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The Gender of *Jus Cogens*

Hilary Charlesworth and Christine Chinkin

I. INTRODUCTION: THE DOCTRINE OF *JUS COGENS*

The modern international law doctrine of *jus cogens* asserts the existence of fundamental legal norms from which no derogation is permitted.[1] It imports notions of universally applicable norms into the international legal process. The status of norms of *jus cogens* as general international law, Onuf and Birney argue, "is not a logical necessity so much as a compelling psychological association of normative superiority with universality."[2] A formal, procedural definition of the international law concept of the *jus cogens* is found in the Vienna Convention on the Law of Treaties.[3] Article 53 states that:

> [A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[4]

1. *Jus cogens* norms have also been recognized in many domestic legal systems. *See* Eric Suy, *The Concept of Jus Cogens in Public International Law*, in 2 *The Concept of Jus Cogens in International Law* 17, 18–22 (Carnegie Endowment for International Peace, 1967); J. Sztucki, *Jus Cogens and the Vienna Convention on the law of Treaties* 6–11 (1972). On the existence of the doctrine of *jus cogens* in international law before the 1969 Vienna Convention, *see*, Alfred von Verdross, *Forbidden Treaties in International Law*, 31 Am. J. Int'l L. 571 (1937); Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 Am. J. Int'l L. 946, 948–60 (1967); *International Law Commission Report 1982*, at 132, U.N. Doc. A/37/10 (1982); Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* chs. 1, 2 (1988).
2. N.G. Onuf & Richard K. Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 Denver J. Int'l L. & Pol'y 187, 190 (1974).
3. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 63 Am. J. Int'l L. 875, 891 (1969).
4. Article 53 purports to define the notion of *jus cogens* only for the law of treaties within the Vienna Convention itself, but is generally regarded as having wider significance. *See also, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986*, art. 53, 25 I.L.M. 572 (1986). Apart

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Such a category of principles has had an uneasy existence in international law as "peremptory" norms do not fit well with the traditional view of international law as a consensual order. If the basis of international law, whether customary or conventional, is the agreement of states, how can states be bound by a category of principles to which they may have not freely consented? On what basis can peremptory norms be distinguished from other rules of international law? Thus Prosper Weil has criticized the theory of *jus cogens* both for forcing states "to accept the supernormativity of rules they were perhaps not even prepared to recognize as ordinary norms"[5] and for generally weakening the unity of the international legal system by introducing notions of relative normativity.[6] As Martii Koskenniemi points out, however, the actual terms of Article 53 contain two distinct strains, non-consensualist ("descending") and consensualist ("ascending"): "*jus cogens* doctrine shows itself as a compromise. . . . [P]eremptory norms bind irrespective of consent . . . but what those norms are is determined by consent."[7]

Article 53, together with Article 64 which provides that treaties conflicting with new peremptory norms of international law become void, was one of the most contentious provisions at the Vienna Conference. Much of the support for the inclusion of the concept of *jus cogens* in the Vienna Convention came from socialist and third world states which saw it as some protection from the unmitigated operation of the principle of *pacta sunt servanda*.[8] Some Western nations were particularly critical of the inclusion of this provision on grounds of its challenge to the principle of state sov-

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from these provisions, explicit references to jus cogens in other treaties are rare. *See also*, International Law Commission, *Draft Articles on State Responsibility*, arts. 18(2), 29(1), 33(2), 2 Y.B. Int'l L. Comm'n 30 (1980).

5. Prosper Weil, *Towards Relative Normativity in International Law*, 77 Am. J. Int'l L. 413, 427 (1983). *See also*, Georg Schwarzenberger, *International Jus Cogens*, 43 Texas L. Rev. 455 (1965).
6. Weil, *supra* note 5, at 423–30. Compare W. Riphagen, *From Soft Law to Jus Cogens and Back*, 17 Victoria U. Wellington. L. Rev. 81, 92 (1987) (arguing that relationship between "soft" international law, "hard" international law, and principles of *jus cogens* is not hierarchical, and that "soft" law and principles of *jus cogens* are more accurately seen as closely connected "entry points" to the legal system).
7. Martii Koskenniemi, *From Apology to Utopia* 283 (1989). An example of the operation of the "compromise" *jus cogens* doctrine is the prohibition on apartheid. Although the chief practitioner of apartheid, South Africa, never "consented" to its prohibition, the principle is widely accepted as universally binding as *jus cogens*. *See* Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 Harv. Int'l L.J. 457, 482 (1985).
8. John H. Spencer, *Review of the Tenth and Eleventh Sessions of the Asian-African Legal Consultative Committee, held in 1969 and 1970*, 67 Am. J. Int'l L. 180, 181 (1973); Richard D. Kearney, *The Future Law of Treaties*, 4 Int'l Lawyer 823, 830 (1970); Robert Rosenstock, *Peremptory Norms—Maybe Even Less Metaphysical and Worrisome*, 5 Denver J. Int'l L. & Pol'y 167, 169 (1975).

