# The Judicial Policy of the International Court of Justice towards Human Rights: Oscillation between Judicial Activism and Judicial Restraint

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## Abstract

The judicial policy of the International Court of Justice (ICJ or the Court) towards human rights has often oscillated between judicial activism and judicial restraint. The cause of the ICJ's oscillation is mainly rooted in the structure of international law, which is in the stage of transition from sovereignty (*raison d'Etat*) to international community (*raison d'humanité*). The question raised is that in which range of legal issues the Court has often displayed a judicial activism or judicial restraint vis-à-vis human rights. This article will endeavour to respond to this question from a critical perspective. In doing so, we will first examine a range of legal issues such as diplomatic protection and international humanitarian law in which the Court has often displayed a judicial activism. We will then analyze a range of legal issues such as jurisdictional immunities of states as well as the Court's jurisdiction where it has often displayed a judicial restraint.

**Keywords:** judicial policy, human rights, methodology of interpretation, judicial activism, judicial restraint, Westphalian structure, international community.

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## Introduction

This article will analyze the judicial policy of the International Court of Justice towards human rights. Pierre-Marie Dupuy defined the concept of judicial policy in the following terms:

The term "judicial policy" of the ICJ should be interpreted as the general orientations which underlie the jurisprudence of the Court with regard to some basic legal issues connected with the way the Court understands its judicial function. Alternatively, and in a broader exception, the term "judicial policy" could be interpreted as pointing to "the way by which the Court tends to apply international law, in order to adapt the interpretation and contents of the applicable rules to the necessities which it considers to be implied by the general evolution of the international legal order. [1]

In general, there exist two different approaches towards judicial policy: judicial activism and judicial restraint. In the context of the present article, the term judicial activism is employed when the Court develops the international human rights without fearing to engage in a more or less modest form of law-making.[2] In doing so, the Court applies certain techniques such as dynamic legal interpretation and broad legal interpretation in order to humanize the Westphalian structure of international law. In contrast, the term judicial restraint is employed when the Court is reluctant to develop the international human rights law**.** In doing so, the Court often applies certain interpretive techniques such as restrictive interpretation, historic and

[1] . Pierre-Marie Dupuy, "The Judicial Policy of the International Court of Justice" in Salerno F (ed)., *Il ruolo del giudice internazionale nell'evoluzione del diritto internazionale e comunitario: Atti del convegno di studi*, (Pad ova: Cedam, 1995, p 61.

[2] . Robert KOLB, The International Court of Justice, (United Kingdom: Hart Publishing, 2013), p 1180.

static interpretation and the presumption in favor of sovereignty in order to preserve the classical structure of international law.[3]

The presumption of this article is that the judicial policy of the ICJ towards human rights has often oscillated between judicial activism and judicial restraint. This, however, raises an important question: why has the judicial policy of the Court oscillated? This article will discuss the main cause of this oscillation so as to respond to this question.

Robert Kolb[4], following the doctrine of Lauterpacht[5], believes that judicial operation may be influenced by historical and social context. For this reason, international courts have often experienced different phases during history. Kolb divides the judicial policy of the ICJ into three main historical phases: dynamism and internationalism (1947-62), proceduralist jurisprudence and a trend towards stagnation (1966-86), and renaissance and hyperactivity (1986-the present day).[6]

The purpose of this article is not to re-explain the three phases of judicial policy of the ICJ in a historical context. Although the historical description of Kolb from the judicial policy of the Court is remarkable, it may not be regarded as an exclusive method of analyzing judicial policy. This article suggests that ICJ's judicial policy can be examined from a subject-matter perspective. This means that the judicial policy of the Court has been influenced by subject-matter of dispute. For instance, the Court has often displayed a judicial restraint[7] regarding some legal issues such as jurisdiction of the Court and jurisdictional immunities of State. In contrast, the Court has often followed a judicial activism regarding certain legal

[3] . Ibid., p 1176.
[4] . Ibid., p 1143.
[5] . Hersch LAUTERPACHT, The Development of International Law by the International Court (London: Cambridge University Press, 1958).
[6] . KOLB, supra note 2, p 1143.
[7] . Judicial Restraint= Cautious Approach

issues such as diplomatic protection and international humanitarian law. Hence, our analysis of ICJ's judicial policy differs Kolb's description in two respects. First, we limit the scope of research to ICJ's judicial policy towards human rights. Second, we analyze the pattern of ICJ's judicial policy in light of subject-matter of dispute.

As will be explained, the cause of the ICJ's oscillation between judicial activism and judicial restraint can be attributed to the structure of international law. Alain Pellet states that the structure of international law moves from sovereignty to international community.[8] Since the 17th century, nation-states have been the original subjects of international legal order. States as active subjects of international law still shape the structure of international law. However, since the middle of the 20th century, the structure of international law has moved towards the international community because of emergence of *Jus Cogens* as well as human rights values. It is important to mention that although international law moves towards the international community, sovereignty of nation-states still play a major role in international legal order.

One would ask how the structure of international law has a profound impact upon the ICJ's judicial policy. Indeed, some legal issues such as ICJ's jurisdiction and jurisdictional immunities of states are structurally rooted in the Westphalian structure of international law, leading to take a judicial restraint by the Court. In contrast, certain legal issues, such as international humanitarian law and diplomatic protection, move often towards the international community and humanization of international law, making it possible for the Court to take a judicial activism.

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[8] . Alain PELLET, "Cours Général : Le Droit International entre Souveraineté et Communauté Internationale" (2007) Brazilian Yearbook of International Law, vol. 2, p 34.

However, it is notable that the legitimacy of the Court's policy towards human rights has been criticized by some of its members; these states have maintained that the Court should modify its state-centric outlook and move towards a more humanistic approach.

