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# Shining Cities on the Hill? The Global City, Climate Change, and International Law

Helmut Philipp Aust[*]

Michele Acuto. ***Global Cities, Governance and Diplomacy. The Urban Link***. London, New York: Routledge, 2013. Pp. 232. $145.00. ISBN: 9780415660884.

Benjamin Barber. ***If Mayors Ruled the World. Rising Cities, Declining Nation States***. New Haven: Yale University Press, 2013. Pp. 432. $22.00. ISBN: 9780300164671.

Sofie Bouteligier. ***Cities, Networks, and Global Environmental Governance. Spaces of Innovation, Places of Leadership***. London and New York: Routledge, 2013. Pp. 240. $42.95. ISBN: 9781138833210.

Simon Curtis (ed.). ***The Power of Cities in International Relations***. London and New York: Routledge, 2014. Pp. 192. $140. ISBN: 9780415728775.

## Abstract

*Cities are beginning to assert themselves as internationally relevant actors. This is particularly noticeable in the climate change context. This development has so far not been accorded a great deal of attention by international lawyers. The review essay discusses four new books by political scientists which offer us a closer look at the political dimension of 'global cities', a term originally coined by sociologist Saskia Sassen. The four books under review as well as this essay pay particular attention to the C40 association – a movement of self-styled city leaders in climate change governance. This group of cities has developed numerous ties with international organizations and private corporations. The review essay analyses how*

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*cooperative endeavours such as C40 challenge our understanding of the relationship between the city and the state and assesses how international law as a discipline could come to terms with these developments. It is argued that international law should fulfil two functions in this regard: recognition and contestation. Whereas cities may not yet be recognized subjects of international law, they are moving closer to this illustrious circle. In any case, their law-making processes are beginning to have a significant impact on processes of global governance.*

# 1  Introduction

Global cities have become a fashionable topic of research, at least in disciplines outside of law. Originally coined in the 1990s by sociologist Saskia Sassen, the term 'global city'[1] has become shorthand for a debate which concentrates on the rise of the city as an internationally relevant actor, often coupled with a seemingly inevitable decline of the nation-state. As Sassen has explained, '[t]he loss of power at the national level produces the possibility for new forms of power and politics at the subnational level'.[2] According to Sassen, cities are becoming the strategic sites 'for a range of new types of operations – political, economic, "cultural", and subjective'.[3] A defining feature of global cities in this sense is that 'this type of city cannot be located simply in a scalar hierarchy that puts it below the national, regional, and global. It is one of the spaces *of* the global, and it engages the global directly, often bypassing the national'.[4] Sassen identifies four key markers of global cityness. They are, (i) 'highly concentrated command points in the organization of the world economy', (ii) 'key locations for finance and specialized service firms', (iii) sites of production (not only in material terms, but also ideational terms) and (iv) markets for the 'products and innovations produced'.[5] At the beginning of the 21st century, Sassen holds, 'the city is once again emerging as a strategic site for understanding some of the major new trends reconfiguring social order'.[6]

If seen from the perspective of the decline of the nation-state, it is only a short step towards the invocation of a new medievalism which takes us back to times past in which governance structures were as muddled and unclear as much of today's global governance mechanisms appear to be.[7] In the meantime, the debate over cities has considerably diversified and Sassen's diagnosis has met with contestation and refinement from various corners.[8] Whereas some criticize her focus on megacities fulfilling central functions in today's globalized world economy[9], others point out that her work ultimately

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[1]    S. Sassen, *The Global City – New York, London, Tokyo* (2nd edn, 2001).

[2]    S. Sassen, *A Sociology of Globalization* (2007), at 106.

[3]    *Ibid.*, at 105.

[4]    *Ibid.*, at 102.

[5]    Sassen, *supra* note 1, at 3–4.

[6]    Sassen, *supra* note 2, at 101.

[7]    See further Morss, 'Resources for a Future: Towards an Articulation of Global Governance', 15 *Melbourne Journal of International Law* (2014) 580.

[8]    For an overview of the state of the art see Parnreiter, 'The Global City Tradition', in M. Acuto and W. Steele (eds), *Global City Challenges – Debating a Concept, Improving the Practice* (2013), at 15. See also the contributions in M. Amen *et al* (eds), *Cities and Global Governance – New Sites for International Relations* (2011).

[9]    J. Robinson, *Ordinary Cities: Between Development and Modernity* (2006); Curtis, 'Introduction', in S. Curtis (ed.), *The Power of Cities in International Relations* (2014) 1, at 10.

puts too much emphasis on a certain vision of the 'private city', where the globalness of cities is most of all defined by the presence of multinational corporations.[10]

The four books under review by Michele Acuto[11], Benjamin Barber[12], Sofie Bouteligier[13] and Simon Curtis[14] explore a particular feature of global cities in Sassen's terms: their profile as global actors in a political sense. In complementing Sassen's work on cities as contemporary sites of the global, they further enrich our understanding of the role of the city in contemporary global governance. The books by Acuto and Bouteligier focus on climate governance and the growing role of cities as international actors in this regard. While the two books are similar in terms of the questions they ask, they differ considerably in methodology and style. Acuto's book uses international relations theory as a background for his analysis. He exemplifies his study with an in-depth assessment of the Greater London Authority (GLA) and its role in setting up C40. Bouteligier, in contrast, has conducted more than 80 semi-structured interviews with city government officials as well as representatives of city networks. This gives her research a strong empirical bent of which she makes good use throughout her book. Barber's book has a broader outlook and strives to make a more general contribution on 'rising cities, declining nation states'. Yet, he takes many of his examples from the broader context of urban sustainability and climate change, which makes his book a valuable point of comparison to the more specific works by Acuto and Bouteligier. He also relies on interviews, which he interweaves with the general story line in the form of portraits of noteworthy mayors. The book by Simon Curtis asks more generally how the emergence of cities as international actors impacts on concepts of international relations. As cannot be expected otherwise with an edited volume, the chapters are more diverse in approach. However, it can be noted that the quality of the contributions is high throughout and that all chapters are clearly linked to the general question underlying the volume, i.e., the inquiry into the actor quality of cities in international relations. As an aside, it can be noted that Acuto and Bouteligier also contributed to this volume.

As one of the contributors to Curtis' volume remarks, '(w)hat passes as urban policies today is increasingly suffused with issues that every so often touch upon "high politics".'[15] This becomes particularly apparent in the field of climate change governance, where the supposedly mundane and technical is immediately connected to the greater whole of the very survival of the earth. But also in other fields cities start to leave their mark on the global plane, with examples ranging from development cooperation[16] over cultural exchanges[17] to security cooperation,[18] with the wide network

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[10]   D. Massey, *World City* (2007).

[11]   M. Acuto, *Global Cities, Governance and Diplomacy. The Urban Link* (2013).

[12]   B. Barber, *If Mayors Ruled the World. Rising Cities, Declining Nation States* (2013).

[13]   S. Bouteligier, *Cities, Networks, and Global Environmental Governance. Spaces of Innovation, Places of Leadership* (2013).

[14]   Curtis, *supra* note 9.

[15]   Ljungkvist, 'The Global City – From Strategic Site to Global Actor', in Curtis, *supra* note 9, at 32.

[16]   von Athenstaedt, 'Aktuelle Tendenzen in der kommunalen Entwicklungszusammenarbeit', *Die Öffentliche Verwaltung* [2013] 835.

[17]   Barber, *supra* note 12, at 271.

[18]   Ljungkvist, *supra* note 15, at 42.

cast by the New York Police Department after the attacks of 9/11 only being the most prominent example.[19]

In other cases, cities and their representatives use the vocabulary of international law to position themselves in opposition to the foreign policy of their respective home state.[20] While this phenomenon is also known in the climate change context – take, for instance, the 'ratification' of the Kyoto Protocol by US Mayors[21] – again examples are not limited to this field. A 2009 decision of the European Court of Human Rights concerned a declaration of the Mayor of Seclin, a small French town, to boycott Israeli products in his municipality as a reaction (one might say 'countermeasure') against alleged Israeli violations of international law.[22] The Mayor was prosecuted for incitement to economic boycott and ultimately convicted by the Court of Appeals with a last appeal to the Cour de Cassation unsuccessful. Before the European Court of Human Rights, the Mayor relied on Article 10 of the European Convention on Human Rights (ECHR), containing the right to freedom of expression. While the Court did not find a violation of Article 10 ECHR, it noted the tension between the political mandate of the Mayor, allegedly an argument for an enhanced importance of the right to freedom of expression, and the constraints which the neutrality of the state might put on the exercise of the powers of local authority.[23] In its somewhat laconic judgment, the Court also remarked in passing that a declaration of economic boycott would usually fall within the powers of the central government.[24]

In any event, there is a good case to be made that what we see today goes beyond traditional town-twinning, a movement to connect cities across borders which sprang up mostly after World War II,[25] or isolated attempts by municipalities to respond to global challenges and participate in global developments. At the same time, one should not make the mistake of taking these phenomena as complete novelties. While it would be somewhat of an overstretch in analogical thinking to make too much of comparisons with the Hanseatic League of Cities,[26] there was also quite a vibrant intermunicipal movement around the time of World War I.