ereignty, its vagueness, the problem of definition of *jus cogens* norms, and the lack of state practice to support it.[9]

Defenders of the notion of *jus cogens* often explain its basis as the collective international, rather than the individual national, good.[10] On this analysis, principles of *jus cogens* play a similar role in the international legal system to that played by constitutional guarantees of rights in domestic legal systems. Thus states, as national political majorities, accept the limitation of their freedom of choice "in order to reap the rewards of acting in ways that would elude them under pressures of the moment."[11] Among those jurists who accept the category of *jus cogens*, however, continuing controversy remains over what norms qualify as principles of *jus cogens*.

Our concern in this article is neither with the debates over the validity of the doctrine of *jus cogens* in international law nor with particular candidates for *jus cogens* status. Rather, we are interested in the structure of the concept detailed by international law scholars. We argue that the concept of the *jus cogens* is not a properly universal one as its development has privileged the experiences of men over those of women, and it has provided a protection to men that is not accorded to women.

II. THE FUNCTION OF *JUS COGENS* IN INTERNATIONAL LAW

The clearest operation of the doctrine of *jus cogens* in international law is set out in the Vienna Convention on the Law of Treaties: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."[12] The freedom of states to enter into treaties is thus limited by fundamental values of the international community. Despite

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9. Hannikainen, *supra* note 1, at 172–73; Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 Am. J. Int'l L. 495, 535–38 (1970); I.M. Sinclair, *Vienna Conference on the Law of Treaties*, 19 Int'l & Comp. L.Q. 47, 66–69 (1970).
10. *E.g.*, Hannikainen, *supra* note 1, at 1–2. Hannikainen writes that "'the international community of States as a whole' . . . is entitled to assume in extremely urgent cases, to protect the overriding interests and values of the community itself and to ensure the functioning of the international legal order, the authority to require one or a few dissenting States to observe a customary norm of general international law as a peremptory customary norm." *Id.* at 241.
11. Laurence H. Tribe, *American Constitutional Law* 10 (1978). *See* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 Brit Y.B. Int'l L. 1, 19–20 (19??).
12. Vienna Convention on the Law of Treaties, *supra* note 3, art. 53. *See also id.* art. 64 (providing that if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with it becomes void and terminates); art. 66 (allowing submission of disputes concerning the application or interpretation of arts. 53 or 64 to the International Court of Justice); art. 71 (setting out the consequences of nullity on the grounds of *jus cogens*).

fears that the inclusion of this provision would subvert the principle of *pacta sunt servanda* and act to destabilize the certainty provided by treaty commitments, *jus cogens* doctrine has been only rarely invoked in this context.[13] It thus has had little practical impact upon the operation of treaties, although it may possibly exert some restraining influence on the conclusion of treaties.

Inconsistent principles of customary international law cannot stand alongside *jus cogens*.[14] Some jurists have argued that all states have a legal interest, and consequently standing, to complain in international fora about violations of the *jus cogens* by another state.[15] Allusions to *jus cogens*-type norms and their procedural and substantive implications in the jurisprudence of the International Court of Justice, however, have been occasional and ambiguous.[16]

Much of the importance of the *jus cogens* doctrine lies not in its practical application but in its symbolic significance in the international legal process. It assumes that decisions with respect to normative priorities can be made and that certain norms can be deemed to be of fundamental significance. It thus incorporates notions of universality and superiority into international law.[17] These attributes are emphasized in the language used in describing the doctrine: *jus cogens* is presented as "guarding the most fundamental and highly-valued interests of international society";[18] as an "expression of a conviction, accepted in all parts of the world community, which touches

