

# THE SHIFTING STATUS OF CITIES IN INTERNATIONAL LAW? A REVIEW, SEVERAL QUESTIONS AND A STRAIGHT ANSWER

GIUSEPPE NESI\*

Dear Mayors, the international community is changing, and cities are more important than ever. I believe in a future for the United Nations based on an inclusive, networked multilateralism that links national governments, civil society, businesses and cities with global and regional organizations, trading blocs and financial institutions.\*\*

## Abstract

*Witnessing the sometimes confusing and often nebulous debate on the position of cities in international law, one could wonder what cities are and what they do in contemporary international law. One could also wonder whether allowing cities to actively participate in the formation and implementation of international norms, and to contribute to international multilateral negotiations on issues of global concern such as sustainable development, climate change or human rights, does really imply a change in their status in international law. In this contribution, the reasons why cities are not subjects of international law, or better, why cities and local authorities still matter in international law because they are part of a State, are systematically assessed. Specific attention is paid to the status and role of transnational city networks. Before concluding, this article makes some final comments on the prospects for cities and transnational city networks in international law.*

Keywords: cities; international legal personality; transnational city networks; subnational diplomacy.

## 1. INTRODUCTORY REMARKS

In November 2019, the Board of Editors and the Editorial Committee of the Italian Yearbook of International Law decided to devote the 2020 Symposium to the topic “Cities and International Law”. Those who proposed this topic emphasized its growing interest in light of the role of cities in crucial fields of in-

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\* Of the Board of Editors.

\*\* UN Secretary-General Antonio Guterres opening remarks to meeting with leading mayors supported by C40 Cities, “Advancing a Carbon-Neutral, Resilient Recovery for Cities and Nations”, New York, 16 April 2021.

ternational law such as, to name a few, climate change, human rights, migration, cultural heritage, sustainable development, economic cooperation, health, security, and foreign policy. In recent years, international associations and institutions have been quite active in organizing meetings and conferences on cities and international law, while efforts to systematize this topic have been conducted through specialized articles, books and research projects.<sup>1</sup> However, no one could have predicted that the 2019 meeting would be the last gathering in person of the Italian Yearbook of International Law Board of Editors and its Editorial Committee before the eruption of the COVID-19 pandemic that is still afflicting us all. The pandemic is having profound consequences across the globe. However, while every corner of the world is touched by this pandemic, its devastating consequences have been even more damaging in densely populated urban areas, where the pandemic allegedly originated. COVID-19 obliged us to discontinue our habit of meeting at the end of the year to present the new volume of the Italian Yearbook of International Law and to hold the symposium at which participants introduce their papers for the next volume, in order to collect opinions and advice on what they have written. However, what was happening all over the world confirmed that *cities and international law* was a timely topic for our symposium.

The legal status of cities in international law and the legal impact of transnational city networks (TCNs) on the law of international organizations appeared to be inter-linked and particularly worthy of attention. The place of cities and their legal status under international law is fundamental, but this does not mean it has been consistently addressed in the literature. It seems undeniable that in recent

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<sup>1</sup> The proliferation of initiatives, research projects, books and articles on the topic in recent times is really impressive. Among the relevant research projects on cities and international law, see “Les villes et le droit international”, available at: <<http://vdicil.org/>>, launched in June 2016. On this project see BEAUDOUIN, *Droit international des villes*, Paris, 2021. Moreover, the International Law Association launched, in May 2017, a study group on Cities and International Law (see: <<https://www.ila-hq.org/index.php/component/easyblog/new-ila-study-group?Itemid=347>>), co-chaired by Aust and Nijman (more information is available at: <<https://www.jura.fu-berlin.de/en/forschung/fuels/Projects/ILA-Study-Group-on-the-Role-of-Cities-in-International-Law/index.html>>). Together with this study group, the T.M.C. Asser Institute for International and European Law organized a workshop in March 2019, and further initiatives followed such as the closing plenary of the American Society of International Law Meeting, in June 2020, entitled “Cities and other sub-national entities: what promise do they hold for international law?”, now available in ASIL, 2020, p. 359 ff., with contributions, among others, by AUST and NIJMAN. A special issue of the Journal of Legal Pluralism and Unofficial Law was recently (2019) devoted to “Cities and the contestation of human rights between the global and the local”, available at: <<https://www.tandfonline.com/toc/rjlp20/51/2?nav=tocList>>. A very important and all-encompassing volume on various aspects of cities and international law is forthcoming. In introducing the volume, the editors underline that “it marks the coming into existence of an actual research field which takes stock of the varying roles that cities play in and for international law” (AUST and NIJMAN, “The Emerging Roles of Cities in International Law – Introductory Remarks on Practice, Scholarship and the Handbook”, in AUST and NIJMAN (eds.), *Research Handbook on Cities and International Law*, Cheltenham, 2021). The volume’s introduction is available at: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3739922](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3739922)>.

times the role of cities and TCNs in international law and international relations has significantly increased. This change is witnessed by both the active participation of cities and TCNs in international fora where issues of local, regional, national and international concern are debated, negotiated and decided upon, and the increasing development of huge networks of cities and local authorities that negotiate themes that are crucial for cities and urban conglomerations but also of international concern. In several cases, cities and local authorities have called upon States to implement international obligations and commitments deriving from international law – whether from treaties, customary law or, quite often, “soft law” instruments. On certain occasions, however, cities have gone further by deciding to act against the position that their States take in international law matters; such as, the incorporation in cities’ deliberations of international conventions that have not been ratified by their States, or the decision to implement international conventions notwithstanding the withdrawal of their States from those conventions, as happened recently in many cities in the United States with regard to the 2015 Paris Agreement on Climate Change. Some authors derive from these facts the idea that a new era has begun in which cities and local authorities have acquired a new status that cannot be ignored by international law.<sup>2</sup>

The interest of cities in participating in international meetings and international legal debates and their aspiration to build up relations with cities in other States and have their voice heard at the international level is not completely new. At the beginning of the last century, international associations of cities were created even before the first universal intergovernmental organization was established and they were vocal in the international arena, but this phenomenon remained isolated.<sup>3</sup> At that time, the attitudes of cities towards international law did not have a follow-up in their participation in international negotiations, and the phenomenon did not attract the attention that has been recently dedicated, *inter alia*, by international law scholars to the role of cities in international law and its potential effects.<sup>4</sup> Those who look at cities as protagonists of international relations do not hesitate to affirm that cities fill a gap in representativeness and democracy in an international system characterized by the alleged lack of effec-

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<sup>2</sup> *Ex multis*, more recently, DURMUS, “Cities and International Law: Legally Invisible or Rising Soft-power Actors?”, in FERNÁNDEZ DE LOSADA and GALCERAN-VERCHER (eds.), *Cities in Global Governance. From Multilateralism to Multistakeholderism?*, Barcelona, 2021, p. 45 ff., and other contributions by various scholars in the same volume.