## I. General considerations about ICJ and human rights

### *a) ICJ's jurisdiction on human rights*

Unlike the specialized regional courts such as the European Court of Human Rights or Inter-American Court of Human Rights, ICJ is not a human rights court to which individuals can bring claims against states, and it has not any specific mandate in the field of human rights. As a general court for inter-state disputes, it has on occasion been called upon to interpret human rights conventions.[9]

### (b) *Classification of the International Court of Justice's judgments and advisory opinions in the field of human rights*

The ICJ's decisions in the field of human rights can be classified into three main groups (based on the relevance of human rights to dispute):[10]

In a first group of decisions rendered by the Court, human rights considerations appeared in more or less incidental ways.[11] In this group, human rights considerations play a secondary and subordinate role, often mentioned in *obiter dictum*. *Corfu channel* and *Barcelona Traction*, for instance, belong to this group.

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[9] . James CRAWFORD, Amelia KEENE, " Interpretation of the human rights treaties by the International Court of Justice" (2019) The International Journal of Human Rights, Vol. 24, Issue 7, p 1.

[10] . Bruno SIMMA, " Human Rights Before the International Court of Justice: Community interest coming to Life? ", in Christian J Tams and James Sloan, eds., The Development of International Law by The International Court of Justice, (United Kingdom: Oxford University press, 2013), p 304.

[11] . Ibid.

In *Corfu channel*, the subject-matter of the dispute was the obligation of coastal State to mine-clearing operation. Therefore, human rights considerations were not directly applicable in this case. Nevertheless, the Court found that Albania was responsible under international law for the explosions that had taken place in Albanian waters by referring to "obligations… based on…elementary considerations of humanity".[12]

Likewise, in *Barcelona Traction*, human rights obligations were not directly applicable. Here, although the subject-matter of the dispute was diplomatic protection of shareholders in a company, the Court introduced the concept of obligations "*erga omnes*". In the view of the Court, the concept of obligations "*erga omnes*" refers to obligations of a State towards the international community as a whole. [13]

In a second group of decisions rendered by the Court, human rights considerations occupied much more space, compared to the first group. Here, there was a kind of link between the subject-matter of the disputes and human rights considerations. The Court's advisory opinion on *Reservations to the Genocide Convention*[14] and *Military and Paramilitary Activities in and against Nicaragua*[15], for instance, fall within this group.

In the Court's advisory opinion on *Reservations to the Genocide Convention*, although the Court dealt with the first human rights instrument created within the United Nations, it did not deal with

[12] . Case concerning Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), [1949] I.C.J.Rep. p 22.

[13] . Case concerning Barcelona Traction, Light and Power Company (Belgium v. Spain), [1970], I.C.J. Rep. p 32.

[14] . Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, [1951] I.C.J. Rep. 15.

[15] . Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), [1986] I.C.J. Rep.

specific legal features of the Genocide Convention. Instead, the Court analyzed regime of reservations to multilateral treaties in general.[16]

In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court dealt with the principle prohibiting recourse to the threat or use of force and the principle of non-intervention. Hence, in a strict sense, human rights obligations were not applicable in this case. However, the Court seized the opportunity and asserted that the use of force and intervention is not considered an appropriate method to monitor or ensure respect for human rights.[17]

In a third group of decisions rendered by the Court, human rights obligations were directly applicable as the subject-matter of the disputes. For instance, the case concerning *Ahmadou Sadio Diallo*[18] and the case concerning *the Obligation to prosecute or Extradite*[19] belong to this group. As will be examined, in this group, the Court directly applied human rights standards. This article mainly focuses on a third group of decisions rendered by the Court in which human rights obligations were directly applicable as the subject-matter of the disputes.

## II. The policy of the Court based on «judicial activism» regarding human rights

At the opposite end of the spectrum to judicial restraint is judicial activism. Here, the Court's attitude is more active, more robust and more inclined to innovate. The Court then develops the international human rights without fearing to engage in a more or less modest form

[16] . SIMMA, supra note 10, p 305.

[17] . *Nicaragua v. United States of America*, supra note 15, p 134, para 268.

[18]. Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), [2010] I.C.J. Rep.

[19] . Case concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), [2012] I.C.J. Rep.

of law-making.[20] In doing so, the Court applies certain techniques such as dynamic legal interpretation and broad legal interpretation.[21]

In recent years, the judicial policy of the Court towards human rights has experienced a qualitative leap.[22] In other words, the Court has tried to promote human rights values qualitatively. In particular, this qualitative leap can be seen in three specific areas: (a) diplomatic protection (b) international humanitarian law (c) inclination of the Court to identify certain human rights as *Jus Cogens* such as the prohibition of torture.

*a) The Court's judicial activism regarding diplomatic protection and human rights*

The Court had a great opportunity to contribute an important jurisprudence to the international law of human rights in the case concerning *Ahmadou Sadio Diallo.* In this case, the Court interpreted the International Covenant on Civil and political Rights (1966) [23] as well as the African Charter on Human and People's Rights (1981)[24].

In December 1998, Guinea lodged an application against the Democratic Republic of the Congo (DRC) in respect of a dispute concerning "serious violations of international law" alleged to have been committed upon the person of Mr. Ahmadou Sadio Diallo, a Guinean national.[25] Guinea alleged that the DRC had violated the

[20] . KOLB, supra note 2, p 1180.
[21] . Ibid.
[22] . SIMMA, supra note 10, p 308.
[23] . International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976) [ICCPR].
[24] . African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, (entered into force 21 October 1986), [Banjul Charter].
[25] . ICJ Website, overview of the case, Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), available at: https://www.icj-cij.org/en/case/103.

rights of Mr. Ahmadou Sadio Diallo by arresting and subsequently expelling him from its territory."[26]

