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Treaty Interpretation and ICJ Recourse to \textit{Travaux Préparatoires}: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties

**INTRODUCTION**

Treaty interpretation is among the most controversial subjects of international law.\(^1\) While scholars generally agree that treaty interpretation should ascertain the intentions of the parties, they rely on different hermeneutic principles to accomplish this task.\(^2\) The ensuing debate primarily concerns two questions: are the intentions of the parties a subjective element apart from the text, and what is the object and purpose of a treaty?\(^3\) With respect to these issues, the practice of treaty interpretation by the International Court of Justice (ICJ)\(^4\) has frequently failed to provide legal certainty, objectivity, and predictability.\(^5\)


\(^2\) E.S. Yambrusic, \textit{Treaty Interpretation} 14 (1987); Mehrish, \textit{supra} note 1, at 39; Schaffer, \textit{supra} note 1, at 130.

\(^3\) Mehrish, \textit{supra} note 1, at 39.

\(^4\) \textit{The International Court of Justice, The International Court of Justice} (1976) [hereinafter \textit{The International Court}]. The International Court of Justice (ICJ) is the primary judicial body of the United Nations. The Statute of the ICJ is an integral part of the Charter of the United Nations (U.N. Charter) and elaborates on Chapter XIV of the U.N. Charter. \textit{Id.} at 17–19.

The member states of the United Nations and other parties to the Statute of the ICJ elect the fifteen judges of the court. Ideally, judges on the ICJ represent the main forms of civilization and the principal legal systems of the world. \textit{Id.} at 21–22.

Jurisdiction under article 34 of the Statute of the ICJ only extends to states and is subject to their consent. \textit{Id.} at 32–33. Hence, the willingness of sovereign states to accept jurisdiction ultimately limits the power of the court. \textit{Id.} at 33–39. As of 1989, only fifty states have submitted to the court's compulsory jurisdiction.

\(^5\) See Yambrusic, \textit{supra} note 2, at 144; Schaffer, \textit{supra} note 1, at 130. Mr. Yambrusic believes that this failure is not due to a judicial refusal to create rules but reflects "the stark reality that interpretation is an intellectual process which does not lend itself to a strict legal formulization." Yambrusic, \textit{supra} note 2, at 144.
This Comment examines recourse to travaux préparatoires\(^6\) by the ICJ in the interpretation of treaties. Part I introduces the standard doctrines of treaty interpretation and their definition and proposed usage of travaux préparatoires. Part II then examines recourse to travaux préparatoires in representative cases and advisory opinions of the ICJ. Part III compares the court's hermeneutic rhetoric and practice and concludes that they are sometimes incongruent. This Comment proposes an amendment to articles 31 and 32 of the Vienna Convention that could facilitate reliable ICJ recourse to travaux préparatoires.

I. DOCTRINAL CONTROVERSY

A. Meaning and Nature of Travaux Préparatoires

Travaux préparatoires consist of the written record of negotiations preceding the conclusion of a treaty.\(^7\) Lord McNair\(^8\) defined travaux préparatoires as "all the documents, such as memoranda, minutes of conferences, and drafts of the treaty under negotiation."\(^9\) Travaux préparatoires thus include materials which document the negotiations and other circumstances that culminated in the formal conclusion of a treaty.

The travaux préparatoires of a treaty can be ambiguous and confusing.\(^10\) During treaty negotiations, drafters may advance several views, some of which they may abandon before adopting

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\(^6\) Travaux préparatoires, or preparatory work, are documents which precede the final text of a treaty and can take various forms. They are akin to the legislative history of U.S. legislation. In this Comment, the term travaux préparatoires subsumes all other terms which refer to preparatory work.


\(^8\) Lord McNair served as judge on the ICJ from 1946–1955. THE INTERNATIONAL COURT, supra note 4, at 105.


\(^10\) Lauterpacht, supra note 7, at 130; Mehrish, supra note 1, at 62.
the final version of the treaty. Because the travaux préparatoires may include such obsolete negotiation positions, they can mislead an interpreter as to the intentions of the signatories at the time of signing the treaty.\textsuperscript{11} Furthermore, while various circumstances may account for the absence of certain provisions in the travaux préparatoires, an interpreter may conclude that silence indicates unanimity among the parties. Crucial deliberations, for example, often occur in private and thus never appear in the negotiation record. Primarily for such reasons, commentators have been reluctant to endorse frequent recourse to travaux préparatoires.\textsuperscript{12}

B. Recourse to Travaux Préparatoires

The four principal schools of treaty interpretation pursue different hermeneutic goals. The intent school ascertains the intentions of the parties, the textualist school establishes the ordinary meaning of the words of the treaty, the teleological approach gives effect to the object and purpose of the treaty, and the New Haven school determines and implements the genuine shared expectations of the parties.\textsuperscript{13} The proponents of these schools are, and have been, among the premier scholars of international law, and their teachings constitute supplementary sources of international law.\textsuperscript{14}

1. The Intent School

Sir Lauterpacht formulated the principles of the intent school in the 1950 Draft Report of the Institute of International Law (Draft Report).\textsuperscript{15} The Draft Report postulates that the interpreter of a treaty must first and foremost ascertain the intentions of the parties. Familiarity with these intentions enables the interpreter

\begin{itemize}
    \item \textsuperscript{11} Mehrish, supra note 1, at 62.
    \item \textsuperscript{12} LAUTERPACHT, supra note 7, at 130.
    \item \textsuperscript{13} Mehrish, supra note 1, at 40 & n.2; see also McDougal, supra note 7, at 40; Yambrusic, supra note 2, at 9, 12; Schaffer, supra note 1, at 130.
    \item \textsuperscript{14} Article 38 of the Statute of the ICJ, reprinted in W. CHAMBERLIN, T. HOVET, Jr. & E. HOVET, A CHRONOLOGY AND FACT BOOK OF THE UNITED NATIONS 1941-1969 170 (1970) [hereinafter CHAMBERLIN].
    \item \textsuperscript{15} Lauterpacht, De l'interprétation des traités, 43 ANNuaire DE L'INSTITUT DE DROIT INTERNATIONAL 366-434, 457-60, especially 390-402 (1950) [hereinafter L'interprétation des traités].
\end{itemize}
to give the treaty the intended meaning. To determine the intentions of the parties, the interpreter may legitimately rely on supplementary sources such as travaux préparatoires, even where the treaty appears unambiguous.

