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IT'S "INSTANT CUSTOM": HOW THE BUSH DOCTRINE BECAME LAW AFTER THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001

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Abstract: Historically, courts have recognized a customary international law only upon finding evidence of uniform state practice over a protracted period of time. In today's rapidly evolving global society, however, "instant custom" theorists contend that new customary international laws may form in much less time than the decades upon decades of consistent practice traditionally required. This Note considers the instant custom theory and argues that the Bush Doctrine became a new customary international law in the immediate aftermath of the terrorist attacks of September 11, 2001.

INTRODUCTION

Hours after the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, President George W. Bush announced that, in bringing to justice those responsible, "we will make no distinction between the terrorists who committed these acts and those who harbor them."¹ While on the one hand, Bush's statement simply embodied America's resolve to seek retribution for the heinous acts, on the other hand, the statement introduced into international relations a novel approach toward fighting terrorism, setting in motion a series of events that culminated in the rapid formation of a new customary international law.²

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¹ U.S. President George W. Bush, Statement by the President in His Address to the Nation (September 11, 2001), at <http://www.state.gov/s/ct/index.cfm?docid=5044> [hereinafter Statement by the President].

² See *id.*; ANTHONY A. D'AMATO, CONCEPT OF CUSTOM IN INTERNATIONAL LAW 88 (1971).

On September 12, 2001, one day after the initial proclamation of what has come to be known as the Bush Doctrine,³ the members of the United Nations (U.N.) General Assembly and Security Council passed resolutions reinforcing the doctrine.⁴ Soon thereafter, through acts and statements, countless states worldwide expressed fervent support for the Bush Doctrine and, more generally, the war against terrorism.⁵

In today's rapidly growing and changing world community, states have accepted the need to adapt the method by which customary international law is made.⁶ This Note reviews the traditional method of customary international law formation and proposes that acceptance of the notion of "instant custom" as a method of forming customary international law is a necessary step in keeping pace with the rapidly evolving international community.

Part I-A reviews the traditional method of forming customary international law. Part I-B discusses legal scholar Anthony D'Amato's reformulated theory of customary international law. Part II explores the evolution of the notion of instant custom. Part III proposes that D'Amato's reformulated customary international law theory best supports the notion of instant custom. Part IV reviews the terrorist attacks of September 11, 2001, and lastly, Part V contends that a new customary international law formed immediately following the attacks. In short, this Note argues that the Bush Doctrine became customary international law through the method of instant custom during the immediate aftermath of the September 11, 2001 terrorist attacks on the United States.

³ The Bush Doctrine is the assertion that nations harboring terrorists are as guilty as the terrorists themselves. Elisabeth Bumiller, *Bush Chides Some Members of Coalition for Inaction in War Against Terrorism*, N.Y. TIMES, Nov. 10, 2001, at B4.

⁴ G.A. Res. 1, U.N. GAOR, 56th Sess., U.N. Doc. A/56/L.1 (2001); U.N. SCOR, 4370th mtg. at 1, U.N. Doc. S/Res/1368 (2001).

⁵ See White House Web Site, West Wing, America Responds, September 2001, at <http://www.whitehouse.gov/news/releases/2001/09/resources.html> (last visited Nov. 29, 2001).

⁶ Louis B. Sohn, "Generally Accepted" International Rules, 61 WASH. L. REV. 1073, 1079 (1986).

I. CUSTOMARY INTERNATIONAL LAW

A. *Traditional Customary International Law*

Article 38 of the Statute of the International Court of Justice (ICJ) defines custom as “evidence of a general practice accepted as law.”⁷ According to legal scholar Anthony D’Amato: “The importance of custom is rooted in the desire of the international community for order and security—aims which are indistinguishable from the meaning of ‘law.’”⁸

Traditional writings maintain that customary international law consists of two elements: (1) *usage*, states’ practice, and (2) *opinio juris*, a sense of legal obligation.⁹ Courts traditionally have ascertained custom by engaging in a detailed historical analysis of many centuries of state practice, recognizing a customary international law when it reflects both a state’s uniform practice over a long period of time and that state’s conscious acceptance of the principle as law.¹⁰ Historically, the period of time required has been rather extensive, with new customary rules developing slowly, often over many decades.¹¹

