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The ICJ and Jus Cogens *through the Lens of Feminist Legal Methods*

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Abstract

This article explores the persistent gap in receptivity to feminist approaches to public international law within international institutions, using the International Court of Justice (ICJ) as an example. The article argues that the ICJ, as the main judicial organ of the United Nations, remains non-receptive to feminist analyses of public international law. Mainstream public international law, therefore, still has a long way to go before we can affirm that feminist critiques of public international law are fully acknowledged and being addressed. In order to defend this argument, the article analyses the ICJ's position on the notion of jus cogens*, including the dissenting and separate opinions of individual judges, through the lens of feminist legal methods.*

1 Introduction

Feminist scholarship in international law has evolved significantly since its first appearance in 1991.[1] The volume and extent of feminist writing has been the best evidence of its subsequent impact.[2] Despite these changes and a wider recognition of the value of feminist legal methods within the discipline of public international law, many international institutions remain impermeable to the influences of feminist scholarship. In addition, the degree to which feminist critiques of international law are accepted and enable change within and by international institutions

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1 Usually the following article is credited with the introduction of feminist approaches to the scholarship of international law: Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law', 85 *American Journal of International Law* (1991) 613.

2 For a good overview of feminist engagement with international law issues, including some subfields of international law, see Otto, 'Feminist Approaches to International Law', in *Oxford Bibliographies* (2012), available at www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0055.xml.

varies significantly.[3] This article explores the persistent gap in receptivity to feminist approaches within international institutions, using the International Court of Justice (ICJ) as an example. The ICJ is 'the principal judicial organ of the United Nations', and it is also the only general judicial organ with universal jurisdiction and thus often labelled as the world court.[4] The article examines the position of the ICJ with regard to feminist approaches, using its analysis of the notion of *jus cogens* as an example. It concludes that, while some individual judges in their separate and dissenting opinions employ feminist methods of analysis (thus demonstrating the possibility for better synergy between mainstream international law and feminist approaches), the ICJ, as an institution, remains impermeable to feminist approaches in its judgments.

In order to achieve the aims of this article, one fundamental methodological difficulty had to be addressed, which originates from the need to make silence speak. The ICJ does not engage with feminist scholarship nor does it provide an explanation about the reasons for such a lack of engagement. Therefore, the question arises: how is it possible to understand the reasons and causes for something that happens within an institution and is not explained by the institution itself? This type of question is not completely new to feminist scholarship. Very often in feminist theorizing, the underlying enquiry relates precisely to the need to uncover the invisible, the silenced. Such discovery, however, remains quite a challenging and difficult endeavour. Within the context of the ICJ, the dissenting and separate opinions of its judges provide an invaluable source of information about what has been excluded from the main judgment. Since judges writing dissenting or separate opinions are on the bench, they have ample opportunity to discuss their opinions with all of the other judges. The need to write a separate or a dissenting opinion indicates that they were not able to persuade the majority and that the majority does not accept their way of thinking.

The various opinions that were examined for this article did not provide any direct engagement with feminist scholarship. However, the very exclusion of certain issues and approaches from the main judgment/advisory opinion and the need to express either a dissenting or a separate opinion on certain issues relevant to feminist scholarship reveals the attitude of the ICJ's majority towards these issues and, thus, towards feminist scholarship. The symbolism of the dissent in itself, whether in general or within the legal realm more specifically, is a very intriguing topic.[5] Within the context

[3] The best examples are the use of gender mainstreaming language and practice as well as discussion around the place of women in peacekeeping. See, e.g., Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations', 18 *Harvard Human Rights Journal* (2005) 1; Otto, 'Power and Danger: Feminist Engagement with International Law through the UN Security Council', 32 *Australian Feminist Law Journal* (2010) 97.

[4] Statute of the International Court of Justice (ICJ Statute) 1945, 1 UNTS 993, Art. 1; Annex to the Charter of the United Nations 1945, 1 UNTS 15.

[5] Generally, see T. Caraus and A. Parvu (eds), *Cosmopolitanism and the Legacies of Dissent* (2015); M. Solomon, Nomos of Dissent, LSE, Centre for the Philosophy of Natural and Social Science, Contingency and Dissent in Science, Technical Report 09/08 (2008). More specifically with regard to law, see Alder, 'Dissent in Courts of Last Resort: Tragic Choices?', 20 *Oxford Journal of Legal Studies* (2000) 221; Belleau and Johnson, 'I Beg to Differ: Interdisciplinary Questions about Law, Language and Dissent', in L. Atkinson and D. Majury (eds), *Law, Mystery and the Humanities: Collected Essays* (2008) 145.

of the ICJ, dissenting and separate opinions also carry a particular normative significance that is attributed to them by the ICJ Statute.[6] Article 57 of the ICJ Statute stipulates: 'If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.' More precisely, the ICJ's Rules of Court indicate: 'Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration.'[7] In this context, the distinction between dissenting and separate opinions becomes clear. When a judge writes a dissenting opinion, he or she disagrees with the operative part of the judgment or opinion, whereas a separate opinion indicates that the judge agrees with the outcome (operative part) but disagrees with the reasoning or grounds for the decision.[8] Thus, dissenting and separate opinions constitute an invaluable lens through which to interpret the main judgment.

