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The Dialogic Function of ICJ Provisional Measures Decisions in the UN Political Organs: Assessing the Evidence

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This article evaluates the degree to which provisional measures ordered by the International Court of Justice (ICJ) have influenced United Nations (UN) diplomacy and the exercise of functions by its political organs in the areas of international peace, security and human rights. The increased utility of the ICJ for the purpose of obtaining interim measures has led to growing scholarly reflection on the effectiveness of these measures. This article considers effectiveness specifically in relation to the extent to which ICJ provisional measures have influenced interactions and the exercise of functions within the UN principal political organs, the Assembly and Council, as well as the HRC. It shows that provisional measures have stimulated dialogue and activity within the political organs, although this has been far from consistent. As Member States continue to consider ways to strengthen the functions of the political organs in the maintenance of international peace and security, and the advancement of human rights, an operational commitment to monitor ICJ provisional measures would provide an important means to support the attainment of these dual institutional objectives.

I. INTRODUCTION

The aim of this article is to consider the extent to which provisional measures ordered by the International Court of Justice (ICJ) have influenced United Nations (UN) diplomacy and the exercise of functions by its political organs in the areas of international peace, security and human rights. In doing so, this article builds on scholarly literature on the function of ICJ provisional measures as part of a broader litigation strategy to influence negotiations and political settlements.[1] Although the ICJ's ordering of provisional measures serves the formal purpose of preserving existing legal rights pending an outcome on the merits of a dispute, scholars have also noted the use of this device by parties as a means to advance a broader strategic purpose that goes beyond the confines of the interim remedy proceedings. The existing literature emphasises two aspects. First, parties have sought provisional measures so as to provide insight into their chances of success in future litigation.[2] While the evidentiary threshold in interim proceedings is lower, it nonetheless provides an early indication to the parties as to a likely outcome on the merits, or what evidence they need to gather to meet this burden. This might in turn encourage a negotiated settlement. For example, the interim decision in *Passage Through the Great Belt* is said to have induced Denmark to negotiate a settlement and discontinue the case.[3] Second, provisional measures can be used to

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[1] See generally Karin Oellers-Frahm, *Use and Abuse of Interim Protection before International Courts and Tribunals*, in COEXISTENCE, COOPERATION AND SOLIDARITY: LIBER AMICORUM RUDIGER WOLFRUM (Holger P. Hestermeyer et al. eds., 2012), at 1685-1703; Erlend M. Leonhardsen, *Trials of Ordeal in the International Court of Justice: Why States Seek Provisional Measures when non-Compliance Is to Be Expected*, 5 J INT'L DISPUTE SETTLEMENT 306 (2014); Cameron A. Miles, PROVISIONAL MEASURES BEFORE INTERNATIONAL COURTS AND TRIBUNALS (2017), at 443-472; Michael Ramsden, *Accountability for Crimes Against the Rohingya: Strategic Litigation in the International Court of Justice*, 26 HARVARD NEGOTIATION L REV. 153 (2021).

[2] Oellers-Frahm, *supra* note 1, at 1686-1687; Miles, *supra* note 1, at 445-449.

[3] Passage through the Great Belt (Finland v. Denmark), Provisional Measures Order, 1991 I.C.J. Rep. 12 (July 29); Miles, *supra* note 1, at 448-449.

draw a situation to the attention of the international community, pressure States into action, and inflict reputational costs (which in turn influence the outcome of the dispute).[4] On this basis, the impact of litigation taken within the court of an international organisation should be measured by the effects it produces within that organisation.[5] This article focuses on the latter function, concerning the effect of ICJ provisional measures in influencing international institutional action, via the UN's principal political forums.

Accordingly, this article emphasises practice in the Security Council (Council) and General Assembly (Assembly), being principal political organs that have specific powers under the UN Charter to advance the peaceful settlement of disputes. The Council has primarily responsibility under the Charter for the maintenance of international peace and security, including enforcement powers under Chapter VII.[6] Its decisions are binding on Member States.[7] It also has a specific power to take action to enforce ICJ judgments.[8] The Assembly, on the other hand, has powers to recommend Member States or the Council to act on a situation.[9] While it does not have the power to issue binding decisions (except in relation to certain internal operational matters), it is the most representative UN organ comprising a near universal membership of States. As such, there has been a tendency over time to use this forum as a means to mobilise shame and exert pressure on recalcitrant States.[10] In this regard, this article focuses specifically on the diplomatic impact of ICJ provisional measures decision within the specific fields of international peace and security and human rights. Furthermore, the Council and Assembly have developed an established practice in advancing these imperatives, including, in relation to the latter, through the creation of the Human Rights Council (HRC) as a subsidiary organ.[11] For that reason, the effect of provisional measures decision on the work of the HRC will also be considered here.

'International peace' includes the absence of a threat or use of force against the territorial integrity or political independence of any State; 'security' refers to the activity which is necessary for maintaining the conditions of peace.[12] Threats to international peace and security include international war and conflict, civil violence, organized crime, terrorism, weapons of mass destruction, and even poverty, disease, and environmental degradation.[13] The cases we consider fall broadly under the following categories: (1) nuclear weapons; (2) security of diplomatic missions and personnel; (3) border disputes; and (4) the threat or use of force against or in the

[4] Oellers-Frahm, *supra* note 1, at 1687; Leonhardsen, *supra* note 1, at 337; Miles, *supra* note 1, at 453.
[5] Markus W. Gehring, *Litigating the way out of deadlock: the WTO, the EU and the UN*, in, DEADLOCKS IN MULTILATERAL NEGOTIATIONS (2012) 96 (Amrita Narlikar ed), at 101-102. This does not preclude non-UN courts from also producing impact within the UN political system, such as the ICC: Michael Ramsden and Tomas Hamilton, *Uniting against Impunity: The UN General Assembly as a Catalyst for Action at the ICC*, 66 INT'L AND COMP. L. Q. 893 (2017).
[6] U.N. Charter art. 24 ¶1, 39.
[7] U.N. Charter art. 25.
[8] U.N. Charter art. 94(2). This arguably does not include provisional measures decided by the ICJ, since art. 94(2) refers specifically to 'judgments' of the ICJ, which would appear to refer to judgments on the merits. C.f. Bruno Simma *et. al.* (eds.), THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, VOLUME II (3rd ed., 2012), at 1957-1958.
[9] U.N. Charter art. 10.
[10] For analysis of some of this practice, see: Michael Ramsden, INTERNATIONAL JUSTICE IN THE UNITED NATIONS GENERAL ASSEMBLY (2021); Blaine Sloan, UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS IN OUR CHANGING WORLD (1992), at 42; Inis L. Claude, *Collective Legitimization as a Political Function of the United Nations*, 20(3) INT'L ORG. 367 (1966).
[11] U.N.G.A. Res. 60/251 (Mar. 15, 2006).
[12] Simma, *supra* note 8, at 109-110.
[13] *Id.*, at 111.

territory of another State. Examining all 23 cases in which the ICJ indicated provisional measures, we noted that 10 met our criteria of being primarily concerned with international peace and security.[14]

The cases that relate to human rights fall broadly under the following categories: (1) the prohibition of genocide; (2) human rights in the context of armed conflict; (3) the right to be free from racial discrimination; and (4) rights of persons subject to the death penalty. These cases engage a wide range of human rights, including the right to life, liberty and security of person, the right not to be subjected to torture or other cruel, inhuman or degrading treatment, the right to equality before the law and non-discrimination, the right to a fair trial, the right to private life, the right to freedom of movement, the right to education, and the right to take part in government. [15] Of the 23 cases in which the ICJ indicated provisional measures, 10 are concerned with human rights. We therefore excluded from our consideration the remaining 3 cases that were bilateral disputes with no human rights or international security dimension.[16]

This article considers the effect of ICJ provisional measures in the political organs from two main vantage points. The first is in the formal exercise of powers by these bodies, in adopting resolutions as part of a campaign for compliance with the interim order. The Council's adoption of a decision requiring compliance, or sanctioning non-compliance, represents the most powerful instrument to uphold a provisional measure. Yet, even absent legally binding powers, Assembly resolutions are capable of exerting pressure on Member States to comply. Many Members have

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[14] Nuclear Tests (Australia v. France), Interim Protection, 1973 I.C.J. Rep. 99 (Jun. 22); Nuclear Tests (New Zealand v. France), Interim Protection, 1973 I.C.J. Rep. 135 (Jun. 22); United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Provisional Measures, 1979 (Dec. 15), available at https://www.icj-cij.org/public/files/case-related/64/064-19791215-ORD-01-00-EN.pdf; Frontier Dispute (Burkina Faso v. Mali), Provisional Measures, 1986 I.C.J. Rep. 3 (Jan. 10); Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures, 1984 I.C.J. Rep. (May 10); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Provisional Measures, 1996 I.C.J. Rep. 13 (March 15); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, 2000 I.C.J. Rep. 111 (Jul 1); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, 2011 I.C.J. Rep. 6 (Mar. 8); Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Provisional Measures, 2011 I.C.J. Rep. 537 (Jun. 15).

[15] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, 1993 I.C.J. Rep. 3 (Apr. 8); *Vienna* Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, 1998 I.C.J. Rep. 248 (Apr. 9); LaGrand (Germany v. United States of America), Provisional Measures, 1999 I.C.J. Rep. 9 (Mar. 9); Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, 2003 I.C.J. Rep. 77 (Feb. 5); Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, 2008 I.C.J. Rep. 311 (Jul. 16); Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, 2008 I.C.J. Rep. 353 (Oct. 15); 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. Russian Federation), Provisional Measures, 2017 I.C.J. Rep. 104 (Apr. 19); Jadhav (India v. Pakistan), Provisional Measures, 2017 I.C.J. Rep. 231 (May 18); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, 2018 I.C.J. Rep. 406 (Jul. 23); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, 2020 I.C.J. Rep. 69 (Jan. 23).

[16] Fisheries Jurisdiction (United Kingdom v. Iceland), Interim Protection, 1972 I.C.J. Rep. 12 (Aug. 17); Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, 1972 I.C.J. Rep. 30 (Aug. 17); Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, 2014 I.C.J. Rep. 147 (Mar. 3).

perceived of Assembly resolutions as exerting 'political' or 'moral' pressure.[17] They also contribute towards a legitimacy narrative regarding the conduct of the Member States concerned.[18] Second, in addition to the exercise of formal powers by the Council and Assembly, we also consider the extent to which ICJ provisional measures stimulated dialogue in the political organs and also provided a forum for the disputing States to arrive at a settlement, using the provisional measures decision as a framework to do so.