B. *D’Amato’s Reformulated Theory of Customary International Law*

D’Amato criticizes traditional writings on customary international law, which he claims, “overcomplicate the matter.”¹² D’Amato contends that the notion of *opinio juris* leads many writers into arcane inquiries regarding the motivations of states, as if states, as artificial entities, could have discernible motivations.¹³ Furthermore, D’Amato argues that the concept of *usage* seems to require an undefinable number of repetitions before a line of conduct can be said to generate legal obligation.¹⁴

⁷ Statute of the International Court of Justice, June 26, 1995, art. 38, 59 Stat. 1055, 1060, T.S. No. 993, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>.

⁸ D’AMATO, *supra* note 2, at 270.

⁹ Katherine N. Guernsey, Comment, *The North Continental Shelf Cases*, 27 OHIO N.U. L. REV. 141, 143 (2000).

¹⁰ Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 877 (1983).

¹¹ See Guernsey, *supra* note 9, at 143.

¹² See D’AMATO, *supra* note 2, at 271.

¹³ *Id.*

¹⁴ *Id.*

D'Amato simplifies the traditional theory of customary international law by reformulating the elements of *opinio juris* and *usage* into simpler elements, "articulation" and "act."¹⁵ According to D'Amato's theory, when a rule is alleged to be a customary international law, the person asserting the rule must adduce both an articulation of the rule and an act, or commitment to act, consistent with the articulation.¹⁶ Many contradictory rules may be articulated, but a state can only act in one way at one time.¹⁷ The act must be visible, real, and significant, thus crystallizing policy and demonstrating which of the numerous, and often contradictory, articulated rules the acting state has decided to manifest.¹⁸ Once the act occurs, the previously articulated rule takes on life as a rule of customary international law.¹⁹

At the very least, the party asserting the existence of a customary international law must cite one instance of an act following the articulation, though there may be a significant difference in the threshold of persuasiveness if two or more acts can be cited.²⁰ While D'Amato's claim-oriented approach gives more persuasive weight to the repetition of the act, it does not engage in "mystical jumps from non-law to law according to the number of repetitions."²¹

In most cases, a state's action is easily recognized: sending up a satellite, testing nuclear weapons, receiving ambassadors, levying customs duties, and capturing a pirate's vessel.²² Since the *North Sea Continental Shelf Cases*, however, scholars have asserted that, in addition to its actions, a state's statements should serve as confirmation of the existence of a custom.²³ That is, not only is "national legislation, parliamentary and administrative practice, and the case-law of municipal tribunals" a valid source of evidence of state practice, but so are the statements of state representatives and their votes at diplomatic conferences or in U.N. bodies.²⁴ Indeed, in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, the ICJ looked to statements made by states at diplomatic conferences for confirmation

¹⁵ See *id.*

¹⁶ *Id.* at 87.

¹⁷ D'AMATO, *supra* note 2, at 88.

¹⁸ See *id.*

¹⁹ *Id.* at 88.

²⁰ *Id.* at 91.

²¹ *Id.* at 271.

²² D'AMATO, *supra* note 2, at 88.

²³ See Guernsey, *supra* note 9, at 154.

²⁴ *Id.*

of the existence of a customary international law.²⁵ In addition to facilitating the process of gathering evidence to confirm the existence of a customary international law, states now have a means through which to change the law without having to act in ways that place them in jeopardy of violating existing laws or harming other states.²⁶

Writing in a time before the manned exploration of outer space, D'Amato offers the example of a 1963 U.N. General Assembly resolution stating that exploration and use of outer space were matters of international law.²⁷ According to D'Amato, the resolution provides the element of articulation, which, alone, does not generate customary international law.²⁸ However, "[i]f states later behave in a manner consistent with the resolution when exploration and use of outer space become technologically feasible, we may then say that customary law has been established."²⁹ Indeed, in his example, D'Amato recognizes that a U.N. General Assembly resolution followed by a consistent act could form a new customary international law.³⁰