<sup>3</sup> On the creation of the Union internationale des villes, in 1913, see United Cities and Local Government (UCLG), *Centenary of the International Municipal Movement*, 2013, available at: <<https://www.uclg.org/en/centenary>>.

<sup>4</sup> NIJMAN, “Renaissance of the City as Global Actor: The Role of Foreign Policy and International Law Practices in the Construction of Cities as Global Actors”, in HELLMANN, FARMHEIR and VEC (eds.), *The Transformation of Foreign Policy: Drawing and Managing Boundaries from Antiquities to the Present*, Oxford, 2016, p. 210 ff.; AUST, “Shining Cities on the Hill? The Global City, Climate Change and International Law”, *EJIL*, 2015, p. 255 ff.; OOMEN and BAUMGÄRTEL, “Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law”, *EJIL*, 2018, p. 607 ff.; OOMEN and DURMUS, “Cities and Plural Understandings of Human Rights: Agents, Actors, Arenas”, *The Journal of Legal Pluralism and Unofficial Law*, 2019, p. 141 ff.

tiveness and legitimacy of States. In this regard, the phrase by the then Mayor of New York, Michael Bloomberg, that “while States talk, cities act” has become a mantra.<sup>5</sup>

These elements put the issue of cities in international law, “a topic which is still at the margin of the international law discourse”,<sup>6</sup> in a context in which even the most sceptical (and positivist) international lawyer cannot ignore that something (new) is happening and the issue cannot be underestimated. The traditional, maybe realist, view that cities do not have any standing in international law since they are simply administrative units of States does not seem to be satisfactory to some.<sup>7</sup> By contrast, some authors have gone as far as to speak about cities as

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<sup>5</sup> The reasons supporting this position have been presented and developed in BARBER, *If Mayors Rule the World. Dysfunctional Nations, Rising Cities*, Yale, 2013. See also: EMANUEL, “The New City States. How Local Governments Make Foreign Policy”, *Foreign Affairs*, 21 February 2020, available at: <<https://www.foreignaffairs.com/articles/2020-02-21/new-city-states>>, who writes that “as national governments become weak, paralyzed, and dysfunctional, cities and their mayors have filled the vacuum”; and “nation-states do not reflect the future. Rather, they are in a state of atrophy and decline”. To conclude that “cities offer disaffected citizens a different approach. They have become places where function has replaced dysfunction, intimacy has replaced distance, and immediacy has replaced dithering”. Along the same lines, LIN, *Governing Climate Change: Global Cities and Transnational Lawmaking*, Cambridge, 2018, esp. p. 106. Since 2016, Michael Bloomberg has been the UN’s special envoy for cities and climate change and his mandate has been renewed in 2021. In 2016, he played a key role in setting up the Covenant of Mayors for Climate and Energy, which unites 10,500 cities, populated by almost one billion people, from 200 countries in the fight against climate change (see: <<https://www.globalcovenantofmayors.org/>>). It unites several earlier initiatives like the C40 Climate Leadership group, the International Council for Local Environmental Initiatives, Climate Alliance, Energy Cities, Eurocities and UCLG. For an all-encompassing and updated list of transnational cities networks and a description of their activities and interactions at the international level, see SWINEY, “The Urbanization of International Law and International Relations: The Rising Soft Power of Cities in Global Governance”, *Michigan Journal of International Law*, 2020, p. 227 ff. (esp. pp. 243-256).

<sup>6</sup> AUST, “The Shifting Role of Cities in the Global Climate Change Regime: From Paris to Pittsburgh and Back?”, *RECIEL*, 2019, p. 58 ff. See also RIEGNER, “International Institutions and the City”, in AUST and DU PLESSIS (eds.), *The Globalization of Urban Governance: Legal Perspectives on Sustainable Goal 11*, New York, 2019, p. 38 ff., who wrote that “despite their increasing significance, relations between international institutions and cities are still an unusual topic for legal research. While international lawyers have accepted international organizations as legal subjects and significant actors, cities are still treated primarily as subnational entities mediated by their nation states. Likewise, local government lawyers have traditionally paid little attention to cities’ international relations. More recently, however, this dualist framework has been challenged by legal scholars who argue that an ‘international local government law’, or a ‘law of the global city’ is emerging”.

<sup>7</sup> The fact that cities are considered part of the State in international law is what emerged (*a contrario*) during a meeting whose proceedings (with contributions by Albert, Coulée, Crawford and Mauguin, Daillier, Dominicé, Jos, Mauguin, Pellet, Ruiz Fabri, Sorel, Tchikaya and Thouvenin) were published by the Société Française pour le Droit International: *Les collectivités territoriales non-étatiques dans le système juridique international*, Paris, 2002. It is meaningful that in the introductory report, although the diversification of actors “et dans une certaine mesure des sujets de droit international” is recognized, cities were not included among these new actors that are listed as “les organisations non gouvernementales, les sociétés transnationales, les organisations internationales, les individus et les collectivités territoriales

subjects of international law.<sup>8</sup> Others emphasize the impact of changes that are happening, and argue that this may lead to cities becoming international legal persons, or maybe that even the concept of legal persons has to be reviewed in contemporary international law and cities will fit into this modified category.<sup>9</sup> Expressions such as “actors”, “international legal authorities”, “non-party stakeholders”, “multi-stakeholders” or “agents” have been more frequently used to describe today’s standing of cities in international relations and international law.<sup>10</sup> For some scholars, “the domestic legal relationship between cities and their states is itself a proper subject of international legal relationship” and this has led to the development of topics such as *international local government law*.<sup>11</sup>

Witnessing this sometimes confusing and often nebulous debate on the position of cities in international law, one could wonder what cities are and what they do in contemporary international law.<sup>12</sup> One could also wonder whether allowing cities to actively participate in the formation and implementation of international norms, as well as admitting their active contribution – as cities or transnational city networks – in international multilateral negotiations on issues of global concern, do really imply a change in their status in international law and in the relationship between cities, States and international organizations. Finally, one could wonder “how” (this author would rather say “whether”) “international law is transformed through the growing role of cities”.<sup>13</sup>

All the articles in the present Symposium offer insightful contributions to the debate and provide thorough analysis on several, relevant aspects of the impact of cities on contemporary international law in different fields such as climate change, cultural heritage, sustainable development, human rights, and the relationship between cities and the countryside.<sup>14</sup> In the following pages I will review (and try to better understand) the different positions on the role of cities

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non-étatiques” (JOS, “Collectivités territoriales non-étatiques et système juridique international dans le contexte de la mondialisation”, *ibid.*, p. 9 ff.).