We consider the reception of ICJ provisional measures in each of the UN's political organs in Parts II and III respectively. Given that the HRC, as an Assembly subsidiary organ, has increasingly performed functions in the field of human rights, Part IV will consider the reception of ICJ interim remedies in this organ. In each part, we will consider, first, whether the provisional measures led the political organ to exercise the formal powers available to it, and second, whether the provisional measures stimulated dialogue in the political organs or strengthened the language of their resolutions. Part V concludes.

II. RECEPTION OF ICJ PROVISIONAL MEASURES IN THE SECURITY COUNCIL

A. Effect on the exercise of formal powers by the Security Council

The Council has broad powers under Chapter VII of the UN Charter to implement measures to maintain international peace and security. Given that the Council can issue binding decisions it does not need to rely on ICJ provisional measures as a source of legal obligation as such. Nevertheless, an ICJ interim order can augment Council responses by drawing attention to an issue and recommending actions in relation to it. The Council in turn might use the interim order to provide justification or added backing for its desired action. In addition, the ICJ decision will involve some degree of adjudication of facts, something that the Council, as a political organ, is unable to engage in absent reliance on fact-finding bodies.[19] Although practice is by no means comprehensive, there are some cases where provisional measures have had a direct bearing on Council decision-making.

(1) United States of America v. Iran

A prominent example where the Council has used provisional measures to support its response in a situation is *United States of America v. Iran*.[20] In response to the actions of Iranian revolutionaries who captured the US Embassy in Tehran, the US instituted proceedings against Iran in the ICJ.[21] The ICJ ordered provisional measures requiring Iran to immediately ensure the restoration of the Embassy to US control; to ensure the immediate release of all US nationals held as hostages; and to afford full protection to all diplomatic and consular personnel of the United

[17] See Sloan, *supra* note 10, at 42 (and UN speeches cited there); U.N.G.A., 72nd Sess., 73rd mtg. at 27, U.N. Doc. A/72/PV.73 (Dec. 19, 2017); U.N.G.A., 62nd Sess., 76th mtg. at 35, U.N. Doc. A/62/PV.76 (Dec. 18, 2007); U.N.G.A., 52nd Sess., 71st mtg. at 18, U.N. Doc. A/52/PV.71 (Dec. 15, 1997).
[18] See e.g. U.N.G.A., 71st Sess., 58th mtg. at 14, U.N. Doc. A/71/PV.58 (Dec. 9, 2016), (Assembly 'must stand with' the people of eastern Aleppo); U.N.G.A., 65th Sess., 76th mtg. at 9. U.N. Doc. A/65/PV.76 (Mar. 1, 2011) (Assembly has sent a 'powerful message to the world' on Libya).
[19] Ramsden, INTERNATIONAL JUSTICE, *supra* note 10, at 108.
[20] *United States of America v. Iran*, Provisional Measures, supra note 14.
[21] *Id*.

States of America (US).[22] Shortly before this order the Council unanimously adopted Resolution 457 (1979) which '[u]rgently call[ed] upon the Government of Iran to release immediately the personnel' of the United Sttaes Embassy.[23] However, Iran failed to take such action leading to the adoption of a further resolution, this time using the ICJ order as an additional basis in which to exert pressure on Iran. The Council thus adopted Resolution 461 (1979) which, in addition to reaffirming its earlier resolution, '[d]eplore[d] the continued detention of the hostages contrary to its resolution 457 (1979) and the Order of the International Court of Justice'; accordingly, the Council threatened, in the event of non-compliance, 'effective measures under Articles 39 and 41 of the Charter' (which include economic or diplomatic sanctions).[24]

It is apparent that the ICJ provisional measures contributed to the Council's prompt action in this situation. The provisional measures were mentioned both in the preamble of Resolution 461, which stated that the Council took them into account, and in the operative paragraphs, where the Council deplored their continued violation.[25] The US, in a letter to the Council President also requested that the Council 'meet at an early date to consider the measures which should be taken to induce Iran to comply with its international obligations': the US emphasised Iran's rejection of the ICJ provisional measures as posing a threat to international peace and security.[26] Iran's violation of provisional measures was thus being used as part of the justification for Chapter VII action. Similar logic weighed heavily in the speech of the Bolivian delegate at the Council meeting to discuss the draft resolution. As he pointed out, Iran's decision to 'totally ignore' the provisional measures and the Council resolution posed a threat to international peace and security which justified the adoption of Chapter VII measures.[27] Although other Council members did not state their concern in precisely such terms, the fact that a number of them emphasised the provisional measures in their speeches suggests that it played a part in their decision.[28]

The provisional measures seemed to have influenced the language of Resolution 461. Although this resolution was phrased as a reaffirmation of Resolution 457 (adopted prior to the provisional measures decision), it is noteworthy that the later resolution conforms to the language of the ICJ order in referring to 'all persons of United States nationality' rather than 'the personnel of the Embassy of the United States of America'.[29] When Iran continued to refuse to comply with the Council resolutions, the US proposed a draft resolution that would have imposed a range of sanctions on Iran.[30] The US delegate cited the ICJ provisional measures as an authoritative expression of the will of the 'world community'.[31] Niger's delegate also emphasised Iran's duty to 'unconditionally obey' the ICJ decision.[32] But there were contrary voices. Mexico argued that it would be 'contradict[ory]' to affirm the ICJ's order 'to ensure that no action will be taken by [the parties] which will aggravate the tension between the two countries' while, on the other hand,

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[22] *Id*., at ¶ 47.
[23] U.N.S.C. Res. 457 (Dec. 4, 1979).
[24] U.N.S.C. Res. 461 (Dec. 31, 1979).
[25] U.N.S.C. Res. 461 (Dec. 31, 1979).
[26] Permanent Representative of the United States of America to the U.N., Letter dated 22 December 1979 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/13705 (Dec. 22, 1979).
[27] U.N.S.C. Official Records, U.N. Doc. S/PV.2183 (Dec. 30, 1979), at ¶¶ 38, 39.
[28] *Id*.,, at ¶¶ 11 (Nigeria), 21 (Zambia), 27 (Jamaica), 46 (Japan), 58 (Canada); U.N.S.C. Official Records, U.N. Doc. S/PV.2184 (Dec. 31, 1979), at ¶ 3 (Gabon).
[29] U.N.S.C. Res. 461 (Dec. 31, 1979), at ¶ 3.
[30] United States of America, Draft Security Council Resolution, U.N. Doc. S/13735 (Jan. 10, 1980).
[31] U.N.S.C. Official Records, U.N. Doc. S/PV.2191, (Jan 11-13, 1980) ¶¶ at 25, 27.
[32] *Id.*, at ¶ 96.

to 'adopt…a draft resolution which most probably would have precisely that effect'.[33] On this view, ICJ provisional measures and Council action are not complimentary but might conflict. The Soviet Union claimed that the dispute between the US and Iran was a 'bilateral dispute' that did not 'fall within the purview of Chapter VII of the Charter'.[34] Ultimately, the draft resolution was not adopted because the Soviet Union voted against it.[35] This itself highlights the structural weakness in seeking to support the implementation of ICJ provisional measures in the Council, particularly where the interests of a permanent member or their client States are implicated in the interim order.

(2) Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)

Another example of provisional measures prompting Council action was *Bosnia Genocide*.[36] The ICJ ordered provisional measures on 8 April 1993 that Yugoslavia should 'immediately…take all measures within its power to prevent commission of the crime of genocide' and to ensure that any military, paramilitary or irregular armed units directed or supported by it do not commit any acts of genocide.[37] The Council had, prior to this order, issued a sizeable number of resolutions on the Yugoslavia situation. This began with Resolution 713 (1991) of 25 September 1991 in which, acting under Chapter VII, the Council imposed an embargo on all deliveries of weapons and military equipment to Yugoslavia.[38] In Resolution 771 (1992) of 13 August 1992, the Council then '[s]trongly condemn[ed] any violations of international humanitarian law, including those involved in the practice of "ethnic cleansing"', demanding the parties to 'cease and desist' from such violations.[39] Nevertheless, the provisional measures provided impetus for further action. In a letter dated 16 April 1993, Bosnia wrote to the Council President to complain that forces supported by Yugoslavia were continuing their assault on Bosnia and, in particular, intensifying their assault on Srebrenica in 'direct violation' of the provisional measures.[40] Bosnia requested the Council to 'take immediate measures under Chapter VII of the Charter to stop the assault and to enforce the Order of the International Court of Justice'.[41] On the same day, the Council unanimously passed Resolution 819 (1993), which '[took] note' of the ICJ provisional measures and included a series of demands, including a demand that Yugoslavia 'immediately cease' the supply of military equipment to Bosnian Serb paramilitary units.[42]

On the following day, the Council adopted Resolution 820 (1993), which commended the Vance-Owen peace plan and decided on a wide range of Chapter VII sanctions in case of non-compliance with the plan.[43] The meeting records suggest that the ICJ's order was, for some States at least, part of the motivation for the resolution.[44] Venezuela's delegate noted that the ICJ order

[33] *Id.*, at ¶ 62.
[34] *Id.*, at ¶ 48.
[35] *Id.*, at ¶ 149. The count was 10 in favour, 2 against and 2 abstentions. The U.S.S.R. had abstained in relation to Resolution 461 (1979).
[36] Bosnia and Herzegovina v. Yugoslavia, Provisional Measures *supra* note 15.
[37] *Id.*, at ¶ 52.
[38] U.N.S.C. Res. 713 (Sept. 25,1991).
[39] U.N.S.C. Res. 771 (Aug. 13, 1992).
[40] Permanent Representative of Bosnia and Herzegovina to the U.N., 'Letter dated 16 April 1993 from the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed to the President of the Security Council', U.N. Doc. S/25616 (Apr. 16, 1993).
[41] *Id.*
[42] U.N.S.C. Res. 819 (Apr. 16, 1993).
[43] U.N.S.C. Res. 820 (Apr. 17, 1993).
[44] U.N.S.C. Official Records, U.N. Doc. S/PV.3200 (Apr. 17, 1993).

implied that Yugoslavia was 'possibly responsible for committing crimes of genocide', which was 'the worst crime against humanity'.[45] He warned that '[i]f the international community, represented by the Council, is not capable of meeting the concern' of the ICJ, 'the credibility and the legitimacy of the whole international political and judicial system would be profoundly and seriously compromised'.[46] Morocco's delegate claimed (inaccurately) that the ICJ had 'finally recognised that this is a case of genocide' which made it necessary for the international community 'to impose sanctions which no country anywhere could ignore'.[47] That said, it must be emphasised that none of the other delegates mentioned the provisional measures, which suggests that the order was not a major motivator of the resolution (especially since the peace plan had been months in the making). It nonetheless provides a basis for debate amongst Members on the responsibility of States for wrongful acts.