In this article, several feminist methods are used to analyse the position of the ICJ on the issue of *jus cogens*, and they are considered through the lens of dissenting and separate opinions. More specifically, the article examines whether some of the selected feminist legal methods are utilized by the ICJ or by individual judges in their dissenting and separate opinions and, if so, how and to what extent. Based on these findings, the article re-evaluates the notion of *jus cogens* and the position of the ICJ on this issue as well as the relationship between the ICJ as the main judicial organ of the United Nations (UN) and feminist scholarship. Adopting a feminist methodology is an efficient way of tackling the difficulty of making silence speak because, even when no direct references to feminist literature exist, it is always possible to investigate the method used and evaluate its affinity with feminist legal methods. However, before proceeding to this analysis, the article clarifies the notion of a feminist approach. This will be of particular importance when justifying why some issues discussed by the ICJ or some approaches taken by the individual judges in their dissenting and separate opinions are deemed to be of relevance to feminist scholarship.

2 Feminist Legal Methods

A *Overview*

Feminist legal scholarship has been characterized since its early years by a diversity of approaches. Thus, it is necessary to clarify which feminist approaches are utilized in this article and how they are used. From the outset, it is important to draw a distinction between feminist legal theory and feminist legal methods or, more specifically, feminist legal approaches. Only the elements of the latter are utilized in this article.

6 ICJ Statute, *supra* note 4.

7 International Court of Justice Rules of Court, 14 April 1978, Art. 95(2); the same rule for advisory opinions is formulated in Art. 107(3).

8 See, e.g., *ICJ Yearbook* (1947–1948), at 80; G. Hernandez, *The International Court of Justice and the Judicial Function* (2014), at 95–98; I. Hussain, *Dissenting and Separate Opinions at the World Court* (1984), at 8, both highlighting the difficulty in some cases of making this distinction.

While the difference might at times be unclear, I have focused consciously on the particular approaches – ways of doing – that are discussed in feminist legal scholarship and that can be labelled as 'feminist'.[9] In this regard, it needs to be stressed that the visions and interpretations of the particular methodological approaches presented below are necessarily only partial and subjective. Although they are based on the existing feminist literature, these approaches are not claimed to be the only possible and valid versions. They are presented as valid extensions of feminist thought, which have been adapted to a deeper engagement with international law concepts.

Generally, most of the feminist scholarship that applies to international law in its early stages has been more grounded in concrete examples and in 'asking the woman question' – that is, enquiring whether women have not been considered.[10] The critical potential of this method, if it is applied to abstract notions, such as states, sovereignty or *jus cogens*, is limited. However, it was an indispensable first step in introducing feminist approaches into the analysis of international law.[11] With time, we can observe a broadening of the feminist agenda and, thus, an expansion of feminist scholarship to include the very questioning of gender binaries, which goes beyond a focus on women. Even the 'woman question' itself was broadened to become a question about exclusion more generally.[12] Equally significant, feminist scholarship today, including in international law, questions the cultural and social construction not only of the category of gender (which is today a widely accepted finding) but also of the category of sex.[13] Thus, as Dianne Otto eloquently states:

[9] This focus on method necessarily limits the volume of available literature. Also, the majority of work focusing on feminist legal methods was published in the later 1980s and early 1990s. On this point, see, in particular, Fisher, 'I Know It When I See It, or What Makes Scholarship Feminist: A Cautionary Tale', 12 *Columbia Journal of Gender and Law* (2003) 439, at 442; Alkan, 'Feminist Legal Methods: Theoretical Assumptions, Advantages, and Potential Problems', 9 *Ankara Law Review* (2012) 157, at 161. The leading work on feminist legal methods remains Bartlett, 'Feminist Legal Methods', 103 *Harvard Law Review* (1990) 829. For other useful references and additional readings, see Abrams, 'Feminist Lawyering and Legal Method', 16 *Law and Social Enquiry* (1991) 373; Bartlett, 'Cracking Foundations as Feminist Method', 8 *Journal of Gender, Social Policy and Law* (2000) 31; Clougherty, 'Feminist Legal Methods and the First Amendment Defense to Sexual Harassment Liability', 75 *Nebraska Law Review* (1996) 1; Mossman, 'Feminism and Legal Method: The Difference It Makes', 3 *Australian Journal of Law and Society* (1986) 30; Scales, 'Feminist Legal Method: Not So Scary', 2 *University of California Los Angeles Women's Law Journal* (1992) 1.

[10] Gould, 'The Woman Question: Philosophy of Liberation and the Liberation of Philosophy', in C.C. Gould and M.W. Wartofsky (eds), *Women and Philosophy: Toward a Theory of Liberation* (1980) 5; for a discussion of this approach in relation to law, see Bartlett, 'Feminist Legal Methods', *supra* note 9, at 837–849.

[11] For instance, the analysis in Charlesworth, Chinkin and Wright, *supra* note 1, at 621–634, focuses mainly on the presence or absence of women in different bodies as well as taking into account women's concerns (e.g., violence and other forms of suffering inflicted on women that are not adequately recognized by international law).

[12] Bartlett, 'Feminist Legal Methods', *supra* note 9, at 847–849.

