

ARTÍCULOS

The normative value of Human Rights treaty bodies' interpretations at the International Court of Justice

El valor normativo de las interpretaciones de los órganos de supervisión de tratados de derechos humanos ante la Corte Internacional de Justicia

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ABSTRACT Although the International Court of Justice (ICJ) is not a human rights court, it has recently addressed human rights issues which has prompted interaction with the opinions of human rights mechanisms. This article will analyze the normative value of Human Rights Treaty monitoring bodies' interpretations recognized by the ICJ in three cases of its jurisprudence: the Wall Advisory Opinion, the case of *Ahmadou Sadio Diallo*, and the case of *Qatar v. the United Arab Emirates*. This analysis indicates that the Court has ascribed great normative weight to these interpretations, but it has been reluctant to adopt their views without conducting its own interpretative assessment of the norms. In its most recent case, the International Court of Justice took an approach that completely departs from the interpretation adopted by the relevant treaty body. This article argues that such a position must be considered in light of the growing criticism that treaty bodies are facing about the quality of their reasonings and command of general international law. Accordingly, treaty bodies could enhance their legitimacy by learning from the ICJ's approach to treaty interpretation and, in addition, could take advantage of the positive aspects of their non-binding character to develop meta-judicial discussions.

KEYWORDS International Court of Justice; human rights; rules of interpretations; treaty monitoring bodies.

RESUMEN Aunque la Corte Internacional de Justicia (CIJ) no es un tribunal de derechos humanos, recientemente ha abordado cuestiones de derechos humanos, lo que ha provocado una interacción con los dictámenes de los mecanismos de derechos humanos. Este artículo analizará el valor normativo de las interpretaciones de los órganos de supervisión de los tratados de derechos humanos reconocido por la CIJ en tres casos de su jurisprudencia: la Opinión Consultiva del Muro, el caso de *Ahmadou Sadio Diallo* y el caso de *Qatar vs. los Emiratos Árabes Unidos*. Este análisis indica que la Corte

Internacional de Justicia ha atribuido un gran peso normativo a estas interpretaciones, pero se ha mostrado reacia a adoptar sus puntos de vista sin llevar a cabo su propia evaluación interpretativa de las normas. En su caso más reciente, la Corte adoptó un enfoque que se aparta completamente de la interpretación adoptada por el órgano del tratado pertinente. Este artículo argumenta que dicha postura debe considerarse a la luz de las crecientes críticas a las que se enfrentan los órganos de tratados sobre la calidad de sus razonamientos y su dominio del derecho internacional general. En consecuencia, los órganos de tratados podrían aumentar su legitimidad aprendiendo del enfoque de la CIJ sobre la interpretación de los tratados y, además, podrían aprovechar los aspectos positivos de su carácter no vinculante para desarrollar debates metajurídicos.

PALABRAS CLAVE Corte Internacional de Justicia; derechos humanos; normas de interpretación; órganos de supervisión de tratados.

Introduction

The International Court of Justice (ICJ) is the main judicial organ of the United Nations (UN) system. Although it is an inter-state dispute settlement mechanism and it is not a human rights court, it has recently ruled over human rights issues (Zyberi, 2019; Espósito, 2023; Simma, 2013; Crook, 2004; Polymenopoulou, 2014; Higgins, 2009).

To develop its interpretations of human rights norms, the ICJ has relied on the use of international law sources established in its Statute (treaties and international custom)¹ and on the general rules of interpretation of the Vienna Convention on the Law of Treaties (VCLT).²

These tools constitute the traditional and internationally recognized sources of international law and rules for the interpretation of treaties (Shaw, 2021; Thirlway, 2019). However, in the field of human rights, a plethora of instruments of a subsidiary character have been created to develop the content of human rights norms. Among them are the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights reports of special rapporteurs appointed by the Human Rights Council, and pronouncements of human rights treaty bodies.

Several human rights mechanisms have repeatedly relied on these instruments to develop or confirm their interpretations and, therefore, to determine whether a state has violated its international human rights obligations.³ Nevertheless, the ICJ

1. As established in article 38 of the International Court of Justice statute.

2. Article 31 and 32 of the Vienna Convention on the Law of Treaties.

3. See for instance Inter-American Court of Human Rights, Advisory Opinion 24/17 on gender identity, and equality and non-discrimination of same-sex couples (24 November 2017); Case of *Atala Riffo and Daughters v. Chile* (Request for Interpretation of Judgment on merits, reparations and costs (21 November 2012) Serie C number 254. *European Court of Human Rights, A, B, C v. Ireland* (Grand Chamber)

has been reluctant to proceed in this manner. Moreover, the ICJ has had a troubling interaction with the pronouncements of certain human rights treaty bodies. In some cases, this Court has followed the interpretations submitted by these mechanisms (although after conducting its own interpretative methodology), but in its most recent case (*Qatar v. the United Arab Emirates*) the ICJ has completely departed from the practice of these bodies that are considered by some scholars as the guardians of human rights treaties (Scheinin, 2012).

