

The Role of Social Media in shaping Customary International Law: Opportunities and Challenges

Lahiruni Ekanayake¹, Vinsuka Gunawardena^{2*}

¹Department of Law, ESOF Uni, Colombo 4, 00400 Sri Lanka

²ESOF Uni, Colombo 4, 00400 Sri Lanka

Corresponding author *:vinsuka.gunawardena@esoft.lk

Abstract

This article examines the potential and pitfalls of using social media, specifically platforms like Twitter, to identify and shape Customary International Law (CIL). Traditionally, CIL is established through consistent state practice and a legal conviction known as *opinio juris*. The global shift to digital communication offers a new opportunity: public statements by states and their officials on social media could potentially serve as contemporary evidence of this required legal conviction. However, the analysis concludes that the risks associated with social media currently outweigh its potential benefits for CIL formation. Several critical challenges cloud its utility. These include the difficulty in distinguishing between a state official's personal and institutional legal views and the serious risks of misinformation stemming from hacking, diplomatic catfishing, and other forms of digital manipulation. Furthermore, social media inherently introduces biases, particularly by favouring Western democracies that have high digital adoption. This can lead to the strategic manipulation of legal narratives online. Without the implementation of robust verification mechanisms, the role of social media in articulating CIL remains fraught with ambiguity and is too unreliable to be a primary source for international law.

Keywords: Customary International Law; social media; State Practice; Digital diplomacy; Misinformation

1. Introduction

The effectiveness of international law depends on the collective adherence of states to its fundamental principles, as articulated in Article 38 of the Statute of the International Court of Justice¹. Among its recognized sources, CIL remains one of the most dynamic yet contested foundations, shaped through the interaction of two core elements; state practice and *opinio juris*².

¹ Statute of the International Court of Justice, 26 June 1945 (entered into force 24 October 1945).

² Christina Ochoa, 'The Individual and Customary International Law Formation' [2007] 48(1) Virginia Journal of International Law.

This research seeks to examine how these elements operate to determine the existence and scope of CIL, while also addressing the ambiguities that persist in its identification.

Beyond the traditional framework, this study further investigates an emerging question as to whether statements made by state officials and entities on social media can serve as credible evidence of state practice or *opinio juris*³. It explores both the potential and the pitfalls of incorporating such digital expressions into the realm of CIL. The research highlights key concerns, including the blurred distinction between personal and institutional statements, the risks of misinformation, hacking, and politicization, and the dominance of Western narratives that marginalize the Global South. By critically analysing these issues alongside landmark cases such as *North Sea Continental Shelf* and *Nicaragua v. United States*⁴, this study aims to evaluate whether digital state conduct can meaningfully and reliably contribute to the evolution of customary international law.

2. Methodology and Methods

This study adopts a qualitative, doctrinal, and analytical methodology to examine how social media influences the evolution of customary international law. It analyzes primary sources such as treaties, judicial decisions, and official digital statements, alongside secondary materials including academic writings and policy papers. A comparative approach across jurisdictions and international organizations is employed to assess both the potential of social media in evidencing state practice and *opinio juris*, and the challenges it poses concerning authenticity, reliability, and bias. This framework enables a critical evaluation of whether digital expressions can be deemed credible in shaping customary international law.

3. Discussion and Findings

3.1. Social Media as a Yardstick for Identifying CIL

Contextualized in a backdrop as reiterated above where it becomes evident that state practice ideally refers to the material factual behavior of states which can amount to custom based on factors such as consistency, widespread nature and existence for a sufficient period of time⁵, the identification of CIL runs a risk of ambiguity. This is on account of the indecisive nature embedded in the lack of precision concerning aspects such as the time required for the formation of a certain custom and how much consistency and widespread acceptance⁶. On top of these

³ Anthony D'Amato, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms' [1996] 25(1) Georgia Journal of International and Comparative Law.

⁴ *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3.

⁵ Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law.

⁶ Monica Hakimi, 'Making Sense of Customary International Law' (2020) 118 Michigan Law Review

ambiguities, a question arises as to whether certain other methodologies could be adopted for the identification of CIL that will pave way for bigger and better clarity. Thus, the following analysis will explore the idea of considering the use of social media by the state as a characteristic that facilitates such identification.