In October 2002, the DRC filed preliminary objections in respect of the admissibility of Guinea's claim. The DRC submitted that Guinea lacked standing to exercise diplomatic protection, because its application sought to protect the rights of two Congolese companies; and that, in any event, neither the companies nor Mr. Diallo had exhausted local remedies.[27] In its judgment of 24 May 2007,[28] the Court declared the Application of the Republic of Guinea to be admissible "in so far as it concerns protection of Mr. Diallo's rights as an individual" and "in so far as it concerns protection of [his] direct rights as *associé* in Africom-Zaire and Africontainers-Zaire".[29]

In its judgment of 30 November 2010 on the merits,[30] the Court unanimously held that the DRC had violated certain human rights provisions, namely Article 13 of the International Covenant on Civil and Political Rights, when it expelled Diallo from its territory. It also held that the DRC had violated Article 9 (1)(2) of the covenant by unjustly arresting Mr. Diallo. The Court further held that the DRC shall make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injuries flowing from the wrongful detentions and expulsion of Diallo in 1995-96. [31]

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[26] . Case concerning Ahmadou sadio Diallo, (Republic of Guinea v. Democratic Republic of the Congo), [2007] I.C.J. Rep. p 585, para 1.

[27] . Ibid., para.11, See also: Transnational Dispute Management Website, available at: https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=7995. See also: Viren MASCARENHAS, "Introductory Note to the Case Concerning Ahmadou Sadio Diallo (Republic of Guinea V. Democratic Republic of Congo) (Preliminary Objection) " (2007) International Legal Materials, Vol. 46, No. 4, pp 709-711.

[28] . Ibid, p 617.

[29] . ICJ Website, supra note 25.

[30] . Case concerning Ahmadou Sadio Diallo, supra note 18, p 692.

[31] . Ibid., para 163. See also: Viren MASCARENHAS, " Introductory Note to the Case Concerning Ahmadou Sadio Diallo (Republic of Guinea V. Democratic

In the case concerning *Ahmadou Sadio Diallo*, the Court played a great part in evolution and protection of human rights by broadening the scope *ratione materiae* of diplomatic protection. [32] In this respect, the Court stated that:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.[33]

*b) The Court's judicial activism regarding international humanitarian law*

In Court has often displayed a judicial activism towards international humanitarian law, using certain interpretive techniques such as teleological and dynamic interpretation. In particular, it has contributed to the development of international humanitarian law in the case concerning *Armed Activities on the Territory of the Congo* (*DRC v Uganda)* and the advisory opinion in the *Wall* case.

In the *DRC v. Uganda* case, the Court dealt with two important issues: the invasion of the DRC by Uganda and the violation of international humanitarian law by Uganda. The Court, in its *dispositif*, concluded that Uganda had violated international humanitarian law and human rights law. Here, the Court contributed to the development of international humanitarian law. In particular, the Court introduced the concept of "duty of vigilance" in the context of international humanitarian law[34] and found that Uganda had failed

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Republic of Congo)" (2011) International Legal Materials, Vol. 50, No. 1, pp 37-75.

[32] . Sandy CHANDHI, "Human Rights and the International Court of Justice" (2011) Human Rights Law Review, Vol.11, No. 3, p 555.

[33] . Case concerning Ahmadou sadio Diallo, supra note 26, p 599, para 39.

[34] . Case concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda),* [2005] I.C.J. Rep. p 253, para 248.

to abide by its "duty of vigilance" over the conduct of private persons in a state of belligerent occupation. Most importantly, this case was the first judgment in the Court's history where a finding of human rights violations, combined with findings of violations of international humanitarian law, was included in the *dispositif*.[35]

The advisory opinion in the *Wall case* also provided the ICJ with a great opportunity to develop international humanitarian law. Here, the Court observed that Israel violated certain obligations *erga omnes*.[36] , it thus would seem that the Court contributed to the development of international humanitarian law in two respects. Firstly, it stated that there is a correlation between human rights system and international humanitarian law.[37] Second, the Court extended the scope of application of the Fourth Geneva Convention to territories not falling under the sovereignty of one of the contracting parties.[38]

*c) The Court's judicial activism regarding Convention against Torture*

The case concerning *questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal)* provided the Court with the opportunity to interpret the Convention against Torture, which is known as one of the most important human rights instruments. In this case, the Court developed international human rights by displaying a

[35] . SIMMA, supra note 10, p 309.
[36] . Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] I.C.J. Rep. p 19, para 155.
[37] . Ibid., p 178, para 106. See also, Claus KREB, "The International Court of Justice and the Law of Armed Conflicts " in Christian J Tams and James Sloan, eds., The Development of International Law by The International Court of Justice, (United Kingdom: Oxford University press, 2013), p 266.
[38] . Wall Advisory Opinion, supra note 36, p 178, para 95.

judicial activism regarding interpretation of the Convention against Torture (CAT)[39].

In February 2009, Belgium filed an application against Senegal relating to Mr. Hissène Habré, the former President of Chad and resident in Senegal since being granted political asylum by the Senegalese Government in 1990.[40] In particular, Belgium asserted that Senegal had failed to instigate proceedings against Habré for certain crimes including acts of torture and crimes against humanity, or to extradite Habré to Belgium where he could be prosecuted was a breach of its obligations under the CAT, particularly Articles 6(2) and 7, as well as customary international law.[41] Senegal responded that "Belgium was not entitled to invoke the international responsibility of Senegal for the alleged breach of its obligation to submit the H[issène] Habré case to its competent authorities for the purpose of prosecution, unless it extradited him". It moreover contended that none of the alleged victims of the acts can be said to be attributable to Mr. Habré had been of Belgian nationality at the time when the acts had been committed.[42]

In its judgment dated 20 July 2012, the ICJ found that it did have jurisdiction to entertain Belgium's claims based on the interpretation and application of the Convention against Torture.[43]

Perhaps one of the most interesting aspects of the ICJ's judgment concerns its analysis of the admissibility of Belgium's claim against

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[39] . UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p 85.

