The Challenges for the ICJ in the Reliance on UN Fact-Finding Reports in the Case against Myanmar

ejiltalk.org/the-challenges-for-the-icj-in-the-reliance-on-un-fact-finding-reports-in-the-case-against-myanmar/

By Michael A Becker

December 14, 2019

This past week's provisional measures hearing in the case against Myanmar at the International Court of Justice (ICJ) made for a remarkable spectacle (see here, here, and here). Acting as the head of her country's delegation, Nobel Peace Prize winner Aung San Suu Kyi sat silently as The Gambia's legal team laid out its case alleging violations of the 1948 Genocide Convention, including brutal descriptions of the atrocities that have been exacted upon the Rohingya minority. When Aung San Suu Kyi addressed the Court herself, she pointedly did not utter the word "Rohingya"—except in a sole reference to the Arakan Rohingya Salvation Army, an insurgent group that Myanmar places at the center of what it frames as an internal armed conflict. Instead, she asked the Court to reject the provisional measures request and to resist the efforts by The Gambia and others to "externalize accountability" for alleged war crimes, leaving Myanmar to addresses these matters itself (CR 2019/19, pp 17-18, paras 24-25) .

In brief, The Gambia accuses Myanmar of engaging in a systematic policy of oppression and persecution against the Rohingya, a Muslim minority in a predominantly Buddhist country, that reaches back decades. Based on the Application, the ICJ will be asked to focus on military campaigns (termed "clearance operations" by Myanmar) carried out against the Rohingya since 2016, which are estimated to have caused more than 10,000 deaths and more than 700,000 people to seek refuge in Bangladesh. This is not the first time that a non-injured State has sought to enforce obligations *erga omnes partes* at the ICJ, but it is the first such case brought under the Genocide Convention.

I wrote previously about the possibility of an ICJ case against Myanmar and some of the attendant challenges. This post aims to highlight a specific challenge that these proceedings will pose for the Court: The Gambia's extensive reliance on UN fact-finding reports, combined with the absence of prior or parallel international criminal proceedings relating to these events. The Application made it apparent that The Gambia would ask the Court to rely on a range of fact-finding reports, and its lead counsel said as much. The provisional measures hearing confirmed the central role that UN fact-finding reports will play. The key question is the extent to which the Court will be willing to give weight to the findings in such reports.

When the Court is asked to rely on third-party findings of fact, it has shown a greater willingness to give weight to findings generated through a court-like process. When evidence has not been tested in an adversarial setting, it is more difficult to predict the extent to which the Court will be willing to credit such evidence. Although the Court has identified various factors to assess the reliability of information in fact-finding reports, the soundness of those criteria is open to question, and the Court has not always explained their application in practice.

The issues surrounding reliance on third-party fact-finding reports may be of lesser importance when it comes to provisional measures, where the evidentiary burden is necessarily more forgiving than at the merits stage. Assuming that the case proceeds, however, the Court will need to confront its approach to reliance on third-party reports. One path forward may be for the Court or the parties to consider calling as witnesses those individuals involved in compiling the fact-finding reports presented to the Court. This would give the Court an opportunity to explore the strengths and weaknesses of their findings through testimony.

Reliance on Evidence Obtained Through a Court-like Process

Past cases offer guidance about when the Court will give weight to the evidence gathered by other fact-finding bodies, and the Court has distinguished between different types of fact-finding processes. For example, in the *Armed Activities* case between the DRC and Uganda, the ICJ indicated its willingness to 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" (para 61). That description fit the Porter Commission, a judicial inquiry established by the Government of Uganda that operated with court-like procedures. The ICJ ultimately relied on some of the evidence discussed in the Porter Commission's report, including statements against interest by Ugandan military officials (see para 78). It also gave substantial weight to the Porter Commission's assessment of the alleged smuggling, looting, and illegal exploitation of resources by Ugandan military personnel (see paras 237-242).