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13. It has been argued that the Treaty of Guarantee of August 16, 1960, between Cyprus, on the one hand, and Greece, Turkey and the United Kingdom on the other, violated the *jus cogens* norm prohibiting the threat or use of force by reserving the right for the Guarantee powers to take action to reestablish the state of affairs created by the Treaty, and that United Nations resolutions on the issue implicitly acknowledge this. Schwelb, *supra* note 1, at 952–53. On assertions of invalidity of the 1979 Camp David agreements on the basis of conflict with norms of *jus cogens*, see Giorgio Gaja, *Jus Cogens Beyond the Vienna Convention*, 172 Recueil Des Cours 271, 282 (1981). For other examples see Gordon Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 Va. J. Int'l L. 585, 607 (1988). The Portuguese application against Australia in the International Court of Justice (Application Instituting Proceedings, filed in the Registry of the Court February 22 1991) obliquely raises *jus cogens* issues in the context of the bilateral Timor Gap Treaty between Indonesia and Australia. 29 I.L.M. 469 (1990).
14. Ian Brownlie, *Principles of Public International Law* 514–15 (4th ed. 1990). *See also*, Jordan Paust, *The Reality of Jus Cogens*, 7 Conn. J. Int'l L. 81, 84 (1991).
15. *E.g.*, Hannikainen, *supra* note 1, at 725–26; Oscar Schachter, *General Course in International Law*, 178 Recueil Des Cours 182–84 (1982).
16. *See, e.g., Barcelona Traction*, 1970 I.C.J. 321, 325 (sep. op. Judge Ammoun); *Namibia* (Advisory Opinion), 1971 I.C.J. 72–75 (sep. op. Judge Ammoun); *US Diplomatic and Consular Staff in Tehran* 1980 I.C.J. 30–31, 40–41, 44–45; *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14, 100–01. (All discussed in Hannikainen, *supra* note 1, at 192–94.)
17. *See generally*, Onuf & Birney, *supra* note 2.
18. Christenson, *supra* note 13, at 587.

the deeper conscience of all nations;"[19] as fulfilling "the higher interest of the whole international community."[20] Indeed, Suy describes *jus cogens* as the foundation of international society without which the entire edifice would crumble.[21]

In the international legal literature on *jus cogens*, the use of symbolic language to express fundamental concepts is accompanied by abstraction. Writers are generally reluctant to go beyond the abstract assertion of principle to determine the operation and impact of any such norms. A tension thus exists between the weighty linguistic symbolism employed to explain the indispensable nature of *jus cogens* norms and the very abstract and inconclusive nature of their formulation. Some writers have argued that the doctrinal discussion of *jus cogens* has no echo at all in state practice.[22]

The search for universal, abstract, hierarchical standards is often associated with masculine modes of thinking. Carol Gilligan, for example, has contended that different ways of reasoning are inculcated in girls and boys from an early age. Girls tend to reason in a contextual and concrete manner; boys in a more formal and abstract way.[23] Most systems of knowledge prize the "masculine" forms of reasoning. The very abstract and formal development of the *jus cogens* doctrine indicates its gendered origins. What is more important, however, is that the privileged status of its norms is reserved for a very limited, male centered, category. *Jus cogens* norms reflect a male perspective of what is fundamental to international society that may not be shared by women or supported by women's experience of life. Thus the fundamental aspirations attributed to communities are male and the assumptions of the scheme of world order assumed by the notion of *jus cogens* are essentially male. Women are relegated to the periphery of communal values.

Our aim here is not to challenge the powerful symbolic significance of

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19. Ulrich Scheuner, *Conflict of Treaty Provisions with a Peremptory Norm of General International Law and its Consequences*, 27 Zeitschrift Fur Auslandisches Offentliches Recht und Volkerrecht 520, 524 (1967).
20. Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 Am. J. Int'l L. 55, 58 (1966).
21. Suy, *supra* note 1, at 18. Similarly, the West German Federal Constitutional Court referred to *jus cogens* as "indispensable to the existence of the law of nations as an international legal order." *Cited in* Christenson, *supra* note 13, at 592.
22. *See, e.g.*, Sztucki, *supra* note 1, at 93–94 ("[I]n the light of international practice, the question whether the concept of *jus cogens* has been 'codified' or 'progressively developed' in the [Vienna] Convention, may be answered only in the sense that there has been nothing to codify."); David Kennedy, *The Sources of International Law*, 2 Am. U. J. Int'l L. & Pol'y 1, 18 (1987).
23. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 25–51 (1982). For a discussion of this characteristic in the context of traditional international relations theory, *see*, J. Ann Tickner, *Hans Morgenthau's Principles of Political Realism: A Feminist Reformulation*, 17 Millenium: J. Int'l Stud. 429, 433 (1988).