In the context of the fragmentation of International Law,⁴ it is pertinent to analyze the ICJ's approach towards these instruments and the normative value allocated to them. For the purpose of this article, such an analysis will be circumscribed to the ICJ's approach toward the pronouncements of human rights treaty bodies: the Human Rights Committee and the Committee for the Elimination of Racial Discrimination (CERD).

These mechanisms are chosen because these are the interpretations that the ICJ had to assess in its three most recent decisions on this topic: Wall Advisory Opinion, *Ahmadou Sadio Diallo*, and *Qatar v. United Arab Emirates*. Although the Court has had the opportunity to analyze human rights violations in other recent cases,⁵ in those situations they did not interact with the pronouncements of treaty bodies, nor did they reflect upon the normative value of these interpretations.

This analysis indicates that the ICJ recognizes treaty bodies' pronouncements as instruments that have great normative value and, therefore, they should be considered by the Court when interpreting human rights treaties. However, the non-binding character of their decisions, the composition of the International Court of Justice and the quality of their legal reasoning are elements that probably discouraged this Court from taking a more welcoming approach toward treaty bodies' interpretations.

Considering the increasing criticism against human rights treaty bodies, due to the poor command of treaty law principles in some of their interpretations, this article concludes that treaty bodies can learn from the jurisprudence of the ICJ and enhance their legitimacy especially by following the interpretative rules of the VCLT. Additionally, treaty bodies could take advantage of their non-binding nature to discuss meta-juridical questions (for example, controversial topics and issues related to cultural diversity), which are essential for the effective implementation of human rights norms.

(16 December 2010); Committee on Economic, Social and Cultural Rights, General Comment number 22: On the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (2 May 2016), E/C.12/GC/22.

4. For a detailed discussion in this regard see (Koskeniemi and Leino, 2002; Young, 2012).

5. See International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports (2005: 168).

Human Rights treaty bodies in international law

There are ten human rights treaty bodies in the UN human rights system. These mechanisms monitor the main human rights treaties on different topics. For instance, the Human Rights Committee monitors the International Covenant on Civil and Political Rights (ICCPR) and the CERD monitors the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention).

Treaty bodies are defined as non-judicial entities consisting of “committees of independent experts that monitor implementation of the core international human rights treaties” (Office of the High Commissioner of Human Rights, 2023b). Their main function is to assess states parties’ reports on the implementation of their human rights obligations through a process of “constructive dialogue” and the adoption of “concluding observations” on how best to comply with their international obligations. The notion of constructive dialogue emphasizes the non-judicial character and cooperative tone of this process (Office of the High Commissioner of Human Rights, 2023a).

Additionally, treaty bodies can receive individual complaints and adopt “views” in a quasi-judicial process if the state at stake has ratified the corresponding protocol. The result of this complaint procedure is the adoption of these views by the expert body, which are of a non-binding nature.

Another practice that has been extended among treaty bodies consists of the adoption of “General Comments” or “General Recommendations” which are “a treaty body’s interpretation of human rights treaty provisions, thematic issues or its methods of work, [that] seek to clarify the reporting duties of State parties with respect to certain provisions and suggest approaches to implementing treaty provisions” (Office of the High Commissioner of Human Rights, 2023a).

Hence, treaty bodies develop their monitoring activities through these different procedures and according to the mandate established in the human rights treaty they monitor. For this reason, although their opinions are not binding, they have great normative weight.

As for the composition of treaty bodies, the International Covenant on Civil and Political Rights requires at least some experts to have legal experience,⁶ while the CERD Convention does not establish this requirement.⁷ This means that while the HRC has mostly legal professionals, the Committee for the Elimination of Racial Discrimination’s membership is more diversified, which might also impact the International Court of Justice’s interaction with these bodies.

6. Article 28(2) of the International Covenant on Civil and Political Rights.

7. Article 8 of the CERD Convention.

International Court of Justice's assessment of treaty bodies' pronouncements

The Wall Advisory Opinion

The first relevant decision of the ICJ that will be analyzed is the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Advisory Opinion) delivered in 2004. Here, the UN General Assembly asked the Court to provide its opinion on the consequences of the construction of the Israeli wall in occupied territory, according to the rules and principles of international law.⁸

Israel cast doubt on the applicability of human rights treaties, such as the ICCPR. To address this question, the International Court of Justice analyzed the scope of application of the International Covenant on Civil and Political Rights contained in article 2 of this treaty, which reads as follows: “each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”.