Various schools of thought have criticized the approach of Sir Lauterpacht. The textualist critique by Sir Fitzmaurice questions why the intentions of the parties should not be apparent from the text alone. Sir Fitzmaurice asserts that parties draft a treaty to express their intentions and that an interpreter must therefore assume that the treaty in fact embodies their intentions. Accordingly, the interpreter should resort to travaux préparatoires only in situations where the treaty is unclear.

2. The Textualist School

The textualist school aims to interpret a treaty principally by establishing the meaning of the text. Sir Fitzmaurice states that the interpreter must first analyze the text of a treaty, not the intentions of the parties apart from the text, because it is the text that manifests the intentions of the parties. Accordingly, the textualist interpreter gives effect to the intentions of the parties by establishing the natural and ordinary meaning of the text.

The textualist interpreter may consult sources other than the treaty only to clarify textual ambiguity or to confirm the natural and ordinary meaning of words. She may only resort to travaux préparatoires.
préparatoires to shed light on the meaning of the text, not on the intentions of the parties apart from the text. Professor Myres McDougal, the founder of the New Haven school, has criticized the restrictive nature of the textualist approach and its reliance on artificial, hierarchical distinctions between primary and secondary sources of interpretation.

3. The Teleological School

The teleological school strives to give effect to the object and purpose of a treaty. Article 19(a) of the 1935 Draft Convention on the Law of Treaties (Draft Convention) sets forth the factors which indicate the object and purpose of a treaty. Most important among them are the historical background of the treaty, the subsequent conduct of the parties, the circumstances surrounding the adoption and interpretation of the treaty, and travaux préparatoires. The Draft Convention does not prioritize these factors because their weight depends on the particular circumstances. Thus, unlike the intent and textualist schools, the teleological approach does not categorically distinguish between primary and secondary sources of interpretation.

4. The New Haven School

The New Haven school attempts to determine and give effect to the genuine shared expectations of the parties, subject to overriding community policies. To this end, an interpreter should examine all significant indices of the expectations of the

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25 Treaty Interpretation and Other Treaty Points, supra note 19, at 206.
26 See McDougal, The International Law Commission’s Draft Articles Upon Interpretation: Textuality Redivivus, 61 Am. J. Int’l L. 992 (1967). McDougal stated that [t]he great defect, and tragedy, in the International Law Commission’s final recommendations about the interpretation of treaties is in their insistent emphasis upon an impossible, conformity-imposing textuality. . . . [T]he ‘basic approach’ of the Commission in generally arrogating to one particular set of signs—the text of a document—the role of serving as the exclusive index of the shared expectations of the parties to an agreement is an exercise in primitive and potentially destructive formalism.
Id. at 992–97 (footnotes omitted).
27 See Mehrish, supra note 1, at 51; Schaffer, supra note 1, at 133.
28 Draft Convention, supra note 9, at 937–38; see also Mehrish, supra note 1, at 51–52; Schaffer, supra note 1, at 133–34.
29 Draft Convention, supra note 9, at 937.
30 Id. at 938; Schaffer, supra note 1, at 134.
31 McDougal, supra note 7, at 40.
parties and of overriding community policies. A treaty and its travaux préparatoires are thus equally valid sources of interpretation. In a critique of the New Haven approach, Professor Leo Gross has indicated the staggering difficulty of interpreting such ambiguous concepts as genuine shared expectations and overriding community policies. His objection to conceptual vagueness seems equally applicable, however, to such textualist concepts as intentions of the parties and natural and ordinary meaning of words.

In conclusion, none of these four schools of thought categorically rejects recourse to travaux préparatoires. The schools disagree about the circumstances which justify such recourse—should an interpreter resort to travaux préparatoires as a matter of course, or rather, only when the text is obscure. The textualist school traditionally resorts to travaux préparatoires cautiously, using them only to confirm the meaning derived from the text or where the text is patently obscure. The intent school considers travaux préparatoires more freely and possibly even before consulting the text of a treaty. The teleological and New Haven schools leave the use of travaux préparatoires to the discretion of the interpreter.

C. The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties of May 22, 1969 (Vienna Convention) is a primary contemporary source of

32 Id. at 40–41. Professor McDougal states that decision-makers should first “ascertain the genuine shared expectations” of the parties. When this fails, they should “augment the relatively more explicit expressions of the parties by making reference to the basic constitutive policies of the larger community . . . .” Where community policy and shared expectations conflict with each other, decision-makers should give effect to community policy.

33 Mehrish, supra note 1, at 56.

34 Gross, Treaty Interpretation: The Proper Rôle of an International Tribunal, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 108, 114 (1969). Mr. Yambrusic pointed out that “[w]hile this [New Haven] method purports to fulfill, and even to increase the degree of legal certainty, it actually interjects into the legal system an element of subjectivity striving to put the law on the level of an exact science working with the formula Facts x Policy = Law.” YAMBRUSIC, supra note 2, at 14 (footnotes omitted).

35 G. FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 46 (1986); Treaty Interpretation and Other Treaty Points, supra note 19, at 206; see also Schaffer, supra note 1, at 144–45. Schaffer writes:

Today there is little, if any, dispute on the permissibility of resort to travaux préparatoires as an aid to treaty interpretation but its significance has never been clearly explained in international jurisprudence. The essential problem is how to balance the final text of the treaty and the mass of documentation going under the label of preparatory work.

36 FITZMAURICE, supra note 35, at 46.
law on the interpretation of treaties. The eighty-five articles of the Vienna Convention codifying the law of treaties reflect seventeen years of intensive work by the United Nations International Law Commission. Articles 31 and 32 of the Vienna Convention adopt a clear, though not extreme, textualist approach to treaty interpretation.

Article 31 lists the primary sources of interpretation. They are the treaty, the agreements made in connection with the conclusion of the treaty, and subsequent agreements and practices to the

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38 Yambrusic, supra note 2, at 170. Mr. Yambrusic notes that the immense effort behind the Vienna Convention clearly indicates that "legal certitude" does not exist. According to Mr. Yambrusic, the Vienna Convention failed to establish a general rule of interpretation that would allow the ICJ to "ensure the certainty and stability of the treaty while, at the same time, promot[e] the progressive development of international law." Compare Sinclair, supra note 7, at 242–60.