[13] See, in particular, the pioneering work of Judith Butler on the performativity of gender and biological sex that questions the gender/sex dichotomy. J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990); J. Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (1993). See also the problematization of the sex/gender dichotomy and of feminist theory's focus on gender in Flax, 'Postmodernism and Gender Relations in Feminist Theory', 12 *Signs: Journal of Women in Culture and Society* (*SJWCS*) (1987) 621.

> [t]o accept the idea of a sex-gender distinction that is reflective of a nature-nurture divide, as in the contemporary United Nations (UN) definitions (Secretary-General UN 1998), is to think of the body as already fixed by biology which is then interpreted culturally. Yet once it is understood that bodies are also socially produced, the colonizing effects of the idea that there are inherent biological certainties can be resisted and the manifold creative possibilities for the expression of gender identity, desire and sexuality can surface.[14]

Within the context of this article, it was necessary to identify elements of feminist approaches that can be usefully applied to an analysis of abstract notions. As already stated, this is necessarily only a partial and subjective reading of feminist methods. However, as will be demonstrated below, each selected method, even if contested and constantly redefined, is firmly grounded in feminist tradition. To some extent, these methods went through transformation in the process of their identification and application. This article transforms them further in order to allow for their application to a broader array of issues and fields. The following elements of feminist scholarship are briefly presented below: (i) the context-specific analysis and attention to the individual and his or her suffering; (ii) intersectionality and (iii) the deconstruction of binaries and the avoidance of hierarchies.

B *Context-Specific Analysis and Attention to the Individual*

Context-specific analysis and attention to the individual and his or her suffering became part of feminist scholarship because a great deal of feminist activism and theory was intimately linked to the personal experience of individual women. In more technical terms, feminist literature refers to this methodology as situated analysis and feminist standpoint epistemology.[15] Fundamentally, standpoint epistemology and situated analysis acknowledge the impossibility of attaining objective universal truth. Therefore, knowledge is acquired, according to this position, by inquiring about multiple partial perspectives. Within the context of traditional feminist inquiry, such inquiry signifies attention to each individual woman's personal experience within the context of her own environment. Without attention to such context, it is not possible to bring forward the specificities of a woman's experience of subjugation. At a more general level, simplified and abstract descriptions of facts or law need to be questioned because biases and silencing might lurk behind this simplicity and abstraction.[16]

It should be emphasized that feminism does not necessarily reject the possibility of objective knowledge. However, this objective knowledge is, from the perspective of

[14] Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism', in M. Davies and V. Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (2013) 197, at 199.

[15] For a general overview, see, e.g., Brooks, 'Feminist Standpoint Epistemology: Building Knowledge and Empowerment through Women's Lived Experience', in S.N. Hesse-Biber and P.L. Leavy (eds), *Feminist Research Practice: A Primer* (2007) 53; S. Harding (ed.), *The Feminist Standpoint Reader: Intellectual and Political Controversies* (2004); Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective', 14 *Feminist Studies* (1988) 575.

[16] For more details on the importance of context-specific analysis to feminist legal scholarship, see Bartlett, 'Feminist Legal Methods', *supra* note 9, in general, and the part on consciousness raising (at 863–867) more specifically.

feminist inquiry, always varied, and its objectivity is dependent on the precision with which position, context and the situated character of knowledge are described.[17] This also means turning the object of knowledge into an active agent.[18] For the purposes of analysing the judgments of the ICJ and the dissenting and separate opinions of individual judges, it is necessary to learn from standpoint epistemology and situated analysis and translate these lessons into the avoidance of abstraction and general statements, ensuring the return to the specificities of each case. It is equally important not to lose sight of the impact that each particular case, however abstract, has on the life of human beings who will be either directly or indirectly impacted by the judgment.

C *Intersectionality*

Intersectionality today is also a firmly established component of feminist scholarship. However, its content, precise contours and areas of applicability are subject to constant discussion.[19] Intersectionality emerged as a response by black women scholars to the inability of two separate practices – anti-racism and feminism – to fully address their experiences of violence as both women and black people.[20] Intersectionality postulates that it is impossible to comprehend fully a person's experience of subordination or oppression without taking into account all aspects that contribute to this person's condition. However, intersectionality cannot simply be reduced to its anti-essentialist stance. Its main focus is on the unmasking of social relations that contribute to the particular forms of oppression. After acknowledging the social construction of categories such as 'woman' or 'black', Kimberle Crenshaw, the author who is credited with having coined the term and articulated the concept of intersectionality, does not deny the reality of the impact of these categories on the lives of people. Instead of emphasizing the artificiality of these categories, intersectionality is 'a project that presumes that categories have meaning and consequences. And this project's most pressing problem, in many if not most cases, is not the existence of the categories, but rather the particular values attached to them and the way those values foster and create social hierarchies'.[21]

Intersectionality also gained traction in international law. However, it is still used only in areas where the categories of identity, such as race, gender or class, are

[17] Haraway, *supra* note 15, generally, and at 583–588, more specifically.

[18] *Ibid.*, at 592.

[19] The literature on intersectionality is very rich. In addition to other works cited in this section, see, e.g., H. Lutz, M.T.H. Vivar and L. Supik (eds), *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (2016) and the 2013 special issue of *Signs*. 'Intersectionality: Theorizing Power, Empowering Theory' 38 *SJWCS* (2013) 785. For a brief presentation, see, e.g., Collins, 'Intersectionality's Definitional Dilemmas', 41 *Annual Revue of Sociology* (2015) 1; McCall, 'The Complexity of Intersectionality', 30 *SJWCS* (2005) 1771.