<sup>8</sup> BODIFORD, “Cities in International Law: Reclaiming Rights as Global Custom”, City University of New York Law Review, 2020, p. 1 ff.

<sup>9</sup> BLANK, “International Legal Personality/Subjectivity of Cities”, in AUST and NIJMAN (eds.), *cit. supra* note 1.

<sup>10</sup> BLANK, “The City and the World”, Columbia JTL, 2006, p. 868 ff.; FRUG and BARRON, “International Local Government Law”, *The Urban Lawyer*, 2006, p. 1 ff.; NIJMAN, “The Future of the City and the International Law of the Future”, in MULLER et al. (eds.), *The Law of the Future and the Future of Law*, Oslo, 2011, p. 213 ff.; AUST, *cit. supra* note 4, p. 255 ff.; ID., “Cities as International Legal Authorities – Remarks on Recent Developments and Possible Future Trends of Research”, *Journal of Comparative Urban Law and Policy*, 2020, p. 82 ff.; HERRSCHEL and NEWMAN, *Cities as International Actors: Urban and Regional Governance beyond the Nation State*, London, 2017.

<sup>11</sup> FRUG and BARRON, *cit. supra* note 10, pp. 13 and 22.

<sup>12</sup> For a confirmation of this state of affairs as regards the global climate change regime (but the observation holds true also for other international law regimes), Aust affirms that “cities and their networks blur considerably the established boundary between public and private actors” (AUST, *cit. supra* note 6, p. 59).

<sup>13</sup> AUST and NIJMAN, *cit. supra* note 1.

<sup>14</sup> See, in the present Symposium, the articles by BAKKER, FRANCONI, LITWIN, LIXINSKI, MARTINEZ and PAVONI.

in contemporary international law with regard to the basic concepts of international legal personality and looking at the participation of cities in international relations.<sup>15</sup> I will examine (and briefly comment upon) some of the most recent doctrinal efforts to reconsider the status of cities in international law. In doing so, I will focus mainly on observations related to the incremental participation of cities in international affairs in recent years and the conclusions to be derived therefrom on the international legal standing of cities (Section 2). Then, the reasons why cities are not subjects of international law, or better, why in international law cities and local authorities still matter but only because they are part of a State, will be systematically assessed and, consequently, attention will be devoted also to the rise of transnational city networks in international law (Section 3). Some final remarks will be made on the prospects for cities, transnational city networks and States on the international scene (Section 4).

## 2. A REVIEW OF THE DIFFERENT POSITIONS ON THE STATUS OF CITIES IN INTERNATIONAL LAW

As recalled above, in recent years, cities have been the subject of several studies by legal scholars, in both national and international law, and in other disciplines such as international relations, sociology, geography, demography, economics, politics and urban studies. Among these disciplines, in order to better understand the role of cities, local authorities and transnational city networks in contemporary international law it may be useful to first refer to a recent sociological study, or rather a study by two sociologists of human rights, that tackle (and criticize) the position of international law scholars towards the role of cities.

Oomen and Baumgärtel have noticed that recent behaviour of States and city representatives in international negotiations in the field of human rights indicates that, while States appear in crisis or unable to reach decisions, cities and local authorities have “increasingly asserted themselves as an alternative with greater legitimacy and more hands-on impact, and they are recognized as such by policymakers, scholars and international and regional organizations alike”.<sup>16</sup> While social science scholars paid attention to this practice, the same did not happen

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<sup>15</sup> I cannot embark on an in-depth perusal of issues of international legal personality in international law, which is out of the scope of this brief article. For a seminal, classical study on legal personality and international law see ARANGIO-RUIZ, *Diritto internazionale e personalità giuridica*, Bologna, 1972. See also ACQUAVIVA, “Subjects of International Law: A Power Based Analysis”, *Vanderbilt Journal of Transnational Law*, 2005, p. 345 ff. With reference also to the issue of international legal personality in relation to cities: NIJMAN, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, Den Haag, 2004; PORTMANN, *Legal Personality in International Law*, Cambridge, 2010, pp. 48-49. With specific regard to the issue of the alleged international legal personality of cities, see SOSSAI, “Invisibility of Cities in Classical International Law”, in AUST and NIJMAN (eds.), *cit. supra* note 1; and BLANK, “International Legal Personality/Subjectivity of Cities”, *ibid.*

<sup>16</sup> OOMEN and BAUMGÄRTEL, *cit. supra* note 4, p. 608.

with regard to international lawyers who were more focused on “how to integrate local authorities into static conventional frameworks firmly based on the premise of State sovereignty”.<sup>17</sup> In other words, according to these authors, international law scholars show a certain interest in the activities of cities on the international scene, but they do so only in order to preserve the current state of affairs and the basics of their discipline, and not to acknowledge the alleged enhanced force of local authorities in international negotiations, including as a form of civil society network, as has been seen in the field of climate change and the negotiations that led to the Paris Agreement of 2015, as well as its follow-up, with the creation of huge networks of cities.