[40] . ICJ website, overview of the case, the Case Concerning *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*), *available at: https://www.icj-cij.org/en/case/144*.

[41] . *Belgium v Senega*, *supra note* 19, para 13. See also: Sangeeta SHAH, "Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal" (2013), Human Rights Law Review, vol. 13, p 352.

[42] . *Belgium v Senegal*, supra note 19, para 64.

[43] . Ibid., p 448, para. 63, See also: ICJ website, supra note 40.

Senegal.[44] In this regard, the Court held that once any State party to the Convention against Torture was entitled to invoke the responsibility of another State party because the obligations of this convention are *erga omnes partes*, i.e., obligations owed toward all States parties. Based on this analysis, the Court held that "[a]ll the other States parties have a common interest in compliance with [the] obligations [under CAT] by the State in whose territory the alleged offender is present".[45] Thus, Belgium, as a member of the CAT, had standing to invoke the responsibility of Senegal for the alleged violations of its obligations under that convention.[46]Most importantly, in this case, the Court affirmed that the prohibition of torture is part of customary international law and it has become a peremptory norm *(jus cogens)*.[47]

In this case, the Court displayed a judicial activism, using a teleological approach with regard to the interpretation of the Convention against Torture. Relying on the object and purpose of the Convention, which is "to make more effective the struggle against torture … throughout the world", the Court found that the States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. The Court considered that all the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present, that common interest implying that the obligations in

[44] . SHAH, supra note 41, p 357.
[45] . *Belgium v Senega*, supra note 19, para 68.
[46] . Ibid., p 450, para. 70, See also: ICJ website, supra note 40.
[47] . Ibid., p 457, para 99.

question are owed by any State party to all the other States parties to the Convention.[48]

Furthermore, *Belgium v Senegal* was also the first instance in which one of the main achievements of the ILC in its Articles on State Responsibility of 2001, namely the distinction made in the context of invocation of responsibility between "injured States" and "States other than injured States", was examined by the Court.[49] Indeed, in this case, the Court followed and activated the logic provided by Article 48 of the ILC's text[50] by emphasizing on the fact that a non-injured State is entitled to invoke the responsibility of another State if the obligation breached owed to the international community as a whole.

## III. The Court's judicial restraint regarding human rights

The Court has often displayed a judicial restraint vis-à-vis a range of legal issues such as immunity and the Court's jurisdiction which are deeply rooted in the Westphalian and Classical structure of international law. In doing so, the Court has applied certain interpretive techniques such as restrictive interpretation, historic and static interpretation and the presumption in favor of sovereignty and against international obligations.[51]

### *(a) Human rights versus immunity*

[48] . Ibid., p 449, para 68.
[49] . SIMMA, supra note 10, p 314.
[50] . International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.
[51] . KOLB, supra note 2, p 1176.

The law of State immunity is a corollary of the sovereign equality of States on which classical international law is premised. [52] In other words, *raison d'être* of State immunity is the sovereign equality of states in international legal order. For this reason, the Court's attitude towards State immunity appeared to be a conservative and orthodox approach.

The Court has often displayed a judicial restraint vis-à-vis jurisdictional immunities by denying the idea that State immunity and immunity of State officials may be revoked in cases of grave violations of human rights. For instance, in the case concerning *Jurisdictional Immunities of the State* and the case concerning *the Arrest Warrant*, the Court displayed such an approach towards State immunity and human rights.

In December 2008, Germany lodged an application against Italy, asking the Court to declare that Italy had violated the jurisdictional immunity of Germany by permitting civil claims to be brought against it in the Italian courts seeking compensation for injuries caused by breaches of international humanitarian law committed by the Third Reich during the Second World War.[53]

In response, Italy made a counter-claim with respect to the question of the compensation owed to Italian victims of grave breaches of international humanitarian law committed by forces of the Nazi regime.[54] The Court decided that the counter-claim presented by Italy was not admissible, because the dispute that Italy intended to bring before the Court related to facts and situations existing before the entry into force of the European Convention for

[52] . Roger O'KEEFE, "jurisdictional immunities" in Christian J Tams and James Sloan, eds., The Development of International Law by The International Court of Justice, (United Kingdom: Oxford University press, 2013), p 107.
[53] . ICJ website, overview of the case, Case Concerning Jurisdictional Immunities of the State (Germany v Italy), available at: https://www.icj-cij.org/en/case/143.
[54] . Ibid.

the Peaceful Settlement of Disputes of 29 April 1957, which formed the foundation of the Court's jurisdiction in the case.[55]

In January 2011, Greece lodged an application for permission to intervene in the case, and the Court, in an Order of 4 July 2011[56], authorized Greece to intervene in the case. In its judgment delivered on 3 February 2012, the ICJ held that the action of the Italian courts in denying Germany's immunity, constituted a violation of international law.[57] It stated that, under customary international law, a State was entitled to immunity even if it was accused of serious violations of international human rights law. As a result, the Court held that Italy must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities lifting the immunity which Germany enjoyed under international law cease to have effect. [58] The decision, held by a great majority, gravely disappointed human rights activists. [59]

It is important to mention that, in this case, the Court, analyzed the legal relationship between *jus cogens* and State immunity. The Court noted that Italy's argument rests on the premise that there is a conflict between *jus cogens* rules shaping part of the law of armed conflict and according immunity to Germany. According to Italy, since *jus cogens* rules always prevail over any inconsistent rule of

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[55] . Case Concerning Jurisdictional Immunities of the State (Germany v Italy), order of 6 July 2010.

[56] . Case Concerning Jurisdictional Immunities of the State (Germany v Italy), order of 4 July 2011.

[57] . Case Concerning Jurisdictional Immunities of the State (Germany v Italy), [2012] I.C.J. Rep. p 155. See also: Marchin KALDUNSKI, "The Law of State Immunity in the Case concerning Jurisdictional Immunities of the State (Germany v. Italy)" (2014) The Law and Practice of International Courts and Tribunals, Vol. 13. p 61.