To clarify the meaning of this provision, the ICJ looked at the practice of the Human Rights Committee that has considered States bound to comply with the ICCPR when they exercise extraterritorial jurisdiction on foreign territory, as ruled in the individual complaints of *López Burgos v. Uruguay* and *Lilian Celiberti de Casariego v. Uruguay*.⁹

However, the International Court of Justice decided not to rely on the Human Rights Committee's assessment of article 2 alone, in fact they conducted its own interpretative examination to confirm the Committee's conclusions. The Court's approach relied on using the rules of treaty interpretation of the Vienna Convention on the Law of Treaties, and considered the object and purpose of the International Covenant on Civil and Political Rights by analyzing the *travaux préparatoires*, which revealed that:

In adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (Wall Advisory Opinion, paragraph 109).

8. International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports (2004: 141).

9. Wall Advisory Opinion, paragraph 109.

In this case, the ICJ concurred with the Human Rights Committee interpretation, but it did not mention why it decided to conduct its own interpretative assessment, instead of just adopting the opinion of the Committee. Here, the Court did not analyze the cases mentioned (*López Burgos v. Uruguay* and *Lilian Celiberti de Casariego v. Uruguay*), though a reading of these decisions reveals a poor quality of legal reasoning, which affects their normative weight and persuasiveness.

Both individual complaints concerned the arrest of Uruguayan nationals by Uruguayan state officials in foreign territory (the first case in Brazil and the second in Argentina). In these cases, the Human Rights Committee had to determine whether it could exercise jurisdiction over human rights violations that were committed by Uruguayan agents in foreign territory. The Committee responded to this question in the affirmative sense, arguing that the phrase “individuals subject to its jurisdiction” does not refer to “the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred”.¹⁰ The Human Rights Committee did not provide reasons for this conclusion and there is no analysis of the *travaux préparatoires* or the object and purpose of the treaty to justify its conclusions as the International Court of Justice does.

The Committee further added that, according to article 5 (1) of the ICCPR, “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State”.¹¹ In this regard, the Human Rights Committee’s reasoning is at least questionable because article 5 is a clause that refers to the prohibition of the abuse of rights, not a jurisdictional provision.¹²

Due to the lack of rigorous analysis, the member of the Committee (and international lawyer) Christian Tomuschat expressed in his individual opinion that although he concurred with the views of the Human Rights Committee, the arguments on the extraterritorial violations of human rights needed to be clarified and developed. Tomuschat disagreed with the Committee’s argument about article 5, which he recalled is not a clause about jurisdiction, and contended that:

10. Human Rights Committee, *Sergio Rubén López Burgos v. Uruguay* (1981) CCPR/C/13/D/52/1979, paragraph 12.2. Also see Human Rights Committee, *Lilian Celiberti de Casariego v. Uruguay* (1981) CCPR/C/13/D/56/1979, paragraphs 10.1-10.2.

11. *López Burgos v. Uruguay*, paragraph 12.3. Also see *Lilian Celiberti de Casariego v. Uruguay*, paragraph 10.3.

12. Article 5(1) of the ICCPR: “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant”.

The scope of application of the Covenant is not susceptible to being extended by reference to article 5, a provision designed to cover instances where formally rules under the Covenant seem to legitimize actions which substantially run counter to its purposes and general spirit. Thus, Governments may never use the limitation clauses supplementing the protected rights and freedoms to such an extent that the very substance of those rights and freedoms would be annihilated [...] In the present case, however, the Covenant does not even provide the pretext for a ‘right’ to perpetrate the criminal acts which, according to the Committee’s conviction, have been perpetrated by the Uruguayan authorities (*López Burgos v. Uruguay*, appendix paragraph 1).

Furthermore, Mr. Tomuschat added that according to the *travaux préparatoires* of the ICCPR, the formula “within its territory” did not restrict the application of this treaty to its “strict literal meaning”. Rather, it intended “to take care of objective difficulties which might impede the implementation of the Covenant in specific situations”, as in the case of occupation or the situation of citizens abroad.¹³ He concluded that:

It was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out willful and deliberate attacks against the freedom and personal integrity against their citizens living abroad (*López Burgos v. Uruguay*, appendix paragraph 2).

Thus, although the International Court of Justice followed the Human Rights Committee’s interpretation, the lack of legal rigor in that treaty body’s analysis (as highlighted by Mr. Tomuschat) may be a reason why the ICJ decided to conduct its own interpretative assessment.