The Court reinforced this approach in *Bosnia v Serbia*, where it explained its readiness to accept factual findings made at the International Criminal Tribunal for the Former Yugoslavia (ICTY) (see para 214). The ICJ concluded that "it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless they have been upset on appeal" (para 223). The Court went so far as to indicate that ICTY findings about "the existence of the required intent" were "entitled to due weight" (para 223). The Court took a similar approach to ICTY findings in *Croatia v Serbia* (see para 182).

It is significant that in its case law the Court has only on one occasion—with respect to Srebrenica—made a finding of genocide (*Bosnia v Serbia*, 2007 judgment, para 297). That conclusion rested heavily on the Court's assessment of the *Blagojević* and *Krstić* cases at the ICTY. In the case against Myanmar, the Court will not be able to draw upon

findings established by parallel criminal proceedings. The Prosecutor of the International Criminal Court (ICC) has opened an investigation into the situation, but these efforts are unlikely to outpace the ICJ case. The same could be said for the recently-filed universal jurisdiction action in Argentina.

Reliance on Evidence Not Obtained Through Adversarial Fact-Finding Process

Based on the Application and the presentations made during the provisional measures hearing, UN fact-finding reports will take center stage in the ICJ case against Myanmar, including reports from the UN Special Rapporteur on the situation of human rights in Myanmar, the UN Special Advisor on the Prevention of Genocide, and, above all, from the Independent International Fact-Finding Mission on Myanmar (the "FFM") established by the UN Human Rights Council in March 2017. The FFM produced four major reports, including a 444-page report in September 2018 and a follow-up report in September 2019. The Application draws extensively on the work of the FFM, and The Gambia referred to many of the FFM's findings during the provisional measures hearing.

In principle, the Court's starting point will likely be that such reports are *not* entitled to the same deference that it has shown to ICTY judgments, since the evidence will not have been obtained or tested through an adversarial, court-like process. However, this does not mean the evidence set forth in these reports will not be given weight—indeed, they may be given substantial weight. But that outcome will likely require the Court to focus on the methods and methodologies adopted by the FFM and other fact-finding bodies, especially because Myanmar has challenged their credibility, completeness, and impartiality, and has established a fact-finding body of its own.

There are relatively few instances of the ICJ relying on the work of non-adversarial UN fact-finding bodies. In *Armed Activities*, the Court drew not only on the report of the quasi-judicial Porter Commission, but also on reports from the UN Secretary-General, special rapporteurs, and a Panel of Experts established by the UN Security Council to monitor the alleged illegal exploitation of the DRC's natural resources. Faced with these materials, the Court outlined certain factors relevant to assessing their weight, reliability, and value. It explained that it would "treat with caution . . .materials emanating from a single source" but would give weight to evidence that has gone unchallenged "by impartial persons for the correctness of what it contains" (para 61). The Court then found that the various reports before it furnished "sufficient and convincing evidence" to determine whether or not Uganda had engaged in the illegal exploitation of the DRC's resources (para 237), and that the record contained "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 (paras 242-243). Some commentators have harshly criticized the Court's approach in *Armed Activities* as a "total delegation" of its fact-finding responsibility, and it is difficult at points in that judgment to determine whether the Court credited information in third-party reports in their own right, rather than merely to corroborate the Porter

Commission. This left unclear the Court's willingness to assign probative value to the findings of non-adversarial fact-finding mechanisms.

Another example of reliance on non-adversarial fact-finding comes from *Bosnia v Serbia*. The Court relied on a 1999 report by the UN Secretary-General (*The Fall of Srebrenica*) and 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 (para 230). (In the provisional measure hearings, counsel for The Gambia quoted this language to suggest that it similarly could describe the FFM reports (CR 2019/18, p 22, paras 6-7)—a proposition open to question.) The Court in *Bosnia v Serbia* did not similarly single out the Report of the Commission of Experts that was established at the request of the UN Security Council in 1992. Instead, it explained that the value of all third-party reports depended on the "source of the item of evidence (for instance, partisan or neutral)", "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 the "quality or character" of the item, such as statements against interest or uncontested facts (para 227). In the 2007 judgment, the Court referred to the Commission of Experts report in relation to when specific towns or villages came under attack, the types of weaponry used, fatality estimates, and prisoner conditions. However, the Court often referred to the Commission of Experts report alongside its summaries of Bosnia's arguments, leaving it unclear whether the Court was adopting the report's findings as its own.