[58] . *Germany v Italy*, [2012] I.C.J. Rep. p 155.

[59] . SIMMA, supra note 10, p 314.

international law, and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.[60] However, in the view of the Court, there is no conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another.[61] The two types of rules operate at different levels. [62] The rules of State immunity belong to procedural law.[63] These rules regulate the exercise of jurisdiction in respect of another State.[64] They do not address the question whether the behavior in respect of which the proceedings are instituted was lawful. In contrast, rules of *jus cogens* are by nature substantive rules of international law. Therefore, in the court's view, there is no conflict between rules of *jus cogens* and those of State immunity.[65]

In his dissenting opinion in Germany v. Italy case, Judge Cançado Trindade criticized the Court's decision, arguing that the term "immunity" (from Latin *immunitas*, deriving from *immunis*) entered the lexicon of international law by reference to "prerogatives" of the sovereign State, being associated with "cause of impunity". The term was meant to refer to something quite exceptional, an exemption from jurisdiction or from execution. It was never meant to be a principle, nor a norm of general application. It has certainly never been intended to except jurisdiction on, and to cover-up, international crimes, grave violations of human rights and of international humanitarian law.[66]

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[60] . *Germany v Italy*, supra note 57, p 140, para 92.
[61] . Ibid., para 93.
[62] . KALDUNSKI, supra note 57, p 70.
[63] . Ibid., p 54.
[64] . Ibid., p 71.
[65]. *Germany v Italy*, supra note 57, paras 93-95.
[66] . Dissenting opinion of Judge Cançado Trindade (Germany v Italy), p 145, para 166.

In the remaining line of reflections of his dissenting opinion, Judge Cançado Trindade sustained the primacy of *jus cogens* and presented a rebuttal of its deconstruction. In his view, one cannot embark on a wrongfully assumed and formalist lack of conflict between "procedural" and "substantive" rules, unduly depriving *jus cogens* of its effects and legal consequences. The fact remains that a conflict does exist, and the primacy is of *jus cogens*, which resists to, and survives, such groundless attempt at its deconstruction. [67] There can be no prerogative or privilege of State immunity in cases of international crimes, such as massacres of the civilian population, and deportation of civilians and prisoners of war to subjection to slave labour: these are grave breaches of absolute prohibitions of *jus cogens*, for which there can be no immunities.[68]

Hence, the case *Germany v. Italy* can be regarded as the triumph of judicial-restraint over judicial activism. In this case, the Court missed the opportunity to re-interpret the scope of the immunity rule in harmony with the evolution of human rights law.[69]

In addition, the Court displayed a judicial restraint vis-à-vis immunity of State officials from foreign criminal jurisdiction, which is, in conceptual terms, a manifestation of State immunity.[70] Therefore, immunity of State officials is also based on the sovereign equality of states summed up in the maxim *Par in parem non habet imperium.*[71] The Court also displayed a judicial restraint in the case concerning *Arrest Warrant of 11 April 2000.*

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[67] . Ibid., para 296.
[68] . Ibid., para 297.
[69] . Stephania, NEGRI, "Sovereign Immunity v. Redress for War Crimes: The Judgement of the International Court of Justice in the Case Concerning Jurisdictional Immunities of the State (Germany v. Italy)" (2014) International Community Law Review, Vol. 16, p 137.
[70] . O'KEEFE, Supra Note 52, p 126.
[71] . Ibid.

In October 2000, the Democratic Republic of the Congo (DRC) submitted an Application against Belgium concerning a dispute over an international arrest warrant issued in April 2000 by a Belgian investigating judge against the acting Congolese Minister for Foreign Affairs, Mr. Abdoulaye Yerodia Ndombasi, requesting his detention and subsequent extradition to Belgium for alleged violations of international humanitarian law. The arrest warrant was transmitted to all States, including the DRC.[72] The DRC requested the Court to adjudge and declare that Belgium had breached the rule of customary international law concerning the immunity against prosecution of incumbent foreign ministers and that it should be required to cancel that arrest warrant and provide compensation for the moral injury to the DRC. Belgium raised objections relating to jurisdiction and admissibility.

On 14 February 2002, the ICJ delivered its judgment; it held that a Minister for Foreign Affairs when abroad enjoyed full immunity from criminal jurisdiction and inviolability, both for acts performed in a "private capacity" and for acts performed in an "official capacity", regardless of whether he is present in the territory of the arresting state on an 'official' or a "private" visit.[73] This immunity and inviolability protect the Minister against any act of authority that would hinder him in the performance of his duties.[74] No exception to this rule is recognized.

The Court then turned its attention to the question of whether there existed any exception to the rule granting immunity from criminal

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[72] . ICJ website, overview of the case, the case concerning *Arrest Warrant of 11 April 2000*, available at: https://www.icj-cij.org/en/case/121.

[73] . Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), [2000] I.C.J. Rep, Para. 55, See also: Jan WOUTERS and Leen De SMET, "The ICJ's Judgment in the Case Concerning the Arrest Warrant of 11 April 2000: Some Critical Observations" (2009) Yearbook of International Humanitarian Law, Vol. 4, p 375.

