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The Rise of Twiplomacy and the Making of Customary International Law on Social Media

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Abstract

Social media usage by States has increased exponentially in recent years. This phenomenon, known as "twiplomacy", has become ubiquitous. Given that almost every State in the world now issues statements via social media, this article examines the potential for Twitter posts to form part of the "raw material" for the formation of customary international law. In other words, it considers whether customary international law can be "made", or evidence of it identified, on social media. Public statements can, in the right contexts, act as State practice or as evidence of *opinio juris*, and a Twitter post from a State

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account ultimately is a public statement like any other. Based on an original scoping study, it is argued that there is evidence of statements being posted on Twitter that, were they issued in a more traditional context, would be seen as having the potential to constitute State practice or evidence of *opinio juris*. The study also suggests that such examples are not yet common, but it is predicted that they will become so. Therefore, this article goes on to examine a number of possible implications of twiplomacy for the identification of customary international law that must be considered, should social media indeed emerge as a notable breeding ground for new rules of custom. These implications include the blurring between the "personal" and the "official"; the brevity and (lack of) clarity and rigour of tweets; the significant increase in the amount of relevant data but also its comparative "centralisation" (with potentially positive as well as negative consequences); and concerns regarding authenticity. It ultimately is concluded that twiplomacy will not change the requirements for the formation of customary international law, but it is likely to have significant implications for how lawyers and researchers go about the practical process of identifying it.

I. Introduction

1. Social media[1] is now a key feature of international relations.[2] Recent years have seen an exponential increase[3] in the use of social media by States. Indeed, this phenomenon – which is often referred to by the portmanteau "twiplomacy"[4] – has now become ubiquitous.

1 For a discussion of different definitions of "social media", see Peter Coe, The Social Media Paradox: An Intersection with Freedom of Expression and the Criminal Law, 24 Information & Communication Technology L (2015), 16, 17.

2 See Part II.

3 Ibid.

4 See, e.g., Maja Šimunjak and Alessandro Caliandro, Twiplomacy in the Age of Donald Trump: Is the Diplomatic Code Changing?, 35 The Information Society (2019), 13. It should be noted that the term "twiplomacy" initially was used to refer to State level activity only on Twitter, but now is increasingly used as shorthand for all State level social media activity, across platforms. Other terms have also been used for the same phenomenon: see, e.g., Corneliu Bjola and Marcus Holmes (eds.), Digital Diplomacy: Theory and Practice (2015) ("digital diplomacy"); Jane O'Boyle, Twitter Diplomacy between India and the United States: Agenda-Building Analysis of Tweets during Presidential State Visits, 15 Global Media and Communication (2019), 121 ("twitter diplomacy"). From 2012-2018, the multinational public relations and communications firm Burson Cohn & Wolfe (BCW) produced a yearly study examining the twiplomacy phenomenon in practice. Since

2. The use of social media in global society[5] engages international law in a number of ways, including both substantive legal issues (such as, for example, the consequences of the proliferation of social media for the balancing of security interests with freedoms of speech and expression),[6] and wider sociological implications of social media usage for the international legal system and international law scholarship.[7] However, the now widespread use of social media specifically *by States* prompts a particular set of legal questions.[8] One such question is whether State level social media posts can contribute, directly and in themselves, to international law-making. For example, in an article published in 2018, Serendahl explored the possibility of whether a statement

2018, the study has been produced biennially. The Twiplomacy Study is based on an extremely detailed and multi-sourced dataset. For the most recent 2020 iteration, data was collected on 1 May and 1 June 2020, see Twiplomacy Study 2020, BCW (20 July 2020), https://twiplomacy.com/wp-content/uploads/2020/07/Twiplomacy-Study-2020.pdf, 41. The full dataset can be downloaded at ibid., 41.

5 See below para. 8.

6 See, e.g., Dominic McGoldrick, The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective, 13 Human Rights LR (2013), 125; Paulina Wu, Impossible to Regulate: Social Media, Terrorists, and the Role for the UN, 16 Chicago JIL (2015), 281; Kitsuron Sangsuvan, Balancing Freedom of Speech on the Internet under International Law, 39 The North Carolina JIL and Commercial Regulation (2014), 701; Cori E. Dauber, YouTube War: Fighting in a World of Cameras in Every Cell Phone and Photoshop on Every Computer (2009), 4.

7 See, e.g., Ralph Janik, Interpretive Community 2.0: How Blogs and Twitter Change International Law Scholarship, 81 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht (2021), 841; Shai Dothan, Social Networks and the Enforcement of International Law, in: Moshe Hirsch and Andrew Lang (eds.), Research Handbook on the Sociology of International Law (2018), 333; Sarah Joseph, Social Media and Promotion of International Law, 109 ASIL Proceedings (2015), 249.

8 It is now clear, for example, that a State can be legally responsible in international law for a tweet by an individual, where that tweet can be attributed to the State in the usual way under the law of State responsibility. See Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights, WTO, Report of the Panel, WT/DS567/R (16 June 2020) particularly para. 7.161 (finding that tweets by individuals that breached international law constituted "governmental tweets" by Saudi Arabia, for which it was legally responsible). See also Waseem Ahmad Qureshi, The Militarization of Social Media, 42 U of Hawaii LR (2019), 169; Francis Grimal, Twitter and the *Jus ad Bellum*: Threats of Force and Other Implications, 6 J Use of Force and IL (2019), 183.

made on social media could amount to a "unilateral declaration" that would bind the State that had issued it under international law.[9]

3. This article considers a different, and much wider-reaching, form of international law-making in the twiplomacy context, that is, the possibility of a social media post contributing directly to the creation, modification or reinforcement of binding customary international law, as evidence of State practice or *opinio juris*. Such a possibility has as yet received almost no consideration in scholarship,[10] although with a pleasing congruity it has been tentatively raised on a few occasions in posts on social media itself.[11]

4. Given that twiplomacy has become ubiquitous in a short space of time, there now exists the potential for social media to become a new breeding ground for customary international law. It would seem very possible that one may be able to identify public statements on social media that – were the same statements to have been issued via a more traditional means of State communication – would be seen as having the potential to constitute the practice of that State, or evidence of its practice or *opinio juris*.[12] This article

9 Erlend Serendahl, Unilateral Acts in the Age of Social Media, 5 Oslo LR (2018), 126. The International Court of Justice (ICJ) famously stated in 1974 that such a declaration by a State "if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding" on that State under international law. Nuclear Tests (Australia v. France), Judgment, ICJ Reports 1974, 253, para. 43; Nuclear Tests (New Zealand v. France), Judgment, ICJ Reports 1974, 457, para. 46. See also ILC, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto, UN Doc A/61/10, ILCYB, 2006, Vol. II, Part Two, 177. However, it is worth noting that the concept of the self-binding unilateral declaration in international law has not been entirely without controversy. See, as the classic critique, Alfred P. Rubin, The International Legal Effects of Unilateral Declarations, 71 AJIL (1977), 1.

10 A rare example where it *has* been considered is Grimal, above n.8, 191 (putting forward the possibility "that a tweet may evidence state practice or *opinio juris* [. . .]" and thus noting that "'official' tweets have at least the potential to effect customary international law development [. . .]", but then not exploring this line of enquiry further).

11 See, e.g., Eliav Lieblich (@eliavl) Twitter (21 June 2019), https://twitter.com/eliavl/status/1142065191607242753?s=20 ("I wonder whether Trump's tweet passes as opinio juris [. . .]"); Boubout Yassine (@bouboutyassine) Twitter (1 June 2017), https://twitter.com/bouboutyassine/status/870397495645540352?s=20 ("[. . .] Toekomstige Rechtstudenten gaan Tweets bestuderen. Statenpraktijk ? Usus opinio juris ?").

12 See generally Monica Hakimi, The Media as Participants in the International Legal Process, 16 Duke J of Comparative and IL (2006), 18 (noting that "in international

examines the possibility for the "raw material" of custom to emerge on Twitter in this way, and thus considers the implications of widespread State social media use for the lawyer or researcher attempting to identify customary international law standards.[13]

5. For reasons of focus, the possible contribution to customary international law-making of *State* social media activity only is considered herein: intergovernmental organisations (IGOs) are excluded from the scope of this article. However, IGOs, of course, also hold social media accounts[14] and are increasingly considered to be able to contribute directly to the formation of customary international law in some (albeit limited) circumstances.[15] It is therefore worth noting that the following analysis may also – again, in the right (comparatively limited) circumstances – be applicable to IGO social media usage.

6. Similarly, this article almost exclusively focuses on State activity on *Twitter*. This spotlighting of just one social media platform, amongst many, is – again – done to ensure focus, and to aid the consistency of analysis. Moreover, Twitter clearly has more "State level" accounts worldwide than any other social media site,[16] meaning that it is the platform with the highest amount of State activity. Notwithstanding the focus on Twitter, though, it is worth keeping in mind that much of the following analysis is likely also to be relevant to State (and in some circumstances perhaps IGO) usage of other social media platforms, such as Facebook[17] or Instagram.[18]

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law it [law-making] is largely accomplished through informal communications, such as public statements and actions, that result in the establishment of custom").

13 On the influence of the rise of global media generally on customary international law development, see ibid.; Achilles Skordas, Hegemonic Custom?, in: Michael Byers and Georg Nolte (eds.), United States Hegemony and the Foundations of International Law (2003), 317 (noting, at 324, that "[t]he global media bring about the emergence of societal *opinio juris*").

14 See, e.g., International Organisations on Social Media 2017, BCW (29 Nov. 2017), https://twiplomacy.com/blog/international-organisations-on-social-media-2017.

15 See, e.g., ILC, Conclusions on the Identification of Customary International Law, with Commentaries, UN Doc A/73/10 (2018), 119-56, conc. 4(2) and commentary, 130-31.

16 See, e.g., K.P. Abdullakkutty, Internationalizing Social Media: The Case of 'Twiplomacy' in India and Russia, 12 IUP J of International Relations (2018), 7, 18.

17 See, e.g., World Leaders on Facebook 2020, BCW (1 Mar. 2020), https://twiplomacy.com/wp-content/uploads/2020/04/World-Leaders-on-Facebook-Study-2020.pdf.

18 See, e.g., World Leaders on Instagram 2018, BCW (4 Dec. 2018), https://twiplomacy.com/blog/world-leaders-instagram-2018/.

7. This article proceeds as follows. Part II briefly highlights the rise of the twiplomacy phenomenon, giving an indication of the huge scale of State level social media (and particularly Twitter) usage. Part III then sets out the required elements that must be identified for customary international law to form: State practice and *opinio juris*. It is argued in Part IV that public statements by States can amount to either of these elements and that therefore a post on social media (which is merely a new means of making a public statement) has the potential to contribute directly to customary international law-making. It is then asked, in Part V, whose statements on social media may be relevant. In other words, whose acts can amount to practice of the State and who can express *opinio juris* on behalf of the State? Part VI then explores whether potential instances of State practice/*opinio juris* can be identified on Twitter at the current time, based on an original scoping study. Parts VII-X examine a number of possible implications of twiplomacy for the identification of customary international law: the blurring between the "personal" and the "official"; the brevity and (lack of) clarity and rigour of tweets; the significant increase in the amount of relevant data but also its comparative "centralisation" (with potentially positive as well as negative consequences); and concerns regarding authenticity. Finally, Part XI concludes.

II. The Rise of Twiplomacy

8. Social media has become a fundamental way in which people communicate globally.[19] As compared to usage in wider international society, world leaders and governments came rather late to the social media party.[20] However, there

19 See, e.g., New York v. Harris, 2012 NY Slip Op 22109 [36 Misc 3d 613] (Criminal Court of the City of New York, Sciarrino, Jr., J.), 2 n.3 ("[t]he reality of today's world is that social media, whether it be Twitter, Facebook, Pinterest, Google+ or any other site, is the way people communicate [. . .]"); Human Rights Committee, General Comment 34: Article 19: Freedoms of Opinion and Expression, UN Doc CCPR/C/GC/34 (12 Sept. 2011) para. 15 ("[s]tates [. . .] should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world."). See also Peter Coe, Redefining 'Media' Using a 'Media-as-a-Constitutional-Component' Concept: An Evaluation of the Need for the European Court of Human Rights to Alter its Understanding of 'Media' within a New Media Landscape, 37 Legal Studies (2017), 25, 32-36 (considering data on the proliferation of "new media" – including social media – in wider society).

20 Serendahl, above n.9, 137.

has been an astonishing increase in the use of social media as a means of State communication in recent years.

9. Looking solely at Twitter,[21] 98% of UN Member States now have an official presence on the platform, with only four UN members having no Twitter account.[22] This is in comparison to 77% of States in 2013.[23] Moreover, the majority of States now have more – in some instances *many* more – than one such account. As of 1 June 2020, there were 1,089 active Twitter accounts at what might be considered the "State level",[24] which is more than double the number that existed in 2013.[25] State level Twitter accounts now have a combined audience of more than 620 million followers.[26] Perhaps the most striking figure of all in terms illustrating the recent rise of twiplomacy, though, is that in the last 8 years there has been roughly a 900% increase in the number of tweets issued by State level Twitter accounts.[27]

10. This shift in State behaviour had already been occurring at notable pace before the start of 2020, but the coronavirus pandemic has further accelerated this rise in State level usage of social media.[28] That is perhaps unsurprising, given the significant limitations that the pandemic has placed on in-person diplomatic exchange, combined with the fact that conducting international relations through social media (and other remote forms of communication) is necessarily an exercise in "social[ly] distanc[ed] diplomacy".[29]

11. Overall, it is undeniable that twiplomacy has now become wholly ubiquitous. Moreover, this fast and substantial growth of State level social media use is inevitably influencing the very nature of diplomatic interaction.

21 Albeit noting that States also hold social media accounts on other platforms, see, e.g., above para. 6.

22 Twiplomacy Study 2020, above n.4, 2.

23 Twiplomacy Study 2013, Burson-Marsteller (23 June 2013), https://twiplomacy.com/blog/twiplomacy-study-2013/ (giving an exact figure of 77.7%).

24 Twiplomacy Study 2020, above n.4, 41. For more discussion on what may be considered to be an account at the "State level" in this context, see Parts V and VII.

