Leiden Journal of International Law (2025), pp. 1–24
doi:10.1017/S0922156525100289

ORIGINAL ARTICLE

INTERNATIONAL COURT OF JUSTICE

Recent developments in reliance upon third-party fact-finding at the International Court of Justice

Michael A. Becker*

School of Law, Trinity College Dublin, Dublin, Ireland
Email: beckerma@tcd.ie

Abstract

This article examines recent developments relating to the use of third-party findings of fact at the International Court of Justice (ICJ). A proliferation of fact-finding mechanisms creates more opportunities for litigants to ask the ICJ to rely on third-party facts. This demands renewed attention to how the ICJ responds to this type of evidence, especially given the rise of public interest litigation that may depend especially heavily on such materials. The analysis focuses on the ICJ's approach in recent requests for the indication of provisional measures and asks whether the Court's approach to third-party evidence differs depending on the phase of litigation, using the 2024 judgment in *Ukraine* v. *Russia* as a case study. Ultimately, recent decisions suggest that the ICJ's efforts to distinguish evidence generated through an adversarial, court-like process from findings of fact based on investigation and fieldwork are often blurred in practice. Moreover, while the Court's liberal approach to third-party evidence at the provisional measures phase may be justifiable, the quest for coherence in how the Court approaches third-party evidence, especially on the merits, remains a work in progress. To that end, the article suggests ways in which the Court could engage more closely with third-party fact-finding reports in the fulfillment of its adjudicatory function.

Keywords: fact-finding; genocide; human rights; International Court of Justice; provisional measures

1. Introduction

This article critically examines recent developments relating to the use of third-party fact-finding in proceedings at the International Court of Justice (ICJ), with a focus on reports by *ad hoc* fact-finding bodies and international commissions of inquiry (together, inquiry bodies). A proliferation of inquiry bodies – which in itself can result in 'duelling inquiries' that offer contradictory assessments[1] – creates more opportunities for litigants to ask international courts

*An earlier version of this article was presented at the 'Recharacterising International Disputes: Exploring the Phenomenon of Multi-Fora Litigation' conference held at Maastricht University (12–13 June 2024), organized by Craig Eggett and Alexandre Skander Galand. I am grateful to the conference participants for their comments and for additional feedback from Christiane Ahlborn, Cecily Rose, Iryna Marchuk, and the anonymous reviewers. All errors remain my own.

[1]Consider the divergent findings made by separate UN-mandated inquiry bodies – one established by the UN Secretary-General, the other by the UN Human Rights Council – that examined the 'Gaza flotilla incident' in 2010. See, e.g., R. Mclaughlin and D. Stephens, 'International Humanitarian Law in the Maritime Context: Conflict Characterization in Judicial and Quasi-Judicial Contexts', in D. Jinks et al. (eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects* (2014), 103 at 114–26; L.J. van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of

and tribunals to rely on inquiry body reports. This demands renewed attention to how individual courts and tribunals respond to such materials.

Inquiry bodies may serve as prerequisites or catalysts for inter-state litigation or international criminal justice responses. Indeed, an inquiry body's recommendations may identify recourse to international courts or tribunals among possible responses to the underlying dispute or conflict – a practice that can be linked to the rise of 'strategic' or 'public interest' litigation before international courts and tribunals.[2] Moreover, an inquiry body's conclusions (for example, that 'the factors allowing the inference of genocidal intent are present')[3] may prove essential to framing a conflict in ways that facilitate or legitimize specific litigation options, including by identifying to potential applicant states the claims that could reasonably be pursued in international proceedings. This is especially relevant in an age of multi-forum litigation and 'disaggregated disputes', where multiple judicial and quasi-judicial bodies face different or overlapping aspects of the same overarching conflict.[4] Multi-forum litigation not only gives new life to concerns about legal fragmentation,[5] but also the possibility of 'fragmentation in truth-telling': scenarios in which different entities that purport to speak with independence and authority endorse competing factual narratives.[6] For these reasons, the role of third-party fact-finding in international litigation is relevant not only to evaluating judicial decisions in specific cases but also to ongoing debates about the benefits and downsides of multi-forum litigation.

This article does not compare how different international courts and tribunals engage with third-party fact-finding reports relating to the same underlying conflict, but instead focuses on ICJ practice, which may influence how other courts and tribunals (for example, regional human rights courts, international arbitral bodies, or domestic courts) approach such materials. The analysis closely examines the ICJ's approach to third-party fact-finding reports in recent requests for the indication of provisional measures, where such reports have played a prominent role. This practice raises important questions about whether the ICJ engages with inquiry body reports differently depending on the phase of litigation (provisional measures versus merits). Another consideration (beyond the scope of this piece) is whether the Court treats third-party fact-finding differently in the context of advisory proceedings (or whether it should).[7]

Section 2 begins by reviewing the ICJ's traditional approach to third-party facts, including an apparent distinction made by the Court between evidence generated through an adversarial

International Law', (2014) 13 *Chinese Journal of International Law* 507, at 528–30. On the proliferation of inquiry bodies, see M.A. Becker, 'Challenging Some Baseline Assumptions About the Evolution of International Commissions of Inquiry', (2022) 55 *Vanderbilt Journal of Transnational Law* 559, at 586.

[2]See J. Bendel and Y. Suedi (eds.), *Public Interest Litigation in International Law* (2024); M. Ramsden, 'Strategic Litigation before the International Court of Justice: Evaluating Impact in the Campaign for the Rohingya Rights', (2022) 33 *EJIL* 441.

[3]See Human Rights Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on *Myanmar*, UN Doc. A/HRC/39/CRP.2 (17 September 2018), para. 1441 (IIFFMM Report, 17 September 2018).

[4]L. Hill-Cawthorne, 'International Litigation and Disaggregation of Disputes: Ukraine/Russia as a Case Study', 68 (2019) *ICLQ* 779. See also I. Marchuk, 'From Warfare to "Lawfare": Increased Litigation and Rise of Parallel Proceedings in International Courts', in A. Kent, N. Skoutaris and J. Trinidad (eds.), *The Future of International Courts: Regional, Institutional and Procedural Challenges* (2019), 217.

[5]Recall the divergent views of the Committee on the Elimination of All Forms of Racial Discrimination and the ICJ on the interpretation of the term 'national origin' in parallel actions by Qatar. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment of 4 February 2021, [2021] ICJ Rep. 71, at 104, paras. 100–1.

[6]C. Stahn and D. Jacobs, 'The Interaction between Human Rights Fact-Finding and International Criminal Proceedings: Toward a (New) Typology', in P. Alston and S. Knuckey (eds.), *The Transformation of Human Rights Fact-Finding* (2016), 255 at 260. See also S. Krebs, 'Designing International Fact-Finding: Facts, Alternative Facts, and National Identities', (2018) 41 *Fordham International Law Journal* 337, 345–9.

[7]On the role of third-party fact-finding in advisory proceedings, see J. G. Devaney, *Fact-Finding Before the International Court of Justice* (2016), 97–8. Reports by UN commissions of inquiry and special rapporteurs featured extensively in the ICJ's July 2024 advisory opinion on the Occupied Palestinian Territory. See *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion of 19 July 2024 (not yet published).

'court-like process' and findings of fact based on investigation and fieldwork. Section 3 turns to how the ICJ has dealt with third-party facts in recent cases, including whether the Court's approach at the provisional measures phase differs from the merits phase. The sheer frequency of provisional measures requests in recent ICJ cases, combined with the expectations that provisional measures orders may create among litigants and the broader public, means that how the Court deals with third-party findings of fact at this preliminary stage merits closer scrutiny. After canvassing a selection of recent provisional measures orders, the analysis treats the 2024 judgment on the merits in *Ukraine* v. *Russia* as a case study.[8] Section 4 offers some observations about how the Court might engage more closely with the methods and methodologies of third-party fact-finders, especially with a view to enhancing its own persuasive authority.[9] Section 5 briefly concludes with what the Court's current approach might mean for future practice at the ICJ. Ultimately, the quest for coherence in how the ICJ approaches third-party evidence remains a work in progress.

2. The International Court of Justice and third-party fact-finding

Parties before the ICJ may direct the Court to findings of fact made by other entities, including inquiry bodies and UN special rapporteurs, as well as other courts and tribunals.[10] Third-party evidence submitted to the ICJ also includes reports by non-governmental organizations (NGOs), national human rights bodies and the media. In its 2007 judgment in *Bosnia* v. *Serbia*, the Court reviewed the key factors that bear on the value of such materials:

1. the sources of the item of evidence (for instance, partisan or neutral);
2. the process by which it has been generated (for instance, an anonymous press report or the product of a careful court or court-like process); and
3. the quality or character of the item (such as statements against interest and agreed or uncontested facts).[11]

These factors suggest that the ICJ views evidence, including formal reports that contain findings of fact, along a continuum of probative value. This affords the Court considerable discretion in whether or how to credit any individual piece of evidence or any single piece of information contained within a report. It also underlines a distinction in the Court's approach between findings of fact that are obtained through an adversarial, court-like process and those generated from mechanisms that rely on interviews, meetings, open-source data, and on-the-spot investigations.[12] The Court has in principle expressed a greater willingness to credit the former over the latter. The Court's practice, however, suggests that the divide between these two categories is blurrier than at first appears. The *Armed Activities* and *Bosnia* v. *Serbia* cases, in

[8] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia)*, Judgment of 31 January 2024 [2024] ICJ Rep. 78.

[9] The Court's approach to questions of evidence may bear on the authority that its decisions carry and the prospects for meaningful compliance and enforcement. See M. Benzing, 'Evidentiary Issues', in A. Zimmermann and C.J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary* (2019), 1371 at 1373.

[10] In contrast to many domestic legal systems, the general rule at the ICJ is that 'all evidence produced in accordance with the ICJ Statute and the Rules of Court will be admissible.' Ibid., at 1379. Certain exceptions have developed on a case-by-case basis, rather than being set out in codified rules of evidence. The Court's approach to assessing the probative value of different types of evidence has also developed in an ad hoc fashion. Ibid., at 1405.

[11] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep. 43, at 135, para. 227.

[12] See M.A. Becker, 'The Challenges for the ICJ in the Reliance on UN Fact-Finding Reports in the Case against Myanmar', *EJIL: Talk!*, 14 December 2019, available at www.ejiltalk.org/the-challenges-for-the-icj-in-the-reliance-on-un-fact-finding-reports-in-the-case-against-myanmar/.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

which the Court engaged with both categories of third-party evidence, point to a more malleable approach (although the idea that these categories are fundamentally different may provide the Court with a convenient means to credit some findings of fact over others in specific cases).[13]

2.1 Reliance on factual findings obtained through a court-like process

In *Armed Activities*, the evidentiary record included the findings of the Porter Commission, a judicial inquiry established by Uganda (and chaired by a retired British judge) to investigate allegations of wrongful conduct by the Ugandan military during its conflict in the 1990s with the Democratic Republic of the Congo. The Porter Commission report was part of the evidentiary record submitted by the parties, alongside various UN reports. The Court explained that it would give 'special attention' to 'evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature'.[14] This description closely fitted the Porter Commission, and the Court ultimately gave substantial weight to several of its findings, including those regarding alleged smuggling, looting, and the illegal exploitation of resources by Ugandan military personnel.[15] This suggests that the Court adopted a general rule for the treatment of third-party evidence in *Armed Activities* based largely on characteristics that happened to describe the Porter Commission, thereby establishing a potentially unrealistic benchmark.