The Ahmadou Sadio Diallo Case

In the judgment of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* of 2010, the International Court of Justice had to rule over a dispute concerning an injury suffered by Mr. Diallo (a Guinean citizen), due to the internationally wrongful acts committed by the Democratic Republic of the Congo. Mr. Diallo was the founder of two companies in the country (Africom-Zaire and Africontainers-Zaire) and as the manager of these companies, in the 1980’s, he instituted legal proceedings against his business partners to recover certain debts. In 1988, Mr. Diallo was arrested and imprisoned, and then finally expelled from the Democratic Republic of the Congo in 1996.

13. *López Burgos v. Uruguay*, appendix paragraph 2.

Guinea alleged that the expulsion of Mr. Diallo constituted a violation of article 13 of the International Covenant on Civil and Political Rights, which states that:

An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The ICJ maintained that under this provision, the expulsion of an alien lawfully in the territory of a State party to the ICCPR “can only be compatible with the international obligations of that State if it is decided in accordance with ‘the law’, in other words, the domestic law applicable in that respect”.¹⁴ Nevertheless, the International Court of Justice argued that to be in accordance with law is an essential but not a sufficient condition to comply with the provision of article 13, for there are two other additional requirements. First, the applicable domestic law must be compatible with all other requirements established in the International Covenant on Civil and Political Rights; and second, the expulsion must not be arbitrary.¹⁵

The ICJ remarked that such an interpretation of article 13 was “fully corroborated” by the jurisprudence of the Human Rights Committee, as exemplified in the individual complaint of *Maroufidou v. Sweden* and in General Comment number 15: The Position of Aliens under the Covenant. However, the International Court of Justice was careful to emphasize that:

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled (*Ahmadou Sadio Diallo*, paragraph 66).

The ICJ’s positive approach to the pronouncement of the Human Rights Committee, in this case, might be related to the improved quality in the reasoning of the case quoted (*Maroufidou v. Sweden*) and of General Comment number 15.

14. International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, preliminary objections, Judgment, I.C.J. Reports (2007: 582, paragraph 65).

15. *Ahmadou Sadio Diallo*, paragraph 65.

In the case of *Maroufidou v. Sweden*, the Committee argued that the meaning of “in accordance with law”, as established in article 13 of the ICCPR, required the domestic law of the State parties to the covenant to be in “compliance with both the substantive and the procedural requirements of the law”.¹⁶ Such requirements do not imply that the Human Rights Committee has the powers “to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly [...], unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power”.¹⁷

The same argument is confirmed in General Comment number 15, where the Committee argued that according to article 13 of the ICCPR, State parties are required to apply and interpret the domestic law “in good faith and in the exercise of their powers”.¹⁸ The Human Rights Committee further notices that “its purpose is clearly to prevent arbitrary expulsions”. This understanding is confirmed “by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it”.¹⁹

Hence, in this case, the International Court of Justice concurred with the Committee’s interpretation this time without conducting its own interpretative assessment. However, the ICJ added the abovementioned paragraph defining for the first time its interaction with treaty bodies and the normative weight recognized to their pronouncements. Here, the Court is careful to clarify that it will “ascribe great weight” to the Human Rights Committee interpretations but remarking that it is not obliged to adopt them.

The Case of *Qatar v. United Arab Emirates* (the application of the International Convention on the Elimination of All Forms of Racial Discrimination)

The most recent judgment of the ICJ on this topic was adopted in 2021. The background of the case is about certain measures taken by the United Arab Emirates (UAE) against Qatari nationals, including the prohibition to enter the territory and requiring these residents to leave the country. These measures were adopted for security reasons in response to allegations of Qatar’s support and financing of terrorist groups.

Two parallel procedures were installed. On March 2018, Qatar deposited an interstate communication with the CERD under article 11 of the CERD Convention, re-

16. Human Rights Committee, *Anna Maroufidou v. Sweden* (1981) CCPR/C/12/D/58/1979, paragraph 9.3.

17. *Maroufidou v. Sweden*, paragraph 10.1.

18. Human Rights Committee, General Comment number 15: The Position of Aliens Under the Covenant (1986), paragraph 9.

19. General Comment number 15, paragraph 10.

questing that the UAE take all necessary steps to end the discriminatory measures against Qatari nationals.²⁰

On June 2018, Qatar filed an application to the ICJ's registry instituting proceedings against UAE pursuant to article 22 of the CERD Convention.²¹ The country raised a preliminary objection maintaining that the International Court of Justice lacked jurisdiction *ratione materiae* over the dispute because the alleged measures did not fall within the scope of the Convention.²²

This preliminary objection constituted a discrepancy about the scope of what constitutes "racial discrimination", which is defined in article 1 of the CERD Convention:

In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The UAE maintained that the subject-matter of the dispute is alleged discrimination on the basis of "current" Qatari nationality, which in its view is different from "national origin".²³ Therefore, according to the position of the country, the laws that restrict the entrance of Qatari nationals do not fall within the definition of racial discrimination contained in the CERD Convention.