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[19]   Barber, *supra* note 12, at 124.

[20]   Cf. Oomen and van den Berg, 'Human Rights Cities: Urban Actors as Pragmatic Idealist Human Rights Users', 8 *Human Rights & International Legal Discourse* (2014) 160, at 167 (pointing to the argument of observance of international law by local authorities despite a state's non-compliance with international law).

[21]   See www.usmayors.org/climateprotection/agreement.htm (last visited 13 February 2015).

[22]   ECtHR, *Willem v. France* Appl. No. 10883/05, Decision of 16 July 2009. Decision available online at http://hudoc.echr.coe.int/.

[23]   *Ibid.*, at paras 32, 37.

[24]   *Ibid.*, at para 39.

[25]   Ljungkvist, *supra* note 15, at 41; at the same time, it should be noted that the twinning phenomenon also created quite some legal problems, as it was the case when cities in then Western Germany tried to form partnerships with cities and towns belonging to the then Communist East, see on these questions Blumenwitz, 'Zur Rechtsproblematik von Städtepartnerschaftsabkommen' *Bayerische Verwaltungsblätter* [1980] 193 (part one) and 230 (part two).

[26]   Yet, Barber writes that today all cities are Hanseatic cities: *supra* note 12, at 109.

This movement was spurred mostly by Socialist mayors across Europe.[27] As we shall see in the further course of this essay, the ideological underpinnings of today's developments differ quite considerably. In some respects there are, however, similarities to the developments in the interwar era: like today, there was hope in particular for an exchange in what can be called the 'municipal sciences', i.e., the hope that experts in urban planning, construction and the like would benefit from an exchange with their peers in other countries.[28] However, this was not a stand-alone goal: the intermunicipal associations created around World War I hoped to embrace the idea of peace through association, which was also the driving force for the creation of the League of Nations. Today, too, there is, as we will see, a tension between a seemingly administrative focus of city networks on the one hand and, on the other hand, their aspirations to be at the forefront of global discourses such as the one on climate change. The intermunicipal movement of the 1920s was largely ignored by international lawyers. However, among those who took note, there was a concern that, with cities mounting the international stage, a significant threat to state sovereignty might materialize, potentially altering the concept of the state as such.[29]

The four books under review are rich sources of inspiration for international lawyers. As noted at the outset, the debate on the rising role of cities on the international plane has so far been mostly neglected in the field of international law. Whereas some contributions have noted this development,[30] the overall response in scholarship has been silence or a passing note that indeed something may be happening with respect to actors and governance structures, but that it would need more research to make sense of this development.[31] A lot of work has been done in sectoral areas, most notably the climate change context, without however necessarily inquiring into what this means

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27 Saunier, 'Sketches from the Urban Internationale, 1910–1950: Voluntary Associations, International Institutions and US Philantropic Foundations', 25 *International Journal of Urban and Regional Research* (2001) 380; Dogliani, 'European Municipalism in the First Half of the Twentieth Century: The Socialist Network', 11 *Contemporary European History* (*Cont Eur Hist*) (2002) 573; Gaspari, 'Cities Against States? Hopes, Dreams and Shortcomings of the European Municipal Movement, 1900–1960', 11 *Cont Eur Hist* (2002) 597; Couperos, 'In Between "Vague Theory" and "Sound Practical Lines": Transnational Municipalism in Interwar Europe', in D. Laqua (ed.), *Internationalism Reconfigured. Transnational Ideas and Movements Between the World Wars* (2011), at 67.

28 Saunier, *supra* note 27, at 382.

29 Borsi, 'Municipalisme et Internationalisme', in N.N. (ed.), *Mélanges Maurice Haurio* (1929) at 84, 91.

30 See Société française pour le droit international (ed.), *Les collectivités territoriales non-étatiques dans le système juridique international* (2002); Blank, 'Localism in the New Global Legal Order', 47 *Harvard International Law Journal* (2006) 263; Blank, 'The City and the World', 44 *Columbia Journal of Transnational Law* (2006) 868; Frug and Barron, 'International Local Government Law', 38 *The Urban Lawyer* (2006) 1; Porras, 'The City and International Law: In Pursuit of Sustainable Development', 36 *Fordham Urban Law Journal* (*Fordham Urban LJ*) (2009) 537; Nijman, 'The Future of the City and the International Law of the Future', in S. Muller *et al.* (eds), *The Law of the Future and the Future of Law* (2011), at 211; Aust, 'Auf dem Weg zu einem Recht der globalen Stadt? "C40" und der "Konvent der Bürgermeister" im globalen Klimaschutzregime', 73 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2013) 673; Daase, 'The Global Public City in the 21st Century: Written and Unwritten Rules within and beyond the State – Transdisciplinary Reflections', *ASIEN* [2013] No. 132, 98.

31 J. Klabbers, *International Law* (2013), at 37.

for the broader structure of international law.[32] Although the four books do not as such address questions of law – or only on a rather general level, as Barber does – they move the discussion considerably closer to the international law discourse through their focus on the international relations (IR) aspects of the topic. Arguably, the language of IR studies is less arcane to international lawyers than the more specialist discourses in sociology, urban studies, political geography and the like. Having in turn received insights from these disciplines, IR studies may serve as a filter for inter- and transdisciplinary insights. There is also, of course, a danger of misunderstandings developing through the translation from one disciplinary language into the other.

With a growing attention to the role of cities in IR scholarship, it can be expected that also the discussion in international law circles will finally pick up. That there should be considerable overlap between the scope of the books under review and international law scholarship becomes abundantly clear from a quote from Acuto's book:

> As such, global cities transcend our traditional and IR-dominated theoretical frames of reference, bypassing scalar (globe, state, region) as well as political (supra-national, governmental, regional and local) hierarchies and piercing through the layers of sovereignty in the Westphalian system.[33]

Similarly, Bouteligier formulates:

> City networks for global environmental governance show how cities can matter beyond their own territories and are one expression of our globalizing world in which norms and practices are shaped and dispersed through networks.[34]

These networks might then be a further variation of what Luis Eslava has described as international law's presence in our everyday lives; only this time in an inverted direction: it is not only the international which is piercing through the outer layers of the state, but it is also the inside of the state which is pushing its way outwards. The idea that issues can be framed as 'purely municipal, purely national, or purely international' is thus called into question.[35] In a nutshell, the books under review challenge traditional notions of the state-centred 'Westphalian system' and look into global norm-setting practices. It is from this point that this review essay takes its cue. It aims to take the issues debated in the four books further and develop its own perspective on what the emergence of cities as international actors means for international law, both in terms of its practice and its scholarship. To this end, it will first look into climate change governance as a particular example which is also the field to which the books under review pay closest attention (section 2). The essay will then turn to a

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32  See, for instance, Osofsky and Levit, 'The Scale of Networks? Local Climate Change Coalitions', 8 *Chicago Journal of International Law* (2008) 409; Schroeder and Bulkeley, 'Global Cities and the Governance of Climate Change: What is the Role of Law in Cities?', 36 *Fordham Urban LJ* (2009) 313; du Plessis, 'Climate Governance in South African Municipalities: Opportunities and Obstacles for Local Government', in B.J. Richardson (ed.), *Local Climate Change Law* (2012) 353; Abbott, 'Strengthening the Transnational Regime Complex for Climate Change', 3 *Transational Environmental Law* (2014) 57.