jus cogens but to argue that the symbolism is itself totally skewed and gendered. In doing so we propose a much richer content for the concept of *jus cogens*; if women's lives contributed to the designation of international fundamental values, the category would be transformed in a radical way. Our focus will be the category of human rights often designated as norms of *jus cogens*.[24]

III. HUMAN RIGHTS AS NORMS OF *JUS COGENS*

The "most essential"[25] human rights are considered part of the *jus cogens*. For example, the American Law Institute's Revised Restatement of Foreign Relations Law lists as violations of *jus cogens* the practice or condoning of genocide, slave trade, murder/disappearances, torture, prolonged arbitrary detention or systematic racial discrimination.[26] This list has been described as "a particularly striking instance of assuming American values are synonymous with those reflected in international law."[27] At a deeper level, Simma and Alston argue that "it must be asked whether any theory of human rights law which singles out race but not gender discrimination, which condemns arbitrary imprisonment but not death by starvation, and which finds no place for a right of access to primary health care is not flawed in terms both of the theory of human rights and of United Nations doctrine."[28]

The development of human rights law has challenged the primacy of the state in international law and given individuals a significant legal status. It has, however, developed in an unbalanced and partial manner and promises much more to men than to women. This phenomenon is partly due to male domination of all international human rights fora,[29] which itself fashions

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24. Although many asserted norms of *jus cogens* are drawn from the international law of human rights, *jus cogens* is usually defined as more extensive. For example, the International Law Commission's Special Rapporteur, Sir Humphrey Waldock, proposed three categories of *jus cogens* norms: those prohibiting the threat or use of force in contravention of the principles of the United Nations Charter; international crimes so characterized by international law; and acts or omissions whose suppression is required by international law. Sir Humphrey Waldock, *Second Report on the Law of Treaties*, 2 Y.B. Int'l L. Comm'n 56–59, U.N. Doc. A/CN.4/156 and Add. 1–3 (1963). *See also*, Roberto Ago, Recueil Des Cours 320, 324 (1971); Scheuner, *supra* note 19, at 526–67.
25. Scheuner, *supra* note 19, at 526.
26. *Restatement (Third) of the Foreign Relations Law of the United States*, § 702 (1987). *Compare*, Marjorie M. Whiteman, *Jus Cogens in International Law, With a Projected List*, 7 Ga. J. Int'l & Comp. L. 609, 625–26 (1977).
27. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens & General Principles*, 12 Aust. Y.B. Int'l L. 82, 94 (1992).
28. *Id.* at 95.
29. For example, within the United Nations, apart from the Committee on the Elimination of all Forms of Discrimination Against Women (whose 18 members are all women), there

the substance of human rights law in accordance with male values. At a deeper level, it replicates the development of international law generally.

A. The Gender Bias of Human Rights Law

International law assumes, and reinforces, a number of dichotomies between public and private spheres of action.[30] One is the distinction drawn between international ("public") concerns and those within the domestic ("private") jurisdiction of states. Within the category of international concerns there is a further public/private distinction drawn. International law is almost exclusively addressed to the public, or official, activities of states, which are not held responsible for the "private" activities of their nationals or those within their jurisdiction. The concept of imputability used in the law of state responsibility is a device to deem apparently "private" acts "public" ones. This more basic dichotomy has significant implications for women. Women's lives are generally conducted within the sphere deemed outside the scope of international law, indeed also often outside the ambit of "private" (national) law.[31]

Although human rights law is often regarded as a radical development in international law because of its challenge to that discipline's traditional public/private dichotomy between states and individuals, it has retained the deeper, gendered, public/private distinction. In the major human rights treaties, rights are defined according to what men fear will happen to them, those harms against which they seek guarantees. The primacy traditionally given to civil and political rights by Western international lawyers and philosophers is directed towards protection for men within their public life—their relationship with government. The same importance has not been generally accorded to economic and social rights which affect life in the private sphere, the world of women, although these rights are addressed to states. This is not to assert that when women are victims of violations of the civil and political rights they are not accorded the same protection,[32] but

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are a total of 13 women out of 90 "independent experts" on specialist human rights committees. *See* Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 Am. J. Int'l L. 613, 624 n.67 (1991).

