

Recent case-law of the ICJ and its significance for International Law

OC - (ILA-14161) - FUNCTIONS OF UNGA RESOLUTIONS IN THE CONTEXT OF DETERMINING THE EXISTENCE OF CUSTOMARY INTERNATIONAL LAW

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Abstract

In the recent *Chagos* case, the International Court of Justice (ICJ) determined that the right to self-determination existed as customary international law when UNGA resolution 1514 (XV) was adopted on 14 December 1960.

According to the ICJ, UNGA resolution 1514 (XV) has “a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption” (*Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, para. 152) despite the strong objections of two States participating – the United Kingdom and the United States – in the advisory procedures.

Against this backdrop, this paper aims to analyze the functions of UNGA resolutions in the context of determining the existence of customary international law. Two questions will be answered. First, what functions should UNGA resolutions be given? Second, how to evaluate UNGA resolutions as the evidence of *opinio juris* or that of customary international law as such is reasonable or not.

The ICJ has developed the functions of UNGA resolutions. In the *Nicaragua* case, the ICJ for the first time recognized the functions of UNGA resolutions in the context of determining the existence of customary international law. According to the ICJ, “*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions,” and “[t]he effect of consent to the text of such resolutions ... may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, pp. 99–100, para. 188). It seems that the Court regarded as evidence of *opinio juris* not UNGA resolutions as such but the attitude towards them.

However, after the *Nicaragua* case, the ICJ expanded and shifted the functions of UNGA resolutions. There were two developments. First, in the *Legality of Nuclear Weapons* case, the ICJ confirmed the “normative value” of UNGA resolutions and their functions to “provide evidence for establishing the existence of a rule or the emergence of an *opinio juris*.” This means that UNGA resolutions can be direct evidence of both customary international law as such and *opinio juris*. In this regard, the ICJ identified “its content, and the conditions of its adoption” and “whether an *opinio juris* exists as to its normative character” as factors when considering the existence of a rule or the emergence of an *opinio juris*. (*Legality of the Threat or Use of Nuclear Weapons, Advisory*

Opinion, I.C.J. Reports 1996, pp. 254-255, para. 70). Second, in the *Congo* case, the ICJ found that the provisions in a UNGA resolution were “declaratory” of customary international law (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *I.C.J. Reports 2005*, pp. 226–227, 268, paras. 162, 300), though it did neither apply nor even refer to the factors clarified in the *Legality of Nuclear Weapons* case.

These two developments finally merged in the *Chagos* case. Having reaffirmed the “normative value” of UNGA resolutions, their functions in relation to customary international law and the factors to be considered when determining its existence, the ICJ acknowledged that UNGA resolution 1514 (XV) “has a declaratory character” as to the right to self-determination as a customary norm in view of “its content and the conditions of its adoption.” (*Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, para. 152). It follows that UNGA resolutions are recognized as the expression of customary international law as such both in theory and practice.

The functions of UNGA resolutions have been expanded from an indirect evidence of *opinio juris* to a direct evidence of *opinio juris* and even customary international law as such. The International Law Commission (ILC) endorses the ICJ practice and takes the view that “[a] resolution adopted by an international organization ... may provide evidence for establishing the existence and content of a rule of customary international law” (Text of the draft conclusions on identification of customary international law adopted by the Commission, Conclusion 12, para. 2).

The question is how to demonstrate that a specific UNGA resolution declares and reflects customary international law.

In the *Chagos* case, the ICJ reaffirmed and applied the factors of “its content, and the conditions of its adoption.”

It should be noted that these factors are not only for considering the existence of a rule but also for examining the emergence of an *opinio juris*. It is thus questionable that the same factors can be used for different purposes.

Regarding the content, the ICJ was of the view that “[t]he wording used in resolution 1514 (XV) has a normative character.” It referred to the preamble and first operative paragraph (*Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, para. 153). Regarding the conditions of its adoption, the ICJ minimized the fact that this resolution was not adopted unanimously but by 89 votes with 9 abstentions and pointed out that “[n]one of the States participating in the vote contested the existence of the right of peoples to self-determination” (*Ibid.*, para. 152). It seems that the ICJ set a relatively lower bar.

Another problem is that the ICJ was not so serious about rebutting the strong objections of the United Kingdom and the United States against the declaratory nature of resolution 1514 (XV). The ICJ has normally avoided or refrained from considering the existence of customary international law when there are conflicting views among the participants in the judicial proceedings. This was an extremely rare where the ICJ confirmed the existence of customary international law despite the different positions of the participants.

In the author’s view, the ICJ should have conducted more detailed analysis based on the traditional two elements (See Text of the draft conclusions on identification of customary international law adopted by the Commission, Conclusion 12, para. 3).

Palavras-chave : UNGA resolutions, customary international law, Chagos case