Nevertheless, it is noteworthy that Council resolutions continued to use the 'ethnic cleansing' label and avoid 'genocide', notwithstanding the ICJ provisional measures used the latter term. As Michelle Ringrose observed, the 'ethnic cleansing' euphemism has been used by the Council to avoid the practical implications of the 'genocide' label, namely, the resultant duty to take action to prevent and suppress actions of genocide.[48] That said, it is significant that at least the delegates of Venezuela and Morocco saw the ICJ provisional measures as justifying the use of 'genocide' in Council resolutions on this situation. This suggests that the ICJ decision contributed towards an acknowledgment of the massacres in Bosnia and Herzegovina as genocide.

B. Informal effects

Despite these examples, the reality is that, in most cases, ICJ provisional measures have not been expressly referenced or acted upon in Council resolutions. The failure to act upon provisional measures that have a broader peace and security dimension might arise for numerous reasons (including, for example, due to a lack of political will or a sense that the matter is best resolved through the ICJ procedure). Nonetheless, there are instances where a Council resolution on a situation was blocked due to a permanent member veto or threat of veto. In this situation, seeking an ICJ interim order might form part of a strategy to exert pressure on international actors, including Council inaction. A related goal of seeking provisional measures might be to support the reframing an issue in legal terms, thereby inflicting reputational costs on the non-compliant State, placing pressure on it to justify its position.

(1) Mobilising Shame against a Recalcitrant State

One case where the interim order was subsequently used by Member States to shame the offending State was *Nicaragua v US*.[49] In its provisional measured decision of 10 May 1984, the ICJ indicated that the US should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines.[50]

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[45] *Id*., at 31.
[46] *Id.*, at 31.
[47] *Id.*, at 43.
[48] Michelle Ringrose, The Politicization of the Genocide Label: Genocide Rhetoric in the UN Security Council, 14(1) GENOCIDE STUDIES AND PREVENTION 124 (2020) See also Michael Ramsden, 'The Crime of Genocide in General Assembly Resolutions: Legal Foundations and Effects', 21(3) HUMAN RIGHTS L. REV. 671 (2021).
[49] Nicaragua v. United States of America, Provisional Measures, *supra* note 14.
[50] *Id.*, at ¶ 41.

Although formal action to uphold the provisional measures were an impossibility in the Council due to the veto, it is apparent that the ICJ decision had effects in other ways. Given US permanent membership of the Council, any attempt to pass a resolution in the Council to condemn the actions of the US (let alone to impose sanctions) was destined for failure. The US vetoed five resolutions on Nicaragua during 1982-1986.[51] Although the US could veto resolutions on the basis that this matter reflected a political decision pertaining to peace and security, ignoring the ICJ's legal pronouncements would impose reputational costs. As one commentator put it, Sandinista Nicaragua 'effectively used the suit at the World Court to reframe the US-Nicaraguan conflict using the norms and values of respect for international law and the rule of law', thereby enabling it to mobilise public opinion against the US.[52]

In this regard, it is clear that the ICJ provisional measures were an important source of pressure against the US, in the Council and elsewhere, and provided part of the justification for the later draft resolutions. This was certainly how Nicaragua saw it. On 10 May 1984, the day the ICJ issued its provisional measures, Nicaragua sent a copy of excerpts of the judgment to the UN for circulation, as a Council document.[53] On 15 May, Nicaragua sent the UN, for circulation in the Council and Assembly, a copy of a resolution adopted by a conference of the Non-Aligned Countries (Nicaragua being a member) which urged the US to comply with the provisional measures.[54] The Council met to consider Nicaragua's situation on 7 September 1984; Nicaragua's delegate noted that 'the United States, which throughout its history has proclaimed itself the defender of international law and has used the International Court whenever it suited its interests, said it would not recognize the Court's jurisdiction on this issue for a period of two years'.[55] He then proceeded to quote the first two paragraphs of the provisional measures in full and to note that, subsequent to the ICJ's decision, 'the United States Government once again cynically declared that it was not at that time carrying out any action contrary to the recommendation of the International Court'.[56] When it was the US delegate's turn to speak he did not directly address these accusations, but rather asserted that Nicaragua's complaints to the Council distracted from the 'underlying problems of the region' and the 'Contadora process they profess to support'.[57]

Prior to the ICJ's decision on the merits, its provisional measures decision would continue to feature in the Council. On 10 May 1985, the Council adopted resolution 562 (1985).[58] The direct cause of this resolution was the US's decision on 1 May to impose a total trade embargo on

[51] U.N.S.C. Official Records, UN Doc S/PV.2347 (Apr. 2, 1982), at ¶ 140; U.N.S.C. Official Records, U.N. Doc. S/PV.2529 (Apr. 4, 1984), ¶ 252; U.N.S.C. Official Records, U.N. Doc. S/PV.2580 (May 10, 1985), ¶¶ 266-268 (the United States vetoed specific paragraphs but ultimately let the toned-down resolution pass); U.N.S.C. Official Records, U.N. Doc. S/PV.2693 (Jul. 31, 1986), at 54-55; U.N.S.C. Official Records, U.N. Doc. S/PV.2718 (Oct. 28, 1986), at 51.

[52] Héctor Perla Jr., SANDINISTA NICARAGUA'S RESISTANCE TO US COERCION: REVOLUTIONARY DETERRENCE IN ASYMMETRIC CONFLICT (2017), at 174.

[53] Permanent Representative of Nicaragua to the United Nations, Letter dated 10 May 1984 from the Permanent Representative of Nicaragua to the United Nations addressed to the Secretary General, U.N. Doc. S/16556 (May 11, 1984).

[54] Permanent Representative of Nicaragua to the United Nations, Letter dated 15 May 1984 from the Permanent Representative of Nicaragua to the United Nations addressed to the Secretary General, U.N. Doc. A/39/260-S/16566 (May 15, 1984).

[55] U.N.S.C. Official Records, U.N. Doc. S/PV.2557 (Sept. 7, 1984), at ¶ 11.

[56] *Id.*, at ¶¶ 12-13.

[57] *Id.*, at ¶ 61.

[58] U.N.S.C. Res. 562 (May 10, 1985).

Nicaragua.[59] The original draft resolution expressed '[r]egret' towards the trade embargo and called on States to refrain from the imposition of trade embargoes.[60] The US vetoed these paragraphs,[61] but the adopted resolution contained a milder call for all States to refrain from carrying out 'political, economic or military actions of any kind … which might impede the peace objectives of the Contadora Group'.[62] It is impossible to measure the effect that the ICJ's provisional measures had on this resolution. The provisional measures were not specifically mentioned in the Council debate, but Nicaragua did ask rhetorically that if the US was 'so sure of itself', 'why does it not resort to existing organs, such as the International Court of Justice, instead of acting in a contrary manner and disregarding the validity and competence of the Court on these issues?'[63] The ICJ's provisional measures decision came up again in a Council debate on 10 December 1985, concerning an escalation in the type of weapons and supplies provided by the US to the *contras*.[64] Nicaragua's delegate stated that this action confirmed the US government's 'disdain' for international law and for the ICJ's order.[65] Here, the rule of law symbolism that an ICJ decision represents was used in an attempt to discredit the US position on this issue. This sentiment was echoed by several other countries (mostly aligned with the Soviet bloc).[66] The US, for its part, sought to undermine the authority of the ICJ by noting that 'of the 15 judges on that Court, 10 of the countries to which those judges belong reject the compulsory authority of the…Court…, including some of Nicaragua's closest friends'.[67]

The pressure on the US mounted when the ICJ decided the merits in favour of Nicaragua.[68] Although the judgment superseded the provisional measures decision, a draft resolution on 31 July 1986 (which was vetoed) mentioned both in its preamble.[69] The reference to the provisional measures served to emphasise the duration of US non-compliance. 'Unfortunately', as Zimbabwe argued, 'this is not the first time the World Court has ruled on aspects of this issue.'[70] Prolonged US non-compliance with the ICJ order since 10 May 1984 raised (according to Zimbabwe's delegate) the question: 'Does international law then account for nothing? Is might to be equated with right in the conduct of international affairs?'[71] The delegate's speech illustrates how the provisional measures were important even after the judgment on the merits was handed down: prolonged non-compliance with the provisional measures strengthened the call for Council action to enforce the judgment on the merits. As Nicaragua's delegate said at a meeting of the Council on 21 October 1986: 'The failure of the United States to comply [with the provisional measures] is public and notorious.'[72]

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[59] U.N.S.C. Official Records, U.N. Doc. S/PV.2577 (May 8, 1985), at ¶ 38.
[60] Nicaragua, Draft Resolution, U.N. Doc. S/17172 (May 9, 1985).
[61] U.N.S.C. Official Records, U.N. Doc. S/PV.2580 (May 10, 1985), at ¶¶ 266-268.
[62] U.N.S.C. Res. 562 (May 10, 1985).
[63] U.N.S.C. Official Records, U.N. Doc. S/PV.2578 (May 9, 1985), at ¶ 227.
[64] U.N.S.C. Official Records, U.N. Doc. S/PV.2633 (Dec. 10, 1985)
[65] *Id.*, at ¶ 26.
[66] U.N.S.C. Official Records, U.N. Doc. S/PV.2634 (Dec. 11, 1985), at ¶ 42 (USSR), ¶ 71 (Cuba), ¶ 119 (Vietnam), at ¶ 124 (Iran); U.N.S.C. Official Records, U.N. Doc. S/PV.2636 (Dec. 12, 1985), at ¶ 99 (Zimbabwe), at ¶ 120 (Iran).
[67] *Id.*, at ¶ 57.
[68] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 1986 I.C.J. Rep 14 (Jun. 27, 1986).
[69] Congo, Ghana, Madagascar, Trinidad and Tobago and United Arab Emirates, Draft Resolution, U.N. Doc. S/18250 (July 31, 1986).
[70] U.N.S.C. Official Records, U.N. Doc. S/PV.2703 (Jul. 31, 1986), at 37.
[71] *Id.*
[72] U.N.S.C. Official Records, UN Doc S/PV.2715 (Oct. 21, 1986), at 5.