30. For a fuller discussion, see *id.* at 625–28.
31. As Professor O'Donovan has pointed out, however, the "private" sphere associated with women is in fact often tightly controlled by legal regulation of taxation, health, education and welfare. Katherine O'Donovan, *Sexual Divisions in Law* 7–8 (1985).
32. Indeed Article 3 of the International Covenant on Civil and Political Rights states they will be accorded equal treatment with men. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, *entered into force* 23 Mar. 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (1966).

that these are not the harms from which women most need protection.

All the violations of human rights typically included in catalogues of *jus cogens* norms are of undoubted seriousness; genocide, slavery, murder, disappearances, torture, prolonged arbitrary detention, and systematic racial discrimination. The silences of the list, however, indicate that women's experiences have not directly contributed to it. For example, although race discrimination consistently appears in *jus cogens* inventories, discrimination on the basis of sex does not.[33] And yet sex discrimination is an even more widespread injustice, affecting the lives of more than half the world's population. While a prohibition on sex discrimination, as racial discrimination, is included in every general human rights convention and is the subject of a specialized binding instrument, sexual equality has not been allocated the status of a fundamental and basic tenet of a communal world order.

Of course women as well as men suffer from the violation of the traditional canon of *jus cogens* norms. However the manner in which the norms have been constructed obscures the most pervasive harms done to women. One example of this is the "most important of all human rights",[34] the right to life set out in Article 6 of the Civil and Political Covenant[35] which forms part of customary international law.[36] The right is concerned with the arbitrary deprivation of life through public action.[37] Important as it is, the protection from arbitrary deprivation of life or liberty through public actions does not address the ways in which being a women is in itself life-threatening and the special ways in which women need legal protection to be able to enjoy their right to life. Professor Brownlie has pointed to the need for empirical,

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33. Compare Brownlie, *supra* note 14, at 513 n.29 (stating that principle of non-discrimination as to sex "must have the same [*jus cogens*] status" as principle of racial non-discrimination). *See also* Hannikainen, *supra* note 1, at 482.
34. Yoram Dinstein, *The Right to Life, Physical Integrity and Liberty,* in *The International Bill of Rights: The Covenant on Civil and Political Rights* 114 (L. Henkin ed., 1981).
35. *See also* Universal Declaration on Human Rights, *signed* 10 Dec. 1948, G.A. Res. 217A (III), art. 3, U.N. Doc. A/810, at 71 (1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 2 (1950).
36. Dinstein, *supra* note 34, at 115.
37. There is debate among various commentators as to how narrowly the right should be construed. Fawcett has suggested that the right to life entails protection only from the acts of government agents. J.E.S. Fawcett, *The Application of the European Convention on Human Rights* 30–31 (1969). Dinstein notes that it may be argued under Article 6 that "the state must at least exercise due diligence to prevent the intentional deprivation of the life of one individual by another." He seems however to confine the obligation to take active precautions against loss of life only in cases of riots, mob action, or incitement against minority groups. Dinstein, *supra* note 34, at 119. Ramcharan argues for a still wider interpretation of the right to life, "plac[ing] a duty on the part of each government to pursue policies which are designed to ensure access to the means of survival for every individual within its country." B.G. Ramcharan, *The Concept and Dimensions of the Rights to Life,* in *The Rights to Life in International Law* 1, 6 (B.G. Ramcharan ed., 1985). The examples of major modern threats to the right to life offered by Ramcharan, however, do not encompass violence outside the "public" sphere. *Id.* at 7–8.

rather than purely abstract, studies on which to base assertions of rights.[38] Such an approach highlights the inadequacy of the formulation of the international legal right to life.