II. TOWARDS THE NOTION OF INSTANT CUSTOM

In the *North Sea Continental Shelf Cases*, the ICJ deviated from the traditional view of customary international law development, that rules develop over an extensive period of time and that specific evidence of *opinio juris* must be obtained.³¹ Indeed, in its opinion, the ICJ prescribed a new course for customary international law, opening the door for official recognition of state practice over the short-term as binding custom, so long as sufficient evidence exists to demonstrate support for the customary international law.³² Though a relatively minor point in the ICJ opinion, the justices noted that rapidly developing customary international law is desirable because it is more attuned to the rate of development in the modern global society.³³ The ICJ stated:

Although the passage of only a short period of time is not necessarily . . . a bar to the formation of a new rule of cus-

²⁵ *Id.*

²⁶ *Id.* at 155.

²⁷ See D'AMATO, *supra* note 2, at 78.

²⁸ *Id.* at 78-79.

²⁹ *Id.* at 79.

³⁰ See *id.* at 78-79.

³¹ See Guernsey, *supra* note 9, at 153.

³² *Id.*

³³ *Id.*

tomary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.³⁴

As an example of a rapidly developed customary international law, Judge Lachs cited the law of freedom of movement in outer space, already an “established and recognized” law, though the practice had occurred only for a short period of time.³⁵

Though the opinion in the *North Sea Continental Shelf Cases* paved the way, legal scholar Bin Cheng officially introduced the notion of instant custom.³⁶ Cheng wrote: “As international law is a horizontal legal system in which states are both the law-makers and the subjects of the legal system, *opinio juris* can arise or change instantaneously.”³⁷ According to Cheng’s instant custom theory, the *usage* prong of customary international law has little or no significance.³⁸ Not only is it unnecessary that the *usage* be prolonged, but there also need be no *usage* at all in the sense of repeated practice, provided that the *opinio juris* of the states concerned can be established clearly.³⁹

Thus, according to Cheng’s theory, states can advance a new customary international law, either in concert with other states or unilaterally, simply by evincing a new *opinio juris*.⁴⁰ If other states do not object, and in fact follow suit, they will share the same *opinio juris*, thus forming a new rule of customary international law.⁴¹

Cheng’s instant custom theory has drawn criticism from scholars who insist that customary international law and “instantaneousness”

³⁴ *North Sea Continental Shelf* (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, para. 74 (Feb. 28).

³⁵ See Guernsey, *supra* note 9, at 150.

³⁶ G.J.H.VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 86 (1983).

³⁷ Bin Cheng, *Custom: The Future of General State Practice In a Divided World*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 513, 532 (R. St.J. Macdonald & Douglas M. Johnston eds., 1983).

³⁸ See VAN HOOF, *supra* note 36, at 86.

³⁹ *Id.*

⁴⁰ Cheng, *supra* note 37, at 549.

⁴¹ *Id.*

are irreconcilable concepts.⁴² Legal scholar G.J.H. van Hoof contends that customary international law as a method of law creation conveys the idea that rules are based on states' practice.⁴³ According to van Hoof, Cheng's theory of instant custom conveys precisely the opposite idea, suggesting that such practice is irrelevant to customary international law.⁴⁴ Abandoning altogether the traditionally required *usage* element, Cheng's theory may be considered an extreme version of the notion that customary international law can form rapidly.⁴⁵

III. INSTANT CUSTOM THROUGH THE LENS OF D'AMATO'S REFORMULATED CUSTOMARY INTERNATIONAL LAW

D'Amato's reformulated customary international law theory, which requires an articulation coupled with an act conforming to the articulation, supports the notion of instant custom—that is, that customary international law can form rapidly.⁴⁶ As the ICJ indicated in the *North Sea Continental Shelf Cases*, the passage of only a short period of time is not a bar to the formation of a new rule of customary international law.⁴⁷ Thus, however short the amount of time that elapses, a particular rule may be considered a customary international law once there is an articulation of the rule and a consistent act that follows.⁴⁸ According to University of Paris Law Professor Prosper Weil, “[Instant custom] is no mere acceleration of the custom-formation process, but a veritable revolution in the theory of custom.”⁴⁹

