CITIES AND INTERNATIONAL LAW: LEGALLY INVISIBLE OR RISING SOFT-POWER ACTORS?

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International law is seen by many practitioners, as well as by conservative legal scholars, as a strictly inter-state endeavour. Symbolically associated with the Treaty of Westphalia, this may have been true for many centuries. But since – at the latest – the *Reparations for Injuries* Advisory Opinion of the International Court of Justice recognised the legal personality of the United Nations as the first non-state entity, this strict state-centricity has ceased to reflect the state of affairs. Instead, today's reality of global governance and its primary normative framework – international law – is messy, pluralist, multistakeholder, uses soft governance tools rather than hard and binding law, and bridges public–private divides. In fact, arguably, states were never monolithic, unified rational actors conducting international law and governance, but were, in fact, when scrutinised through a socio-legal lens, an amalgamation of influence from elements within and without the state apparatus, such as diplomats, networks, bureaucrats, faith organisations, political groups, other levels of governments and more (Berman, 2007). International law worked to reduce such influences to stricter imagined categories such as "subjects" and "objects" for the purpose of creating a solid, dependable, as well as binding legal framework with chances of enforcement. This "subjecthood" or *international legal personality* is the primary concept in positive international law distinguishing actors from non-actors. Now, however, even the most positivist[1] of international lawyers are confronted with the pluralisation of actors without established legal personality engaging in practices traditionally reserved for states. There is, additionally, a growing preference for norms designed to govern international behaviour to be soft, non-binding and created through multistakeholder governance processes rather than binding treaties signed by states only. Non-state actors, starting with international organisations like the United Nations, but later also encompassing individuals, NGOs, transnational corporations and armed groups, have been gradually accepted by international lawyers to be participants and to possess legal significance in international law (Gal-Or et al., 2015). The pluralisation of actors and the softening of the norms created corresponds to a move from multilateralism – referring to an inter-state governance system – towards multistakeholderism – referring to a system of norm generation and governance that involves many actors relevant to a subject matter, which is the premise of this volume.

1. Legal positivism refers to the standpoint that lawyers ought to be interested only in what law is and not what it should be. According to legal positivists, what law is can be determined conclusively by looking at whether it was issued by the relevant authority. "Soft law" and any actors excluded from official law-making capacity should be disregarded as non-law and non-actors, as giving them a quasi-legal value might threaten the legal system.

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In this world, cities and their transnational city networks (TCNs) have been engaging with increasing resonance, competence and rigour in the governance of (and norm generation on) issues that would traditionally be considered within the jurisdiction of the state. Our previous research (Durmuş and Oomen, forthcoming) focussing on the field of migration has found that this engagement of cities with matters of global governance, including by mobilising international law, can be generally divided into two types of engagement, namely: (a) seeking a seat in traditionally state-centric processes; and (b) creating city-centric (or local-centric, to be more inclusive of non-urban localities) fora to engage collectively with international law and global governance. The two types of engagement are complemented by cities' engagement with international law in governing their *own* locality. For some, the question then becomes: Is any of this city engagement relevant for international law? What are the prospects for achieving recognition of cities' activities and space for their engagement in formal international legal frameworks? This piece argues that international law, even as it currently stands, can be observed both conservatively and more progressively. The progressive perspective recognises – often through the support of interdisciplinary research – the de facto engagement and even influence of local governments on international law. This piece also argues that even if observed through a conservative legal positivist lens, the engagement of local governments with international law is likely to be increasingly relevant to the developments in the content and practice of international law. This is true regardless of whether it takes a long time for any *formal* change of status to occur – if it occurs at all. If cities, collectively, are seeking formal recognition of their role and status in international law, they are on exactly the right path, both in seeking a seat at the table in state-centric processes and in organising and convening with their peers to engage in international law and governance matters without reservations and concerns about whether or not they are "permitted" by international law to do so (as "subjects" or holders of international legal personality). The recognition of new players in the game, whether by progressive or more conservative observers or by existing players, does not come about by such permission but by a retroactive recognition of accumulated evidence showing a new de facto reality. I will now seek to explicate this by first reflecting on what the conservative and more pluralist perspectives concerning actors in international law are and how they have changed, followed by a reflection on the current state of affairs with regard to cities' engagement with international law. Finally, I will summarise some suggestions for practitioners representing the municipalist movement in global governance.