25 Twiplomacy Study 2013, above n.23, (identifying 505 such accounts).

26 Twiplomacy Study 2020, above n.4, 2.

27 This figure is reached through a comparison of the Twiplomacy Study 2013, above n.23 (which identified 1,081,728 such tweets) and Twiplomacy Study 2020, above n.4, 2 (which identified 8.7 million such tweets).

28 See Michael Haman, The Use of Twitter by State Leaders and its Impact on the Public During the COVID-19 Pandemic, 6(11) Heliyon (2020), E05540.

29 Twiplomacy Study 2020, above n.4, 12.

A notable proportion of State communications are now transmitted directly to millions of individuals in a way that simply was not possible in the past. Social media communication necessarily occurs both vertically (i.e., communication from States to publics, their own and foreign – and, to a limited extent, vice versa),[30] and horizontally (i.e., between States).[31] As a result, there have been changes to the way that States tailor (some of) their communications, and thus to the character of those communications.[32] The question for this article is whether twiplomacy may also have implications for the way in which States make customary international law.

III. The Elements Required for Customary International Law Formation

12. Customary international law is, of course, one of the two most important sources of international law, along with treaties.[33] Rules of customary international law bind all States *prima facie*.[34] As such, if a post on social media can

30 Pablo Barberá and Thomas Zeitzoff, The New Public Address System: Why Do World Leaders Adopt Social Media?, 62 International Studies Q (2018), 121, 124.

31 Constance Duncombe, Twitter and Transformative Diplomacy: Social Media and Iran–US Relations, 93 International Affairs (2017), 545, particularly 547 and 551; Šimunjak and Caliandro, above n.4, 14.

32 See, e.g., Xin Zhonga and Jiayi Lu, Public Diplomacy meets Social Media: A Study of the U.S. Embassy's Blogs and Micro-Blogs, 39 Public Relations R (2013), 542 (noting that this more "public diplomacy" has led to more deliberately "personal" and informal communications, which are shorter and issued more rapidly).

33 See Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1055, 33 UNTS 93, art. 38; Hilary Charlesworth, Law-Making and Sources, in: James Crawford and Martti Koskenniemi (eds.), The Cambridge Companion to International Law (2012), 187, particularly 189-95; Andrew T. Guzman, Saving Customary International Law, 27 Michigan JIL (2005-2006), 115, 116.

34 See, e.g., North Sea Continental Shelf Cases (Federal Republic of Germany v. Netherlands, Federal Republic of Germany v. Denmark), Merits, ICJ Reports 1969, 3, para. 63; International Law Association (ILA) Committee on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Final Report of the Committee, London Conference (2000), www.ila-hq.org/en/committees/index.cfm/cid/30, section 1. The exceptions to the universal binding force of customary international law are: 1) "local" or "special" customary international law, where a custom emerges for a particular group of States (see, generally, Anthony D'Amato, The Concept of Special Custom in International Law, 63 AJIL (1969), 211; Right of Passage over Indian Territory (Portugal v. India), Merits, ICJ Reports 1960, 4, particularly 39); and 2) instances where a State has gained exemption to the

be seen as contributing to the formation or change of customary international law, then tweets have potential legal implications not just for "the tweeting State", but for all States.[35]

13. The "classic" approach[36] to the identification of customary international law requires that two elements must be present: State practice and *opinio juris sive necessitatis* ("*opinio juris*" for short).[37] This approach is not universally subscribed to, with some commentators questioning, respectively, the necessity of the State practice criterion[38] or of the *opinio juris* criterion.[39] Nonetheless, the two-element approach certainly represents the majority orthodoxy.[40] Two elements are needed because States observably "practice" all kinds of things without binding legal obligations resulting from them; something "else" is thus necessary to turn mere practice into legally constituting practice.[41] The Conclusions of the International Law Commission (ILC) on

customary rule through its prior persistent objection (see, generally, James A. Green, The Persistent Objector Rule in International Law (2016)).

35 Aside from any persistent objectors. See ibid.

36 Harmen van der Wilt, State Practice as Element of Customary International Law: A White Knight in International Criminal Law?, 20 International Criminal LR (2019), 784, 789-94.

37 See North Sea Continental Shelf Cases, above n.34, para. 77; Continental Shelf (Libyan Arab Jamahiriya/Malta), Merits, ICJ Reports 1985, 13, para. 27; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, ICJ Reports 1986, 14, para. 207; Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening), Merits, ICJ Reports 2012, 99, para. 55.

38 See, e.g., Brian D. Lepard, Customary International Law: A New Theory with Practical Applications (2010).

39 See, e.g., Maurice Mendelson, The Subjective Element in Customary International Law, 66 BYIL (1995), 177; Rein Müllerson, On the Nature and Scope of Customary International Law, 2 Austrian R of International and European L (1997), 341.

40 See Noah A. Bialos, The Identification of Customary International Law: Institutional and Methodological Pluralism in U.S. Courts, 21 Chicago JIL (2020), 1, 3 ("[a]lthough there is some disagreement around the margins, the jurisprudence of the International Court of Justice, as well as the consistent practice of numerous other international bodies, reflects international consensus on this two-element approach"); ILC, Second Report on Identification of Customary International Law, by Sir Michael Wood, Special Rapporteur, UN Doc A/CN.4/672, ILCYB, 2014, Vol. II, Part One, 163, paras. 21-27 (providing significant evidence of support for the two-element approach in State practice, case law and scholarship).

41 Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95 AJIL (2001), 757, 776; Michael P. Scharf,

the *Identification of Customary International Law*,[42] and, more importantly, the widespread acceptance of those Conclusions by *States*,[43] has strongly reaffirmed the two-element approach in recent years.[44]

14. The first necessary element – State practice – refers to the material factual behaviour of State actors: i.e., the "conduct of the State".[45] Although there can exist uncertainty in any given instance about the "sufficiency" of practice for the creation of a rule of custom (i.e., whether the practice is suitably consistent, widespread and has been occurring for long enough),[46] there is general agreement that anything a State "does" in the context of international relations potentially may qualify as State practice.[47] During the UN era there have admittedly been occasional suggestions in scholarship that mere "words" (i.e., verbal "acts") cannot amount to "State practice" for the purposes of customary international law formation, and thus that "deeds" are required.[48] However, the notion that only "physical" acts are relevant is not widely supported: the correct understanding is that "[v]erbal acts, and not only physical acts, of States count as State practice."[49]

Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments (2013) 47.

42 UN Doc A/73/10, above n.15, particularly conc. 2.

43 For example, the Conclusions were adopted as Draft Resolution III by the Sixth Committee, UN Doc A/73/556 (2018), and then – without debate or vote – by the General Assembly, UN Doc Res 73/203 (2018). See also UN Doc A/CN.4/672, above n.40, para. 21 ("[t]here was widespread support for this approach [. . .] in the Sixth Committee").

44 See Monica Hakimi, Making Sense of Customary International Law, 118 Michigan LR (2020), 1487, 1497 (while being sceptical of the traditional approach to custom, nonetheless noting that "[t]he ILC Conclusions are the most systematic and authoritative effort to date to articulate the secondary rules [regarding the identification of custom]").

45 UN Doc A/73/10, above n.15, conc. 5.

46 See, e.g., Hugh Thirlway, The Sources of International Law (2014) 63-66; Guzman, above n.33, 150-51.

47 See, e.g., UN Doc A/73/10, above n.15, conc. 6 (and commentary, 133-34); Michael Akehurst, Custom as a Source of International Law, 47 BYIL (1974-1975), 1, 10; Michael Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law (1999) 19.

48 See, e.g., Anthony D'Amato, The Concept of Custom in International Law (1971) 87-98; W. Hays Parks, The ICRC Customary Law Study: A Preliminary Assessment, 99 ASIL Proceedings (2005), 208, 210.

49 ILA Final Report, above n.34, 14. See also UN Doc A/73/10, above n.15, conc. 6. For more discussion of public statements as State practice, see Part IV.

15. *Opinio juris* is a more elusive and uncertain criterion than is the requirement of State practice.[50] The most common account of *opinio juris*, though, is that it represents the subjective, psychological State belief that the practice in question is "law".[51] In other words, in addition to *doing* something (State practice), it is said that States must also believe that they are doing that "thing" because a legal obligation requires them to, or a legal right allows them to. This conception easily can be (and exhaustingly has been) unpicked, however. It is, for example, paradoxical, in that it asserts that belief in a rule's binding legal force is what creates its binding legal force.[52] That paradox can be explained away on the basis of mistaken belief, but not credibly: a process of law-making based on the shared delusions of States is neither desirable nor an accurate representation of what occurs in practice.[53] The traditional

50 Jörg Kammerhofer, Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems, 15 EJIL (2004), 523, 532 (*opinio juris* "is the most disputed, least comprehended component of the workings of customary international law"); Byers, above n.47, 18; Yudan Tan, The Identification of Customary Rules in International Criminal Law, 34 Utrecht J of International and European L (2018), 92, 98; Pemmaraju Sreenivasa Rao, The Identification of Customary International Law: A Process that Defies Prescription, 57 Indian JIL (2017), 230.

51 This traditional position is taken by major textbooks on public international law, e.g., Malcolm N. Shaw, International Law (9th edn, 2021), 70-75, by the ICJ, e.g., North Sea Continental Shelf Cases, above n.34, 44, and by the Permanent Court of International Justice, e.g., The Case of the S.S. Lotus, Merits, PCIJ Reports 1927, Series A, Part 2, No. 10, 3, particularly 28.

52 See David Lefkowitz, (Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach, 21 Canadian J of L & Jurisprudence (2008), 129; László Blutman, Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail, 25 EJIL (2014), 529, 536; Byers, above n.47, 130-33; Hillary C.M. Charlesworth, Customary International Law and the *Nicaragua* Case, 11 Australian YIL (1984-1987), 1, 9-10; D'Amato, above n.48, 66-72; Akehurst, above n.47, 32.

53 Patrick Dumberry, The Formation and Identification of Rules of Customary International Law in International Investment Law (2018) 303-04; Christian Dahlman, The Function of *Opinio Juris* in Customary International Law, 81 Nordic JIL (2012), 327, 332; Byers, above n.47, 131. It also has been suggested that reference to the term "accepted as law" in the Statute of the ICJ, above n.33, art. 38 can go some way towards solving the paradox, on the basis that this can be interpreted as either acceptance that there is a rule or acceptance that there will be one. See, e.g., UN Doc A/CN.4/672, above n.40, para. 68 ("[u]se of this term ["accepted as law"] from the [ICJ's] Statute goes a large way towards overcoming the *opinio juris* 'paradox'"). However, the present author is not entirely convinced by this argument, as it seems an exercise in dubious linguistic gymnastics to interpret "accepted *as law*" as including "accepted as *going to become* (or *might become*) law".

account of *opinio juris* is also based on the obvious fiction that huge abstract entities (States) can "believe" anything at all.[54]

16. The present author, for his part, takes the view that alongside practice, customary international law formation also is predicated on the attainment of a level of social acceptance, within the community of States, as to the legal implications of that practice. This social acceptance emerges, and can be identified, through a process of State claim and response.[55] States advance "claims" or "articulations" as to what the law is (with this – in the initial stages of the custom's gestation, at least – usually being a veiled assertion of what they *would like* the law to be). These claims, cumulatively and coupled with the responses of other States to them (if positive), can establish a level of "social acceptance" sufficient for the emergence of binding rules of customary international law.[56] "*Opinio juris*" is the term ascribed by international lawyers to these instances of claim and response – what can also be termed "articulation[s] of legality"[57] – or, sometimes, "*opinio juris*" is applied in a "collective" sense to mean the cumulative claims and responses sufficient to achieve the general social acceptance that a binding custom has formed.[58]

54 See Maurice Mendelson, Formation of Customary International Law, 272 Recueil des cours (1998), 155, 269-70; Michel Virally, The Sources of International Law, in: Max Sørensen (ed.), Manual of Public International Law (1968), 116, 133-35.

55 This conceptualisation of *opinio juris* is certainly not new. It was perhaps most famously expounded by McDougal and others from the New Haven School, see, e.g., Myers S. McDougal *et al.*, Studies in World Public Order (2nd edn, 1987) 14; Myers S. McDougal, Editorial Comments: The Hydrogen Bomb Test and the International Law of the Sea, 49 AJIL (1955), 356, 357 (discussing the process specifically in relation to the customary international law of the sea). See also Maurice Mendelson, Practice, Propaganda and Principle in International Law, 42 Current Legal Problems (1989), 1, 6-8; Akehurst, above n.47, 36-37, 53 (particularly in relation to the "response" aspect); Nicaragua, Merits, above n.37, para. 207 ("[t]he significance for the Court of cases of State conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the *ground offered as justification*" (emphasis added)).

56 See Byers, above n.47 (advancing a view of *opinio juris* as a "diffuse consensus" or a shared understanding of legal relevance); Gerald J. Postema, Custom in International Law: A Normative Practice Account, in: Amanda Perreau-Saussine and James Bernard Murphy (eds.), The Nature of Customary Law: Legal, Historical and Philosophical Perspectives (2007), 279, 292 ("[c]ustomary norms are established and mature in a community not by repetition [at least, not *necessarily* by repetition], but by *integration*", emphasis added).

57 To borrow a term used by Roberts, above n.41, 776 and 788.

58 See, e.g., Stephen C. Neff, Consent, in: Jean d'Aspremont and Sahib Singh (eds.), Concepts for International Law: Contributions to Disciplinary Thought (2019), 127, 135.

17. While there remains uncertainty as to the nature of the two required elements (especially *opinio juris*), we perhaps can take some solace in the fact that States themselves acknowledge and utilise customary international law, largely unperturbed by the academic handwringing that accompanies it.[59] In any event, beyond its likely futility, any attempt to resolve decades (if not centuries)[60] of theoretical and practical uncertainty surrounding the process of customary international law formation goes beyond this article's scope. It suffices here to have noted the orthodox two-element approach and to have briefly set out how those elements are understood for the purposes of this piece. The key question is whether a tweet could amount to an instance of/evidence of State practice or to evidence of *opinio juris*.

