Interpretation of Treaties

Jana MAFTEI[1], Varvara Licuța COMAN[2]

Abstract: The treaty today represents the main tool used by states in their cooperation, in order to regulate the international relations, because of the clarity and precision with which there are ascertained the agreements concluded between the subjects of international law. Any author interested in the Law of Treaties has analyzed the problem of interpretation, a particularly important and complex issue. The legal interpretation is the foundation of law, the need for these operations lies in clarifying the meaning of legal norms for its correct application and it is required by the imprecision of used terms, the interaction and inter-conditioning of some regulations. The legal interpretation involves distinct meanings, generated by the specifics of each branch of law, and in this paper we showed the theoretical and practical interest of interpreting a treaty in the negotiation and drafting its text stage, both in its implementation phase or settling disputes concerning its execution. As research methods for the completion of the paper we used analysis and interpretation of legal regulations in the matter, in particular the Vienna Convention on the Law of Treaties of 1969, the doctrinal opinions of Romanian and foreign legal literature, the practice of states and jurisprudence in this area.

Keywords: the Vienna Convention on the Law of Treaties; international public law; principles of international law

1. Introduction

The legal interpretation and the principles underlying this logical-legal operation particularly complex, represents one of the themes that generated numerous academic disputes falling within the category of those subjects which the more problematic they are, the more it stimulates the interest of the specialists in their scientific research.

[1] Associate Professor, PhD, "Danubius" University of Galati, 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. Corresponding author: janamaftei@univ-danubius.ro.

[2] Assistant Professor, PhD in progress, "Danubius" University of Galati, 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. Corresponding author: varvara.coman@univ-danubius.ro.

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The importance of this institution lies in the practical need of interpreting the legal rules for their implementation and the resolution of litigations, in the sense of producing the most effective effects.

It can be said that the legal interpretation is the foundation of law, based on the idea that the legal system as a whole depends on the fair and equitable interpretation, consistent with the legitimate needs, aspirations and objectives of the recipients.

In the sphere of the international legal interpretation it acquires special meanings. In this paper we identify the theoretical and practical interest of the interpretation, in the text negotiation and drafting stage of a treaty negotiation and also in the stage of applying the conventional norms established in treaties, answering to the following questions: what does the interpretation of an international treaty represent and who may be the author of the interpretation, which are the specific rules of interpretation of treaties and the legal effects that the interpretation produces.

We examined this issue in the framework of the work of the International Law Commission on codifying treaties, the principles concerning the interpretation established in the 1969 Vienna Convention on the Law of Treaties (VCLT) and international jurisprudence in this matter.

2. Legal Interpretation

Broadly, the interpretation represents the assignment of a meaning to the researched phenomenon and it derives from the Latin word *interpretatio* which means transposing the meaning of a sentence from an unknown language into a known language for the recipient (Huma, 2005, p. 25)

In the specialized doctrine the legal interpretation has generally been defined as "*the set of rational operations of abstraction, explanation and reasoning of the meaning and significance of law rules formulated in the legal texts in force, means of evidence and principles of law, with the aim of their fair application in different practical situations"* (Mihai, 2003, p. 445), or *"all means, techniques, tools and methods by which it becomes possible the appliance of law*". (Eremia, 1998, p. 6)

The need for interpretation of legal norms lies in clarifying its meaning and it is imposed by the inaccuracy of the used terms, the interacting and inter-conditioning of some regulations.

Particularly important is what the subject establishes when conducting interpretation in the moment of researching the legal text, as the analysis of the overall rule of law elements can reveal to "*the one who knows how to read*" meanings and new values.

One of the issues underlying the complexity of this institution is the very subject of legal interpretation, which is itself an interpretation. In addition, the result the interpreter will get to inevitably be subject to other interpretations. We are basically in the presence of "endless" logical-legal operations as a the legal interpretation will have a justified result only when it will be understood, or generally deciphering and decoding in particular, all aspects contained in the rule of law being implied reciprocally forever. Each interpretation opens horizons to new values and meanings which required the need to develop rules that would allow the avoidance of arbitrary interpretation and it would reveal the true mechanism of the interpretation.

