doi:10.1017/aju.2022.47

FEMINIST APPROACHES TO INTERNATIONAL LAW

JUS COGENS: REDUX

*Patricia Viseur Sellers**

In *The Boundaries of International Law: A Feminist Critique* (*Boundaries*),[1] amidst observations about masculine bias in treaty law, co-authors Christine Chinkin and Hilary Charlesworth queried the masculine configuration, i.e., the gender of *jus cogens* or peremptory norms. A peremptory norm is "accepted and recognized by the international community . . . as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character."[2] Interrogating whether *jus cogens* privileged the experiences of males over that of females, they challenged *jus cogens*' presumed universality and its intended utility. Accepted peremptory norms, they averred, exerted a silencing, deleterious impact on core feminine values such as sexual equality or freedom from gender discrimination.[3] Decades after the Vienna Convention on the Law of Treaties' (VCLT) codification of *jus cogens*, the International Law Commission (ILC) reified a non-exhaustive list of peremptory norms that explicitly excluded gender-based discrimination.[4] This essay proposes a "*jus cogens* redux" to revive Chinkin and Charlesworth's question by peering at several threads in the thwarted conversations about whether freedom from gender discrimination rises to peremptory norm status. The conversational threads lay tattered by positive law's reliance on enumerated treaty provisions and accepted precepts of customary international law. They are frayed by normative law's philosophical, moralists' approach. Neither the positivist law nor the normative law's concepts of how to determine *jus cogens* values grapples with gender or gender minorities. By default, each retains a masculine approach that configures the gender of *jus cogens* as "non-female."

Gender Discrimination as Jus Cogens: The Positive Law Approach

Boundaries argued that a patriarchal lens infuses the determination of peremptory norms. While acknowledging the significance of genocide, slavery, torture, prolonged arbitrary detention, and systematic racial discrimination as peremptory norms, it found that *jus cogens* elevated what were, arguably, male values.[5] Peremptory norms omitted female-centered values, such as sexual equality, reproductive freedom, freedom from endemic violence, or a right to peace. Charlesworth and Chinkin specifically pondered why freedom from sex discrimination—the equivalent to gender discrimination today—was excluded from peremptory norm status, yet prohibitions of racial

* *The Special Advisor for Slavery Crimes to the Prosecutor of the International Criminal Court; Visiting Fellow, University of Oxford, Oxford, UK. All views expressed herein are expressed solely in the author's personal capacity.*

[1] Hilary Charlesworth & Christine Chinkin, The Boundaries of International Law: A Feminist Critique 120 (2000).

[2] Vienna Convention on the Law of Treaties, Art. 53, May 23, 1969, 1155 UNTS 331.

[3] *See also* Hilary Charlesworth & Christine Chinkin, *The Gender of* Jus Cogens, 15 Hum. Rts. Q. 63 (1993).

[4] Int'l L. Comm'n Rep., Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*), ch. IV, para. 57, UN Doc. A/74/10 (2019).

[5] Charlesworth & Chinkin, *supra* note 1, at 120.

© Patricia Viseur Sellers 2022. Published by Cambridge University Press on behalf of The American Society of International Law. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.

https://doi.org/10.1017/aju.2022.47 Published online by Cambridge University Press

discrimination were accepted. *Jus cogens*, they concluded, left women "relegated to the periphery of communal values and the ungoverned private sphere of the human experience."[6] Their observations about the *jus cogens* doctrine were readily assailed or pointedly ignored.