Qatar contended that its claims were based on the acts and omissions of the UAE that discriminated against Qataris on the basis of "national origin", which constituted a violation of the Convention, which requires States parties take all appropriate measures to eliminate racial discrimination.²⁴ In this regard, Qatar stated that the definition of what constitutes this type of discrimination, according to article 1 of the CERD Convention, includes discrimination based on nationality, which is encompassed in the article's reference to national origin.²⁵

20. According to article 11.1: "If a State party considers that another State party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee".

21. According to article 22: "Any dispute between two or more States parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement".

22. International Court of Justice, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. United Arab Emirates*), preliminary objections, Judgment, I.C.J. Reports (2021: 71, paragraph 38).

23. *Qatar v. United Arab Emirates*, paragraphs 51-53.

24. *Qatar v. United Arab Emirates*, paragraph 44.

25. *Qatar v. United Arab Emirates*, paragraph 45.

To address this preliminary objection, the ICJ interpreted the term “national origin” applying the rules established in articles 31 and 32 of the Vienna Convention on the Law of Treaties.²⁶ The International Court of Justice recalled that article 31(1) of the VCLT requires to interpret a treaty “in good faith [and] 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”.²⁷ In this sense, the ICJ sustained that the interpretation of a treaty “must be based above all upon the text of the treaty”.²⁸

Hence, the International Court of Justice observed that the word “origin” in its ordinary meaning denoted “a person’s bond to a national or ethnic group at birth, whereas nationality is a legal attribute which is within the discretionary power of the State and can change during a person’s lifetime”. And thus, the definition of “racial discrimination” refers to “characteristics that are inherent at birth”.²⁹

Then, the ICJ turned to the analysis of the context in which the term “national origin” was used within the CERD Convention. For this purpose, this Court took into consideration paragraphs 2 and 3 of article 1, which state the following:

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

According to the ICJ, these paragraphs corroborated its interpretation of the ordinary meaning of the term “national origin” as not encompassing the meaning of current nationality. Paragraphs 2 and 3 expressly exclude from the definition of “racial discrimination” distinctions between “citizens and non-citizens” and certain legal provisions concerning “nationality, citizenship or naturalization”. Therefore:

In the Court’s view, such express exclusion from the scope of the Convention of differentiation between citizens and non-citizens indicates that the Convention does not prevent States parties from adopting measures that restrict the right of non-citizens to enter a State and their right to reside there —rights that are in dispute in this case— on the basis of their current nationality (*Qatar v. United Arab Emirates*, paragraph 83).

Proceeding to the analysis of the object and purpose of the treaty, the International Court of Justice observed that the preamble of the CERD Convention con-

26. *Qatar v. United Arab Emirates*, paragraph 75.

27. Vienna Convention on the Law of Treaties, article 31(1).

28. *Qatar v. United Arab Emirates*, paragraph 81.

29. *Qatar v. United Arab Emirates*, paragraph 81.

demned “colonialism and all practices of segregation and discrimination associated therewith”.³⁰ Given this, the ICJ sustained that the object and purpose of this treaty is “to bring to an end all practices that seek to establish a hierarchy among social groups as defined by their inherent characteristics or to impose a system of racial discrimination or segregation”.³¹

To conclude with the rules of interpretation of the VCLT, the International Court of Justice proceeded to the analysis of the *travaux préparatoires* of the CERD Convention as a supplementary means of interpretation.³² In this regard, the ICJ reviewed the different drafting stages of the Convention.³³

The definition of “racial discrimination”, in the different drafts, demonstrated that the drafters had long discussions where they made a distinction between “national origin” (as country of origin) and “nationality” (in a political-legal sense). Several state delegates considered that not all differences based on nationality should be eliminated because most states made distinctions between nationals and aliens.³⁴

In conclusion, the International Court of Justice upheld the UAE’s preliminary objection conceding that they could not exercise jurisdiction *ratione materiae* because the subject-matter of the dispute (“nationality” instead of “national origin”) did not fall within the scope of the CERD Convention.

Nevertheless, the International Court of Justice’s conclusions become problematic considering the previous and parallel assertions that the CERD had adopted in 2005 (a General Recommendation) and in 2019 (the decision on admissibility in the inter-state dispute between Qatar and the UAE), which were in stark contradiction with the ICJ’s findings.

In its General Recommendation XXX paragraph 4 on discrimination against non-citizens of 2005 the CERD decided that:

Differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.

