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Sic utere tuo ut alienum non laedas: the duty to exercise one’s rights in ways that do not harm the interests of other subjects of law

“The legislature's job is to write law. It's the executive branch's job to interpret law.”
- George W. Bush, Austin, TX, 11/22/00

Abstract

This article will argue that a new norm of compliance with agreements is becoming customary with regard to the global environmental commons, particularly in the case of climate change and U.S. behavior towards the Kyoto Protocol. While the United States’ repudiation of its signature on the Protocol in 2001 was legal under the practice of traditional international law, this same practice is no longer sufficient in scope or in time to keep pace with the rapid advances in our scientific understanding of global environmental processes. Because every member of the international community can suffer significant harm from climate change, the presumption of compliance with restrictions on greenhouse gases is emerging as a customary norm of international law. Section I of this article will determine whether the United States has any outstanding legal obligation to reduce greenhouse gases under either the United Nations Framework Convention on Climate Change or the Kyoto Protocol. Section II will examine the common understanding of how customary norms of international law are formed and whether the United States is bound by these norms to take steps to reduce greenhouse gases in lieu of an explicit agreement. Section III will consider why the United States is continuing to remain an exceptional nation under this norm and whether its arguments for not participating in the regime are legally and politically valid. Section IV will examine any levers to compliance with the global environmental regime that custom may provide. Finally, this article will examine directions for future legal consideration of global environmental norms.

Table of Contents

Introduction
I. Is the United States bound by any treaty or other specific instrument of international law to reduce greenhouse gases?
   A. The United Nations Framework Convention on Climate Change
B. The Kyoto Protocol

II. In the absence of a treaty, is the United States bound by custom to curtail GHG emissions?
   A. What constitutes custom and how is it generally created?
   B. Can the obligation to reduce GHG emissions be considered custom?
      1. The global environmental commons is different from other areas covered by international law
      2. Universal observance not always required
      3. Custom can be created over a short time period
      4. Persistent objector status
      5. *Obligations omnium*: formation of a new customary norm of compliance with the global environmental regime

III. If the United States is bound by customary norm to reduce its GHG emissions, why is it continuing to remain exceptional?
   A. “Developing countries are not participants”
   B. “Economic harm”
   C. “Uncertain science”

IV. Even if a new norm has emerged, what levers to compliance does it provide?
   A. Diffuse reciprocity and pressure from allies
   B. Moral condemnation
      1. Failure to live up to our stated commitments and principles
      2. Erosion of the stability of international law
      3. *Jus cogens*?

Conclusion and Future Considerations

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**Introduction**

Customary international law is perhaps the most vague of legal doctrines. A norm, custom or general principle that appears germane to the fundamental interests of the international community can be thorny or tenuous when implemented. With the international community itself not always able to agree upon or even identify its fundamental interests, these norms can seem like figures in the fog, indistinct and always moving. It is especially difficult to determine when a new norm has emerged from this fog.

This article will argue that a new norm of compliance with agreements is becoming customary with regard to the global environmental commons, particularly in the case of climate
change and U.S. behavior towards the Kyoto Protocol. While the United States’ repudiation of its signature on the Protocol in 2001 was legal under the practice of traditional international law, this same practice is no longer sufficient in scope or in time to keep pace with the rapid advances in our scientific understanding of global environmental processes. Because every member of the international community can suffer significant harm from climate change, the presumption of compliance with restrictions on greenhouse gases (GHGs) is emerging as a customary norm of international law. Section I of this article will determine whether the United States has any outstanding legal obligation to reduce GHGs under either the United Nations Framework Convention on Climate Change (UNFCCC) or the Kyoto Protocol. Section II will examine the common understanding of how customary norms of international law are formed and whether the United States is bound by these norms to take steps to reduce GHGs in lieu of an explicit agreement. Section III will consider why the United States is continuing to remain an exceptional nation under this norm and whether its arguments for not participating in the regime are legally and politically valid. Section IV will examine any levers to compliance with the global environmental regime that custom may provide. Finally, this article will examine directions for future legal consideration of global environmental norms.

Two key assumptions must be stated at the outset of this article. First, the intellectual concepts behind the creation of customary norms of international law are valid regardless of the application of those norms. In other words, states are expected to comply with existing law and norms, even if there is currently no real-world forum for their adjudication. Second, for the practical purpose of this discussion, there is little if any operational difference between a nation that is not a party to a global environmental treaty and a party that is out of compliance with that
same treaty. In both cases, the desired end-state is that all nations are parties and that they comply with the treaty’s terms.

I. Is the United States bound by any treaty or other specific instrument of international law to reduce greenhouse gases?

While political traction has been gained by stressing the uncertainties surrounding climate change, the actual science behind the theory is not in doubt by any reputable scientist. Ultraviolet light from the sun passes down through the upper atmosphere and is absorbed by the earth. It is then re-emitted in the form of infrared heat, most of which passes back up through the atmosphere, and escapes into space. Some of the heat, however, is reflected back down to the earth’s surface; without this effect, there would be no life on earth, since the planetary surface would be as cold as outer space. Before the Industrial Revolution, the average concentration of carbon dioxide (CO₂, the most common GHG) in the atmosphere was 280 parts per million (ppm). However, over the last 150 years, a combination of fossil fuel burning and land use changes have caused the average CO₂ concentration to rise to 379 ppm and it is still rising. Nor is CO₂ the only gas that traps heat: methane (CH₄), nitrous oxide (NO₂), hydrofluorocarbons (HFCs), and others all contribute to the greenhouse effect, some having many times the global warming potential of CO₂. The effects of climate change will be varied across space and time,

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1 Legally, there is a world of difference between the two. A nation out of compliance with a treaty to which it is a party is in breach, whereas a nation that has accepted no legal constraint in this matter can be said to be doing nothing wrong. However, scientifically, an out-of-compliance party and a non-party nation are equally responsible for furthering global warming by failing to reduce their GHG emissions. Hence, they are equally culpable for creating the international situation that gives rise to the emerging norm, and thus are equally problematic from the scientist’s point of view.

2 *Climate Change 2007: The Physical Science Basis Summary for Policymakers* [hereinafter IPCC AR4 Working Group I SPM]

3 For the latest IPCC Fourth Assessment Report findings on global warming, see IPCC AR4 Working Group I SPM; *Climate Change 2007: Climate Change Impacts, Adaptation and Vulnerability Summary for Policymakers*; and
and can range from sea level rise to ecosystem changes to droughts and floods to more extreme weather events to an increase in negative human health effects, though all of these outcomes are predicted with varying degrees of certainty.\(^4\) With such a range of negative effects possible, the international community has enacted two treaties to deal specifically with climate change.