In *Bosnia* v. *Serbia*, the Court reiterated the presumptive value of factual findings generated through an adversarial judicial process – in that case, the findings contained in judgments by the International Criminal Tribunal for the former Yugoslavia (ICTY).[16] The Court took the position that 'it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal'.[17] Going further, the Court indicated that findings relating to 'the existence of the required [criminal] intent' were 'also entitled to due weight'.[18] This paved the way for the Court's determination in *Bosnia* v. *Serbia* that the massacre at Srebrenica in July 1995 constituted genocide; this was the predicate to the Court's conclusion that Serbia, while not directly responsible for the genocide at Srebrenica, had breached its obligation to prevent genocide under Article I of the Genocide Convention.[19] Nearly a decade later, the Court took the same deferential approach to ICTY findings in *Croatia* v. *Serbia*, although it did not find any violations of the Genocide Convention in that case.[20]

In sum, the Court has expressed a high degree of comfort with affording considerable weight to facts established though a judicial, court-like process in which evidence has been tested by cross-examination. This can be explained partly by reference to notions of judicial efficiency, as it might be deemed 'unnecessarily duplicative' for the ICJ to determine for itself those facts already 'authoritatively established' by another international court or tribunal.[21] However, commentators

[13] *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168; see *Bosnia v. Serbia*, *supra* note 11.

[14] See *Armed Activities*, ibid., at 201, para. 61.

[15] Ibid., at 249–51, paras. 237–42. The Court's willingness to credit the Porter Commission has faced criticism because the Commission itself identified 'serious flaws and constraints involved in its fact-finding process'. See R. Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice', 6 (2007) LPICT 119, at 152–3.

[16] See *Bosnia v. Serbia*, *supra* note 11, at 131, para. 214.

[17] Ibid., at 134, para. 223.

[18] Ibid.

[19] Ibid., at 222, para. 438. The Court's assessment of Srebrenica relied heavily on the *Blagojevic* and *Kristic* cases at the ICTY. Ibid., at 162–6, paras. 291–7.

[20] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3 February 2015, [2015] ICJ Rep. 3, at 74–5, para. 182, and at 136–7, paras. 469–72.

[21] R. J. Goldstone and R. Hamilton, '*Bosnia* v. *Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the former Yugoslavia', (2008) 21 LJIL 95, at 106.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

have questioned the wisdom of such deference.[22] Moreover, relatively few cases at the ICJ have presented such opportunities, and there has yet to be an ICJ judgment on the merits in which findings of fact by the International Criminal Court (ICC) have been deemed relevant.[23] This may change in the future, as the ICC Prosecutor is currently investigating three situations (*State of Palestine*, *Bangladesh/Myanmar*, *Ukraine*) that overlap with pending ICJ cases.[24]

2.2 Reliance on factual findings not obtained through a court-like process

In principle, the ICJ takes a less deferential approach to third-party fact-finding reports that are not the product of an adversarial, court-like process.[25] In practice, however, the Court has shown a similar openness to relying on these types of materials, especially when generated by other UN bodies. *Armed Activities* and *Bosnia* v. *Serbia* are again instructive.

The record in *Armed Activities* included reports by the UN Secretary General, the UN Mission in the DRC (MONUC), the Special Rapporteur of the Commission on Human Rights, and the UN Expert Panels mandated to monitor UN Security Council sanctions. Recalling its approach to evidence in the *Nicaragua* case,[26] the Court explained in *Armed Activities* that it would 'treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source' but would give weight to evidence that was unchallenged 'by impartial persons for the correctness of what it contains'.[27] It further stated that it would consider evidence contained in UN documents 'to the extent that they are of probative value and are corroborated, if necessary, by other credible sources'.[28] This indicated that the Court would not blindly accept the contents of a report simply because it was generated under UN auspices but left unclear when further corroboration was required or by what means it could be achieved.

Furthermore, the Court's application of these principles in *Armed Activities* left something to be desired. First, the Court found that a 'coincidence of reports from credible sources' convincingly established that Ugandan forces had committed 'massive human rights violations and grave breaches of international humanitarian law' in the DRC, including a failure to adequately protect civilians during hostilities, and that Ugandan forces also incited ethnic conflicts.[29] In making these broad findings, the Court sometimes noted that the UN reports it relied upon were corroborated by other sources (such as NGO reports), but it did not explain whether it had considered systematically how the UN reports had been compiled, so as to assess the credibility of their findings.[30] Nor was it clear whether UN materials and NGO reports were, in

[22]See the views collected in Devaney, *supra* note 7, at 113–15. See also Teitelbaum, *supra* note 15, at 152–7. These arguments find force in critical evaluations of the fact-finding capacities of international criminal tribunals. See N. A. Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010).

[23]The most relevant example may be the 2022 reparations judgment in *Armed Activities* (*Armed Activities on the Territory of the Congo (DRC v Uganda)*, Reparations, Judgment of 9 February 2022 [2022] ICJ Rep. 13) where the parties and the Court might have made better use of ICC decisions on reparations to determine the compensation to be paid by Uganda. See C. Rose, 'Evidentiary Challenges in the Litigation of War Reparations: *Armed Activities on the Territory of the Congo (DRC v. Uganda)*', 16 (1) (2025) JIDS (advance).

[24]International Criminal Court, Situations Under Investigation, available at www.icc-cpi.int/situations-under-investigations.

[25]See V. Koutroulis, 'The Prohibition of Use of Force in Arbitrations and Fact-Finding Reports', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015), 605 at 613 (noting a historical reluctance by international courts and tribunals to rely on inquiry body reports).

[26]See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 41, para. 64.

[27]See *Armed Activities*, *supra* note 13, at 201, para. 61.

[28]Ibid., at 239, para. 205.

[29]Ibid., at 239–241, paras. 207–209.

[30]Ibid., at 240–1, para. 209. However, the Court did note expressly that some UN reports relied upon by the DRC, including a MONUC report, were based on sources not deemed reliable. Ibid., at 225–6, para. 159. As Ruth Teitelbaum has pointed out, however, it was not clear that the flaws attributable to the MONUC report were not equally present in other UN reports to which the Court appeared to give weight. See Teitelbaum, *supra* note 15, at 147.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

essence, based on the same underlying sources and therefore not necessarily corroborative of each other.

Another set of claims alleged that Ugandan forces engaged in the illegal exploitation of natural resources in the DRC. Here, the Court determined that the materials before it – including the Porter Commission report and UN Expert Panel reports – furnished 'sufficient and convincing evidence' to decide the question and provided 'ample credible and persuasive evidence' of looting and exploitation that engaged the responsibility of Uganda, even if that evidence did not establish a government policy.[31] The judgment left unclear whether the Court was crediting information in the UN expert panel reports in its own right – despite recognized problems with some findings – or was only using such reports to corroborate the Porter Commission report.[32] The cumulative weight of the evidence may have reasonably supported the Court's overall assessment, even if reports contained inaccuracies. Nonetheless, one commentator castigated the Court for what she described as the 'total delegation' of its fact-finding responsibility.[33]

In *Bosnia* v. *Serbia*, the ICJ made use of UN reports alongside the above-mentioned material from the ICTY. This included contemporaneous reports that the UN Commission of Experts established pursuant to Security Council Resolution 780 (1992) produced during the events in question.[34] However, the Court relied more extensively on *The Fall of Srebrenica*, a 1999 report produced retrospectively by the UN Secretary-General at the behest of the General Assembly.[35] The Court emphasized that the 'care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation' lent 'considerable authority' to the document, which gave 'substantial assistance' to the Court.[36] The Court also relied on other UN reports, including the Commission of Experts reports, to establish when specific towns or villages came under attack, the types of weaponry used, fatality estimates, and prisoner conditions.[37] The Court took a similar approach in *Croatia* v. *Serbia* where it identified a specific UN Special Rapporteur report as deserving 'evidential weight' because of the 'independent status of its author' and because it was 'prepared at the request of organs of the United Nations, for purposes of the exercise of their functions'.[38] That report provided the basis for the Court's determination that Croatian armed forces had committed acts of killing constituting the *actus reus* of genocide against Serb civilians.[39]

[31]See *Armed Activities*, *supra* note 13, at 249, para. 237, and at 251, paras. 242–3.

[32]It was not entirely clear how the Court resolved certain problems (or errors) in the UN Expert Panel reports, some of which the DRC conceded. See Teitelbaum, *supra* note 15, at 146.

[33]S. Halink, 'All Things Considered: How the International Court of Justice Delegated Its Fact-Assessment to the United Nations in the *Armed Activities* Case', 40 (2007–2008) *NYU Journal of International Law & Politics* 13, at 26. See also Teitelbaum, *supra* note 15, at 146–7.

[34]M. C. Bassiouni, 'The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', (1994) 88 AJIL 784.

[35]UNGA, Report of the Secretary-General pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, UN Doc. A/54/549 (15 November 1999).

[36]See *Bosnia v. Serbia*, *supra* note 11, at 137, para. 230.

[37]Ibid., at 154, para. 276.

[38]See *Croatia v. Serbia*, *supra* note 20, at 133, para. 459.

[39]Ibid., at 144, para. 493. By comparison, the ICTY approached third-party fact-finding reports with considerable caution and typically used their findings 'to corroborate other more direct evidence presented at trial', rather than relying on the reports in their own right to establish key facts. D. Re, 'Fact-Finding in the Former Yugoslavia: What the Courts Did', in M. Bergsmo (ed.), *Quality Control in Fact-Finding* (2013), 279 at 280; see also ibid., at 294–301. This usually meant assessing findings on a 'case-by-case basis' to determine whether it was 'sufficiently sourced and whether it reflected direct observations or (single or multiple) hearsay'. *Prosecutor v. Gotovina*, Judgment of 15 April 2011, Case No. IT-06-90-T, T. Ch., para. 39.