(2) Catalysing Diplomatic Exchanges

As alluded to earlier, one way in which a State can draw attention to ICJ provisional measures is by writing letters to the Council so as to encourage their good offices on a dispute. We will now consider two cases in which correspondence by the parties on the terms of ICJ provisional measures served to engage the Council in the process of dispute settlement.

Cameroon v. Nigeria related to an armed dispute between Cameron and Nigeria over the Bakassi peninsula.[73] On 15 March 1996, the ICJ indicated provisional measures to the effect that both parties were to observe a ceasefire agreement, and not take any action to prejudice the rights of the other. The parties were to ensure that the presence of armed forces in the Bakassi peninsula did not extend beyond the positions in which they were situated prior to 3 February 1996; they were to take all necessary steps to conserve evidence and lend every assistance to the fact-finding mission of the Secretary-General.[74]

From the start, letters had played a crucial role as the means of communication between the parties and the Council. On 28 February and 4 March 1994, Cameroon and Nigeria respectively wrote to the Council President to convey their perspectives on armed clashes related to the dispute and, in Cameroon's case, to request an urgent Council meeting.[75] Cameroon wrote two more letters to the Council President on 28 March and 20 April to transmit a communiqué of the Organization of African Unity and to submit the informal text of a draft resolution.[76] On 29 April, the Council President, writing on behalf of the members of the Council, wrote to Cameroon and Nigeria in response to their letters, to encourage the efforts of the Organization of African Unity (OAU) to reach a political settlement, and to request the UN Secretary-General, in consultation with the OAU Secretary-General, to follow developments and keep the Council informed.[77] The conflict had then quieted down until 3 February 1996, when Nigerian troops began to advance, despite the case pending before the ICJ. On 22 February, Cameroon wrote to the Council President to request the Council to invite a report from the Secretary-General on the situation in the Bakassi peninsula and to urge Nigeria to withdraw its troops to their positions prior to 21 December 1993.[78] Nigeria also wrote to the Council, calling Cameroon's letter intentionally misleading.[79] In response, on 29 February 1996 the Council President wrote to Cameroon and Nigeria on behalf of Council

[73] *Cameroon v. Nigeria, supra* note 14.
[74] *Id.*, at ¶ 49.
[75] Permanent Representative of Cameroon to the U.N., Letter dated 28 February 1994 from the Permanent Representative of Cameroon to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1994/228 (Feb. 28, 1994); Permanent Mission of Nigeria to the U.N., Letter dated 4 March 1994 from the Chargé d'Affaires A.I. of the Permanent Mission of Nigeria to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1994/250 (March 4, 1994).
[76] Permanent Representative of Cameroon to the U.N., Letter dated 28 March 1994 from the Permanent Representative of Cameroon to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1994/351 (Mar. 28, 1994); Permanent Representative of Cameroon to the U.N., Letter dated 20 April 1994 from the Permanent Representative of Cameroon to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1994/472 (Apr. 20, 1994).
[77] U.N.S.C., Identical letters dated 29 April 1994 addressed to the Permanent Representatives of Cameroon and Nigeria to the United Nations by the President of the Security Council, U.N. Doc. S/1994/519 (Apr. 29, 1994)
[78] Republic of Cameroon, Letter dated 22 February 1996 from the Minister for Foreign Affairs of the Republic of Cameroon addressed to the President of the Security Council, U.N. Doc. S/1996/125. (Feb. 23, 1996)
[79] Permanent Representative of Nigeria to the U.N., Letter dated 27 February 1996 from the Permanent Representative of Nigeria to the United Nations addressed to the President of the Security Council, UN Doc S/1996/140 (Feb. 27, 1996).

members.[80] The Council condemned the recent violence and urged the parties to 'redouble [their] efforts to reach a peaceful settlement through' the ICJ. They also called upon the parties to respect the Togo ceasefire and to return their forces to the positions they occupied before the dispute was referred to the ICJ, and they endorsed the Secretary-General's proposal to send a fact-finding mission to the Bakassi peninsula. This Council letter was noted in the preamble to the ICJ's decision on provisional measures, and the measures indicated by the ICJ were strikingly similar to the recommendations of the Council.[81]

A number of subsequent letters mentioned the ICJ decision. In one dated 12 April 1996, the President of Cameroon wrote to the Council President to express his 'full … support' for the measures and to suggest several points for the fact-finding mission to investigate.[82] On 2 May, Cameroon wrote to the Council President to inform the Council of new attacks by Nigerian troops against Cameroonian positions; Cameroon claimed that these events 'prove[d] *a posteriori* the relevance…of the protective measures' indicated by the ICJ and in particular the urgent need to begin the fact-finding mission.[83] On 24 May, the Secretary-General wrote to the Council President, saying that the Head of State of Nigeria had indicated to him his 'awareness that the ICJ had urged the two countries to lend assistance to a United Nations mission to Bakassi and said that, in deference to this order, the Government of Nigeria accepted in principle the idea of such a mission'.[84] On 12 December 1996, Cameroon wrote to Nigeria to protest against electric and water supply projects implemented by Nigeria in disputed territory which Cameroon called 'a flagrant violation of the protective measures'; the letter was copied to the Council.[85]

Another case in which the parties to the dispute engaged the Council in correspondence was *Qatar v. United Arab Emirates*.[86] This case related to the Qatar diplomatic crisis which began on 5 June 2017, when Saudi Arabia, the UAE, Bahrain and Egypt severed diplomatic relations with Qatar, purportedly on the ground of Qatar's support for terrorism. At the ICJ, Qatar complained that measures taken by the UAE on 5 June 2017, to expel all Qataris from its territory and prohibit Qataris from entering the UAE, were discriminatory against Qataris in violation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). On 23 July 2018, the ICJ ordered provisional measures requiring the UAE to ensure that families separated by the 5 June measures were reunited; that Qatari students affected by the measures were

[80] U.N.S.C., Identical letters dated 29 February 1996 from the President of the Security Council addressed to the President of the Republic of Cameroon and to the Head of State and Commander-in-chief of the armed forces of the Federal Republic of Nigeria, UN Doc S/1996/150 (Feb. 29, 1996).
[81] Cameroon v. Nigeria, *supra* note 14, at ¶¶ 45-46; c.f. ¶ 20.
[82] Permanent Mission of Cameroon to the U.N., Annex to the Letter dated 15 April 1996 from the Charge d'Affaires A.I. of the Permanent Mission of Cameroon to the United Nations addressed to the President of the Security Council (16 April 1996) UN Doc S/1996/287.
[83] Permanent Mission of Cameroon to the U.N., Letter dated 2 May 1996 from the Charge d'Affaires A.I. of the Permanent Mission of Cameroon to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1996/330 (May 2, 1996).
[84] U.N. Secretary-General, Letter dated 24 May 1996 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/1996/390, (May 29, 1996)
[85] Permanent Mission of Cameroon to the U.N., Annex to the Letter dated 16 December 1996 from the Chargé d'Affaires A.I. of the Permanent Mission of Cameroon to the United Nations addressed to the President of the Security Council, UN Doc S/1996/1052 (Dec. 17, 1996). Such letters continued until 1998: Permanent Mission of Cameroon to the U.N., Letter dated 13 March 1998 from the Permanent Representative of Cameroon to the United Nations addressed to the President of the Security Council, UN Doc S/1998/228 (Mar. 13, 1998); Permanent Mission of Cameroon to the U.N., Letter dated 11 December 1998 from the Permanent Representative of Cameroon to the United Nations addressed to the President of the Security Council, UN Doc S/1998/1159 (Dec. 11, 1998).
[86] Qatar v. United Arab Emirates, Provisional Measures, *supra* note 14.

given the opportunity to complete their education in the UAE or to obtain their educational records if they wish to continue their studies elsewhere; that Qataris affected by the measures are allowed access to courts and tribunals of the UAE; and that both parties not take any measures to aggravate the dispute.

From the start, Qatar had called on the Council to intervene to resolve the diplomatic crisis, as it characterised the sanctions imposed against Qatar as violations of international law. Qatar's foreign minister told reporters that 'the United Nations is the right platform to start from' and that '[t]here is a role for the Security Council and for the General Assembly and all the United Nations mechanisms' in resolving the crisis.[87] On the other hand, the UAE advocated a 'diplomatic solution at the regional level'.[88] The Council was reluctant to intervene. The Council president, China's UN ambassador, told reporters that the Council had not received a formal request for intervention and that 'it's something that should be sorted out among the brothers in the [Gulf Cooperation Council] and in the region'.[89]

Such inaction of the Council (even after the ICJ provisional measures decision) explains why Qatar relied on informal methods such as letters to the Council to draw attention to its cause. Both Qatar and the UAE had previously written letters to the Council addressing the crisis,[90] but the ICJ's decision added a new dimension to their exhortations. On 26 July 2018, three days after the ICJ decision, Qatar wrote to the Council president regarding the provisional measures.[91] The letter did not merely transmit the decision but highlighted several particularly important aspects of it. Qatar called the decision 'a recognition by the highest international judicial body of the validity of the legal position of Qatar with regard to the crisis that has been concocted against it'. The decision also (according to Qatar) 'reaffirm[ed] that Qatar has been correct to address the crisis and its impact on international peace and security, as well as its humanitarian consequences, through international law, international and bilateral instruments, and international conflict-resolution mechanisms'. While Qatar was 'striving to de-escalate the situation', it would continue to use 'legal means' to protect the 'interests and rights' of Qataris. Three weeks later, on 15 August 2018, the UAE responded with its own letter addressed to the Council.[92] It claimed that Qatar had 'misrepresented' both Qatar's policies and the order of the ICJ, and that the UAE was 'already in compliance with the provisional measures'.[93] The UAE also drew attention to the ICJ's provisional

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[87] *Qatar: UN should play a role in resolving Gulf crisis*, AL JAZEERA (Jul. 28, 2017), https://www.aljazeera.com/news/2017/07/qatar-play-role-resolving-gulf-crisis-170727223916633.html.