Notably, in 2006, Allain Pellet, a member of the ILC, opposed gender discrimination as a *jus cogens* contender and derided the efforts to include it as an attempt to legislate through the recognition of peremptory norms. He stated that, "[w]hether international legal norms are the result of elitist masculine bias rights theories or not[,] . . . they will keep their status of positive norms as long as they are not superseded by better, more people oriented and gender-neutral norms vested with a peremptory character."[7] Pellet claimed that the situation was regrettable, yet reiterated that "the condemnation of gender discrimination is still limited to certain parts of the world[,] . . . which prevents it to be considered a norm accepted and recognized by the international community."[8] By contrast Pellet accepted the "peremptorization"[9] of racial discrimination because it enjoyed universal reprobation. Pellet, however, interpreted the pervasive lack of state support to eliminate gender discrimination as evidence that it was not a value "deeply rooted in the conscience of mankind."[10] In this early sortie, freedom from gender discrimination as a potential peremptory norm was touted as unjustified from a positive law perspective. Pellet's claim that freedom from gender discrimination was deracinated from the conscience of mankind, appeared to foreshadow its normative law disqualification as a peremptory norm.

Gender Discrimination as Jus Cogens*: The Normative Approach*

The normative law concept rests upon *jus cogens*' universal and potential, aspirational functions within international law. It ostensibly diverges from the positivist reliance on black letter law. Using a normative analysis, Evan J. Criddle and Evan Fox-Decent's fiduciary theory conceptualizes *jus cogens* as what *should* be states' non-derogable sovereign duties. States should owe *jus cogens* obligations to their citizens and to humanity at large[11] that are grounded in integrity, fairness, equity, and solicitude or genuine concern. The fiduciary theory unhesitatingly postulates that racial discrimination and unequal treatment should violate states' sovereign duties: therefore, their prohibitions would be regarded as peremptory *norm*s.[12]

Under the fiduciary theory, prospective peremptory norms would include due process, the right to be free from state corruption, and the right to self-determination from external colonization and to safeguard the internal self-determination of Indigenous populations.[13] However, among the reiteration of fairness and equal treatment, absent is any serious discussion about freedom from gender discrimination as a prospective peremptory norm. Offered, in passing, is a brief comment about states' inattention to private acts, such as domestic violence, that "would not necessarily preclude it from being a peremptory norm."[14] In a pithy footnote, the fiduciary theory concedes the possibility of enlarging the peremptory norm of genocide to include gender as a targeted group.[15]

[6] *Id.* at 120–21.

[7] Alain Pellet, *Comments in Response to Christine Chinkin and in Defense of* Jus Cogens *as the Best Bastion Against the Excesses of Fragmentation*, 17 FINN. Y.B. INT'L L. 83 (2006).

[8] *Id.* at 84.

[9] *Id.* at 85.

[10] *Id.* at 87.

[11] Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of* Jus Cogens, 34 YALE J. INT'L L. 331 (2009).

[12] *Id.* at 360.

[13] *Id.* at 363.

[14] *Id.* at 378.

[15] *Id.* at 369.

https://doi.org/10.1017/aju.2022.47 Published online by Cambridge University Press

However, the cosmopolitan citizens described in the fiduciary theory to whom states should owe *jus cogens* obligations, while occasionally envisioned as racialized, are basically gender-less. This is farcical: all racialized people are also gendered. However, freedom from gender discrimination as an independent prospective norm arouses little concern. Even though the fiduciary theory is vaunted as compatible with non-Western thought, the authors admit that its premise could "challenge deeply engrained cultural values in some parts of the world,"[16] such as the entrenched discriminations of caste and (racialized) apartheid. Any intersectional approach to entrenched discrimination inclusive of gender is undetectable. Essentially, the cosmopolitan citizens framed in the fiduciary theory's normative approach, retain presumptions of masculinity that consign overt female values to a silenced existence.