The “sins” of international law scholars in addressing the relationship between local authorities and States are first that they “have so far followed a predictable pattern that [...] is predisposed to accommodate rather than challenge conventional frameworks”;<sup>18</sup> secondly, international law scholars have “sought to assess the relevance of these processes using established categories of international law”.<sup>19</sup> As to the latter, Oomen and Baumgärtel stress that, in their opinion, the attempt was not successful since it ended up stressing the key role of domestic law in defining the competence of the local authorities and concluding that local authorities only make a “modest” contribution to the development of international law.<sup>20</sup>

In the field of international responsibility, for example, they take note that according to Crawford and Mauguin “the prospect of bypassing the State is simply impractical”.<sup>21</sup> Consequently, according to Oomen and Baumgärtel, international law scholars have tried to get around these difficulties by not addressing the “challenging issue of legal subjecthood right away”, but rather refocusing “on cities as the object of international norms”, and by stressing that cities’ activities “may count as ‘soft law instruments with some degree of international normativity’”.<sup>22</sup>

It is clear that these attempts by international law scholars at answering some of the questions concerning the role of cities in contemporary international law are aimed at circumventing those questions rather than answering them, as recognized by the same authors cited here.<sup>23</sup> The failure to directly engage with the

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, p. 611. After a perusal of some of the most important contributions by legal scholars (Blank, Frug and Barron, Porras, Aust) to the debate, the authors conclude that on this point “these works join the chorus of social science scholarship that describes a close and almost dialectical relationship between global and local actors”.

<sup>19</sup> *Ibid.*, p. 612.

<sup>20</sup> *Ibid.*

<sup>21</sup> CRAWFORD and MAUGUIN, “Collectivités territoriales non-étatiques et droit international de la responsabilité”, in Société Française pour le Droit International, *cit. supra* note 7, p. 157 ff.

<sup>22</sup> OOMEN and BAUMGÄRTEL, *cit. supra* note 4, p. 612. This last assertion is made citing the conclusions reached by NIJMAN, *cit. supra* note 10, p. 225.

<sup>23</sup> OOMEN and BAUMGÄRTEL, *cit. supra* note 4, p. 613. According to Oomen and Baumgärtel “international law scholarship on local authorities has come quite a long way from its modest beginnings. A genuine interest exists to understand the rise of cities and other ‘localities’ and

issue at a more fundamental level stems from concerns put forward by other authors and recalled in the same article: from those who think that elevating the status of cities and local authorities would lead to a world even more “unmanageable” than the current one; to those who warn about the intention of cities to affirm a more neo-liberal call for privatization; to those who have reservations about cities’ networks since they “reproduce hierarchies known from the State system”; or, finally, to those who warn against the “premature rejection and ‘demonization’ of the State, which could have detrimental political consequences [...]”.<sup>24</sup> The conclusion of Oomen and Baumgärtel is that, as regards international law scholars, they “have not so far shown the audacity to dream about ‘new horizons of possibility’”.<sup>25</sup>

Recent international relations studies have emphasized that in the last two decades cities have been entering the international political arena, notwithstanding some institutional, legal and political obstacles. According to those studies, cities have been acting on the international scene as independent actors from the States to which they belong and have been able to shape and influence international negotiations. They have done so through different strategies, including: (1) coalescing together to form large networks, which engage in city or “glocal” (globalized-local) diplomacy; (2) allying with well-connected and well-resourced international organizations; (3) gaining inclusion in UN multilateral agendas; (4) mirroring state-based coalitions and their high-profile events; (5) harnessing the language of international law (especially international human rights and environmental law) to advance agendas at odds with their national counterparts; and (6) adopting resolutions, declarations, and voluntarily self-policed commitments – *global law* – that look strikingly similar to state-made international law.<sup>26</sup>

The conclusion is that “using these six strategies, cities are piercing the states-only veil of international politics in ways arguably not seen in the post-Westphalian era”.<sup>27</sup>

Looking at the standing acquired by cities on the international plane, one cannot but agree with this last observation. The fact that in the last two decades cities and their mayors have been able to construct solid inter-city alliances such as ICLEI-Local Governments for Sustainability, C40, Climate Leadership Forum, Metropolitan Mayors Caucus, the World Organization of United Cities and Local Governments (UCLG), International Union of Local Authorities (IULA), Mayors’ Organizations, World Federation of United Cities (WFUC), World Urban Forum, Global Metro City, and the Glocal Forum, and that through those alliances they have been able to participate actively in inter-

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to integrate them into the discipline”. However, they think that “the combined emphasis on cities as ‘objects’ of international law, the prevalence of ‘soft law’ and the potential problems of their increased relevance precludes a more fundamental engagement with the topic that could [...] make a real contribution to the further development of international law”. Along the same lines, see OOMEN and DURMUS, *cit. supra* note 4.

<sup>24</sup> OOMEN and BAUMGÄRTEL, *cit. supra* note 4, pp. 612-613.

<sup>25</sup> *Ibid.*, p. 629.

<sup>26</sup> SWINEY, *cit. supra* note 5, esp. p. 229.

<sup>27</sup> *Ibid.*, p. 230.

governmental negotiations and make their voice heard on these occasions, is true beyond any doubt.<sup>28</sup> However, the description of the ways and means (“the strategies”) used by cities to obtain these results does not necessarily imply that by doing so cities can be considered more than “actors” or that they become subjects of international law. Actually, what cities have been able to do with regard to their standing in international relations does not differ (too much) from what other alleged international “actors” have been able to do and to achieve in what I would call the “intergovernmental plus arena”, i.e. intergovernmental negotiations open to participants other than States. Reference is made here to what coalitions of NGOs do in many fields, ranging from climate change to international criminal justice. More specifically, with regard to the latter, the establishment of the International Criminal Court (ICC) would not have been possible without the constant presence and activity of the Coalition for the establishment of the ICC (CICC), an association of more than 2,500 NGOs that participated in all the phases of the negotiations that led to the establishment of the ICC and is still very active in this field.<sup>29</sup> However, no one even thinks that by so doing the CICC has become a subject of international law, although it is clear that it has been, and still is, a “pervasive” actor in promoting international criminal justice.<sup>30</sup>

Even more perplexities arise from a recent attempt to illustrate, now from a legal point of view, alleged changes in the international legal status of cities by one of the “pioneers” of international law scholarly studies on cities. After declaring the insufficiencies of what he calls the “intuitive approaches” to the question (those who reject international subjectivity/personality for cities and those who think that what matters is how cities function in reality, not whether