IV. Public Statements as both State Practice and *Opinio Juris*

18. Although there is no definitive account of what form State practice must take, nor of what can, or cannot, qualify as evidence of *opinio juris*, the non-prescriptive approach taken by the ILC in its Conclusions on the *Identification of Customary International Law*[61] represents the majority view. The Commission concluded that both State practice and evidence of *opinio juris* "may take a wide range of forms."[62] Importantly for the purposes of this article, the ILC's (non-exhaustive) list of examples of possible forms of State practice includes a number of acts that, as the commentary makes clear, amount to "official statements on the international plane".[63] Likewise, in relation to evidence of *opinio juris*, the Commission included amongst its (again,

59 ILA Final Report, above n.34, 30 ("[. . .] in the real world of diplomacy the matter [of what amounts to *opinio juris*] may be less problematic than in the groves of Academe"); Omri Sender and Michael Wood, A Mystery No Longer? *Opinio Juris* and Other Theoretical Controversies Associated with Customary International Law, 50 Israel LR (2017), 299 ("the academic torment that accompanied this source of law in the books has not impeded it in action"). See also Marie Aronsson-Storrier, Publicity in International Law-Making: Covert Operations and the Use of Force (2020), particularly 37-55 (advocating an approach that focuses on the normative content of State actions (physical or verbal) over an unnecessary prioritisation in the debate of defining (and establishing the relationship between) the elements of State practice and *opinio juris*).

60 See Emily Kadens, Custom's Past, in: Curtis A. Bradley (ed.), Custom's Future: International Law in a Changing World (2016), 11.

61 UN Doc A/73/10, above n.15.

62 Ibid., concs. 6(1) and 10(1).

63 Ibid., 134 (commentary to conc. 6).

non-exhaustive) list of examples "public statements made on behalf of States".[64]

19. The ILC's position in this regard is relatively uncontroversial. As was noted in Part III, it is widely agreed that State practice need not be limited to physical acts but can also include verbal acts. This, of course, includes public statements.[65] To add nuance to this, it is worth noting that a distinction can be drawn between statements acting as *evidence* of State practice (which may help to establish the occurrence of legally relevant conduct, but does not in itself constitute that conduct: for example, "we have sent our troops to X location") and statements as State practice *recte nominatur* (where the statement itself constitutes the legally relevant conduct: for example, an instance of diplomatic protest).[66] It is perhaps more common for a statement to constitute the former rather than the latter, given that much State conduct still constitutes physical acts.[67] In any event, ultimately both statements as evidence of practice and statements constituting practice in themselves contribute to the *identification* of customary international law, even if only the latter contributes (directly) to its creation. To an extent, therefore, drawing a distinction between the two may be somewhat artificial.[68]

20. Of more importance is the fact that care must be taken when assessing whether any given statement can be viewed as State practice/evidence of State practice.[69] For example, it has often been asserted that, while statements

64 Ibid., conc. 10(2).

65 Guzman, above n.33, 152 ("the most common view would include virtually any utterance by the state or its representatives as evidence of state practice"). See also, e.g., Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America), Judgment, ICJ Reports 1952, 176, 200 (the ICJ referring to statements appearing in diplomatic correspondence to evaluate a claim of State practice); Patrick Dumberry, Statements as Evidence of State Practice for Custom Creation in International Investment Law, 10 World Arbitration and Mediation R (2016), 1, particularly 1-8; Mendelson, above n.54, 204-07; Akehurst, above n.47, 1-8.

66 State of Israel, ILC Draft Conclusions on Identification of Customary International Law – Israel's Comments and Observations (18 Jan. 2018), https://legal.un.org/ilc/sessions/70/pdfs/english/icil_israel.pdf, 14.

67 Ibid.

68 See UN Doc A/CN.4/672, above n.40, para. 38.

69 Sienho Yee, Report on the ILC Project on 'Identification of Customary International Law' (Report by the Special Rapporteur of the Asian-African Legal Consultative Organisation (AALCO) Informal Expert Group on Customary International Law), 14 Chinese JIL (2015), 375, para. 39 ("caution should be

amounting to (or evidencing) specific State conduct evidently can be relevant to the identification of customary international law, statements made entirely in the *abstract* either cannot amount to State practice at all, or – in a softer version of the claim – should be considered to be practice of lesser "weight".[70] Others have disputed this characterisation on the basis that statements made in the abstract are nonetheless "conduct of the State".[71] What is clear, at least, is that statements can give rise to more uncertainty in the identification of customary international law than is the case for traditional "physical" State practice. Equally, it is unquestionably the case that statements can amount to State practice (or evidence it) in the right circumstances.

21. There is also significant support for the idea that public statements are one way in which States can express their *opinio juris*.[72] Indeed, *opinio juris* – a process of legal claim and response that establishes social acceptance[73] – almost necessarily involves some form of "articulation",[74] meaning that statements (if sufficiently unequivocal) are an especially clear, and thus valuable, way of evidencing it.[75] It is also worth noting that, contrary to the debate regarding practice, *opinio juris* can be expressed in the abstract.[76] For these

exercised in according value to verbal acts, although it would be inappropriate to exclude them completely").

70 See ibid., paras. 39-40; ILC, Summary Record of the 3225th mtg. (17 July 2014), ILCYB, 2014, Vol. I, 121 (Mr. Hassouna), paras. 64-67; Sienho Yee, The News That *Opinio Juris* "Is Not a Necessary Element of Customary [International] Law" Is Greatly Exaggerated, 43 German YIL (2000), 227, 235; Israel's Comments and Observations, above n.66, 14.

71 See UN Doc A/CN.4/672, above n.40, para. 37; Tim Hillier, Sourcebook on Public International Law (1998), 70-72.

72 See, e.g., Prosecutor v. Stanislav Galić, Judgment and Opinion, IT-98-29-T, ICTY, T Ch I (5 Dec. 2003) para. 50 n.103 (where the International Criminal Tribunal for the Former Yugoslavia explicitly cited speeches made in the House of Commons by the British Prime Minister as evidence of *opinio juris*); Lepard, above n.38, 172; Roozbeh (Rudy) B. Baker, Customary International Law: A Reconceptualization, 41 Brooklyn JIL (2016), 439, 444; Michael N. Schmitt and Sean Watts, The Decline of International Humanitarian Law *Opinio Juris* and the Law of Cyber Warfare, 50 Texas ILJ (2015), 189, 209.

73 See above para. 16.

74 Roberts, above n.41, 776 and 788 (referring to *opinio juris* as the "articulation of legality").

75 UN Doc A/73/10, above n.15, 141 (commentary to conc. 10).

76 This is well-evidenced, for example, by the widespread use of military manuals to establish the social acceptance of, and thus to inform the identification of, customary rules of the *jus in bello*. See Jean-Marie Henckaerts, Customary International Humanitarian Law: Taking Stock of the ICRC Study, 78 Nordic JIL (2010), 435,

reasons, a statement is perhaps more likely to constitute evidence of *opinio juris*, rather than an instance of (or evidence of) State practice.[77]

22. All of this means that – while there is a need for nuance in assessing them – public statements ultimately can qualify both as State practice and *opinio juris*.[78] This conclusion may give rise to fears of "double counting", i.e., using the same statement as evidence of both State practice and *opinio juris*. Such an approach is sometimes said to be entirely unacceptable, because if practice and *opinio juris* are exactly the same thing, then there is nothing to distinguish customary international law from other non-legal factors that influence State conduct.[79] This perhaps goes too far.

23. In the view of this author it is certainly preferable to assess different pieces of evidence for each of the two elements, to avoid conflating the assessment of 1) State practice and 2) *opinio juris*.[80] However, it is ultimately these two *assessments* that must be separated, not necessarily the evidence used in making them: it is not conceptually impossible that the same piece of evidence can demonstrate both State practice and *opinio juris*, so long as the *evaluation* of that evidence involves two separate inquiries.[81] Thus a statement can, in

448; Robert Heinsch, Methodology of Law-Making: Customary International Law and New Military Technologies, in: Dan Saxon (ed.), International Humanitarian Law and the Changing Technology of War (2013), 17, 27-30. *Contra* Israel's Comments and Observations, above n.66, 2-3.

77 UN Doc A/73/10, above n.15, 141 (commentary to conc. 10) ("statements are more likely to embody the legal conviction of the State, and may often be more usefully regarded as expressions of acceptance as law (or otherwise) rather than instances of practice").

78 Memorandum by the Secretariat, Identification of Customary International Law, Ways and Means for Making the Evidence of Customary International Law More Readily Available, UN Doc A/CN.4/710/Rev.1 (14 Feb. 2019) para. 41 ("[p]ublic statements made on behalf of States may constitute evidence of State practice and acceptance as law (*opinio juris*)").

79 See Hugh Thirlway, Human Rights in Customary Law: An Attempt to Define Some of the Issues, 28 Leiden JIL (2015), 495–506, 504 ("clearly the same statement, or group of statements, cannot play both roles"); Gennady M. Danilenko, Law-Making in the International Community (1993), 81-82; Byers, above n.47, 136-42; Mendelson, above n.54, 206-07.

80 See, e.g., ILC, Third Report on Identification of Customary International Law, by Sir Michael Wood, Special Rapporteur, UN Doc A/CN.4/682, ILCYB, 2015, Vol. II, Part One, 93, para. 15 ("[w]hen seeking to identify the existence of a rule of customary international law, evidence of the relevant practice *should* therefore *generally* not serve as evidence of *opinio juris* as well", emphasis added).

81 Noora Arajarvi, The Requisite Rigour in the Identification of Customary International Law: A Look at the Reports of the Special Rapporteur of the

the right circumstances, act as either State practice or evidence of *opinio juris*. It can also act as *both*. However, it is important to note that for it to qualify as evidence of either State practice or *opinio juris* the statement must be *public*, or at least must be communicated effectively to other States.[82]

24. Overall, then, the pool of possible evidence that can demonstrate the raw material of customary international law is broad, and the features required of that evidence are general and flexible. It is argued, moreover, that they are sufficiently general and flexible to extend to new media, including social media. While social media has unique features, there seems to be nothing *so* unique about it that would preclude it from being a means of issuing a public statement like any other. A statement, say, read by a Head of Government at a lectern, in a public setting, can in the right circumstances constitute an instance of State practice and/or evidence of *opinio juris*. And it is difficult to see a statement by a Head of Government made on Twitter as being, qualitatively at least, any different. Indeed, a statement on social media has, of course, been made about as "publicly" as it can get: if anything, strengthening its credentials as a potential contributor to customary international law formation. Ultimately, "[s]ocial media is just another form of communication".[83]

International Law Commission, 19 International Community LR (2017), 9, 35 ("[a]s long as practice (be it physical or verbal) on one hand and *opinio juris* (be it evidenced in the same or different materials as the practice) on the other, are separately assessed, resulting in a finding that both elements are present, one may reach the conclusion that a rule of CIL has materialised"); Müllerson, above n.39, 344 n.11; UN Doc A/73/10, above n.15, 141 (commentary to conc. 10).

82 In relation to the publicity requirement for statements acting as State practice (or evidence of State practice), see, e.g., Yoram Dinstein, The Interaction Between Customary International Law and Treaties, 322 Recueil des cours (2006), 243, 275; UN Doc A/73/10, above n.15, 133 (commentary to conc. 5); ILA Final Report, above n.34, 15. In relation to the publicity requirement for statements acting as evidence of *opinio juris*, see, e.g., UN Doc A/73/10, above n.15, conc. 10 (listing "*public* statements made on behalf of States" as a possible form of evidence of *opinio juris*, emphasis added) and 141 (commentary to conc. 10) ("an *express public statement* on behalf of a State that a given practice is permitted, prohibited or mandated under customary international law provides the clearest indication that the State has avoided or undertaken such practice (or recognized that it was rightfully undertaken or avoided by others) out of a sense of legal right or obligation", emphasis added); Schmitt and Watts, above n.72 (at 209, explicitly referring to "*public* statements of legal intent" as evidence of *opinio juris*, emphasis added, and then at 216 noting that a leaked document is "hardly an exemplar of reliable *opinio juris*").

83 Stephen Maloney, Alan Moss and Dragan Ilic, Social Media in Health Professional Education: A Student Perspective on User Levels and Prospective Applications, 19 Advances in Health Sciences Education (2014), 687, 692.

V. Whose Statements?

25. If tweets do indeed have customary international law-making potential, one might ask whose tweets might be able to contribute to the formation of custom. For a public statement to qualify as either State practice or *opinio juris* it must be expressed by a State.[84] This means that only tweets from "State" Twitter accounts have potential law-making relevance.[85] A key issue is therefore whose statements can amount to the practice of a State, or act as evidence of its *opinio juris*. There has been relatively little explicit consideration in scholarship of these questions, despite the practical importance of being able to determine which individuals/organs within a State are (or are not) so empowered.[86]

26. It occasionally has been argued that only those who can bind a State to a treaty or via a unilateral declaration can engage in State practice or express *opinio juris* on behalf of the State.[87] The logic here seemingly is based on an analogy between methods of law creation rooted in a voluntarist understanding of customary international law.[88] However, certainly when it comes to State practice, it is evident that the short list of those who are considered able to provide the consent of the State to be bound by a treaty absent the need for full powers[89] or bind the State via a unilateral declaration without specific authorisation[90] – i.e., Heads of State, Heads of Government and Ministers for Foreign Affairs – is notably under-inclusive.[91] Relevant practice can stem from the exercise of any of the functions of the State, not merely the executive.[92] It has therefore been argued that any act that can be *attributed* to the

84 UN Doc A/73/10, above n.15, particularly 132 and 141.

85 "State" Twitter accounts should be taken to include the "personal" accounts of relevant officials, if acting in an official capacity through those accounts. For discussion, see Part VII. Note also that tweets from IGO accounts could potentially contribute to customary international law-making in certain limited circumstances, although further discussion of this is beyond the scope of this article. See above para. 5.

86 See Jean d'Aspremont, The Discourse on Customary International Law (2021),59-60 (alluding to this practical importance).