In *Croatia v Serbia*, the Court reiterated the factors from *Bosnia v Serbia* that it would use to determine the probative value of third-party reports (paras 189-191). The Commission of Experts report did not feature in the 2015 judgment, but the Court singled out a UN Special Rapporteur report as meriting "evidential weight" because of "the independent status of its author" and the fact that it was "prepared at the request of organs of the United Nations, for purposes of the exercise of their functions". The Court further noted that Croatia had not challenged the objectivity of the report (para 459). The Court then relied on its findings to determine that killings constituting the *actus reus* of genocide were carried out by Croatian armed forced against Serb civilians (para 493).

How Should the Court Approach Fact-Finding Reports in the Case against Myanmar?

As a formal matter, the Court has thus shown a greater willingness to give weight to factual findings arrived at through a formal process that includes cross-examination of witnesses and allows for other evidence to be tested in an adversarial setting. Most reports by UN commissions of inquiry, fact-finding missions, and special rapporteurs—including those which The Gambia relies upon—do not meet this standard. Nonetheless, the Court has signaled that reports based on "comprehensive sources", produced by

individuals having an "independent status", and carried out at the request of UN organs in the exercise of their functions are more likely to be credible, probative, and entitled to weight.

This approach is questionable. 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—such as Myanmar—refuse to co-operate. This final problem relates to the sixth provisional measure that The Gambia has requested—an order that Myanmar grant access to and co-operate with all UN fact-finding bodies engaged in investigating the situation of the Rohingya. The Gambia has suggested that Myanmar's efforts to prevent investigators from carrying out their work amounts to "an obstruction of the fair administration of justice" and that access for fact-finding bodies is needed to ensure that the Court will be "properly equipped" to adjudicate the dispute (CR 2019/18, p 71, paras 24-26). There is logic to this request, but it also suggests some acknowledgement that the existing fact-finding reports may not be enough.

Another factor that may complicate the view that *prima facie* weight should attach to the findings of UN fact-finding bodies—because of their presumed independence and impartiality—is a trend that has seen a blurring of the line between expertise and advocacy. Those who serve on fact-finding bodies are often chosen, at least in part, because they bring expertise, prestige, and a reputation for fairness and independence to the mission. However, those who serve on fact-finding bodies may assume a different role after a report has been published. As members of fact-finding bodies disseminate their findings to UN bodies and to the public (often calling for their recommendations to be implemented), the impartial expert may morph into advocate and activist. Such outreach may be crucial to maximizing the impact of a fact-finding body's work, but it is untested whether this might also complicate efforts to persuade the ICJ to give weight to a report's findings. In principle, post-report advocacy by the members of fact-finding bodies should not necessarily call the independence and impartiality of such bodies into question, but, for example, it would be highly unusual, and almost certainly inappropriate, if the judges of an independent and impartial international court were to behave similarly.

So, on the one hand, we might ask whether the increased scrutiny that UN fact-finding has faced over the past decade or so—including in many EJIL:*Talk!* posts—will make the Court more cautious about relying on such reports in the case against Myanmar. On the other hand, one could argue that UN fact-finding bodies have become more

sophisticated and transparent about their methodologies. There has certainly been no shortage of efforts directed as establishing best practices and standardized procedures for UN fact-finding.

Whether or not UN fact-finding has improved in general, the FFM for Myanmar appears to have taken such concerns seriously, and The Gambia described the FFM as having followed "rigorous UN guidelines for best practices" (CR 2019/18, p 22, para 6). The September 2018 report included a detailed section on methodology that addresses standard of proof, information-collection methods (including the process for selecting interviewees), witness protection, and the storage of summary records of interviews (see paras 8-32). It explained that factual findings in relation to major incidents or patterns of conduct were based on multiple independent and credible sources of information and detailed which sources were characterized as "first-hand information". It separately listed the types of information used to corroborate first-hand accounts and noted a different approach to incidents of torture or sexual and gender-based violence. The report also explained how the FFM assessed the reliability and credibility of sources, taking into account potential biases, motivations, and how information was obtained. Overall, the FFM reports do not appear to have encountered the same types of criticisms from commentators that many fact-finding reports receive; the main complainant in this case appears to have been the Government of Myanmar.