39 Schaffer, supra note 1, at 139; see also Vienna Convention, supra note 37, at arts. 31–33. Article 31 provides:

**General rule of interpretation**

1. A treaty shall 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.

2. The context of the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 provides:

**Supplementary means of interpretation**

Recourse 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:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Article 33 concerns the interpretation of treaties authenticated in two or more languages. For an exhaustive account of the legislative history of articles 31 and 32, see Yambrusic, supra note 2, at 169–218.
extent that they manifest an express understanding among the parties.\textsuperscript{40} The title of article 31, "General rule of interpretation," indicates that these are equivalent sources of interpretation.\textsuperscript{41} Interpretation under article 31 focuses on a treaty's ordinary meaning which is deemed to express the intentions of the parties. The meaning must be consistent with the object and purpose of the treaty and its related documents.\textsuperscript{42} A term can have a special meaning only if its proponent can show that the term should have that special meaning.\textsuperscript{43} This method of interpretation is not exclusively textualist because it takes into consideration the object and purpose of the treaty as well as contemporaneous and subsequent related documents. Article 31, however, clearly does not permit primary consideration of supplementary means of interpretation such as travaux préparatoires.

Article 32 lists travaux préparatoires as one of the supplementary sources of interpretation.\textsuperscript{44} The interpreter may resort to travaux préparatoires when the meaning of the text is ambiguous or obscure, or where applying article 31 would lead to a manifestly unreasonable result.\textsuperscript{45} This formulation resounds the textualist tenets. The contemporary international legal community thus presumably agrees that travaux préparatoires are only supplementary means of treaty interpretation.

II. ICJ Recourse to Travaux Préparatoires

This Section discusses historical ICJ recourse to travaux préparatoires in interpreting treaty provisions. This inquiry focuses on the methodological consistency of the court. Representative cases and advisory opinions document the circumstances which led the court to resort to travaux préparatoires, and the kinds of travaux préparatoires that the court has considered. The examples dem-

\textsuperscript{40} I. Brownlie, Principles of Public International Law 600, 625 (1979); Mehrish, supra note 1, at 62; see also Vienna Convention, supra note 37, at art. 31.

\textsuperscript{41} Brownlie, supra note 40, at 625; Schaffer, supra note 1, at 139; Mehrish, supra note 1, at 61–62.

\textsuperscript{42} Vienna Convention, supra note 37, at art. 31(1); Brownlie, supra note 40, at 626; Schaffer, supra note 1, at 139.

\textsuperscript{43} Vienna Convention, supra note 37, at art. 31(4); Brownlie, supra note 40, at 626; Schaffer, supra note 1, at 143.

\textsuperscript{44} Vienna Convention, supra note 37, at art. 32; Mehrish, supra note 1, at 62; Schaffer, supra note 1, at 144.

\textsuperscript{45} Vienna Convention, supra note 37, at art. 32; Brownlie, supra note 40, at 627.
onstrate an occasional discrepancy between judicial rhetoric and practice.

A. Sufficiently Clear Text

In the 1948 advisory opinion Conditions of Admission of a State to Membership in the United Nations (Conditions of Admission),\(^\text{46}\) the ICJ did not resort to travaux préparatoires because it found that the text of article 4(1) of the Charter of the United Nations (U.N. Charter) was sufficiently clear. The court examined the issue of whether the conditions of article 4(1) governing admission of states to the United Nations were exhaustive.\(^\text{47}\) The judicial method of interpretation required an initial examination of the text of article 4(1). The court found that the conditions were exhaustive because the natural meaning of the text clearly demonstrated the intentions of the parties. Only a compelling reason would have justified looking beyond the natural meaning of the words.\(^\text{48}\) The court followed the practice of the Permanent Court of International Justice (PCIJ)\(^\text{49}\) in not resorting to travaux préparatoires where the text of the convention is “sufficiently clear in itself.”\(^\text{50}\) Thus, the method of interpretation in this case was consistent with the textualist approach.


\(^\text{47}\) Id. at 61. Article 4(1) states that “[m]embership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter, and, in the judgment of the Organization, are able and willing to carry out these obligations.” U.N. Charter, art. 4(1), reprinted in Chamberlin, supra note 14, at 131. The ICJ interpreted this provision to contain five conditions. An applicant had to “1) be a State; 2) be peace-loving; 3) accept the obligations of the Charter; 4) be able to carry out these obligations; and 5) be willing to do so.” Conditions of Admission, 1948 I.C.J. at 62.

\(^\text{48}\) Id. at 63.

\(^\text{49}\) See The International Court, supra note 4, at 14–17. The Permanent Court of International Justice (PCIJ) was the predecessor of the ICJ and constituted the judicial organ of the League of Nations.

In the 1961 case *Temple of Preah Vihear (Preah Vihear)*, the ICJ further articulated the canons of interpretation underlying its own jurisprudence. Accordingly, the court assigns words the meaning which they naturally have in their particular context. Nevertheless, words must not always be interpreted in a "purely literal way." An unreasonable, absurd, or self-contradictory result entitles the court to consider relevant circumstances beyond the text. The principles enunciated in *Conditions of Admission* and *Preah Vihear* affirmed a generally textualist method of interpretation, presaging articles 31 and 32 of the Vienna Convention.

B. Confirmation of Textualist Interpretation

The ICJ resorted to travaux préparatoires to support its textualist conclusion in the 1978 case *Aegean Sea Continental Shelf (Aegean Sea)*. The court, in that case, interpreted Reservation (b) of the Declaration accompanying the Greek instrument of accession to the 1928 General Act for the Pacific Settlement of International Disputes (General Act). The Greek argument invoked plain rules of English grammar to contend that Reservation (b) only applied to issues of domestic jurisdiction—as opposed to the international dispute before the court—and did not negate the jurisdiction of the court. Responding to this claim, the ICJ closely analyzed the text of Reservation (b), considered the whole context of the General Act, and compared Reservation (b) with the two-year old Greek reservation to the jurisdiction of the PCIJ. The court concluded that these sources did not support the Greek


52 Id. at 32.

53 *Aegean Sea Continental Shelf* (Greece v. Turk.), 1978 I.C.J. 3. The Greek and Turkish governments disputed the entitlement of certain Greek islands in the Aegean sea to a portion of the adjacent continental shelf. Among other things, Greece based its claim of ICJ jurisdiction on article 17 of the 1928 General Act for the Pacific Settlement of International Disputes to which Greece and Turkey acceded on September 14, 1931, and June 26, 1934, respectively. Id. at 13–14.