[20] Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color', 43 *Stanford Law Review* (1991) 1241, at 1242. For one of her earliest analyses, see Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', 139 *University of Chicago Legal Forum* (1989) 139.

[21] Crenshaw, 'Mapping the Margins', at 1297.

dominant.[22] From a broader perspective, intersectionality teaches that a deep understanding of an issue or situation involves looking at this issue or situation from a variety of angles simultaneously. From the perspective of public international law and the ICJ's approach to writing judgments, intersectionality illuminates the shortcomings of the separation and compartmentalization of issues. In addition, the categories with which international law operates are not value free. While the process of categorization itself is a way of exercising power, it is equally important to understand how the values attached to different categories of international law allow power to operate, leading to the creation of hierarchies. Thus, such categorization has social and material consequences. This interpretation and transfer of intersectionality as a method from identity politics into a broader field of international law might be problematic. However, it is in line with recent attempts to understand intersectionality as a broader social science methodology[23] and also reflects intersectionality's own ambiguity and open-endedness.[24]

D *Deconstructing Binaries and Hierarchies*

Attention to binaries is one of the fundamental elements of feminist scholarship since many (if not all) binaries exemplify the basic male/female distinction or what is often termed 'the gender binary'. However, as with the other elements of feminist methodology discussed above, feminist scholarship does not have one settled approach to dealing with binaries. While many, if not all, feminists want to challenge the hierarchical construction of the relationship between male and female,[25] some feminists focus too much on the category of 'woman' and do not recognize sufficiently the need to challenge the binary as such. In fact, this excessive focus on socially constructed feminine gender, especially in the earlier stages of the feminist movement, contributed to preserving the continuation of this binary. This focus on the social construction of gender and the ensuing reinforcement of the binary was the subject of criticism in Judith Butler's *Gender Trouble* published in 1991.[26]

Within the present article, the methodological approach of binary/hierarchy deconstruction takes up this criticism and joins those feminist scholars who argue for the need not only to identify binaries and problematize their hierarchical structuring but also, most importantly, to deconstruct the binary. The line of feminist thought that

[22] See, e.g., Henne, 'From the Academy to the UN and Back Again: The Travelling Politics of Intersectionality', 33 *Intersections: Gender and Sexuality in Asia and the Pacific* (2013), available at http://intersections.anu.edu.au/issue33/henne.htm; Vakulenko, 'Gender and International Human Rights Law: The Intersectionality Agenda', in S. Joseph and A. McBeth (eds), *Research Handbook on International Human Rights Law* (2010) 196; Yuval-Davis, 'Intersectionality and Feminist Politics', 13 *European Journal of Women's Studies* (2006) 193.

[23] McCall, *supra* note 19.

[24] Davis, 'Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful', 9 *Feminist Studies* (2008) 1446.

[25] Scott, 'Gender: A Useful Category of Historical Analysis', 91 *American Historical Review* (1986) 1053, at 1066.

[26] Butler, *Gender Trouble*, *supra* note 13.

developed the idea of deconstructing binaries to the fullest was greatly influenced by the French philosopher Jacques Derrida.[27] Due to the complexity of Derrida's ideas, and the feminist engagements with it, any summary is easily contested and challenged.[28] However, for the purposes of the present analysis, I present one reading that is shared by at least some feminist scholars. According to Derrida, deconstruction is neither a method nor an analysis or critique.[29] According to him, 'deconstruction takes place'.[30] Therefore, it might be contradictory to use this term in a chapter on method. However, feminist scholars use insights from Derrida's writings on deconstruction to develop their methodological approaches. Thus, Joan Scott writes:

> Deconstruction involves analysing the operations of difference in texts, the ways in which meanings are made to work. The *method* consists of two related steps: the reversal and displacement of binary oppositions. This double process reveals the interdependency of seemingly dichotomous terms and their meaning relative to a particular history.[31]

Deconstruction reveals the falsity of any dichotomy and interdependency of both terms of a dichotomy. In the context of submitting international law to a feminist analysis, it is important to recognize the rigid polarization of two concepts and demonstrate their interdependence.

In the existing feminist analyses of international law, the 1991 article by Hilary Charlesworth, Christine Chinkin and Shelley Wright, entitled 'Feminist Approaches to International Law', highlighted a number of binaries that shaped the field through the prism of a public/private distinction.[32] Attention to binaries is very helpful in that it allows us to approach any area of study whatever the level of abstraction at which it operates. Simultaneously, it might be very difficult to decide how to go beyond the simple identification of binaries and what a deconstruction of these binaries might involve. It is in this context that we have to remember Derrida's warning about deconstruction not being a method, a pre-defined set of steps to follow. Since each binary has its own *raison d'être* – its own internal dynamic – deconstruction takes place each time anew, each time differently. One way in which the identification of binaries is useful is that it helps us to identify hidden and invisible hierarchies. Each binary implies an actual or potential hierarchy. Within gendered discourse, male is usually presented

[27] This and the following element (avoidance of hierarchies) are well articulated and applied in relation to human rights law in Otto, *supra* note 14. However, Dianne Otto uses the term 'gender asymmetry' instead of hierarchy.