2.3 Summary of the ICJ's standard approach

In sum, the ICJ has indicated a presumptive willingness to credit findings of fact generated by a formal, court-like process that includes the cross-examination of witnesses and allows for evidence to be tested in an adversarial setting. Most reports generated by UN fact-finding bodies or UN special rapporteurs do not meet that standard. Nonetheless, the Court has also stated that when UN reports are produced by individuals having an independent status and are based on comprehensive sources, and when they are prepared at the request of UN organs in the course of the exercise of their functions, they are more likely to be credible, probative, and entitled to weight than when those elements are lacking.[40] These factors potentially cover a broad swathe of UN fact-finding bodies, but the assumptions that underlie the Court's position are open to question:

> The factors the Court identifies do not necessarily assure methodological rigor or evenhandedness, and the Court can hardly fail to note that the widespread establishment of ad hoc fact-finding bodies over the past quarter century has led to greater scrutiny of their methods and methodologies. Commentators have pointed to the risks of flawed witness accounts, insufficient study of documentary evidence, or a lack of relevant expertise, especially with regard to military operations. Findings might be based on erroneous information that has been widely disseminated, thus presenting a false picture of corroboration, or the standard of proof adopted by a fact-finding body may differ from that which an international court would require. Moreover, the work of many fact-finding bodies is hindered by their lack of access to the relevant territory when states ... refuse to co-operate.[41]

These considerations suggest reasons for the Court to revisit its approach to engaging with third-party findings of fact, including by: (i) paying greater attention to the methodology and methods of the fact-finder; (ii) examining the underlying evidence collected (such as satellite imagery, forensic reports, witness statements, or official documents); or (iii) calling individuals involved in the preparation of fact-finding reports as witnesses who can be questioned by the parties and the judges.[42] This last possibility could help to avoid 'ill-founded over-reliance' on a report or, conversely, a scenario in which relevant evidence is not given due weight because details about the fact-finding body's methodology are missing or have been called into question and left unaddressed.[43] Recent practice does not suggest a move by the Court in this direction, but several pending cases may bring these issues into sharper relief.

3. Recent developments

In light of the evidentiary standards the ICJ has articulated, Section 3 considers the application of those standards in recent practice. It first examines recent requests for provisional measures, where the 'risk-assessment' nature of the procedure and the fact that findings are without prejudice to the merits point to an even greater willingness on the Court's part to credit third-party fact-finding. It then considers the significance of third-party fact-finding reports in the *Ukraine* v. *Russia* case decided on the merits in 2024.

[40]The Court's pronouncements leave unclear whether NGO reports are presumptively entitled to less weight (or require a more searching review) than reports from the UN or other international organizations. See also Section 3.1.2, *infra*.

[41]See Becker, *supra* note 12. See also C. Van den Wyngaert, 'International Criminal Courts as Fact (and Truth) Finders in Post-Conflict Societies: Can Disparities with Ordinary International Court be Avoided?', (2006) 100 *ASIL Proceedings* 6 (criticizing the ICJ for not subjecting UN reports to a higher level of scrutiny). For a contrary view: K. Del Mar, 'Weight of Evidence Generated through Intra-Institutional Fact-Finding before the International Court of Justice', (2011) 2 JIDS 393 (arguing that the ICJ should give *prima facie* weight to findings of fact made by UN bodies).

[42]See also text accompanying notes 140–70, *infra*.

[43]See Becker, *supra* note 12; see Teitelbaum, *supra* note 15, at 152.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

3.1 Third-party facts and provisional measures

Third-party fact-finding reports can play a significant role in requests for the indication of provisional measures. When inquiry bodies document especially grave misconduct, such as violations of human rights or international humanitarian law on a massive scale, they can play a critical function in convincing states to initiate ICJ proceedings in the first place, especially if applicant states are not directly injured and instead seek to enforce a collective interest.[44] Such reports may provide the bulk of the facts on which an applicant bases its claims. While directly injured states also make use of fact-finding reports to support their legal claims, the need to rely on such reports is especially acute in the case of non-injured states that may lack first-hand information.

On a request for provisional measures, the Court applies a multi-part test to determine whether the indication of provisional measures is warranted. That test comprises *prima facie* jurisdiction over the dispute, the plausibility of the rights for which protection is sought, a link between the measures requested and the protection of such rights, and the existence of an urgent risk of irreparable prejudice to those rights. At the provisional measures phase, the Court does not make definitive findings of fact. However, in the application of its multi-part test, the Court will frequently consider factual evidence, primarily with respect to whether the applicant has established a risk of imminent and irreparable harm. In practice, the Court also sometimes refers to factual evidence under the heading of plausibility; this has contributed to the impression that while the Court refers formally to the plausibility of the *rights* invoked by the applicant, its focus sometimes appears to be on whether a party's *claims* are at least plausible.[45]

A survey of recent provisional measures practice demonstrates that parties frequently support their requests for interim relief by asking the Court to give weight to third-party fact-finding reports. Furthermore, the Court very often does so, with little express reference – at least in its orders – to the underlying indicia of reliability and probative value described above.

3.1.1 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)

In November 2019, The Gambia initiated proceedings alleging violations of the 1948 Genocide Convention by Myanmar based on severe ill-treatment of the Rohingya ethnic minority. It simultaneously requested provisional measures aimed at protecting the remaining Rohingya in Myanmar from future acts of genocidal violence. In January 2020, the Court referenced third-party fact-finding reports at several points in finding that the requirements to indicate provisional measures were met.[46] First, when discussing the plausibility of the rights invoked by The Gambia, the Court referred to the reports of the Independent International Fact-Finding Mission on Myanmar (the IIFFMM) established in 2017 by the UN Human Rights Council, including its conclusions on genocidal intent.[47] The Court also referred to UN General Assembly resolution 73/264, which contained assertions of fact and law based on the IIFFMM reports.[48] Secondly, the Court relied upon the IIFFMM reports to establish the imminent risk of irreparable prejudice to

[44]Inquiry body reports can also be key tools in the hands of civil society actors that lobby states to take such action, especially when a state has not suffered a direct injury and may need to be persuaded that adjudication is merited. See M. A. Becker, 'Pay No Attention to that Man Behind the Curtain: The Role of Civil Society and Other Actors in Decisions to Litigate at the International Court of Justice', (2023) 26 *Max Planck Yearbook of United Nations Law* 90, at 97–103.

[45]See M. Lando, 'Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice', (2018) 31 LJIL 641, 648–53.

[46]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020 [2020] ICJ Rep. 3, at 28, para. 76.

[47]Ibid., at 22, para. 55. See HRC, Res. 34/22, Situation of Human Rights in Myanmar, UN Doc. A/HRC/Res/34/22 (3 April 2017), at paras. 11–13.

[48]See *The Gambia v. Myanmar* (Provisional Measures), *supra* note 46, at 21–2, para. 54.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

the rights at issue. Noting the acts of violence documented by those reports, the Court found that 'the Rohingya in Myanmar remain extremely vulnerable'.[49] It further noted the IIFFMM's view that the Rohingya in Myanmar faced a 'serious risk of genocide'.[50]

In the oral proceedings, Myanmar asked the Court to refrain from intervening in view of the ongoing work of a different inquiry body that Myanmar had established in July 2018: the Independent Commission of Enquiry (the ICOE).[51] The day before the ICJ handed down its decision, the ICOE released an executive summary of its report which stated that it had found evidence of war crimes, but not genocide.[52] Given the timing, it was not surprising that the ICJ did not address the ICOE's findings in the 23 January Order. Nonetheless, one might speculate that the Court would not have viewed a report by the ICOE (a fact-finding body created by the state under scrutiny) as entitled to the same presumptive weight that it was willing to extend to the IIFFMM reports (i.e., reports that appeared to have been prepared with care by independent experts at the request of a UN body in the exercise of its functions), at least at the provisional measures stage.[53] The relative value of the distinct fact-finding exercises may feature at the merits stage.

3.1.2 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)

The longstanding territorial dispute between Armenia and Azerbaijan over Nagorno-Karabakh collapsed into armed conflict in September 2020. Each state initiated ICJ cases based on alleged violations of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), with both sides claiming ethnic discrimination in connection with the renewed hostilities. By the end of 2024, Armenia had submitted five requests to the Court for new or modified provisional measures; Azerbaijan had done so twice.

Some of these requests relied extensively on fact-finding reports. For example, in its ruling on Armenia's first request for the indication of provisional measures, the ICJ referred to a resolution by the Parliamentary Assembly of the Council of Europe that was based on information from 'reputable international NGOs and a wealth of information from different sources', as well as a joint statement by UN human rights experts issued by the UN Office of the High Commissioner for Human Rights (OHCHR).[54] In light of these materials, the Court found a real and imminent risk of irreparable prejudice.[55]

The Court did not refer to any third-party fact-finding reports when it rejected Armenia's request in October 2022 for a modification of the existing provisional measures based on detention conditions.[56] However, in its ruling on Armenia's next request in December 2022, which

[49]Ibid., at 26, paras. 71–2.

[50]Ibid., at 26, para. 72.

[51]See *The Gambia v. Myanmar*, *supra* note 46, CR 2019/19, at 16, paras. 17–18 (Aung San Suu Kyi) and at 70, para. 14 (Okowa). The underlying suggestion was that the existence of such an initiative was 'inconsistent with it allegedly harbouring genocidal intent'. See *The Gambia v. Myanmar* (Provisional Measures), *supra* note 46, at 25, para. 68.

[52]Office of the Independent Commission of Enquiry, '*Press Release*', 20 January 2020, available at www.icoe-myanmar.org/icoe-pr-final-report, archived at perma.cc/VCQ9-GQG9.

[53]In addition, unlike the Porter Commission in *Armed Activities* (see text at notes 14–15, *supra*), the ICOE did not operate with court-like procedures. The IIFFMM was highly critical of the ICOE in its own report. Human Rights Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/42/CRP.5 (16 September 2019), para. 231.

[54]*Application of the International Convention on the Elimination of All Form of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, Order of 7 December 2021, [2021] ICJ Rep. 361, at 389–90, paras. 85–7.

[55]Ibid., at 390, para. 88.

[56]*Application of the International Convention on the Elimination of All Form of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, Order of 12 October 2022, [2022] ICJ Rep. 578.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

concerned Azerbaijan's alleged blockade of the Lachin Corridor, the Court noted that the 'information available to it' established that disruption on the Lachin Corridor had impeded the transport of Armenian nationals in need of urgent medical care and the transport of essential goods into Nagorno-Karabakh.[57] Armenia's submissions on these points drew upon news sources and domestic human rights bodies, not international fact-finding bodies, and the Court did not address why these sources were entitled to weight.[58] In July 2023, the Court denied a follow-up request from Armenia relating to the Lachin Corridor, but the Court did indicate additional provisional measures in November 2023 on Armenia's fifth request, which followed a new military offensive by Azerbaijan in September 2023. In requiring Azerbaijan to facilitate the free movement of people to and from the disputed region, the Court referred to UN reports regarding the mass displacement of ethnic Armenians from the region since September 2023, but did not engage with any of the other information submitted to it.[59]

On Azerbaijan's requests for provisional measures, the Court directed Armenia in its Order of 7 December 2021 to prevent the incitement and promotion of racial hatred.[60] That outcome was informed by the Court's reliance on 'the information presented to it by the Parties' with respect to alleged violations of the rights invoked by Azerbaijan.[61] This appeared to comprise news reports, materials produced by domestic human rights bodies, and at least one report by Human Rights Watch.[62] In its application initiating proceedings, Azerbaijan also referred to CERD Committee reports.[63] In 2023, the Court rejected Azerbaijan's second request for provisional measures, concerning alleged landmine activity by Armenia, on legal grounds and did not engage with the facts.[64]

Taken as a whole, the Court's practice in these two cases provided little guidance about what sources of evidence were relied upon or why certain examples of third-party fact finding were deemed of sufficient quality and credibility to have value. For example, it was difficult to ascertain to what extent Human Rights Watch reports were given significant weight and, if so, whether they were viewed by the Court as essentially carrying the same weight as a report from a UN-mandated fact-finding body.