54 Id. at 20–28. Reservation (b) provides in relevant part that "disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece" are excluded from the jurisdiction of the ICJ. Id. at 21.

55 Id. at 23–24. One of the reservations to the jurisdiction of the PCIJ included "disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication . . . ."
claim in a compelling manner, and turned to travaux préparatoires for further support.56

The travaux préparatoires included internal Greek documents relating to the Greek instrument of accession to the General Act. The ICJ reviewed both the first and final draft of the projet de loi and their accompanying exposé des motifs.57 Based on all the examined factors, including the travaux préparatoires, the court held that Reservation (b) contained two distinct elements, one relating to territorial status, and the other to domestic jurisdiction. The method of interpretation in this case was consistent with articles 31 and 32 of the Vienna Convention and the textualist school.

The ICJ further resorted to travaux préparatoires to support a textualist conclusion in the 1988 case Border and Transborder Armed Actions (Border Actions).58 Honduras had claimed that article XXXI of the Pact of Bogotá failed to establish ICJ jurisdiction for lack of a supplementary declaration.59 The court refuted this claim and stated that article XXXI, if read in the context of articles V, VI, VII, and LV of the Pact of Bogotá, expressed an autonomous commitment to accept the jurisdiction of the court and, therefore, did not support the Honduran assertion.60 Consequently, a supplementary declaration neither was required nor could affect a signatory’s commitment to accept ICJ jurisdiction. To confirm its interpretation of the Pact of Bogotá, the court resorted to travaux préparatoires.

The published proceedings of Committee III of the Conference of Bogotá indicated that the United States, as a signatory of

56 Id. at 26.
57 Id. at 27. The exposé des motifs explained that Reservation (b) was, in effect, a repetition of the territorial reservation in the Greek acceptance of the compulsory jurisdiction of the PCIJ.
59 Id. at 82–88, 107. The Pact of Bogotá and the Charter of the Organization of American States (OAS) were drafted and adopted at the Bogotá Conference in 1948. Id. at 77. Article 2 of the OAS Charter proclaimed the purpose of OAS to be “the pacific settlement of disputes,” and article 23 provided that “[a] special treaty will establish adequate procedures for the pacific settlement of disputes.” The special treaty provided for in article 23 was the Pact of Bogotá to which both Nicaragua and Honduras were parties. Article XXXI of the Pact of Bogotá provides that the parties accept, for the duration of the Pact, the compulsory jurisdiction of the ICJ under article 36(2) of the Statute of the ICJ in relation to any other American state and to disputes which involve the interpretation of a treaty.
60 Id. at 84. The ICJ relied on the words “compulsory ipso facto” pertaining to the jurisdiction of the ICJ to conclude that the article in and of itself constituted acceptance of the jurisdiction of the court.
the Pact of Bogotá, could not have relied on its reservation to an earlier declaration of acceptance of ICJ compulsory jurisdiction. U.S. membership within the Pact of Bogotá would have been unconditional without an express reservation.\textsuperscript{61} The court therefore concluded that the acceptance of compulsory jurisdiction under article XXXI was not subject to previous reservations unless such reservations were explicitly reaffirmed under article LV of the Pact of Bogotá.\textsuperscript{62} Thus, in \textit{Aegean Sea and Border Actions} the court acted consistently with the textualist approach by considering the text and context of the provisions in question before relying on \textit{travaux préparatoires} for additional support.

C. Textual Ambiguity

The ICJ resorted to \textit{travaux préparatoires} in the 1952 case \textit{Rights of Nationals of the United States of America in Morocco (Rights of Nationals)}\textsuperscript{63} because the text of the treaty was inconclusive. The court examined whether the Moroccan customs authorities violated article 95 of the multilateral General Act of Algeciras of 1906 (Act of Algeciras).\textsuperscript{64} The United States alleged that the Moroccan customs authorities erroneously based the customs value of imported merchandise on the value of the merchandise in Morocco. According to the ICJ, the provisions of article 95, alone and in the context of other relevant articles of the Act of Algeciras, were not conclusive.\textsuperscript{65}

A subsequent examination of the records of the Conference of Algeciras which drafted the Act of Algeciras revealed the rejec-

\textsuperscript{61} Id. at 85–87. As a consequence, the United States made a reservation to the Pact of Bogotá regarding “any jurisdictional or other limitation contained in any Declaration deposited by the United States under Article 36, paragraph 4, of the Statute of the Court, and in force at the time of the submission of any case.”

\textsuperscript{62} Id. at 88.

\textsuperscript{63} Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176.

\textsuperscript{64} Id. at 207. Article 95 of the General Act of Algeciras lists four factors which are relevant for the valuation of merchandise for customs purposes:

(a) the valuation must be based upon its cash wholesale value;

(b) the time and place of the valuation are fixed at the entry of the merchandise at the custom-house;

(c) the merchandise must be valued “free from customs duties and storage dues”, [sic] that is to say, the value must not include these charges;

(d) the valuation must take account of depreciation resulting from damage, if any.

\textsuperscript{65} Id. at 208.
tion of a German proposal that based the customs value of merchandise on the value of the merchandise in its country of origin. The court found that article 95 clearly did not envision this method as the exclusive manner of valuation. Commenting that the travaux préparatoires were also unhelpful, the court concluded that the customs value of imported goods should be based on the value of the merchandise in its country of origin as well as its value in Morocco. Thus, the court first examined the text, found it inconclusive, and then considered the travaux préparatoires. The method of interpretation in this case again conformed to the textualist approach.

The ICJ has also resorted to travaux préparatoires in cases involving contradictory treaty provisions. In the 1959 case Sovereignty over Certain Frontier Land (Frontier Land), the court considered whether the 1843 Boundary Convention between Belgium and the Netherlands transferred ownership of certain plots of land from the Netherlands to Belgium. The 1843 Boundary Convention explicitly preserved the proprietary interest of the Dutch border town Baarle-Nassau. Dutch ownership derived from an 1841 Communal Minute which was adopted by the 1843 Boundary Convention in its Descriptive Minute. The Descriptive Minute reiterated that Baarle-Nassau should remain the owner of the plots of land but simultaneously assigned them to the

66 Id. at 210. The proposed German amendment to the draft article stated that "[t]he ad valorem duties imposed on imports in Morocco shall be assessed on the value of the imported goods in the place of shipment or of purchase, to which shall be added the transport and insurance charges to the port of discharge in Morocco . . . ."