I. Is international law only inter nations?

There is an understanding that international law was always organised as a strictly inter-state global legal order – the so-called "Westphalian system", referring to the Treaty of Westphalia which established states as equal and sole subjects of international law. However, even the epitomised Treaty of Westphalia itself had city signatories.[2] Further, the independent cities forming the Hanseatic League in the 12th century would "adopt[…] rules on trade and safe navigation routes [which] then bound all member-cities; these rules influence[d] the development of the maritime law of nations" (Nijman, 2016: 11). In the centuries to come, the modern state would establish itself as the primary and only subject

2. https://avalon.law.yale.edu/17th_century/westphal.asp

of international law. Developments in technology and globalisation, however, inevitably created a need and opportunity for more actors to emerge, such as international organisations. The most significant step for the recognition of so-called "non-state actors" in international law was the Advisory Opinion of the International Court of Justice (ICJ) on *Reparations for Injuries Suffered in the Service of the United Nations,* which concerned a UN Special Rapporteur targeted by the national government in which he was operating (International Court of Justice, 1948). In this advisory opinion, the ICJ – through circular reasoning – recognised that the United Nations has a functional kind of partial legal personality. While not the same as the full and primary legal personality states enjoy, this would allow the UN to fulfil the functions enshrined in its Charter. The Court thus stated that the United Nations *must have had* a kind of legal personality in order to sign the agreements, undertake the responsibilities and enjoy the rights endowed to it by states in its creation.

There are two types of engagement by cities with global governance: (a) seeking a seat in traditionally state-centric processes; and (b) creating city-centric fora to engage collectively with global governance.

This advisory opinion was the first legal recognition of the new, no longer strictly inter-state reality of global governance. The emergence and status of new non-state actors were thereafter analysed by international lawyers in a similar manner. Thus, if a need arose for this actor to *function* in the international legal order with a degree of autonomy, a *degree of functional legal personality would emerge* for this actor, which might mean that it could hold its own rights, obligations, and/or participate in law-making. For example, when human rights emerged as a field of international law in which individuals held rights against states, it was argued that individuals had acquired functional legal personality, meaning they had become actors in international law (Gal-Or et al., 2015). Of course, legal personality is not the only way an observer could determine the extent to which an entity is an "actor" in international law, but it remains the most established legal concept for this purpose, although many scholars find little need for this concept at the present day.

Despite the increased attention on cities in the social sciences in the past decades, local governments have been largely overlooked in the legal scholarly discussions around so-called non-state actors, although some lawyers have explored cities from other legal perspectives (Blank, 2006; Aust, 2015; Oomen and Baumgaertel, 2018; Durmuş, 2020). This has partially to do with the fact that formal international law *does* have a place for local governments, albeit not an autonomous one. Nijman has recognised that cities in the international field have characteristics of both sub-state actors (state organs) and non-state actors, acting in their autonomous interest outside the direction of the central government (Nijman, 2016). The prior understanding is easily compatible with state-centric international law while the latter proves problematic. According to the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts, local governments are considered "state organs" (UNGA, 2008: Art. 4), showing their sub-state character. This means that every action or omission by local governments that breaches an international obligation of their respective state is attributed to the state – they have no autonomous standing. Within this safe, established framework, the UN Human Rights Council (UNHRC) has been engaging in the last few years with the question of the role of local governments in promoting and protecting human rights as *state organs* bound by all the international legal obliga-

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tions binding their respective states (HRC, 2015: para.1). When it comes to law-making in international law (one of the capacities of *international legal persons*), one could argue that customary international law, which is built by accumulated *state practice* accompanied by a belief that the practice constitutes law, could offer a narrow entry point for local governments, where local governments contribute to its development as *a state organ* (Durmuş, 2020). Otherwise, positive international law has offered no place to local governments in their autonomous, non-state capacity.

Parallel to this pluralisation of actors, the last decades have also witnessed a decline in the usage of the formal sources of international law codified in the ICJ Statute (Art 38(1)) – treaties, customary international law and general principles of law – and an increased preference for non-binding commitments and guidelines, so-called "soft law". Many fewer treaties are now concluded between states than in the 1990s, while non-binding norms such as the UN Guiding Principles on Business and Human Rights and the Sustainable Development Goals (SDGs) attract more interest, advocacy and mobilisation from the international community. The usage of such forms of soft law also allows the international community to circumvent the question of who exactly is a formal subject of international law with the capacity to conclude treaties, and instead focus on simply reaching as wide a societal consensus as possible. The new norms made this way are often not binding and have little (or no) justiciability (ability to be enforced by courts). This in no way means that soft law is ineffective, however, as international law depends on actors to enforce it in the absence of a central enforcer. If soft law created in multistakeholder processes with broad consensus enjoys more popularity and wider mobilisation (like the SDGs) while states perpetually turn away from binding law, the power of soft law should not be underestimated.