The importance of legal interpretation was assessed according to the different stages of law development. Thus, if the natural law schools supporters, such as H. Grotius and Pufendorf, and those of the historic schools (Savigny) admitted only the purely logical interpretation and the specific means of formal logic, the positivism recognized only the value of legal norms. One of the followers of this school, Laurent, strictly limited the role of the interpreter, adding that the written norm leaves nothing arbitrary for the interpreter, it does not have the mission to do the law, the law is done.[1]

Authors such as Jhering, Comte, Duguit have reconsidered the role of interpretation bringing as arguments in its favor the evolution of social life and the need to adapt the legal phenomena to the interests of the social groups. Hans Kelsen attributes the interpretation made by the law enforcement authorities an authentic character, arguing that it creates the law. (Kelsen, 1962, p. 462 and the next)

[1] „*Les codes ne laissent rien à l'arbitraire de l'interprète, celui ci n'a plus mission de faire le droit, le droit est fait.*" (Brimo, 1967, p. 259)

The legal interpretation value has increased proportionally with the augmentation of the social relations number that required legal regulation and that did not find resolution in the existing rules, but outdated and inadequate to the registered progress in society, with the people's need for justice and equity, with the need to open the law to the society and its improvement. Some authors have even put the sign of equivalence between law and interpretation.[1] (Beck, 1982, p. 201)

3. Interpretation of Treaties

3.1. The International Treaty

It is widely accepted that the Treaty is nowadays the principal source of public international law, the best way to find and determine the international commitments that the states commit themselves as subjects of international legal relations binding, as a carriers of sovereignty. It was even believed that "*we live in the age of treaties*." (Linderfalk, 2007, p. 1)

The International treaty is, at the same time, an important tool to influence international cooperation, a very efficient development and management method of international relations.

Regardless of the name they bear, the international treaty is the consistent manifestation of the will of two or more subjects of international law, in order to produce legal effects of international law.

Without going into details, we mention that in regulating the Vienna Convention of 1969, which codified the law of treaties, the international treaty is "*an international agreement concluded between States in written form and governed by the international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"* (article 2, paragraph 1, letter (a). Another important document in this regard, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, extends the international treaty scope, by including international organizations in category subjects of international law that can have the role as part of a treaty.

[1] "*Law may be characterized as the interpretation of texts*."

3.2. The Definition of the Interpretation of Treaties

Any author interested in the Law of Treaties approached this very important topic. For example we mention Robert Kolb, Richard K. Gardiner, Robert R. Wilson, Serge Sur, Ion M. Anghel, Ioan Voicu etc.[1] Sir Arnold McNair believed that *(t)here is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation*" (McNair, 1961, p. 364), and the International Law Commission appreciated that "*interpretation of documents is to some extent, an art not an exact science.*" (ILC, 1966, p. 218)

The legal interpretation involves distinct meanings generated by the specific of each fields of law. Schwarzenberger believes that interpretation is "*the process of establishing the legal nature and the effects of the consensus to which the parties have reached.*" (Schwarzenberger, 1971, p. 116) Edwin Glaser noted that interpreting a treaty is "*to elucidate the meaning of its text*" (Glaser, 1968, p. 25) and he identifies three groups of issues that require the resolution in this regard:

- what does it mean to interpret an international treaty, that is the object problem of interpreting treaties;
- who has the authority to interpret the international treaties; from whom does it emanate a certain interpretation of a text, what authority, what legal effects does this interpretation have, i.e. the problem of interpretation ways of treaties;
- how to interpret the international treaties, i.e. consisting of international law rules on treaty interpretation. (Glaser, 1968, p. 26)

Ion M. Anghel includes in the acceptation of interpretation of the Treaty the action of research and establishing, either the authors will of the analysis text or the significance of the text as such, the rule which in the silence of the text, should be applied. (Angel, 2000, p. 1173) Finally, the definition that we find in a dictionary of international law concerns the interpretation of treaties as being "*a thought process of clarifying and elucidating unclear and ambiguous provision of a treaty."* (Boczek, 2005, p. 328)

As for us, we consider the interpretation particularly important within the negotiation stage or settlement of a treaty for the resolution of disputes regarding

[1] (Anghel, 2000), (Gardiner, 2008), (Kolb, 2006) (Sur, 1974), (Voicu, 1968), (Wilson, 1930).

the execution through which is performed to establish the meaning of terms and expressions, in the purpose of the proper implementation of its provisions.