67 Id. at 210, 213. The travaux préparatoires resorted to consisted of preliminary drafts of the Act.

68 Hogg, The International Court: Rules of Treaty Interpretation II, 44 MINN. L. REV. 5, 30 (1960); see also LAUTERPACHT, supra note 7, at 126.

69 Sovereignty Over Certain Frontier Land (Belg./Neth.), 1959 I.C.J. 209. The boundary between the Belgian town Baerle-Duc and the Dutch town Baarle-Nassau consisted of a series of Dutch enclaves in Baerle-Duc and Belgian enclaves in Baarle-Nassau. Id. at 212. Belgium and the Netherlands disputed the ownership of the two plots known from 1836 to 1843 as numbers 91 and 92, section A, Zondereygen.

70 Id. at 217. Several minutes and treaties document the ownership history of the two plots. According to the 1841 Communal Minute the plots belonged to Baarle-Nassau. Id. at 213. The Netherlands allegedly produced one of the two original copies of the 1841 Communal Minute. The 1843 Boundary Convention ostensibly maintained the proprietary status quo of the two towns but, nevertheless, established a new borderline between the Dutch and Belgian kingdoms based on a special study. Id. at 214–15. The Descriptive Minute, an annex to the 1843 Boundary Convention, contained this study which effectively assigned the plots to Baerle-Duc even though it, too, purported to maintain the status quo.
Belgian border town Baerle-Duc. Without further explanation, the ICJ resorted to travaux préparatoires presumably because of this inconsistency.

The travaux préparatoires included minutes of proceedings of the Mixed Boundary Commission and its Sub-Commission. These commissions carried out the preparatory work leading to the Descriptive Minute.\(^7\) The minutes of proceedings led the ICJ to conclude that the Mixed Boundary Commission had, in fact, established a new boundary between Belgium and the Netherlands.\(^7\) With the further support of two letters, the court held that the Boundary Convention transferred the plots of land from Baarle-Nassau to Baerle-Duc.\(^7\) Although the ICJ did not explain its method of interpretation, one likely reason for its recourse to travaux préparatoires was the inconsistent language of the Descriptive Minute. The judicial recourse to travaux préparatoires in Rights of Nationals and Frontier Land seems consistent with the textualist method of interpretation because the court sought to overcome textual ambiguity in both cases.

D. Textual Silence

The silence of a treaty on the issue before the court led the ICJ to resort to travaux préparatoires in the 1951 advisory opinion Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).\(^7\) The issue before the court was the potential effect of objections, entered only by some signatories, to unilateral reservations to the multilateral Convention on the Prevention and Punishment of the Crime of Genocide

\(^{7}\) Id. at 217–20. The Mixed Boundary Commission first considered plots 91 and 92 in its 174th, 175th, and 176th meeting. In the 176th meeting of December 4, 1841, based on the work of the Sub-Commission, the Mixed Boundary Commission proposed to assign the plots to the Dutch town Baarle-Nassau. The Mixed Boundary Commission took up the issue again in its 208th, 209th, 211th, 220th, and 225th meeting. In the 225th meeting of April 4, 1843, the Commission annulled the minutes of the 175th and 176th meeting and adopted the text of the 1841 Communal Minute along with the detailed survey maps which assigned the plots to the Belgian town Baerle-Duc. The ICJ stressed that these maps were important and that their legal force was that of the 1843 Boundary Convention by virtue of their incorporation.

\(^{7}\) Id. at 222.

\(^{7}\) Id. at 220–21. The President of the Dutch Commission sent a letter to the Dutch Foreign Minister and the Burgomaster of Baerle-Duc sent a letter to the President of the Belgian Boundary Commission.

The court explicitly based its analysis on rules which determine the effect of the intentions of parties to multilateral conventions. Even though treaty law generally permits only reservations accepted by all parties, a number of circumstances warranted a flexible approach in the Genocide Convention. The absence of an express provision in the Genocide Convention did not prohibit reservations but rather, justified determining their availability, validity, and effect based on travaux préparatoires.

The travaux préparatoires included the records of a debate by the Sixth Committee of the General Assembly which immediately preceded the adoption of the Genocide Convention by the General Assembly. During this debate, some delegates explicitly conditioned their signature and ratification of the Genocide Convention on the possibility of entering reservations. These statements, together with the wording of the question submitted to the court, led the ICJ to conclude that the parties essentially had agreed that reservations to the Genocide Convention were permissible. This recourse to travaux préparatoires seems consistent with the textualist approach, because the textual silence warranted such recourse.

In the 1951 Haya de la Torre Case, however, the ICJ did not resort to travaux préparatoires despite a similar situation involving textual silence. The 1928 Havana Convention on Asylum (Havana Convention) did not proscribe the manner of termination of Mr. Haya de la Torre's diplomatic asylum in Colombia. Even though applicable provisions were lacking, the ICJ did not resort to travaux préparatoires, but asserted, without explicit support, that
the Havana Convention embodied the spirit of the Latin American tradition of protecting refugees. According to the court, only an express provision could abolish that tradition. The ICJ held that Colombia should terminate the asylum but, instead of ordering the surrender of the refugee to Peru, left the resolution of the conflict to the “convenience” and “political expediency” of the parties.80

The Haya de la Torre Case and Genocide Convention show the discretionary response of the court to textual silence. Under the circumstances, recourse to travaux préparatoires was consistent with the textualist method of interpretation, and the failure to take recourse did not per se identify any particular hermeneutic approach. Judicial reliance on the spirit of the Havana Convention, however, seems characteristic of the New Haven school.