The predominant sources of articulated rules are treaties, draft conventions of the International Law Commission, and resolutions of the U.N. General Assembly.⁵⁰ The discussion in this Note will focus on U.N. General Assembly resolutions. Indeed, U.N. General Assembly resolutions can contribute to a determination of a particular customary international law as long as they are considered evidence, and not complete proof, of the principles they support.⁵¹ Thus, as seen in the outer space exploration example, U.N. General Assembly resolutions

⁴² See VAN HOOF, *supra* note 36, at 86.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *id.*

⁴⁶ See D'AMATO, *supra* note 2, at 88.

⁴⁷ *North Sea Continental Shelf*, 19 I.C.J. 3, para. 74.

⁴⁸ See D'AMATO, *supra* note 2, at 74.

⁴⁹ Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 435 (1983).

⁵⁰ D'AMATO, *supra* note 2, at 86.

⁵¹ Kerwin, *supra* note 10, at 899; see Weil, *supra* note 49, at 417.

provide the "articulation" element of a customary international law.⁵² As viewed under the traditional theory of customary international law, the resolutions constitute a consensus on legal norms, providing clear evidence of the *opinio juris* of states.⁵³ The resolutions are the sociological and political expression of trends, wishes, and intentions of the international community.⁵⁴ Therefore, though they do not constitute the formal source of new customs, resolutions serve to prepare, and even accelerate, the formation of new customary international laws.⁵⁵

The U.N. Secretariat explained that a declaration "may be considered to impart . . . a strong expectation that Members of the international community will abide by it" and "in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States."⁵⁶ Thus, to become customary international law, a resolution must be generally accepted as legally binding by the members of the international community, either at the time of its adoption or by the subsequent practice of a reasonable number of states.⁵⁷ Subsequent practice evidences a state's willingness to conform to the principles contained in a declaration.⁵⁸

Through this method, many U.N. General Assembly resolutions have come to constitute "generally accepted" principles of international law.⁵⁹ These include resolutions on human rights, relations between states, the definition of aggression, the exploration and use of outer space, and the protection of the environment.⁶⁰

In *Filartiga v. Pena-Irala*, the U.S. Court of Appeals for the Second Circuit stated that a declaration creates an expectation of adherence, and insofar as the expectation is gradually justified by state practice, a declaration may become recognized as customary international law.⁶¹ The number of instances in which the *Filartiga* court cited U.N. General Assembly resolutions as authority makes clear the court's implicit

⁵² See D'AMATO, *supra* note 2, at 78-79.

⁵³ J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L. L. 449, 484 (2000).

⁵⁴ Weil, *supra* note 49, at 417.

⁵⁵ See *id.*

⁵⁶ Sohn, *supra* note 6, at 1079.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1078.

⁶⁰ *Id.*

⁶¹ 630 F.2d 876, 883 (2d Cir. 1980).

holding that these resolutions constitute authoritative sources of international law.⁶²

According to the notion of instant custom, therefore, regardless of how little time passes after articulation, a particular rule may be considered customary international law once states act in accordance with the rule as articulated in a U.N. General Assembly resolution.⁶³

IV. THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001

On September 11, 2001, the U.S. came under attack in a series of deliberate and deadly terrorist acts.⁶⁴ The heinous suicide attacks began at New York City's World Trade Center when a single passenger plane, hijacked en route from Boston to Los Angeles, slammed into one of the twin towers at 8:45 a.m.⁶⁵ Within minutes, a second plane struck the other tower, another dove into the Pentagon, and a fourth plummeted to the earth outside of Somerset, Pennsylvania.⁶⁶