87 See, e.g., Karl Strupp, Les règles générales du droit de la paix, 47 Recueil des cours (1934), 258, 313-16.

88 Mendelson, above n.54, 199 (making this point).

89 Vienna Convention on the Law of Treaties (VCLT) (1969), 1155 UNTS 331, art. 7(2)(a).

90 UN Doc A/61/10, above n.9, principle 4.

91 Mendelson, above n.54, 198-203.

92 UN Doc A/73/10, above n.15, conc. 5 and commentary, 132.

State under the law of State responsibility also can be considered to constitute an instance of its practice for the purposes of the identification of customary international law.[93]

27. Admittedly, an analogy to the law of State responsibility is imperfect in this context, as it seems unlikely that there is an exact correlation. For example, in 2014, concern was expressed by some members of the ILC about including references to attribution in the (then draft) Conclusions on the *Identification of Customary International Law* on the basis that certain acts of non-State actors – while in some circumstances clearly being attributable under the law of State responsibility[94] – may not be appropriately considered to be "practice" in the customary international law-making context.[95] Ultimately, references to the practice being "attributable" to the State thus were dropped from the ILC's work.[96] However, while a direct analogy to State responsibility must be treated with some care, it nonetheless can be said more broadly that any organ or official who represents the State and is acting in their official capacity can engage in State practice.[97]

28. The picture is perhaps less clear when it comes to who can express *opinio juris*. It has been argued, in a similar vein to State practice, that the list of those who can express *opinio juris* is not limited to the likes of Heads of State, Heads of Government or Foreign Ministers, meaning that a wider pool of actors can be presumed to be able to express *opinio juris* than can be presumed

93 UN Doc A/CN.4/672, above n.40, para. 34.

94 See, e.g., ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10, ILCYB, 2001, Vol. II, Part Two, art. 8.

95 See ILC, Identification of Customary International Law, Statement of the Chairman of the Drafting Committee, Mr. Gilberto Saboia (7 Aug. 2014), https://legal.un.org/ilc/sessions/66/pdfs/english/dc_chairman_statement_identification_of_custom.pdf, 10-11. Similarly, there is debate as to whether the acts of federal states or other such local authorities, can amount to State practice in the context of customary international law formation. *Compare* UN Doc A/CN.4/672, above n.40, para. 34 with ILA Final Report, above n.34, 16-17. Again, this is the case even though it is clear that the acts of such entities can give rise to State responsibility (UN Doc A/56/10, above n.94, art. 4(1)).

96 See ILC, Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session, prepared by the Secretariat, Report of the International Law Commission on the work of its sixty-sixth session, UN Doc (15 Jan. 2015), Identification of Customary International Law, 15, para. 55; ILC, Fifth Report on Identification of Customary International Law, by Sir Michael Wood, Special Rapporteur, UN Doc A/CN.4/717, (14 Mar. 2018), para. 51.

97 Sender and Wood, above n.59, 304 ("[i]t is no longer seriously contested [. . .] that relevant practice may emanate from any organ of the state [. . .]").

to be able to consent to bind the State to a treaty or under a unilateral declaration.[98] Indeed, this must be the case, given that, for example, it is well-established that the decisions of domestic courts can constitute evidence of *opinio juris*.[99]

29. More specifically, it has been suggested[100] that statements by any "organ" of the State under the law of State responsibility[101] can act as evidence of *opinio juris*. This would, as is sometimes said to be the case with State practice, mean the expression of *opinio juris* in linked to the question of attribution. It is, however, not clear whether this understanding is correct. While it is not entirely free from difficulty, the broad idea that actions that can be attributed to a State can constitute instances of its practice makes a good deal of sense, because the very purpose of attribution is to establish that a given behaviour is indeed an "act of the State". In contrast, the character of *opinio juris* as the embodiment of States' *legal position* is arguably at least closer – albeit not analogous – to the provision of consent to bind the State to a treaty or under a unilateral declaration than can be said of merely engaging in conduct.[102]

30. Ultimately, whether a particular State agent can express *opinio juris* is likely to be context specific, dependant on the circumstances, as well as on the character both of the legal assertion and the actor doing the asserting.[103] It is therefore difficult to know, in any specific instance, whether a public statement by a State official does or does not have "*opinio juris* potential". Of course, it can be said with confidence that an agent who is empowered, merely by virtue of their office, to bind the State to a treaty also can express its *opinio*

98 Lazare Kopelmanas, Custom as a Means of the Creation of International Law, 18 BYIL (1937), 127, in general, but particularly 131-32.

99 International case law makes it clear that domestic decisions can evidence *opinio juris*. See, e.g., Lotus (France v Turkey), PCIJ Reports, Ser. A, No. 9, 1927, paras. 60, 66, 75-81; Jurisdictional Immunities, above n.37, para. 7. See also UN Doc A/73/10, above n.15, 141 (commentary to conc. 10).

100 See, e.g., Lepard, above n.38, 171-90.

101 See, e.g., UN Doc A/56/10, above n.94, art. 4.

102 See, e.g., Israel's Comments and Observations, above n.66, 8 (arguing in this context that "statements of State's representatives should be attributed to the State only if they were *properly authorized* and made in an official capacity", emphasis added).

103 See generally, Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, ICJ Reports 2006, 6, paras. 47-49.

juris. Fairly clearly, Head of States, Heads of Government or Foreign Ministers can express *opinio juris*,[104] and the same can be said for the decisions of domestic courts.[105] However, it is very possible that, as with State practice, a much wider group of State agents also may be able to do so, in the right context, although this cannot be said with confidence. As such, while statements by any agent of the State can potentially constitute the practice of that State, some care must be taken as to whose statements are viewed as evidence of *opinio juris*.

VI. Searching for the Raw Material of Custom on Twitter

31. To the knowledge of this author, no State has explicitly relied on or referenced a tweet as State practice or as evidence of its own (or another State's) *opinio juris*. However, more oblique references to tweets issued from State level accounts have begun to appear in official "digests of State practice" that have been compiled by the State concerned[106] or compiled with the direct input of the State concerned.[107] This suggests a growing acceptance on the part of States that tweets that they have issued can amount to instances of their "practice". Equally, such examples remain relatively rare, and they still are only implicit support, from a small number of States, for the idea that tweets can contribute to the creation of customary international law.

32. Yet, there are other indications that States and their representatives are alive to the possibility of social media posts contributing to customary international law. For example, one might note the recent "edited conversation" between Harvard Professor Naz Khatoon Modirzadeh and the Legal and Sanctions Coordinator of Mexico to the UN, Pablo Arrocha Olabuenaga, concerning the February 2021 "Arria-formula" meeting of the UN Security

104 Having said this, things are complicated further in the social media context by the increased use of "personal" accounts by high-ranking officials. See Part VII.

105 See above para. 28.

106 See, e.g., Digest of United States Practice in International Law 2018, CarrieLyn D. Guymon (ed.), Office of the Legal Adviser, United States Department of State, https://2017-2021.state.gov/digest-of-united-states-practice-in-international-law-2018/index.html, 32, 277, 361.

107 See, e.g., Survey of Israeli Practice Relating to the COVID-19 Pandemic, in Light of International Law, Yaël Ronen (ed.), International Law Forum of the Faculty of Law of the Hebrew University of Jerusalem with the support of Israel Ministry of Justice and Israel Ministry of Foreign Affairs (27 June 2021) https://en.law.huji.ac.il/sites/default/files/lawen/files/corona_digest_210628.pdf, 22.

Council.[108] During that conversation, Arrocha noted, almost as if it were self-evident, that to identify *opinio juris* "[*n*]*ormally*, people [legal advisors, practitioners and academics] look for public statements *or tweets that are issued by a government*."[109] This shows that some States are already looking at social media as a place to find the raw material of custom. Indeed, the representative of at least one State – Mexico – apparently sees this as an entirely unremarkable practice.[110]

33. The above would suggest that it might well be possible, amongst the vast number of communications now being issued from State level social media accounts,[111] to identify statements that – were they issued in a more traditional way – would be considered to have the potential to be part of the raw material for customary law-making in future. Is custom already being "made" on Twitter?

34. With the aim of testing this possibility, an original scoping study was undertaken, predominantly conducted by this author's research assistant, Konstantina Nouka.[112] To be clear, this study was not undertaken with the aim of finding sufficient State practice and *opinio juris* to be able to identify a new secondary rule[113] of custom to the effect that the elements required for the formation of customary international law can be found on social media. It is not necessary to establish such a new legal rule permitting custom to emerge on social media, because, as was argued in Part IV, practice and evidence of

108 A Conversation between Pablo Arrocha Olabuenaga and Naz Khatoon Modirzadeh on the Origins, Objectives, and Context of the 24 February 2021 'Arria-formula' Meeting Convened by Mexico, 8 J Use of Force and IL (2021), 291.

109 Ibid., 297 (emphasis added). In the context of the conversation, Arrocha was referring specifically to *opinio juris* regarding the law governing use of force, but his point is transferable to *opinio juris* generally.

110 *Contra* Ashley Deeks, High-Tech International Law, 88 George Washington LR (2020), 574, 576 ("[i]nternational lawyers who work for governments do not use these technologies [including social media] today" to assist in the identification or application of international law).

111 See Part II.

112 See Konstantina Nouka, Twiplomacy Project: Study Examining Possible Instances of State Practice/*Opinio Juris* on Twitter (2020) (unpublished background paper, on file with author); Twiplomacy and Customary International Law Project, Original Dataset 1 – Accounts Surveyed (on file with author); Twiplomacy and Customary International Law Project, Original Dataset 2 – Tweets Identified (on file with author).

113 To use Hart's famous term. See H.L.A Hart, The Concept of Law (2nd edn, 1994), particularly 79-99. In the international law context, see Jonathan I. Charney, Universal International Law, 87 AJIL (1993), 529, 533-34.

opinio juris already can take many forms, which can extend to new media. Moreover, the study was not undertaken with the aim of finding sufficient State practice and *opinio juris* to be able to identify any new customary rule *at all*, nor was it intended in any sense to be "comprehensive" with regard to identifying potential instances of State practice or *opinio juris* on Twitter (if such a thing were even possible). Instead, the intention of the study was merely, and modestly, to explore whether it is possible to find any examples of statements on social media that had the *potential* to constitute the raw material of custom.

35. The study was confined to examining posts issued from State level accounts[114] on Twitter. It involved the review of 182 Twitter accounts, representing 47 different States.[115] These accounts were selected for the study with the aim of gaining a diverse and representative picture of the activity of States on Twitter. Thus, the selection criteria included global regional distribution (for example, States were selected from every continent and major sub-region).[116] Similarly, States were selected to ensure a range of political, social, economic, and religious diversity.[117] The number of followers that the accounts had was also a factor employed as part of the process of selection, with the aim to ensure that a spectrum of accounts were included (i.e., from those with large numbers of followers through to accounts with relatively few).[118] Finally, a representative mix of both "official" and "personal" accounts was ensured.[119]

36. The overall pool of data being reviewed was ultimately close to 2.5 million tweets, issued across the 182 accounts surveyed.[120] 100 individual search

114 The uncertainty identified in Part V as to whose actions can count as State practice and, particularly, whose statements can evidence *opinio juris* meant that a narrow and cautious approach was taken to the understanding of a "State level account" for the purposes of the scoping study. A "State level account" was thus determined on the basis that it was either an institutional account of a Head of State, Head of Government or Foreign Minister, or was an institutional account of an organ or ministry of the State having a similar function. In addition, "personal" accounts of Heads of State, Heads of Governments and Minsters of Foreign Affairs were also included. For more on the "personal" Twitter accounts of such officials, see Part VII.

115 Original Dataset 1, above n.112.

116 Nouka, above n.112, 3.

117 Ibid.

118 Ibid.

119 Ibid. For more on the distinction between "official" and "personal" accounts, see Part VII.

120 The exact total number of tweets issued by the accounts surveyed, as of 20 July 2020, was 2,417,410. This figure was reached through collating the issued tweets

terms were then applied to the tweets of the selected accounts. A list of the search terms used can be found in *Annex 1*.[121] The chosen search terms included both terms associated with international law or international legal process in general, as well as common terms related to six substantive areas of international law (international investment law, international environmental law, law of the sea, law on the use of force, international humanitarian law, international criminal law).[122] In addition, all of the used search terms were, in each instance, translated into all of the official languages of the State concerned[123] and applied to the Twitter accounts of that State in each of those languages.[124]

37. The tweets identified by these search terms were then assessed to see if they in fact had any potential value in terms of contributing to customary international law standards. This involved a qualitative, analytical judgment: could the tweet in question reasonably be seen to have the potential to be an act of conduct implicating a standard of behaviour or evidence of such conduct (possible State practice), or an articulation of the State's legal position (possible *opinio juris*)? Following this qualitative scrutiny and judgment, a majority of the original "hits" were dismissed as having the potential neither to be practice nor *opinio juris*. This was usually on the basis that it was clear that they were purely political statements.

38. Ultimately, this left a dataset of 36 tweets of potential relevance. These identified tweets were then coded as either being affirmations of relatively well accepted existing customary international law standards, or as statements that could act as initial steps towards new or amended rules of customary international law. A majority of the 36 (26, i.e. 72%) identified tweets were in some measure confirmatory/reaffirmative of generally accepted existing customary international law standards. Thus, statements were identified on Twitter

from each account and then combining these data. See Original Dataset 1, above n.112.

121 See also Nouka, above n.112, 1-2.

122 It must be acknowledged that the selection of the search terms was, necessarily, somewhat arbitrary. Results would, obviously, vary were one to select other terms. However, the aim was to provide the widest possible "qualitative net" to try to "capture" any potential instances of State practice or *opinio juris*, should they be out there in the Twitterverse.

123 Nouka, above n.112.

124 See UN Doc A/CN.4/710/Rev.1, above n.78, para. 85 (noting that "the first barrier in accessing the evidence of customary international law [. . .] is a linguistic one").

regarding, for example, the requirement of proportionality for the use of force in self-defence,[125] the prohibition of the use of chemical weapons,[126] and the prohibition of attacks on cultural property in the context of an armed conflict.[127] These tweets, and others like them, may have implications for rules of customary international law, but certainly not "revolutionary" ones, given that the standards that they reference are widely considered already to be established.[128]

39. However, it was also the case that 10 tweets were identified that could be read, potentially, as pushing the boundaries of existing standards, either towards possible amendment (i.e., a contested interpretation) of custom, or towards new custom altogether. These include support for the crime of ecocide from France (specifically, a tweet by President Emmanuel Macron),[129] which is not yet a crime under international law despite growing support for it.[130]

125 Donald Trump (@realDonaldTrump) Twitter (21 June 2019) https://twitter.com/realDonaldTrump/status/1142055388965212161 (i.e., tweet by the President of the US at the time of its issuance. Given that the account @realDonaldTrump is now "permanently suspended" (see below para. 46), this tweet cannot any longer be accessed online. The salient part of it read: "[. . .] On Monday they [Iran] shot down an unmanned drone flying in International Waters. We were cocked & loaded to retaliate last night on 3 different sights when I asked, how many will die. 150 people, sir, was the answer from a General. 10 minutes before the strike I stopped it, not [. . .] proportionate to shooting down an unmanned drone [. . .]").