Yet, the positivist vision is not the only way to see international law. Some pluralist scholars have long recognised the power of actors and types of norms not contemplated by "official" international law. Legal pluralists, especially representatives of the "New" New Haven School of International Law (Koh, 2007) have been exploring the notion of "bottom-up international law-making" (Levit, 2007) by "norm-generating communities" (Berman, 2007) constantly proposing, negotiating and contesting different imaginations of the law with different levels of persuasive power and authority. Norms are created, interpreted, challenged and enforced – travelling, as they change, between different international actors and governance levels – within a constant multi-directional process (Berman, 2007; Durmuş, 2020). These scholars, following the original New Haven scholars of the Cold War era, argue that law's power comes not only from coercion and enforcement capacity, but above all from persuasion by the actors who advocate for them, including by those *within* the state. Through the interactions with other members of the international community, the advocates of a certain norm may successfully change what other actors consider to be in their best interests and in those of the international community. While positive international law may remain reluctant and conservative, this pluralist lens is very helpful in understanding how global governance functions today.

II. What are cities doing?

Cities and their transnational city networks have been engaging with international law and issues of global governance with increasing intensity for at least three decades. While local governments in this engagement demonstrate qualities of both non-state and sub-state actors (Nijman, 2016; Durmuş, 2020), most relevant for the purposes of this piece is to focus on the activities of local governments that are somewhat autonomous and comparable to the engagement of non-state actors, since these are activities that go unrecognised by, and challenge, formal international law. Here, our previous research in the field of migration and human rights has shown a multiplicity of ways in which local governments engage with international law.

The International Court of Justice showed in 1948 that if a new actor in international law had functions which required a degree of autonomy, and this was accepted by other actors such as states, a *degree of functional legal personality* would emerge for this actor.

Engaging with international law in their own local governance

Firstly, local governments can engage with international law in their own localities regardless of whether they are also seeking to engage in the global governance of these issues. Symbolic ratification of international treaties and the adoption of international soft law instruments into local governance are good examples for this engagement. Instances from practice include San Francisco and other US cities symbolically ratifying the Convention on the Elimination of All Kinds of Discrimination Against Women (CEDAW) while the United States has not (Davis, 2016), the city of Graz creating a local implementation plan for the local realisation of the Convention on the Rights of Persons with Disabilities (CRPD), and the widespread practice of referring to the Sustainable Development Goals (SDGs) in local law and policymaking. When the United States withdrew from the Paris Climate Agreement, many cities pledged to continue to comply with the international treaty, demonstrating that the "state" is not monolithic. While this engagement certainly constitutes a contestation of what formal international law considers permissible and by which actors, this practice alone is not considered direct engagement in global governance by this author and thus will not be discussed extensively. Such activity concerns the governance *of the locality* the local government represents, and does not necessitate interaction, negotiation and deliberation with other international actors. Of course, such practices often do not stand alone. They may be linked to activities such as reporting progress on adopted international norms to monitoring bodies, which include interactions with international actors and would therefore fit within the categories below.

Participating in traditionally state-centric processes

The second type of engagement, as found in our recent research on migration and human rights, is how cities and TCNs seek a seat at the table in traditionally state-centric global law and governance processes (Durmuş and Oomen, forthcoming). Some of the most noteworthy examples are local governments' advocacy campaign for the inclusion of SDG 11 on Sustainable Cities and Communities in the 2030 Agenda and their efforts to be recognised in the Paris Climate Agreement as important actors in the fight against climate change (Art. 7(2); Art. 11(2)), as well as in the Global Compacts for Migration and Refugees (41 referenc-

A legal pluralist perspective on international law argues that law's power lies not only in coercion but persuasion, and that actors big and small, even unrecognised, can influence what others consider "good" for themselves and the international community.

es to local governments in total). Local governments gathered in parallel to government representatives for the Global Compact for Migration in Marrakech in December 2018, demonstrating their eagerness both to take part in state-centric processes and gather amongst themselves, even if not "permitted" to join the states. Also worth mentioning are local governments' efforts to secure formal recognition within the United Nations system, including but not limited to the conferences and proceedings of UN-Habitat. Some municipalist victories in these regards include the recognition of the International Union of Local Authorities as a consultative entity before ECOSOC in 1948, the inclusion in 1992 of local governments as a Major Group to be consulted in the UN especially within the climate regime (Garcia-Chueca, 2020), the creation of the UN Advisory Council for Local Authorities (UNACLA) in 1999, and local governments acquiring accreditation at the United Nations to participate in UN proceedings (unless their national governments reject to it in time) (Durmuş and Oomen, forthcoming: 7). Recently, in June 2019, the UN Human Rights Council for the first time organised a consultative meeting on the role of local governments in human rights that invited TCNs such as UCLG to the Council's headquarters in Geneva. By the same token, cities such as New York have gone as far as reporting to the United Nations on their progress in implementing the Paris Climate Agreement and the SDGs locally through the Voluntary Local Reviews, as if they were required to do so by the normative mechanisms (Javorsky, 2018).