33  Acuto, *supra* note 11, at 159.

34  Bouteligier, *supra* note 13, at 2.

35  Eslava, 'Istanbul Vignettes: Observing the Everyday Operation of International Law', 2 *London Review of International Law* (2014) 3, at 38.

question which is crucial for a legal analysis of the phenomenon, i.e., the relationship between the city and the state (section 3). Thereafter, I will suggest two ways in which international law can help to make sense of the global practices of cities, i.e., through providing a language for recognition as well as contestation of these developments (section 4).

## 2 Cities and the Governance of Climate Change: The Example of the C40 Network

To a certain extent, the books under review share a common starting point. They identify shortcomings in the global climate change regime and point towards the need for novel actors to rise to this truly global challenge. Barber is outspoken about this: 'The traditional nation-state perspective and the inter-*national* strategies it propagates have produced little more than aggravation, pessimism, and ultimately a sense of deep futility.'[36] To a certain extent, the books live off the portrayal of the state as a *bête noire* which has deeply failed. In comparison, cooperation among cities is portrayed as a sparkling new alternative, showing us *shining cities on the hill.*

All of the books emphasize informality and hybridity of city networks and alliances as defining features of these cooperative 'institutions'. An illustrative example is the role of 'C40', an alliance of self-proclaimed city leaders in climate change governance.[37] The founding of C40 can be traced back to an idea of then London Mayor Ken Livingstone, who thereby wished to define an agenda for London as a green and global city. Acuto's book is particularly rich with respect to the genesis of the C40 and devotes a chapter-long case study to the role of the Greater London Authority (GLA) therein. Key to London's self-positioning in this respect was the idea that 'London must fulfil its potential as world city in the national interest as well as that of Londoners'.[38] Further, as Acuto notes, the idea was that 'by building planning connections across geopolitical scales, global cities mould the geography of global governance and connect actors, resources and institutions into new and inherently multiscalar aggregations beyond the hierarchical structures of their state'.[39]

The multiscalar connections thus brought about would 'represent more or less formalized policymaking networks that govern by means other than traditional governmental politics, deploying *market* or *planning* instruments as key tools to circumvent state-centric hierarchies'.[40]

Membership in C40 is based on the idea of exclusivity, of being a club of particularly virtuous cities which distinguishes it from city networks with a more open and wide-ranging membership, such as ICLEI,[41]. The initial intention with C40 was to focus on 'megacities' that would bring particular clout to this network. At the same time, what

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[36] Barber, *supra* note 12, at 317.
[37] See www.c40.org/ (last visited 16 Feb. 2015).
[38] Acuto, *supra* note 11, at 94.
[39] *Ibid.*, at 95.
[40] *Ibid.*, at 96.
[41] 'ICLEI – Local Governments for Sustainability', see www.iclei.org (last visited 16 Feb. 2015).

can be called the '70% mantra' was coined: cities and urban areas more generally are believed to be responsible for this share of the total global amount of greenhouse gas emissions.[42] This heavy contribution of cities to climate change is taken to mean that cities have a special responsibility to do something against global warming. C40 has been particularly successful in capturing the attention of relevant policymakers. In 2011, then World Bank president Robert Zoellick stated that '[i]t is no stretch of the imagination to believe that cities will take the lead in overcoming climate change'.[43]

In terms of institutional design, C40 has a chair and a secretariat. Members meet every other year for 'summits' as well as working meetings in between in various (asymmetric) constellations. Membership in C40 is not open to all cities. In the beginning, Ken Livingstone had the idea to build the new organization closely on the model of the G8 and G20. Initially named C20, its name was soon changed to C40. By now, the network has almost 70 members whose membership status is differentiated. Some cities are members as 'megacities', others as 'innovator cities' – thus bringing smaller cities into the network – and recently a new category of 'observer cities' has been added.

The idea behind C40 is not to create a network that controls its members through some kind of compliance mechanism. Officially, it is all about the exchange of information, with a view to assembling best practices. Among its goals is the translation of 'global concerns into the localised language of planning, architecture and urban public policy'.[44] In substantive terms, C40 aims to flag the possibilities of change at the local level. Cities are encouraged to make use of their administrative and policy powers in order to mitigate as well as adapt to climate change. This could be done, for example, by way of combining the buying power of member cities in the fields of water and waste management, street lighting and public transport as well as generally through attempts to become more efficient energy consumers.[45] Other possibilities include the improvement of adaptive capacity by means of land-use planning. Accordingly, in the day-to-day business of C40, matters of a technical, administrative nature seem to dominate.

At the same time, C40 is not just inward-looking, i.e., focusing on improved local governance. It is also projecting its image on the global level, i.e., trying to improve global governance. It participates in meetings connected with the Conferences of the Parties (COPs) meetings of the United Nations Framework Convention on Climate Change (UNFCC).[46] In this context, C40 produces declarations which are 'compiled following canonical international law and UN consuetudinary practices'.[47] On the

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[42] See, for instance, on the C40 website of the city of Sydney: www.cityofsydney.nsw.gov.au/vision/towards-2030/sustainability/carbon-reduction/c40-global-cities-climate-network (last visited 16 Feb. 2015).

[43] See www.worldbank.org/en/news/speech/2011/06/01/world-bank-group-president-robert-b-zoellick-opening-remarks-c40-large-cities-climate-summit (last visited 16 Feb. 2015).

[44] Acuto, 'The New Climate Leaders?', 39 *Review of International Studies* (2013) 835, at 840.

[45] See www.c40.org/blog_posts/c40-releases-groundbreaking-research-on-the-importance-and-impact-of-cities-on-climate-change (last visited 16 Feb. 2015).

[46] See www.c40.org/blog_posts/cities-have-unprecedented-voice-at-un-climate-talks (last visited 16 Feb. 2015).

[47] Acuto, *supra* note 44, at 842.

other hand, C40 has started to partner with international organizations such as the World Bank. In 2011, C40 and the World Bank set up a partnership the goal of which is to develop a consistent approach towards climate action plans on the local level.[48] In particular, a common standard for the measuring of greenhouse gas emissions is to be developed. The standards developed in this context are bound to become yardsticks for investment decisions of the 'Climate Investment Fund' of the World Bank, which is funded with a stock capital of 6.4 billion US dollars. To this fund, members of C40 will have a 'one window' access.[49]

Here, the issue of international standard-setting arises. While it is difficult to obtain information on how the generation of standards is actually organized – the agreement between C40 and the World Bank is not available in the public domain – it appears from the description of the project on the relevant websites that C40 and the World Bank are in some way exercising a form of legislative function, generating standards which cities need to comply with if they wish to benefit from funding by the World Bank. As it has been noted in the literature that the World Bank has generally shifted much of its attention in the developmental context to the local level,[50] the significance of this development should not be understated; all the more so as the World Bank and other international institutions tend to share a particular vision of the city which is characterized by an emphasis on decentralization and market openness.[51]

More recently, C40 and a number of other city alliances – including ICLEI and Eurocities[52] – have formed the UN Cities Mayors Compact, an 'alliance of alliances', it could be said (or a 'network of networks'). Under this scheme, it is envisaged that the best practices of a variety of different city networks are joined. City networks and their members are expected to commit to certain levels of greenhouse gas reductions and to publish this information annually. This is labelled as a compliance mechanism, thus indicating that there is a fine line between the informality and voluntarism underlying this initiative and a more compelling form of governance which strives to hold cities to their commitments.[53] This programme partly replicates institutional structures devised at the European level, where the European Commission has helped to set up the so-called 'Covenant of Mayors', a scheme under which cities and municipalities in the EU and beyond can sign up to produce 'Sustainable Energy Action Plans'.[54] These plans are then monitored by the Commission and – if they are in compliance

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[48]  See  http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSDNET/0,contentMDK:22929574~p agePK:64885161~piPK:64884432~theSitePK:5929282,00.html (last visited 16 Feb. 2015).

[49]  *Ibid.*

[50]  See, for instance, Blank, 'The City and the World', *supra* note 30, at 907; Bouteligier, 'A Networked Urban World – Empowering Cities to Tackle Environmental Challenges', in Curtis, *supra* note 9, 57, at 60; Ljungkvist, *supra* note 15, at 38.

[51]  See further Frug and Barron, *supra* note 30, at 57; Trisolini and Zasloff, 'Cities, Land Use and the Global Commons: *Genesis* and the Urban Politics of Climate Change', in W.C.G. Burns and H.M. Osofsky (eds), *Adjudicating Climate Change – State, National and International Approaches* (2009), 72, at 87; Nijman, *supra* note 30; Daase, *supra* note 30, at 100; Eslava, *supra* note 35, at 19–21.