126 Foreign Policy CAN (@CanadaFP) Twitter (5 Feb. 2018), https://twitter.com/CanadaFP/status/960632662019977218.

127 Javad Zarif (@JZarif) Twitter (5 Jan. 2020), https://twitter.com/JZarif/status/1213742809095770113 (i.e., tweet by the Foreign Minister of Iran at the time of its issuance).

128 On proportionality in the *jus ad bellum*, see, e.g., Chris O'Meara, Necessity and Proportionality and the Right of Self-Defence in International Law (2020) particularly 97-117; on the prohibition on chemical weapons, see, e.g., Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Customary International Humanitarian Law, International Committee of the Red Cross (ICRC) Study (2005), Rule 74; on the prohibition of attacks on cultural property, see, e.g., ibid., Rule 40.

129 Emmanuel Macron (@EmmanuelMacron) Twitter (29 June 2020), https://twitter.com/EmmanuelMacron/status/1277599257692946434.

130 See Anastacia Greene, The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?, 30 Fordham Environmental LR (2019), 1, 46 ("[e]ventually, when enough countries recognize the crime [of ecocide], it could be recognized as a norm under customary international law").

Another useful example is an indication by Colombia's President, Iván Duque Márquez, that the requirements of the (itself, certainly non-binding)[131] 2019 "Leticia Pact"[132] – which is aimed at protecting the Amazon Rainforest – have binding effect.[133] Also identified were tweets from Venezuela asserting that the act of economic blockade can equate to a crime against humanity.[134] This claim, it at least may be said, is certainly controversial.[135]

40. Care admittedly must be taken with any of these identified tweets. This is, in part, because States have a notorious tendency to mix the legal with the political and be unclear about whether an adopted position or argument is an expression of one, the other, or both.[136] There is thus a danger that purely political statements, issued for consumption by the general public, may be vested with unintended legal meaning by the researcher.[137] Moreover, it is important to recall that particular instances of State practice or expressions of *opinio juris* exist, at least in the early stages of a rule's emergence, only as potential

131 See Johan Ramirez, Amazon 'Leticia Pact' was a Wasted Opportunity, *DW* (9 Sept. 2019), www.dw.com/en/opinion-amazon-leticia-pact-was-a-wasted-opportunity/a-50362482; Amazon Wildfire Crisis: Need for an International Response, European Parliament, Briefing (Nov. 2019), www.europarl.europa.eu/RegData/etudes/BRIE/2019/644198/EPRS_BRI(2019)644198_EN.pdf, 7.

132 Pacto de Leticia por la Amazonía, comunicado (6 Sept. 2019), www.gob.pe/institucion/rree/noticias/50579-pacto-de-leticia-por-la-amazonia.

133 Iván Duque (@IvanDuque) Twitter (7 Sept. 2019), https://twitter.com/IvanDuque/status/1170120594760839169.

134 Cancillería Venezuela (@CancilleriaVE) Twitter (13 Mar. 2020), https://twitter.com/CancilleriaVE/status/1238291340431183877; Cancillería Venezuela (@CancilleriaVE) Twitter (2 June 2020), https://twitter.com/CancilleriaVE/status/1267883997541150720. Venezuela has made this same claim in other contexts. See, e.g., Referral Pursuant to Article 14 of the Rome Statute to the Prosecutor of the International Criminal Court by the Bolivarian Republic of Venezuela with Respect to Unilateral Coercive Measures, Situation in the Bolivarian Republic of Venezuela II, ICC-01/20 (4 Mar. 2020), www.icc-cpi.int/RelatedRecords/CR2020_00802.PDF, 32-51.

135 See Dapo Akande, Payam Akhavan and Eirik Bjorge, Economic Sanctions, International Law, and Crimes Against Humanity: Venezuela's ICC Referral, 115 AJIL (2021), 493.

136 See, generally, Christian Reus-Smit, The Politics of International Law, in: Christian Reus-Smit (ed.), The Politics of International Law (2004), 14, 36-38; Dino Kritsiotis, Arguments of Mass Confusion, 15 EJIL (2004), 233.

137 See John B. Bellinger, III and William J. Haynes II, A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law, 89 I R of the Red Cross (2007), 443, particularly 447.

contributors to law formation. The level of "social acceptance" required to create new customary international law necessitates a process of claim *and response*: a claim may be evidence of *opinio juris*, but not sufficient evidence in itself to have law-making implications.[138] Until a custom crystallises into binding law by way of an appropriate level of social acceptance (based on *multiple* claims and responses),[139] the raw material of its creation (i.e., State practice and *opinio juris*) exists in a "pre-legal" netherworld of potential, rather than as yet actual, legal significance.[140]

41. Thus, for example, Macron's tweet can be read – and ultimately may only *be* – support for planned attempts to legislate the crime of ecocide at the international level.[141] Duque's tweet can be viewed as a reaffirmation of a political commitment expressed by his nation to protect the rainforest: its legal implications as yet are unclear, and they will only *become* clear if and when other States respond to them with supportive statements of their own.

42. Keeping this in mind, the point is that the tweets identified in the scoping study have, at least in the view of this author, and of his research assistant,[142] the potential to contribute to customary international law formation, should circumstances conducive to this (i.e., more practice and evidence of

138 See above para. 16.

139 It is worth considering that Twitter could offer unique ways of facilitating the process of "claim and response" that is the basis of the *opinio juris* requirement. The ability on the platform to "re-tweet" a statement by another State with a single click, or, more pertinently, to "quote" another State's tweet (in seconds) alongside an explicit statement of approval, could add a new element to the long-standing claim/response dynamic.

140 See Yee, above n.70, 238 (labelling this material of as yet unfulfilled potential "candidate *opinio juris*"). For general discussion of the "pre-legal" period in the emergence of customary international law, see Dino Kritsiotis, On the Possibilities of and for Persistent Objection, 21 Duke J of Comp. and IL (2010), 121, 131-32; Thomas Christiano, The Legitimacy of International Institutions, in: Andrei Marmor (ed.), The Routledge Companion to the Philosophy of Law (2012), 380, 387; Green, above n.34, 153-55.

141 See Stop Ecocide Foundation, Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text (June 2021), https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf; Marco Colacurci, The Draft Convention Ecocide and the Role for Corporate Remediation: Some Insights from the International Monsanto Tribunal and a Recent Research Proposal, 21 International Criminal LR (2021), 154; Noëlle Quénivet, Editorial: The Crime of Ecocide, 26 Environmental Liability – Law, Policy and Practice (2021), 171.

142 Nouka, above n.112, particularly 23-28.

opinio juris in sufficient amounts) emerge in the future. That said, the relatively small number of instances of possible practice/*opinio juris* found in the scoping study means that the contribution of social media posts to the creation of customary international law is perhaps best viewed as a potential rather than actual phenomenon at the current time. Or, at least, it may be said that emerging custom cannot yet be identified to a notable extent on social media.

43. Equally, it is argued that the study clearly *demonstrates the potential for this* in a real-world context. When this is coupled with the conclusion that tweets are just another form of public statement,[143] and when this is set in the context of the ever-increasing rise of twiplomacy,[144] it is necessary to consider the possible implications of social media contributing to the emergence of customary international law to a notable extent in future (should it do so, as this author would predict). It is to such possible implications that this article now turns, in Parts VII-X.

VII. The Use of "Personal" Twitter Accounts by State Officials

44. Part V highlighted the fact that it can be difficult to know, irrespective of the social media context, whether the acts of a particular official can amount to the practice of the State, and particularly who is empowered to express *opinio juris* on its behalf. This difficulty is exacerbated in the age of twiplomacy because the nature of social media means that State level communication increasingly is coming directly from individuals, rather than from abstract government departments or their spokespeople.

45. Indeed, a large proportion of State Twitter (and other social media) accounts are now those of individual leaders or ministers. Some of these are not truly "individual" accounts, because they take the form of an "institutional account for the presidency or prime ministry".[145] Such "institutional individual" accounts have more in common with the accounts of an entire government, ministry, or department, in that they represent the "office" of the post-holder (meaning that tweets from them are not necessarily posted by the individual post-holder in question).

143 See Part IV.

144 See Part II.

145 Barberá and Zeitzoff, above n.30, 122.

46. Commonplace too, though, is the use of what one might call "personal" accounts[146] by senior State officials. This distinction is best evidenced by reference to the Twitter account of "twiplomacy poster boy", Donald Trump. The account @realDonaldTrump was used by Trump without distinction before he became US President and while he was President. Trump clearly intended to use it after he left office too, and would have done so were it not for the fact that the account was "permanently suspended" by Twitter following his support for those who attacked the US Capitol in January 2021.[147] @realDonaldTrump can be contrasted with @POTUS, which is the official Twitter account of the office of the US Presidency. @POTUS was used by Barak Obama while – but *only* while – he was in office, and it is currently being used by Joe Biden.

47. Donald Trump may have engaged in the highest profile use of a "personal" State level social media account while in office, but the Trump Twitter circus should not obscure the fact that the use of such accounts by State officials around the world is now common practice. Indeed, roughly 40% of the total number of State Twitter accounts are of this sort.[148] These "personal" accounts act to blur the line further between the individual and the official,[149] which in turn creates challenges for evaluating the legal relevance of the tweets that come from them.

48. These challenges are well illustrated by US case law and, again, the incessant tweeting of Donald Trump while he was in office. In *Trump v. Hawaii*, which concerned Proclamation No 9645 (the infamous "travel ban" for individuals from a number of predominantly Islamic States), the US Supreme Court in 2018 seemingly saw the legal resonance of Trump's "personal" tweets as self-evident: the Court examined the implications of tweeted links by the President from @realDonaldTrump, without questioning whether or not they were

146 A term used with hesitancy, noting that nothing posted on social media is in any way "personal".

147 See Twitter 'Permanently Suspends' Trump's Account, BBC News (9 Jan. 2021) www.bbc.co.uk/news/world-us-canada-55597840.

148 Twiplomacy Study 2018, BCW (10 July 2018), https://twiplomacy.com/blog/twiplomacy-study-2018/.

149 See, generally Karabi C. Bezboruah and Martinella M. Dryburgh, Personal Social Media Usage and its Impact on Administrative Accountability: An Exploration of Theory and Practice, 15(4) International J of Organization Theory and Behavior (2012), 469 (examining social media's effect in blurring personal and official "roles" in public organisations, including governmental, and the implications of that for accountability); Coe, above n.1, 39 ("the use of social media erodes individuals' perceptions of private and public boundaries [. . .]").

official statements of the executive.[150] In reaching a decision that has been described as "grievously wrong",[151] the 5-4 majority concluded that the travel ban was not inherently discriminatory, and, as part of that decision, did not see the President's tweets as demonstrating relevant anti-Muslim bias.[152] Nonetheless, the Court did not even consider the *prima facie* legal relevance of those tweets in reaching that decision, simply assuming this (albeit that it did not then derive the same legal meaning from them that was asserted by Hawaii).

49. In reaching a different conclusion to the majority in her dissent, Justice Sotomayor made far more extensive reference to Trump's tweets.[153] Again, though, as was the case for the majority, she apparently saw the legal relevance of these tweets to be self-evident,[154] the difference being only that she took a contrary view as to their legal *consequence* for the dispute in question.

50. Tackling the issue rather more "head on", the US Court of Appeals for the Fourth Circuit in *IRAP v. Trump* (also in 2018, and also in relation to the "travel ban") took the view that

> there is no question that the President's statements [in tweets] upon which the majority relies, which were widely reported and disseminated, provide reliable evidence of the President's intent. The Government acknowledges that the President's tweets [. . .] constitute 'official' statements of the President.[155]

Having reached this conclusion, the majority made extensive evidentiary use of the President's tweets from his "personal" Twitter account in reaching its decision.[156]

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150 Trump v. Hawaii, No 17-965 585 U.S. ___ (2018), Slip Op., 28.

151 Harold Hongju Koh, The Trump Administration and International Law (2019), 31.

152 Trump v. Hawaii, above n.150, 28-29.

153 Ibid. (Sotomayor, J., diss. op.), 9-10.

154 See ibid. (Sotomayor, J., diss. op.), 9 n.1 (viewing it as sufficient, in making extensive reference to the President's tweets, simply to footnote that "[a]ccording to the White House, President Trump's statements on Twitter are 'official statements'").

155 International Refugee Assistance Project (IRAP) v. Trump, No 17-2231 (4th Cir 2018) (Gregory, C.J., maj. op.), 206. See also ibid., 48. The reference by the Court to "Government acknowledgement" is in relation to the statement made by the White House in 2017 that Trump's tweets represented "official statements by the President of the United States". See Elizabeth Landers, White House: Trump's Tweets are 'Official Statements', CNN (6 June 2017), https://edition.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html.

156 See IRAP v. Trump, above n.155, 42, 48, 49, 209.

51. Taken together, *Trump v. Hawaii* and *IRAP v. Trump* (especially the latter) would seem to establish that Trump's tweets while in office constituted statements of the United States itself. However, this clarity apparently has been muddied by the recent 2021 Supreme Court decision in *Knight Institute*,[157] a case about whether the blocking of users on Twitter by the President constituted a violation of their First Amendment rights.