The existing framework based on the material factual behavior of states as stated above is predominantly centered on the commission of physical acts or scenarios that can amount to a custom with a potential to be recognized as CIL. A slight deviation from this narrative could be observed in the international arena in this respect where recognition has also been extended to verbal statements that could be considered as CIL.⁷ In this respect, such verbal statements complement well with the notion of *opinio juris* which is more often than not, a legal claim or a response establishing social acceptance and therefore which necessarily involves some form of “articulation”.⁸ As stipulated in *Prosecutor v Stanislav Galić*⁹ public statements could then be considered as one way through which states express their *opinio juris* and considering the widespread use of social media for global communication in the current context, social media platforms could definitely contain such statements that have the potential for being identified as CIL.

In this context, there seem to exist progressive indications that States and their representatives are alive to the possibility of social media posts contributing to CIL¹⁰. In other words, this phenomenon could also be termed as Twiplomacy¹¹, which has in fact evolved in recent times as a generic term for all social media activities by states and their leaders. As demonstrated by statistic data based on a 2020 study by Brurson, Cohn and Wolfe, 189 countries out of 193 UN member states have an official social media presence¹². Among these, 163 heads of state and government and 132 foreign ministers have personal accounts on Twitter. These accounts are often and primarily used for diplomacy and mass communication with the national and international communities.¹³ Considering this frequency of usage and the willingness of states to transmit their messages in a global scale, this could be identified as promising potential for the formation of CIL.

3.2. Implications of the Distinction between State Accounts and those of State Officials

Statements made through Twitter in institutional and personal capacities by states in this manner, in fact act as raw material that could serve the foundation for transpiring into *opinio juris*. To

⁷ Ibid (n4).

⁸ Ibid (n5).

⁹ (Judgment and Opinion) IT-98-29-T (ICTY, 5 December 2003)

¹⁰ James A Green, ‘The Rise of Twiplomacy and the Making of Customary International Law on Social Media’ (2022) 113 American Journal of International Law.

¹¹ Ibid (n4).

¹² Kebene Wodajo, ‘The user state: an alternative reading of the state role and duty in the age of platformized harm’ [2023] 31(1) International Journal of Law & Information Technology.

¹³ Ibid (n12).

illustrate with examples, tweets by the President of France expressing France's allegiance to criminalize ecocide¹⁴, indications by the President of Colombia on the binding effect of the Leticia Pact aimed at protecting Amazon Rain Forest¹⁵, tweets from Venezuela asserting that the act of economic blockade can equate to a crime against humanity¹⁶ could be deemed as statements having legal ramifications, that could receive collective acceptance from the international community. However, these statements also carry the inherent risk of having purely political propaganda that could be misinterpreted as having legal depth by the researcher. This is 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 both¹⁷. Thus, in such circumstances, even though public statements *prima facie* appear as promising potential for *opinio juris*, they could in fact be existing in a pre-legal netherworld which may or may not transpire for statements of legal significance¹⁸.

Additionally, statements made by state's official accounts and personal accounts of state officials could give rise to certain discrepancies. For an example, the tweeting of Donald Trump through his personal Twitter account named "@realDonaldTrump" could be contrasted with @POTUS which is the official Twitter Account of the Office of the U.S presidency¹⁹. This gives rise to the question as to whether statements made by Trump in his personal capacity could have such implications.

Thus, in *Trump v Hawaii*²⁰, on the Proclamation that issued a travel ban on citizens from Islamic States the Supreme Court considered the implications of statements made through @realDonaldTrump without distinguishing the fact that they were made in his personal capacity. In this context, considering the fact that these statements were inherently anti-Islamic, to consider that they served as a reflection of the entire state's perspective on par with the idea that statements made by officials should be considered in the formation of CIL would be morally reprehensible. Also, in *IRAP v Trump*²¹, the US Court of appeal for the Fourth Circuit held that statements made by Trump which were widely disseminated among the majority could be identified as official statements even though they were made through personal accounts. However, in *Biden v Knight Institute*²², emphasizing this distinction again, the Court held that Trump's Twitter account is not a state-controlled space and therefore he has the discretion to block users without that amounting

¹⁴ Emmanuel Macron (@EmmanuelMacron), '[Tweet text]' (29 June 2020).