Jens David Ohlin likewise conceives of *jus cogens*' function from a normative perspective.[17] For Ohlin, *jus cogens* norms should reflect the natural order, have universal validity, and not be solely dependent upon treaty provisions, customary law requirements, or general principles of law. Ohlin illustrates how positive law positions resulted in the 1825 *Antelope Case*'s re-enslaving of 280 Africans. A normative law approach would have reached the opposite conclusion, based on natural law's sense of justice and intolerance of the slave trade. In the nineteenth century, positive law's strict adherence to black letter law, seemingly exiled normative natural law approaches to the realm of a legal utopia.[18] Ohlin, however, assesses the identification of *jus cogens* norms as possibly having revived the moral imperatives of natural law. In the fiduciary theory, he finds an "inherent naturalism" underlying its substantive criteria of fairness, fundamental equality, and indispensable due process. He insists that such criteria flow from "beyond positive sources of law" and imbue peremptory norms with an "ethically minimum content."[19] Ohlin, therefore, interprets the construction of *jus cogens*' doctrine as allowing for residual normative, meaning aspirational, concepts of natural law.[20]

Despite his normative viewpoint, Ohlin does not identify freedom from gender discrimination as material to peremptory norms. He endorses recognized peremptory norms such as slavery, torture, and genocide. His espousal of natural law's moralist claims might have explicitly discarded gender hierarchies, as an ethical minimum safeguard against gender discrimination. Indeed, today, the *Antelope* case would intersect both the racialized *and* the gendered fate of the enslaved Africans as "contrary to basic principles of humanity and reason."[21] The prohibition of sex discrimination in the Universal Declaration of Human Rights embodies naturalist, universal aspirations that Ohlin might claim informs *jus cogens*' origins. Yet, Ohlin's normative law examination of *jus cogens* does not generate any serious contemplation of freedom from gender discrimination.[22]

Gender Discrimination as Jus Cogens*: ILC Approach*

In 2015, the ILC placed peremptory norms of international law on its agenda and tasked Special Rapporteur Dire Tladi of South Africa with producing several reports to assist the ILC.[23] Tladi's Fourth Report presented a

[16] *Id.* at 379.

[17] Jens David Ohlin, *In Praise of* Jus Cogens' *Conceptual Incoherence*, 63 McGill L.J. 701, 714 (2018).

[18] *Id.* at 708–09.

[19] *Id.* at 717.

[20] *Id.* at 722–23.

[21] *Id.* at 710.

[22] For a critique of gender analysis in the International Court of Justice *jus cogens* jurisprudence, see Ekaterina Yahyaoui Krivenk, *The ICJ and* Jus Cogens *Through the Lens of Feminist Legal Methods*, 28 Eur. J. Int'l L. 959 (2017).

[23] *See* Dire Tladi, *The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*): Making Wine from Water or More Water Than Wine*, 89 Nordic J. Int'l L. 1 (2020); Peremptory Norms of General International Law (*Jus Cogens*): Disquisitions and Disputations (Dire Tladi ed., 2021) (hereinafter Peremptory Norms).

https://doi.org/10.1017/aju.2022.47 Published online by Cambridge University Press

methodology to identify non-derogable obligations of international law. Its positive law analysis relied on the primary evidence of treaty provisions, state practice, domestic legislation, court decisions, and the resolutions of international bodies. Subsidiary evidence consisted of international jurisprudence, the conclusions of expert bodies, and the scholarship of publicists.[24] Draft Conclusion 23 of the Fourth Report compiled an illustrative, non-exhaustive list of peremptory norms, namely: the prohibition of aggression; the prohibition of genocide; the prohibition of crimes against humanity; the prohibition of the basic rules of international humanitarian laws; the prohibition of apartheid and racial discrimination; the prohibition of slavery; the prohibition of torture, and the right to self-determination.[25]

The Fourth Report excluded freedom from gender discrimination as a peremptory norm.[26] Tladi initially stated that freedom from "gender discrimination should be prohibited in the same way as other *jus cogens* norms."[27] He voiced it more clearly than Ohlin or Criddle-Fox-Decent. However, the fifty-five reservations to the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) erected a barrier to its *jus cogens* status.[28] Morally, Tladi recognized that arbitrary discrimination merited *jus cogens* status. However, the dearth of "explicit *opinio juris cogentis*" prevented its recognition and that of gender discrimination.[29] Tladi directly referenced Charlesworth and Chinkin's concern about racial discrimination's *jus cogens* status. He explained that the prohibition of racial discrimination "as such" was not *jus cogens*, rather, the "composite prohibition" of apartheid *and* racial discrimination constituted the peremptory norm.[30]