3.3. Forms of Interpretation of Treaties

The operation of interpreting international treaties may be achieved by the States Parties to the Treaty, of international organizations through specialized bodies and doctrinaires.

Practice and specialized literature have noted that according to the *author of the interpretation*, the interpretation can be *authentic* or *inauthentic*. In turn, the *authentic interpretation* can be *collective* or *unilateral*. It is considered to be authentic interpretation the interpretation made by the entity that issued / adopted a legal act and it has a legal obligatory force. This form of interpretation has special features in the law of treaties, because, on one hand collective authentic interpretation is achieved by all parties to the treaty, in the moment of adopting the text or later, and on the other hand, under the sovereignty of each State Party to a treaty can make their own interpretation and indicate the meaning that they attribute to the text of that treaty. Internally, there are competencies to perform interpretation of the government authority bodies, usually foreign affairs ministries of the states parties to the Treaty.

Collective interpretation is illustrated by the interpretive clauses that states include them in the text of treaties (whether bilateral or multilateral), usually in the first articles. The purpose of these definitions and meanings which the states agree to grant to different terms used in the text of the treaty that is to avoid any misunderstanding that may arise in implementing that treaty. For example, the Convention on the Rights of the Child[1] stipulates in article 1 that "*for the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*". The Vienna Convention on Consular Relations (1963) includes these definitions in article 1, specifying the meaning that they assign to terms such as consular post, consular district, head of consular post, consular officer, consular employee, consular archives etc. The Interpretation made by the States Parties can also be achieved by amendments or by separate interpretation agreements. For

[1] Adopted and opened for signature, the ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.

example, *the Treaty of understanding, cooperation and good neighborly relations between Romania and Hungary* from 1996[1] listed in Annex documents referred to in article 15, paragraph 1.b)[2] and it recorded the agreement of the two states regarding the fact that the Recommendation 1201 does not refer to collective rights, nor obliges the Parties to provide those persons the right to a special status of territorial autonomy based on ethnic criteria.

The *Inauthentic interpretation* is performed by body of an international organization (e.g. UN General Assembly interprets the UN Charter). The jurisdictional interpretation has also an inauthentic feature because it interprets the rule of law in its application, it does not create law and order, and the decision is only enforceable against the parties in litigation and only in the case in question. The Statute of the International Court of Justice establishes in article 34 line 3 "*Whenever a case is subject to the Court it discusses the interpretation of the constitutive act of a public international organization or the interpretation of an international convention interpreted under this act, the Registrar will notify the organization concerned and it shall communicate in copy the entire written procedure*" and article 36 line 2 letter a) provides that States Parties to this Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes having as subject the interpretation of a treaty.

Doctrinal interpretation is achieved by specialists in scientific papers and they do not have legal obligatory force, it is not authentic, but it can influence the creation and application process of international law norms.

According the *interpretation subject* we distinguish between *objective interpretation*, which considers only the actual text of the Treaty, considering that the intention of the parties was clearly expressed in the Treaty and *subjective interpretation* when it is intended to find the true will of the parties.

[1] Ratified by Law No. 113 of 10 October 1996, published in Official Monitor no. 250 of October 16, 1996.

[2] Document of the Copenhagen Meeting on the Human Dimension of the Organization for Security and Cooperation in Europe, June 29, 1990; the Declaration of the United Nations General Assembly on the rights of persons belonging to national or ethnic, religious and linguistic minorities (Resolution 47/1 35), 18 December 1992 and Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe on an additional protocol to the European Convention on Human Rights on the rights of national minorities.