[74] . *Democratic Republic of the Congo v. Belgium*, paras 51-55.

jurisdiction to incumbent Ministers for Foreign Affairs when they were charged with war crimes or crimes against humanity. The Court found that it had been unable to deduce from its evaluation of State practice that there existed under customary international law any form of exception to the rule granting immunity from criminal jurisdiction to incumbent Ministers for Foreign Affairs when they were charged with war crimes or crimes against humanity.[75]

In the *Arrest Warrant* case, the Court stated that a serving minister for foreign affairs was entitled to absolute immunity *ratione personae* from foreign criminal jurisdiction and to inviolability from foreign measures of personal constraint.[76] However, it emphasized that any immunity *ratione Personae* from the jurisdiction of the Courts of another state from which incumbent ministers for foreign affairs might benefit did not equate to "impunity for any crimes they might have committed".[77]Hence, the Court has vigorously affirmed a traditional vision of inter-state relations based on mutual respect for sovereignty in the context of the cases related to State immunity.[78]

*(b) The Court's judicial restraint regarding its jurisdiction*

The Court has often displayed a judicial restraint regarding its jurisdiction. This policy is mainly rooted in the Westphalian structure of international law in which no State can be brought before an international court or tribunal against its will.[79] The international

[75] . Ibid., p 24, para 58.

[76] . Ibid., p 23, para 57. See also: OKEEFE, supra note 52, p 120.

[77]. Ibid., p 25, para 60.

[78] . O'KEEFE, Supra Note 52, p 148.

[79] . Mehrdad PAYANDEH, "The Concept of International Law in the Jurisprudence of H. L. A Hart" (2011) The European Journal of international law, Vol. 21, No. 4, p 985.

legal order does not comprise an international judiciary with comprehensive and compulsory jurisdiction.[80]

The ICJ is the principal judicial organ of the United Nations.[81] It is the only international judicial body with general jurisdiction in international disputes. Its contentious jurisdiction is limited to disputes between states[82] and requires the consent of the States which are parties to the dispute.[83] Before the Court, states are free to give or withhold their consent to its jurisdiction.[84] This consensual view of the Court's jurisdiction fit within the Westphalian paradigm of international law, preserving the interests of individual States.[85]

The voluntary character of the Court's international jurisdiction would mean that if the Court is too robust in its pronouncements, States may decide to stop sending it cases and/or to annul existing titles of jurisdiction.[86] For this reason, the Court has often displayed a judicial restraint regarding its jurisdiction.

The Court has often displayed a judicial restraint regarding its jurisdiction in cases involving grave violations of human rights. For instance, the Court displayed such a policy in the case concerning *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Rwanda*). In May 2002, the DRC instituted proceedings against Rwanda before the ICJ, requesting the Court to

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[80] . Ibid.

[81] . Art. 92 of the UN Charter

[82] . Art. 34(1) of the ICJ Statute. In addition, the Court may give advisory opinions upon the request of the UN General Assembly and Security Council, as well as, other organs of the UN and specialized agencies, which may be so authorized by the General Assembly (Art. 96 of the UN Charter).

[83] . Art. 36 of the ICJ Statute.

[84] . Andreas PAULUS, "International Adjudication" in Samantha Besson & John Tasioulas, eds., The Philosophy of International Law, (United Kingdom: Oxford University Press, 2010), p 210.

[85] . A. Claire CUTLER, "Critical Reflections on the Westphalian Assumptions of International law and Organization: A Crisis of Legitimacy" (2001), Review of international studies, Vol. 27, No. 2, p 133.

[86] . KOLB, supra note 2, p 1175.

pronounce that Rwanda was responsible for aggression against the DRC, serious violations of human rights and of international humanitarian law.[87] The DRC also maintained that the acts of Rwanda had breached the sovereignty and territorial integrity [of the DRC], as guaranteed by the United Nations Charter and the charter of the organization of African Unity. In addition, the DRC submitted that the jurisdiction of the Court derived from the supremacy of peremptory norms *(jus cogens)*, as reflected in certain international treaties and conventions, in the area of human rights.[88] It further contended that Article 66 of the Vienna Convention on the Law of Treaties establishes the jurisdiction of the Court to settle disputes arising from the violation of peremptory norms *(jus cogens)* in the area of human rights, as those norms are reflected in a number of international instruments.[89]

In its judgment of 3 February 2006, the Court ruled that it did not have jurisdiction to entertain the Application filed by the DRC. It found that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things, and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law *(jus cogens)* and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with

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[87] . Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda). [2006] I.C.J. Rep. para 1. See also: Alexander ORAKHELASHVILI, "Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Rwanda*), jurisdiction and admissibility, judgement of 3 February 2006" (2006) International and Comparative Law Quarterly, Vol. 55, Issue. 03, p 753.

[88] . ICJ Website, overview of the case, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), available at: https://www.icj-cij.org/en/case/126.

[89] . *Democratic Republic of the Congo v. Rwanda*, supra note 87, para 1.

a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute, that jurisdiction is always based on the consent of the parties.[90]

Furthermore, in *DRC v. Rwanda*, the Claimant alleged, *inter alia*, that the Genocide Convention had been violated by Rwanda. However, the Court decided that it did not have jurisdiction on that basis because Rwanda had made the reservation to Article IX of the Genocide Convention.[91]

The Court stated that reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. It also added that Rwanda's reservation cannot be regarded as being incompatible with the object and purpose of Genocide Convention.[92] Using a technique based on giving of reasons in brief terms, the Court's view about the reservation to Genocide Convention displayed a judicial restraint.[93] Five members of the Court found this position unsatisfactory enough to write a joint separate opinion.[94] This criticism proceeds from the observation that it is highly problematic for a state to make a reservation excluding recourse to the monitoring or judicial machinery embodied in a human rights treaty, especially if such recourse constitutes the only

[90] . Ibid., para 64.

[91] . UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p 277.

[92] . *DRC v. Rwanda*, Supra Note 87, para 67.

[93] . KOLB, supra note 2, p 1176.