A number of recent studies show that being a women may be hazardous even from before birth due to the practice in some areas of aborting female fetuses because of the strong social and economic pressure to have sons.[39] Immediately after birth womanhood is also dangerous in some societies because of the higher incidence of female infanticide. During childhood in many communities girls are breast-fed for shorter periods and later fed less so that girls suffer the physical and mental effects of malnutrition at higher rates than boys.[40] Indeed in most of Asia and North Africa, women suffer great discrimination in basic nutrition and health care leading to a disproportionate number of female deaths.[41] The well-documented phenomenon of the "feminization" of poverty in both the developing and developed world causes women to have a much lower quality of life than men.[42]

Violence against women is endemic in all states; indeed international lawyers could observe that this is one of those rare areas where there is genuinely consistent and uniform state practice. An International Tribunal on Crimes Against Women, held in Brussels in 1976, heard evidence from women across the world on the continued oppression of women and the commission of acts of violence against them.[43] Battery is the major cause of injury to adult women in the United States, where a rape occurs every six minutes.[44] In Peru, 70 percent of all crimes reported to police involve women as victims.[45] In India, 80 percent of wives are victims of violence, domestic abuse, dowry abuse or murder.[46] In 1985, in Austria, domestic violence against the wife was given as a factor in the breakdown of marriage in 59 percent of 1,500 divorce cases.[47] In Australia, a recent survey indicated

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38. Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *The Rights of Peoples* 1, 16 (J. Crawford ed., 1988).
39. United Nations, *The World's Women, 1970–1990: Trends and Statistics* 1 n.2 (1991); Charlotte Bunch, *Women's Rights as Human Rights: Towards a Re-Vision of Human Rights*, 12 Hum. Rts. Q. 486, 488–89 n.3 (1990).
40. Bunch, *supra* note 39, at 489; United Nations, *supra* note 39, at 59.
41. Amartya Sen, *More Than 100 Million Women Are Missing*, N.Y. Rev. Books, 30 Dec. 30 1990, at 61.
42. *See, e.g., Women are Poorer*, 27 (3) U.N. Chronicle 47 (1990).
43. *Crimes Against Women: The Proceedings of the International Tribunal* (D. Russell ed., 1984). Richard Falk has pointed out the importance of such grass roots initiatives in contributing to the normative order on the international level (without referring to this Tribunal). Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in *The Rights of Peoples* 17, 27–29 (J. Crawford ed., 1988). *Compare* Crawford, *The Rights of Peoples: Some Conclusions*, in *id.* at 159, 174–75.
44. Bunch, *supra* note 39, at 490.
45. *Id.*
46. *Id.*
47. United Nations, *supra* note 39, at 19.

that one in five men believed it acceptable for men to beat their wives;[48] while surveys by the Papua New Guinea Law Reform Commission found that up to 67 percent of wives had suffered marital violence.[49]

The United Nations system has not ignored the issue of violence against women. For example, the United Nations Commission on the Status of Women has noted its great concern on this matter and the Economic and Social Council has adopted resolutions condemning it.[50] The General Assembly itself has supported concerted, multidisciplinary action within and outside the United Nations to combat violence against women and has advocated special measures to ensure that national systems of justice respond to such actions.[51] A United Nations report on violence against women observes that "[v]iolence against women in the family has . . . been recognized as a priority area of international and national action. . . . All the research evidence that is available suggests that violence against women in the home is a universal problem, occurring across all cultures and in all countries."[52] But although the empirical evidence of violence against women is strong, it has not been reflected in the development of international law. The doctrine of *jus cogens*, with its claim to reflect central, fundamental aspirations of the international community, has not responded at all to massive evidence of injustice and aggression against women.

The great level of documented violence against women around the world is unaddressed by the international legal notion of the right to life because that legal system is focussed on "public" actions by the state. A similar myopia can be detected also in the international prohibition on torture.[53] A central feature of the international legal definition of torture is that it takes place in the public realm: it must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[54] Although many women are victims of torture in this "public" sense,[55] by far the greatest violence against women occurs in the "private" nongovernmental sphere.