Mary H. Hansel forthrightly challenged the ILC's methodology and its supposedly neutral standards and objective benchmarks.[31] Hansel found Tladi's examination of freedom from gender discrimination disingenuous, arguing that it failed to explore both the primary and subsidiary evidence supporting the prohibition of gender discrimination as a potential obligatory norm. To Hansel, favorable evidence abounded. It existed in core UN treaties, UN declarations, UN resolutions, regional human rights treaties, and UN treaty-body, international criminal law, and regional human rights jurisprudence.[32] Regarding the fifty-five reservations to CEDAW that rationalized the denial of *jus cogens* status, she astutely observed that treaty reservations were not axiomatically a viable benchmark. States Parties to CEDAW totaled 189 countries, making it a widely ratified treaty. One-third of the fifty-five reservations pertained to Article 29's dispute mechanism, while two-thirds, or thirty-six reservations, pertained to Articles 2, 9, and 16, that respectively barred discrimination against women, upheld residency rights of women, and ensured equality in family law.[33]

Hansel also might have underscored that seventeen states formally lodged objections to those thirty-six reservations, expressing concern that they contravened CEDAW's very purpose—prohibition of gender discrimination. Importantly, twenty-two states withdrew or modified their reservations, such as Egypt and Fiji's withdrawals in 2008 with respect to Article 9.[34] State objections, withdrawals, and reassessments of CEDAW reservations

[24] Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*), Dire Tladi, UN Doc. A/CN.4/727 (2019) [hereinafter Fourth Report).

[25] *Id.*, para. 60.

[26] *Id.*, para. 134.

[27] *Id.*, para. 135, n. 411.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Mary H. Hansel, *"Magic" or Smoke and Mirrors? The Gendered Illusion of* Jus Cogens, *in* Peremptory Norms, *supra* note 23, at 491.

[32] *Id.* at 483–86.

[33] *Id.* at 486–87.

[34] Status of Treaties, Convention on the Elimination of All Forms of Discrimination Against Women.

https://doi.org/10.1017/aju.2022.47 Published online by Cambridge University Press

might have been considered by Tladi as primary evidence of positivist pronouncements against gender discrimination. Together, they undermine the Fourth Report's reliance upon the dated 2006 UN document that tallied the fifty-five reservations to CEDAW.[35] Furthermore, Tladi notes that state unanimity is not required for a norm to achieve peremptory status.[36] States that ratified CEDAW concur with its aims. Even given those remaining CEDAW reservations, today, it would be inconceivable, for states to conclude an international treaty that sanctions gender discrimination.

Hansel, therefore, justifiably questions the ILC's methodological failure to identify freedom from gender discrimination as a peremptory norm. She might have asked why a similar analysis was not applied to the Convention against Torture, Cruel, Inhumane or Degrading Treatment (CAT). CAT has 173 state parties, fifteen less than CEDAW, with a total of twenty-one reservations.[37] Ohlin correctly observed that torture's "prohibition(s) achieved *jus cogens* status at the international level before (being) . . . widely recognized in domestic systems."[38] In comparison, focusing only on CEDAW's reservations appears arbitrary, discriminatory, and a misleading criterion to reject a contender for *jus cogens* status.