[28] For some examples, see D. Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (1991, rev. edn 1999); N.J. Holland (ed.), *Feminist Interpretations of Jacques Derrida* (1997); E.K. Feder, M.C. Raulison and E. Zakin (eds), *Derrida and Feminism: Reading the Question of Woman* (1997). See also a very short, but eloquent, article highlighting the links between Derrida's thought and feminism. Grosz, 'Derrida and Feminism: A Remembrance', 16 *Differences: A Journal of Feminist Cultural Studies* (2005) 88.

[29] Derrida, 'Letter to a Japanese Friend (Prof Izutsu)', in D. Wood and R. Bernasconi (eds), *Derrida and Difference* (1985) 1.

[30] *Ibid.*

[31] Scott, 'Deconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism', 14 *Feminist Studies* (1988) 32, at 37–38 (emphasis added).

[32] Charlesworth, Chinkin and Wright, *supra* note 1, at 626–634, 638–643.

as being superior to female. The goal of many feminist approaches is not to reverse this hierarchy but, rather, to eliminate it altogether through a deconstruction of the binary.[33] Thus, the identification of binaries and the avoidance of hierarchies are closely interconnected.

3 Feminism, *Jus Cogens* and the ICJ

Now that these three feminist approaches or methods have been explained and justified, an example will be provided of what their application to a particular issue might produce. The particular issue identified is the notion of *jus cogens*, as it is addressed by the ICJ.[34] It was chosen because the focus on the ICJ's position allows the scope to be narrowed, focusing only on key issues. Simultaneously, it exemplifies the dynamic of the relationship between feminist thought and the UN's main judicial organ, as stated in the introduction. The choice of *jus cogens* was dictated by two considerations. First, the notion of *jus cogens* has already been subject to some feminist analysis; however, this analysis (as will be explained later) mainly addressed the substance of *jus cogens* and thus limited the critical potential of the feminist approach. The application of the three approaches selected in this article illustrates the more far-reaching potential of feminist enquiry. Second, the notion of *jus cogens* is typically abstract and, for scholars unfamiliar with feminist literature, 'neutral'.

A Jus Cogens *in the Case Law of the ICJ: An Overview*

The first time the term *jus cogens* is mentioned expressly in the jurisprudence of the ICJ was in the *North Sea Continental Shelf* judgments of 1969.[35] In the following decades, the use of the notion of *jus cogens* has been very limited. Even in some cases where it would have been appropriate to discuss and use this notion at length, the ICJ has been very cautious. It was mentioned three times in the *Nicaragua* judgment on merits;[36] once in the *Nuclear Weapons* advisory opinion[37] and once in the *Gabčíkovo-Nagymaros* case[38] (as well as two more references to peremptory character as a synonym of *jus cogens*).[39] In all of these cases, the ICJ did not engage in any discussion of *jus cogens*

[33] This idea is well articulated by Dianne Otto, *supra* note 14.

[34] The discussion of the concept of *jus cogens* as such is beyond the scope of this article. The literature on the concept is quite extensive. For two recent examples that contain detailed bibliographies and references to previous literature, see R. Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (2015); T. Weatherall, *Jus Cogens: International Law and Social Contract* (2015).

[35] *North See Continental Shelf (Federal Republic of Germany v. Netherlands; Federal Republic of Germany v. Denmark)*, Judgment, 20 February 1969, ICJ Reports (1969) 3, at 42, para. 72.

[36] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, 27 June 1986, ICJ Reports (1986) 14, at 100, para. 190.

[37] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, at 258, para. 83.

[38] *Case Concerning the Gabčíkovo-Nagymaros Project*, Judgment, 25 September 1997, ICJ Reports (1997) 7, at 62, para. 97

[39] *Ibid.*, at 40, 67, paras 50, 112.

as such but simply responded to one of the arguments made by the parties, mostly affirming that there was no need to consider the notion.[40]

The nature and extent of the ICJ's engagement with the concept of *jus cogens* changed in the 2000s. This shift in the way in which the ICJ engages with the concept of *jus cogens* has continued to the present day.[41] The ICJ is more and more generous in using this term even in cases and circumstances when it is not central to the case and could be avoided. The ICJ has also provided some insight into the concept itself. Two specific judgments where the ICJ expressed its opinion on the nature and character of *jus cogens* in more detail – the *State Immunities* and the *Armed Activities* cases – will be the subject of this analysis. However, before proceeding with this examination, the following section will provide an overview of the existing feminist engagement with the notion of *jus cogens*.

B *Existing Feminist Analysis of* Jus Cogens

Existing feminist analysis dates back to 1993 when an article on the gender of *jus cogens* by Hilary Charlesworth and Christine Chinkin was published.[42] This article contains some general statements on the gendered nature of *jus cogens*. However, its main focus is on the gender bias of human rights as a norm of *jus cogens*, and it cannot, therefore, be considered a full and detailed example of the application of feminist analyses to *jus cogens*. Nevertheless, in the absence of any other attempt to analyse *jus cogens* from a feminist perspective, this article provides a useful entry point. In their analysis of the function of *jus cogens* in international law, the authors emphasize the highly abstract and symbolic value of *jus cogens*, which almost never materializes in concrete practical application: '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.'[43] And, more specifically, they explain: 'In the international legal literature on

[40] One slight departure from this attitude is represented in the *Nicaragua* case, where the International Court of Justice (ICJ) refers to some statements about the *jus cogens* character of the prohibition of the use of force as evidence of the customary nature of this prohibition. However, the ICJ never engaged in any discussion of the juridical value of such statements. See *Nicaragua*, *supra* note 36, at 100, para. 190.