3.1.3 Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russia)

Immediately following Russia's full-scale invasion of Ukraine on 24 February 2022, Ukraine instituted ICJ proceedings which alleged that Russia had falsely accused Ukraine of committing genocide as a pretext for the 'special military operation'.[65] Ukraine also requested provisional measures. In finding an urgent risk of irreparable prejudice to the rights invoked by Ukraine under the 1948 Genocide Convention (i.e., the right 'not to be subjected to military operations . . . for

[57] *Application of the International Convention on the Elimination of All Form of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, Order of 22 February 2023, [2023] ICJ Rep. 14, at 27, para. 54.

[58] *Application of the International Convention on the Elimination of All Form of Racial Discrimination (Armenia v. Azerbaijan)*, Request by the Republic of Armenia for the Indication of Provisional Measures, 27 December 2022.

[59] *Application of the International Convention on the Elimination of All Form of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, Order of 17 November 2023, [2023] ICJ Rep. 619, para. 56.

[60] *Application of the International Convention on the Elimination of All Form of Racial Discrimination (Azerbaijan v. Armenia)*, Provisional Measures, Order of 7 December 2021, [2021] ICJ Rep. 405, at 430–1, para. 76(1).

[61] Ibid., at 424–5, para. 52 and at 429, para. 67.

[62] *Application of the International Convention on the Elimination of All Form of Racial Discrimination* (Azerbaijan v. Armenia), Republic of Azerbaijan, Request for the Indication of Provisional Measures of Protection, 23 September 2021, at para. 28.

[63] *Application of the International Convention on the Elimination of All Form of Racial Discrimination* (Azerbaijan v. Armenia), Application Instituting Proceedings, 23 September 2021, at para. 93.

[64] *Application of the International Convention on the Elimination of All Form of Racial Discrimination* (Azerbaijan v. Armenia), Provisional Measures, Order of 22 February 2023, [2023] ICJ Rep. 36, at 42–3, paras. 22–4.

[65] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russia), Provisional Measures, Order of 16 March 2022, [2022] ICJ Rep. 211, at 219, paras. 30–1.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

the purpose of preventing and punishing an alleged genocide in the territory of Ukraine'), the Court referred to a UN General Assembly resolution of 2 March 2022 that expressed 'grave concern at reports of attacks on civilian facilities such as residences, schools and hospitals, and of civilian casualties'.[66] The Court did not identify or engage with such reports (it was not clear that the Court could have known exactly what the language in GA Resolution ES-11/1 referenced) in ordering Russia to immediately suspend the military operation.[67]

Ukraine's Application made use of third-party fact-finding reports, including from the OHCHR Human Rights Monitoring Mission in Ukraine, to rebut Russia's allegations of genocide in Eastern Ukraine. Specifically, Ukraine pointed to the absence of any reference in such reports to evidence of genocide.[68] These materials were not strictly relevant to the provisional measures request. However, Ukraine can be expected to reiterate the value of such reports at the merits phase, which the Court has since limited to Ukraine's claim that it was not in breach of its own obligations under the Genocide Convention.[69] The OHCHR reports may therefore play a role in Ukraine's efforts to, in effect, prove a negative.[70] Ukraine may also seek to use more recent third-party fact-finding reports to establish that Russia has violated the provisional measures indicated in March 2022, perhaps with a view to obtaining reparations.[71] It remains uncertain, however, whether the provisional measures were 'invalidated or voided' by the decision on jurisdiction.[72]

3.1.4 Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syria)

In June 2023, Canada and the Netherlands jointly instituted proceedings against Syria concerning alleged violations of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. They simultaneously requested provisional measures, including those aimed at ameliorating conditions of detention in Syria and requiring the disclosure of burial sites.[73] In this connection, the applicants directed the ICJ to the substantial body of fact-finding work by the Independent International Commission of Inquiry on the Syrian Arab Republic, which had operated continuously since its establishment by the Human Rights Council in 2011.[74] In its decision, the Court gave substantial weight to information from several of the Commission of Inquiry's reports, including its 11 March 2021 report that described the use of

[66]Ibid., at 228, para. 76, referring to GA Res. ES-11/1, Aggression Against Ukraine, UN Doc. A/RES/ES-11/1 (2 March 2022).

[67]Ibid., at 230–1, para. 86(1).

[68]*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russia*)*, Application Instituting Proceedings, 27 February 2022, at paras. 21–22. In the proceedings, Russia asserted that its actions were justified by self-defense rather than the obligation to prevent genocide; Ukraine pointed to a 24 February 2022 speech by President Vladimir Putin that suggested otherwise. Ibid., at para. 20.

[69]In its February 2024 judgment on preliminary objections, the Court found that it lacked jurisdiction over Ukraine's claims focused on alleged violations of the Genocide Convention based on Russia's bad faith invocation of the duty to prevent. See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russia*)*, Preliminary Objections, Judgment of 2 February 2024, para. 149 (not yet published); see also I. Marchuk and A. Wanigasuriya, 'The Curious Fate of the False Claim of Genocide: On the ICJ's Preliminary Objections Judgment in Ukraine v. Russia & Beyond', *Verfassungsblog*, 24 February 2024, available at verfassungsblog.de/the-curious-fate-of-the-false-claim-of-genocide/.

[70]Ukraine may seek to emphasize the absence of references to genocide in third-party reports to support the proposition that Russia, rather than Ukraine, should bear the primary burden of proof on Ukraine's 'reverse compliance' submission. See Marchuk and Wanigasuriya, ibid.

[71]Ibid.

[72]M. Alexianu, 'Ukraine's ICJ Provisional Measures: A Narrow Path to Remedies', *EJIL: Talk!*, 20 February 2024, available at www.ejiltalk.org/ukraines-icj-provisional-measures-a-narrow-path-to-remedies/.

[73]*Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syria)*, Provisional Measures, Order of 16 November 2023, [2023] ICJ Rep. 587, at paras. 1–5.

[74]See HRC, Res. S-17/1, Situation of Human Rights in the Syrian Arab Republic, UN Doc. A/HRC/S-17/2 (18 October 2011), at paras. 13–17. The Commission's mandate has been renewed regularly.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

'arbitrary detention, torture and ill-treatment, including through sexual violence' as 'a hallmark of the conflict'.[75] The Court further noted that the Commission of Inquiry had detailed repeatedly the 'systematic' use of torture in Syrian detention facilities and went on to quote directly from three further reports.[76] Based on this material, the Court found the requirement of a real and imminent risk of irreparable prejudice met.[77] As in other provisional measures orders, the Court did not discuss the inquiry body's methods or explain why its views were entitled to considerable weight. Syria's non-appearance in the proceedings was an additional factor. This meant that Syria did not challenge the evidence presented or identify any potential weaknesses in the Commission of Inquiry's reports, including the fact that its work was carried out without access to Syrian territory.

3.1.5 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)

In December 2023, South Africa instituted proceedings against Israel under the 1948 Genocide Convention in response to Israel's military campaign in Gaza following attacks by Hamas and other armed groups on 7 October 2023. South Africa simultaneously requested the indication of provisional measures, and, over the next several months, made two additional formal requests for the indication of new or modified provisional measures.[78]

In the Court's January 2024 ruling on South Africa's first request, the Court referred to a range of UN materials in setting out facts under the heading of plausibility.[79] This included daily spot reports by the UN Office for the Coordination of Humanitarian Affairs (OCHA), World Health Organization (WHO) reports, and statements by UN special procedures mandate holders, the CERD Committee, and UN officials responsible for the on-the-ground work of UN bodies in Gaza, as well as statements by Israeli officials.[80] On the urgent risk of irreparable prejudice to the rights of the Palestinians in Gaza, the Court cited statements by the UN Secretary-General to the UN Security Council and additional statements by the Commissioner-General of the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).[81] Based on these materials, the Court described the civilian population in Gaza as 'extremely vulnerable' and 'the catastrophic humanitarian situation' in Gaza at 'serious risk' of further deterioration – thus providing the basis for the indication of provisional measures.[82]

South Africa called upon the Court again in March 2024 and May 2024 to indicate additional or modified provisional measures. South Africa's March 2024 request focused on the allegation that a famine was in progress in Gaza due to Israel's continuing military operation. In its order, the Court relied extensively on third-party reports, mainly from UN-affiliated bodies (including the WHO, the World Food Programme (WFP), the Food and Agriculture Organization (FAO), and the United Nations Children's Fund (UNICEF)), as well as daily spot reports from OCHA, to find a change in the situation within the meaning of Article 76 of the Rules of Court.[83] On whether those changed circumstances created a new imminent risk of irreparable harm, the Court also

[75] See *Canada and the Netherlands v. Syria*, *supra* note 73, at para. 72.

[76] Ibid., at paras. 72–4.

[77] Ibid., at para. 75.

[78] For an assessment of the Court's orders, see M. A. Becker, 'Crisis in Gaza: *South Africa v Israel* at the International Court of Justice (or the Unbearable Lightness of Provisional Measures)', 25 (2025) *Melbourne Journal of International Law* (advance).

[79] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures, Order of 26 January 2024, [2024] ICJ Rep. 3.

[80] Ibid., at paras. 46–53.

[81] Ibid., at paras. 67–9.

[82] Ibid., at paras. 70, 72.

[83] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures, Order of 28 March 2024, at paras. 19–22 (not yet published).