<https://twitter.com/EmmanuelMacron/status/1277599257692946434> accessed [20 July 2024].

¹⁵ Johan Ramirez, 'Amazon "Leticia Pact" Was a Wasted Opportunity' DW (20 August 2023)

<https://www.dw.com/en/amazon-leticia-pact-was-a-wasted-opportunity/a-66344354> accessed [20 July 2024].

¹⁶ Cancillería Venezuela (@CancilleriaVE), '[Tweet text]' (13 March 2020)

<https://twitter.com/CancilleriaVE/status/1238291340431183877> accessed [20 July 2024].

¹⁷ Ibid (n17).

¹⁸ Ibid (n16).

¹⁹ Ibid (n18).

²⁰ *Trump v Hawaii* 585 US 595 (2018).

²¹ *IRAP v Trump* 883 F 3d 233 (4th Cir 2018).

²² *Biden v Knight First Amendment Institute* 593 US 23 (2021).

to an infringement of their First Amendment rights. These instances collectively demonstrate the controversies involved in attaching legal relevance to statements made by a world leader in his personal capacity. To hold them as amounting to *opinio juris* could make the state and its citizens be subjects of politicized propaganda and give rise to controversies rather than catering towards an end goal of a customary international law that benefits the entire community.

3.3. Loose Regulations for State Accounts as a Breeding Ground for Statements that Lack Credibility

Even though States' usage of social media platforms in this manner could be understood in a global context, in terms of furthering diplomatic communications and keeping up with the trends of globalization, concern has also been raised on the issue of such initiatives overshadowing the regulatory function of the states in the process. This is because when using social media platforms for such engagement, it amounts to state activity that emanates from its capacity as a user.²³ This creates an environment whereby the state is propelled to avoid its regulatory duty by becoming the user subject of corporate regulated digital space²⁴ For an example, by virtue of following this practice, it creates an unhealthy trend where a state that utilizes social media in a provocative and harmful manner could evade responsibility for such actions since the statements made to that extent will be screened not through the constitution or the laws of the state concerned or from human rights perspectives but from the Terms of Service in the relevant platforms. This could be identified as giving ample opportunities for states to channel distorted information, engage in agenda shaping and manipulation of public opinion.²⁵ Thus it could be argued that even though states' engagement in the global arena sounds like a promising avenue in terms of widespread communication, there is a higher chance for the information shared through state accounts' lacking credibility and, in such circumstances, it raises a questionable concern as to whether they have sufficient standards to be identified as CIL.

3.4. Concerns Related to Authenticity of Information

As much as there is solid evidence that portrays states' engagement in social media, it is also accompanied by the inherent risks within the system in terms of exposure to hackers. This practice whereby people falsely purporting to be State officials or organs post public statements as if on behalf of the State²⁶ is also known as "diplomatic catfishing". Considering the rapid advancement of technology and the numerous ways in which unauthorized access could be made into different social media platforms, there rises a major issue in the authenticity of the information shared by states' accounts in such instances. This is because in such a context, for an

²³ Jack M Balkin, 'Free Speech is a Triangle' (2018) 118 Columbia Law Review.

²⁴ Rory Van Loo, 'Rise of the Digital Regulator' (2017) 66 Duke Law Journal.

²⁵ Ibid (n24).

²⁶ 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' (2017) 27 Journal of the Legal Aspects of Sport.

example, tweets could be generated from the hacked accounts which were not generated by those account holders in the first place. World leaders who got victimized by this move could be identified as Barack Obama, Joe Biden and the Indian Prime Minister Narendra Modi.²⁷ In addition to hacking, diplomatic catfishing is also quite easily carried out through the creation of fake accounts that adopt the identity of the state's account or that of a representative. Such fake accounts could certainly muddy further the already murky waters of researching the raw materials that could lead to the formation of CIL²⁸. Hacking can also pave way for information that generates a picture of chaos and instability regarding the state in question. For an example, in August 2012, the Ugandan office of the Prime Minister's website was hacked where the hacker collective openly declared their reluctance over an anti-homosexuality bill.²⁹ This indicates that even though there could be a mass of information that appears like they could be transformed to state practice and *opinio juris*, in the absence of proper regulatory systems to verify their authenticity, they cannot be identified as falling within the purview of information that can amount to CIL.

