanings. Caution must be exercised so as to avoid a one-sided interpretation by which the *travaux* allegedly justify the view that was desired by one side in the discussions, thereby neglecting or ignoring the view of others whose reason for accepting the final compromise may have been quite different. Indeed, for Judge Schwebel the separate intent of a single party or group of parties is virtually irrelevant:

> 'The intention of the parties', in law, refers to the common intention of both parties. It does not refer to the singular intention of each party which is unshared by the other. To speak of 'the' intention of 'the parties' as meaning the diverse intentions of each party would be oxymoronic.[42]

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39 UN Doc. A/CONF.183/13 (Vol. II), pp. 6, 18.

40 For example: Roy S. Lee, ed., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague/London/Boston: Kluwer Law International, 1999.

41 UN Doc. A/CN.4/SER.A/1966, p. 201, para. 35.

42 *Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, ICJ Reports 1994, p. 112, Dissenting Opinion of Judge Schwebel, p. 128.

An example of this is provided by a Trial Chamber of the International Criminal Tribunal for Rwanda, concluding with reference to the preparatory work of the Genocide Convention that the drafters intended to protect all 'permanent and stable groups', and not just the 'national, ethnic, racial and religious' categories enumerated in Article 2 of the treaty.[43] Actually, the references in the *travaux* were rather perfunctory. While they might indicate the views of a few delegations, they hardly provide enough support on which to base such a novel interpretative expansion of the plain words of the Convention.

In 1948, dismayed at the failure of the United Nations General Assembly to adopt a human rights treaty or covenant at the same time as the Universal Declaration of Human Rights, Hersch Lauterpacht contended that '[n]ot being a legal instrument, the Declaration would appear to be outside international law', and that as a result there was 'little meaning in attempting to elucidate, by reference to accepted canons of construction and to preparatory work, the extent of an obligation which is binding only in the sphere of conscience'.[44] Putting to one side Prof. Lauterpacht's pessimistic (and ultimately quite inaccurate) assessment of the Universal Declaration, which was provoked by his great disappointment at the failure of the General Assembly to adopt a human rights treaty at its third session, the suggestion that *travaux préparatoires* of a 'mere declaration' are of 'little meaning' cannot be sustained. Scholars have learned a great deal, and still have a great deal to learn, from the preparatory work of the Universal Declaration, as this informs not only the meaning of the instrument itself but also contributes to a grasp of the origins of human rights law and its contemporary meaning.[45] The Commission on Human Rights and the General Assembly made choices about the content of human rights norms, and even about the nomenclature used to define fundamental rights, that have resonated through subsequent treaties and other instruments.

To take an example of contemporary interest, Article 12 of the European Convention on Human Rights affirms that '[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'. The *travaux* of the European Convention leave no doubt that the text was derived from Article 16 of the Universal Declaration: 'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.' Although increasingly legislators in European jurisdictions are recognizing that marriage

43 *Prosecutor* v. *Akayesu* (No. ICTR-96-4-T), Judgment, 2 September 1998, paras. 510, 515.

44 Hersch LAUTERPACHT, 'The Universal Declaration of Human Rights', (1948) 25 *British Yearbook of International Law* 354, at p. 369.

45 Johannes MORSINK, *The Universal Declaration of Human Rights, Origins, Drafting, and Intent*, Philadelphia: Penn, 2000; Mary Ann GLENDON, *A World Made New, Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York: Random House, 2001; Paul Gordon LAUREN, *The Evolution of International Human Rights, Visions Seen*, Philadelphia: University of Pennsylvania Press, 2003;.

may be entered into by two persons of the same sex, the European Court of Human Rights has typically been rather cautious in this area. In 2010, rejecting an application by two Austrian men who complained that they were being denied the right to marry, it noted the use of the term 'men and women', which stands in distinction to other provisions of the Convention (and the Declaration) that speak of 'everyone'. According to the ruling:

> 'The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate.'[46]

The implication, it seems, is that marriage was intended to be reserved to 'men and women', that is, to two persons of opposite sex.

The *travaux préparatoires* of the European Convention are of no help here. The drafters simply adopted the formulation used in the Universal Declaration of Human Rights. The decision by the drafters of the Declaration to speak of 'men and women' was certainly 'deliberate', as the Grand Chamber noted, but this had nothing to do with reserving marriage to couples of the opposite sex, which it suggested was the explanation for such a deviation from the ordinary terminology. The departure from the term 'everyone' in favour of 'men and women' was made by the Commission on Human Rights out of concern about the equality of both partners in the marriage, and for that reason alone.[47] The term 'men and women' had already been employed in the preamble of the Charter of the United Nations where the intent, once again, was to underscore the importance of equality of treatment and non-discrimination.

Regardless of their exact place in interpretation, *travaux préparatoires* have their own intrinsic interest. Their use as 'supplementary' means for the purposes of interpretation is only one of several reasons that justify our attention to them. They enable us to comprehend the status of debate about legal issues at a given time and in a particular forum. They contribute to a grasp of the history of international law-making. They provide insight into the views both of States, at a particular time, as well as of the individuals and organisations participating in the negotiation process. They merit periodic reconsideration. Preparatory works are like a challenging landscape for the artist, altered in appearance each time they are painted: the light is different, the time of day or the season has changed, a new building has intervened or an old one has been demolished. Claude Monet said that 'a landscape does not exist in its own right, since its appearance changes

46 *Schalk and Kopf v. Austria*, no. 30141/04, §55, ECHR 2010. See also: *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, §83, 21 October 2010.

47 UN Doc. E/CN.4/AC.2/SR.6, pp. 2–7.

at every moment; but the surrounding atmosphere brings it to life – the light and the air which vary continually.' Our understanding of the past is framed by the issues of the present and anticipation of the future. To legal scholars, the *travaux préparatoires*, like the painter's landscape, present a constant and unremitting source of new insights, ideas and approaches.