[88] *Id.*

[89] *Id.* See also *UN says it has received no formal request for intervention in Qatar crisis*, AL ARABIYA (Aug. 1, 2017), https://english.alarabiya.net/en/News/gulf/2017/08/01/UN-says-it-has-received-no-formal-request-for-intervention-in-Qatar-crisis.html.

[90] See e.g. Permanent Representative of the United Arab Emirates to the U.N., Letter dated 4 May 2018 from the Permanent Representative of the United Arab Emirates to the United Nations addressed to the President of the Security Council, UN Doc S/2018/425 (May 7, 2018); Permanent Representative of Qatar to the U.N., Identical letters dated 9 May 2018 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2018/441 (May 15, 2018).

[91] Permanent Representative of Qatar to the U.N., Identical letters dated 26 July 2018 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2018/562 (Jul. 31, 2018).

[92] Permanent Representative of the United Arab Emirates, Letter dated 15 August 2018 from the Permanent Representative of the United Arab Emirates to the United Nations addressed to the President of the Security Council U.N. Doc. S/2018/590 (Aug. 16, 2018).

[93] *Id*.

measure that both parties should refrain from any action which might aggravate or extend the dispute, implying that Qatar's accusations before the Council violated this measure.

On 14 June 2019, the ICJ handed down a second decision on provisional measures, rejecting the UAE's counter-request for provisional measures against Qatar.[94] On 30 July, Qatar wrote to the Council President claiming 'yet another international legal victory'.[95] Accordingly, the 'decision confirmed that Qatar respects and fully complies with international legal rules and agreements' and 'demonstrate[d] the validity of [Qatar's] position since the start of the crisis'.[96] Again, Qatar emphasised its eagerness to avoid escalation and find a diplomatic solution, while at the same time reiterating its commitment to using legal means to protect the rights of its nationals. As before, the UAE felt compelled to respond in a letter dated 9 September 2019 to the Council President. It repeated its accusation that Qatar had misrepresented the Court's decision and its emphasis on the order not to aggravate the dispute, and attempted to shift the attention to Qatar's alleged 'policy of supporting extremism'.[97] This dispute thus shows the use of ICJ provisional measures as a means for States to give publicity to their cause as well as to advance their narratives in international political fora.

III. RECEPTION OF ICJ PROVISIONAL MEASURES IN THE GENERAL ASSEMBLY

A. Effect on the exercise of formal powers by the General Assembly

In this section, we consider the extent to which ICJ provisional measures have influenced the exercise of power by the Assembly. As mentioned, the Assembly has powers to make recommendations to Member States and the Council. While it does not have the power to issue binding decisions, it is the most representative UN organ comprising a near universal membership of States. As such, this body has frequently been used to mobilise shame and exert pressure on recalcitrant States to bring their conduct back into conformity with international law.[98] The issue therefore is whether the Assembly has recommended Member States to observe provisional measures and the form in which such exhortations have taken; two cases in particular show some correlations.

(1) Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)

We have seen already how the provisional measures in the *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)* led to a swift response from the Council. The Assembly also eventually responded to the ICJ decision, albeit eight months after provisional measures were ordered. On 20 December 1993, the Assembly thus adopted Resolution 48/88 on the situation in Bosnia and Herzegovina, taking note in the preamble the provisional measures decision that

[94] Qatar v. United Arab Emirates, Provisional Measures, *supra* note 14.
[95] Permanent Representative of the State of Qatar to the U.N., Identical letters dated 30 July 2019 from the Permanent Representative of the State of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2019/610 (Aug. 1, 2019).
[96] *Id*.
[97] Permanent Representative of the United Arab Emirates to the U.N., Letter dated 9 September 2019 from the Permanent Representative of the United Arab Emirates to the United Nations addressed to the President of the Security Council UN Doc S/2019/728. (Sep. 10, 2019)
[98] See generally Ramsden, INTERNATIONAL JUSTICE, *supra* note 10.

Yugoslavia should immediately take all measures to prevent commission of the crime of genocide.[99] It further took note of the ICJ's later statement that the present perilous situation demands…[the] immediate and effective implementation of those [provisional] measures'.[100] The operative part of the resolution included a list of 30 points; *inter alia*, the Assembly 'urge[d]' all States to continue the measures taken to comply with the sanctions imposed by the Council, and condemned the 'violations of the human rights of the Bosnian people and of international humanitarian law committed by parties to the conflict, especially those violations committed as policy, flagrantly and on a massive scale, by Serbia and Montenegro and the Bosnian Serbs'.[101] In contrast to the Council, which avoided mention of the term 'genocide', the Assembly's resolution expressly 'reaffirm[ed] its determination to prevent acts of genocide'. This is significant since the genocide was the subject matter of the provisional order. That said, it should be noted that in Resolution 47/121 (1992), the Assembly had already proclaimed that ethnic cleansing was 'a form of genocide'.[102] Nevertheless, reference to the provisional measures decision in Resolution 48/88 shows this decision to be at least one of the motivators behind this resolution.

(2) Ukraine v. Russian Federation

Another example of a case in which ICJ provisional measures contributed to action by the Assembly is *Ukraine v. Russian Federation.*[103] This case concerned allegedly discriminatory measures by Russia against Crimean Tatars in occupied Crimea. On 19 April 2017, the ICJ indicated provisional measures that required Russia to refrain from maintaining limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*. Russia was also required to ensure the availability of education in the Ukrainian language.[104]

The Council's ability to act in relation to this case was limited as a result of Russia's veto power. Prior to the ICJ decision, Russia had already vetoed two draft resolutions on the situation in Ukraine.[105] The Council passed a resolution in relation to the downing of Malaysia Airlines flight MH17 in Ukraine, but that resolution did not attribute responsibility for the downing.[106] In contrast, the Assembly had on 27 March 2014 adopted Resolution 68/262, which affirmed the territorial integrity of Ukraine in response to Russia's annexation of Crimea.[107] On 19 December 2016, the Assembly adopted Resolution 71/205 on the situation of human rights in Crimea, in which it condemned 'the abuses, measures and practices of discrimination against the residents of the temporarily occupied Crimea, including Crimean Tatars … by the Russian occupation authorities'.[108] The following year, on 19 December 2017, the Assembly once again considered the situation of human rights in Crimea. In Resolution 72/190, adopted that day, the Assembly explicitly '[took] note of the order of' the ICJ and urged Russia to 'fully and immediately comply'

[99] U.N.G.A. Res. 48/88 (Dec. 20, 1993).
[100] *Id.*, at ¶ 59.
[101] U.N.G.A. Res. 48/88, supra note 99.
[102] U.N.G.A. Res. 47/121 (Dec. 18, 1992).
[103] Ukraine v. Russian Federation, Provisional Measures, *supra* note 15.
[104] *Id.*, at ¶ 106.
[105] U.N. Doc. S/2014/189; U.N. Doc. S/2015/562.
[106] U.N.S.C. Res. 2166 (Jul. 21, 2014). For detailed analysis on this situation, see: Michael Ramsden, *Uniting for MH17*, 7(2) ASIAN J INTL L 337 (2017).
[107] U.N.G.A. Res. 68/262 (Mar. 27, 2014).
[108] U.N.G.A. Res. 71/205 (Dec. 19, 2016).

with the order.[109] The Assembly later repeated this call in its subsequent resolutions 73/263 of 2018[110] and 74/168 of 2019.[111]

A comparison between Resolution 72/190 of 2017 and Resolution 71/205 of the previous year further illustrates the impact of the ICJ provisional measures. While the 2016 resolution urged Russia to 'revoke immediately the decision declaring the Mejlis of the Crimean Tatar People an extremist organization and banning its activities, and repeal the decision banning leaders of the Mejlis from entering Crimea',[112] the 2017 resolution added a call for Russia to 'refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions'.[113] The 2017 resolution also urged Russia to 'ensure the availability of education in the Ukrainian and Crimean Tatar languages'.[114] Except for the mention of the Crimean Tatar language, these two additions were lifted verbatim from the ICJ's order. Thus, the provisional measures led to substantive changes in the content of Assembly resolutions on this situation.

B. Indirect effects

(1) Nicaragua v. United States of America

Earlier on, we discussed how Nicaragua used Council debates to draw attention to the ICJ provisional measures of 10 May 1984 in *Nicaragua v. United States of America*.[115] We now examine how it did the same in the Assembly. On 24 October 1984, the Assembly met to discuss the situation in Central America.[116] The Contadora Group had introduced a draft resolution which urged States to sign the Contadora Act on Peace and Co-operation in Central America of 7 September 1984.[117] But Nicaragua wanted more: 'to denounce the policy of State terrorism of the Reagan Administration'.[118] To this end, it presented its own draft resolution which would have explicitly taken note of the ICJ provisional measures and asked for an end of the US aggression against Nicaragua.[119]

Countries that supported Nicaragua tended also to cite the decision of the ICJ. Yemen called upon the US to 'abide by the text of the Order'.[120] Poland expressed its 'astonish[ment] that the United States would not recognize the authority of the International Court of Justice' and asserted that 'compliance by the United States with the Provisional Measures…would improve conditions for a political solution to the problems of the region'.[121] The Soviet Union noted that the US 'openly proclaimed policy of flagrant interference' was 'defying decisions of the

[109] U.N.G.A. Res. 72/190 (Dec. 19, 2017).
[110] U.N.G.A. Res. 73/263 (Dec. 22, 2018).
[111] U.N.G.A. Res. 74/168 (Dec. 18, 2019).
[112] U.N.G.A. Res. 71/205, *supra* note 106, at ¶ 2(g).
[113] U.N.G.A. Res. 72/190, *supra* note 110, at ¶ 3(j).
[114] *Id.*, ¶ 3(i).
[115] Nicaragua v. United States of America, Provisional Measures, *supra* note 14.
[116] U.N.G.A. Official Records, U.N. Doc. A/39/PV.35 (Oct. 24, 1984).
[117] Colombia, Mexico, Panama and Venezuela, Draft Resolution, U.N. Doc. A/39/L.6. (Oct. 18, 1984)
[118] *Id.*, at ¶ 40.
[119] Nicaragua, Draft Resolution, U.N. Doc. A/39/L.7 (Oct. 22, 1984). See also U.N.G.A. Official Records, UN Doc A/39/PV.35 (Oct. 24,1984), at ¶ 73; U.N.G.A. Official Records, U.N. Doc. A/39/PV.36 (Oct. 24, 1984), at ¶ 214.
[120] U.N.G.A. Official Records, U.N. Doc. A/39/PV.35 (Oct. 24, 1984), at ¶ 81.
[121] U.N.G.A. Official Records, U.N. Doc. A/39/PV.36 (Oct. 24, 1984), at ¶ 4.