A. The United Nations Framework Convention on Climate Change

The United States is a party to the United Nations Framework Convention on Climate Change,\(^5\) the umbrella agreement under which the Kyoto Protocol was designed to operate. Signed on June 12, 1992 and ratified on October 15 of the same year, the UNFCCC contains several general obligations that the United States is required to fulfill. Article 3.1 recognizes that parties have “common but differentiated responsibilities” with regard to their ability to protect the climate, and commits the developed countries to “take the lead in combating climate change and the adverse effects thereof.” Article 3.3 sets forth the precautionary principle, stating that parties should “anticipate, prevent or minimize the causes of climate change[…].” However, the chapeau to Article 3 states that the parties “shall be guided” by these articles, not be required to

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\(^4\) The IPCC consistently assigns levels of certainty representing the collective judgment about an outcome based on observational evidence, modeling results, and theory. If something has a greater than 99% chance of happening, it is referred to as “virtually certain,” if something has a 90%-99% chance of happening, it is referred to as “very likely,” and so forth, all the way down to “exceptionally unlikely” with a probability of less than 1%. IPCC AR4 Working Group I SPM states that, “Most of the observed increase in globally averaged temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic greenhouse gas concentrations.” (emphasis in original) The complete range of certainty estimates can be found at *Summary for Policymakers*, IPCC, 5, at <http://www.ipcc.ch/pub/un/syreng/spm.pdf>.

comply with them. Article 4 lays out basic tasks for the parties, such as “develop a national inventory of GHGs,” “publish regional programs containing measures to mitigate climate change,” and “promote sustainable management.” However, nothing in Article 4, or indeed in the entire Framework Convention, commits signatories to any specific reductions by any specific dates.

The parties did not set out to produce an agreement free of required action. During the negotiation, specific proposals were made to commit the parties to either binding targets and timetables or to further study. These ranged in action from Denmark’s proposal of a 20 percent reduction from 1990 GHG levels by 2005 to the Netherlands’ proposal that the parties analyze the feasibility of and options for any GHG reductions at all. However, the main holdout to the establishment of any sort of targets and timetables for GHG reductions was the United States, which argued that in lieu of actual emissions reductions, the Framework Convention should adopt an approach that encouraged “the development of better information, national strategies and action plans.”6 With most of the other nations lined up in favor of concrete restrictions, the United States strategically decided to hold off announcing whether or not then-President George H.W. Bush would attend the Rio environmental summit that same year. Concerned that the summit would be judged a failure if the president of the world’s largest GHG emitter did not attend, the other nations agreed to a vaguely-worded Framework Convention, with no binding timetables and no commitments to do anything at all.7

7 Rose Gutfeld, Earth Summitry: How Bush Achieved Global Warming Pact with Modest Goals, WALL ST. J., May 27, 1992, at A1. This was an “achievement” that the Bush Administration had no desire to keep secret. Fearing political repercussions for the President in the 2004 election, the Department of Energy, the State Department, and the Office of Management and Budget all argued publicly and forcefully against any action to head off global
B. The Kyoto Protocol

In 1995, negotiations were begun at the UNFCCC first Conference of the Parties specifically to strengthen the commitments under UNFCCC articles 4.1 and 4.2, which were deemed “not adequate.” On November 12, 1998, the United States signed the Kyoto Protocol to the UNFCCC, the first protocol to contain binding targets and timetables for reduction of GHGs. Carrying further the idea of “common but differentiated responsibilities,” the developed countries listed in Annex I of the UNFCCC (the “Annex I countries”) were assigned targets based on the assumption that since the developed countries contributed the most to the climate problem with their historically high emissions levels, they would be the first ones to undertake emissions reductions. The developing countries, in light of their economic conditions and priorities, were not assigned specific targets and timetables in this Protocol.

Article 3.1 is the binding part of the Protocol, stating that,

The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts…

Annex A commits the United States to a 7 percent reduction from its 1990 GHG emission levels by 2012 at the latest. The phrasing of this sentence establishes that the United States and other Annex I Parties have a legally-binding commitment to meet their emission commitments by the use of the word "shall." This contrasts with the Framework Convention, where the commitment to return emissions to 1990 levels was only an "aim." Even though binding targets and

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10 Kyoto Protocol, Art. 3(1).
timetables were politically unpopular, the Clinton Administration intended to submit the Protocol to the Senate for ratification,11 but when the Byrd-Hagel Resolution stating the Senate’s opinion that the Protocol should not be ratified was passed 95-012, Kyoto was shelved.

The United States has since repudiated13 the Kyoto Protocol, now in force in 141 other countries,14 on three grounds. First, the White House contends that the scientific judgment surrounding the causes and effects of climate change is “uncertain.” Second, compliance with the targets established in the Protocol is alleged to do irreparable harm to the American economy. Third, the Protocol itself unfairly excludes developing nations such as China and India from being required to meet their own binding targets and timetables.15 The merits of each of these points will be discussed in Section III, but under customary international law, the United States has the right to repudiate a signed agreement before it has been ratified, and because the United States publicly repudiated Kyoto before ratification, it is not legally bound by its terms.16 Since there are only two international legal instruments that specifically address climate change,

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12 S. Res. 98 (1997). The U.S. Senate never formally voted on ratification of the Kyoto Protocol, but the Byrd-Hagel Resolution was taken as indicative of its voting position.
13 The Vienna Convention on the Law of Treaties does not specify any particular method by which a nation can repudiate a signed treaty before ratification, though the CRS (see Ackerman, supra) opines that a letter from the Secretary of State to the depository would suffice. However, the Bush Administration has stated repeatedly in news conferences, press briefings, articles and other media that the United States considers Kyoto dead. Given the widespread publicity of this position and its grumbling acceptance by the other Parties, there can be no doubt that the United States has de facto, if not de jure, repudiated the Protocol, and no legal challenge to its having done so has been mounted.
14 On November 18, 2004, Russia became the last major country to ratify Kyoto, thus triggering the entry-into-force requirement of at least 55 nations accounting for at least 55% of the world’s GHG emissions. Ninety days later, on February 16, 2005, the Protocol entered into force.
16 Vienna Convention on the Law of Treaties, May 23, 1969, art. 18(a), 1155 U.N.T.S. 331 [hereinafter Vienna Convention] states that, “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when … it has signed the treaty … until it shall have made its intention clear not to become a party to the treaty …” The United States has not signed the Vienna Convention, but still accepts Article 18 as customary international law.
and since the first requires no actual GHG reductions and the United States is not a party to the second, no explicit legal instrument requires the United States to mitigate or reduce its GHG emissions in any way.

Had it become a party, it is doubtful that the United States could have met its Kyoto goal of a 7 percent reduction from 1990 levels by 2012. In fact, total U.S. GHG levels have gone up significantly since the Protocol was signed, and the United States now emits approximately 15 percent above its 1990 levels. However, since the overwhelming consensus of international scientific judgment indicates that continued atmospheric accumulation of GHGs will cause significant climate impacts, it is expected that reductions will benefit the entire international community. Consequently, the U.S. repudiation of the Kyoto Protocol is unacceptable from a scientific point of view.

