CHAPTER NINE

THE RELIGIOSITY OF JUS COGENS: A MORAL CASE FOR COMPLIANCE?

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I. INTRODUCTION

Jus cogens can be defined as ‘rules of customary international law that are so fundamental that they cannot be modified by treaty,’ or law that ‘imports notions of universally applicable norms into the international legal process.’ Although this positivist definition of jus cogens appears relatively straightforward Christopher Ford reminds us that ‘jus cogens is among the most ambiguous and theoretically problematic of the doctrines of international law.’ This difficulty results in jus cogens being a phrase that tends to elicit looks of horror from international law students (and many practitioners) the world over. It is not that the positivist construct is difficult, but that questions relating to the ‘why’ of jus cogens are exceptionally tricky to answer. Why should these particular rules and rights have a higher status in international law than others? Why should states have to comply with these rules regardless of the surrounding circumstances and their security (and political) exigencies? Why should this category of law exist at all?

Questions of this nature arise not because we don’t feel that it is right and proper that certain rules should be capable of being enforced against all states at all times, but because we don’t know why we feel like that. In times of international change, crisis or conflict these theoretical vulnerabilities are particularly open to exploitation. If a state argues that it must carry out torture on suspected terrorists, for example, and forwards the argument that this may well save innocent civilians from a ticking bomb

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it is difficult for us to convince the state not to do so by saying ‘but it’s a violation of *jus cogens*’. The state will respond with a simple question – *why should we comply with jus cogens if such compliance makes us weaker?* The only answer the respondent can give is, essentially, ‘just because’. Hardly convincing…

It is not the case that *jus cogens* has only become theoretically vulnerable since the events that ‘shook the world’; however this vulnerability has become particularly worrying in recent years. In a state of global uni-polarity the United States of America, joined by its partners in the ‘Coalition of the Willing’, has launched a so-called ‘War on Terror’ in which international norms have all too often appeared to be low on the list of priority. Thomas Franck has remarked on the emerging view of ‘international law as a disposable tool of diplomacy, its systems of rules merely one of many considerations to be taken into account by governments when deciding, transaction by transaction, what strategy is most likely to advance the national interest’ (sometimes described as the ‘rational choice theory’). This observation leads us to two conclusions. First, that if we care about international law we may well have to start rethinking what we conceive of as ‘the national interest’. Second, that if he is right we are experiencing (or at least entering) a ‘Grotian Moment’ – the phrase used by Richard Falk to describe a fundamental change of circumstances that creates the need for a different world structure and a different international law.

This new era of international relations appears dominated by national and international security concerns which manifest themselves not only in national laws to enhance police powers, but also in changing international priorities, the use of force and the exercise of power to advance particular ideals with a view to meeting the security needs of the main protagonist nations. These ideals are expressed in the catchphrases of ‘regime change’, ‘spreading democracy’, ‘transformational diplomacy’ *etc.*…and almost uni-

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