Will the FFM's methodological transparency be enough to persuade the Court to rely on its factual findings? On some points, the Court may be able to examine the underlying evidence used by the FFM, such as satellite imagery or government documents. However, much of the evidence consists of confidential interviews with victims and other witnesses. This poses a greater challenge for the Court, since giving weight to such accounts—or broader findings based on them—means deferring to the credibility and value assessments made by the FFM, unless the victims and witnesses that gave such accounts are called to testify in the ICJ proceedings (as might be the case for a limited subset of the hundreds of people interviewed by the FFM). One need only review the Court's discussion of the witness statements submitted in *Croatia v Serbia* (see paras 192-199) to appreciate its concerns about out-of-court testimony that is provided without details relevant to credibility and value (see also Judge Donoghue's Declaration). It is unclear whether the FFM would be able to provide the ICJ with the confidential summary records of interviews and meetings—or whether this would be sufficient. The September 2018 report notes the possibility of sharing these records with "competent authorities carrying out credible investigations" (see para 32). The Court may want to explore this possibility.

Another possibility is to call key individuals involved in the preparation of such reports to testify. If the Court has concerns about how a fact-finding body has conducted its work, this would allow judges and the parties to ask questions about the process—whether in general or in relation to specific items. Testimony could identify and explain potential gaps in a fact-finding body's account, or the extent to which a fact-finding body's mandate created a focus on certain types of facts over others. It could also

address the impact of Myanmar's non-cooperation. Myanmar will undoubtedly continue to attack the credibility of the fact-finding reports placed before the Court by The Gambia. Calling the individuals who worked on those reports to testify would offer a means to elicit direct rebuttals to those charges. In sum, such testimony could help the Court to avoid either ill-founded over-reliance on a fact-finding body's report, or a scenario in which potentially probative evidence is disregarded because details about the underlying process are missing or have been called into question and left unaddressed.

Conclusion

Ultimately, it is important to be realistic about the Court's capacities and limitations when it comes to fact-finding, and it is worth recalling that the Statute clearly envisions that the Court might rely on fact-finding by others. Article 50 empowers the Court to entrust any individual, bureau, or commission to carry out an enquiry or give an expert opinion. Relying on findings of fact made by a third-party at the Court's direction is not such a far cry from relying upon the findings of fact by an entity established by another UN organ or subsidiary body—especially if the Court has the opportunity to directly question those involved.

A final note, however, is warranted on the distinction between giving weight to factual findings by a UN fact-finding body and deferring to its legal conclusions. It is typical for fact-finding bodies to offer legal conclusions on the basis of their investigations, but it rests with the ICJ to identify the applicable law and draw its own legal conclusions from the established facts, whether the Court has adduced those facts from primary documents, live witness testimony, or, indeed, the assessments of a fact-finding body. The Gambia refers not only to the factual findings of the FFM, but also to its conclusions about genocidal intent, for example. It has argued that these legal assessments—not only the FFM's factual findings—should be given significant weight, and there was back-and-forth between the parties during the provisional measures hearing about the value of legal conclusions by the FFM or the special rapporteur. But the fact that the FFM considers that the evidence demonstrates genocidal intent—or that any other international actor or State has made that determination—should have very limited value for the Court. As may be the case when an expert appears before the Court, it can be unhelpful for an expert to reach the ultimate legal question that the Court must decide, rather than limiting the scope of testimony to information that bears on that question. In such situations, the Court may find itself at pains to demonstrate its independence. In the end, the Court will almost certainly not feel bound by the legal conclusions of the FFM or any other fact-finding body. The more interesting question will be how the Court decides to address the findings of fact that are presented.