All of these activities – seeking to take part in international law-making, seeking to have their role and responsibility with regards to norms recognised, voluntarily reporting their compliance with international norms, seeking official accreditation, acquiring an actual body in the United Nations system dedicated to them, establishing their role strongly enough for United Nations organs to invite them to deliberations (such as the Habitat III Conference) that involve the development of international norms – fit squarely with the International Court of Justice's reasoning that an arising functional need in international law (the creation and functioning of the UN) necessitated a recognition of a limited kind of legal personality.. States' jealous guarding of their sovereignty means it would be far-fetched to expect such formal legal recognition for sub-state actors any time soon. But it is clear that local governments have been successfully implementing the kind of steps that brought other non-state actors increased recognition, in order to be recognised if not as a "non-state actor" – as international lawyers call NGOs, international organisations and armed groups – then as "stakeholders" in the multi-stakeholder processes of global governance.

Creating local-centric norms and governance mechanisms

Finally, local governments, seemingly fed up with the disproportionately high effort required to seek inclusion in mainstream international legal processes, also convene in their local-centric fora to discuss global governance issues and even engage in their own norm generation to address these issues (Durmuş and Oomen, forthcoming). They do this within institutionalised city networks such as the European Coalition of Cities Against Racism (ECCAR), the World Human Rights Cities Forum (WHRCF), and United Cities and Local Governments (UCLG); as

well as in specialised processes structured around the creation of normative documents, such as the conferences leading up to the signing of the European Charter for Safeguarding Human Rights in the City in Saint Denis in 2000. These practices mimic states' practices in global governance, creating permanent international organisations as well as convening conferences to create international treaties. Examples such as the adoption of the Cities for Adequate Housing Declaration (2018), the Global Charter-Agenda for Human Rights in the City (2012) and the launch of a Global Green New Deal by C40 (2019) in collaboration with Fridays for Future are significant here. All these initiatives disregard the question of whether cities *may* engage in international law and demonstrate innovation, initiative and brazen leadership – showing the world what *they* think international law should look like.

III. Analysis and suggestions for practitioners

So, if the question is "What does international law say about all this engagement?" the answer is "That depends on how one sees international law". From a pluralist perspective, cities are very active components of the global system of intertwined norm-generating communities advocating and negotiating their understandings of international law and to diverging extents succeeding in influencing other actors in the field. From a more conservative perspective, local governments are nonetheless relevant both in their "sub-state" role (demonstrated by UN-Habitat and the UNHRC's interest in and increasing embrace of local governments), as well as in their "non-state" autonomous activities, including engagement with and even creation of international norms, both by seeking to join traditional actors and by organising among themselves. This is because, whether formal law "sees" these processes or not, the engagement of cities does not go unnoticed and can to diverging degrees influence other more central actors in the international system. As an official from the UNHRC Advisory Council stated at the closing ceremony of the WHRCF in Gwangju in 2018, the UNHRC often bases its reports on the role of local governments in human rights on the documents created by cities in their networks.[3] These UNHRC reports are then cited by international lawyers exploring the role of cities in international law and the cycle of influence continues. Local governments were also a significant actor in developing and codifying the content of the right to housing, a formal legal right, through the UN-Habitat conferences (Marcenko, 2019).

The final conclusion of this piece is that, whether cities have higher legal status or official recognition in their agenda or not, they have been taking exactly the right steps to influence the development of international law and to be included in global governance processes. A pluralist lens reveals what legalists may not see, namely that local governments are part and parcel of the patchwork of international law and governance, as some of the most enthusiastic internationalist actors taking the initiative and showing the motivation we now miss amongst states. If cities seek official legal recognition, the activities they engage in, particularly seeking inclusion in state-centric processes, are exactly the criteria recognised by the international community in determining who is an actor and who is not. However, these processes are often frustrating for cities and their networks and require energy that might be deemed dispro-

From a pluralist perspective, cities are active components of the global system of norm-generating communities advocating and negotiating their understandings of international law. Whether formal law "sees" these processes or not, cities' influence (big or small) informs actors and norms in the international system.

3. Participant observation by the author at the WHCRF, October 2018, Gwangju.

portionate to the scant space and voice they gain from it. Therefore, in order to continue demonstrating their full potential, fluency and competence in international law and global governance, cities and TCNs should continue investing in their own local-centric fora and their local engagement with international law. These combined efforts are bound to gain more and more recognition from all actors in the field, and local governments – just like other non-state actors who now enjoy a more established legal status – could reach the recognition, power and influence they seek and deserve.

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