[41] The following is the chronological list of more recent cases where the notion of *jus cogens* is either mentioned or discussed in more detail. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 3; *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda)*, Jurisdiction and Admissibility, 3 February 2006, ICJ Reports (2006) 6; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43; *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Preliminary Objections, 24 May 2007, ICJ Reports (2007) 582; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (*State Immunities*), Advisory Opinion, 22 July 2010, ICJ Reports (2010) 403; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports (2012) 422.

[42] Charlesworth and Chinkin, 'The Gender of Jus Cogens', 15 *Human Rights Quarterly* (1993) 63.

[43] *Ibid.*, at 66.

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.'[44] Thus, in regard to the function of *jus cogens*, the authors conclude: 'The search for universal, abstract, hierarchical standards is often associated with masculine modes of thinking.'[45] However, they choose not to challenge this symbolic value and function but, rather, to analyse and challenge its content as it pertains to human rights law. Basically, they argue for a more inclusive content of *jus cogens* that would reflect the experience of women and not only that of men.[46]

Thus, Charlesworth and Chinkin raise the question of the gendered nature of *jus cogens* as a category. However, they do not displace or challenge the category as such, but only its content. The analysis in the next section attempts to do precisely what the authors of the 1993 avoided – analyse how the very nature and symbolic significance of *jus cogens* as a concept is problematized from a feminist perspective in the dissenting and separate opinions of some judges in the ICJ. It should be remembered at this point that none of these judges would deem their way of addressing these issues to be feminist. However, as is demonstrated below, the approaches chosen by these particular judges do correspond to some of the approaches commonly advocated in feminist literature, as described above. This analysis will demonstrate that, while feminist approaches are not completely alien to some judges of the ICJ, they are confined to a minority that chooses to express these approaches in separate and dissenting opinions. The majority of judges are not ready to accept these techniques even when they are not labelled as feminist.

C *The Attitude of the ICJ and Its Dissenting and Separate Opinions*

The *State Immunities* case deals with *jus cogens* in the most detail.[47] In this case, the issue of *jus cogens* was raised in the context of state immunities against court proceedings in a foreign jurisdiction. An Italian court accepted a series of cases brought against Germany by individual victims of war crimes.[48] Another aspect of this judgment relates to the declaration of executability of a judgment delivered by the Greek courts against Germany in similar circumstances as well as the seizure of German property as a measure of execution of various national courts' decisions.[49] Germany brought the case against Italy to the ICJ, alleging that the institution of proceedings against it in the Italian courts, the declaration of foreign judgments against it as executable and the seizure of its property violated Germany's state immunities. One of the defences formulated by Italy related to the *jus cogens* nature of the norms violated by Germany during World War II. According to this argument, state immunities cede in the face of violations of *jus cogens* norms.[50]

44 *Ibid.*, at 67.
45 *Ibid.*
46 *Ibid.*, at 68 and the following analysis.
47 *State Immunities*, *supra* note 41.
48 *Ibid.*, at 113–114, paras 27–29.
49 *Ibid.*, at 115–116, paras 30–36.
50 See, in particular, the ICJ's summary of Italy's argument. *Ibid.*, at 135, para. 80.

The attitude of the majority opinion towards the argument based on *jus cogens* can be summarized as follows. Since the rules of *jus cogens* prevail over conflicting treaty or customary law rules, the court first needed to ascertain whether a conflict between the alleged *jus cogens* norms (in this case, the norms prohibiting 'the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour'[51]) and another rule of customary law (namely, the rule on state immunities) existed. According to the majority opinion, such a conflict did not exist because the rules on state immunity and the *jus cogens* rules relevant to the case, such as the prohibition of the murder of civilians, address different matters. The former rules address procedural issues (whether a court may exercise jurisdiction), and the latter rules are substantive in nature. In the majority's opinion, according immunities to states and, thus, preventing proceedings from being initiated does not create a conflict with the rule of *jus cogens* because it has no bearing on the evaluation of the legality – or not – of state actions.[52] The ICJ added:

> Nor is the argument strengthened by focusing upon the duty of the wrongdoing State to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act.[53]

Thus, the ICJ's majority opinion is founded on a binary opposition between substance and procedure. Moreover, in order for the reasoning of the ICJ to succeed, a strong compartmentalization of issues must be made in addition to this binary opposition. The strict separation of legality, responsibility and reparations as independent and unrelated must be done. Furthermore, this analysis should be performed at a highly theoretical, abstract level that is detached from the facts of the case. Although the judgment contains, as usual, a section on historical and factual background, the facts of the case are also presented in a very detached and abstract manner.[54] Moreover, the facts are provided in a way that is almost unconnected to the legal analysis. The dissenting opinion of Judge Cançado Trindade provides a very vivid illustration of a different approach to the presentation of facts and the connection between the facts and the legal analysis.[55]