II. In the absence of a treaty, is the United States bound by custom to curtail GHG emissions?

Having concluded that neither the UNFCCC nor the Kyoto Protocol legally bind the United States to make any reductions in GHG emissions, why is the United States required to do anything? And, having decided to do nothing, why are so many other nations displeased at the Americans’ attitude of refusal?

The United States could very well be a spoiler in the whole climate change mitigation regime. Because the United States accounts for approximately 30 percent of current global CO₂ emissions.}

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emission levels\textsuperscript{18} and so far has refused to curtail those emissions in any credible way, climate change will continue in spite of attempts by other nations to stabilize the climate under international agreements such as Kyoto. In other words, non-compliance by the United States can nullify compliance by other Annex I nations.\textsuperscript{19} However, in lieu of the explicit treaty requirements to curtail GHG emissions, emerging custom may provide some guidance. Custom is traditionally defined as “a pattern and practice of behavior motivated by a sense of legal obligation.”\textsuperscript{20} But determining the exact point at which behavior crystallizes into custom is extremely difficult. How is custom catalyzed and what is the tipping point between custom and mere widespread behavior? And what are the bars to the creation of custom and to its recognition as such by all nations?

A. What constitutes custom and how is it generally created?

Customary international law is in operation when states both practice a particular norm and subjectively believe that they have a legal obligation to do so. Custom is important in the evolution of international law because while treaties bind only the signatory states, customary norms bind all states.\textsuperscript{21} In a world with over 200 separate states, identifying a pattern of practice can be difficult, and tying that pattern to a sense of legal obligation (\emph{opinio juris sive necessitatis}) even more so. Several important cases have contributed to the formation of

\begin{itemize}
  \item \textsuperscript{19} Australia is the only other Annex I nation that has not ratified the Kyoto Protocol. Since they only account for one percent of global GHG emissions, however, their non-compliance does not have the potential to spoil the global regime. For further discussion of the spoiler concept, see Jonathan I. Charney, \textit{Universal International Law}, 87 AM. J. Int’l L. 529 (1993); see also Geoffrey Palmer, \textit{New Ways to Make International Law} 86 AM. J. Int’l L. 259 (1992).
  \item \textsuperscript{20} Restatement (Third) of Foreign Relations Law § 102 (1987).
  \item \textsuperscript{21} Charney, \textit{supra}, at 531.
\end{itemize}
custom, but none has yet provided the definitive roadmap of how an idea goes from common behavior to customary norm.

“Pattern and practice” means that most states generally recognize that a certain behavior is accepted and expected of them. Although there is no precise definition of what constitutes state practice, the ICJ has held that such a practice must be widespread and virtually uniform. It is not required that the practice be either traditional or completely consistent, but it is required that states who fail to practice the custom be regarded as guilty of violating a legal obligation of some sort. “Legal obligation” is a trickier matter to identify because it is extremely subjective: a state knows that the international community expects this behavior and the state itself recognizes that this is something it ought to do; maybe it does not always comply, but it knows it should. A legal obligation can be identified by a wide range of evidence, including diplomatic correspondence, official policy statements, judicial decisions, UN resolutions and declarations, and so forth.

Such soft law can serve a number of useful purposes. It can change the political thinking on an issue, it can expand the circumstances in which an issue is considered, and it can cause opinion to coalesce. Some specific principles and practices are currently being examined as environmental customary norms, though not all states agree on this designation. For example, the Beef Hormones case illustrates that the European Union (EU) considers the precautionary principle as customary international law, the United States considers the precautionary principle

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23 An exception may apply if the nation casts itself as a “persistent objector.” See subsection B.4, infra.
25 Ibid., at 312.
26 Palmer, supra, at 269. Palmer goes further to assign soft law and norm creation to the intersection of international law and international politics; in the climate change debate, this means the intersection of Kyoto compliance and anti-regime politicking by the Bush Administration.
not as customary international law, but more of an “approach,” and Canada falls somewhere in between. Other principles such as “polluter pays” are beginning to gain traction in the field as well. The question for legal scholars then becomes, how to determine when a new custom emerges from the fog? And is such a custom emerging vis-à-vis compliance with a GHG emission reduction regime?

B. Can the obligation to reduce GHG emissions be considered custom?

1. The global environmental commons is different from other areas covered by international law

Its non-adherence to the Kyoto Protocol is not the only time that the United States has been exceptional with regard to international law, and yet the global legal system has not crumbled. The system contains laws and treaties governing every sort of behavior and commitment, from bilateral and multilateral trade agreements to international human rights conventions to multilateral environmental agreements, and American exceptionalism has apparently not doomed any of it. However, because the global environmental regime involves problems that are literally global in scope and source, it is different – in fact, one might say that it is by definition

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27 OECD. “Uncertainty and Precaution: Implications for Trade and Environment” Joint Working Party on Trade and Environment. COM/ENV/TD(2000)114, p. 19. The Beef Hormones case was brought by the United States against the EU, which had banned imports of beef that had been raised with growth hormones due to health concerns about their long-term effects. The United States claimed that the ban had no basis in scientific fact since the hormones had not been demonstrated to have an adverse effect. Even though the WTO twice found the ban to be illegal, the EU maintains the ban to this day.

exceptional. As previously suggested, the non-compliance of the United States may act as a spoiler for the rest of the climate change mitigation regime.\textsuperscript{29}

In the area of international trade law, non-parties or parties out of compliance with a particular treaty may face economic deprivation or, at worst, sanctions. If recalcitrant parties decide to comply, the sanctions can be reversed relatively quickly with appreciable harm only to certain sectors of domestic society. Laws governing trade govern essentially bilateral relationships between states, and other nations generally are not affected by violations. For example, if a country prohibits importation of a good, the exporting parties will suffer a financial loss, but the trade regime in general is not imperiled by non-compliance, nor is the ability of other nations to engage in trade. If the trade barrier is removed by a WTO arbitration panel, imports of the good in question can be resumed.