Violence against women is not only internationally widespread, but most

48. Australian Government, Office of the Status of Women, *Community Attitudes Towards Domestic Violence in Australia* 2 (1988).
49. United Nations, *Violence Against Women in the Family* 20 (1989).
50. U.N. E.S.C. Res. 1982/22, 1984/14.
51. G.A. Res. 40/36 (1985), *cited in* United Nations, *supra* note 49, at 4.
52. United Nations, *supra* note 49, at 4.
53. A more detailed analysis of the international law prohibition on torture from a feminist perspective is contained in Charlesworth, Chinkin & Wright, *supra* note 29, at 628–29.
54. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (Dec. 10, 1984), art. 1(1), *draft reprinted in* 23 I.L.M. 1027 (1984), *substantive changes noted in* 24 I.L.M. 535 (1985), also *reprinted in Human Rights: A Compilation of International Instruments*, at 212, U.N. Doc. ST/HR/1/Rev.3 (1988).
55. *See, e.g.*, Amnesty International, *Women in the Front Line: Human Rights Violations Against Women* (1991).

of it occurs within the private sphere of home, hearth and family.[56] In the face of such evidence, many scholars now have moved from an analysis of domestic violence based on the external causes of such violence to a structural explanation of the universal subordination of women: "wife beating is not just a personal abnormality, but rather has its roots in the very structuring of society and the family; that in the cultural norms and in the sexist organization of society."[57]

Violence against, and oppression of, women is therefore never a purely "private" issue. As Charlotte Bunch noted, it is caused by "the structural relationships of power, domination and privilege between men and women in society. Violence against women is central to maintaining those political relations at home, at work and in all public spheres."[58] These structures are supported by the patriarchal hierarchy of the nation state. To hold states accountable for "private" acts of violence or oppression against women, however, challenges the traditional rules of state responsibility.[59] The concept of imputability proposed by the International Law Commission in its draft articles on state responsibility does not encompass the maintenance of a legal and social system in which violence or discrimination against women is endemic and where such actions are trivialized or discounted.[60] It could be argued that, given the extent of the evidence of violence against women, failure to improve legal protection for women and to impose sanctions against perpetrators of violence against women should engage state responsibility.[61]

The problematic structure of traditionally asserted *jus cogens* norms is also shown in the more controversial "collective" right to self-determination.[62] The right allows "all peoples" to "freely determine their political status and freely pursue their economic, social and cultural development."[63] Yet the oppression of women within groups claiming the right of self-determination has never been considered relevant to the validity of their claim or to the form self-determination should take.[64] An example of this is

56. United Nations, *supra* note 49, at 18–20.
57. *Quoted in id.* at 30.
58. Bunch, *supra* note 39, at 491.
59. *See* Gordon Christenson, *Attributing Acts of Omission to the State*, 12 Mich. J. Int'l L. 312 (1991).
60. The International Law Commission's controversial definition of an international crime in Draft Article 19 (3)(c), *supra* note 4, is also significantly limited in its coverage; it refers to a "serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, apartheid."
61. *See* Americas Watch, *Criminal Injustice: Violence Against Women in Brazil* (1991).
62. This norm is not accepted by all commentators as within the *jus cogens*, but has considerable support for this status. *See* Brownlie, *supra* note 14, at 513.
63. International Covenant on Civil and Political Rights, *supra* note 32, at 1.
64. *See* Christine Chinkin, *A Gendered Perspective to the Use of Force in International Law*, 12 Aust. Y.B. Int'l L. 279 (1992); Charlesworth, Chinkin & Wright, *supra* note 29, at 642–43.

the firm United States support for the Afghani resistance movement after the 1979 Soviet invasion without any apparent concern for the very low status of women within traditional Afghani society.[65] Another is the immediate and powerful United Nations response after Iraq's 1990 invasion of Kuwait. None of the plans for the liberation or reconstruction of Kuwait were concerned with that state's denial of political rights to women. Although some international pressure was brought to bear on the Kuwaiti government during and after the invasion to institute a more democratic system, the concern did not focus on the political repression of women and was quickly dropped.

The operation of the public/private distinction in international human rights law operates to the detriment of women. In a sense, the doctrine of *jus cogens* adds a further public/private dimension to international law as *jus cogens* norms are those which are central to the functioning of the entire international community and are thus "public" in contrast to the "private" or less fundamental human rights canon. In this way, women's lives are treated as being within a doubly private sphere, far from the concerns of the international legal order.