E. Non-Appearance of a Party

In the 1973 Fisheries Jurisdiction case, the ICJ resorted to travaux préparatoires because the defendant, Iceland, failed to appear in court.81 The ICJ relied on travaux préparatoires to examine questions of jurisdiction under the 1961 Exchange of Notes, concluded between the United Kingdom and Iceland (Exchange of Notes). The compromissory clause of the Exchange of Notes provides that either party can refer to the ICJ disputes which concern extensions of Icelandic fisheries jurisdiction.82 The court noted that under different circumstances, it would not resort to travaux préparatoires because the compromissory clause clearly covered the dispute.83 In cases, however, where a party fails to appear before the court—such as Iceland in this case—the ICJ must

80 Id. at 81, 83.
81 Fisheries Jurisdiction (U.K. and N. Ir. v. Ice.), 1973 I.C.J. 3, 6–7, 9–10. Iceland neither filed pleadings nor appeared in court. Iceland informed the ICJ of the decision not to appear in a letter stating that “considering that the vital interests of the people of Iceland are involved,” Iceland would not “confer jurisdiction on the Court in any case involving the extent of the fishery limits of Iceland . . . .” Id. at 7.
82 Id. at 8. The compromissory clause provided that Iceland would give the United Kingdom six months notice of extensions of fisheries jurisdiction and that “in case of a dispute in relation to such extension[s], the matter shall, at the request of either party, be referred to the International Court of Justice.”
83 Id. at 9–10. Under normal circumstances, the ICJ would have applied the principle affirmed in its 1950 advisory opinion concerning the Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4 (Advisory Opinion). Under this approach, consistent with the textualist school, there is no occasion to resort to preparatory work if the text of a convention is “sufficiently clear in itself.”
examine all potential jurisdictional objections. In fulfillment of this duty, the ICJ reviewed the record of negotiations culminating in the Exchange of Notes.

The *travaux préparatoires* included records of the bilateral negotiations; drafts of the Exchange of Notes; Icelandic government memoranda to the Althing, the Icelandic Parliament; and diplomatic messages, letters, and notes. The bilateral negotiation records showed that the Icelandic representatives initially preferred arbitration, but eventually accepted the ICJ as an appropriate forum for third-party dispute resolution. Subsequent drafts of the Exchange of Notes referred to the ICJ as did the government memorandum accompanying the submission of the proposed Exchange of Notes to the Althing. Furthermore, relying on delegation proposals and draft exchanges of notes, the ICJ traced the evolution of "at the request of either party," the phrase which ultimately proscribed the official mode of invoking ICJ jurisdiction. Finally, a series of ministerial messages, letters, and notes led to the decision to formally register with the United Nations the agreement to use the ICJ as a forum for third-party dispute resolution. The court concluded that the *travaux préparatoires* clearly confirmed the jurisdiction of the ICJ. The use of *travaux préparatoires* as a precautionary measure in this case was consistent with the textualist school and article 32 of the Vienna Convention.

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85 Id. at 10. The records of October 28, 1960, stated that an extension of the fisheries jurisdiction would be "based either on an agreement (bilateral or multilateral) or decisions of the Icelandic Government which would be subject to arbitration at the request of appropriate parties."
86 Id. at 10–11. The memorandum explained that "if a dispute arises in connection with these measures, [namely, the extension of fisheries jurisdiction,] this shall be referred to the International Court of Justice . . . ."
87 Id. The Icelandic delegation proposed that in case of a dispute, "the measures will be referred" to the ICJ. The United Kingdom delegation proposed to insert "at the request of either party" to ensure that a unilateral application would be valid. In a draft Exchange of Notes, Iceland responded with the proposal that in case of a dispute, "the measures will, at the request of the several parties, be referred to the ICJ." The United Kingdom rejected this proposal and insisted on the language "at the request of either party" to which Iceland eventually agreed.
88 Id. at 11–13. In a message by the Secretary of State for Foreign Affairs delivered on December 14, 1960, the United Kingdom asserted the essential nature of an express agreement binding both parties. A letter from the United Kingdom to Iceland affirmed that the assurance should take the form of an agreement registered with the Secretariat of the United Nations. Iceland finally accepted this stipulation which was reflected in the memorandum of February 28, 1961, to the Althing.
F. Questions of First Impression

In the 1984 case Military and Paramilitary Activities in and Against Nicaragua (Nicaragua), the ICJ resorted to travaux préparatoires in examining the scope of article 36(5) of the Statute of the ICJ as a question of first impression. Nicaragua invoked the jurisdiction of the ICJ under article 36(5) of the Statute because it had accepted the compulsory jurisdiction of the PCJ in 1929 under article 36(2) of the Statute of the PCJ. Because the court found that the Nicaraguan Declaration of 1929 had been valid but not binding at the time of the PCJ, a question of first impression arose as to whether article 36(5) of the Statute of the ICJ applies to such declarations.

The court first interpreted the actual text of article 36(5) and stated that “binding” did not expressly qualify declarations under article 36(5). The court further remarked that the word “binding” never even occurred in the travaux préparatoires. In addition, the French delegation at the San Francisco Conference had requested that the phrase “still in force” in article 36(5) not be translated “encore en vigueur” (still in force), but rather, “pour une durée qui n’est pas encore expirée” (for a duration which has not yet expired). This translation puts a temporal, as opposed to a conditional, emphasis on “still in force.” Hence, the court concluded that the English version of article 36(5) includes declarations that were non binding at the time of the PCJ. Subsequent states’ practice confirmed this conclusion of the ICJ which held that it had jurisdiction to entertain the Nicaraguan claim. This method of interpretation followed the tenets of the textualist school be-

90 Id. at 403–13. Article 36(5) of the Statute of the ICJ provides:

Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptance of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

Id. at 399. Nicaragua, as a member of the League of Nations, made a declaration under article 36(2) of the Statute of the Permanent Court of International Justice that stated the following: “On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.”
91 Id. at 404.
92 Id. at 406. The opinion did not reveal what kind of travaux préparatoires the court considered.
93 Id. at 413, 442.
cause the travaux préparatoires served to illuminate the meaning of the text, not the intentions of the parties.

G. Judicial Indecision

Inexplicable reasons motivated the ICJ to resort to travaux préparatoires in the 1952 Ambatielos Case. In Ambatielos, the United Kingdom asserted that according to a 1926 Declaration, Greece could base claims against the United Kingdom on the Treaty of 1886 only if it had formulated them before it signed the 1926 Declaration. To support its assertion, the United Kingdom relied on travaux préparatoires, which the court reviewed.