International Court of Justice'.[122] Cuba and Mongolia characterised the US breach of the ICJ provisional measures as 'flagrant violations of international law'.[123] The provisional measures also featured in the speeches of India,[124] Cyprus,[125] Czechoslovakia,[126] Bulgaria,[127] the GDR,[128] Syria,[129] Laos,[130] Byelorussia,[131] Algeria,[132] Zimbabwe,[133] Iran,[134] and Palestine.[135] Only Honduras dared to attempt to turn the ICJ provisional measures on their head and accuse Nicaragua of 'distort[ing] the considerations put forward by the Court'.[136] The US did not address the ICJ's decision at all, but rather emphasised its 'support for diplomatic efforts to achieve an effective and lasting peace in Central America'[137] as well as the undemocratic nature of Nicaragua's government.[138] In the end, after 'extensive [off-the-record] consultations', Nicaragua decided to not to press for a vote on its draft resolution, and the Assembly adopted the Contadora Group's resolution by consensus as Resolution 39/4 of 26 October 1984.[139] But even though the resolution adopted did not mention the provisional measures or US non-compliance, the extensive discussion of the provisional measures during the Assembly meeting still provided a means to inflict reputational harm on the US and mobilise international public opinion against them.

The following year, on 21 October 1985, the President of Nicaragua took the opportunity of the commemoration of the UN's 40th anniversary to call upon the US to abide by the ICJ's provisional measures decision.[140] He stated: 'In a tacit admission of its own guilt, the United States has declared that it will not accept the Court's jurisdiction nor abide by its findings. On the other hand, our presence in the Court constitutes a historic milestone in the defence of the sovereignty and self-determination of small nations'.[141] In his words, Nicaragua was 'defending international law'.[142] On 22 November 1985, at the Assembly meeting on the situation in Central America, Nicaragua continued to reiterate its call for the US to abide by the ICJ provisional measures.[143] As in the previous year, ICJ decision was also emphasised by numerous delegates, including the

[122] *Id.*, at ¶¶ 69-70.
[123] *Id.*, §37; U.N.G.A. Official Records, U.N. Doc. A/39/PV.37 (Oct. 25, 1984), at ¶ 21.
[124] U.N.G.A. Official Records, U.N. Doc. A/39/PV.35 (Oct. 24, 1984), at ¶ 88.
[125] U.N.G.A. Official Records, U.N. Doc. A/39/PV.36 (Oct. 24, 1984), at ¶ 120.
[126] *Id.*, at ¶ 234.
[127] U.N.G.A. Official Records, UN Doc A/39/PV.37 (Oct. 25, 1984), at ¶ 32.
[128] *Id.*, at ¶ 67.
[129] *Id.*, at ¶ 137.
[130] U.N.G.A. Official Records, U.N. Doc. A/39/PV.38 (Oct. 25, 1984), at ¶ 134.
[131] *Id.*, at ¶ 150.
[132] *Id.*, at ¶ 201.
[133] *Id.*, at ¶ 234.
[134] *Id.*, at ¶ 280.
[135] *Id.*, at ¶ 375.
[136] U.N.G.A. Official Records, U.N. Doc. A/39/PV.36 (Oct. 24, 1984), at ¶ 214.
[137] U.N.G.A. Official Records, U.N. Doc. A/39/PV.38 (Oct. 25, 1984), at ¶ 46.
[138] *Id.*, at ¶ 63.
[139] U.N.G.A. Official Records, U.N. Doc. A/39/PV.39 (Oct. 26, 1984); U.N.G.A. Res. 39/4 (Oct. 26, 1984).
[140] U.N.G.A. Provisional Verbatim Record, U.N. Doc. A/40/PV.42 (Oct. 21, 1985), at 9.
[141] *Id.*, at 6-7.
[142] *Id.*, at 9.
[143] U.N.G.A. Provisional Verbatim Record, U.N. Doc. A/40/PV.88 (Nov. 22, 1985) at 13.

delegates of India,[144] Vietnam,[145] Laos,[146] Syria,[147] Yugoslavia,[148] Ghana,[149] the USSR,[150] Yemen,[151] Byelorussia,[152] Zimbabwe,[153] and Libya.[154] Ultimately those meetings did not result in a resolution that year, apparently because there was not enough time to discuss[155] (although the Assembly did pass a related resolution that requested the immediate revocation of the US unilateral trade embargo against Nicaragua).[156] But the debates must nevertheless have caused some embarrassment to the US.

On 27 June 1986, the ICJ handed down its judgment on the merits,[157] which effectively superseded the provisional measures. On 3 November 1986, the Assembly finally adopted Resolution 41/31 which urgently called for compliance with the ICJ judgment.[158] Although the resolution did not mention the provisional measures, their importance should not be overlooked. By including the provisional measures in its chronology,[159] Nicaragua could emphasise the duration of US non-compliance with the ICJ's decisions, enabling it to claim that: 'The Nicaraguan Government … has been extremely patient with the United States.'[160]

(2) Speeches at the report of the ICJ

Given that opportunities to discuss an issue at the Assembly are limited, a State that wishes to draw attention to ICJ provisional measures will often take advantage of every opportunity to do so. We have seen how Nicaragua did this when it called on the US to comply with the ICJ decision in its speech at the Assembly's commemoration of the UN's 40th anniversary. Another such opportunity is the chance to give a speech on the occasion of the report of the ICJ. Over the past three decades, there has been a large increase in the number of States that gave speeches at the report of the ICJ. In 1989, only two States spoke at that occasion, and neither of them mentioned any specific decision of the ICJ.[161] In 2019, a total of 49 States gave speeches, many of which mentioned specific ICJ decisions.[162] For the purposes of this article, it is worth examining how States used these speeches to draw attention to provisional measures of the ICJ.

In *Georgia v. Russian Federation*, the ICJ considered Georgia's complaint that Russia practised racial discrimination against ethnic Georgians in the Russian-occupied South Ossetia and

[144] U.N. Doc. A/40/PV.88, at 48.
[145] U.N.G.A. Provisional Verbatim Record, U.N. Doc. A/40/PV.89 (Nov. 24, 1985), at 24.
[146] *Id*., at 46.
[147] *Id*., at 83.
[148] U.N.G.A. Provisional Verbatim Record, U.N. Doc. A/40/PV.90 (Nov. 25, 1985), at 103.
[149] *Id.*, at 111.
[150] U.N.G.A. Provisional Verbatim Record, U.N. Doc. A/40/PV.91 (Nov. 26, 1985), at 14.
[151] *Id.*, at 57.
[152] *Id.*, at 72.
[153] *Id.*, at 123.
[154] *Id.*, at 171.
[155] See U.N.G.A. Provisional Verbatim Record, U.N. Doc. A/40/PV.122 (Dec. 18, 1985), at 6.
[156] U.N.G.A. Res. 40/188 (Dec. 17, 1985).
[157] Nicaragua v. United States of America, Judgment, *supra* note 68.
[158] U.N.G.A. Res. 41/31 (Nov. 3, 1986).
[159] U.N.G.A. Provisional Verbatim Record, U.N. Doc. A/41/PV.53 (Nov. 3, 1986), at 50.
[160] *Id.*, at 51.
[161] U.N.G.A. Provisional Verbatim Record, U.N. Doc. A/44/PV.43 (Nov. 3, 1989).
[162] U.N.G.A. Official Records, U.N. Doc. A/74/PV.20 (Oct. 30, 2019); U.N.G.A. Official Records, U.N. Doc. A/74/PV.21 (Oct. 30, 2019).

Abkhazia regions of Georgia.[163] On 15 October 2008, the ICJ indicated provisional measures compelling both parties to refrain from committing, sponsoring, defending or supporting acts of racial discrimination within South Ossetia and Abkhazia. The parties were also required to do all in their power to ensure, without distinction as to national or ethnic origin, security of persons, the right to freedom of movement and residence within the border of the State, and the protection of the property of displaced persons and of refugees. Further, they were also required to do all in their power to ensure that public authorities did not engage in acts of racial discrimination, while also facilitating humanitarian assistance in support of the rights under CERD.[164] The provisional measures remained in place until the ICJ upheld Russia's preliminary objection that Georgia had not satisfied the procedural requirements under Article 22 of CERD for recourse to the ICJ.[165]

Both Georgia and Russia made speeches addressing the provisional measures at the report of the ICJ to the Assembly on 30 October 2009.[166] Both countries emphasised their respect and support for the Court. Georgia stated that it was 'solely up to the Court to determine whether or not our northern neighbours complied with the ruling' and referred to two specific examples of 'clear factual evidence indicating that none of the provisional measures have been fulfilled'.[167] On the other hand, Russia emphasised the strong minority opinion, pointing out that 'for the very first time in its judicial proceedings on provisional measures, seven judges formed a united front, signing an opinion dissenting from the position of the other eight'.[168] Russia cited the minority opinion, '[r]epeating the conclusion of the Russian side', that 'it was odd that Georgia, having referred to cases of racial discrimination allegedly committed by the Russian Federation since the early 1990s, had waited until armed conflict had broken out with Russian and South Ossetian forces to refer this dispute to the Court'.[169] By taking its own arguments from the mouths of the dissenting judges, Russia managed to clothe its arguments with judicial authority. At the same time, it hedged its arguments. Whilst it claimed to adhere to the ICJ decision, it ended its speech ominously, warning of the danger that 'international judicial proceedings will lose their purely legal nature and become forums for political manipulation under the pretext of international law'.[170]