In areas of human rights law, non-parties or parties out of compliance may face sanctions, diffuse reciprocity (shunning or shaming, for example), and bad publicity. Non-compliance may also render appreciable harm to women, ethnic or religious minorities, or other sectors of domestic society. This harm may be felt across local borders in the form of refugees or diaspora-driven ethnic strife, but it generally does not affect distant nations. If parties decide to comply, harm can generally repair itself within the domestic society in a few years, perhaps over a generation. Sanctions and other punitive measures can be lifted immediately and their effect mitigated quickly. It has been argued that human rights laws are essentially unilateral statements

\textsuperscript{29} When the Convention on International Trade in Endangered Species (CITES) was being negotiated, Japan, as the world’s largest consumer of illegal wildlife, could have acted as a veto state for the wildlife trade regime if it had refused to participate. At the time, Japan imported over 80 percent of the world’s trade in African ivory and was expected to veto a proposal to move the African elephant from threatened status on Appendix II to endangered status on Appendix I. Under heavy pressure from NGOs, the United States and the EC, however, Japan agreed to the proposal, and the resulting ban caused ivory prices to fall by over 90 percent. See Porter, Gareth, Janet Welsh Brown, and Pamela S. Chasek. 2000. “The Development of Environmental Regimes: Ten Case Studies” Chapter Three in Global Environmental Politics, Third Edition. Boulder, CO: Westview Press, pp. 100-101.
of position, and whether a state complies or does not comply, or is not a party, will not generally affect the dealings and interests of other states, or the existence of the regime itself.

However, the area of global environmental law is critically different from trade and human rights law, because it is neither unilateral nor bilateral, but truly multilateral. The regime attempts to address behavior not between human beings themselves, but between human beings and the natural world. This relationship is one that we do not fully understand and certainly cannot control, though we can affect it. Our assessment of what this regime should look like and what sorts of behavior it should include are governed by the best scientific judgment we can apply at the time, so the very purpose of the regime itself can change over time as our scientific knowledge advances. The scientific component drives the qualitative argument that the global environmental regime is different from trade or human rights because the behavior of one nation can affect the viability of the entire regime for every other participant.

Thus a nation’s non-compliance or non-party status is much more significant in this area than in other areas of international law because the level of harm resulting from non-compliance or non-participation has the potential to be much greater. Specifically, large polluters can negatively affect the viability of the treaty regime, even if they are not parties, by the sheer magnitude of their contamination. The United States puts out approximately 30% of global CO₂ emissions and is the largest emitter on a per-capita basis. Even if every other nation on earth

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31 Ian Brownlie. *A Survey of International Customary Rules of Environmental Protection* 13 NAT. RESOURCES J. 180 (1973). Brownlie argues that while existing customary law for the environment tolerates a certain level of “ordinary use” pollution, the relevant standards may be changed by new expertise, by particular complaints of states and competent international organizations, and by standards set in multilateral conventions. Extending this logic, the standards set in the Kyoto Protocol can be seen to capture the emerging norm until such time as they are superseded by better scientific information about the effects of GHGs on the climate.
32 World Resources Institute. 2002. “Contributions to Global Warming” map, as found at http://climate.wri.org/topic_data_trends.cfm. Recently the Netherlands Environmental Assessment Agency calculated that China had overtaken the United States in total emissions in 2006, with China producing an estimated 6.2 billion metric tons CO₂ to the United States’ 5.8 billion tons CO₂. See “China Now No. 1 in CO₂ Emissions”
was a compliant party to a climate regime, global warming would still proceed because of the non-compliance of the “indispensable party.” This means that one non-party nation can render the entire regime ineffective and useless because the regime would not, and could not, achieve its goal of stabilization of atmospheric GHG levels. Depending on the type of pollutant, the effects of non-compliance can affect every nation on the globe, whether contiguous to the non-party or not. For example, chlorofluorocarbon emissions came largely from the United States and Europe, but they had the greatest effect on the nations around the South Pole (Chile, Argentina, New Zealand) because that is where the most acute damage to the stratospheric ozone layer occurred. GHG emissions are predicted to cause a sea level rise sufficient to inundate major areas of entire Pacific island nations and archipelagos. These effects can take decades or perhaps centuries to reverse. The ozone hole, for example, won’t close till 2050, and we have no idea how long it will take to reverse global climate change, if it is even possible at all. Because the very nature of the global environmental regime is different than that of other areas of international law, the traditional formation of customary norms has proven inadequate to deal with global environmental problems. Indeed, international law as a whole has never been confronted with a set of problems of the nature and quality of global environmental change.

2. Universal observance not always required

A particular practice is generally required to be widespread, and not particular to one area of the world, before it is recognized as custom. However, some legal scholars argue that while a

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34 Palmer, p. 282.
practice must cover more than one area of the world, it need not be universal.35 This can muddy the waters as to what constitutes a customary norm, since many observed practices such as Shari’a do not rise to the level of global legal norm, though they may be observed in more than one area.36 This issue arose in the 1969 North Sea Continental Shelf case, where the ICJ noted that an “insufficient” number of states had ratified the 1958 Continental Shelf Convention to render its provisions into custom.37 Other scholars note that, in creating new laws and norms, states must break old ones, thereby ensuring that a norm is, at least at the beginning, not universally observed.38 However, this presupposes that the only source of new laws and customs is old laws and customs. The global environmental threats that we now face render this constriction inapplicable, since most of the laws that we now have to deal with these threats were created de novo. Certainly the number of signatories to a treaty or agreement can be informative as to whether or not a customary norm is being created. Due to the American withdrawal from the Kyoto Protocol, virtual unanimity of all other industrialized nations and the agreement of some developing nations was needed to meet the 55/55 entry-into-force trigger.39

If a possible customary norm cannot be assigned to all states as uniform behavior, it may be more relevant to consider the range of the physical area covered by the norm. For example, the preamble of the U.N. Law of the Sea states that the seabed and its resources are “the common

37 North Sea Continental Shelf Case, at §73. The dissenting opinion by Judge Lachs, however, points out that there are any number of reasons why states that have signed treaties do not ratify them in a timely fashion, and one cannot conclude that disagreement with the principle or intent to follow a different principle is the main reason. Hence the number of parties that have ratified a convention is irrelevant to its norm-creating character.
heritage of mankind” and every state has the right to benefit from them regardless of their location. The idea of an environmental resource being common to all nations is rooted in basic ecology: the oceans are all interconnected, and an action taken by one littoral state can affect many others. The atmosphere and the climate can certainly be considered in the same fashion: the earth has one atmosphere, and emissions from anywhere on the globe can affect the entire climate. The joint implementation and bubble concepts specified in the Kyoto Protocol speak to this ecological reality by allowing nations to count their emissions together and benefit from common climate mitigation measures.