In the decision on the admissibility of the inter-state communication submitted by Qatar against the UAE of 2019, the CERD rejected the country’s preliminary objection concerning the Committee’s jurisdiction *ratione materiae*. The CERD recognized that “nationality, as such, is not mentioned as a ground of prohibited racial discrimination”

30. CERD Convention, paragraph 3 of the preamble.

31. *Qatar v. United Arab Emirates*, paragraph 86.

32. As established in the Vienna Convention on the Law of Treaties, article 32.

33. *Qatar v. United Arab Emirates*, paragraphs 92-97.

34. *Qatar v. United Arab Emirates*, paragraph 93.

and that article 1 paragraph 2 excluded the application of the Convention to distinctions between citizens and non-citizens. Also, it acknowledged that the UAE's reasoning was in accordance with the *travaux préparatoires* of the CERD Convention.³⁵

However, this treaty body argued that “in its subsequent practice” it has “repeatedly called upon States parties to address instances of discrimination against non-citizens on the basis of their nationality”. The legal sources used by the Committee for the Elimination of Racial Discrimination to support its argument were a phrase from an academic book written by a former member of the Committee, which this treaty monitoring body called an “authoritative commentary on the Convention”; and a self-referential statement to its own General Recommendation XXX.³⁶

Aware of these discrepancies, in the case of *Qatar v. the UAE*, the ICJ turned to the examination of the CERD's practice because both Qatar and the UAE expressed different opinions concerning the pronouncements of this treaty body and the interpretation of “national origin”. On this issue, the International Court of Justice expressed that “in its jurisprudence, it has taken into account the practice of committees established under human rights conventions, as well as the practice of regional human rights courts, in so far as this was relevant for the purposes of interpretation”.³⁷

In this regard, the UAE maintained that the opinions and general recommendations of the Committee “do not constitute subsequent practice or agreement of States parties [...] regarding the interpretation of the Convention”.³⁸ In particular, the UAE considered that General Recommendation XXX “does not constitute an interpretation based on the practice of States parties and that, in any event, it is not intended as a general prohibition of all differential treatment based on nationality”.³⁹

The UAE's position was in line with the recent studies of the International Law Commission (ILC) in this regard. In its draft conclusions on subsequent agreement and practice in relation to treaty interpretation of 2018,⁴⁰ the Commission maintained that treaty bodies' pronouncements do not constitute a *per se* subsequent agreement or subsequent practice for the interpretation of treaties. The International Law Commission further noticed that this proposal has been expressly rejected by states and abandoned by treaty bodies themselves.⁴¹

35. Decision on the admissibility of the inter-state communication submitted by Qatar against the UAE (27 August 2019) CERD/C/99/4, paragraph 55-56.

36. Decision on the admissibility of the inter-state communication submitted by Qatar against the UAE, paragraph 58-59.

37. *Qatar v. United Arab Emirates*, paragraph 77.

38. *Qatar v. United Arab Emirates*, paragraph 98.

39. *Qatar v. United Arab Emirates*, paragraph 98.

40. Vienna Convention on the Law of Treaties, article 31(3) a) and b).

41. International Law Commission, draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (2018: 90-99) A/73/10, conclusion 13.

As for the decision on admissibility delivered by the CERD in 2019 (in respect of the communication submitted by Qatar) the UAE “contends that these decisions are in no way binding on the Court and their reasoning with regard to the interpretation of the term ‘national origin’ is insufficient”. The UAE further added that the conclusions of the CERD “are based on a single criterion, that is the Committee’s ‘constant practice’, which is inconsistent with the rules of treaty interpretation as reflected in articles 31 and 32 of the Vienna Convention”.⁴²

Qatar, on the other hand, argued that the ICJ must “ascribe great weight to the CERD Committee’s interpretations of the Convention, in keeping with its jurisprudence relating to committees established under other human rights conventions”. Qatar maintained that the CERD, “as the guardian of the Convention, has developed a constant practice whereby differentiation based on nationality is capable of constituting racial discrimination within the meaning of the Convention”.⁴³

The International Court of Justice recalled that although it should “ascribe great weight” to the interpretations adopted by human rights treaty body mechanisms, this Court was “in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee”. The ICJ stated that it “carefully considered the position taken by the CERD Committee”, but “by applying, as it is required to do (...), the relevant customary rules on treaty interpretation” they came to a different conclusion.⁴⁴

Probably, the Court took this less friendly position towards the CERD’s pronouncements due to the poor quality of the latter’s reasoning in these two pronouncements, which expressly contradicted the rules of interpretation of the VCLT and the literal words of the CERD Convention (paragraphs 2 and 3 of article 1). Also, it is important to remember the CERD’s composition, which does not consist solely of legal professionals. This situation might discourage the ICJ from considering it as an authorized voice in legal scholarship.