[52]  See www.eurocities.eu (last visited 16 Feb. 2015).

[53]  Cities Mayors Compact, 'Action Statement' UN Climate Summit, 23 September 2014.

[54]  See www.covenantofmayors.eu/index_en.html (last visited 16 Feb. 2015).

with the goals of the Covenant – give privileged access to funding by the European Development Bank.[55]

Another marked feature of C40 is its tendency towards hybrid forms of organization. It has developed close links with the private sector, most significantly with the Clinton Climate Initiative (CCI) of the Bill Clinton Foundation.[56] This linkage with private foundations echoes the trajectory of the earlier intermunicipal movement of the interwar era. The historian Pierre-Yves Saunier has shown how the inter-city associations established in the wake of World War I – in particular the *Union internationale des villes* (UIV), later to become the International Union of Local Authorities (IULA) which merged with other associations in 2004 into the United Cities and Local Governments (UCLG) – became the target for philanthropic engagement of US foundations in the interwar period. The Carnegie and Rockefeller foundations were especially active in tapping into the potential of the UIV, with a view to exporting modern US techniques of public administration to the predominantly European members of UIV, whose structures of local government and public administration were considered to be old-fashioned and ineffective.[57] The underlying ethos of these programmes was, in the words of Saunier, the spreading of 'the gospel of the new social sciences, government efficiency and expertise', and ultimately the instilment into European administrations of 'American methods and concepts' and the promotion of 'a professional, expert view of local government'.[58] From this interwar episode in transnational policy development, a direct line seems to exist to today's '100 resilient cities' project which is funded by the Rockefeller Foundation.[59] Cities that have successfully applied to be funded through this project retain only a certain level of control over the resources given to them, however. A large part of the money coming with this status seems to be earmarked for garnering advice from consultancies attached to the Rockefeller Foundation, providing, in the language of the project website, 'access to solutions, service providers and partners from the public, private and NGO sectors who can help them develop and implement their resilience strategies'.[60] Notably, the '100 resilient cities' initiative also lists C40 as a partner.[61]

C40 has also established links with corporations such as Siemens with which it is working towards developing tools and programmes for 'smart cities'.[62] Under this latter scheme, C40 and Siemens hand out awards for particularly virtuous cities. As the funding of C40 is heavily dependent on such connections, one might wonder who is

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[55]   See further Heyvaert, 'What's in a Name? The Covenant of Mayors as Transnational Environmental Regulation', 22 *Review of European Community and International Environmental Law* (2013) 78; Aust, *supra* note 30, at 690.

[56]   See M.J. Hoffmann, *Climate Governance at the Crossroads – Experimenting with a Global Response after Kyoto* (2011), at 91.

[57]   Saunier, *supra* note 27, at 387–391.

[58]   *Ibid.*, 389–390.

[59]   www.100resilientcities.org/pages/about-us#/-_/ (last visited 16 Feb. 2015).

[60]   *Ibid.*

[61]   www.100resilientcities.org/blog/entry/what-is-the-100-resilient-cities-platform-of-partners#/-_/   (last visited 16 Feb. 2015).

[62]   This concern shines through in Bouteligier, *supra* note 13, 85, at 98–100.

in the driving seat when it comes to the formulation of the initiatives and programmes of C40.[63] This question becomes more acute when an influence on what one could call jurisgenerative processes can be witnessed, as is arguably the case with the cooperation with the World Bank. Bouteligier remarks that the outlook of C40 would be decidedly neoliberal and focused on cooperation with the private sector.[64] Curtis draws attention to a related question in this regard. The general vogue of neoliberal policies in the 1990s, he argues, created the policy space that cities now aspire to fill. Neoliberal ideology has striven to reduce the state to the absolutely necessary functions. Along with the emergence of networked forms of information and cooperation, this, according to Curtis, opened the gates for cities to go global.[65]

The four books under review all pay particular attention to C40. It seems to lend itself to being a case study which illustrates particularly well how far cities have come as actors of global governance. The depth with which the practice of C40 is analysed varies, as does the methodology employed. Barber limits himself to fairly general remarks about the idea underlying C40 and how it is evidence of the 'rise of the city'. Acuto and Bouteligier, in contrast, look more closely at the institutional practices and take a critical, yet constructive approach towards the confluence of public and private authority which shines through the activities of C40.

## 3 The City and the State

This brings us to a crucial question that is central to the books under review: the relationship between cities and 'the state'. The most frontal assault on the state as an embodiment of traditional structures of governance and politics comes from Barber. He portrays states as essentially dysfunctional. One could extrapolate from his book the finding that today all states are failed states. His mission statement is set out right at the beginning of his book: 'let cities, the most networked and interconnected of our political associations, defined above all by collaboration and pragmatism, by creativity and multiculture, do what states cannot'.[66] Barber has a surprisingly clear view of general state failure which he somewhat overstates: 'The nation-state once did the job, but recently it has become too large to allow meaningful participation even as it remains too small to address centralized global power.'[67] Cities, in comparison 'lack an appetite for sovereignty and jurisdictional exclusivity'. This 'enable[s] them as agents of cross-border collaboration'.[68] For the solving of contemporary challenges of global

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[63] Acuto, *supra* note 11, at 127; see also Bouteligier, *supra* note 50, at 66 on the attraction of C40 exerts for corporate partners.

[64] Bouteligier, *supra* note 13, at 85.

[65] Curtis, 'The Meaning of Global Cities' in Curtis, *supra* note 9, at 24; a similar consideration is also prominent in Sassen's work: see Sassen, *supra* note 2, at 193. See in this respect also already N. Brenner, *New State Spaces – Urban Governance and the Rescaling of Statehood* (2004).

[66] Barber, *supra* note 12, at 4.

[67] *Ibid.*, at 5. One can note, in this regard, that some of the cities which Barber is discussing in his book are way bigger than a good number of the allegedly dysfunctional nation states, making this argument somewhat redundant.

[68] *Ibid.*, at 71.

governance, Barber sees no role for states: 'Never before has sovereign power been used so effectively to impede and thwart collective action.'[69]

Barber is also quick to dismiss other models of international organization: the UN and the League of Nations, he writes, were based on a 'folly'.[70] In contrast, cooperation among cities would not fall prey to the same dangers of failure, as cities have 'no sovereignty that might be infringed by the agreements they make.'[71] Barber can be criticized for having an overly simplistic view of cooperation among states and cities respectively. Whereas the field of traditional international relations is characterized by him as a zero sum game, pretty much in line with notions of hard-boiled realism, his view of cities follows an almost idealistic outlook on their virtuousness. Simply by joining forces, so he wishes to convince the reader, beneficial cooperation emerges, almost in a *perpetuum mobile* style. Similarly, Curtis points out that:

> it seems increasingly likely that the very structure of the international society of states is incapable of dealing with problems of collective action. And it is here, in this governance vacuum, that cities have found the motivation and the capability to act in ways in which states either cannot or will not.[72]

However, it might be wondered what makes cities more resilient against the same collective action problems that states face. Are they by definition better citizens of the world? Barber would surely answer in the affirmative. A less optimistic vision would be, however, that the momentary rise of city activities might also be owed to the enhanced possibilities of city marketing that global leadership in forums such as C40 entails. The motives of cities to engage in the global climate change regime complex may be less altruistic than some hope them to be.[73] Window dressing, catering for liberal and left-leaning constituencies in big cities or simply the need to attract the much sought after professionals for the high-end service, banking and legal industries with a green image might spring to mind.[74] Ileana Porras has rightly remarked in this context that:

> Tempting though it is, we need to defend ourselves against an easy romanticism in which we imagine that either the environment, sustainable development, cities, or community will somehow of their own accord produce a more communitarian recognition of shared interests, which will help us get beyond self-interest.[75]

Yet, Barber aside, the volumes under review are nuanced in their outlook. Whereas they all see the city on the rise – as Barber does – they do not necessarily share his

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[69]  *Ibid.*, at 147.

[70]  *Ibid.*, at 157.

[71]  *Ibid.*, at 165.

[72]  Curtis, *supra* note 9, at 10.