In *Costa Rica v. Nicaragua*, the ICJ considered a border dispute between Costa Rica and Nicaragua over the San Juan River. Costa Rica complained that Nicaragua had occupied and constructed a canal in the disputed territory. On 8 March 2011, the ICJ indicated the following provisional measures: both parties should refrain from maintaining any personnel (civilian or military) in the disputed territory, except that Costa Rica may dispatch civilian personnel charged with the protection of the environment; they should refrain from any action which might aggravate or extend the dispute; and they should inform the Court as to compliance with the provisional measures.[171] On 22 November 2013, in response to Costa Rica's complaint that Nicaragua had commenced construction of two new canals in the disputed territory, the ICJ ordered further provisional measures: Nicaragua should refrain from dredging and other activities in the disputed

[163] Georgia v. Russian Federation, Provisional Measures, supra note 14.
[164] *Id.*, at ¶ 149.
[165] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, 2011 I.C.J. Rep. 70 (Apr. 1, 2011), at ¶ 186.
[166] U.N.G.A. Official Records, U.N. Doc. A/64/PV.32 (Oct. 30, 2009).
[167] *Id.*, at 5.
[168] *Id.*, at 7.
[169] *Id.*
[170] *Id.*
[171] Costa Rica v. Nicaragua, *supra* note 14, at ¶ 86.

territory; it should fill the trench it had dug already (and inform the Court as to compliance, providing photographic evidence); it should remove all personnel from the disputed territory; Costa Rica may take appropriate measures in relation to the two new channels so far as necessary to prevent irreparable environmental damage; and both parties should inform the Court as to compliance.[172]

What is particularly interesting about this case is that Costa Rica did not refer to the provisional measures in its speeches at the report of the ICJ on 26 October 2011[173] and on 30 October 2014,[174] but Nicaragua did. This is the opposite of what we would have expected, since Costa Rica was the applicant and Nicaragua the respondent. In 2011, Nicaragua's delegate claimed that it had 'faithfully abided by all the points in the ruling [on provisional measures] and will continue to do so'.[175] In 2014, he did not mention the dispute with Costa Rica specifically, but made the general assertion that Nicaragua 'has always faithfully fulfilled its international obligations' in the total of five cases currently before the Court to which it was a party.[176] The absence of any mention of the provisional measures in the speeches of Costa Rica's delegates can be explained by the formulaic character of their speeches; almost the entirety of the delegate's speech in 2014 was copied from the previous delegate's speech at the same occasion in 2013.[177]

We have already mentioned the decision in *Ukraine v. Russian Federation*.[178] At the report of the ICJ on 25 October 2018, Ukraine's delegate pointed out that neither of the ICJ's substantive provisional measures (that Russia should lift its ban on the *Mejlis* and that it should ensure the availability of Ukrainian-language education) had been complied with.[179] She accordingly called on 'the entire international community to insist that Russia abide by international law, including the binding rulings of the International Court of Justice'.[180] Faced with Ukraine's accusations, Russia's delegate stated that he 'fe[lt] obliged to comment'.[181] He criticised Ukraine for using this agenda item 'not to evaluate the work of the Court during the reporting period but as propaganda for its position with regard to the proceedings against' Russia.[182] He also accused Ukraine of attempting to 'impose its own understanding of the provisional measures'.[183] Both Ukraine and Russia made much the same points on the same occasion the following year.[184]

The final case to consider in this section is *Qatar v. United Arab Emirates*.[185] Qatar complained that, by measures dated 5 June 2017, the UAE, in violation of CERD, expelled all Qataris from its territory and prohibited Qataris from entering the UAE. On 23 July 2018, the ICJ ordered provisional measures, including that the UAE ensure that families separated by the 5 June measures were reunited and that affected Qatari students be able to complete their education in the

[172] Costa Rica v. Nicaragua, *supra* note 14.
[173] U.N.G.A. Official Records, U.N. Doc. A/66/PV.43 (Oct. 26, 2011).
[174] U.N.G.A. Official Records, U.N. Doc. A/69/PV.34 (Oct. 30, 2014).
[175] U.N.G.A. Official Records, U.N. Doc. A/66/PV.43 (Oct. 26, 2011), at 20.
[176] U.N.G.A. Official Records, U.N. Doc. A/69/PV.34 (Oct. 30, 2014), at 1.
[177] U.N.G.A. Official Records, U.N. Doc. A/68/PV.41. (Oct. 31, 2013)
[178] Ukraine v. Russian Federation, Provisional Measures, *supra* note 15.
[179] U.N.G.A. Official Records, U.N. Doc. A/73/PV.25 (Oct. 25, 2018), at 8-9.
[180] *Id.*, at 9.
[181] *Id.*, at 26.
[182] *Id.*
[183] *Id.*
[184] U.N.G.A. Official Records, U.N. Doc. A/74/PV.20 (Oct. 30, 2019), at 21; U.N.G.A. Official Records, U.N. Doc. A/74/PV.21 (Oct. 30, 2019), at 25.
[185] *Qatar v. United Arab Emirates*, Provisional Measures, *supra* note 14, at 406.

UAE.[186] Qatar highlighted the provisional measures in its speech at the report of the ICJ on 25 October 2018.[187] It claimed that the decision 'confirms [Qatar's] determination to deal with the crisis, its effects on the maintenance of international peace and security and its humanitarian consequences within the context of international law'.[188] Without explicitly accusing the UAE of non-compliance, she asserted that '[n]on-compliance with the Court's decisions … undermines international efforts to maintain peace and security' and that, under the San Francisco Conference which established the UN, non-compliance is 'viewed…as a hostile act'.[189] The UAE, in turn, exercised its right to reply to what it referred to as 'the decision by the International Court of Justice that requested both parties to refrain from any act that would exacerbate, perpetuate or make their dispute more difficult to settle'.[190] It claimed that the UAE was 'committed' to compliance with the provisional measures and had applied 'humanitarian exceptions' to spare individual Qataris the consequences of the measures taken against Qatar.[191] The provisional measures decision therefore served as a means to prise concessions from a State as to the need to bring its measures into compliance with international law.

IV. RECEPTION OF ICJ PROVISIONAL MEASURES IN THE HUMAN RIGHTS COUNCIL

The HRC was established in 2006 by the Assembly with the mandate of 'promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner'.[192] Among other things, the HRC serves as a forum for dialogue on human rights; it makes recommendations to the Assembly with regard to the promotion and protection of human rights; it undertakes a universal periodic review (UPR) of the fulfilment by each State of its human rights obligations; and it submits an annual report to the Assembly.[193]

The impact of the ICJ provisional measures on HRC discourse and functions is most apparent in the context of the UPR. The UPR operates on a cycle of 4-5 years. It includes, *inter alia*, a national report prepared by the State under review, a compilation of UN information prepared by the Office of the United Nations High Commissioner for Human Rights (OHCHR), and a report of the Working Group on the UPR, which includes a presentation by the State under review, recommendations of other States, and responses by the State under review. Provisional measures of the ICJ may be relevant at any of these stages. The combined availability of a national report, a presentation by the State under review, recommendations of other States, and an opportunity for the State under review to respond provide many chances for dialogue. Below we consider three cases which demonstrate this.

(1) Georgia v. Russian Federation

[186] *Id.*, at ¶ 79.
[187] U.N.G.A. Official Records, U.N. Doc. A/73/PV.25 (Oct. 25, 2018).
[188] *Id.*, at 12.
[189] *Id.*
[190] *Id.*, at 26.
[191] *Id.*
[192] U.N.G.A. Res. 60/251 (Mar. 15, 2006).
[193] *Id.* As to the impact of the HRC on the work of the Assembly and Council, see: U.N.G.A., 66th Sess., 89th mtg. at 24, U.N. Doc. A/66/PV.89 (Dec. 19, 2011) (Assembly 'enrich[es] the international human rights dialogue with their discussion'); Michael Ramsden and Tom Hamilton, 'Uniting against Impunity: The UN General Assembly as a Catalyst for Action at the ICC', 66 INT'L AND COMP. L. Q. 893 (2017).

As will be recalled, in *Georgia v. Russian Federation*, the ICJ ordered provisional measures in relation to alleged racial discrimination by Russia against ethnic Georgians in Russian-occupied South Ossetia and Abkhazia.[194] In the 2009 UPR of Russia, Georgia submitted a recommendation that Russia 'comply with the provisional measures prescribed by the International Court of Justice'.[195] Russia responded that 'assertions about control by the Russian Federation over the territory of South Ossetia or the situation there do not correspond to reality and therefore the issues raised do not fall under the jurisdiction of the Russian Federation'.[196] Russia dismissed Georgia's recommendation as irrelevant, for the somewhat vague reason that are not relevant as it 'did not comply with the basis of the review stipulated in HRC Resolution 5/1 "Institution-building of the United Nations Human Rights Council"'.[197] The resolution referred to by Russia was the one that set out the basis of the UPR. Georgia in turn responded, in a *note verbale*, that Russia's assertion was 'inadequate, contradicting to the aims of HRC and UPR, having the goal to justify and hide gross and systematic violations'.[198] Since Russia had referred to the basis of the UPR (which includes the UN Charter, the Universal Declaration of Human Rights, and other human rights instruments to which the State is a party), Georgia took the opportunity to argue point by point why Russian action in South Ossetia and Abkhazia involved violations of the UN Charter, the UDHR, and CERD, citing the ICJ provisional measures as evidence of concerns in relation to CERD.[199]

Georgia also mentioned its application to the ICJ in its national report for its own UPR in 2011.[200] The OHCHR in its compilation of UN information for Georgia's UPR also noted that the representative of the Secretary-General on the human rights of internally displaced persons had reported that the ICJ had ordered provisional measures to be taken by Georgia and (in the words of the OHCHR report) 'a third country' in relation to CERD.[201] Notably, the said report of the representative of the Secretary-General had placed particular emphasis on the ICJ's provisional measure that 'both parties shall facilitate, and refrain from placing any impediments to, humanitarian assistance in support of the rights to which the local population are entitled under [CERD]'.[202] In the interactive dialogue component of the UPR, Russia did not directly address the ICJ provisional measures, but again emphasised its view that South Ossetia and Abkhazia were