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

relied on assessments by OCHA, WFP, and FAO and UN officials.[84] It further noted declarations from organizations involved in the delivery of humanitarian assistance into Gaza that it would only be possible to address the humanitarian crisis if military operations were suspended.[85] Taken together, these reports and statements provided the basis for the Court's finding that the situation presented a further risk of imminent irreparable prejudice to the rights at issue.[86]

Finally, in May 2024, the Court issued a third order indicating provisional measures against Israel in response to a new request focused on Israel's military offensive in Rafah, the area in the south of Gaza that had come to serve as a place of refuge for large numbers of displaced Palestinians from elsewhere in Gaza.[87] Again, the Court relied extensively on reports from OCHA, UNICEF, and WFP, as well as statements from UNRWA officials.[88] The Court also had the benefit of reports submitted confidentially to it by Israel in response to the Court's Order of 26 January 2024, as well as South Africa's response to Israel's first report.[89] Notably, Israel urged the Court during the oral hearing not to accept at face value the contents of the UN reports submitted to it. Invoking *Armed Activities*, Israel described South Africa's 'heavy reliance' on UN reports as flawed 'when these cannot be said to constitute sufficient evidence of a reliable quality', especially when such materials 'have been prepared without access to relevant and necessary information, including that held by Israel, and often without any attempt to access such information'.[90] Asserting that many of the reports invoked by South Africa relied on 'Hamas sources or on those subject to Hamas intimidation', Israel emphasized that such reports 'should not be accepted automatically, especially in a complex combat reality'.[91] The Court did not address those points in finding that Israel's actions had created a further risk of irreparable harm that demanded new provisional measures – in this case, that Israel immediately halt its military offensive in Rafah.[92] If the case proceeds to the merits, it is all but certain that third-party fact-finding reports will play a major role, including reports published subsequent to the May 2024 order.[93]

3.1.6 Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)

In connection with the conflict in Gaza, Nicaragua instituted proceedings against Germany in March 2024 alleging that Germany's material support for Israel was in violation of the 1948 Genocide Convention and international humanitarian law. Nicaragua asked the Court to indicate provisional measures aimed at requiring Germany to suspend aid to Israel and to reinstate

[84]Ibid., at paras. 31–2, 34–5.

[85]Ibid., at para. 36.

[86]Ibid., at para. 40.

[87]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures, Order of 24 May 2024 (not yet published).

[88]Ibid., paras. 44–6.

[89]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, CR 2024/28, at 14, para. 38 (Noam).

[90]Ibid., at 18, paras. 64, 66 (Noam).

[91]Ibid., at 18, para. 65 (Noam).

[92]See *South Africa v. Israel*, Order of 24 May 2024, *supra* note 87, at para. 57(2). On confusion surrounding the Court's order, see A. Taub, 'What the ICJ Ruling Actually Means for Israel's Offensive in Rafah', *New York Times*, 30 May 2004; A. Haque, 'Halt: The International Court of Justice and the Rafah Offensive', *Just Security*, 24 May 2024, available at www.justsecurity.org/96123/icj-gaza-israeli-operations/.

[93]For example: Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN Doc. A/HRC/56/26 (11 June 2024) (examining alleged violations of international human rights law and international humanitarian law and possible international crimes committed by all parties between 7 October 2023 and 31 December 2023); Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN Doc. A/79/232 (11 September 2024) (examining treatment of hostages and detainees and attacks on medical facilities and personnel from 7 October 2023 to August 2024).

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

Germany's funding of UNRWA.[94] While Nicaragua's Application contained references to reports by OCHA and UN special rapporteurs (directed at documenting the humanitarian situation in Gaza), the factual assertions relating to Germany's alleged complicity in violations of IHL and the Genocide Convention drew largely upon news sources, rather than UN reports. Ultimately, the Court credited Germany's assertions at the oral hearing that there had been a steep decrease in arms exports from Germany to Israel following the beginning of the Israeli military operation and that German law contained adequate safeguards to prevent the use of military aid to commit violations of international law.[95] One can only speculate whether Nicaragua's position would have been bolstered had it been able to produce relevant materials by a UN fact-finding body that were specific to German policies and practice and challenged Germany's account.

3.1.7 Conclusion on third-party fact-finding reports in provisional measures orders

In sum, recent practice suggests that the ICJ generally has few concerns at the provisional measures phase about relying on some types of third-party evidence – namely, materials generated by UN bodies or statements by UN officials with operational knowledge and access to institutional resources (including the day-to-day fact-finding work that is part of regular activities). However, in some cases, the ICJ's willingness to accept and credit third-party fact-finding also extends to NGO reports, and in other cases, the Court has appeared to accept, without question, decisions by political bodies (namely, the UN General Assembly) to assert or endorse certain facts on the basis of third-party fact-finding. All of this can be explained – and, arguably, justified – by the fact that the Court is likely to err on the side of caution when assessing risk in the face of a request for provisional measures, especially when there is alleged to be a serious threat to human life.[96]

The Court's approach at the provisional measures phase is also broadly consistent with its willingness at the merits phase to treat UN reports as deserving 'evidential weight' based on the presumed independence and competence of actors within the UN system. However, as noted above, the Court's position in *Armed Activities* was that UN documents merit consideration to the extent they have 'probative value' and are 'corroborated, if necessary, by other credible sources'.[97] In the provisional measures orders summarized above, the Court did not address whether the information in the UN documents relied upon was corroborated by other credible sources. Nor did the Court address potential criticisms of those evidentiary sources (such as those raised by Israel in response to South Africa's May 2024 request), even if only to explain why such criticisms were not persuasive. The Court's approach to third-party findings of fact at the provisional measures phase can be summarized as follows: Accept the facts now, ask questions later (or: better to be safe than sorry). There are risks attendant to this practice, however.

First, although decisions by the ICJ at the provisional measures phase are not definitive and are without prejudice to the merits of the case, the Court's treatment of the facts at the provisional measures phase may have an outsize influence on how parties, other states, or the broader public understand the conflict.[98] They may also influence how other international courts and tribunals, if the dispute is litigated in multiple forums, understand the facts. Rather than approaching a set of complex factual allegations with a clean slate, another court or tribunal may approach that evidence against the backdrop of how the ICJ has already determined – albeit provisionally – certain facts. It may then need to decide not only whether to credit an inquiry body's report, but

[94]*Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Provisional Measures, Order of 30 April 2024, at para. 5 (not yet published).

[95]Ibid., at paras. 16–20.

[96]This resonates with the distinction between international law's 'action-guiding' and 'accountability' functions, with provisional measures focused on the former. T. Dannenbaum and J. Dill, 'International Law in Gaza: Belligerent Intent and Provisional Measures', (2024) 118 AJIL 659, 678–82.

[97]See text accompanying note 28, *supra*.

[98]See C. Miles, *Provisional Measures Before International Courts and Tribunals* (2017), at 455–8.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

also whether the ICJ's approach to that material is a relevant consideration. Other courts or tribunals might defer to the ICJ's approach, whether or not deference is warranted.

Secondly, the ICJ's willingness to rely on third-party findings of fact at the provisional measures phase increases the possibility that such reliance will later prove misplaced. Facts established by an inquiry body – perhaps based on incomplete information – may later turn out to be incorrect or misleading. If discrepancies come to light, this may invite attacks against the Court's competence and credibility. One could also envisage a scenario in which confirmation bias on the part of some ICJ judges might result in a reluctance to concede that an earlier decision was ill-founded or influence what facts are credited going forward.[99] Moreover, parties, commentators, and the broader public may turn out to have had warped expectations about a party's likelihood of success on the merits if the Court has credited facts at the provisional measures phase that were later deemed unreliable.

Ultimately, the tendency to apply a more liberal standard to evidence at the provisional measures stage reflects a trade-off. When faced with a situation that reasonably appears to present an urgent risk of irreparable harm to plausible rights, the Court cannot necessarily be expected to subject third-party fact-finding reports to the same level of scrutiny that can be applied at the merits phase. Moreover, if the Court declines to indicate provisional measures where there are reasonable grounds to do so, even if some of the evidence raises questions, the Court will also face legitimacy costs. At the same time, the Court should not ignore challenges to the credibility of the evidence it is being asked to rely upon, even when seeking to act quickly in a situation of real urgency. Even at the provisional measures stage, this could mean the Court referring specifically to an inquiry body's methodology to explain a willingness to credit its findings, placing greater emphasis on the fact that the Court's findings are without prejudice to the merits, or making greater use of rebuttable presumptions and adverse inferences.[100]

3.2 Case study: Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia)

The next question is whether there is a meaningful difference between the Court's propensity to credit third-party findings of fact at the provisional measure stage and its approach at the merits stage. With the benefit of a more complete evidentiary record and further opportunity for party argument, does the Court take a more demanding approach to the factual findings of third parties? As of mid-2025, none of the above cases involving provisional measures has yet reached the merits. However, a recent judgment in a different case between Ukraine and Russia, which also included a provisional measures order, suggests that the question should be answered in the negative, with certain caveats.

In January 2017, Ukraine instituted ICJ proceedings against Russia alleging violations of the 1999 International Convention for the Suppression of the Financing of Terrorism (ICSFT) and the CERD. The ICSFT claims concerned Russia's alleged support for pro-Russian separatists in Eastern Ukraine (including in connection with the downing of Flight MH17 in July 2014); the CERD claims concerned events in Crimea following its purported annexation by Russia in 2014. Upon the seisin of the Court, Ukraine also requested provisional measures. This provides a window into how the Court's approach to third-party evidence may differ between the provisional measures and merits phases.

[99]See V. Fikfak et al., 'Bias in International Law', (2022) 23 *German Law Journal* 281.

[100]See also text accompany notes 140–70, *infra*.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

3.2.1 Ukraine v. Russia: Provisional measures

Ukraine sought provisional measures relating to its claims under both treaties but succeeded only with respect to its CERD claims.[101] Ukraine's argument was that it had a right under ICSFT Article 18 to Russia's cooperation in preventing terrorism, including by Russia not providing funds to separatists in Eastern Ukraine to be used to carry out acts of terrorism.[102] Ukraine contended that its claims – not merely its rights under the treaty – were 'far more than simply "plausible"' and, in this regard, directed the Court to the alleged acts of terrorism documented in reports by the Special Monitoring Mission of the Organisation for Security and Co-operation in Europe (OSCE).[103] For its part, Russia referred the Court to reports by the OHCHR, the OSCE, and the International Committee of the Red Cross that characterized the acts complained of by Ukraine as violations of international humanitarian law, but did not describe such acts as terrorism.[104] This was intended to show that the ICSFT did not apply.

The Court's ruling was notable for being the only decision to date in which the Court has rejected a request for provisional measures based on a finding that the rights for which protection was sought were not plausible.[105] The Court concluded that Ukraine had not provided a sufficient basis to find the elements of intention or knowledge set out in ICSFT Article 2, which were linked to the obligation of co-operation under Article 18.[106] The Court did not explain whether this conclusion turned on a decision not to credit information in the reports invoked by Ukraine or rather that neither knowledge nor intent could be inferred from the evidence.

The Court's approach to Ukraine's requests concerning the CERD followed a more familiar pattern. Ukraine invoked OHCHR and OSCE reports that detailed 'intimidatory tactics used . . . to silence political expression by the Crimean Tatar community' and the 'rapid decline of Ukrainian-language instruction in Crimea'.[107] For its part, Russia directed the Court to an OHCHR report that had *not* criticized certain acts complained of by Ukraine and to the fact that the CERD Committee had *not* triggered 'the urgent action procedure at its disposal'.[108] In its ruling, the Court took note of the OHCHR report's finding that actions taken against the *Meijlis*, the highest executive representative body of Crimean Tatars, amounted to a deprivation of rights, as well as the OSCE report on the decline in Ukrainian language instruction. On this basis, the Court found the requirements for provisional measures met.[109]

[101] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia),* Provisional Measures, Order of 19 April 2017, [2017] ICJ Rep. 104, at 140–1, para. 106.