[94] . Joint separate opinion by judges Higgins, Kooijmans, Elaraby, Owada and Simma

option available to states parties to have questionable reservations to that treaty evaluated in an objective manner.[95]

The Court also displayed a judicial restraint regarding its jurisdiction in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*). In August 2008, Georgia filed an application against the Russian Federation before the ICJ.[96] Here, Georgia claimed that the Russian Federation had failed to respect its obligations under the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD)".[97] Georgia submitted that:

The Russian Federation, through its State organs and State agents, had violated its fundamental obligations under CERD by providing armed support to the South Ossetian and Abkhaz separatist groups.[98] These violations had been mostly related to prohibition of racial discrimination. In fact, Russian Federation, through its State organs, imposed certain illegal measures including racial discrimination in Georgia.

Georgia invoked Article 22 of the CERD as a foundation for the Court's jurisdiction. In December 2009, the Russian Federation raised four preliminary objections in respect of jurisdiction. In its second preliminary objection, the Russian Federation submitted that

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[95] . SIMMA, supra note 10, p 309.

[96] . ICJ Website, overview of the case, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), available at: https://www.icj-cij.org/en/case/140.

[97] . UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p 195.

[98] . The Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*). [2011] I.C.J. Rep. Para 16. See also: Phoebe OKOWA, "The International Court of Justice and the Georgia/Russia dispute" (2011) Human Rights Law Review, Vol. 11, No. 4, p 743.

the procedural requirements of Article 22 of the CERD for recourse to the Court had not been fulfilled.[99] According to this provision,

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

The ICJ then analyzed in detail whether Article 22 of the CERD imposed conditions pre-requisite to the exercise of its jurisdiction. In particular, it examined whether that provision required that the dispute must not have been settled by negotiation or by the use of Convention procedures prior to seizing the Court.[100] The Court ruled that Article 22 of the CERD requires parties to attempt a negotiated settlement before proceedings to adjudication and that, on the facts, this had not occurred.[101]

In determining what constitutes negotiations, the Court observed that negotiations are distinct from mere protests or disputations. It noted that negotiations had occurred between Georgia and the Russian Federation before the commencement of the relevant dispute. Nevertheless, those negotiations did not pertain to the matters relating to the CERD prior to 9 August 2008.[102] The ICJ considered that neither procedure outlined in Article 22 had been met. Article 22 of the CERD thus could not serve to establish the Court's jurisdiction in the case. As a result, the ICJ upheld the second preliminary objection raised by the Russian Federation.[103] The Court also found that it was

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[99]. ICJ Website, overview of the case, supra note 96.

[100] . *Georgia v. Russian Federation*, supra note 98, paras 122-147, See also*:* OKOWA, supra note 98, p 751.

[101] . Ibid., p 139, para 180. See also: OKOWA, supra note 98, p 740.

[102] . Ibid., p 118, para 108.

[103] . Ibid., p 140, para 185.

required neither to consider nor to rule on the other objections to its jurisdiction raised by the Respondent. Hence, the Court concluded that it did not have jurisdiction to entertain the Application filed by Georgia on 12 August 2008.[104]

Hence, the *Georgia v. Russian* case dealt with a particular human rights treaty (CERD), displaying the Court's judicial restraint in respect of its jurisdiction. Five members of the Court wrote a joint dissenting opinion, criticizing the Court's judgment.[105] The joint dissenters questioned the conclusion that Article 22 of the CERD sets forth a requirement of prior negotiations and maintained that the judgment had failed to consider arguments that could lead to a different interpretation of that clause. They also considered that even if Article 22 establishes preconditions to the seisin of the Court, those preconditions — prior negotiations or recourse to the procedures set forth in the CERD — must be read as alternative, rather than cumulative requirements.[106]

The authors of the joint dissenting opinion also took issue with the application of the requirement of prior negotiations that the judgment applied under Article 22, which they considered to be formalistic and at odds with the Court's recent jurisprudence.[107] They pointed out that, in the judgment, the Court concluded for the first time that it lacks jurisdiction on the sole basis that the Applicant had failed to satisfy a prior negotiation requirement[108] — despite the fact that when Georgia filed its application, any attempt by Georgia to resolve the dispute through negotiations had no chance of success.

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[104] . ICJ Website, overview of the case, supra note 96.
[105] . Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja.
[106] . Ibid., para 42.
[107] . Ibid., para 50.
[108] . Ibid., para 63.

Judge Cançado Trindade also criticized the Court's decision in *Georgia v. Russian Federation.* In his dissenting opinion, he proceeded to a critical review of the practice concerning the optional clause of compulsory jurisdiction of the Hague Court (PCIJ and ICJ). Judge Trindade regretted the importance that a distorted practice had come to ascribe to individual State consent, placing it even above the imperatives of the realization of justice at international level.[109]

Judge Cançado Trindade proceeded to consider the relationship between the optional clause/compromissory clauses and the nature and substance of the corresponding treaties wherein they are enshrined. He sustained that human rights treaties (such as the CERD Convention) are ineluctably victim-oriented, and that the acknowledgement of the special nature of those treaties has much contributed to their hermeneutics, which has led to their implementation to the ultimate benefit of human beings, in need of protection.[110] He further advanced the view that hermeneutics of human rights treaties such as CERD requires a primacy of considerations of *ordre public*, of the collective guarantee exercised by all the States Parties, of the accomplishment of a common goal, superior to the individual interests of each Contracting Party.[111] In his view, the Court cannot keep on embarking on a literal or grammatical and static interpretation of the terms of compromissory clauses enshrined in those treaties, drawing "preconditions" therefrom for the exercise of its jurisdiction, in an attitude remindful of traditional international arbitral practice.[112] Hence, he proposed that realization of international justice should be taken into account

[109] . Dissenting opinion of Judge Cançado Trindade, (*Georgia v. Russian*), paras. 37-45.
[110] . Ibid., para 191.
[111] . Ibid., para 70.
[112] . Ibid., para 206.

for the methodology of interpretation of human rights treaties such as CERD.[113]

It should be noted that although the Court has often followed a judicial restraint regarding its jurisdiction, it has recently modified its approach in the case concerning *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*). In this case, the Court displayed a judicial activism concerning its jurisdiction as opposed to its orthodox approach. Indeed, in *Ukraine v. Russian Federation*, the Court took a leap forward in terms of promoting human rights.