[194] Georgia v. Russian Federation, Provisional Measures, *supra* note 15.
[195] U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Russian Federation, U.N. Doc. A/HRC/11/19 (Oct. 5, 2009), at ¶ 54.
[196] *Id.*, at ¶ 77.
[197] *Id.*, at ¶ 86.
[198] Permanent Mission of Georgia to the U.N., Note verbale dated 3 March 2009 from the Permanent Mission of Georgia to the United Nations Office and other international organizations at Geneva addressed to the Office of the High Commissioner for Human Rights, U.N. Doc. A/HRC/11/35 (Apr. 6, 2009).
[199] *Id.*
[200] Georgia, National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Georgia, U.N. Doc. A/HRC/WG.6/10/GEO/1 (Nov. 8, 2010), at ¶ 142.
[201] Office of the High Commissioner for Human Rights, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1: Georgia, U.N. Doc. A/HRC/WG.6/10/GEO/2 (Nov. 15, 2010), at ¶ 22.
[202] U.N. Secretary-General, Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin: Addendum: Mission to Georgia, U.N. Doc. A/HRC/10/13/Add.2 (Feb. 13, 2009), at ¶ 70.

independent States and 'thus their human rights situation could not be discussed under the review of Georgia'.[203]

(2) Ukraine v. Russian Federation

The next case to consider is *Ukraine v. Russian Federation.*[204] In Ukraine's presentation to the Working Group on the UPR for Ukraine in 2018, Ukraine pledged to 'continue using all of the measures available to ensure that the Russian Federation complied with the temporary measures ordered by the International Court of Justice'.[205] Russia did not respond specifically to the ICJ provisional measures but it recommended that Ukraine '[a]dopt immediately all measures aimed at preventing discrimination and prosecution on ethnic or religious grounds', thus implicitly counter-accusing Ukraine of racial discrimination.[206]

When it came to Russia's UPR, Ukraine recommended that Russia should '[f]ully comply with the provisional measures order of 19 April 2017 of the International Court of Justice'.[207] Russia, unsurprisingly, did not accept the recommendation.[208] It did not respond specifically to the ICJ provisional measures, but it claimed generally that recommendations regarding human rights in South Ossetia and Abkhazia were 'unacceptable as they did not comply with the principles of the universal periodic review, as set out in resolutions 5/1 and 16/21 of the Human Rights Council', since those territories were 'not part of the Russian Federation' and the 'remark that those territories were under the "effective control" of the Russian Federation was without basis'.[209] The implicit assumption of the ICJ to the contrary, that Russia did appear to exercise control, thus did not prise any concessions from Russia in relation to its conduct in South Ossetia and Abkhazia.

(3) Qatar v. United Arab Emirates

Qatar mentioned the ICJ provisional measures in *Qatar v. United Arab Emirates* in the first paragraph of the 'Challenges, Obstacles and Future Vision' section of the national report for its 2019 UPR. It portrayed its case before the ICJ as an effort to promote international law (CERD in particular) and protect human rights. Qatar also mentioned how it supplemented its case before the ICJ with complaints to other international human rights bodies: 'Qatar has submitted a complaint against both Saudi Arabia and the United Arab Emirates before the Committee on the Elimination of Racial Discrimination and it has submitted communications to nine special procedures mandate

[203] U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Georgia, U.N. Doc. A/HRC/17/11 (Mar. 16, 2011), at ¶ 32.
[204] Ukraine v. Russian Federation, Provisional Measures, *supra* note 15.
[205] U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Ukraine, U.N. Doc. A/HRC/37/16 (Jan. 3, 2018), at ¶ 7.
[206] *Id.*, at ¶ 116.42.
[207] U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Russia, U.N. Doc. A/HRC/39/13 (Jun. 12, 2018), at ¶ 147.28.
[208] U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Russian Federation: Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, U.N. Doc. A/HRC/39/13/Add.1 (Sep. 3, 2018), at ¶ 9.
[209] Russia Report, *supra* note 207, at ¶ 135.

holders of the Human Rights Council'.[210] Qatar also drew attention to the ICJ provisional measures at the presentation to the Working Group on the UPR.[211]

What is more interesting is how the UAE attempted to use Qatar's UPR to support the UAE's position in the ICJ. The UAE submitted a number of recommendations to the Working Group, and in particular it asked Qatar to '[a]mend Decree-Law 17 of 2010 regarding the establishment of the National Human Rights Committee to ensure that it is in compliance with the … Paris Principles', to '[c]ease to instrumentalise the National Human Rights Committee in carrying activities for political ends', and to 'request the Committee to refrain from implementing government programmes in contradiction with the Paris Principles'.[212] As per standard practice, the troika of States responsible for Qatar's UPR report amended the report to include the recommendations of the UAE. What is remarkable is that the UAE then wrote to the ICJ Registrar to claim the announcement of those amendments as 'new … evidence' relevant to the UAE's request for provisional measures against Qatar, omitting to mention that those amendments had in fact been submitted by the UAE itself.[213] Qatar objected to the submission of the item as evidence, and the ICJ agreed that the evidence was 'not material' to its decision.[214] Qatar then wrote to the HRC President, accusing the UAE of attempting to 'mislead' the ICJ and requesting that the President 'draw the attention of the United Arab Emirates to the gravity of its misconduct, and request the State to avoid such inappropriate action in the future.'[215]

Aside from the UPR, Qatar's case illustrates another way in which ICJ provisional measures can have an impact on HRC activities. In the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance on her visit to Qatar, she 'strongly urges all parties to [the ICJ] proceedings to respect their obligations under international human rights law and to abide by the findings of … the International Court of Justice'.[216] Qatar's own comments on that report declared: 'The Special Rapporteur and the international community is by now fully aware of the record of the violations of human rights to which the citizens of Qatar have been subject on account of their nationality, thanks to many reports issued and the decisions of the International Court of Justice'.[217] This suggests that the decisions of the ICJ support the HRC's activities both in terms of fact finding and by providing legal and moral support to the HRC's exhortations.

V. CONCLUSION

[210] Qatar, National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Qatar, U.N. Doc. A/HRC/WG.6/33/QAT/1 (Mar. 1, 2019), at ¶ 89.
[211] Report of the Working Group on the Universal Periodic Review: Qatar (11 July 2019) UN Doc A/HRC/42/15, §14.
[212] *Id.*, at ¶¶ 134.62-134.63.
[213] U.N. Human Rights Council, Letter dated 26 September 2019 from the Permanent Representative of Qatar to the United Nations Office at Geneva addressed to the President of the Human Rights Council, U.N. Doc. A/HRC/42/G/4, Annex II (Nov. 5, 2019).
[214] Qatar v. United Arab Emirates, Provisional Measures, *supra* note 15, at ¶ 14.
[215] Permanent Representative of Qatar to the U.N., Letter dated 26 September 2019 from the Permanent Representative of Qatar to the United Nations Office at Geneva addressed to the President of the Human Rights Council, U.N. Doc. A/HRC/42/G/4 (Nov. 5, 2019).
[216] U.N. Human Rights Council, Visit to Qatar: Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, U.N. Doc. A/HRC/44/57/Add.1 (Apr. 27, 2020), at ¶ 5.
[217] U.N. Human Rights Council, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on her visit to Qatar: Comments by the State, U.N. Doc. A/HRC/44/57/Add.3, at 3 (Jun. 29, 2020).

The increased utility of the ICJ for the purpose of obtaining interim measures has led to growing scholarly reflection on the effectiveness of these measures. This scholarship has, however, remained at a relatively abstract level of identifying general possible sources of impact. This article has sought to go the extra step by contributing towards the scholarly literature through consideration of the extent to which ICJ provisional measures have influenced interactions and the exercise of functions within the UN principal political organs, the Assembly and Council, as well as the HRC, in the attainment of the objectives set out in the UN Charter.

The evidence presented above does establish the capacity for provisional measures dealing with international peace and security, and human rights, to inform activity within the UN political organs. In providing a preliminary judicial determination on a given state of affairs, such decisions serve a valuable purpose in providing the political organs with information to guide Member dialogue and support their recommendations or action. This is particularly valuable in cases where there has been a lack of prior judicial determinations. The decisions also provide a framework in which to monitor ongoing State compliance, although, admittedly, the political organs have not always consistently performed such monitoring function. The raising of provisional measures decisions in the political organs has also inflicted reputational costs on the offending States, or at the least placed a burden of justification upon them which has led to discussion in these forums on the measures that such States are taking to bring their conduct into compliance with the interim orders.

At the same time, the evidence reviewed in this article shows a general lack of consistency of approach by the political organs in the manner in which they incorporate ICJ provisional measures into their response framework in a given situation. Such inconsistency is explicable for several reasons. This might be because of the implication of the interests of Council permanent members (or their client States) in the provisional measures decision, thereby leading to the exercise of the veto or a watering down of resolutions to avoid contentious elements addressed by the ICJ. Relatedly, the reception of provisional measures decisions in the political organs also have to be considered in light of the sometimes conflicting imperatives of crisis management within the political organs, where there might be a preference for resolutions to be drafted with strategic ambiguity, so as to avoid alienating a party to a conflict, thereby ensuring their engagement. At the same time, there might be blind spots or a general lack of political will in the political organs to act upon a situation, with a preference therefore to regard provisional measures implementation to be a matter of primary concern for the ICJ rather than the political organs.

The selective engagement of provisional measures decisions by the political organs in turn raises issues concerning ways to better establish dialogue between the ICJ and political organs within the UN system. It is not possible to explore the possibilities in detail here, although there are some options that can be borrowed from other campaigns for more consistent UN action in response to situations that undermine human rights and international peace. One proposal has envisaged a role for the Assembly to certify that a crisis poses an imminent threat of mass atrocity as a basis for the veto to be suspended in that situation.[218] However, there are limits to the Assembly performing this function absent independent fact-finding: the certification of mass atrocity might thus be underpinned by the ICJ's preliminary determinations on a situation (that is, where the Court has jurisdiction over such situation). Similarly, another proposal might be for an ICJ determination of preliminary measures to automatically trigger a special session of the Assembly or Council to consider ways to ensure State compliance with these orders. The ICJ itself

[218] See Jennifer Trahan, EXISTING LEGAL LIMITS TO VETO POWERS IN THE FACE OF ATROCITY CRIMES (2020), at 133.

has adapted its working methods to provide greater monitoring of provisional measures decisions, through the creation of an *ad hoc* committee (comprising three judges) to monitor implementation.[219] In a similar manner, as Members continue to consider ways to strengthen the functions of the political organs in the maintenance of international peace and security, and the advancement of human rights, an operational commitment to monitor ICJ provisional measures would provide an important means to support the attainment of these dual institutional objectives.

[219] Art. 11, Internal Judicial Practice.