[73]  At the same time, this scepticism should not lead to paternalistic views about the limits of action at the municipal level, see Trisolini and Zasloff, *supra* note 51, for an instructive discussion of a New Zealand court case in which the ability of cities to regulate land use in a sustainable manner was questioned.

[74]  See further *ibid.*, at 86–97 for a discussion of the motives cities might have to engage in climate change action. See also Janos and McKendry, 'Globalization, Governance, and Renaturing the Industrial City', in Curtis, *supra* note 9, 89, at 92.

[75]  Porras, *supra* note 30, at 599.

conviction that states are on the decline. Rather, they paint a more variegated picture of contemporary global governance in which cities and their activities come to complement the state, international organizations and other actors. This more nuanced diagnosis is in line with recent scholarship in international law, finding that while the consent-based system of international law may be under strain, it is still holding out and consolidating around a core of activities, all the while being challenged by informal means of governance.[76] Curtis very helpfully points out that:

> We must recognize, in the case of a network of global cities, spanning the globe with a fragile web of material infrastructure, lacking the capacity of the medieval city to defend itself in our world of states, that the power that sustains such a possibility resides in the state and the state-system .... It is here that we must bring the state back in and recognise the folly of trying to understand the meaning of global cities in isolation from their conditions of possibility.[77]

So much is eventually even admitted by Barber, who writes that:

> Cities can cross borders easily, but they exist only within borders as subsidiary civic entities inside of states, subject to statist powers, sovereignty, and jurisdiction. Cities can govern globally where states can't, but only insofar as national states let them or look the other way.[78]

Eventually, future research should also explore further to what extent national constitutional law enables or restrains cities and other local authorities in participating in global governance mechanisms.[79] From an international law perspective, two issues stand out in this context. First, cities (understood as municipalities) have a particular non-status in international legal discourse. This is partly owed to the fact that they are state organs when they act internationally. As such, they are not granted the status of subjects of international law and thus lack the capability to create international law in the traditional sense.[80] However, their actions are attributable to the state. Violations of international law committed by the local levels of government thus generate state responsibility under Article 4 of the 2001 International Law Commission Articles on State Responsibility.[81]

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[76] Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', 108 *American Journal of International Law* (2014) 1, at 33–36; see also Pauwelyn, Wessel and Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', 25 *European Journal of International Law* (*Eur J Int'l L*) (2014) 733, at 747–749.

[77] Curtis, *supra* note 65, at 16, 18.

[78] Barber, *supra* note 12, at 166.

[79] This research can build on existing contributions on individual jurisdictions, see, for instance, on Canada, Madison and Brunet-Jailly, 'The International Activities of Canadian Cities: Are Canadian Cities Challenging the Gatekeeper Position of the Federal Executive in International Affairs?', in Curtis, *supra* note 9, at 107; on Germany see Aust, '*Global Cities* und das Grundgesetz: Kommunales Selbstverwaltungsrecht und auswärtige Gewalt', in L. Heschl *et al.* (eds), *L'Etat, c'est quoi? Staatsgewalt im Wandel* (2015) 215; on South Africa see du Plessis, *supra* note 32; on the United States see Resnik *et al*, 'Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)', 50 *Arizona Law Review* (2008) 709.

[80] For a variety of positions on this question see the exchange among Dominicé, Daillier, Jos, Pellet, Ruiz Fabri, Sorel, Sturma, Tchikaya and Thouvenin, reproduced in Daillier, 'Les collectivités territoriales non-étatiques sujets du droit international?' in SFDI, *supra* note 30, at 197.

[81] Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/56/83 of 12 December 2001; see further Crawford and Mauguin, 'Les collectivités territoriales non-étatiques et le droit international de la responsabilité', in SFDI, *supra* note 30, at 157; Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority', in J. Crawford *et al.* (eds), *The Law of International Responsibility* (2010) 237, at 241.

While so much is clear, the emergence of cities on the international level is a further blow to the traditional billiard ball model in which states are styled as self-contained unitary actors. The outer profile of the state becomes more variegated when cities start to act on the global level. In a positive light, this can be seen as a form of the vertical separation of powers, making the state more responsive to the needs of local communities and the people living in them. It could also be seen as a further variation of the division of competences in federal systems, where it is not uncommon that the federal units conduct a foreign policy of their own, albeit usually within certain confines defined by the federal constitution.[82] In a more negative light, this trend could be seen as a harbinger of fragmentation, or even disintegration of the state which might lose its capability of maintaining a unified and coherent foreign policy.[83] While the latter aspect may sound somewhat dated, it is not necessarily so. Among all forms of political organization, the state arguably has the longest tradition in surviving and adapting to new circumstances. It would be premature to discount states as doomed and solely negative factors.[84] Especially in constellations of growing international integration such as the European Union, the state has been rediscovered by some as a more probable source of democratic legitimacy than its international competitors.[85] It is possible that in the long run also the climate change regime will abandon its phase of experimentation and will realign around forms of governance in which states have yet again a more prominent role to play. In other words, just as the virtuousness of cities should not be taken for granted, the state should not be demonized as such. Cities as well as states are empty containers whose political content is defined and redefined time and again.

Phenomena similar to undertakings such as the C40 have been discussed in the context of what Anne-Marie Slaughter has labelled transnational networks of civil servants.[86] To Slaughter, these networks are an expression of the disaggregation of statehood; they bring about 'a world in which the basic unit of cooperation is not a unitary state but a disaggregated state, meaning that the elements of both government within the state and governance between and above states are different government

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[82]    For a development of the concept of the 'open federal state' (primarily to be found in Europe, as opposed to allegedly closed federal states such as the United States) see B. Fassbender, *Der offene Bundesstaat* (2007). On the situation in the United States see Kincaid, 'The International Competence of US States and their Local Governments', in F. Aldecoa and M. Keating (eds), *Paradiplomacy in Action – The Foreign Relations of Subnational Governments* (1999), at 111, who finds that also in the US the sub-national level has found some room for international engagement.

[83]    See, against the background of discussions in Germany in the 1980s, Graf Vitzthum, 'Außenpolitik der Gemeinden?', in A. Randelzhofer and W. Süß (eds), *Konsens und Konflikt – 35 Jahre Grundgesetz* (1986) 75.

[84]    Cf, for instance, Knop, 'Statehood: Territory, People, Government', in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (2012) 95, at 111–112; also for an emphasis on the democratic accountability of states Crawford, 'Sovereignty as a Legal Value', in *ibid.*, at 117, 132.

[85]    This holds particularly true for the recent jurisprudence of the German Federal Constitutional Court on the limits of European integration, see for a critical and thorough analysis Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference', 10 *European Constitutional Law Review* (2014) 263; more generally on democratic legitimacy in global governance see Peters, 'Dual Democracy', in J. Klabbers *et al.*, *The Constitutionalization of International Law* (2009) 263, at 271–296 on the role of democratic nation-states.

[86]    A.M. Slaughter, *A New World Order?* (2004).

institutions.'[87] In her more recent work, Slaughter has taken a growing interest in power relationships in and among networks. She counts C40 as a prime example among the forms of networks that wield real power in today's world:

> It is a group of forty, big global cities. It involves connecting those cities, meeting regularly, sharing best practices, committing to ongoing projects, and effectively saying 'I tried this and it worked. I tried this and it didn't.' You share and you learn and you improve, in a continual model. *That is law that actually encourages sharing.*[88]

However, there is a marked difference between C40 and the forms of inter-agency exchanges that Slaughter had originally in mind. When lower branches of central or federal governments participate in such exchanges, their mandate is delegated from the central authority of the state. This is different when cities act. Arguably, cities bring with them a political mandate of their own. In most cases, cities are not merely decentralized forms of governmental authority. Rather, the authority of mayors is often based on local elections, thus granting them some form of a more immediate democratic legitimacy, or at least a form of democratic legitimacy which is distinct from the authority that the ordinary organs of the state can rely on.[89] Accordingly, cities can be understood as a particular form of non-state actors in international law: they are parts of states, but also bring their own political identity to the international level which transcends this characteristic of belonging to 'the state'.[90]

At the same time, the C40 example testifies that much of what cities engage in belongs to the field of hybrid governance, i.e., a mixture of public and private forms of authority. The distinction between the public and the private is squarely called into question by C40 and related activities of other international networks of cities. As Acuto writes, we can see:

> a hybrid positioning in global governance: on the one hand, as local governments, these cities have the authority to implement policies and mobilize resources for joint actions – a direct advantage on the 'global civil society model'. On the other hand, as a transnational network, the C40 as a collective actor can lobby multiple scales of governance ... while also not being constrained by the strict dynamics of international decision-making .... The C40's legitimacy for transnational environmental action comes in this sense from a median position between the 'global deal' sovereign and political representation prerogatives and the 'global civil society' authoritative knowledge and public opinion representation claims.[91]

What Acuto only hints at here are the close relations of C40 with the private sector. The close alignment between cities and private corporations may, to a certain extent,

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[87]   Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy', 24 *Michigan Journal of International Law* (2003) 1041, at 1068.