3. Custom can be created over a short time period

Most custom is created over time, but as global climate change progresses, we may not have decades or centuries to wait for a new custom of environmental compliance to emerge. The North Sea Continental Shelf case stated that, “the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law.” This has been referred to as “instant custom,” a phenomenon which legal scholar Prosper Weil argues is not just acceleration of the custom-formation process, but is a revolution in the theory of custom because rules that have been accepted by a very large number of states are now

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41 Joint implementation allows Annex I nations to take credit for emissions-lowering projects in other Annex I countries. The bubble concept allows a group of Annex I countries, like the individual member states of the EU, to meet their commitments the best they can as long as the overall group emission level decreased by the required amount. For further discussion of these concepts, see EIA, Greenhouse Gases and the Kyoto Protocol Executive Summary, Report #SR/OIAF/98-03, as found at http://www.eia.doe.gov/oiaf/kyoto/execsum.html (accessed June 21, 2007).
42 North Sea Continental shelf case, at §74. The dissenting opinion agrees in principle, stating that, “the great acceleration of social and economic change, combined with that of science and technology, have confronted law with a serious challenge; [t]he dimension of time in law, being relative, must be commensurate with the rate of movement of events which require legal regulation.”
instantly extended to all states, whether or not they agree.\textsuperscript{43} Geoffrey Palmer, however, argues that this is exactly the evolution in the formation of custom that the international environmental arena needs.\textsuperscript{44} While this development may alarm traditional practitioners of international law, this is exactly where environmental law based upon ecological science takes us. Rules governing the global environmental commons, if rooted in rational science, become binding on all states because all states are \textit{de facto} parties to the environment, whether or not they are \textit{de jure} parties to a particular agreement.

Furthermore, our scientific knowledge about climate change and its causes and effects has increased considerably over a relatively short period of time. Before the Intergovernmental Panel on Climate Change (IPCC), most scientific pronouncements on climate had come from the Advisory Group on Greenhouse Gases, a small scientific body founded in 1985 under the auspices of WHO and UNEP. The larger IPCC was created in 1988 and the U.S. Global Change Research Program in 1990, and these international collaborations of scientists have made huge scientific strides in our ability to understand the causes and effects of climate change. Only four years elapsed between the formation of the IPCC and the signing of the Framework Convention, and only another five until binding emissions reductions were negotiated. As environmental science moves quickly, environmental law, especially soft law in the form of custom, must keep up or be rendered irrelevant.

\textbf{4. Persistent objector status}

\textsuperscript{44} Palmer, pp. 277-278. He cites the 1989 Hague Declaration on the Environment, which the United States did not sign, as promoting, “the principle of developing … new institutional authority … which, in the context of the preservation of the earth’s atmosphere, shall be responsible for combating any further global warming … and shall involve such decision-making procedures as may be effective even if, on occasion, unanimous agreement has not been achieved.” The import of this declaration is that decisions made by some states could now instantly be binding on all states, a radical new development in traditional international law.
If a state objects to the formation of a new rule and custom from its inception, it can claim “persistent objector” status. Various legal arguments about the validity and usefulness of persistent objector status have been advanced, but the hallmark of the status is the persistence: the state must object to the norm from the beginning. Furthermore, if a state does not object to the norm while it is being created, any law based on that norm becomes binding on the state, even if it objects after the law is created.

However, the U.S. negotiated and signed the Kyoto Protocol and intended to submit it for ratification. Far from failing to object, the United States initially embraced both this agreement and the norm it contained, walking away only in 2000. Consequently, the United States can hardly claim that it is a persistent objector to the particular principle of reducing GHG emissions. The United States is a party to many other multilateral environmental agreements (MEAs) that call for mandatory behaviors, reductions or restrictions. For example, the Americans led the negotiations for the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer and were instrumental in its passage. Therefore, the United States cannot argue now that it objects to the principle of international interest in the environment, or the validity of the international environmental commons as a proper arena for law. Furthermore, many of its particular concerns and suggestions the United States made regarding economic development were added to the text

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45 This rule states that parties who object to a norm as it is becoming law are subsequently not bound by it. This rule has surfaced in a number of cases and international conventions, such as the 1900 Paquete Habana case, the 1928 Havana Convention, and the 1950 Peru-Colombia asylum case. For an exhaustive examination of the legal justification for and usefulness of the persistent objector principle, see Ted L. Stein, The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law 25 HARV. INT’L L. J. 457 (1985).

46 Charney 1993, p. 537-8. He does point out that, unlike a bill before a legislature, the evolution of a norm may be so stealthy that states do not even know that customary law is being made, and may have formed no opinion about it. However, since the Americans actively helped create both the UNFCCC and the Kyoto Protocol and shaped their provisions to American preferences, the United States cannot now claim to be a persistent objector.

of the treaty, so it is reasonable to assume that it must have had an intent to comply at some point.

5. **Obligations omnium: formation of a new customary norm of compliance with the global environmental regime**

If a new norm of expected compliance with treaties addressing the global environmental commons is forming, what specific points of evidence argue for it? First, the importance of various MEAs addressing compliance with global environmental problems cannot be overstated. Both the UNFCCC and the Kyoto Protocol deal directly with the expected reduction of GHGs, and the Stockholm Declaration, the Montreal Protocol (along with its framework convention), the Rio Declaration, the Law of the Sea, and other MEAs deal with the expectation of environmental protection as a duty of states. Second, pressure from allies and public opinion bear on the formation of custom. This will be discussed further in Section IV, but the United States has faced pressure from close and longtime allies such as Canada and the United Kingdom as well as developing nations to either ratify Kyoto or take some other meaningful actions to reduce GHG emissions. Third, sub-national actors recognize the necessity to control GHGs and have taken actions themselves: California and most of the states in the Northeast have promulgated climate control measures, and individual cities such as Chicago and Seattle have

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48 Paul Kevin Waterman, *From Kyoto to ANWR: Critiquing the Bush Administration’s Withdrawal From the Kyoto Protocol to the Framework Convention on Climate Change* 13 TRANSNAT’L L. & CONTEMP. PROBS. 755 (2003). See Depledge for an article-by-article examination of each nation’s contributions to the negotiations.


attempted to meet their pro rata Kyoto emissions at the city level.\textsuperscript{52} Fourth, the best climate science we have argues for the need to reduce GHG emissions so as to avert possibly significant damage to the global environmental commons.

Taken alone, each of these points may not be dispositive, but taken together they argue persuasively for the recognition of a customary norm, with which the United States is out of compliance.\textsuperscript{53} Because the global environmental commons is unique among areas of international law, the traditional requirements for the formation of custom and the ability of nations to opt out of it are significantly less applicable. In theory there is no room for exceptionalism in any of its forms in the global environmental regime.

\textbf{III. If the United States is bound by customary norm to reduce its GHG emissions, why is it continuing to remain exceptional?}

What if a nation decides to be exceptional anyway, even in the face of demonstrable environmental and legal harm? So far, the United States has found no compelling reason to become a party to the Kyoto Protocol. This situation could continue, but since GHG emissions are increasing every year, it is scientifically axiomatic that the situation should not continue. If the United States could be convinced to ratify the Protocol, the chances of injurious greenhouse effect warming would be lessened.