Depending on the result of the interpretation, it can take one of three forms: literal, extensive or restrictive interpretation. The ad literam interpretation is that where the interpreter finds that there is no consistency between the legal text and the practical cases that can be included in the legal norm hypothesis. The other two forms of interpretation, there is no correlation between the legal text and the cases of practice, the utterance being limited or too broad, in these conditions the interpreter must extend, respectively, restrict the application of the legal rules.

3.4. Rules and Principles of Interpretation of Treaties

The interpretation technique of the legal norm as regards the treaty interpretation requires four interpretation methods:

- Grammatical interpretation, requiring a legal standard international interpretation of the rules of grammar on syntax, morphology, vocabulary;
- Systematic interpretation, which involves the establishing of the international legal standard meaning of a treaty by its relation to the whole text, to the legal institution or other provisions of international law;
- Historical and teleological interpretation, which consists of clarifying the meaning of the terms of a treaty taking into account the historical, social, political conditions, needs which led to the adoption of the document in question and the purpose pursued by the states, as parties to the Treaty, in such case it should be considered the preparatory work for drafting the treaty text, the debates about the draft treaty within international conferences, exchanges of notes etc.
- Logical interpretation, a method which leads to clarify the content of a treaty by the use of reasoning and arguments of formal logics: exceptio est strictissimae interpretationis; generalia specialibus non derogant, specialia generalibus derogant; ubi lex non distinguit, nec nos distinguere debemus; actus interpretandus est potius ut valeat quam ut pereat; argumentum ad absurdum; argumentum per a contrario; argumentum a majori ad minus; argumentum a fortiori ratione etc.

In practice, states have established in the domain of conclusion and implementation of treaties rules, methods, principles and procedures used in interpretation (Cretu, 2006, pp. 216-217), which were codified by the 1969 Vienna Convention on the Law of Treaties.

Fitzmaurice identified six principles of interpretation (Fitzmaurice, 1986, pp. 344-346) based on the International Court jurisprudence mainly: principle of actuality or textuality, principle of the natural and ordinary meaning, principle of integration, principle of effectivness (*ut res magis valeat quam pereat)*, principle of subsequent practice and principle of contemporaneity. As we observe in the doctrine, most of these principles have been introduced in the International Law Commissions proposals and they were adopted "without changes" by the Vienna Conference in the articles 31 and 32. (Fitzmaurice & Elias, 2004, p. 219)

1969 Vienna Convention on the Law of Treaties establishes in article 31 the general rule of interpretation of treaties: *"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"*. It is a consecration of the principle of good faith, a fundamental principle of international law. Good faith in international law has the usual sense, i.e., intention and consciousness of the compliance of the attitude with the truth, with the rules of law. (Glaser, 1968, p. 74) This provision is consistent with that contained in article 26 VCLT, that is *pacta sunt servanda*. According to the principle of good faith the interpretation of any treaty must be made with the intention of establishing the exact meaning of its regulations. In the matter of treaty interpretation, good faith demands the compliance of the following requirements:

- if the treaty is clear, the meaning should not change under the pretext of respecting the spirit;
- the used terms in the treaty must be assigned to their ordinary, natural meaning, and they should be interpreted taking into account the object and purpose of the treaty;
- to a term it will be assigned a special meaning if it is established that it was the intention of the parties. (Anghel, 2000, p. 1185)

We believe that in the interpretation of treaties there must be considered other fundamental principles of international law: the principle of sovereign equality of States, the principle of peaceful settlement of disputes, the principle of inviolability of borders and territorial integrity, the principle of respecting human rights and fundamental freedoms, etc.

In the situation where from interpretations under article 31 VCLT it is achieved to an ambiguous meaning or obscure or the interpretation has led to a result which is manifestly absurd or unreasonable, the article 32 provides the possibility of using

complementary means of interpretation, noting the preparatory work and the circumstances in which the treaty was concluded. This solution can be approached also to confirm the meaning resulting from the application of article 31.