[102] Ibid., at 127, para. 66.

[103] Ibid., at 127, para. 68.

[104] Ibid., at 128, para. 70. See also Teitelbaum, *supra* note 15, at 151–2 (suggesting that conclusions based on a report's omissions are problematic if there is no clear reason why a report would have considered a (legal) issue).

[105] See *Ukraine v. Russia* (Provisional Measures), *supra* note 101, at 131–2, para. 75. See I. Marchuk, 'Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v. Russia*)', (2017) 18 *Melbourne Journal of International Law* 436, at 448–50, 453.

[106] See *Ukraine v. Russia* (Provisional Measures), *supra* note 101, at 131–2, para. 75. This included the requirement under ICSFT Art. 2(b) that funds be provided with the knowledge or intention that they will be used to cause death or serious bodily injury for the purpose of intimidating a population or compelling a particular course of state action. Ibid., at 130, para. 73.

[107] Ibid., at 136, para. 91. Many of the reports relied upon by Ukraine at the ICJ also featured in the judgment of the European Court of Human Rights (ECtHR) in *Case of Ukraine v. Russia (re Crimea)*, Judgment of 25 June 2024, [2024] ECHR. That case also covered alleged ill-treatment targeting Crimean Tartars and ethnic Ukrainians in Crimea, but the title of jurisdiction did not restrict Ukraine's claims to discrimination based on ethnic origin. The ECtHR broadly affirmed that OHCHR reports and other third-party reports relied upon by Ukraine contained credible information but reiterated that 'it will reach its own conclusions, applying the relevant Convention standard of proof, by reference to the objective facts reported by these organizations rather than by adopting the conclusions they reached'. Ibid., at para. 988; see also paras. 1089, 1220.

[108] See *Ukraine v. Russia* (Provisional Measures), *supra* note 101, at 137, para. 94.

[109] Ibid., at 138, para. 98.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

In sum, the ICJ gave weight to OHCHR and OSCE reports at the provisional measures phase with respect to Ukraine's CERD claims, did not put stock in Russia's arguments relating to the omission of certain issues from other UN reports, and did not – apparently – find that any third-party findings of fact supported Ukraine's claims relating to intention or knowledge with respect to the ICSFT claims, including the requirement that predicate acts be carried out for the purpose of terrorism.

3.2.2 Ukraine v. Russia: Merits

Approximately six and a half years later, the ICJ handed down the judgment on the merits on 31 January 2024.[110] Ukraine prevailed on a narrow subset of issues, but most of its claims were rejected. Specifically, the Court found that Russia had breached its obligation under the ICSFT to investigate certain individuals allegedly involved in financing terrorism and that Russia had violated the CERD with respect to Ukrainian language instruction in Crimea. This was a 'sobering experience' for those who had expected (or hoped for) a result more favourable to Ukraine.[111]

The outcome on the ICSFT claims turned mainly on the Court's narrow interpretation of the term 'funds' in the treaty (a legal question),[112] rather than whether there was evidence that Russia had failed to investigate or prosecute individuals who had acted with the requisite knowledge or intention in connection with acts covered by Article 18 (a fact-based question).[113] The Court's exclusion of Ukraine's ICSFT claims relating to the supply of weapons and ammunition to pro-Russian separatists (because these were not 'funds') made the fact-finding reports by third parties (including the on-the-spot reports of the OSCE Special Monitoring Mission) largely irrelevant. This was therefore not a case of the Court failing to credit third-party facts so much as the Court adopting a legal interpretation that had a dramatic impact on what facts mattered.

The outcome on Ukraine's CERD claims hinged more squarely on the Court's view of the facts adduced by third parties – including whether the evidence demonstrated that discrimination against Crimean Tatars and ethnic Ukrainians was based on ethnic origin rather than political views and whether Russian measures amounted to discrimination against the Crimean Tatars based on a theory of disparate impact (i.e., that acts of physical violence disproportionately targeted Crimean Tatars and people of ethnic Ukrainian origin).[114] In examining that evidence, the Court reiterated the standard language from *Armed Activities* and the *Bosnia* v. *Serbia* and *Croatia* v. *Serbia* cases on the probative value of reports from official or independent bodies (as described above).[115]

The first issue concerned Ukraine's allegation that Russia had violated CERD Articles 2 and 6 by engaging directly in acts of physical violence in Crimea against Crimean Tatars and ethnic Ukrainians (including 'prominent activists'), by failing to prevent such violence by private persons, and by failing to investigate these incidents.[116] Ukraine supported these allegations with UN reports, including two OHCHR reports, alongside NGO reports and witness statements.[117] For its part, Russia noted that the UN reports did not assert that victims were targeted based on their ethnicity, but rather because of their political views – which was not an offence covered by

[110]See *Ukraine v. Russia* (Merits), *supra* note 8.

[111]I. Marchuk, 'Unfulfilled Promises of the ICJ Litigation for Ukraine: Analysis of the ICJ Judgment in *Ukraine v. Russia* (CERD and ICSFT)', *EJIL:Talk!*, 22 February 2024, available at www.ejiltalk.org/unfulfilled-promises-of-the-icj-litigation-for-ukraine-analysis-of-the-icj-judgment-in-ukraine-v-russia-cerd-and-icsft/.

[112]See *Ukraine v. Russia* (Merits), *supra* note 8, at para. 53.

[113]The Court did note that it lacked 'sufficient evidence' to characterize the relevant armed groups as 'notorious' for committing terrorist acts, which was relevant to establishing whether a funder would have had the requisite knowledge about how funds were to be used. Ibid., at para. 76.

[114]See Marchuk, *supra* note 111.

[115]See *Ukraine v. Russia* (Merits), *supra* note 8, at para. 175.

[116]Ibid., at paras. 202, 204.

[117]Ibid., at paras. 205–6.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

the CERD.[118] As for Ukraine's argument that the OHCHR reports helped to establish a 'pattern of physical violence' against certain ethnic groups, Russia contended that the reports were 'based on inadequate methodologies'.[119]

In the Court's view, the OHCHR reports supported Ukraine's general allegations relating to the 'ill-treatment of abducted persons in Crimea' and that 'several targeted people were pro-Ukrainian activists'.[120] However, the Court also credited the emphasis in those reports on the fact that such individuals were targeted for their political views, not their ethnicity, as such. Since the Court's position was that 'political identity' was not relevant to 'ethnic origin' under the CERD, such incidents could not be equated with discrimination based on ethnic origin.[121]

The Court was also unconvinced by Ukraine's evidence that Crimean Tatars and ethnic Ukrainians disproportionately suffered acts of violence. Affirming its willingness to ascribe 'particular weight to reports by international organizations that are specifically mandated to monitor the situation in a given area', the Court nonetheless suggested that greater caution was required in this case because OHCHR findings were based on the reports of a UN-mandated monitoring body that lacked access to Crimea.[122] However, the Court noted that those same reports also pointed to acts of violence against persons of Russian and Central Asian ethnic origin, which seemed to carry weight for the Court.[123] Ultimately, the Court found that political opposition to Russia, rather than ethnic origin, explained any 'disparate adverse effect' suffered by Crimean Tatars and ethnic Ukrainians and undermined the CERD claim.[124]

A similar pattern played out with respect to other CERD issues, including Ukraine's allegation that Crimean Tatars were singled out for arbitrary searches and detentions.[125] On this point, the Court 'attributed considerable weight to reports of several UN organs and monitoring bodies', as well as a Council of Europe report and a UN General Assembly resolution that referred to such reports.[126] On this basis, the Court found that Ukraine had 'sufficiently demonstrated that the law enforcement measures concerned produced a disparate adverse effect on the rights or persons of Crimean Tatar origin'.[127] Once again, however, the evidence did not establish that Crimean Tatars were targeted specifically based on ethnicity rather than political viewpoint.[128] The Court came to similar conclusions on claims relating to measures taken against the *Mejlis*. This body was targeted based on the political activities of its members rather than their ethnic origin; moreover, the ban on the *Mejlis* did not amount to depriving the Crimean Tatars of their representation.[129] This last conclusion seemed to sidestep a 2016 OHCHR report which had found that no other Crimean Tatar NGO 'can be considered to have the same degree of representativeness and legitimacy' as the *Mejlis*.[130]

It was only on claims relating to Ukrainian language instruction in Crimea that Ukraine prevailed. The Court relied on an OHCHR report to establish a 'steep decline' in the number of students receiving instruction in Ukrainian after 2014.[131] This was sufficient to establish an

[118]Ibid., at para. 207.
[119]Ibid., at para. 208.
[120]Ibid., at paras. 211, 214.
[121]Ibid., at para. 214.
[122]Ibid., at para. 215.
[123]Ibid., at para. 216.
[124]Ibid., at para. 217.
[125]Ibid., at paras. 230–1.
[126]Ibid., at para. 238.
[127]Ibid.
[128]Ibid., at para. 241. But see *Ukraine v. Russia* (Merits), *supra* note 8 (Judge Charlesworth, Separate Opinion, at paras. 28–9) (suggesting that the extensive detail provided in OHCHR reports relating to raids involving excessive force and exceeding the requirements of legitimate law enforcement actions meant that Russia's pro forma invocation of 'security and public health' did not discharge Russia's obligation to justify its actions).
[129]See *Ukraine v. Russia* (Merits), *supra* note 8, at paras. 251, 271–3.
[130]See *Ukraine v. Russia* (Merits), *supra* note 8 (Judge Sebutinde, Dissenting Opinion, at para. 26).
[131]See *Ukraine v. Russia* (Merits), *supra* note 8, at para. 358.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

adverse effect on the rights of Ukrainian children and a CERD violation by Russia.[132] By contrast, the Court was unpersuaded by Ukraine's claims about destruction of cultural heritage. Russia took the position that it was in fact engaged in preserving and promoting, rather than destroying, Crimean Tatar heritage.[133] The Court noted that the CERD Committee had expressed deep concern about reports relating to destruction and damage to Crimean Tatar heritage but also that the Committee did 'not take a position as to whether the respective reports are accurate and does not rely on first-hand evidence' – and that Ukraine had not otherwise substantiated the allegations.[134] This engagement with the CERD Committee's observations was notable for its closer scrutiny of how a third party had itself assessed the underlying facts. It also suggested a far less deferential approach than the Court has often shown when crediting UN General Assembly resolutions that similarly express concern or condemnation based on other reports.