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<sup>28</sup> All these TCNs have their own websites and it does not seem worthwhile citing them here since they are easily accessible. The scholarly contributions, from different disciplines, to the issue of TCNs are countless. For interesting observations on the role of cities’ networks and updated references to their activities in a specific field such as climate change mitigation it seems useful to refer, by way of example, to HEIKKINEN et al., “Transnational Municipal Networks and Climate Change Adaptation: A Study of 377 Cities”, *Journal of Cleaner Production*, 2020, available at: <<https://doi.org/10.1016/j.jclepro.2020.120474>>. Another interesting example is the role of ICLEI on “urban biodiversity”, on which see FRANTZESKAKI et al., “The Multiple Roles of ICLEI: Intermediating to Innovate Urban Biodiversity Governance”, *Ecological Economics*, 2019, available at: <<https://doi.org/10.1016/j.ecolecon.2019.06.005>>. The outcome of this research is that ICLEI fulfils three role patterns: knowledge role (educator and integrator); relational role (connector and mediator); and game-changing role (pathbreaker and co-creator). And the authors conclude that “ICLEI and other transnational city networks orchestrate information flows and knowledge aggregation at cross levels, resulting in more effectively knowledge integration in cities and advancing agenda on urban biodiversity”. See also BAKKER’s article in this Volume, esp. section 3.

<sup>29</sup> See: <<https://www.coalitionfortheicc.org/>>.

<sup>30</sup> TRAMONTANA, “The Participation of NGOs in the Dynamics of International Law-Making”, in ARCARI and BALMOND (eds.), *Diversification des acteurs et dynamique normative en droit international*, Napoli, 2013, p. 123 ff. On the participation of NGOs in international negotiations concerning international criminal justice, see the papers contained in TREVES et al. (eds.), *Civil Society, International Courts and Compliance Bodies*, The Hague, 2005, pp. 105-146.

they are conceptualized as subjects/persons), Blank “calls into question the denial of cities’ status in international law pointing to their growing importance as central actors on the international legal plane”.<sup>31</sup> According to Blank, cities are “becoming crucial actors” and are allegedly involved in international dispute settlement procedures, even if he admits that “this involvement still requires the consent of their state”. Furthermore, other changes in the position of cities in the field of foreign relations and in the formation of global networks would lead one to “call into question the rigid definition of what it means to be a ‘subject/person’ of the law, and the theory of the international legal system, that lies behind it”.<sup>32</sup> Following this reasoning, Blank states that cities “are where international agreements are translated into real policies, and they are the ones that decide what international rights and obligations actually mean”, and “where more authentic and participatory democracy is exercised”. The deep involvement of cities in the international sphere and their connection with international institutions indicates that cities, “although relying on their state’s agreement to perform these activities, are operating ‘as if’ they were international legal persons”.<sup>33</sup> This final statement indicates that in real terms cities are not international legal persons. In explaining why cities should have international legal personality (i.e. they do not have it yet), and why this is desirable, the same author argues that cities’ international legal personality would not replace that of States, “but would rather complement it”. One could question whether this is any different than saying that cities, *per se*, do not possess international legal personality. However, in his opinion cities would be much better than States in promoting participatory democracy, combating populism, promoting cultural, religious, ethnic and linguistic pluralism, as well as economic efficiency, and in countering executive overreach through a different and more consistent “separation of powers”.<sup>34</sup> Each one of these arguments would deserve several comments, although comments and criticisms are honestly presented by the same author (in the same text). As a concluding remark, he states that:

even if facilitating institutions such as the UN cannot be adapted to a world with thousands or even millions of international legal subjects, we can certainly think of an international law where cities are legal persons who bear international legal duties, who are capable of entering international agreements, and who are making international legal claims.<sup>35</sup>

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<sup>31</sup> BLANK, *cit. supra* note 9. He finds his conviction on several studies aimed at emphasizing the enhanced role of cities in “protecting” and shaping international legal norms, developing international networks and even engaging in foreign relations, especially in certain areas such as sustainability and climate change, human rights, immigration, and gender equality.

<sup>32</sup> *Ibid.*, Section II.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, Section III.

<sup>35</sup> *Ibid.*, Section IV.

It seems that this assessment refers, maybe, to the international law of the future; it remains to be explained whether it is compatible with institutions and norms of contemporary international law.

Another attempt to single out the role acquired by cities in contemporary international law through their impressive participation in international negotiations was conducted by one of the most authoritative international law scholars on the topic, Helmut Aust, when he looked into what has recently happened in the field of climate change.<sup>36</sup> In view of the difficulties arising in intergovernmental negotiations on this issue after Rio and Kyoto, cities and TCNs were very critical of States for the stalemate that preceded the conclusion of the Paris Agreement in 2015. The accusation that States only talked while cities acted was particularly harsh. The conclusion of the Agreement and its rapid entry into force in 2016 have demonstrated, according to Aust, that those criticisms were premature and that States still play a crucial and irreplaceable role in concluding international treaties. At the same time, looking at the complex content of the Agreement, it emerges that while States have kept their prerogatives in treaty-making power, cities are called upon to implement the Agreement, and strengthen their position at the international level. Therefore, after Paris, “no longer can it be argued that the inter-State system is dysfunctional [...]. But the importance of the subnational level for this part of global governance can no longer be denied”.<sup>37</sup> And Aust concludes that:

the growing role of cities in global governance – and increasingly also in international law – adds another layer of complexity to our understanding of these fields. This complexity is owed not least to the dual character of cities when they act at the international level. They remain State organs and hence represent to a certain extent their respective State. At the same time, the field of climate change governance exemplifies that cities frequently act globally precisely in order to pursue a policy which sets them apart from their home State.<sup>38</sup>

Although this position provides a possible answer to the request for clarification of the role of cities in international law (by restating that they are part of their States), it seems to introduce a sort of schizophrenia by cities, which are part of their respective State but also able to run against it globally.<sup>39</sup> However, one could also say that if cities criticize their central governments – whether it happens at the international or at the domestic level – these criticisms do not change the cities’ nature as subnational units of the States to which they belong.

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<sup>36</sup> AUST, *cit. supra* note 6, p. 57 ff.

<sup>37</sup> *Ibid.*, p. 65.

<sup>38</sup> *Ibid.*, p. 66.

<sup>39</sup> Aust recognizes that “it is time for international law to openly acknowledge this development and accommodate these practices in its fundamental doctrines. As of now, this process has only just begun” (*ibid.*).