B. A Feminist Rethinking of *Jus Cogens*

In the context of human rights, what can a feminist contribution to the jurisprudence of *jus cogens* be? For example, should we seek to define a "fourth generation" of women's human rights? Such a development could lead to segregation and marginalization of exclusively women's rights and would be unlikely to be accepted as *jus cogens*. It has been argued that the central task of feminist theory in international relations is to understand the world from the perspective of the socially subjugated.[66] One method of doing this in international law is to challenge the gendered dichotomy between public and private worlds and to reshape doctrines based on it. For example, existing human rights law can be redefined to transcend the distinction between public and private spheres and truly take into account women's lives as well as men's.[67] Considerations of gender should be fun-

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65. *See* Charlesworth, Chinkin & Wright, *supra* note 29, at 642–43.
66. Sarah Brown, *Feminism, International Theory, and International Relations of Gender Inequality*, 17 Millenium: J. Int'l Stud. 461, 472 (1988).
67. For example, in the context of the right to life, the wide terms of the Human Rights Committee's General Comment on Article 6 of the International Covenant on Civil and Political Rights could be exploited to argue for the prevention of domestic violence as an aspect of this right. *See* U.N. Doc. CCPR/C/21/Rev.1 (1989), at 4–6 (1989). *See also* General Recommendation No. 19 of the Committee on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/1992/L.I/Add.15 (1992), which describes gender based violence as a form of discrimination against women.

damental to an analysis of international human rights law.[68]

Feminist rethinking of *jus cogens* would also give prominence to a range of other human rights; the right to sexual equality, to food, to reproductive freedom, to be free from fear of violence and oppression, and to peace. It is significant that these proposals include examples from what has been described as the third generation of human rights, which includes claimants to rights that have been attacked as not sufficiently rigorously proved, and as confusing policy goals with law-making under existing international law.[69] This categorization of rights to which women would attach special value might be criticized as reducing the quality and coherence of international law as a whole.[70] Such criticism underlines the dissonance between women's experiences and international legal principles generally. In the particular context of the concept of *jus cogens*, which has an explicitly promotional and aspirational character, it should be possible for even traditional international legal theory to accommodate rights that are fundamental to the existence and dignity of half the world's population. Professor Riphagen's nonhierarchical analysis of jus cogens[71] accommodates the inclusion of these rights even more readily.

IV. CONCLUSION

Fundamental norms designed to protect individuals should be truly universal in application as well as rhetoric, and operate to protect both men and women from those harms they are in fact most likely to suffer. They should be genuine human rights, not male rights. The very human rights principles that are most frequently designated as *jus cogens* do not in fact operate equally upon men and women. They are gendered and not therefore of universal validity. Further, the choices that are typically made of the relevant norms and the interpretation of what harms they are designed to prevent reflect male choices which frequently bear no relevance to women's lives. On the other hand, the violations that women do most need guarantees against do not receive this same protection or symbolic labelling. The priorities asserted are male-oriented and are given a masculine interpretation. Taking women's experiences into account in the development of *jus cogens* norms will require a fundamental rethinking of every aspect of the doctrine.

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68. Interesting work already exists in this area. For example, on the prohibition on apartheid, see Cheryl L. Poinsette, *Black Women under Apartheid: An Introduction*, 8 Harv. Women's L.J. 93 (1985); Penny Andrews, *The Legal Underpinnings of Gender Oppression in Apartheid South Africa*, 3 Aust. J.L. & Soc'y 92 (1986).
69. *See, e.g.*, Brownlie, *supra* note 38, at 16.
70. *Id.* at 15.
71. *See supra* note 6.

It has been argued that the "New World Order" promised as a positive and progressive development from the realignment of the superpowers and the apparent renaissance of the United Nations in fact continues the same priorities as the old world order.[72] The gendered nature of the international legal order is not yet on the agenda in the discussions of any truly new world order. Without full analysis of the values incorporated in *jus cogens* norms or the impact of their application, further work to make them effective in a new international legal order will in fact only continue the male orientation of international law.

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72. *See, e.g.*, Philip Alston, *Human Rights in the New World Order: Discouraging Conclusions from the Gulf Crisis,* in *Whose New World Order: What Role for the United Nations?* 85 (M. Bustelo & P. Alston eds., 1991).