It is noted that in formulating VCLT there are assigned different degrees of freedom to the interpreter: whether article 31 requires ("*a treaty shall be interpreted*..."), article 32 leaves up to the performer the recourse of additional means of interpretation ("*recourse may be had to supplementary means of interpretation*") (Waibel, 2011, p. 574)

VCLT provides special rules concerning the interpretation of treaties authenticated in two or more languages, which were included in article 33. For the interpretation of such a treaty, article 33 requires the rule according to which a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty otherwise provides or the parties agree that, in case of divergence, a particular text shall prevail.

Usually, treaties include this term in the final clauses. For example, even VCLT provides in article 85 that "*the original of this Convention, of which the Chinese, English Spanish, French and Russian texts are equally authentic, shall be deposited to the Secretary General of the United Nations*." Similarly, the 1961 Vienna Convention on Diplomatic Relations established in article 53 that the original "*the English, Chinese, Spanish, French and Russian texts are equally authentic, and they shall be deposited with the Secretary General of the United Nations who will transmit a certified copy to all States belonging to any of the four categories mentioned in Article 48*".

If the treaty provides or if the parties have agreed otherwise it may be considered an authentic text, a version of the treaty in a language other than those in which the text was authenticated. Although the VCLT provides that the terms of a treaty are presumed to have the same meaning in authentic texts, such a situation can lead to ambiguity regarding the terms used for drafting the Treaty, in practice being able to find different ways of equivalent terms in different languages when they proceed to compare texts. (Miga-Besteliu, 2005, p. 120)

If the parties agree otherwise, one of the texts shall prevail, prevailing in the meaning of the interpretation of that version. If there is no particular clause of the different versions and in the situation where the comparison of the authentic texts results in a difference of writing, which cannot be eliminated by applying the rules of article 31 and 32 VCLT, in interpretation it will be taken into account the object

and the purpose of the treaty and will adopt the meaning "*best reconcile these texts*." (article 34, VCLT)

The interpretation of treaties is governed identically by the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (article 31-33).

As regards the legal texts that have generated from much discussion and were subject to interpretation as a legal operation we mention *Cauza CIJ - Romania c. Ukraine for maritime spaces delimitation in the Black Sea*, which presented a question of great importance for our country.

Thus, in September 2004, the International Court of Justice was asked by the request of Romania, on the failure to reach a convenient solution for both Romania and Ukraine regarding the delimitation of the continental plateau and the exclusive economic zone between the two countries in the Black Sea.

Basically, in 1997 it was signed the *Treaty on good neighborly relations and cooperation between Romania and Ukraine*, ending with a Supplementary Agreement which stated that there will be held discussions also on the subsequent conclusion of an agreement by which it is achieved the strict delimitation of the continental plateau and exclusive economic zones. From 1998 to 2004 there were numerous negotiations, but the desire on the Black Sea delimitation between the two countries remained without end.

Although both countries agree on the fact that the resolution of this dispute falls within the jurisdiction of the International Court of Justice (ICJ), however the scope of the jurisdiction conferred on the Court differ. Ukraine, by a unilateral interpretation, has recognized a restrictive competence in the task ICJ, stating that it cannot rule only on "the delimitation of the continental plateau and the exclusive economic zones of the Parties". On the other hand, Romania has given a broad interpretation in the sense that the delimitation should be based on the conformation of border by the ICJ, already established by bilateral agreements and then to decide on other areas that are subject to dispute.

In support of his case, Ukraine cited the lack of international legal principles on which to base the existence of a dividing line between the territorial sea and the continental plateau of a State of another State.

ICJ argued that in jurisprudence there should be a precedent in this regard, that is *The cause regarding the territorial and maritime disputes between Nicaragua and*

Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007) where such a line was determined on maritime delimitation.

Moreover, the ICJ has established that for the resolution of this dispute it is essential the interpretation of section 4 (h) of the Additional Agreement which provided that "*the problem of delimitation of the continental shelf and the exclusive economic zones shall be solved by the... International Court of Justice*".