All states benefit from the international law system because it imparts a degree of predictability and order to international relations. The rules of the system allow members to avoid conflict and promote peaceful cooperative relations. Fear of sanctions, the desire to be

\textsuperscript{52} For further discussion, see Section IV.B.1, and notes 71, 72, infra.
\textsuperscript{53} “We are nowadays witnessing the appearance, alongside obligations erga omnes, of what one is tempted to call obligations omnium.” Weil, p. 422.; for similar arguments, see Brownlie, p. 183.
viewed as reliable and law-abiding, and general respect for the rule of law further impel states to obey customary international law. Yet these rules are undermined by free-riders, states that reap the benefits of the system without paying the costs. In the case of global climate change, the United States, wary of carrying free riders like India and China, has decided to become a free rider itself. Its example may encourage other nations not to follow customary international law, thereby derailing the entire regime.\footnote{Charney, 1993, pp. 530-533. He points out that, while individual states may gain short-term advantage by violating laws or customs in particular situations, their long-term interests are more likely to be served by acting in accordance with the system.}

Modern legal experts such as Michael Ignatieff identify three distinct types of exceptionalism: exemptionalism, wherein the United States supports multilateral treaties and regimes but only if they contain exemptions for U.S. practices or citizens; double standards, wherein the United States criticizes other nations (particularly in human rights law) but ignores any criticism it receives; and legal isolationism, wherein the United States ignores other legal jurisdictions.\footnote{Ignatieff, Michael, ed. 2005. American Exceptionalism and Human Rights. Princeton, NJ: Princeton University Press. While Ignatieff focuses on U.S. behavior towards human rights law, his contributors to this volume recognize the troubling impact of American exceptionalism on the environmental regime as well, particularly with regard to global warming.} While all three types of exceptionalism carry significant consequences in the realm of international environmental law, American exemptionalism is what weighs most heavily on the climate change regime, particularly with regard to U.S. behavior toward the Kyoto Protocol. Legal scholars have postulated that there are three reasons why states do not comply with treaty requirements: 1) ambiguity of the treaty language, 2) limitations on the capacity of the party to comply, and 3) temporal dimension of the social, economic, and political changes the treaty would require.\footnote{Abram and Antonia Handler Chayes. On Compliance 47 INT’L ORG. 188 (1993).} Customary norms of international law govern international behavior in the same fashion that treaties do by regulating the conduct of states towards each other, and in fact govern a greater percentage of international decisions because they operate when there is no
specific treaty to regulate that conduct. Consequently, the reasons that a nation might be reluctant to participate in a treaty stem from the same concerns that would prevent them from acknowledging a norm – that their obligations are unclear or too onerous, or somehow they are being treated unfairly. The reasons the United States government has put forward for refusing to ratify Kyoto refer to the former, but in reality, American objections have everything to do with the latter.

A. “Developing countries are not participants”

The Bush Administration has argued that the United States will not participate in the Kyoto Protocol because it does not include developing nations such as India and China. These nations, while historical under-emitters, are developing rapidly and relying heavily on fossil fuels to do so. China alone is looking to build 562 new coal-fired power plants in the next eight years, and the country’s overall CO₂ emissions are expected to surpass those from the United States as early as 2009. Compliance with the Protocol would place the United States at a relative disadvantage economically, both vis-à-vis the EU, which has a denser population and different transportation patterns and can economically absorb emissions cuts more easily, and the developing countries, which could undercut U.S. goods on the world market since they would not be forced to spend money on climate control measures.

Critics of Kyoto have based this objection on the traditional American idea of fairness: if the United States is required to cut back on its use of fossil fuels and suffer the attendant economic

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57 White House Analysis, p. 1.
dislocation, then other countries that also rely on fossil fuels should share the pain, regardless of their Annex I status. However, the legal concept of “common but differentiated responsibilities” answers the purported fairness issue. Both the UNFCCC and the Rio Declaration, as well as the Protocol itself, refer to the responsibility of developed nations to take the lead in combating climate change not merely because they are the wealthiest countries and have the economic means to do so, but because the development process that generated their wealth also generated the GHG buildup that the entire world is now having to combat. Though both India and China have implemented various domestic GHG emission limitation strategies, they have stated that they will not accept binding emissions limits or timetables until the developing nations do.\footnote{Peter Walker. “China speeds towards ‘biggest greenhouse gas emitter’ title.” \textit{The Guardian}. April 24, 2007, as found at http://www.guardian.co.uk/china/story/0,,2064484,00.html.}

\textbf{B. “Economic harm”}

The Administration has argued secondly that the United States will not participate in Kyoto because to do so would cause significant harm to the American economy.\footnote{White House Analysis, p. 2.} Estimates of the cost of implementing the Kyoto Protocol range from as low as one-tenth of one percent to as high as three percent of GDP, depending on differences in the methodology used.\footnote{For a comprehensive economic analysis of different costing mechanisms, see EIA, “Comparing Cost Estimates for the Kyoto Protocol” Dept. of Energy, 2002, as found at http://www.eia.doe.gov/oiaf/kyoto/cost.html.} However, the cost of implementing the Protocol does not have any bearing on the legality of the norm. Indeed, when compared to countries who violate clear \textit{jus cogens} norms of genocide and torture for political, ideological or theological reasons, cost seems almost a mundane reason to violate a norm, especially when coming from the wealthiest country on earth.

The “economic harm” argument, unlike the “developing countries do not participate” argument, has less to do with actual economic harm and more to do with the political harm the
Bush Administration may face if the United States either ratifies Kyoto or implements any sort of compulsory GHG emission reduction measures. Environmental issues in general have acquired a liberal Democratic cast, and are unlikely to garner support from a Republican Administration. Furthermore, some political conservatives see compliance with any sort of global norm or treaty as a violation of American sovereignty.\textsuperscript{64} Just as George H.W. Bush faced internal pressure from members of his own Administration and electoral pressure from some sections of his political base not to attend the Rio summit unless the Framework Convention contained no binding targets and timetables, George W. Bush’s supporters and most of the members of his party in Congress are unlikely to throw their support behind global environmental regulation like Kyoto. The 2006 election that resulting in Democratic Party control of both houses of Congress has not yet translated into meaningful climate-related foreign policy.