52. The 2019 appeal hearing of *Knight Institute v. Trump*[158] followed the pattern of the previous US case law regarding the legal status of the tweets issued from @realDonaldTrump. The US Court of Appeals for the Second Circuit concluded that, for the period that Trump was President, "the factors pointing to the public, non-private nature of [his Twitter] Account [. . .] are overwhelming",[159] meaning that the account could be treated as an "official" one.[160] Moreover, the Court concluded that this had legal implications: specifically, it found that Trump blocking users from his account indeed amounted to a violation of their First Amendment rights.[161]

53. However, in 2021, in *Biden v. Knight Institute*,[162] the Supreme Court vacated the Second Circuit decision for mootness. While noting that "Mr. Trump often used the account to speak in his official capacity",[163] Justice Thomas, concurring, took the view that Trump's account was not a "government-controlled space", given that ultimate control of the account was vested in Twitter itself.[164] On that basis, the Justice concluded that Trump was entitled to block users without this impinging their First Amendment rights.[165]

54. *Knight Institute* shows how controversial it may be to determine the legal implications of a world leader's tweets from a "personal" account for the government, or for the State, that they lead. This adds an additional layer of complexity to identifying customary international law should Twitter become

157 Joseph R. Biden, Jr, et al v. Knight First Amendment Institute at Columbia University, *et al.*, 593 U. S. ____ (2021), Slip Op., 1 (Thomas, J., concurring).

158 Knight First Amendment Institute, *et al.* v. Donald J. Trump, *et al.*, [2019] No. 18-1691-cv.

159 Ibid., 19.

160 The Justice provided significant evidence to support this conclusion, see ibid., particularly 7-10.

161 Ibid., 27.

162 Knight Institute (2021), above n.157.

163 Ibid., 3.

164 Ibid., particularly 3, 8-9.

165 Ibid., 12.

a key forum for emerging custom. However, ultimately the question is likely to be one determined by the character of the statement made and the context within which it was made, rather than the character of the account from which it was made. In much the same way that acts of State agents in their personal capacity cannot be attributable to the State under the law of State responsibility,[166] it is generally understood that statements made by State officials purely in their "personal capacity" cannot be considered the practice or *opinio juris* of the State.[167]

55. Equally, again analogising to the law of State responsibility, the threshold for establishing "personal capacity" is high. Only conduct that is "so removed from the scope of their official functions that it should be assimilated to that of private individuals" is un-attributable to the State.[168] As noted previously,[169] attribution under the law of State responsibility is an imperfect analogy for who can act on behalf of the State in relation to its practice or *opinio juris*. But even if the threshold of what amounts to an actor's "personal capacity" were to be considered to be less high in the context of customary international law-making, it would still seem a stretch to argue that tweets intended to be consumed by millions and clearly focused on the "business of State" are statements made by officials acting in their "personal capacity" simply because they are issued from a "personal" account.[170] A tweet from an official about the outcome of a sporting event from their "personal" account is unlikely to be an instance of State practice or evidence *opinio juris*, whereas a

166 See, e.g., UN Doc A/56/10, above n.94, 42 (commentary to art. 4).

167 Consider, e.g., the approach of the ICRC Study on Customary International Humanitarian Law, above n.128. Amongst many other sources, the opinions governmental experts from around the world were sought, but it was explicitly and repeated emphasised that their contribution to the study was in their "personal capacity". Ibid., liv, lvi, 273. See also Malcolm MacLaren and Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 German LJ (2005), 1217, 1233 n. 73, 1239, 1236 n. 83.

168 UN Doc A/56/10, above n.94, 46 (commentary to art. 7).

169 See above para. 27.

170 See Duncan B. Hollis and Tsvetelina J. van Benthem, Threatening Force in Cyberspace, in: Laura Dickinson and Edward Berg (eds.), Big Data and Armed Conflict: Legal Issues Above and Below the Armed Conflict Threshold (forthcoming 2022), pre-publication version, *SSRN* (14 December 2021) https://ssrn.com/abstract=3985032, 12 ("the use of a private [Twitter] account does not automatically imply that we have a 'private actor' at play" when it comes to legal consequences for the State).

tweet from an official from their "personal" account about a use of force by another State likely would have the potential to contribute to the formation of custom. Yet such distinctions can only ever be illustrative, because context is crucial: for example, tweeting about a sporting event might count if the tweeter happened to be the State's Minister for Sport.

56. Ultimately, distinguishing an "official" from a "personal" tweet when they are issued from the very same ("personal") account is a tricky business, and that fact engenders further uncertainty not just about which accounts, but which *tweets* to consider (and which to dismiss) when researching custom. *Knight Institute* would also suggest it may well be legally controversial when it comes to a State seeking to hold another responsible for a breach of a customary international law rule, the existence of which is alleged to stem (even in part) from statements made via "personal" Twitter accounts.

VIII. Tweets as Poor Legal Tools

57. It has been argued, in scholarship taking a behavioural science approach to evaluating International Relations, that the "rules of the game" are as yet unclear in the new world of twiplomacy.[171] The "symbols, appeals and discursive moves",[172] so intuitively understood by the game's players in the context of traditional methods of State discourse, are not yet defined in the new landscape of social media communication.

58. For example, one might consider the limitation to a small number of characters for each tweet. It has been observed, in general terms, that the restriction in the length of Twitter posts – initially to 140 characters when the platform was launched, although since expanded to 280 characters – has had notable linguistic effects in society.[173] In the context of any attempt to derive legal meaning from a tweet, its inherent brevity is likely to diminish its value. Of course, a tweet now can be extended into a longer "thread" (i.e., a series of connected tweets). Threads, assuming the account holder is inclined to use them, may act to mitigate possible concerns relating to the brevity of

171 Craig Hayden, Don Waisanen and Yelena Osipova, Facilitating the Conversation: The 2012 U.S. Presidential Election and Public Diplomacy through Social Media, 57 American Behavioral Scientist (2013), 1623.

172 Ibid., 1627.

173 See Arnout B. Boot, Erik Tjong Kim Sang, Katinka Dijkstra and Rolf A. Zwaan, How Character Limit Affects Language Usage in Tweets, 5 Palgrave Communications (2019), 1.

communication, but they come with their own problems. Twitter threads are notoriously difficult to follow; certainly, it can be said that they are a sub-optimal way of expressing complex ideas.[174]

59. A related, and perhaps even greater, concern is the speed involved in the composition of tweets. Ultra-fast State communication has its advantages, but, especially when it comes to tweets from the "personal" accounts of State officials, the speed at which statements can be (and often are being) written and posted may result in ambiguities or mistakes that reduce the reliability of tweets as accurate statements of policy. Speeches and diplomatic protests, in contrast, are likely to go through many rounds and levels of scrutiny before release.[175] In this context one might note Israel's written response in January 2018 to the (then still draft) Conclusions of the ILC on the *Identification of Customary International Law*. Although Israel accepted that statements could act as instances of State practice or as evidence of *opinio juris*, it argued that

> casual, spontaneous or 'in the heat of the moment' statements made by State officials are insufficient for the purposes of identification of customary international law and should not be given *any weight* in this regard.[176]

60. While Israel was making this point in relation to statements generally, the characterisation "casual, spontaneous or 'in the heat of the moment'" feels like an apt description of a large proportion of statements made on social media specifically.[177]

61. Indeed, such factors have led to the legal resonance of tweets, rather than statements generally, being viewed with concern. It was previously noted[178] that in *IRAP v. Trump* in 2018, the US Court of Appeals for the Fourth Circuit confirmed that the tweets of Donald Trump, while in office,

174 See, e.g., Taylor Lorenz, It's Impossible to Follow a Conversation on Twitter, The Atlantic (15 Feb. 2019) www.theatlantic.com/technology/archive/2019/02/its-impossible-follow-conversation-twitter/582907.

175 See, generally Iver B. Neumann, 'A Speech That the Entire Ministry May Stand for', or: Why Diplomats Never Produce Anything New, 1 International Political Sociology (2007), 183.

176 Israel's Comments and Observations, above n.66, 8 (emphasis added).

177 Xin and Lu, above n.32. *Contra* Courtenay Honeycutt and Susan C. Herring, Beyond Microblogging: Conversation and Collaboration via Twitter, 42nd Hawaii International Conference on System Sciences (2009), 1 (examining the potential for Twitter to facilitate meaningful conversation and collaboration).

178 See Part VII.

represented tweets of the United States, despite being issued from a "personal" account. Interestingly, though, the Court also went on to say that tweets

> [. . .] are unbounded resources by which to find intent of various kinds. They are often short-hand for larger ideas [. . .] And they are often susceptible to multiple interpretations, depending on the outlook of the recipient.[179]

62. Thus, the Fourth Circuit took the view that tweets from the "personal" Twitter account of a Head of State/Government are official statements of the State of legal relevance, while at the same time noting that tweets are an unhelpfully short and unclear legal resource. Or, put more simply, the Court effectively said: "State level tweets have legal implications, but good luck trying to work out what those legal implications *are* in any given instance, because tweets are poor legal tools."

63. One might therefore conclude that the very nature of social media – and the way it is commonly *used*, including by State officials tweeting from their own accounts[180] – would mean that deriving law-making implications from a tweet, at least one from a "personal account", is impossible. This would go too far, however. It is the context that determines the implications of a statement for the emergence of custom, not the form in which the statement is made.[181]

64. A better view is that the *weight* of an individual tweet as evidence of practice/*opinio juris* contributing to formation of customary international law is likely to be (although will not necessarily be) lesser than for a statement made in a more traditional context. As the ILC made clear in its commentaries to the Conclusions on the *Identification of Customary International Law*, "[s]tatements made casually, or in the heat of the moment, will usually carry less weight than those that are carefully considered [. . .]".[182] In the Twitter

179 IRAP v. Trump, above n.155, 264.

180 Xin and Lu, above n.32.

181 See, e.g., Müllerson, above n.39, 342-44; Dumberry, above n.65, 6; UN Doc A/CN.4/672, above n.40, paras. 29-31.

182 See UN Doc A/73/10, above n.15, 128 (commentary to conc. 3). See also Yee, above n.69, paras. 27-28 (stressing, as Special Rapporteur of the AALCO Informal Expert Group (IEG) on Customary International Law, the importance of taking "a rigorous and systematic approach to the identification of customary international law". This view was also reiterated by the IEG following deliberation, with slightly different wording: see Comments on the ILC Project on Identification of Customary International Law, Informal Expert Group on Customary International Law of the

context, this is particularly likely to be the case for tweets that have been issued from the "personal" account of a State official, which are commonly posted without "committee" oversight or review.[183] In contrast, tweets issued by the "institutional" account of a department or ministry will commonly have been crafted and reviewed, in a manner more similar to traditional press statements.[184]

65. The features of social media and the way it is used – the imposition of arbitrary limits on the length of tweets (and the general tendency towards brevity in social media posts generally), the increased capacity for statements to be issued instantaneously and the tendency for them to be made without review (at least when it comes to "personal" accounts) – all act to reduce the nuance and credibility of the statements made, and thus the weight that should be afforded to them in contributing to binding law. It would seem uncontroversial to say that statements of only 240-characters (or, perhaps, made through a difficult to follow "thread" of multiple 240-character snippets), issued in a context of fast, informal and unrestrained communication, are unlikely to be of the same probative value in relation to law-making as, for example, a carefully drafted (and redrafted) official communiqué of multiple pages.

IX. The Proliferation and "Centralisation" of Data

66. There is an ongoing growth trend in terms of the available material that could contribute to the creation or modification of customary international law. The amount of data now publicly available that may be of possible relevance means that the job for anyone attempting seriously to engage with emerging customs, as a legal practitioner or researcher, is ever more challenging:

Asian-African Legal Consultative Organisation (AALCO), annexed to Report by Sufian Jusoh, Chairman of the AALCO's Informal Expert Group on Customary International Law (24 Mar. 2015), www.aalco.int/54thsession/AALCOIEG%20Chairman's%20Statement%20and%20Special%20Rapporteur's%20Report%2020150324.pdf, 3, Comment C).

183 Xin and Lu, above n.32.

184 For example, in the United Kingdom, the Government Communication Service (GCS) provides any staffers who are running a government department's social media account with a detailed "checklist" of requirements that they must follow when posting statements. See Propriety in Digital and Social Media, GCS (13 Mar. 2020), https://gcs.civilservice.gov.uk/guidance/professional-standards/propriety/propriety-in-digital-and-social-media.

> [T]he significant increase in the number of States and international organizations, the intensification of international intercourse, and the development of international law in a number of fields have all contributed to the broadening of the scope of rules of customary international law [. . .] This, in turn, led to an expansion of the resources which could potentially be relevant as evidence of the two elements thereof: a general practice and its acceptance as law (*opinio juris*).[185]

67. Indeed, the ILC Special Rapporteur for the *Identification of Customary International Law* topic, Sir Michael Wood, remarked in his fourth report on the subject in 2016 that "[t]he sheer quantity of available material is daunting"[186] and went on to describe "the great mass of materials that is now at hand."[187] This growth trend is certainly not new,[188] but it is continuing.

68. The reality of the work involved in taking a methodologically sound inductive approach to asserting the existence (or not) of rules of customary international law means that in practice we (judges, practitioners, academics, *et al*) tend to cut corners.

> [E]ven the most conscientious chronicler of custom may find it impossible to give a complete account of what is going on. As it happens, moreover, most writers do not even make a serious attempt.[189]

69. This results in "anecdotal or derivative" accounts of substantive customary international law.[190] It also is likely to exacerbate the potential for selection bias. Global South States have, of course, long been marginalised in the identification of customary international law standards, with their practice

185 UN Doc A/CN.4/710/Rev.1, above n.78, para. 8.

186 ILC, Fourth Report on Identification of Customary International Law, by Sir Michael Wood, Special Rapporteur, UN Doc A/CN.4/695 (16 Mar. 2016), para. 45.

187 Ibid., para. 46.

188 See, e.g., ILC, Article 24 of the Statute of the International Law Commission, Working Paper by Manley 0. Hudson, Special Rapporteur, UN Doc A/CN.4/16, ILCYB, 1950, Vol. II, 26, para. 13. See also Deeks, above n.110, 619; Scott Sullivan, Networking Customary Law, 61(3) U Kansas LR (2013), 659, 688.

189 Mendelson, above n.55, 12. See also Fernando R. Tesón, Fake Custom, in: Brian D. Lepard (ed.), Reexamining Customary International Law (2017) 86; Daniel Joyner, Why I Stopped Believing in Customary International Law, 9 Asian JIL (2019), 31, 38.