Hansel might also have cited the ILC's failure to source primary evidence from international criminal law jurisprudence. Twenty years ago, I wrote that even though rape could constitute a basis of the *jus cogens* norms of war crimes, the act of rape, itself, unlike torture, was not a stand-alone peremptory norm. I called this phenomenon, "legal piggybacking"[39] sexual violence onto recognized peremptory norms of genocide, crimes against humanity, or war crimes. International jurisprudence on torture, as a war crime or a crime against humanity frequently is factually based upon gendered and sexual violence, such as rapes committed against females.[40] Similarly, the Srebrenica genocide jurisprudence was unquestionably gendered, ruling that the execution of 8,000 males diminished the reproductive capacity of that Bosnian Muslim group.[41] In 2019, the International Criminal Court's *Ntaganda* trial chamber decision on jurisdictional prerequisites, held that rape and sexual slavery, "in times of war and peace" were peremptory norms.[42] *Ntaganda*'s jurisprudence, finally, "un-piggy-backed" rape and sexual slavery's reliance on their characterization as war crimes and upon wartime scenarios to justify their peremptory status, Hansel, unfortunately, made no recourse to *Ntaganda*'s interpretation of these peremptory norms that exhibited freedom from gender discrimination.

In 2019, at its seventy-first session, the ILC unanimously accepted the Fourth Report, including the non-exhaustive list of peremptory norms[43] and transmitted it, through the UN secretary-general, to states for their comments and observations. In 2022, at the seventy-third session of the ILC, states commented on the positivist

[35] Fourth Report, *supra* note 24, para. 135, n. 411; *See also* Declarations, Objections and Notifications of Withdrawal of Reservations Related to the Convention on the Elimination of All forms of Discrimination Against Women, UN Doc. CEDAW/SP/2006/2 (Apr. 10, 2006).

[36] Tladi, *supra* note 23, at 7.

[37] Hansel, *supra* note 31, at 493.

[38] Ohlin, *supra* note 18, at 714.

[39] Patricia Viseur-Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT'L L. 287, 296 (2002).

[40] *See* Prosecutor v. Ntaganda, Second Decision on the Defense's Challenge to the Jurisdiction of the Court in Relation to Count 6 and 9, ICC-01/04-02/06, paras. 51–52 (Jan. 4, 2017); David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of* Jus Cogens: *Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219 (2005); DINAH SHELTON, *JUS COGENS*: ELEMENTS OF INTERNATIONAL LAW (2021).

[41] Patricia Viseur Sellers, *Genocide Gendered: Srebrenica*, Ninth International Humanitarian Law Dialogs 21 (2016).

[42] *Id.*; *Ntaganda*, *supra* note 40, paras. 51–52.

[43] Draft Conclusions, *supra* note 4, paras. 56–57. Ironically, at that session, the ILC removed the restricted definition of gender under the proposed crimes against humanity treaty, to fortify the potential scope of gender-based persecution. *Id.*, para. 42.

https://doi.org/10.1017/aju.2022.47 Published online by Cambridge University Press

methodology. Freedom from gender discrimination as a *jus cogens* value was never raised. The ILC ignored the *Ntaganda* jurisprudence. Tladi recommended that the ILC refer the draft conclusions together with the list of peremptory norms to the General Assembly for transmission to all states.[44] Ultimately, the ILC omitted, without conducting a comprehensive examination, freedom from gender discrimination as a contender for peremptory norm status.

Conclusion

Boundaries observed masculine perspectives that configured peremptory norms and queried the omission of women-centered values, such as sexual equality. A quarter of a century later, the ILC's positive law analysis "objectively" excluded freedom from gender discrimination as a stand-alone peremptory norm. Neither normative nor positivist legal conceptualizations of *jus cogens* have grappled substantively with gender or other values that are prioritized by females or by gender minorities. By default, a masculine approach to peremptory norms persists, notwithstanding, the remarkable *Ntaganda* jurisprudence. Apparently, freedom from gender discrimination would disrupt and dislodge the gender hierarchies still embedded in *jus cogens*.

To respond to Charlesworth and Chinkin's question redux, the gender of *jus cogens* veers, decidedly, masculine.

[44] Fifth Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur, para. 227, UN Doc. A/CN.4/747 (2022).

https://doi.org/10.1017/aju.2022.47 Published online by Cambridge University Press