C. “Uncertain science”

The Administration has argued thirdly that the science that underlies the reductions contained in the Protocol, and indeed the whole climate change mitigation regime, is speculative and arbitrary.\textsuperscript{65} Of all the arguments leveled against the Protocol, however, this is the only one that direct scientific evidence can overcome. As mentioned above, the IPCC was formed in 1988 by the WHO and UNEP,

\begin{quote}

\texttt{to assess on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation. The IPCC does not carry out research nor does it}
\end{quote}


\textsuperscript{65} White House Analysis, p. 1.
monitor climate related data or other relevant parameters. It bases its assessment mainly on peer reviewed and published scientific/technical literature.\textsuperscript{66}

The IPCC is made up of thousands of scientists from around the world and is broken out into three working groups dealing with physical science, impacts, and mitigation and adaptation. Its job is to synthesize the best scientific, technical, and socio-economic information on the causes and effects of climate change.\textsuperscript{67} These scientists rotate in and out of chair and lead author positions, and all of the organization’s review procedures and finances are open for public scrutiny. The IPCC represents the best international scientific accord on the problem of global climate change, and its latest assessment report states clearly that, “[T]he understanding of anthropogenic warming and cooling influences on climate has improved since the Third Assessment Report (TAR), leaving to \textit{very high confidence} that the globally averaged net effect of human activities since 1750 has been one of warming.”\textsuperscript{68}

Science is a new factor in the creation of customary norms of international law, though there is no better field in which to give scientific findings significant norm-creating weight than environmental law. Science, too, can help set the bar to treaty exceptionalism much higher. For example, if the United States could sequester its carbon with any measure of reliable success, it might have an argument for why it could be exceptional with regard to the Kyoto Protocol, because it would not be causing the same level of atmospheric harm per molecule of CO\textsubscript{2} produced as other nations who do not sequester their CO\textsubscript{2}. However, since it cannot sequester CO\textsubscript{2} economically, or at least no better than any other CO\textsubscript{2}-producing nation, it has no grounds for exceptionalism. This moves environmental law away from the traditional practice that a state

\textsuperscript{66} IPCC. “Mandate and Mission of the IPCC” As found at http://www.ipcc.ch/about/about.htm.


\textsuperscript{68} IPCC AR4 Working Group I SPM, p. 5 (emphasis in original).
can be exceptional just because it desires to be. In the case of the global environmental commons, and facing an emerging norm of expected compliance with global environmental treaties, mere desire to be exceptional for whatever policy reason is not enough in the face of the ecological damage that could be done by an “exceptional” nation.

IV. Even if a new norm has emerged, what levers to compliance does it provide?

Non-compliance with or non-party status within the global climate change regime can damage not only the viability of the regime itself, but the very climate the regime is designed to protect. Thus, non-compliance in the global environmental regime should carry a greater penalty than non-compliance in other regimes.

A. Diffuse reciprocity and pressure from allies

It is possible that nations who do not comply with a regime or customary norm will face diffuse reciprocity from their allies and other parties. This can take the form of obstructionism in other legal areas, such as imposition of tariffs or travel restrictions, or disagreement or non-enforcement of legal judgments, or bad publicity. However, the author has found no specific actions against American interests that were performed because the United States continues to emit high levels of GHGs, so this seems to be an unproven strategy for pressuring the United States to comply with Kyoto and the norm underlying it. In order for diffuse reciprocity to be effective, the “reciprocity” part must be made clear: in this case, the United States must know that it is not receiving the full international cooperation it desires in a non-environmental area due to its non-compliance in the environmental area, specifically that it has not and apparently

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will not ratify Kyoto. In other words, the link must be explicit, or the non-compliant party will not understand how it needs to change its behavior to avoid further reciprocity. Reciprocity also has the most value when the parties are more equal in size and power.\textsuperscript{70} Thus, there is a limited amount of reciprocity that other parties can apply to the United States, since it is a critical player in world trade, finance, media, and many other global regimes.

B. Moral condemnation

Failing any sort of concrete reciprocity, the last weapon of the international law-abiding is moral condemnation.

1. Failure to live up to our stated commitments and principles

In ratifying the Rio Declaration, the UNFCCC, the Montreal Protocol, and other MEAs, the United States has signaled its public belief in, and intent to live by, certain principles, such as the precautionary principle, sustainable development, and common but differentiated responsibility. Each time the United States walks away from an agreement or a commitment, it is damaging its ability to be taken seriously when it proposes a new agreement or principle. Chayes and Chayes argue that, “outrage when solemn commitments are treated as ‘scraps of paper’ is rooted in U.S. history. It is unlikely that this kind of reaction is unique to the United States.”\textsuperscript{71} Hence, either the United States does not consider the Kyoto Protocol, and by reference the UNFCCC, as a solemn commitment, or this outrage is selective by topic.

Interestingly, rather than waiting for the federal government to act, state governments, local governments, private companies, and individuals all can and have acted to curb GHG emissions

\textsuperscript{70} Robert O. Keohane, \textit{Reciprocity in International Relations} 40 INT’L ORG. 6 (1986).
\textsuperscript{71} Chayes and Chayes, p. 186.
to the best of their ability. In 2002, California passed a first-in-the-nation law requiring strict emission controls on every car sold in the state, starting in model year 2009. Environmental groups hope and automakers fear that, due to the size of the car market in California, this law could force changes in vehicles sold nationwide. California governor Arnold Schwarzenegger has since pledged to reduce the state’s GHG emissions to 1990 levels by 2020. This year, ten northeastern and mid-Atlantic states have joined a landmark pact called the Regional Greenhouse Gas Initiative to reduce GHG emissions from their power plants. The mayors of Seattle, Minneapolis, Albuquerque, and nearly 200 other cities have signed onto the Climate Protection Agreement, pledging to reduce their cities’ GHG emissions, to 7% below 1990 levels by 2012, exactly the target the United States was to have achieved under Kyoto. These actions help to bolster the acceptance of the norm at the sub-national level – the more entities (sub-national, national and supra-national) that accept this norm, the more it emerges from the fog of nascent custom and begins to impact the behavior of states. That these sub-national actors feel they have a responsibility to comply with the norm of compliance with international environmental agreements indicates how widespread and powerful it is, and just how exceptional the U.S. position is.

2. Erosion of the stability of international law

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73 Massachusetts and Rhode Island originally pulled out of this pact due to a disagreement over price caps for power plants, the lack of which they felt would have passed inordinately high energy costs on to consumers. However, in February of 2007, both states re-joined. Further information on RGGI can be found at [http://www.rggi.org/index.htm](http://www.rggi.org/index.htm).
75 For an examination of the benefits to the climate regime of sub-national actions and why it does not have to be economically irrational as “tragedy of the commons” theory suggests it would be, see Kirsten H. Engel and Scott R. Saleska. *Subglobal Regulation of the Global Commons: The Case of Climate Change* 32 ECOLOGY L. Q. 183 (2005).
As long as the American government is out of compliance with this norm, is it contributing to the erosion of international law? The answer to this question depends on whether the norm is considered to be contained in, or at least substantively represented by, the targets and timetables set by the Protocol. Kyoto is the first international environmental agreement to provide specific binding targets and timetables for the coordinated international reduction of greenhouse gases. Lacking any predecessor agreement except for the non-binding Framework Convention, some scholars would argue that Kyoto can be recognized as the only viable agreement to enshrine the principle of GHG reduction by states.\(^76\) Others would disagree, pointing out that the United States, in attempting to reduce GHGs on a voluntary basis and negotiating separate climate-related agreements such as the Asia-Pacific Partnership on Clean Development and Climate,\(^77\) has recognized the norm and is attempting to comply in the best way it can.\(^78\) However, the overarching purpose of the norm, as stated in the objective of the UNFCCC (Article 2) is “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.” This hints at yet another role for science to play in adjudicating, if only in an epistemic scientific court of opinion, that one method of attempting to comply with a norm is acceptable because it achieves its aim, while another method is not acceptable because it tries and fails.