On the evening of September 11th, President George W. Bush addressed the nation, condemning the acts of terror and making plain his intent to attribute the acts to the Taliban regime.⁶⁷ Bush declared: "We will make no distinction between the terrorists who committed these acts and those who harbor them."⁶⁸ The next day, September 12, 2001, the members of the U.N. General Assembly and Security Council followed Bush's lead, passing resolutions that reinforced the Bush Doctrine.⁶⁹ The U.N. General Assembly stated: "[T]hose responsible for aiding, supporting, or harbouring the perpetrators, organizers and sponsors of such acts will be held accountable."⁷⁰ The Security Council adopted the same text in unanimous enactment of a binding resolution requiring all member states to pursue terrorists and those who support them.⁷¹ Thus, in addition to

⁶² Kerwin, *supra* note 10, at 886.

⁶³ See D'AMATO, *supra* note 2, at 79; Sohn, *supra* note 6, at 1079.

⁶⁴ *Black Tuesday; Erupting on a Crisp September Morning, Terrorist Attacks Bring America to a Standstill—and Take an Unthinkable Human Toll*, PEOPLE, Sept. 24, 2001, at 6, available at 2001 WL 25549830.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See Statement by the President, *supra* note 1.

⁶⁸ *Id.*

⁶⁹ G.A. Res. 1, *supra* note 4; U.N. SCOR, *supra* note 4.

⁷⁰ G.A. Res. 1, *supra* note 4.

⁷¹ U.N. SCOR, *supra* note 4; White House Website, West Wing, Diplomatic Actions, available at <http://www.whitehouse.gov/response/diplomaticresponse.html> [hereinafter White House].

bringing to justice Osama bin Laden and the al-Qaeda organization that committed the terrorist acts, the states also pledged to pursue the Taliban regime for harboring the terrorists in Afghanistan.⁷²

V. THE BUSH DOCTRINE—AN INSTANT CUSTOM

There is strong evidence that the Bush Doctrine, first proclaimed by the U.S. in response to the terrorist attacks of September 11, 2001, became an instant custom during the days and weeks following the attacks.⁷³ That is, the Bush Doctrine developed into a new customary international law once states began acting in accordance with the rule first articulated by Bush and then by the U.N. General Assembly and the Security Council.⁷⁴

As discussed, in order to prove that a new customary international law has formed, there must be both an articulation of the rule and an act consistent with the articulation.⁷⁵ Bush's Address to the Nation, and the subsequent U.N. General Assembly and Security Council resolutions, provided the requisite articulation of the Bush Doctrine.⁷⁶ The resolutions attest to the member states' willingness to conform to the Bush Doctrine.⁷⁷ Moreover, the fact that U.N. Security Council resolutions are legally binding provides further evidence that, in unanimously enacting the resolution, members of the Security Council intended to obligate themselves to pursue terrorists and those who harbor them, in conformity with the new Bush Doctrine.⁷⁸

Furthermore, there is abundant evidence that states both acted and committed themselves to act in accordance with the resolutions.⁷⁹ Indeed, by the end of September 2001, less than three weeks after the

⁷² See Secretary of State Colin L. Powell, Campaign Against Terrorism, Address Before the House International Relations Committee (October 24, 2001), at <http://www.state.gov/secretary/rm/2001/index.cfm?docid=557> [hereinafter Powell]. The U.S. provided "clear and compelling proof" that the individuals who carried out the terrorist attacks were part of the worldwide terrorist network of al-Qaeda, headed by Osama bin Laden and his key lieutenants and protected by the Taliban. Suzanne Daley, *NATO Says U.S. Has Proof Against Bin Laden Group*, N.Y. TIMES, Oct. 3, 2001, at A1. The Taliban regime conquered ninety percent of Afghanistan during the 1990s. *Nation Building in Afghanistan*, N.Y. TIMES, Sept. 27, 2001, at A20. Throughout its rule, the Taliban have allowed Osama bin Laden to hide out in Afghanistan. *Id.*

⁷³ See D'AMATO, *supra* note 2, at 88.

⁷⁴ See *id.*

⁷⁵ *Id.*

⁷⁶ See *id.*

⁷⁷ See Sohn, *supra* note 6, at 1079.

⁷⁸ See White House, *supra* note 71.