3.5. Strategic Narratives that Camouflage the Real Picture

Within the current framework of digital diplomacy, the consequences and potential implications embedded in Israel- Palestine conflict also warrant consideration. When analyzing the recent study on 759 tweets published by the Israel Ministry of Foreign affairs during the 2014 Gaza war it becomes evident that Israel foreign ministry constructed a series of 14 linguistic frames that resonated well with Israel's narrative of the war and which were subsequently released through its official twitter platform to the international arena³⁰. This stands as a classic example of how the Foreign Ministry has utilized social media platforms in a hypocritical manner that circumvents the real acts of damages and injury inflicted by Israel , contrary to the principles of International Humanitarian Law and in such a manner that legitimizes each and every level of atrocity thus committed. For an example, the Israeli MFA attempted to create a moral dichotomy between Hamas and Israel. While Hamas was framed as being an extension of ISIS and committing war crimes, Israel was framed as taking the moral highroad by opening humanitarian windows and building a field hospital outside Gaza. The moral dichotomy was best captured by the tweet 'We Cease, They Fire' ³¹ Additionally, the cause of the conflict was framed as Hamas's objective of destroying the State of Israel and the Jewish people so that Israel had no choice but to attack. ³²

²⁷ Ibid (n18).

²⁸ Olga Babko-Malaya et al, 'Detection of Hacking Behaviors and Communication Patterns on Social Media' (2017) IEEE International Conference on Big Data (BIGDATA).

²⁹ Ronald Mayambala and Solomon Rukundo, 'African Human Rights Law Journal' [2019] 19 Digital activism and free expression in Uganda.

³⁰ Ilan Manor and C Rhys, 'Visually framing the Gaza War of 2014: The Israel Ministry of Foreign Affairs on Twitter' [2018] 11(4) Media, War and Conflict.

³¹ BD Wood and JS Peake, 'The Dynamics of Foreign Policy Agenda Setting' (1998) 92 American Political Science Review.

³² K Parry, 'Images of Liberation? Visual Framing, Humanitarianism and British Press Photography During the 2003 Iraq Invasion' (2011) 33 Media, Culture & Society.

Thus, this sort of biased narratives that strategically undermine the crimes committed by Israel vehemently support the proposition that recognizing them as raw materials capable of forming CIL would be morally and legally reprehensible.

4. Conclusion

The traditional doctrine of CIL remains a vital source in shaping the foundations of international law, primarily through its twin elements, state practice and *opinio juris*. However, in an increasingly digital era, the emergence of social media as a platform for official communication raises questions about its legitimacy in contributing to CIL. This research highlights that, while social media could potentially advance the evolution of customary law by providing real-time insights into state conduct, it also introduces significant risks. The blurring of personal and institutional statements, the absence of regulatory safeguards, misinformation, hacking, and Western-centric biases threaten the credibility and inclusivity of such digital evidence. Consequently, this study concludes that without robust monitoring, authentication, and verification mechanisms, social media statements cannot yet be recognized as reliable indicators of customary international law. The disadvantages presently outweigh the benefits, demanding greater caution and structural reform before adoption.

References

Primary Sources

1. Report of the International Law Commission on the Work of its Sixty-Eighth Session (2 May-10 June and 4 July-12 August 2016) UNGA 71st Session Supp No 10 UN Doc A/71/10
2. *Biden v Knight First Amendment Institute* 593 US 23 (2021)
3. *Colombian-Peruvian Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266
4. *IRAP v Trump* 883 F 3d 233 (4th Cir 2018)
5. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14
6. *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3
7. *Prosecutor v Stanislav Galić (Judgment and Opinion)* IT-98-29-T (ICTY, 5 December 2003)
8. *Trump v Hawaii* 585 US 595 (2018)
9. Statute of the International Court of Justice, 26 June 1945 (entered into force 24 October 1945)

Secondary Sources

10. Blazka M, 'Follow Me, What's the Harm: Considerations of Catfishing and Utilizing Fake Online Personas on Social Media' (2017) 27 *Journal of the Legal Aspects of Sport*
11. D'Amato A, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms ' [1996] 25(1) *Georgia Journal of International and Comparative Law*
12. Green A J, 'The Rise of Twiplomacy and the Making of Customary International Law on Social Media' (2022) 113 *American Journal of International Law*