3.2.3 Conclusions on the Court's approach to third-party fact-finding in Ukraine v. Russia

In sum, *Ukraine* v. *Russia* demonstrated that the ICJ remains open to crediting facts set out in reports emanating from the UN or other international bodies.[135] At the provisional measures phase, the Court's liberal approach to the evidence was consistent with its practice in more recent provisional measures proceedings. At the merits phase, the Court mostly did not question the value and credibility of UN and other third-party reports, with the notable exception of drawing attention to the fact that when a fact-finding body lacks access to territory (as in the case of the UN-mandated monitoring body that lacked access to Crimea), caution is required. This may be a red flag for parties to other cases before the Court in which evidentiary support (for example, the IIFFMM reports in *The Gambia* v. *Myanmar*) comes from reports by UN fact-finding bodies that could not access the territory. On other claims, the Court was not convinced by Ukraine's arguments, even where they seemed to find some support in UN reports. But the Court, for the most part, did not suggest that it found the reports that Ukraine relied upon to be flawed or not credible (with the exception of the CERD Committee's references to cultural heritage destruction); instead, the Court seemed to look past certain facts that arguably put its legal conclusions on (somewhat) shakier ground.

The Court's decision on the CERD claims, in particular, faced criticism for failing 'to see beyond discrimination on political grounds'.[136] This criticism may be well-founded, but the Court's approach was not the result of a blinkered approach to fact-finding reports. Rather, the Court's restrictive interpretations of CERD and ICSFT provisions served to make third-party fact-finding reports less important than they otherwise might have been. In this sense, the case was a missed opportunity for the Court to engage more closely with how the structure, operation, or methodology of a fact-finding body corresponds to the quality or usefulness of its findings. For example, many of the reports invoked by Ukraine on its ICSFT claims were from on-site 'monitoring' missions, rather than reports by fact-finding entities that could not access the territory (in contrast to the reports relating to Ukraine's CERD claims on Crimea). Information was gathered in different ways across reports (for example, first-hand accounts by monitors versus witness interviews conducted at a distance). In addition, some of the reports relied upon by

[132]Ibid., at para. 359.

[133]Ibid., at paras. 328–9.

[134]Ibid., at paras. 333–4.

[135]A different issue, beyond the scope of this piece, is how the Court dealt with expert reports commissioned by the parties, which were largely undiscussed in the judgment.

[136]See Marchuk, *supra* note 111. See *Ukraine v. Russia* (Merits), *supra* note 8 (President Donoghue, Separate Opinion, at paras. 15–22; Judge Sebutinde, Dissenting Opinion, at paras. 22–4; and Judge Charlesworth, Separate Opinion, at paras. 26–30). Notably, Judge Donoghue's views drew upon two expert reports included in Ukraine's written pleadings (see paras. 15, 18–20), while Judge Charlesworth faulted the Court for failing to require 'more convincing evidence' from Russia to justify the 'large-scale "police" actions' taken against Crimea Tatars, as documented in OHCHR reports (see paras. 28–9).

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

Ukraine were 'spot' reports that provided contemporaneous accounts of daily events, rather than after-the-fact assessments. Different fact-finding bodies also had different mandates; the OSCE monitoring mission, for example, was charged with objective and impartial reporting but also with reducing tension and fostering peace and dialogue. These distinctions might have been relevant to how the ICJ assessed these reports. However, none of these factors appeared to play any role in the Court's analysis.

4. Moving towards coherence?

Recent ICJ practice raises more questions than it answers in terms of whether the Court is moving towards greater coherence in its engagement with third-party fact-finding.[137] In light of the significant number of pending cases in which fact-finding reports feature prominently (including the recent wave of 'public interest' cases brought by non-injured states), the Court will soon find itself again facing how or why certain facts ascertained by third parties should be credited. Moreover, the Court is unlikely in these cases to be able to fall back upon an evidentiary record established by an international criminal tribunal, as it did in *Bosnia* v. *Serbia* and *Croatia* v. *Serbia*. Instead, with mainly UN fact-finding reports (and similar types of materials) to rely upon in pending cases relating to genocide and torture, the Court's approach to that evidence may be dispositive.

Ultimately, the degree to which the Court accounts for any given fact-finder's methodology and methods remains underexplained. For example, the Court often takes a dim view of witness statements collected by parties, which appear to sit at the lower end of the spectrum in terms of probative value.[138] Yet the Court has devoted little attention to scrutinizing the testimonial evidence that undergirds many third-party fact-finding reports. In principle, the Court's emphasis on the importance of cross-examination in an adversarial, court-like setting suggests that witness testimony gathered in other ways – and not subject to cross-examination – has less value. Yet once that type of testimony has been incorporated into the report of a UN fact-finding body, these concerns often seem to be resolved. Whether or not this is justifiable, it is the Court's failure to account for this apparent incoherence – that is, to explain why certain evidence should be credited, beyond reciting platitudes – that raises concerns.[139] The Court could address this in several ways.

First, the Court could elaborate upon its current approach by engaging more squarely with the methodologies and methods that fact-finding bodies adopt when producing their reports.[140] This means identifying and considering the process that a fact-finding body has used to arrive at key conclusions when faced with conflicting or incomplete evidence, including how it eliminated alternative plausible explanations (especially on mixed questions of law and fact relating to attribution, causation, responsibility, or intent).[141] The extent to which a fact-finding body articulates the process by which it collected and evaluated evidence may clarify the degree of

[137]J.G. Devaney, 'A Coherence Framework for Fact-Finding Before the International Court of Justice', (2023) 36 LJIL 1073.

[138]See *Ukraine v. Russia* (Merits), *supra* note 8, at para. 177; see Croatia v. Serbia, *supra* note 20, at paras. 192–9.

[139]See Devaney, *supra* note 137, at 1075, 1085. As discussed above, the Court has shown a greater propensity to credit reports by individuals having an 'independent status' and that are 'based on comprehensive sources' and 'corroborated, if necessary, by other credible sources'. See text at notes 26, 34, 36, *supra*.

[140]The Court might refer to any number of existing guidelines and collections of 'best practices' that aim to standardise fact-finding practice. See, e.g., OHCHR, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (2015), available at www.ohchr.org/sites/default/files/Documents/Publications/CoI_Guidance_and_Practice.pdf; M. C. Bassiouni and C. Abraham, *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (2013).

[141]Many fact-finding bodies may operate 'intuitively' when it comes to drawing inferences and reaching conclusions, rather than consciously engaging with certain 'epistemic principles' of fact-finding. See S. de Smet, 'Justified Belief in the Unbelievable,' in Bergsmo, *supra* note 39, 73 at 74. Admittedly, the Court itself does not always explain how the evidence has led it to reach particular conclusions or why other possible inferences were rejected.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

certainty that can attach to specific findings.[142] The Court might also consider whether the fact-finding body has sought to address any preexisting assumptions reflected by its mandate or that have been brought to the exercise by its own members.[143] Overall, the Court's focus should be on the fact-finding body's working practices rather than its institutional provenance.

For example, the ICJ could look more closely at how a fact-finding body has collected testimonial evidence, including how witnesses were identified and questioned, what safeguards were put in place to ensure that witnesses could speak freely, and what factors were used to assess credibility and to corroborate statements.[144] Corroboration also raises issues with respect to open source information and social media data.[145] UN fact-finding bodies are increasingly setting out more detailed accounts about how they approach these matters.[146] It may be especially helpful to the Court when fact-finding reports provide examples of information or testimony that was not credited because it could not be corroborated or lacked credibility, since this illustrates how the fact-finding body implemented its own standards.

Another consideration is the overall organization of a fact-finding body's work. Many third-party fact-finding reports (especially when addressed to large-scale conflicts rather than specific incidents) use illustrative examples or case studies to support their conclusions (for example, to establish a pattern of conduct that may be relevant to the legal characterization of a situation).[147] This echoes long-held concerns that human rights fact-finding risks improperly treating anecdote as evidence[148] or insufficiently accounts for possible forms of selection bias in how data is interpreted.[149] When faced with these types of reports, the Court should consider how representative cases were chosen and what this may have left beyond the frame. The Court should also consider how a fact-finding body responded to any failure or refusal by government officials or key non-state actors to provide information or access to sites or witnesses, including whether such non-cooperation led the fact-finding body to draw adverse inferences. Finally, the Court should ask whether a fact-finding body was adequately equipped to make certain types of findings and whether appropriate specialists were retained to provide relevant expertise (for example, on military targeting, forensics, sexual and gender-based violence, or quantitative data analysis). It should matter to the Court whether a fact-finding body has been transparent about the limitations of its inquiry and the potential impact of those limitations on its findings and conclusions.[150]

Secondly, the Court could take a more proactive approach to assessing inquiry body reports by calling those involved in their creation to testify.[151] The ICJ Statute empowers the Court to 'make all arrangements connected with the taking of evidence' and the Rules of Court allow it to seek information beyond that produced by the parties for the 'elucidation of any aspect of the matters in issue', including by arranging 'for the attendance of a witness or expert to give

[142]Ibid., at 134–6.

[143]See C.E.M. Harwood, *The Roles and Functions of Atrocity-Related United Nations Commissions of Inquiry in the International Legal Order* (2020), 94–6, 132–5.

[144]See R. Muzigo-Morrison, 'Victims and Witnesses in Fact-Finding Commissions: Pawns or Principal Pieces?', in Alston and Knuckey, *supra* note 6, 175 at 183–8.

[145]See D. Murray, et al., 'Mapping the Use of Open Source Research in UN Human Rights Investigations', 14 (2022) *Journal of Human Rights Practice* 554 (analysing potential benefits of open-source data (including its capacity to mitigate restrictions on access to territory) and downsides (including risks of false or manipulated content)).

[146]For example, the 17 September 2018 IIFFMM report provided a detailed account of its methodologies and methods. See IIFFMM Report, 17 September 2018, *supra* note 3, paras. 8–32.

[147]T. Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice', (2011) 16 *Journal of Conflict & Security Law* 105, 115–17.

[148]M. Satterthwaite, 'Finding, Verifying, and Curating Human Rights Facts', (2013) 107 *ASIL Proceedings* 62, 64.

[149]B. Root, 'Statistics and Data in Human Rights Research', (2013) 107 *ASIL Proceedings* 65, 66.

[150]See de Smet, *supra* note 141, at 136.

[151]A party that is relying on inquiry body reports might also consider seeking to call those involved as witnesses, rather than leaving that decision to the Court.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

evidence in the proceedings'.[152] The purpose of such testimony would not be to repeat information contained in a fact-finding report but to address the above considerations about methodology and methods. If relevant information and explanations are not set out in the report, the Court may need to seek this information out.[153] Such testimony could be incorporated into the oral proceedings alongside the main party arguments and any other live testimony.[154] Alternatively, the ICJ might consider adopting a new procedure to pose questions to the authors of inquiry body reports in a type of fact-finding hearing adjacent to the main proceedings.[155] In either case, creating opportunities for the Court to engage directly with the authors of key fact-finding reports could be a way for the Court to fulfill its role-based 'epistemic duty' when it comes to evidence.[156] As noted above, this could provide a means for the Court to take account of potential gaps or weaknesses in an inquiry body's report while also assisting the Court to resolve challenges to a report's veracity or fairness.