At this point, it is useful to recall the elements of feminist analysis presented above. If a feminist approach is characterized by its contextual and case-focused analysis, which concentrates on the experience of the affected human beings, the approach to the facts taken by Judge Cançado Trindade can be characterized as feminist. Similarly, two other dissenting judges reproached the majority judgment for its lack of contextual analysis and a detailed examination of the facts.[56] According to them, if the ICJ

[51] *Ibid.*, at 140, para. 93.
[52] *Ibid.*
[53] *Ibid.*, at 140–141, para. 94.
[54] *Ibid.*, paras 20–36.
[55] *Ibid.*, Dissenting Opinion of Judge Cançado Trindade.
[56] *Ibid.*, paras 7, 27, 36, Dissenting Opinion of Judge Yusuf, in particular; para. 12, Dissenting Opinion of Judge Gaja.

had conducted a more case-focused, detailed and contextual analysis, it would have arrived at a different conclusion.

As already highlighted, another important feminist approach consists in the deconstruction of binaries. Thus, the binaries maintained and even reinforced in the judgment clearly contradict the feminist stance. Two of the dissenting judges expressed their criticism of some of the binaries that dominated the judgment: *iure imerii*/*iure gestionis*;[57] domestic/international[58] and procedure/substance.[59] Judge Bennouna, in his separate opinion, also identified and criticized the opposition and separation drawn in the main judgment between immunities and responsibility.[60] He criticized the approach adopted in the main judgment for its investigation of different areas and notions of international law in isolation from other branches and areas of international law, which reflects a feminist intersectionality approach.[61] However, ultimately, he joined the majority in the outcome since, according to him, the recognition of responsibility by Germany throughout the proceedings was sufficient.[62] In doing so, he maintained the separation between responsibility and remedies.

However, none of the judges attempted to deconstruct the ordinary norm/*jus cogens* norm binary or, to put it differently, to undergo a hierarchy deconstruction. Thus, for example, the dissenting opinion of Judge Cançado Trindade firmly holds to the primacy of *jus cogens*, maintaining a hierarchy. Although he ultimately attributes primacy to *jus cogens* not only in theory but also in the practical consequences that he attaches to them in his dissenting opinion, the maintenance of this hierarchy is suspicious from a feminist perspective. However, it should be admitted that, even from a feminist perspective, it might be difficult to abandon the very notion of *jus cogens* since it appears to be one of the few tools available in international law to counter the will of states. Even Charlesworth and Chinkin do not challenge the category as such, despite their criticism; instead, they redefine its content.[63]

For Judge Cançado Trindade, values (or the content of *jus cogens*) also appear to be central to his opinion. He infuses these values with a lot of attention for human beings and their suffering, which closely mirrors the stance adopted by Charlesworsth and Chinkin in their article.[64] However, Judge Cançado Trindade does not highlight the

[57] See *ibid.*, at 297–298, para. 27, Dissenting Opinion of Judge Yusuf; at 237–246, paras 158–183, Dissenting Opinion of Judge Cançado Trindade.

[58] *Ibid.*, at 304–305, para. 47, Dissenting Opinion of Judge Yusuf; at 237–246, paras 158–183, Dissenting Opinion of Judge Cançado Trindade, especially when he criticizes state-centrism.

[59] *Ibid.*, at 285–286, paras 294–297, Dissenting Opinion of Judge Cançado Trindade.

[60] *Ibid*, Separate Opinion of Judge Bennouna, in general.

[61] *Ibid.*; see also at 177, para. 28, more specifically the idea of unity of international law. Judge Cançado Trindade in his dissenting opinion voiced similar concerns and highlighted the artificial separation by the ICJ majority of various subfields of international law. For instance, he affirmed: 'State immunities cannot keep on being approached in the light of an atomized or self-sufficient outlook (contemplating State immunities in a void), but rather pursuant to a comprehensive view of contemporary international law as a whole, and its role in the international community.' *Ibid.*, at 296, para. 298, Dissenting Opinion of Judge Cançado Trindade.

[62] *Ibid.*, at 176, para. 26, Separate Opinion of Judge Bennouna.

[63] See Charlesworth and Chinkin, *supra* note 42.

[64] *Ibid.*

problematic nature of authorship: who defines the values and in whose name? These are questions constantly raised by feminist scholars. Although the answer might seem obvious in some circumstances, without constantly repositioning this question at the centre of one's enquiry, it is very easy to slide into a hegemonizing discourse. Thus, we can identify an affinity between the positions of several of the dissenting judges and feminist legal methods. All of the elements of a feminist approach identified above are featured to some extent in the various dissenting and separate opinions of four out of fifteen judges participating in the judgment.