190 Mendelson, above n.55, 13.

and *opinio juris* often unconsidered or ignored.[191] It is all too common for the existence of customary international law to be asserted based merely on a review of the practice/*opinio juris* of a handful of powerful States from the Global North.[192] The growth in available material increases this risk: the more data there are, the more likely it is that a researcher will prioritise the material that is the easiest to access or collate. And this, of course, will tend to be the practice and evidence of *opinio juris* of western democracies, to the increased detriment of the Global South (and thus to the increased detriment of the development of representative and methodologically sound customary international law). Ultimately, it may be said that the steady increase in the amount of raw material of customary international law can act to dilute the credibility of assertions of the existence of particular rules.

70. The rise of twiplomacy is very likely to generate material with customary law-making potential, and the amount of such material on social media can be expected to grow notably over coming years. This would act further to increase the customary international law "data pool". Moreover, the short length of a tweet and the speed at which it can be sent mean that twiplomacy could add to the amount of relevant material *significantly* over a comparatively short period. It also could contribute to individual States producing a greater amount of inconsistent practice or contradictory evidence of *opinio juris*. Many States have multiple relevant Twitter accounts[193] as well as social media accounts on other platforms.[194] This could translate into a higher risk of States failing to "speak with one voice" and doing so across a markedly larger number of statements. Thus, while the continual increase in the amount of data that may be relevant to customary international law formation is not a new phenomenon, and concerns in relation to that growth trend are similarly longstanding, the twiplomacy phenomenon has the potential to exacerbate notably those concerns.

71. However, the widespread use of social media by States may also have *positive* implications for the customary international law researcher, and,

191 B.S. Chimni, Customary International Law: A Third World Perspective, 112 AJIL (2018), 1, particularly 20-27. See also, generally George Rodrigo Bandeira Galindo and César Yip, Customary International Law and the Third World: Do Not Step on the Grass, 16 Chinese JIL (2017), 251.

192 J. Patrick Kelly, The Twilight of Customary International Law, 40 Virginia JIL (1999-2000), 449, 472-73.

193 See above para. 9.

194 See above para. 8.

indeed, for the accuracy and credibility of the identification of customary international law. Consider the scoping study discussed in Part VI of this article. The author's research assistant was able to undertake a survey of a data pool that totalled somewhere in the region of 2.5 million public statements made on behalf of States (representing every region of the world).[195] This empirical data collection was conducted in less than 6 weeks and produced a refined, coded dataset of potential instances of State practice/*opinio juris*.[196]

72. The fact that large numbers of public statements are now being made by States on the same platform, Twitter, acts to "centralise" the possible material, notably improving the practicalities of searching for statements of relevance.[197] Search terms can be applied immediately and consistently across a large dataset, as can appropriate translations of those terms. Moreover, the cursory nature of a tweet – which it will be recalled was of such concern to the Court in *IRAP v. Trump*[198] – also means that search results then can be considered (and dismissed or investigated further) with significant speed as compared to, for example, researching published digests of State practice: "[f]aced with large volumes of information [. . .] a foreign ministry lawyer with limited time and resources could deploy algorithmic tools to help her extract important insights from that data."[199]

73. Twitter has been commonly used as a platform for undertaking "big data" analytics for a number of years,[200] including important social trend mapping.[201] The emergence of customary international law is ultimately but

195 See above para. 36.

196 Original Dataset 1, above n.112; Original Dataset 2, above n.112.

197 See UN Doc A/CN.4/710/Rev.1, above n.78, para. 76 ("such availability [of evidence of State practice and *opinio juris*] is neither consistent across the many types of evidence of customary international law, nor is it homogeneous across regions of the world."); UN Doc A/CN.4/695, above n.186, para. 45 (noting that the challenges for identification customary international law in the context of the large amount of data available are "compounded by the absence of a common classification system to compare and contrast the practice of States [. . .]"); Ryan M. Scoville, Finding Customary International Law, 101 Iowa LR (2016), 1893, 1896 ("[t]here is no complete database – electronic or otherwise – of state practice and *opinio juis*").

198 IRAP v. Trump, above n.155, 264. See, generally Part VIII.

199 Deeks, above n.110, 579.

200 Shilpi Tanejal and Manish Taneja, Big Data and Twitter, 2 International J of Research in Computer Applications and Robotics (2014), 144.

201 See, e.g., Eoin Lenihan, A Classification of Antifa Twitter Accounts Based on Social Network Mapping and Linguistic Analysis, 12 Social Network Analysis and Mining (2022), 1; Andranik Tumasjan *et al*, Election Forecasts with Twitter: How 140

one form of social trend[202] – albeit a very particular one – and a similar approach to analytics therefore could act as an additional tool to aid its identification. Indeed, forms of big data analytics have now been deployed, with some success, in various domestic law contexts.[203]

74. It is worth noting that the benefit envisaged here is not merely a time saving one, although that in itself should not be undervalued.[204] It may go to the heart of the *rigour* of the identification of customary international law. It has been argued that moves towards a more "networked" approach to examining the emergence of custom (including but not limited to analysis of social media) can act as a means of "re-empiricising" the identification of customary international law, overcoming the dangers of an increased lack of empirical grounding.[205] Searching for the raw material of custom on social media has the potential to allow for the practice and *opinio juris* of more States to be fed into determinations over the existence of customary international law. Aggregating much more, and more diverse, data can increase the credibility (and thus normative strength) of claims as to the existence of legal rules.[206]

75. Perhaps ironically, large scale data analysis also may be able, to some extent, to mitigate selection bias concerns,[207] and reduce the ethnocentric focus on the practice/*opinio juris* of powerful, western States. It is just as easy, for example, to search the Twitter account of an African leader as a European one, and it is almost as easy to search both. Contrast this to selection choices necessarily made about which curated digest of State practice one is able to read. This has the potential to have an increased "democratising" effect: both in terms of which States' practice/*opinio juris* are fed into the custom calculation, and the extent to which all States' legal advisors can undertake a meaningful review of emerging custom.[208]

76. These possible benefits of twiplomacy for the identification of customary international law are currently somewhat speculative and should be treated

Characters Reflect the Political Landscape, 29 Social Science Computer R (2010), 402.

202 Hakimi, above n.44, 1505.

203 Deeks, above n.110, 586-89, 595-96.

204 See Scoville, above n.197, 1896 ("the difficulty is one of limited resources, both institutional and human").

205 Sullivan, above n.188.

206 Ibid., particularly 688, 699.

207 See Sullivan, above n.188, 689.

208 Deeks, above n.110, 617.

critically. For example, one concern that has been raised in relation to any increase in the use of digital technologies in the field of international law is that it may create inequalities as between States that use the technology in question and those that do not (or, at least, do not use it as extensively).[209] It is therefore worth keeping in mind that social media usage in the Global South, while increasing, remains at a lower level than in the Global North (predominantly for economic reasons).[210]

77. It is also important to remember that in some authoritarian regimes around the world, access to Twitter is restricted or entirely prohibited, and officials thus may be less concerned about communicating directly with the populous than is likely to be the case for elected politicians in liberal democracies.[211] It may even be unwise: individuals in some States – especially mid-ranking officials in more authoritarian regimes – might be unlikely to make legal assertions on Twitter for fear of overstepping their authority.

78. State usage of social media is now (almost) universal, in the sense that virtually every State has at least one account,[212] and the potential "democratising" effect of this for customary international law-making should be noted. Equally, it should not be overstated, because not all States use social media to the same extent or in the same way. Thus, there could be more, and perhaps more easily deciphered, "raw material" to be mined from the social media accounts of western democracies than other States, leading – as usual – to their prioritisation in data collection and analysis. Twiplomacy certainly will not eradicate selection bias issues when it comes to custom.

79. It also needs to be stressed that data-analysis on a large scale, at least when it comes to the analysis of tweets as possible contributions to customary international law, is only going to be as good as the quality and range of the search terms applied,[213] and that the results obtained will only be of any value

209 Ibid., 648. See also UN Doc A/CN.4/710/Rev.1, above n.78, paras. 89-90.

210 Jacob Poushter, Caldwell Bishop and Hanyu Chwe, Social Media Use Continues to Rise in Developing Countries but Plateaus Across Developed Ones, Pew Research Center (19 June 2018), www.pewresearch.org/global/2018/06/19/social-media-use-continues-to-rise-in-developing-countries-but-plateaus-across-developed-ones.

211 See, generally Guy Schleffer and Benjamin Miller, The Political Effects of Social Media Platforms on Different Regime Types, 4 Texas National Security R (2021), 77.

212 See Part II.

213 See above n.122.

following their careful qualitative review by international law experts.[214] The rise of twiplomacy will not solve all of the practical difficulties involved in identifying custom, nor can an algorithm replace an international lawyer.[215]

80. In 1996, Gamble argued that the growth of the internet would, in time, mean that it would become "possible to find state actions and official pronouncements with unimaginable speed and precision"[216] to the extent that "[i]t will be possible to complete an exhaustive search [. . .] in a matter of minutes in order to assess the consistency of behaviour and sense of obligation required for customary international law."[217] The internet clearly has not yet delivered this, and widespread social media usage by States will not either. However – while this comes with associated concerns – twiplomacy does have the potential to contribute to the more efficient, inclusive, and rigorous identification of customary international law, because it can allow for significantly more data to be analysed as part of the calculation.

X. Issues of Authenticity

81. Another set of possible implications for international lawyers seeking to identify customary international law standards relate to the authenticity of statements made on social media, which may be more difficult to verify than is the case for statements made via more traditional methods of communication.

82. Admittedly, the concerns raised in this Part must not be overstated. For example, tweets purporting to be from a State that are in fact of dubious provenance are much more likely to have short term political implications, if any, rather than legal ones. This is for various reasons. The veracity of a (seemingly) State level public statement – especially one that, for example, asserts a particular legal position – will necessarily face at least some measure of scrutiny before it could realistically be fed into the mix of customary international law formation.[218] The process of customary international law formation is

214 See Thomas Burri, International Law and Artificial Intelligence, 60 German YIL (2017), 91, 92-95 (making a similar point in relation to the application of artificial intelligence to the identification and correct application of international law).

215 See, generally, ibid.

216 John K. Gamble, International Law and the Information Age, 17 Michigan JIL (1996), 747, 783.

217 Ibid.

218 See generally Alan Boyle and Kasey McCall-Smith, Transparency in International Law-Making, in: Andrea Bianchi and Anne Peters (eds.), Transparency in International Law (2013), 419.

one that requires repeated and multiple State voices.[219] This means that there is time to assess the genuineness of those voices as they accumulate before a custom is established, and also that – should a "rogue" tweet somehow slip past such scrutiny – it would not, in itself, lead to the creation of a new rule of customary international law.[220] Most importantly, a "false" State tweet need only be dismissed as such by a genuine State representative for it to lose legal resonance.

83. This all means that it is unlikely that authenticity issues particular to social media would affect actual law-making. However, concerns regarding authenticity should not be dismissed either, because where they could have more notable implications is in (further) complicating the process of the identification of customary international law *for the lawyer or researcher*. As such, it is necessary to consider them here.

84. First, there is obvious potential on social media for what one might term "diplomatic catfishing",[221] that is, people falsely purporting to be State officials or organs and then posting public statements *as if* on behalf of the State. This could be due to the hacking of the relevant social media account, something that has seen a "sharp increase" in recent years.[222] For example, in July 2020 the accounts of 130 high profile Twitter users were hacked as part of a bitcoin scam.[223] This resulted in tweets being issued from these accounts that the account holders had not themselves sent. While most of the account holders were celebrities from the world of entertainment, one of the hacked users was Barack Obama, and another was Joe Biden.[224] Admittedly, neither was President of the US at the time, but one of them recently had been and

219 Thirlway, above n.46, 72-79.

220 See ibid., 72.

221 See Lauren Reichart Smith, Kenny D. Smith and Matthew Blazka, Follow Me, What's the Harm: Considerations of Catfishing and Utilizing Fake Online Personas on Social Media, 27 J of the Legal Aspects of Sport (2017), 32 (regarding the widespread phenomenon of "catfishing" on social media generally).

222 Olga Babko-Malaya *et al*, Detection of Hacking Behaviors and Communication Patterns on Social Media, IEEE International Conference on Big Data (BIGDATA) (2017), 4636 (noting this increase in hacker (and other nefarious actor) activity on social media, and then exploring ways of mapping such behaviour).

223 Joe Tidy, Major US Twitter Accounts Hacked in Bitcoin Scam, BBC News (16 July 2020), www.bbc.co.uk/news/technology-53425822. See also Twitter Investigation Report, New York State, Department of Financial Services (14 Oct. 2020) www.dfs.ny.gov/Twitter_Report.

224 Panagiotis Kyriakou, Cryptocurrency Theft, Scam and Other Misadventures: What Prospects for International Governance?, EJIL:Talk! (24 July 2020), www.ejiltalk.

the other was soon to be. The controversial Dutch politician Geert Wilders was another victim of the hack, which is notable because he was serving as an elected member of the Dutch parliament at the time.[225]

85. A few months later, in September 2020, an account belonging to the Indian Prime Minister Narendra Modi was hacked, again resulting in tweets from that account being issued that Modi had not sent.[226] This is of especial note because, to the knowledge of this author, it was the first time a *serving* Head of State or Government has had one of their social media accounts hacked in this way.

86. It is thus clear that "diplomatic catfishing" is already occurring online. Moreover, nothing so technically demanding as hacking a social media account[227] would be required for authenticity issues to arise. "Diplomatic catfishing" can be achieved through the simple creation of a fake account, purporting to be the official account of a State. Such fake accounts could certainly muddy further the already murky waters of researching the raw material of customary international law. To illustrate this, one need only recall the infamous incident in 2017 when *The New York Times* was fooled into reporting on tweets issued by an account claiming to represent the State of North Korea, which was fake.[228]

87. The potential for fake accounts to be mistaken for the real thing is exacerbated when it is considered that only around 58% of the State level accounts on Twitter possess the blue "verification mark",[229] which the platform bestows upon accounts that have been confirmed as belonging to the person or organisation that they purport to belong to. This means that any of the

org/cryptocurrency-theft-scam-and-other-misadventures-what-prospects-for-international-governance.

225 Leo Kelion, Twitter Says Hackers Viewed 36 Accounts' Private Messages, BBC News (23 July 2020), www.bbc.co.uk/news/technology-53510574; Twitter Investigation Report, above n.223.