Interesting observations have been presented by Aust also with reference to TCNs and their place in international law. In this regard, he recalls that in recent times TCNs have shown dynamic attitudes in global affairs and “aim to establish themselves in a broader way as part of the relevant governance structure”.<sup>40</sup> In order to explain what is happening, it is recalled that the city networks believe that they are efficient while States are dysfunctional; that cities are pragmatic and problem-solving; and that cities have democratic legitimacy, being the closest to the people. The reactions of international law to this development are, according to Aust, twofold: according to a traditional, positivist approach, city networks are not dealing with international law, cities are not subjects of international law and do not contribute to the formation of international law; on the other side, those who enthusiastically support a sort of progressive approach to the issue (“a contourless global law mindset”) would “welcome all activities of cities with open arms, stipulating that all boundaries between domestic and international law, between hard and soft law have collapsed”.<sup>41</sup> According to Aust, “the former approach is as uninspiring and lacking imagination as the latter is falling short of law’s fundamental objective to provide for normative guidance [...]”.<sup>42</sup> Quite interestingly, he proposes a third way, inspired by the “works on transnational networks of civil servants, the global administrative law literature and recent work on ‘informal international law-making’.” However, this approach also does not seem to be satisfactory if Aust concludes that:

whether this turn to informality maintains flexibility and could thus help to turn cooperation between cities into a productive laboratory for societal change, it can also mean that existing power structures are reproduced on a different level.<sup>43</sup>

In a further attempt to respond to “the traditional absence of cities from international law”, the same author has recently proposed including cities among the international legal authorities which, according to Aust, “seems to imply that international law is recognizing the authority of a given entity”, with the very important caveat that “the concept of authority goes beyond mere subjectivity”.<sup>44</sup> Thus, in order to qualify cities as international legal authorities the first issue is

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<sup>40</sup> AUST, “‘Good Urban Citizen’”, in HOHMANN and JOYCE (eds.), *International Law’s Objects*, Oxford, 2018, p. 229 ff.

<sup>41</sup> This criticism has been reiterated by Aust (and du Plessis) on another occasion when they spoke about “global governance literature, which is often more interested in informal processes, international relations and political workings than in concrete questions of architecture of governance and the functioning of existing and future domestic and international law” (AUST and DU PLESSIS, “Summary of Observations and Pointers for Future Research”, in AUST and DU PLESSIS (eds.), *cit. supra* note 6, p. 273 ff.

<sup>42</sup> AUST, “‘Good Urban Citizen’”, *cit. supra* note 40, pp. 229-230.

<sup>43</sup> *Ibid.*, p. 230.

<sup>44</sup> AUST, “Cities as International Legal Authorities – Remarks on Recent Developments and Possible Future Trends of Research”, *Journal of Comparative Urban Law and Policy*, 2020, p. 82 ff., esp. p. 82.

to ascertain whether any rule of international law recognizes some regulatory power to cities; and then on which basis this authority is constituted.<sup>45</sup> It follows that cities would be “a most peculiar form of international legal authority as the ground for their authority is hybrid: it follows from both international and domestic law”; furthermore, the position of cities and global networks of cities in international law is equated to that of international organizations. However, it is recognized that, because of the traditional view that international law is an inter-State law, cities are not listed among the subjects of international law in international law textbooks. A bottom-up process and a top-down phenomenon would indicate, according to Aust, that “this state of affairs is gradually changing”. The bottom-up process would amount to the global activities of cities and the active participation of cities and their associations in international meetings: this would imply that cities and their associations are today “relevant actors, addressing a governance gap created by the allegedly ineffective structures of the traditional system of inter-state diplomacy”. On the other side, and this is defined as the top-down process, States and international organizations “increasingly recognize that cities and subnational authorities are relevant actors and could thus be understood as international legal authorities”.<sup>46</sup> These processes are “complementary and jointly contribute to the shaping of an international legal authority for cities”. Aust affirms that this authority will develop “in the sense that States increasingly recognize the global aspects of local matters”, and would agree to cities going beyond their national competences in view of the achievement of their objectives.<sup>47</sup> Therefore, a parallel is made with the theory of implied powers in the law of international organizations. Aust does not hide the difficulties of this theoretical construction and admits that the field of global city cooperation is still a “laboratory for experimentation” and that this field “will increasingly call for robust comparative law endeavors in order to understand more fully the framework conditions under which cities can implement their international legal authority”.<sup>48</sup>

Another commendable effort to describe the role of cities and TCNs in contemporary international law has been recently made by Durmus by looking, once again, at the international engagement of cities in various fields of international concern.<sup>49</sup> In this regard, phenomena such as the “pluralization of actors without established legal personality engaging in practices traditionally reserved for states”, and the preference for non-binding international norms “created through multistakeholder governance processes rather than binding treaties signed by states only” would imply “a move from multilateralism – referring to an inter-

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, pp. 83-84. According to Aust this assertion is based on three “pillars”: a) international law increasingly calls on the local level directly; b) cities are important for the enforcement of agreed upon international norms; c) States have set up international agreements regulating transboundary cooperation among subnational authorities (*ibid.*, pp. 85-86).

<sup>47</sup> *Ibid.*, p. 86.

<sup>48</sup> *Ibid.*

<sup>49</sup> DURMUS, *cit. supra* note 2, p. 46.

state governance system – towards multistakeholderism – referring to a system of norm generation and governance that involves many actors relevant to a subject matter”.<sup>50</sup>

In particular, Durmus noted the engagement of cities and TCNs in international matters usually managed by States and the creation of institutions where local authorities engage, as such, in international law and global governance. This engagement paves the way to the formal recognition of cities and TCNs as actors in international law, “regardless of whether it takes a long time for any formal change of status to occur – if it occurs at all”.<sup>51</sup> According to Durmus, the observation of the modalities through which, in the last thirty years, cities and TCNs have interacted with international organizations may contribute to “a recognition of a limited kind of legal personality”, and this would amount for cities and TCNs to a recognition “if not as a ‘non-state actor’ then as ‘stakeholders’ in the multi-stakeholder processes of global governance”.<sup>52</sup>

Durmus concludes that, while the novel, crucial role of cities and TCNs in international negotiations and more generally in contemporary international law should be recognized, cities and TCNs are not to be considered, *as such*, subjects of international law.