Another case where *jus cogens* features prominently in the main judgment is the *Armed Activities* case.[65] The *jus cogens* nature of norms was raised by the Democratic Republic of the Congo (DRC) in relation to its attempt to use Article IX of the Genocide Convention as a basis for the ICJ's jurisdiction.[66] Although both states party to the dispute were parties to this Convention, Rwanda, when becoming party to the Convention, formulated a reservation to Article IX that sets forth the possibility of submitting disputes to the ICJ. The DRC argued that, because of the *jus cogens* nature of the prohibition of genocide, the reservation of Rwanda was contrary to the object and purpose of the Convention and thus null and void. Therefore, the DRC held that the ICJ had jurisdiction. The position of the majority expressed in the ICJ judgment highlighted the procedural nature of Article IX:

> Rwanda's 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. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.[67]

This position clearly reinforces the binary opposition between substance and procedure similarly to the *State Immunities* case. The analysis is also situated at a highly abstract level detaching Article IX from the context within which it is situated and operates. One of the dissenting judges, Judge Koroma, efficiently tackled these weaknesses in the judgment.[68] He approached the issue of Rwanda's reservation to Article IX in a comprehensive manner, connecting it both to the totality of the Convention (its operation) and to the broader context within which the issue was raised, including the current developments in international law. In particular, with regard to the compatibility of Rwanda's reservation to Article IX with the object and purpose of the Convention, the judge evaluated the Convention's object and purpose as a whole and emphasized the close connection between the objectives of prevention and punishment for the crime. Since Article IX provides for the competence of the ICJ not only to decide disputes related to the interpretation and application of the Convention,

[65] *Armed Activities*, *supra* note 41.

[66] *Ibid.*, at 29, para. 56. Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277.

[67] *Armed Activities*, *supra* note 41, at 32, para. 67.

[68] *Ibid.*, at 55, Dissenting Opinion of Judge Koroma.

but also its fulfilment, including the issue of responsibility of states for the commission of genocide, Article IX acquires particular significance within the context of this Convention:

> Article IX focuses on disputes at the level of State actors. … Article IX is thus crucial to fulfilling the object and purpose of the Convention since it is the only avenue for adjudicating the responsibilities of States. Denying the Court this function, as Rwanda purports to do by its reservation, not only prevents the Court from interpreting or applying the Convention but also – and this in my view is the critical point in the present case before the Court – from enquiring into disputes between Contracting Parties relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, and is thus not conducive to the fulfilment of the object and purpose of the Convention, namely, the prevention and punishment of genocide.[69]

Thus, Judge Koroma adopts a position that confronts the binary, as feminist scholars would do. His analysis also includes elements of intersectional analysis whereby connections between various issues are established and the overall conclusion is drawn not from each and every single element of the situation but, rather, from the overall interplay of all the relevant aspects.

It is interesting to note that Judges Higgins, Koojimans, Elaraby, Owada and Simma drafted a separate opinion that comes very close to the position expressed by Judge Koroma in his dissenting opinion.[70] This separate opinion highlights such aspects as the compartmentalization of issues in the main judgment and expresses scepticism with regard to the majority's approach in evaluating the place of Article IX within the object and purpose of the Convention. However, despite the interesting questions that the separate opinion raises, it does not go far enough to challenge the status quo. For our purposes, it is interesting to highlight a series of feminist approaches in this opinion that were relied on by these five judges.

From a comparative analysis of the attitudes of the judges in separate and dissenting opinions, we can draw the following conclusions. The judges on the ICJ bench are not completely unfamiliar with, nor unsupportive of, feminist analyses of international law. It is difficult to ascertain to what extent the judges who relied on these techniques of feminist analysis are conscious of this affinity. Nevertheless, the very existence of this link and the presence of feminist approaches in the dissenting and separate opinions is highly significant. On the other hand, the majority judgments are still impermeable to any of these developments. The contrast between the outcomes reached in the judgments and the outcomes proposed in the dissenting opinions also demonstrates the reformative potential that feminist approaches can bring to international law.

[69] *Ibid.*, at 58, para. 13.

[70] *Ibid.*, at 65, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma.

5 Conclusions

This article has investigated the ICJ's failure to engage with feminist approaches to international law. It has done so through an analysis of the presence or absence of feminist methods in dealing with the notion of *jus cogens*. Looking at various cases, the analysis contrasted the approach adopted in the main judgment with the views formulated in the dissenting and separate opinions. Feminist approaches were mainly identified in the dissenting opinions, rather than in the separate opinions (four out of six opinions discussed were dissenting), which indicates that the increased receptivity of international law to feminist approaches has a great reformatory potential.

Although it is encouraging that feminist approaches can be identified in the dissenting and separate opinions of some judges, the attitude of the ICJ as a judicial organ remains impermeable and unreceptive to feminist approaches. Dissent has no absolute meaning or significance. It can be evaluated properly only when compared to the majority opinion from which it dissents. However, the above analysis has demonstrated that opinions that come close to feminist approaches and use feminist methods (even without acknowledging that they are doing so) are still relegated to the area of dissent. Therefore, we can conclude that what Charlesworth, Chinkin and Wright said in 1991 about the gendered nature of public international law and many of its apparently gender-neutral notions still holds true, at least as far as these majority judgments are concerned. Feminist analysis is still relegated to dissent and is only presented in a tiny minority of dissenting and separate opinions.

The ICJ as the main judicial organ of the UN, whose judgments are constantly studied, reproduced and discussed by scholars and, thus, significantly influence the development of the discipline, remains non-receptive to feminist analyses of public international law. Mainstream public international law, therefore, still has a long way to go before we can affirm that feminist critiques of it are being fully acknowledged and addressed.