[88]   Slaughter, 'Filling Power Vacuums in the New Global Legal Order', 54 *Boston College Law Review* (2013) 919, at 932 (emphasis added).

[89]   See Porras, *supra* note 30, at 597 for a warning against a too easy and comfortable reliance on the grass roots argument.

[90]   See in this connection also Bulkeley and Schroeder, 'Beyond State/Non-State Divides: Global Cities and the Governing of Climate Change', 18 *European Journal of International Relations* (2012) 743.

[91]   Acuto, *supra* note 11, at 111.

be a return to the origins of modern cityhood. As Gerald Frug described in his seminal article on the city as a legal concept, cities were initially conceived as corporations in both English and American law.[92] What followed over the centuries was a struggle between attempts to politicize cities – for example, in the home rule movement in England – and to turn them into mere administrative units without political clout, but also no longer with the privilege to engage in business-related activities as this was difficult to square with the emerging public/private distinction. What is important here is what was also already described by Max Weber in his posthumously published fragment on the city. Cities in England as well as more generally in Northern Europe were founded for business interests; hence the form of organization as a corporation with only vaguely established boundaries between city and guild.[93] The strong relationships of C40 with the private sector may thus appear in a different light. It is telling in this regard, as noted by Acuto, that under the tenure of Mayor Bloomberg, New York remodelled its previous sister city programme and replaced it with 'New York City Global Partners Inc.', with the aim of networking more closely with the world's big metropolises.[94] Bloomberg as a mayor, Barber notes, 'talked like a businessman'.[95]

## 4 What Role for (International) Law?

All this raises the question of what role (international) law has to play. Under traditional doctrines of sources and subjects of international law, the activities of cities in transnational networks such as C40 are hard to accommodate.[96] Cities lack subjectivity and the norms which might be generated by their activities fall squarely outside of the canon of Article 38, paragraph 1 of the Statute of the International Court of Justice. While so much is clear, it is also obvious that traditional doctrines are far from exhaustive of the variety of today's global legal practices.[97] The books under review as such do not deal with questions of law, perhaps aside from Barber who discusses somewhat summarily the limits domestic law may put on cities going global.[98] Yet, certain challenges for international law (or should one say, international law scholarship?) emerge from the books. More precisely, the books invite (international) lawyers to reflect on the contribution their discipline may make to the ongoing debate on global cities. Two related issues stand out in this regard: recognition and contestation.

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[92]    Frug, 'The City as a Legal Concept', 93 *Harvard Law Review* (1980) 1057; see also for an updated and condensed version Frug, 'A Legal History of Cities', in N. Blomley *et al.* (eds), *The Legal Geographies Reader* (2001), at 154; for a contemporaneous analysis see J.F. Dillon, *Commentaries on the Law of Municipal Corporations*, vol. 1 (5th edn, 1911), at 16–40.

[93]    M. Weber, *Wirtschaft und Gesellschaft. Die Wirtschaft und die gesellschaftlichen Ordnungen und Mächte. Nachlass, Teilband 5: Die Stadt* (2000) [originally published posthumously 1921], at 44.

[94]    Acuto, *supra* note 11, at 113–114.

[95]    Barber, *supra* note 12, at 26.

[96]    See also Eslava, *supra* note 35, at 46.

[97]    Klabbers, 'Law-making and Constitutionalism', in Klabbers, *supra* note 85, at 85, 87; for a sceptical view towards the incorporation of new forms of norm-making into the domain of international law see J. d'Aspremont, *Formalism and the Sources of International Law* (2011).

[98]    Barber, *supra* note 12, at 139.

## A  *Recognition*

By recognition, I understand the status question. How can international law scholarship come to terms with C40 and similar initiatives? Do these initiatives change our perspectives on actors and subjects of international law? Do they call into question our traditional distinctions between law and non-law?

Various conceptual lenses could be deployed in order to make sense of these practices. As already mentioned, the global activities of cities could be seen as a further emanation of the inter-agency networks analysed by Anne-Marie Slaughter.[99] They could also be understood as forms of 'global administrative law' (GAL)[100] or as forms of the exercise of 'international public authority' (IPA).[101] If one emphasizes the character of cities as laboratories for societal change,[102] a perspective of democratic experimentalism might also spring to mind.[103] While all these approaches can bring something to the legal analysis of how cities might come to shape our contemporary international system, they appear to miss the bigger picture of what the emergence of the city as an international actor means.[104] It is probably futile to look for the one grand theory which embodies all aspects of cities' participation in global governance. However, specific analytical approaches can be useful to make sense of cities' activities in a generic and over-arching manner. The most wide-ranging and inclusive focus would be a global law perspective along the lines of Paul Schiff Berman's legal-pluralist approach. Berman invites us to 'treat the multiple sites of normative authority in the global legal system as a set of inevitable interactions to be managed, not a "problem" to be "solved"'.[105] According to Berman, one should not worry too much about the quality of normative commitments as law. The question of what constitutes law, according to him, is a site of contestation among multiple actors.[106] While Berman's analysis is flawless in so far as he identifies the various sites of authority in today's global governance, his call for a non-essentialist understanding of law is also troubling. As Jan Klabbers has convincingly argued, there are good reasons to maintain some kind of distinction between law and non-law.[107] Not all normative commitments

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[99]  Slaughter, *supra* note 86.

[100]  Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law & Contemporary Problems* (2005) 15; see also from this perspective with a special focus on local actors Stewart, 'States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures', 50 *Arizona Law Review* (2008) 681.

[101]  A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010).

[102]  See, for instance, E. Glaeser, *The Triumph of the City* (2011); D. Saunders, *Arrival City* (2011).

[103]  For an application of this theory to international law see M. Young, *Trading Fish, Saving Fish – The Interaction Between Regimes in International Law* (2011), at 131, 291.

[104]  There is a danger in styling the global activities of cities as merely administrative and problem-solving, thus falling into the trap of managerialism. On this dynamic see Koskenniemi, 'The Fate of Public International Law' 70 *Modern Law Review* (2007) 1; F. Johns, *Non-Legality in International Law – Unruly Law* (2013), at 14.

[105]  P.S. Berman, *Global Legal Pluralism. A Jurisprudence of Law beyond Borders* (2012), at 54.

[106]  *Ibid.*, at 56–57.

[107]  Klabbers, *supra* note 31, at 37–39; see also Kingsbury, 'The Concept of "Law" in Global Administrative Law' 20 *Eur J Int'l L* (2009) 23.

are meant to create binding obligations. Whereas it might be over-ambitious to seek an answer to the eternal question of 'what constitutes law' in our context, an insight from a recently published research project on 'informal international law-making' ('IN-LAW' as the scholars behind the project call it) can be used: it may be unclear whether all the practices which C40 and other such networks engage in constitute or give rise to international law. At the same time, the relevance of these processes for international law can be more easily established.[108]

So is 'IN-LAW' a useful approach in order to make sense of the international activities of cities? 'IN-LAW is informal in the sense that it dispenses with certain formalities traditionally linked to international law.'[109] Joost Pauwelyn, Ramses Wessel and Jan Wouters have identified different markers for IN-LAW.[110] A distinction is made between output informality, process informality and actor informality.[111] All these forms of informality appear in the context of cities' participation in the global climate change regime complex. Their actions do not give rise to *formally* binding international agreements (output informality), the way in which cities organize themselves in networks and alliances deviates considerably from established forms of international cooperation (process informality) and, most importantly, their cooperation is the very evidence of actor informality, as the sheer fact of them entering the global level is testimony of states and international organizations (IOs) no longer being the only international actors. Pauwelyn is also clear that not all informal contacts across borders give rise to law: 'output must be normative in that it steers behaviour or determines the freedom of actors. It is exactly this intent or effect that raises questions of accountability. Where a network has no effect or impact, the question of accountability loses its practical importance.'[112]

It can be argued that such normativity is emerging. The formulation of best practices may not create legally binding obligations in a traditional sense, but might contribute to shaping behaviour. When, as is the case now in the new UN Mayors Cities Compact, different associations of cities partner in order to develop common standards for emission registries and also a compliance mechanism is set up, the pressure is mounting for localities to join this club if they do not wish to be perceived as outsiders of a newly emerging part of the climate change regime complex. This new effort fits what Kenneth Abbott has described as moving a regime complex to a higher level of ordering, going beyond mere exchanges of information.[113] The UN Mayors Cities Compact in itself does not offer financial incentives or cannot leverage power in the form of imposing sanctions. However, due to the connections between, for instance, C40 and the World Bank, it becomes attractive for cities to join this programme. If they miss out, they also miss out on privileged access to funding. Already in the 1960s,

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[108] Pauwelyn, 'Informal International Lawmaking: Framing the Concept', in J. Pauwelyn, R.A. Wessels and J. Wouters (eds), *Informal International Lawmaking* (2012) 13, at 17.