The travaux préparatoires showed that the parties had deleted the term "anterior" from a Greek draft which originally provided for "anterior claims eventually deriving from the Anglo-Greek Commercial Treaty of 1886." After examining and apparently relying on the travaux préparatoires, the ICJ subsequently dismissed the British claim and held that it did have jurisdiction. The court further stated, however, that "[i]n any case where, as here, the text to be interpreted is clear, there is no occasion to resort to preparatory work." While the ICJ thus clearly affirmed the textualist principles of interpretation, it blatantly contradicted them by resorting to travaux préparatoires under these circumstances.

III. HERMENEUTIC RHETORIC AND PRACTICE

This Comment is primarily concerned with ICJ cases and advisory opinions and focuses on the pronouncements of the court
alone. In light of the habitual submission of travaux préparatoires by the parties, the court usually knows the general content of the travaux préparatoires. Consistent recourse to travaux préparatoires according to textualist principles of treaty interpretation should therefore be treated as jurisprudentially prescriptive, and not as an actual description of the practice of the court. This Comment discusses the prescriptive jurisprudence of the ICJ as it relates to the use of travaux préparatoires.

A. General Rule of Interpretation

As a general rule, the ICJ asserts that it follows the textualist canons of treaty interpretation. The cases and advisory opinions discussed in Part II are apparently consistent with this assertion. The ICJ affirmed in Preah Vihear that words should be given their natural meaning in the context of the treaty as a whole. This method of interpretation may be abandoned when it leads to an unreasonable result. In such instances, the court may properly consider relevant factors in addition to the treaty, including travaux préparatoires. Thus, the ICJ usually considers the disputed provisions in the context of the whole treaty and its object and purpose before resorting to travaux préparatoires.

The ICJ does not resort to travaux préparatoires where it finds the text itself to be sufficiently clear. The court established this rule in the 1948 Conditions of Admission and explicitly affirmed it in Competence of the General Assembly (1950), the Ambatielos Case (1952), and in Fisheries Jurisdiction (1973). Furthermore, the judicial use of travaux préparatoires in Aegean Sea (1978), Nicaragua (1984), and Border Actions (1988) seems consistent with this rule.

B. Resort to Travaux Préparatoires

The court has resorted to travaux préparatoires numerous times, justifying its recourse with references to special circumstances unique to each respective case. The circumstances permitting use of travaux préparatoires include support of a textualist conclu-

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98 See supra text accompanying notes 46–50.
99 See supra text accompanying notes 51–52.
101 See supra notes 50, 83, and accompanying text.
sion;\textsuperscript{102} textual ambiguity,\textsuperscript{103} contradiction,\textsuperscript{104} or silence;\textsuperscript{105} non-appearance of a party;\textsuperscript{106} and questions of first impression.\textsuperscript{107} According to textualist principles, these factors fully justify resort to \textit{travaux préparatoires}. The purely textual problems warrant recourse because the natural and ordinary meaning of the words is unclear. In all other cases, the court always has the right to confirm a textualist conclusion by resorting to \textit{travaux préparatoires}.

Recourse to \textit{travaux préparatoires} for the purpose of confirming a textualist conclusion is a precautionary measure. For example, the breakdown of the adversary system due to the non-appearance of a party in \textit{Fisheries Jurisdiction}, or the question of first impression in \textit{Nicaragua} prompted the court to confirm its preliminary conclusions by relying on \textit{travaux préparatoires}. Even though neither case presented a textual problem necessitating recourse to \textit{travaux préparatoires}, the court took the precaution of relying on the supplementary materials. Such reliance seems implicitly conditioned on the fact that the \textit{travaux préparatoires} support the preliminary conclusion of the court.

What would the court do if the \textit{travaux préparatoires} contradicted its textualist conclusion? Such a contradiction seems inevitable. The apparent lack of such cases in ICJ jurisprudence gives rise to the suspicion that the court admits to resorting to \textit{travaux préparatoires} for support of a textualist conclusion only where the \textit{travaux préparatoires} confirm its initial conclusion. Such resort would not only be biased and unfair to the parties, but would also undermine the court's judicial authority.

C. Political Context

Recourse to \textit{travaux préparatoires} is not automatic, even where warranted by textualist criteria.\textsuperscript{108} In the \textit{Haya de la Torre Case}, for example, the text of the Havana Convention did not address the contested issue. The ICJ, nevertheless, did not resort to \textit{travaux préparatoires}, but left the final resolution of the conflict to

\textsuperscript{102} See supra text accompanying notes 53–56 and 58–60.
\textsuperscript{103} See supra text accompanying notes 63–65.
\textsuperscript{104} See supra notes 69–70 and accompanying text.
\textsuperscript{105} See supra text accompanying notes 74–76.
\textsuperscript{106} See supra notes 81, 83–84, and accompanying text.
\textsuperscript{107} See supra text accompanying notes 89–91.
\textsuperscript{108} See supra text accompanying notes 78–80.
the political expediency of the parties. This political maneuver by the court was almost inevitable because the signatories to the Statute of the ICJ are sovereign states that can reject the compulsory jurisdiction of the court at their discretion. Thus, ICJ jurisprudence, including the use of travaux préparatoires, is affected by—though not necessarily subject to—the political interests of the parties.

D. Hermeneutic Inconsistencies

The stated rules of ICJ treaty interpretation sometimes conflict with the judicial use of travaux préparatoires. The ICJ explicitly considered the travaux préparatoires in the Ambatielos Case and concluded that they did not support the British claim. In a subsequent section of its opinion, however, the court negated the validity of recourse to travaux préparatoires under the circumstances of the case. Such inconsistencies reveal the inherent problems of collective drafting, rather than judicial confusion about principles of interpretation. Nevertheless, these inconsistencies deprive the court of its capacity to create jurisprudential certainty and predictability.

Some of the ICJ decisions may indicate that the court at times explicitly subscribes to a method of treaty interpretation which is consistent with the intent school. In Genocide Convention, for example, the ICJ announced that it would resolve the issue of the effect of reservations to the Genocide Convention based on rules that determine what effect the court should give to the intentions of the parties. Subsequently, the ICJ examined the text and reasoned that the textual silence warranted examination of travaux préparatoires. Thus, the court announced rules of interpretation which are identical to those of the intent school, although interpreting the treaty in a manner apparently consistent with the textualist school.

Scholars have explained such inconsistent language by proposing that all schools of interpretation attempt to establish and give effect to the intentions of the parties. An assertion to that effect does not per se identify the speaker as a disciple of the intent

109 See supra text accompanying notes 94–97.
110 See supra text accompanying notes 75–76.
111 See supra text accompanying notes 2 and 35.
school. In light of the textual silence in *Genocide Convention* warranting recourse to *travaux préparatoires*, the method of interpretation could still be characterized as textualist.