Citing scientific uncertainty about the exact processes and outcomes of climate change as justification for the U.S. withdrawal from Kyoto may itself violate international law.\(^79\) Article 3(3) of The UNFCCC states that “lack of full scientific certainty shall not be used as a reason...

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\(^76\) Brownlie, p. 180. In effect, Brownlie would be arguing that the norm tracks the treaty, at least at present.


\(^79\) Waterman, p. 763.
postponing” measures aimed at combating global warming.\textsuperscript{80} There is considerable debate as to whether or not the precautionary principle as captured above is itself a customary norm, but Waterman argues that it is particularly applicable in this case because the United States, in using the “uncertain science” argument to reject Kyoto, is doing exactly what it promised it would not do when it ratified the UNFCCC.\textsuperscript{81}

\textbf{3. Jus cogens?}

Could protection of the global environment and expected compliance with international environmental treaties even be lifted from customary norm to \textit{jus cogens}\textsuperscript{82}? There are some legal scholars that point out the negative and confusing effects of breaking the normative regime into \textit{jus cogens} norms on one hand and “ordinary” norms on the other.\textsuperscript{83} However, the development of \textit{jus cogens} norms seems to be a positive one, since only the most heinous crimes of slavery, torture, and genocide are currently contained in this category,\textsuperscript{84} crimes which the international community seems uniformly prepared to banish in theory if not always in practice. Furthermore, the identification of a \textit{jus cogens} norm, even if unenforceable, carries its own prohibitive weight. For example, a state may still choose to engage in genocide, but if it does so, it knows it is doing something illegal and reprehensible, even if it may never come to trial.

Slavery, torture, and genocide are prohibitive norms; states are forbidden from carrying them out. Compliance with agreements and treaties which apply to the global environmental

\textsuperscript{80} UNFCCC, Art 3(3)
\textsuperscript{81} Ibid.
\textsuperscript{83} Weil, p. 423.
\textsuperscript{84} Some scholars have argued that rape and the juvenile death penalty ought to be \textit{jus cogens} norms as well, which means the category is open for expansion beyond its current limits. See Dean Adams, \textit{The Prohibition of Widespread Rape as a Jus Cogens}, 6 SAN DIEGO INT’L L.J. 357 (2004); and Rachel J. Avery, \textit{Killing Kids Who Kill: An International Perspective on the Juvenile Death Penalty in the United States} 7 UCLA J. INT’L L. & FOREIGN AFF. 303 (2002).
commons, however, would be the first prescriptive norm to be elevated to the level of *jus cogens*. This means that states would be required to carry them out. This becomes problematic when states do not have the resources to carry out prescriptive norms, leaving them in violation of customary international law due merely to financial circumstances and not due to any overt choice of action.\(^8^5\)

*Jus cogens* norms would operate upon the whole international community, but Weil points out “a tendency to vague personification of the international community,”\(^8^6\) something which he finds unsettling. Which nations are part of this international community and who can speak for it? It must be a number less than the whole, or any nation would have what Weil calls “an inconceivable veto” over the development of any norm, *jus cogens* or otherwise. Yet it falls within the legal rights of a nation to opt in or out of this community with regard to certain regimes of international law. Nations who choose not to have capitalist economies can opt out of the WTO or any other body of trade law. Nations who define their social structures in certain ways can opt out of human rights law; while the moral value of this is questionable, the legal value is not. Yet no nation on earth can opt out of the international environment. No nation can pronounce, “We choose not to be affected by climate” or “We choose not to need fresh water, so these rules don’t apply to us.” This is where science, particularly global environmental science, can play its part in both delineating the international community and identifying norms that are in its fundamental interests and, by extension, norms that each state must abide by without abrogation. In the case of the global environment, the international community includes every nation on earth and abrogation of any state’s fundamental responsibilities negatively affects each member.

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\(^8^5\) Chayes and Chayes, pp. 193-195.
\(^8^6\) Weil, p. 426.
Conclusion and Future Considerations

American greenhouse gas emissions reached a record high of 7.15 billion metric tons CO$_2$ equivalent in 2005, up 0.6 percent from 2004 and up 16.9% from 1990, and there appears to be no slowing down. Should the United States accede to the Kyoto Protocol, however, the benefits would include the restoration of the American reputation for multilateral leadership which many countries feel that it has abandoned, the avoidance of diffuse reciprocity from other Annex I countries, and the partial mitigation of the ecological harm incurred by global warming. There would be no legal costs, though the Bush Administration has argued that it would be very expensive economically to retool the national economy to comply with GHG restrictions. But the prolonged absence of the United States from meaningful participation in the global climate regime raises the question of how to avoid non-compliance from an indispensable party in the future.

Does the global community need a new international environmental organization to enforce compliance with the emerging norm of environmental protection? In a United Nations General Assembly debate in 1989, New Zealand proposed the formation of an “Environmental Protection Council” as a new body in the U.N. system that would make binding decisions on global environmental issues. New Zealand argued that,

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\text{[T]he traditional response of international law, developing legal standards in small, incremental steps, each of which must be subsequently ratified by all countries, is no longer appropriate to deal with the highly complex environmental problems of the future.}\]

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88 Palmer, p. 279.
More recently, scholars have proposed the creation of a World Environmental Organization for this purpose, an environmentally-focused version of the WTO.89 This, however, is a step that the United States and most nations would think twice before agreeing to. The United Nations is ponderous enough without adding another agency with its attendant secretariat, diplomats, and scientific advisors. Yet New Zealand’s point that unanimity is too slow and unwieldy to deal with problems such as global climate change is valid. The recognition of a customary norm in favor of compliance with treaties addressing the global environmental commons could help bridge the gap between the erosion of sovereignty and the anarchy that characterizes the current international system.

Perhaps such an international body will not be necessary. Other nations, and sub-national actors within the United States, have already begun to implement this customary norm, as represented by the Kyoto Protocol. Since globalization will require higher levels of harmonization of standards across countries, the EU and the other Kyoto parties will set the terms. Manufacturers, transportation companies, and other industries will find it economically more efficient to comply with one standard rather than make different products with different processes for different markets.90 Even energy producers such as BP-Amoco and General Electric have stated that they believe that regulation on GHG emissions is inevitable, and the sooner standards are fixed, the more lead time they will have to make the most economic transition possible.91 In the meantime, however, the formation of a customary norm of compliance with global environmental agreements can both contribute to the evolution of

90 Temple, p. 243.
international law to deal adequately with worldwide environmental problems and can help preserve the biosphere from irrevocable climatic change.