This case has been considered by some scholars as a deviation of the International Court of Justice from its previous practice in relation to treaty bodies’ pronouncements. (Ulfstein, 2022) Nevertheless, a careful assessment of the ICJ’s position indicates that it has not previously taken an openly positive position towards treaty bodies’ decisions. In the *Wall Advisory Opinion*, the Court agreed with the Human Rights Committee conclusions, but it decided to conduct its own interpretative assessment to corroborate the Committee’s interpretation. Also, in the *Ahmadou Sadio Diallo* case, the ICJ already took a more cautious approach to treaty bodies’ decisions by expressly stating that these opinions have great normative weight

42. *Qatar v. United Arab Emirates*, paragraph 98.

43. *Qatar v. United Arab Emirates*, paragraph 99.

44. *Qatar v. United Arab Emirates*, paragraph 101.

but then clarifying that the Court is not obliged to adopt them in the exercise of its judicial functions.

The International Court of Justice's interaction with Human Rights treaty bodies: Dialogue or conflict?

The analysis of these three cases indicates that the interaction between the International Court of Justice and Human Rights treaty monitoring bodies is becoming complicated. Some scholars have criticized the ICJ's approach, which they perceive as establishing a relationship of superiority rather than cooperation and dialogue in the development of international law (Costello and Foster, 2022; Ulfstein, 2022).

However, three issues should be considered to understand the Court's approach. The first one is the legal nature of human rights treaty monitoring bodies and their powers conferred under international law. These mechanisms received the mandate to monitor states' compliance with their respective human rights treaty obligations, but they are not judicial bodies, and their views constitute non-binding pronouncements. Such a characteristic does not diminish the important work that they pursue in the advancement of human rights, however it means that, although states should strongly consider these views in good faith, they are not obliged to follow them.

This non-binding nature of treaty body mechanisms becomes relevant regarding questions that have been raised about the legitimacy of certain self-conferred powers. This is the case of criticism about the adoption of general comments that establish detailed (and sometimes contested) normative content for each human right obligation, which is not a faculty explicitly granted by human rights treaties (Pedone and Kloster, 2012; Keller and Grover, 2012).⁴⁵

Thus, taking into consideration these premises, it is difficult to maintain that treaty bodies are the last and only interpreters of human rights treaties, as argued by some experts (Neuman, n.d.).⁴⁶ They certainly have an important role in monitoring and advising compliant with human rights obligations, but the acceptance and adoption of their views depend on the quality of their reasoning and the mastering of international law general rules. In this regard, there is a pending task that must be addressed by commissioners.

The second issue to be considered is the wave of scholarly criticism that human rights treaty bodies are experiencing due to their lack of technical-legal rigor in their

45. Joanna Harrington, "The Human Rights Committee, Treaty Interpretation, and the Last Word." *EJIL: Talk!*, August, 5, 2015. Available at <https://bit.ly/473NcPV>.

46. Gabriella Citroni, "The Human Rights Committee and Its Role in Interpreting the International Covenant on Civil and Political Rights Vis-à-Vis States parties." *EJIL: Talk!*, August, 28, 2015. Available at <https://bit.ly/3O27bFO>.

interpretative processes (Craven, 2001; Dennis and Stewart, 2013; O'Flaherty, 2007; Odello and Seatzu, 2013; Schlütter, 2012). As stated in section III, treaty body mechanisms do not always provide detailed and well-argued reasons for the adoption of their interpretations, partly due to their diverse composition that is not limited to legal experts. In some cases, they even disregarded the literal words of the treaty or the drafters' views expressed in the *travaux préparatoires*, as required by the customary rules of the VCLT interpretation.

In some more concerning cases, treaty bodies have not even developed a structured argument at all and they just relied on a self-referential quote, as criticized by the Norwegian scholar Birgit Schlütter:

Treaty bodies use their own jurisprudence and General Comments to interpret their covenant's provisions even further, or to confirm their own interpretations. Ultimately, this method may alienate human rights interpretations from national state practice and implementation. When referring mainly to General Comments and their own jurisprudence, human rights interpretation is only concerned with the treaty body's own perception of the rights enshrined in 'its' convention (2012: 292).⁴⁷

The third issue is interrelated to the second one: the composition of the International Court of Justice and treaty bodies. The lack of legal rigor is partly due to the composition of these independent committees because some of the commissioners do not possess a legal background and such expertise is not a requirement for the appointment.⁴⁸ This diversity of professions enriches the work of treaty bodies with different perspectives in their role of constructive dialogue, but it can also result in a poor command of general principles of treaty law and state responsibility.