In January 2017, Ukraine lodged an application against the Russian Federation before the ICJ with regard to alleged breaches by the latter of its obligations under the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (the "ICSFT") and the CERD.[114] In September 2018, the Russian Federation filed certain preliminary objections with respect to the jurisdiction of the Court and the admissibility of the Application. Finally, the Court rejected the preliminary objections filed by Russian Federation and held that it has jurisdiction to proceed on the merits of the case.[115]

In *Ukraine v. Russian Federation,* the Court displayed a judicial activism, employing certain interpretive techniques such as broad

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[113] . Ibid., para 66.

[114] . ICJ Press Release, Case concerning 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), [2019], No.2019/46, 8 November 2019.

[115] . Case Concerning 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), [2019] I.C.J. Rep. p 607.

interpretation and teleological interpretation. Indeed, in this case, the Court interpreted the CERD in light of its object and purpose. In this regard, two important observations must be made:

First, the Court interpreted Articles 2 and 5 of the CERD, using the technique of broad interpretation. This approach can be read to have contributed to the development of human rights as embodied in the CERD. In this regard, the Court stated that:

The Court, taking into account the broadly formulated rights and obligations contained in the Convention, including the obligations under Article 2, paragraph 1, and the non-exhaustive list of rights in Article 5, considers that the measures of which Ukraine complains (see paragraph 88 above) are capable of having an adverse effect on the enjoyment of certain rights protected under CERD. These measures thus fall within the provisions of the Convention. [116]

Second, the Court made an important contribution to the development of human rights law by interpreting Article 22 of the CERD in light of object and purpose of this convention. Interestingly, Article 22 of the CERD is a procedural provision, setting certain preconditions for the seizin of the Court. However, the Court interpreted this procedural provision in light of object and purpose of this particular human rights treaty (CERD). In this regard, the Court stated that:

The Court considers that Article 22 of CERD must also be interpreted in light of the object and purpose of the Convention. Article 2, paragraph 1, of CERD provides that States parties to CERD undertake to eliminate racial discrimination "without delay". Articles 4 and 7 provide that States parties undertake to eradicate incitement to racial discrimination and to combat prejudices leading to racial discrimination by adopting "immediate and positive measures" and "immediate and effective measures" respectively. The preamble to

[116] . Ibid., para 96.

CERD further emphasizes the States' resolve to adopt all measures for eliminating racial discrimination "speedily". The Court considers that these provisions show the States parties' aim to eradicate all forms of racial discrimination effectively and promptly. In the Court's view, the achievement of such aims could be rendered more difficult if the procedural preconditions under Article 22 were cumulative. [117]

Hence, it is clear that the Court has often displayed a judicial restraint concerning its jurisdiction. In particular, in the Court's view, grave violations of *jus cogens* do not confer it jurisdiction to entertain the claims made by applicant. However, the Court has recently displayed a judicial activism in the case *Ukraine v. Russian Federation.* Nevertheless, this new approach may hardly be seen as an indication that grave breaches of *jus cogens* would confer jurisdiction to the Court.

## Conclusion

The ICJ is not a human rights court to which individuals can bring claims against states, and it has not any specific mandate in the field of human rights. As a general court for inter-state disputes, it has on occasion been called upon to interpret human rights conventions.

The judicial policy of the ICJ has been influenced by dual structure of international law. In one hand, international law preserves the interests of individual States. on the other hand, it protects human rights and values of the international community. This dual structure has affected the constant jurisprudence of the Court, giving rise to an oscillation between judicial activism and judicial restraint. In certain respects, judicial policy can be compared to tightrope-walking in which the Court seeks to achieve a balance

[117] . Ibid., para 111.

between the interests of individual States and values of the international community.[118]

Contemporary international law itself has evolved slowly evolved, imposing limits on the manifestations of a State voluntarism.[119] This trend has gradually manifested itself in the jurisprudence of the ICJ.

This article suggested that ICJ's judicial policy can be examined from a subject-matter perspective. From this perspective, the Court has often displayed a judicial activism regarding certain legal issues such as diplomatic protection and international humanitarian law, following a humanistic approach towards international law. Concerning diplomatic protection, the Court played a great part in evolution and protection of human rights by broadening the scope *ratione materiae* of diplomatic protection. It has also contributed to the development of international humanitarian law, clarifying the correlation between human rights system and the law of armed conflict.

In contrast, the Court has often displayed a judicial restraint regarding certain legal issues such as jurisdiction of the Court and jurisdictional immunities of states, following a state-centric approach towards international law. The law of state immunity is a corollary of the sovereign equality of states on which classical international law is premised. [120] In other words, *raison d'être* of state immunity is the sovereign equality of states in international legal order. For this reason, the Court's attitude towards state immunity appeared to be a conservative and orthodox approach. Furthermore, the Court's judicial restraint regarding its jurisdiction can be mainly attributed to

[118] . Pieter KOOIJMANS, "The ICJ in the 21st century: Judicial Restraint, Judicial Activism, or proactive judicial policy" (2007), The international and comparative law quarterly, Vol. 56, p 743.
[119] . Dissenting opinion of Judge Cançado Trindade, (*Georgia v. Russian*), para 65.
[120] . See: O'KEEFE, Supra note 52.

the Westphalian structure of international law where no State can be brought before an international court or tribunal against its will. Nevertheless, the Court's judicial restraint has been criticized by some of its members as being incompatible with current evolutions of contemporary international law, especially the advent of the international law of human rights. In their view, the Court should modify its state-centric outlook and move towards the realization of international justice.[121]

[121] . Dissenting opinion of Judge Cançado Trindade, (*Georgia v. Russian*), para 1.