The general formulation of this point, according to the Court, "*suggest[s] that the Parties did not anticipate that the Court would be called upon to delimit an all-purpose maritime boundary along the outer limit of Ukraine's territorial sea*". Moreover, the Court was of the opinion that the outcome of the case is essential in the interpretation of paragraph 4 (h) of the Additional Agreement for the purpose of conferring jurisdiction in interpreting the text in accordance with the object and purpose of the Agreement as a whole. Moreover, in the settlement of the case there were taken into account all existing agreements between the parties concerning the delimitation of their territorial seas, the Court having the jurisdiction only in the respect of the delimitation of the continental plateau and the exclusive economic zones of the two countries, and not on the demarcation of territorial waters. ICJ considered that it cannot be prevented from exercising its competences in the sense of deciding on a segment of line by which it is achieved the demarcation between the continental plateau and the exclusive economic zone of a state and the territorial sea of the other State to the other seaward limit.

In order to demonstrate the importance of various forms, rules and principles of legal interpretation of treaties we also mention *Hamdan v. Rumsfeld* - 126 S. Ct. 2749, 2764 (2006) in which there questions about the content of the article (common) 3 of the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field*, August 12, 1949 and where the United States Supreme Court rejected the interpretation of this article by the Bush Administration. Essentially, the events of September 11, 2001 represent the beginning of a period that can be characterized as the "*the global war against the new terrorism*." (Arend, 2007, pp. 673-708) Following the extensive military operations that the United States took in Afghanistan and elsewhere, the U.S. State has hesitated on the problem of the category in which to fit those detained as a result of the participation in armed conflict: were they prisoners of war or not? If that would have been classified as prisoners of war, they would have had rights under the Geneva Convention. Otherwise, their rights would have been limited.

U.S. government decided that those detained from these armed conflicts cannot enjoy the rights of prisoners of war under article 3. Al Qaeda is a non-state actor and therefore cannot be considered as part of the Geneva Conventions.

When the D.C. Circuit Court of Appeals decided Hamdan among other things it was stated: *"Afghanistan is a "High Contracting Party." Hamdan was captured during hostilities there. But it is the war against terrorism in general and the war against al Qaeda in particular, an "armed conflict not of an international character?"* (Arend, 2007, p. 717)

United States Supreme Court, also rejected the Bush administration's interpretation of the provisions of article 3, states: *"the reference in Common Article 3 to "conflict not of an international character occurring in the territory of one of the High Contracting parties," does not refer only to civil war —as the Government had argued — but rather to any conflict that is not between states."*[1]

The Court further explained: *The term "**conflict not of an international character**" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "**fundamental logic [of] the Convention's provisions on its application.**" [Hamdan v. Rumsfeld, 415 F.3d] at 44 (Williams, J., concurring). Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a non-signatory "Power," and must so abide vis-à-vis the non-signatory if "the latter accepts and applies" those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a non-signatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning."*[2]

[1] *Hamdan v.Rumsfeld in United States Reports, vol. 548, Cases Adjudged in The Supreme Court at October Term, 2005, p. 562, http://www.supremecourt.gov/opinions/boundvolumes/548bv.pdf.*
[2] *Idem.*

4. Conclusions

The interpretation of treaties issue is complex and solving it requires taking into consideration a number of aspects. "Coordinates of appropriate methods of interpretation," said one Romanian author "can highlight the dynamic nature of the international law". (Eremia, 1998, p. 54)

In this brief review we highlighted the importance and necessity of the act of interpretation of treaties, both in their adoption stage, when the Parties at the negotiation of a treaty agree to assign certain meanings of terms used in the text of that treaty, and in the correct application of provisions of international agreements or in the situation of settlement of international disputes.

The interpretation process requires compliance with rules of interpretation that the states have codified by the 1969 Vienna Convention on the Law of Treaties, which establishes parameters where the texts of various treaties must be understood. The interpretation of a treaty should lead to the clarification of ambiguous terms and to determine the real intention of the parties concerning the rights, obligations established by the text.

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