226 Sugam Pokharel and Rishi Iyengar, Twitter Investigating Apparent Hack of Account Tied to Indian Prime Minister Narendra Modi, CNN Business (3 Sept. 2020), https://edition.cnn.com/2020/09/03/tech/twitter-hack-modi-intl-hnk/index.html.

227 See Brian Alleyne, Computer Hacking as a Social Problem, in: A. Javier Treviño (ed.), The Cambridge Handbook of Social Problems: vol 2 (2018) 127, 128 (noting that "hackers" are "highly skilled technologist[s]").

228 See Jayson Harsin, A Critical Guide to Fake News: From Comedy to Tragedy, 164 Pouvoirs (2018), 99, 104.

229 Twiplomacy Study 2020, above n.4, 41 (noting that only 632 out of 1089 identified State level accounts have the "blue mark").

remaining 42% could just as easily be a fake account created in a teenager's bedroom[230] as the account of a serving president. That is, unless one has the time to undertake one's own verification of the account: time that a busy foreign ministry legal advisor, at least, is unlikely to possess.

88. Concern over this problem is clearly shared by Twitter itself, with the company announcing in August 2020 that it was launching a new "government and state-affiliated media account label" on its platform,[231] in addition to the usual blue mark. This extra verification label is specifically to be applied to the accounts of

> senior officials and entities that are the official voice of the nation state abroad, specifically accounts of key government officials, including foreign ministers, institutional entities, ambassadors, official spokespeople, and key diplomatic leaders.[232]

89. Initially this label was applied only to the accounts of the so-called "P5" States.[233] Moreover, Twitter did not plan to apply the label to the "personal" accounts of State level officials; for example, it chose not to label @realDonaldTrump as a "State-affiliated" account when applying the label to US accounts in the initial rollout (at a time when Trump was still in office).[234] This approach would have seriously undermined any value that the label may have, given the widespread use of "personal" accounts by State officials, as examined in Part VII. However, in February 2021, Twitter reversed this approach and decided additionally to label the "personal" accounts of

230 It is notable that the alleged "mastermind" of the June 2020 Twitter hack was a minor. See Salvador Rodriguez, 17-year-old Accused of Masterminding Twitter Bitcoin Scam, CNBC (31 July 2020), www.cnbc.com/2020/07/31/twitter-bitcoin-scam-masterminded-by-17-year-old.html.

231 About Government and State-Affiliated Media Account Labels on Twitter, Twitter, Help Center, https://help.twitter.com/en/rules-and-policies/state-affiliated.

232 Ibid.

233 See Anthony Ha, Twitter Adds Labels for Government Officials and State-controlled Media, TechCrunch (6 Aug. 2020), https://techcrunch.com/2020/08/06/twitter-state-media-labels/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvLnVrLw&guce_referrer_sig=AQAAAKMJ9Uga-lxbH0f9Dq4bNwij4A5lHo4vY7LvTelfsExw7m3mkNI6iODm4WLKFTNVX0fXEIC4wFykKzCyuULTYRVOk5mAX0GQSrvH8S1H-wNqocdMWSy4HhpQkaM0Ltfmz2xZzrjV-YYbqelnZR5Qidhwhq6dFP7QaXWBYeGQUPyT. The "P5" refers to the permanent members of the UN Security Council: China, Russia, the UK, France, and the US.

234 Ibid.

serving State officials.[235] It also began to extend the label to the accounts of more States.[236] As of 23 February 2022, it has been applied to accounts from a total of 21 States,[237] and is intended to be extended to more States in future.[238]

90. While this extra level of authentication is welcome, it is important to note that the verification of State accounts by Twitter appears to have displayed a bias towards western democracies in the Global North. It tends to be the accounts of States from the Global South that have not been verified by the company. Of the accounts that do not have the blue mark in place[239] a massive 88% are from the Global South.[240] As such, there is an undeniable, and huge, "verification gap" between Twitter accounts from States of the Global North and those of the Global South. This fact is both disappointing and entirely unsurprising.

91. There is a risk, as a result, that Global North States (and researchers/lawyers generally), will consider much of the practice or *opinio juris* of Global South States manifesting on social media as lacking legitimacy, on the basis that the relevant account does not have the appropriate "verification". This would be nothing new, of course: as was noted in the previous Part, States of the Global South have always been marginalised in relation to the making of customary international law.[241] However, the Twitter "verification gap" nonetheless represents the potential for a depressing re-embedding of colonial

235 Adam Smith, Twitter will Add Labels to Head of States' Personal Accounts in Attempt to Stop them Manipulating the Platform, The Independent (12 Feb. 2021), www.independent.co.uk/life-style/gadgets-and-tech/twitter-state-account-labels-b1801441.html.

236 Ibid.

237 About Government and State-Affiliated Media Account Labels on Twitter, above n.231. These States are China, France, Russia, the US, the UK, Canada, Germany, Italy, Japan, Cuba, Ecuador, Egypt, Honduras, Indonesia, Iran, Saudi Arabia, Serbia, Spain, Thailand, Turkey, and the United Arab Emirates.

238 Ibid.

239 Which, as noted, are around 42% of the total number of State level accounts identified by BCW's 2020 Twiplomacy Study. See above para. 87.

240 This estimate is based on the author's own coding of the Twiplomacy 2020 Master Data File (1 May 2020) (which is available for download via the Twiplomacy Study 2020, above n.4). Of the 475 unverified accounts identified by BCW, this author coded 419 as being from States of the Global South (using the definition of "Global South" adopted by Nour Dados and Raewyn Connell, The Global South, 11 Contexts (2012), 12). The coded version of the dataset is on file with the author.

241 See above para. 69.

law-making patterns in the context of a new forum for State activity – a forum that, as argued in Part IX, could actually facilitate a more "democratised" approach to the identification of customary international law in the right circumstances.

92. In time, should Twitter's new "State level" verification label be applied to a sufficiently large number of relevant accounts (especially if this is all or close to all of them) this could reduce concerns over the Global North/Global South "verification gap", and authenticity concerns more generally. However, there is no guarantee that Twitter will be willing to extend the label sufficiently widely. One might also ask whether it is desirable for the regulator and arbiter of veracity, in a law-making context, to be a private multinational company rather than States themselves.[242] A far more appropriate approach would be the creation of a repository of verified State accounts hosted by a suitable IGO (say, the UN), with States declaring and providing the evidence of the veracity of their accounts to avoid confusion. The creation of such a repository is perhaps unlikely any time soon, though.

93. In any event, the very fact that the application of a new label has been considered necessary by Twitter in the first place (especially when one recalls that the platform already uses the blue verification mark) highlights the scale, or at least potential scale, of "fake twiplomacy". As will be recalled from the start of this Part, authenticity concerns should not be overstated when it comes to customary international law-making on social media, but they certainly should not be ignored either.

XI. Conclusion

94. State usage of social media is now ubiquitous. In the context of the recent rise in twiplomacy, this article has examined the potential for customary international law to be made on social media. Or, more specifically, it has considered whether posts from State Twitter accounts are able to act as State practice or evidence of *opinio juris*, and thus form part of the raw material contributing to the formation of customary international law. It has been argued that tweets are merely another form of "public statement" and that they therefore can contribute to customary international law-making in the same way as

242 See Knight Institute (2021), above n.157, 12 (Justice Thomas expressing concern that control of the process of governmental communication on social media ultimately rests "powerfully in the hands of private digital platforms" rather than in the hands of the State official or organ holding the relevant social media account).

any other official statement made by a State. There is nothing so unique about social media as to prevent it from manifesting practice or evidence of *opinio juris*.

95. Based on an initial scoping study, it also can tentatively be concluded that there are some statements that have *already been issued* on Twitter that possess all the features of State practice/*opinio juris*. However, these findings should not be overstated: they are best read as demonstrating the possibility of social media posts contributing to custom in the future rather than establishing this occurrence today, at least to any sizable extent. More empirical work, on a bigger scale, is needed to assess this phenomenon further. It would be wise to conduct a new, larger survey on this in 3-4 years from now, to take into account the fact that social media usage by States continues to increase significantly, and to allow time for statements made by States on social media to "take hold" in the legal social consciousness of the international community. It is predicted by the present author (again, tentatively) that it is only a matter of time before scholars and then, ultimately, States, will refer to social media posts as instances/evidence of State practice or evidence of *opinio juris*.

96. If social media does indeed become a breeding ground for customary international law in the way and to the extent predicted, this will present challenges for the identification of the law. These include uncertainty over whose Twitter accounts, and which tweets from them, might be relevant to the formation of custom. This partly is because a degree of uncertainty remains as to who can express *opinio juris* on behalf of the State. Clarity on this question from an actor such as the International Court of Justice (ICJ) or the ILC would be welcomed. This would be beneficial for the identification of customary international law in general, but it would be especially valuable in the twiplomacy context, where the issue of "whose statements can count" is exacerbated by the additional blurring of the "personal" and the "official" due to the widespread use of "personal" accounts by State officials.

97. Concerns can also be raised about the difficulty of deriving legal meaning and intent from often short, informal, and instant statements rather than considered official pronouncements. Tweets are undoubtedly poor legal tools, both inherently and because of the way that they are commonly used. At the same time, twiplomacy presents us with the ability to sift through huge datasets in a fraction of the time required for traditional customary international law analysis (at least where that traditional analysis is done properly). Social media platforms – given that States now use them all the time – can act as a single source on the internet for gathering the necessary raw material, in "bite

sized" chunks. This has the potential to have significant benefits for the researcher, and for the methodological rigour that they are able to employ to the identification of customary international law, in terms of how much data they can review and from how many different States.

98. Of course, what here could be given with one hand could well also be taken away with the other. More data, on a centralised platform, can be much more easily searched and thus more of it included in analysis. But this also means even more proliferation of the raw material of customary international law, which already is a concern, for example in terms of the inclusion (or, rather, exclusion) of the practice and *opinio juris* of Global South States. It remains to be seen whether the advantages to the researcher of centralised and easily searchable statements will offset the sheer amount of such statements and the fact that they will be comparatively cursory and likely not as carefully considered (and thus less legally nuanced).[243]

99. Finally, this article examined potential authenticity issues that could proliferate practice and *opinio juris* on social media. "Diplomatic catfishing", both through the hacking of genuine State accounts and the creation of fake ones, already occurs on social media. Moreover, there is a concerning "verification gap" between the Twitter accounts of States of the Global North and those of the Global South, which runs the risk of delegitimising and thus further marginalising Global South States' input into the process of customary international law-making. Issues of authenticity and verification should not be overstated but nonetheless should be kept in mind by lawyers and researchers as State usage of social media continues to increase.

100. Ultimately, Twitter and other social media platforms represent just another way for States (like everyone else) to communicate. This means that there is no reason that twiplomacy cannot contribute to the creation of customary international law – and the huge rise in State usage of social media suggests that this is highly likely – but it also means that there is nothing so unique about social media that it will change the requirements for the formation of customary international law. The reaction of States to the ILC's

243 See generally Rosine Faucher, Social Media and Change in International Humanitarian Law Dynamics, 2 Inter Gentes (2019), 48, 72 (discussing the possible implications of social media use for the application and enforcement of International Humanitarian Law: "[s]ocial media [. . .] has democratized and increased access to information worldwide", but "[d]espite these benefits, social media also comes with challenges. At a technical level, the quantity and quality of information generated is difficult to control").

Conclusions on the *Identification of Customary International Law*[244] indicates that there is general agreement that State practice and *opinio juri*s are as necessary as ever, and the rise of twiplomacy is unlikely to alter the need for both elements, or the requirements as to the *nature* and *quality* of these elements.[245] However, twiplomacy nonetheless could have significant implications in this context: it has the potential to change how lawyers and researchers undertake much of the practical process of *identifying* the elements required for the formation of customary international law.

Annex 1

Search Terms Applied to Selected Twitter Accounts in the Scoping Study Conducted to Underpin Part VI

General terms potentially relating to international law / international legal process
• Agreements
• Belief
• Believe
• Contracting parties
• Customary international law
• ICJ
• Illegal
• International law
• *Jus cogens*
• Legal
• *Opinio juris*
• Sovereignty
• State conduct
• State practice
• State responsibility
• Territory
• UN Charter
• Vienna Convention on the Law of Treaties

244 See above para. 13.

245 Martins Paparinskis, COVID-19 Claims and the Law of International Responsibility, 11 J of International Humanitarian Legal Studies (2020), 311, 319 n.36 ("Modern technologies that officials increasingly use for expressing their views on topics of international law, such as Twitter, have not obviously changed the normal standards of the international legal process").

International Criminal Law

- Aggression
- Civilians
- Crimes against humanity
- Criminal liability
- Criminal responsibility
- Extradition
- Genocide
- Rome Statute
- Terrorism
- Torture
- War crimes

International Humanitarian Law

- Armed conflict
- Combat
- Geneva Conventions
- Hague Convention
- International Committee on the Red Cross
- *Jus in bello*
- Proliferation
- Weapons

International Investment Law

- Assets
- Bilateral investment
- Bilateral investment treaties
- BITs
- Companies
- Economic order
- Foreign investment
- Investors
- Multilateral agreements on investment
- Natural resources
- OECD
- Transnational cooperation
- WTO

International Environmental Law

- Antarctic Treaty
- Atmosphere
- Climate change
- Council of Europe Convention on Civil Liberties for Damage Resulting from Activities on the Environment
- Due diligence
- Ecocide
- Endangered species
- Environment
- International Maritime Organization
- Kyoto Protocol
- Marine
- Nature
- Nuclear
- Ozone
- Paris Agreement
- Polluter pays
- Pollution
- Precautionary principle
- Protocol on Environmental Protection
- Rio Declaration on Environmental Development
- Stockholm Conference on the Human Environment
- UN Convention on Biological Diversity
- UN Environment Programme

Law on the Use of Force

- Host states
- Hostilities
- Humanitarian intervention
- *Jus ad bellum*
- Necessity
- Proportionality
- Security Council
- Self-defence / Self-defense

Law of the Sea

- Bays
- Coast
- Coastal state
- Contiguous zone
- Continental shelf
- Economic Zones
- EEZ
- External waters
- Fishing zones
- High Seas
- Innocent passage
- Internal waters
- International Seabed Authority
- LOSC
- Piracy
- Straight baseline
- Territorial sea
- Transit passage
- UNCLOS