In contrast, the membership of the ICJ is mainly composed of experienced traditional public international law experts (instead of human rights lawyers) which deeply influences the ethos, approaches and frameworks of analysis used by the judges (Espósito, 2023; Koskenniemi and Leino, 2002). In this regard, the Court enjoys a good reputation and is known for its moderation and conservative approaches to legal interpretation (McWhinney, 2006). This way of proceeding can be criticized by proponents of more proactive perspectives, but it also provides a sphere of stability and legitimacy that is generally well received by states (Alter, 2021; Donoghue, 2014), which is hard to find in other international tribunals (Flogaitis and Zwart, 2013; Co-tensse, 2019).

Accordingly, the International Court of Justice's judgment in the case of *Qatar v. the UAE* should not be received as an attack against human rights treaty bodies, or

47. See as an example Human Rights Committee, *Whelan v. Ireland*, CCPR/C/119/D/2425/2014 (17 March, 2017).

48. See on this topic Mechlem (2009).

even worse, as a lack of commitment to ending racial discrimination. Rather, it could be seen as a wake-up call to treaty bodies to enhance their legitimacy and respond to criticism.⁴⁹

Treaty bodies could address these issues by learning from the ICJ's approach to treaty interpretation and by taking advantage of their non-binding nature. The legitimacy and acceptance of treaty body pronouncements (and international law as a whole) rests on their persuasiveness and analytical rigor, rather than on treaty ratification or forceful enforcement (Hathaway, 2001). Therefore, a thorough and structured application of the general rules of treaty interpretation, reflecting a mastery of international law, is essential to maintain the moral and legal authority of treaty bodies. The Court's approach to the interpretation of human rights norms, following the rules of articles 31 and 32 of the VCLT, provides a framework that should be further used by human rights mechanisms (Mechlem, 2009).⁵⁰

As for the positive aspects of the treaty bodies' non-binding nature, the environment created by the framework of a "constructive dialogue" provides a less confrontational space where different perspectives and approaches can be discussed. This platform could be used to address obstacles and challenges to the implementation of human rights related to meta-legal questions, like controversial or sensitive topics or issues related to cultural diversity and relativism.⁵¹

Conclusions: The International Court of Justice's decisions as a wake-up call

According to this analysis, the International Court of Justice's interaction with human rights treaty bodies has been complicated. In the Wall Advisory Opinion, the Court adopted the interpretation of the Human Rights Committee but decided to corroborate that result with its own interpretative assessment. In the *Ahmadou Sadio Diallo* case, the ICJ also followed the Committee's pronouncement without providing its own analysis. However, the International Court of Justice clarified its position towards treaty bodies by stating that their interpretations have "great normative weight", but that the Court is not obliged to follow them. In the case of *Qatar v. the UAE* the International Court of Justice took a more confrontational approach, departing completely from the CERD's interpretations. Moreover, in this last case, the ICJ conducted its own detailed interpretative assessment that denoted the argumentative force of its conclusions, in contrast to the Committee's position.

49. See this argument in Ulfstein (2022).

50. On this point, as seen in the analysis of the *Ahmadou Siado Diallo* case, the International Court of Justice has not always been consistent when using the rules of the VCLT. Thus, the Court also could improve on this issue.

51. For a detailed discussion of these issues see Donders (2012) and Brems (1997).

Considering these cases, some scholars have considered that the Court has departed from its previous favorable attitude towards treaty bodies and, instead, it has installed a relationship of hierarchy (Ulfstein, 2022). Nevertheless, this analysis shows that the ICJ's position in this regard has always been cautious, which is partly explained by the growing criticism that these mechanisms are subject due to their lack of rigorous analysis and poor mastery of interpretation rules.

Also, the International Court of Justice's position can be explained by the legal status of treaty bodies under international law. Although, they have the mandate to monitor states' compliance with their treaty obligations, they are not judicial organs, and their decisions are of a non-binding nature. This means that they can hardly be considered the last and only interpreters of human rights treaties. Also, it indicates that since states and international courts are not obliged to adopt their opinions, the legitimacy and acceptability of their interpretations rest on their persuasiveness and analytical rigor.

Thus, in order to enhance their legitimacy, treaty bodies could learn from the ICJ's judgments and consider them not as an attack on human rights, but as a wake-up call to improve the quality of their reasoning. In this regard, the use of the VCLT's rules of interpretation, as applied by the International Court of Justice, would be a step forward.

Additionally, treaty bodies should not view their non-binding nature as an obstacle to the exercise of their functions. Rather, this less confrontational environment could be a useful platform for discussing challenges to the implementation of human rights norms related to debates that go beyond the legal sphere, like the relationship between cultural diversity and the universality of human rights. Accordingly, the International Court of Justice's cases analyzed in this article should be read as an opportunity to improve the methodologies used by treaty bodies and to reflect on new horizons of work and debate.


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