[109] *Ibid.*, at 15.

[110] See Pauwelyn, Wessel and Wouters, *supra* note 76, at 734, note 2.

[111] Pauwelyn, *supra* note 108, at 15–20.

[112] *Ibid.*, at 16.

[113] Abbott, *supra* note 32, at 72, 82.

Wolfgang Friedmann drew the attention of international lawyers to a new form of sanction, at the time in the context of the beginnings of the process of international institutionalization among states through international organizations. A new type of sanction, he wrote, would be exclusion from participation in this development.[114]

Although the commitments entered into by cities are not legally binding in a traditional sense, they may generate a different form of normativity, entrapping cities (and possibly also other actors) in a net of commitments which may slowly harden into something akin to binding law.[115] The more cities become accepted as partners in global governance, the less relevant will their informal status (as opposed to states and IOs) be in the long run.

The central question then is whether the emergence of cities on the international level will fundamentally challenge and change traditional notions of international law. International law – as a legal system, as a community of knowledge – may react in different ways to this factual phenomenon. Generally speaking, two options are available for dealing with it (more sub-options can of course be identified).[116] First, the new trend can be ignored and international law can be consolidated around its accepted core notions (pertaining most importantly to subjectivity and sources). Second, international law may embrace these new developments and open its conceptual arsenal for actors and norms which transcend the traditional framework. I am inclined to lean towards the latter option, without however giving up on the requirement of formal criteria to distinguish between law and non-law.[117] In more concrete terms, I argue for the observation of processes by which cities (and other actors) assert themselves as internationally relevant actors, together with an analysis of how the established structures of international law respond to these processes. It might not be possible to identify a precise tipping point where the assertion of authority is successful, but in this way the plausibility of claims to participation in the international legal system may be assessed gradually. The assessment of the evolution of the international legal system is thereby never frozen in time, but can only provide snapshots of its development at a respective point in time.

In this context, the work by Janet Levit is relevant. She focuses on 'bottom-up approaches' to international law-making in which a small law-making group, similar to a private club, begins to assemble substantive rules, emanating from the practices of the group members.[118] Together with Hari Osofsky, Levit has applied this theory to activities of cities in the climate change context, arguing that we are in the presence

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[114] W. Friedmann, *The Changing Structure of International Law* (1964), at 88 *et seq.*

[115] On processes of 'self-entrapment' see, in a different context, Kleinlein, 'Between Myth and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law', 81 *Nordic Journal of International Law* (2012) 79, at 122–28; for a constructivist reading of the relationship between cities and climate change see Trisolini and Zasloff, *supra* note 51, at 93.

[116] For a taxonomy of possible reactions to soft law – a related question – see Goldmann, 'We Need to Cut off the Head of the King: Past, Present and Future Approaches to International Soft Law', 25 *Leiden Journal of International Law* (2012) 335.

[117] See also d'Aspremont, *supra* note 97.

[118] Levit, 'A Bottom-Up Approach to International Lawmaking', 30 *Yale Journal of International Law* (2005) 125, at 129.

of 'lawmaking processes', consisting of practitioners' activities which are legally consequential. These decisions would not necessarily be international law initially, but ultimately they would via being embedded in legal texts or through the shaping of outcomes.[119] These observations match a number of criteria that Acuto suggests for the identification of relevant new actors in international politics. He flags four criteria: recognition, authority, autonomy and cohesion.[120] Recognition refers to 'a growing acceptance of this entity by other international actors and audiences'.[121] Authority is meant to signify that an alliance does not only rely on the 'residual powers of its members ... but rather increasingly on the pooled resources that cities can potentially network through C40'.[122] Autonomy means the bringing about of 'institutional distinctiveness and thus capacity for international action independent from other actors'.[123] Finally, cohesion refers to 'a capacity to formulate and articulate internally consistent policies'.[124]

For international law, the criterion of recognition is possibly the most salient one. If we apply the four criteria to traditional international organizations, not all of them would stand up to this test. Whereas most IOs would probably aspire to meet all four of these criteria, express recognition by other subjects (through the process of its creation by its founding members) is usually sufficient to bring about a new legal subject. With respect to international networks of cities, it is precisely this momentum that is only beginning to unfold. As cities are not subjects of international law themselves, they also cannot contract out parts of such legal personality. Accordingly, recognition needs to come from other sources if cities (either individually or collectively) wish to become recognized as international actors. I would argue here that such recognition can also be derived from other sources than a formal conferral of legal subjectivity or the granting of treaty-making power. The more 'accepted' international actors such as states and IOs refer to cities as relevant actors, the more their status will become enshrined in international law.

This process of conferring authority is already taking place. Take, for instance, the various declarations of UN climate change summits and COPs where the local level is regularly identified as a relevant stakeholder, starting with the Rio Declaration 1992.[125] Similar forms of empowerment and recognition can be found in various decisions of the COP of the Convention on Biodiversity.[126] The most recent evidence for such growing recognition is the Mayors Compact launched at the 2014 UN Climate

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[119]  Osofsky and Levit, *supra* note 32, at 429–430.

[120]  Acuto, *supra* note 11, at 138–139.

[121]  *Ibid.*, at 138; Bouteligier, *supra* note 13, at 106–107, also refers to recognition of C40.

[122]  Acuto, *supra* note 11, at 138–139.

[123]  *Ibid.*, at 139.

[124]  *Ibid.*

[125]  United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, 'Agenda 21', UN Doc A/CONF.151/126 (vols I and II).

[126]  UN Doc. UNEP/CBD/COP/DEC/IX/28 of 9 October 2008, preamble; UN Doc. UNEP/CBD/COP/DEC/X/22 of 29 October 2010, para 3; UN Doc. UNEP/CBD/COP/DEC/XI/8 of 5 December 2012; see also the Report of the Executive Secretary on the Implementation of Decision X/22: Progress Made by National, Subnational and Local Governments, UN Doc. UNEP/CBD/COP/11/INF/32 of 1 October 2012.

Summit. In addition, the UN and other international organizations are engaged in wide-ranging processes of formulating standards for local governance.[127] Although these may be primarily addressed at the respective nation states, these standards have the indirect effect of empowering local authorities. Gerald Frug and David Barron have gone so far as to speak of an emerging international local government law in this respect, meaning that the formerly solely domestic legal framework for municipal activities is now considerably shaped by international rules and principles.[128]

Although difficult to pin down in positivist/formalist terms, we can see the emergence of a new class of actors in international law – cities. At the same time, such conferrals of recognition are a double-edged sword for city networks. They might eat up the central factor of legitimacy that city networks rely on: their alleged flexibility as opposed to the more traditional forms of international cooperation. If they want to play further on the melody that their cooperation is inherently different from inter-state cooperation – the central argument by Barber – cities need to be careful not to be seen in the 'wrong company'. Yet, strengthening the links of cooperation with relevant international organizations remains important to cities. As Bouteligier notes: 'although city networks link up new actors and contents, they also subscribe to traditional partners, views, solutions, and approaches. Multilateral institutions, for example, are still invaluable partners.'[129] Accordingly, city networks appear to orientate themselves towards two goals: on the one hand, appearing as innovative forms of governance while, on the other hand, not losing touch with the established realities of international politics and governance.[130]

## B *Contestation*

Recognition is not everything, however. The emergence of cities as international actors should not be praised uncritically. Contestation of this development is called for as well. International law doctrines and scholarship can fulfil a useful role here, serving as a critical prism through which the international activities of cities can be assessed. All too often, the tendency in the existing literature on the global role of cities is to praise it as a panacea against the perils of the contemporary state system. It is especially Barber who falls into this trap. This becomes most evident when he sets out his model of a new form of confederative democracy which would unite cities through a global parliament of mayors.[131] Apart from the irony that after much praise for the informality of city to city cooperation and the loathing of formalist state and IO institutions, Barber suggests setting up a global parliament of mayors, his approach is telling with respect to how standards elaborated in this legislature should be implemented

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[127] See, with further references, du Plessis, *supra* note 32, at 354–356.