E. *Types of Travaux Préparatoires*

The ICJ has resorted to various kinds of *travaux préparatoires*, including negotiation records, minutes of commission proceedings, committee debates preceding the adoption of a convention, preliminary drafts of provisions, diplomatic exchanges, and government memoranda. These documents fit the general definition of *travaux préparatoires* as advanced by the various schools. In most cases, they document the intent of the parties during the process which culminated in the drafting, signing, and ratification of a treaty. Recently, however, the ICJ seems to have resorted to types of *travaux préparatoires* which are more indirectly related to the negotiation process.

The *travaux préparatoires* considered in *Fisheries Jurisdiction* and *Aegean Sea* included internal government documents. These documents were not part of the work product resulting from the bilateral negotiations. The memoranda submitted to the Icelandic Althing and the Greek *projet de loi* were addressed from one branch of the respective government to another. These documents relate only indirectly to *travaux préparatoires*. The ICJ relied on them because they demonstrated the inclination of the parties during negotiations. The parties never intended, however, that these records represent their views in the international arena. Judicial reliance on them exceeds the scope of recourse to traditional *travaux préparatoires*. It is questionable whether the ICJ should be able to hold a government accountable for statements that were never part of its foreign relations record, even though the parties apparently consented to such recourse by submitting the documents to the court.

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112 See supra notes 85, 92–93, and accompanying text.
113 See supra notes 61, 71–72, and accompanying text.
114 See supra text accompanying note 77.
115 See supra notes 66–67, 86–87, and accompanying text.
116 See supra notes 73, 88, and accompanying text.
117 See supra notes 57, 86, and accompanying text.
118 See supra text accompanying notes 7–9.
F. Judicial Rhetoric and Practice

The principles that appear to guide the ICJ in its use of travaux préparatoires seem consistent with the textualist canons of treaty interpretation and with articles 31 and 32 of the Vienna Convention. The consistent textualist rhetoric of the ICJ, however, does not necessarily guarantee a similarly consistent interpretative practice. The cases and advisory opinions discussed demonstrate that a measure of incongruity is not an uncommon feature of the judicial recourse to travaux préparatoires. In addition, the scope of travaux préparatoires relied upon seems to have expanded to include documents which relate only indirectly to the negotiation of the disputed treaty.

Inconsistencies between hermeneutic rhetoric and practice deprive judicial decrees of certainty, diminish their predictive value, and erode confidence in the competence and sincerity of the court. As any judge, attorney, or law student knows, a text can be validly interpreted in various ways. The interpretation of texts does not occur in a vacuum and ICJ jurisprudence necessarily reflects the political context of a case to some degree. In this sense, the court operates outside strict textualist rules of interpretation—even though textualist language legitimizes the judicial decrees. Therefore, it is desirable that the court adopt a theory of interpretation which provides for such hermeneutic devices as travaux préparatoires that allow the court to consider a wider context as a matter of course. Otherwise, the incongruence of judicial rhetoric and practice fails to provide the certainty and predictability that allow states to trust and rely on the jurisprudence of the ICJ.

G. Proposal

The proposal set forth below would amend articles 31 and 32 of the Vienna Convention. The proposed amendments could create greater consistency in the jurisprudence of the ICJ and simultaneously facilitate the use of travaux préparatoires by parties before the court. The proposed certification of official travaux préparatoires would give the parties ample opportunity to clarify their intentions, the meaning of treaty provisions, and the object and purpose of the treaty prior to the occurrence of a dispute.

119 See supra notes 21–25, 39, and accompanying text.
Proposed Amendment to Article 31: 120

2(c) any travaux préparatoires and other supplementary means of interpretation upon request by a party.

Proposed Amendment to Article 32: 121

1. The International Court of Justice is charged with the duty to designate certifiable categories of preparatory work which shall constitute the official travaux préparatoires. The quantity of travaux préparatoires shall be limited so that habitual recourse will not unduly burden judicial practice. At the same time, the quantity of travaux préparatoires shall allow the parties to convey their views on issues relevant to the interpretation of the treaty.

2. The International Court of Justice shall designate a depository for travaux préparatoires.

3. Within one year of signature of or accession to a treaty, the signatories shall collect and present for certification and subsequent deposition to the United Nations such preparatory work as shall constitute the official travaux préparatoires.

4. The United Nations is charged with the duty to create and maintain appropriate facilities to carry out the purpose of this article under the direction of the International Court of Justice.

The proposed amendment to article 31 obligates the court to consider the travaux préparatoires upon the request of a party. Only official travaux préparatoires will be routinely admissible in court. The court would still exercise discretion in admitting further supplementary materials. Amended article 32 provides an administrative procedure for the official definition, creation, and deposition of travaux préparatoires. The categories of certifiable travaux préparatoires should not be qualitatively restrictive. Amended article 32 would limit the quantity of travaux préparatoires, however, to ensure that the judges on the court will be able to consider the travaux préparatoires routinely upon request.

These amendments allow the parties to use travaux préparatoires to clarify, supplement, and comment on treaty provisions to aid the court in its interpretation. The parties could thus create a hermeneutic context for the ICJ, to which they would be committed by virtue of the travaux préparatoires. The ICJ could ground its judicial decrees openly in a wider, predetermined context, and

120 See supra note 39 for the full text of article 31.
121 See supra note 39 for the full text of article 32. This proposed amendment replaces article 32 in its entirety.
thus presumably reduce the jurisprudential uncertainties currently inherent in its hermeneutic rhetoric and practice.

Conclusion

The use of travaux préparatoires by the ICJ is purportedly consistent with the tenets of the textualist school and the Vienna Convention. Nevertheless, contradictions in the hermeneutic rhetoric of the court and inconsistencies between its rhetoric and interpretative practice remain. The former may be explained by the intricate nature of collective drafting. The latter can be understood in light of the politically sensitive nature of ICJ jurisdiction over sovereign nation states. Regardless of their cause, jurisprudential shortcomings threaten to weaken the court’s effectiveness. The proposed amendment to articles 31 and 32 of the Vienna Convention would be a step towards strengthening the court’s jurisprudence.

Martin Ris