⁷⁹ See Powell, *supra* note 72.

passage of the U.N. General Assembly and Security Council resolutions, the U.S. already had obtained forty-six multilateral declarations of support from a long list of states, including: Great Britain, India, Pakistan, Russia, China, Japan, Australia, and South Korea.⁸⁰ According to U.S. Secretary of State Colin Powell, states came forward immediately, offering finances, intelligence, law enforcement, military support, and humanitarian aid.⁸¹

For example, Great Britain acted in conformity with the articulation of the Bush Doctrine by taking on a leading role in military operations against the Taliban.⁸² Likewise, Pakistan, historically an Afghan ally, stated its intention to “discharge its responsibilities under international law,” announcing a policy of full support in combating international terrorism.⁸³ As a result, Pakistan granted permission for U.S. and British bombers and cruise missiles to fly through its airspace.⁸⁴ Saudi Arabia acted in direct accordance with the Bush Doctrine by severing diplomatic ties with the Taliban regime, which had “ignored all Saudi attempts ‘to persuade it to stop harboring criminals and terrorists.’”⁸⁵ Similarly, the United Arab Emirates cut relations with the Taliban for continuing to harbor terrorists.⁸⁶ As another example, Liberia offered its airspace and airports in joining the global fight against terrorists and those who harbor them.⁸⁷ Though just a few of many, these examples are representative of the countless states that have acted and committed themselves to act in accordance with the Bush Doctrine.⁸⁸

Through their actions and statements, therefore, myriad states worldwide expressed immediate and fervent support for the Bush Doctrine, articulated first by President Bush on September 11, 2001,

⁸⁰ White House Website, News Releases for September 2001, at <http://www.whitehouse.gov/news/releases/2001/09/>.

⁸¹ Powell, *supra* note 72.

⁸² See D’AMATO, *supra* note 2, at 88; Blair is the “USA’s Best Secretary of State,” BBC WORLDWIDE MONITORING, Oct. 16, 2001, available at LEXIS, News Group File.

⁸³ Pakistan Says in Touch with Afghanistan, Not to Participate in Global Campaign, BBC WORLDWIDE MONITORING, Sept. 16, 2001, available at LEXIS, News Group File.

⁸⁴ Anxious Days in Pakistan, N.Y. TIMES, Oct. 9, 2001, at A24.

⁸⁵ Saudis Criticize the Taliban and Halt Diplomatic Ties, N.Y. TIMES, Sept. 26, 2001, at B5.

⁸⁶ Kingdom Cuts Ties with Taliban; Militia Harbors Terrorists Who Cause Harm to Islam and Tarnish the Names of Muslims, MIDDLE EAST NEWSFILE, Sept. 26, 2001, available at LEXIS, News Group File.

⁸⁷ Liberia Reportedly Endorses U.S. Military Strikes Against Afghanistan, BBC WORLDWIDE MONITORING, Oct. 9, 2001, available at LEXIS, News Group File.

⁸⁸ See Powell, *supra* note 72.

and again by the U.N. on September 12, 2001.⁸⁹ Therefore, it may be argued that the Bush Doctrine became instant custom during the days and weeks following the September 11, 2001 terrorist attacks on the U.S.⁹⁰

CONCLUSION

Instant custom, unlike traditional, slow-forming customary international law, is attuned to the rate of development in today's rapidly changing global society. The terrorist attacks of September 11, 2001, demonstrate why states must be able to act swiftly and in conformity with international law, especially in instances where their actions are sure to entail extraterritorial consequences. In a world that can be forever altered by sudden and unexpected developments such as technological advances or, in the present case, suicide airplane hijackings, states must be able to create new international laws that enable them to react and adapt to the changing reality. It is both dangerous and counterproductive for states' actions to be constrained by antiquated international laws, which, when formed, could not have contemplated all of the world's future needs and developments. The international community must heed this call to recognize and accept instant custom as a viable and necessary method of customary international law formation.

⁸⁹ *See id.*

⁹⁰ *See D'AMATO, supra note 2, at 86.*