[128] Frug and Barron, *supra* note 30; see also H. Lindemann, *Kommunale Governance. Das Konzept der Stadt im Völkerrecht* (2014).

[129] Bouteligier, *supra* note 13, at 140–141.

[130] Acuto, 'An Urban Affair – How Mayors Shape Cities for World Politics', in Curtis, *supra* note 9, 69, at 72–73 also points out that city networks would depend on the funding of international organizations in order to implement their programmes.

[131] Barber, *supra* note 12, at 336–337.

on a global level. Recognizing that not all cities will be represented in the parliament, Barber takes comfort in the fact that its decisions would be non-binding. Other cities and towns would thus be free to follow or not. Almost immediately on the heels of this consideration, Barber ponders the idea that other cities should regularly follow these recommendations and could possibly 'opt out' of them.[132]

This is a very clear example of ideational governance which is declared to be non-binding, but expected to exert a considerable normative pull for outsiders not involved in the decision-making process. Although this is only an intellectual experiment by Barber, it potentially foreshadows another consequence of the emergence of cities as international actors. It is still an open question how international law made by cities will differ from international law made by states. It seems to be a fair estimate, however, that a growing role of cities in international law-making processes will be another challenge to the consent-based structure of international law.[133] If only for the multiplication of involved actors, it will become more difficult to uphold the requirement of consent. It can be expected that collections of best practices will multiply and come from various and competing sources of authority. This invites considerations about the power dynamics which will be at play in this regard. As Bouteligier puts it:

> Even when successful, not everyone is enthusiastic about the spread of best practices. The construction of a best practice is an act of internationalisation and, as said, results from a power struggle. ... the agenda of many localities is determined by a small group of cities and agents based in the Global North.[134]

In historical perspective, it is noteworthy that another form of ideational governance lay at the roots of the movement towards the creation of international organizations. As Mark Mazower has shown, exchanges between statisticians and scientists in the late 19th and early 20th centuries proved to be a laboratory for new forms of cooperation.[135] We have also seen how the early phases of intermunicipal cooperation were driven by a similar ethos of exchange between scientists and experts.[136] If this analogy is worthwhile, networks of cities and their exchanges of best practices are here to stay.

This highlights the risks of a reproduction of the managerial ethos present in many other fields of inter-agency relations. It also presents a direct threat to the vital argument for the legitimacy of the international activities of cities, i.e., that eventually cities represent citizens somewhat more directly. While this ideal can be linked to a broader principle of subsidiarity, the growing city networks have to pay close attention not to cut this essential lifeline all too early. In addition, particular consideration should be given to the contribution of and impact on cities in the Global South.[137] While it is significant that the C40 chair has passed from New York's mayor Bloomberg to Eduardo

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[132]  *Ibid.*, at 350.

[133]  On challenges to this structure see also Krisch, *supra* note 76.

[134]  Bouteligier, *supra* note 13, at 95; on a related note, see already Chimni, 'International Institutions Today: An Imperial Global State in the Making' 15 *Eur J Int'l L* (2004) 1, at 18–19.

[135]  M. Mazower, *Governing the World – The History of an Idea* (2012), at 94–115; see also Orford, 'Scientific Reason and the Discipline of International Law', 25 *Eur J Int'l L* (2014) 369.

[136]  Saunier, *supra* note 27.

[137]  See also Eslava, *supra* note 35.

Paes of Rio de Janeiro, it is fair to say that so far the driving forces in many of the city associations in the climate change context originated from the Global North. Paying more attention to the role of cities from the Global South would open up additional avenues to look at the global role of local authorities. In World Bank and UN-Habitat documents cities are routinely portrayed as both problems and solutions of global magnitude. This dual description invites an intellectual operation which puts some cities on the problem side and others on the solution side; thus also accounting for the attractiveness of developing best practices. Around cities of the Global South, specific discourses have developed, which may critically irritate the potential one-sidedness of such exchanges. Suffice it to mention here the wide and growing literature on the 'right to the city' movement.[138]

From the perspective of subsidiarity, it is appealing to think of cities' cooperation in the climate change context – but also in other policy domains – as a laboratory, paving the way for progress by slowly exerting a pull for nation-states to follow. However, caution is called for. It may not be a coincidence that among the C40 cities, power relationships seem to reproduce hierarchies known from the state system.[139] Mayors and city administrations may also simply use the language of subsidiarity and participation to style themselves as more friendly faces of global governance as compared to central bureaucracies and distant international organizations. Their democratic mandate to do so may, however, wear thin. Enthusiasm for the emergence of a new actor in international law should not lead us to deprive the state of the ability to coordinate and to make political decisions. City networks and alliances may not exactly contribute to the construction of shining cities on the hill – they may however be a beacon of hope as long as other governance mechanisms in the climate change context fail to live up to the expectations legitimately levelled at them.

## 5　Concluding Observations

All in all, the four books should be eye openers for international lawyers. They invite us to read international law differently, i.e., to look at the sub-national level, a scale of government which is so often obscured from sight in our discipline. The four books have different merits. The book by Barber is likely to make the biggest impact as it is not purely scholarly in posture and ambition. Despite the criticism elaborated in the course of this review essay, his book is a particularly important contribution to the debate as it will make scholars, general readers and policy makers alike aware of this new dimension of global governance. For those who wish to get more fine-tuned analyses of the global role of cities, the three other books are all recommended reading. Bouteligier pays the closest attention to the context of the global climate change

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[138] See further D. Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* (2012), at 3; for an intriguing case study see J. Hohmann, *The Right to Housing. Law, Concepts, Possibilities* (2013), at 198–227; work in this direction can build on B. Rajagopal, *International Law from Below. Development, Social Movements and Third World Resistance* (2003), who also delivered an as yet unpublished paper on 'the right to the city' at Wissenschaftskolleg zu Berlin, 13 July 2011.

[139] Barber, *supra* note 12, at 140–141.

regime. Acuto's book has a stronger grounding in general IR theory. The edited volume by Curtis is naturally more diverse in nature, but through its case studies and cross-cutting analyses adds perspectives on a number of issues which are not explored in the other books.

For international lawyers, it is now time to build further on these foundations. The challenge consists of taking into account new global practices without giving up on the specificities of international law as a discipline. While not all parts of global governance are organized in the language of law, this review essay has argued that the global cooperation between cities is legally significant and is also meeting with a form of gradual accommodation by the international legal system. Whereas cities and their global associations are not yet recognized subjects of international law, their norm-setting practices are moving them ever closer to this illustrious circle.

### Individual Contributions to Simon Curtis (ed.), The Power of Cities in International Relations

*Simon Curtis,* Introduction: Empowering Cities;

*Simon Curtis,* The Meaning of Global Cities: Rethinking the Relationship between Cities, States and International Order;

*Kristin Ljungkvist,* The Common Sense of Global City 'Actorness' in Contemporary World Politics;

*Sofie Bouteligier,* A Networked Urban World: Empowering Cities to Tackle Environmental Challenges;

*Michele Acuto,* An Urban Affair: How Mayors Shape Cities for World Politics;

*Nik Janos* and *Corina Mckendry,* Globalization, Governance and the Production of Urban Socio-Ecological Space;

*Emmanuel Brunet-Jailly*, The International Activities of Canadian Cities: Are Canadian Cities Challenging the Gate-Keeper Position of the Federal Executive in International Affairs?;

*Mark Amen,* Municipal Bonds and Global Power;

*Elizabeth Cobbett,* Johannesburg: Financial 'Gateway' to Africa.