Thirdly, the Court could take a more proactive role regarding the burden of proof in cases involving third-party fact-finding reports. The ICJ adheres generally to the default approach in international adjudication: the party asserting certain facts bears the burden of proving such facts (*onus probandi incumbit actori*).[157] But the Court has recognized that this rule is not absolute and 'varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case'.[158] The prominent use of third-party fact-finding reports invites revisiting when the Court will 'shift' or 'reverse' the burden of proof to the other party. If fact-finding reports that emanate from the UN or other international organizations satisfy a minimum threshold of reliability (taking into account the considerations of methodology and methods noted above), the contents of such reports might be deemed to create a *prima facie* case made up of rebuttal presumptions of probative value.[159] In other words, a high-quality fact-finding report that establishes a *prima facie* case (i.e., evidence 'sufficient to maintain the

[152]1945 Statute of the International Court of Justice, 33 UNTS 993, Art. 48; Rules of Court, Art. 62. The Court might also invoke Art. 34(2) when seeking to receive testimony from individuals involved in fact-finding reports mandated by the United Nations or another public international organization. See also ICJ Statute, Art. 34(2).

[153]Whether the ICJ could compel a fact-finder to reveal a source raises separate questions. See G. Robertson, 'Human Rights Fact-Finding: Some Legal and Ethical Dilemmas', (2010) 3 *UCL Human Rights Review* 15, 30–9 (discussing practice at the ad hoc tribunals for the former Yugoslavia and Rwanda and at the Special Court for Sierra Leone). There may be good reasons for a source's non-disclosure, but the consequence may be that evidence from that source cannot be afforded as much weight as it might otherwise merit. Ibid., at 36–7.

[154]The Court has developed procedures to streamline the process of obtaining testimony from experts, including by setting deadlines for the submission of expert reports and establishing formats for the examination of experts during the hearing. See, e.g., *Whaling in the Antarctic (Australia v. Japan)*, Judgment of 31 March 2014, [2014] ICJ Rep. 226, at 236, paras. 14–17; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment of 1 December 2022, [2022] ICJ Rep. 614, at 623, paras. 15–16.

[155]The ICJ might take inspiration from the procedure utilized in some cases by the ECtHR to receive expert testimony *in camera* at Strasbourg. ECtHR, Rules of Court (as amended 28 March 2024), Annex to the Rules (concerning investigations), Rule A1. For a brief comment on this type of fact-finding hearing, see M. A. Becker and C. Rose, 'The Return of Not-Quite "Phantom Experts"? The ICJ Meets with IPCC Scientists', *Verfassungsblog*, 3 December 2024, available at verfassungsblog.de/the-icj-meets-with-ipcc-scientists/. See also H. Keller and P. Ganesan, 'The Use of Scientific Experts in Environmental Cases Before the European Court of Human Rights', (2024) 73 ICLQ 997, 1015–1018 (discussing the 'legitimacy-enhancing function of expert consultations').

[156]See Devaney, *supra* note 137, at 1084.

[157]See, e.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, [2010] ICJ Rep. 14, at 71, para. 162. *See also* C. E. Foster, 'Burden of Proof in International Courts and Tribunals', (2010) 29 Australian Year Book of International Law, 27, 35–6, 40–1.

[158]*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, [2010] ICJ Rep. 639, at 660, para. 54.

[159]This recalls Katherine Del Mar's proposal that the ICJ should attribute *prima facie* weight to findings of fact by other UN organs. See Del Mar, *supra* note 41, at 22. The proposal here, however, assumes that the Court has identified certain additional factors – beyond simply the fact that a report has been generated under UN auspices – that establish a baseline of credibility.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

proposition affirmed' if uncontradicted)[160] would shift the burden of proof to the other party (usually, the respondent). In turn, a failure to respond meaningfully to a report's contents would result in the Court crediting that evidence (just as the Court could also credit direct evidence that has not been rebutted). In principle, this should incentivize parties to engage substantively with the assertions and allegations contained in third-party fact-finding reports and 'to bring forward the information they have' that contradicts or calls into question a fact-finding body's findings and conclusions,[161] even if they may have no formal legal obligation to do so.[162] This would be preferable to a party simply dismissing *in toto* a UN-mandated report as biased or flawed, whether because of a one-sided mandate, past statements by a fact-finding body's member, or a lack of access to the relevant territory.[163]

The Court also has the power to draw adverse inferences from a party's failure to cooperate when asked to furnish information or explanations.[164] Historically, the Court has been reluctant to make use of that power,[165] but the prominent role of third-party fact-finding reports in cases on the Court's docket might also justify taking a less circumspect approach to adverse inferences. If a party before the Court has failed to engage with relevant aspects of a third-party fact-finding report (or has claimed that a report cannot be relied upon because it was prepared without access to information in that party's possession), the Court could directly request that party to supply explanations or to produce documents relating to those points.[166] A failure to cooperate with the Court's request in that scenario would bolster any decision by the Court to then credit the contents of the fact-finding body's report based on an adverse inference.[167]

Burden-shifting with respect to third-party fact-finding reports might have especially important consequences in cases involving non-appearance. The Court makes extensive efforts to ensure that a non-appearing party is treated fairly and that the applicant's arguments and evidence remain subject to scrutiny, as required by Article 53 of the ICJ Statute.[168] So what are the implications of non-appearance in cases in which the evidence derives largely from third-party fact-finding reports? Does the sound administration of justice require the Court to challenge such evidence, stepping into the shoes of the non-appearing party while ascertaining that the applicant's claims are well founded in fact and law?

The Court has made clear that Article 53 does not compel it to examine the accuracy of a party's factual submissions 'in all their details'.[169] This suggests that while the Court would be well-advised to subject third-party fact-findings reports to the type of scrutiny outlined above, a non-appearing party 'to some extent forfeits the opportunity to counter the factual allegations of the

[160]See Foster, *supra* note 157, at 51. See also C. Roberts, 'Reversing the Burden of Proof Before Human Rights Bodies', (2021) 25 *International Journal of Human Rights* 1682, 1689.

[161]See Roberts, *supra* note 160, at 1687.

[162]C.J. Tams and J.G. Devaney, 'Article 49', in Zimmermann and Tams, *supra* note 9, 1415 at 1425–26. But see Devaney, *supra* note 7, at 187–202 (arguing that the Court can compel, not merely request, the disclosure of evidence).

[163]Note the objections raised by Israel and Russia, respectively, at notes 90–91 & 119, *supra*.

[164]See ICJ Statute, *supra* note 152, Art. 49 (specifically, 'formal note shall be taken of any refusal' by the agent to produce a document or to supply an explanation when requested by the Court).

[165]See Teitelbaum, *supra* note 15, at 129–35.

[166]The regional human rights courts commonly shift the burden of proof to the respondent state 'where the determination of whether or not there was a human rights violation depends on the manner in which the authorities reached a certain decision'. See Roberts, *supra* note 160, at 1691.

[167]See Pulp Mills, *supra* note 157, at 71, para. 163. See also Devaney, *supra* note 137, at 246–7 (arguing for the Court to draw adverse inferences when faced with non-cooperation).

[168]Art. 53 specifies that the Court must satisfy itself that it has jurisdiction over the dispute and that an applicant's claim 'is well founded in fact and law' before ruling against a non-appearing party. See ICJ Statute, *supra* note 152, Art. 53. See also *Nicaragua v. United States*, *supra* note 26, at 39–40, para. 59; F. S. Eichberger, 'Informal Communications to the International Court of Justice in Cases of Non-appearance', 22 (2023) LPICT 5, at 8–11.

[169]*United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment of 24 May 1980, [1980] ICJ Rep. 3, at 9, para. 11.

https://doi.org/10.1017/S0922156525100289 Published online by Cambridge University Press

respective opponent'.[170] By definition, a non-appearing party cannot rebut whatever *prima facie* case a fact-finding report might establish, which opens the door to the Court crediting such materials. (In practical terms, this could operate just as if the non-appearing party had refused to cooperate with a request by the Court to address the facts set out in a report, leading the Court to draw an adverse inference.) The Court should not shy away from this possibility, so long as it has adequately 'stress-tested' the fact-finding report itself. At the same time, the Court cannot reasonably be expected to identify every possible shortcoming in a fact-finding body's report, especially since certain errors or misapprehensions might be knowable only by the party that has, in essence, forfeited its right to raise those challenges.

5. Conclusion

This article has made the case that the indicia currently used by the Court to establish the credibility and value of inquiry body reports are unsatisfactory and not always applied in consistent or coherent ways. With a view to bolstering the persuasive authority of its own decisions, the Court could do more to demonstrate that it is not taking a purely intuitive or deferential approach to these materials. But this requires the Court to engage proactively with how inquiry bodies go about their work. To be clear, the argument is not that the ICJ should reject third-party fact-finding or hold such reports to an impossible standard, but rather that the Court's credibility and the weight of its decisions demands more dynamic engagement. This extends to dealing with ill-founded or politically motivated criticisms of third-party fact-findings that, if not addressed, may undermine the Court's work.

This study also suggests the need for research into the possible negative implications of a world in which damning reports by inquiry bodies or other UN entities precede judgments by the ICJ or other international courts and tribunals that fail to match expectations, as in the 2024 judgment in *Ukraine* v. *Russia*. This goes less to the weight that courts should attribute to fact-finding reports, however, and more to the disconnect between the non-binding 'judgment' that an inquiry body's report may reflect and the very different judgment that an international court may deliver. Inquiry bodies do not necessarily pursue the same goals or serve the same function as international courts.[171] For this reason, inquiry body reports may create unrealistic expectations about litigation outcomes. It is conceivable that inquiry body practice – and the extensive reliance on inquiry body reports by civil society actors and states in relation to some ICJ proceedings – risks exacerbating broader concerns with strategic litigation at the international level, including the prospect of incoherence among different sources of authority and related threats of disenchantment with international law and backlash against international courts. Whether these are serious concerns, and whether they can be addressed by international courts seeking to achieve greater coherence in how they engage with third-party fact-finding, merits continuing scrutiny.

[170]H. von Mongoldt and A. Zimmermann, 'Article 53', in Zimmermann and Tams, *supra* note 9, 1467 at 1491.

[171]See M. A. Becker and S. M. H. Nouwen, 'International Commissions of Inquiry: What Difference Do They Make?', 30 (2019) EJIL 819, 831–89; L. van den Herik and C. Harwood, 'Commissions of Inquiry and the Charm of International Criminal Law: Between Transactional and Authoritative Approaches', in Alston and Knuckey, *supra* note 6, 233 at 236–9, 244–7.

Cite this article: Becker MA (2025). Recent developments in reliance upon third-party fact-finding at the International Court of Justice. *Leiden Journal of International Law*. https://doi.org/10.1017/S0922156525100289