Finally, Bodiford has recently stated that, although “cities’ status in international law remains ambiguous, they are in a twilight zone in international law between sovereign and not sovereign”.<sup>53</sup> Furthermore, that on the basis of their participation and the active role played in international negotiations, cities “are becoming emergent actors and subjects of international law”.<sup>54</sup> In view of the direct engagement of cities in areas such as environment, transportation, housing, water, and planning, Bodiford argues that cities should even be considered “sovereign actors”. This strong support for “subjectivity” and “sovereignty” of cities in international law seems to collide with the exclusivity (monopoly) of States in foreign policy with regard to the example of the conclusion of agreements between cities belonging to different States. Leaving aside the fact that this

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<sup>50</sup> *Ibid.*, p. 45.

<sup>51</sup> *Ibid.* According to Durmus, “[i]f 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”.

<sup>52</sup> *Ibid.*, p. 50. Those modalities are synthesized as: “seeking to take part in international law-making, seeking to have their role and responsibility with regards to norms recognized, 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”.

<sup>53</sup> BODIFORD, *cit. supra* note 8, pp. 1-2.

<sup>54</sup> *Ibid.*, p. 22.

type of agreement is concluded between sub-national territorial entities (i.e. by sub-entities of different States) in the framework of constitutional and legislative provisions, it is acknowledged that “the agreements which cities make with each other fall outside the scope of sovereign foreign policy”.<sup>55</sup>

Lastly, underlining the differences between cities and “rural hinterlands” and claiming an alleged superiority of cities, Bodiford assigns to cities a central role between State and rural periphery. He argues that cities should, on the one hand, “challenge the parochial interest of a nation or a region” and, on the other, should conclude “an agreement which encompasses a patchwork of the world’s cities with the world’s highest GDP” in order to “drag even the greatest geo-political troglodytes kicking and screaming into the twenty-first century.”<sup>56</sup> I admit that it is unclear to me what the connection between this affirmation and the alleged subjectivity of cities in international law is.

Although I do not always see the rationale of some of these doctrinal reconstructions of the role of cities and cities’ associations in contemporary international law, the attempts at attributing to them a sort of legal personality/subjectivity based mainly on the observation that these entities are participating, as such, in international negotiations and have been recognized as active contributors in shaping and implementing international law (norms) cannot be underestimated. The openness shown by States and international organizations to the participation of cities and TCNs in international negotiations is also noteworthy. Finally, the fact that local authorities are called upon, in some areas of international concern, to replace States’ inability or unwillingness to act or even to counter their own States’ position regarding international obligations or commitments is something that deserves attention.

However, one could wonder whether these elements suffice to pave the way to a paradigm shift towards the recognition of cities’ and TCNs’ subjecthood in international law, and thus to encourage the insertion of cities among the (emerging) subjects of international law in future textbooks.

### 3. CITIES AND TRANSNATIONAL CITIES NETWORKS IN CONTEMPORARY INTERNATIONAL LAW

The opinions expressed by scholars on the alleged international legal personality/subjectivity of cities in international law, as previously reviewed, have something in common: the position of cities in international law has deeply changed in the last 30 years and cities are today unanimously acknowledged as “actors” that participate in international negotiations, when issues concerning their areas of competence are at stake. The reasons why cities decide to participate actively in international negotiations are diverse, ranging from the desire to be directly involved in debates and deliberations on issues of global and local

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<sup>55</sup> *Ibid.*, p. 25.

<sup>56</sup> *Ibid.*, p. 31. On the relationship between cities and the countryside, see the contributions to this Symposium by FRANCONI and LITWIN.

concern, to an alleged lack of representativeness and inability of central governments to address those same issues. Thus, cities have been able to “sit at the table” and to affirm their crucial role, especially on these issues. Cities have almost always participated at the international level through TCNs which, legally speaking – as I will clarify later on –, are different from cities as such in contemporary international law.

This practice has allowed cities to be better informed, to share relevant international experiences and to make their voice heard at the international level, as well as to improve their local governance on issues of global concern. All these elements surely contribute to the recognition of cities and local authorities as being among the protagonists of international relations together with other entities such as NGOs and multinationals, although with some important “constitutional” differences since cities and local authorities are public, territorial entities within nation States. However, this does not imply that they are, as such, subject of international law, a qualification pertaining to the State to which they belong.

Without commenting further upon the various opinions and reconstructions made by scholars on this issue, let us be clear: to be a subject of international law still means to have international rights and duties, to participate in the formation of international customary and conventional norms, to be held responsible for internationally wrongful acts. Do cities, as such, possess these features? First, cities – in the absence of a uniform definition in international law and considering the difficulties arising when international law scholars attempt to devise one – are part of the State to which they belong. Being territorial units of their own State implies that international law is relevant for cities qua part of their State. Thus, the practice of cities and local authorities contributes as a manifestation of their nation State’s practice to the formation of customary international law,<sup>57</sup> while they also give their contribution to the formation of treaties by attending and influencing the outcome of international negotiations (although they do not ratify international treaties, according to the Vienna Convention on the Law of Treaties) if their participation is allowed or acquiesced to by States and intergovernmental

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<sup>57</sup> International Law Commission, Draft Conclusions on identification of customary international law, with commentaries, 2018. I refer namely to Conclusion No. 5, labelled “Conduct of the State as State practice”: “State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions”. In the Commentary (p. 2) it is specified that: “[t]o qualify as State practice, the conduct in question must be ‘of the State’. The conduct of any State organ is to be considered conduct of that State, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a *territorial unit of the State*. An organ includes any person or entity that has that status in accordance with the internal law of the State; the conduct of a person or entity otherwise empowered by the law of the State to exercise elements of governmental authority is also conduct ‘of the State’, provided the person or entity is acting in that capacity in the particular instance” (emphasis added). Many years ago, one of the founders of this Yearbook referred to the relevance of administrative practice in the formation of customary international law (FERRARI BRAVO, “Méthodes de recherche de la coutume internationale dans la pratiques des Etats”, RCADI, Vol. 192, 1985-III, p. 233 ff., esp. pp. 282-283).

organizations.<sup>58</sup> In the field of responsibility for internationally wrongful acts, if the acts or omissions of cities amount to violations of international obligations, those acts or omissions are attributable to their State, according to the Articles on the Responsibility of States for Internationally Wrongful Acts and to practice.<sup>59</sup> Thus, one cannot but agree with one of the authors who is more convinced about the “rising role” of cities in international law when she writes that:

[...] cities remain disconnected from black letter international law except through the intermediation of States, and no amount of creative lawyering or interpretive gymnastics can change that fact, at least so long as the current international legal framework remains in place.<sup>60</sup>

We could maybe discuss whether “the current international legal framework” is still viable or something has changed or will change in the short run. And one could consider various attempts at widening the definition of international law, including a “global law variant” (even if the word “variant” is quite frightening in these pandemic times) according to which “these formal categories are obviously much less important”.<sup>61</sup> But this is not the aim of this contribution, which, rather than foreseeing the international law of the future, attempts to clarify what is the status of cities in contemporary international law. In this regard, it seems that all those who have studied this issue, notwithstanding some attempts at making further steps towards new approaches, get to the same conclusion: cities matter at the international level because they are part of the States to which they belong, as is the case with all the various branches of the nation State according to international law. This also implies that since cities contribute to shape, through various means and in different forms, the position of States when the latter are

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<sup>58</sup> On the uncertain legal qualification of certain types of contracts concluded between cities and international agencies, see RIEGNER, *cit. supra* note 6, pp. 44-47.

<sup>59</sup> According to Aust, “Shining Cities”, *cit. supra* note 4, p. 267: “[f]rom an international law perspective [...], 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. 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” (emphasis added). On this specific issue, see also the interesting observations by SOSSAI, *cit. supra* note 15. For international jurisprudence, even before the adoption of the ILC Draft Articles just recalled, see *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, ICJ Reports 1989, p. 15 ff., where the United States invoked the responsibility of Italy for an alleged internationally wrongful act arising from a decision made by the Mayor of Palermo (esp. paras. 105 and 129). A very in-depth reconstruction of the evolution of the concept of attribution within the ILC works and beyond, is available in ARANGIO-RUIZ, *State Responsibility Revisited. The Factual Nature of the Attribution of Conduct to the State*, Milano, 2017.

<sup>60</sup> SWINEY, *cit. supra* note 5, p. 243.

<sup>61</sup> AUST, “Cities in International Law – From Outsiders to Insiders?”, ASIL, 2020, p. 368 ff., p. 369.

called upon to express their positions at the international level, they are having, and rightly so, “a seat at the table” as “actors”, “stakeholders”, “participants”, “agents”...

Defining the standing of the associations of cities or transnational city (or municipal) networks in contemporary international law is, in my opinion, a different issue than defining the standing of cities. As cities are parts of their nation State, and the international subjectivity of the latter is not debated, when cities decide to “act” on the international scene they do it in different ways, ranging from participating in international activities to belonging to TCNs that have been established for different reasons and attend, as associations of cities and local authorities, international meetings.<sup>62</sup> One could also say that TCNs rather than cities as such are today the “real” representative of cities in the world of international relations since cities express their positions at the international level mainly through the TCNs.

While in international law cities are “invisible actors” since they are part of the nation State, TCNs can be defined as non-State actors similar to NGOs and other entities that participate in international relations but without being subjects of international law, thus not possessing international legal personality, and similar to – *mutatis mutandis* – other associations of “public” entities of different States such as the Inter-Parliamentary Union, an international (yet, not intergovernmental) organization of national parliaments.<sup>63</sup>

In conclusion, TCNs, “as innovative forms of governance [...] not losing touch with the established realities of international politics and governance”,<sup>64</sup> are surely an expression of the common interests of cities and local authorities, and represent such interests in international negotiations. They do so on different topics and in different ways, implementing the decisions of their members. Participating in international negotiations, TCNs have shown that they are able to influence the content of international law instruments in fields such as environmental protection and human rights, and are able also to shape behaviour in these

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<sup>62</sup> HERRSCHEL and NEWMAN, *cit. supra* note 10, p. 3: “[o]ver the past twenty years or so, there has been rapid growth of city and regional networks as new vehicles to protect and promote local and regional interests in a globalising, yet politically still largely state-centric, world. As a consequence, nation states and their territories come into sharper focus, as their borders lose the function of protecting and maintaining an image of a sovereign, cohesive entity in the international arena. Instead, the picture is becoming more detailed and differentiated, with a growing number of sub-national entities, cities, city-regions and regions, becoming more visible in their own right, either individually, or collectively as networks, by, more or less tentatively, stepping out of the territorial canvas and hierarchical institutional hegemony of the state. Prominent and well-known cities, and those regions with a strong sense of identity and often a quest for more autonomy, have been the most enthusiastic, as they began to be represented beyond state borders by high-profile city mayors and some regional leaders with political courage and agency. While some have ventured out individually with confidence, such as the mayors of the main ‘global cities’, others have invested time and resources in networking with like-minded others, and with the United Nations (UN) and other IOs, to gain the necessary capacity and desired impact which, individually, they felt lacking”.

<sup>63</sup> On the Inter-Parliamentary Union (IPU), see: <<https://www.ipu.org/>>.

<sup>64</sup> AUST, “Shining Cities”, *cit. supra* note 4, p. 275.

and other issues. They have been doing so as mediators of cities' interests but not as subjects of international law.

#### 4. CONCLUDING REMARKS

The role of cities and TCNs in contemporary international law does not depend on whether a “traditional” or “progressive” approach to international law is adopted,<sup>65</sup> or whether one is sympathetic to one international law school of thought or another.<sup>66</sup> At a time when international liberalism and multilateralism are under attack, international lawyers – while being open to any argumentation aimed at improving a better understanding of the features of international law – should reject any selective approach as regard to the basics of international law that could result in a further weakening of the system.<sup>67</sup> And this holds true also for the alleged subjectivity of cities. Acknowledging cities' international legal subjectivity would imply, *inter alia*, a tremendous proliferation of international subjects that would result in an untenable situation as regards not only international law but also the essential features of international institutions, as has also been observed by the supporters of such acknowledgment.<sup>68</sup> Furthermore, one could wonder whether being subjects of international law would add anything to cities' capability to participate in international relations and to have an impact on relevant aspects of international law. Here too, the right answer is given by the

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<sup>65</sup> AUST, “Cities in International Law”, *cit. supra* note 61, p. 369. In posing crucial questions regarding the impact of cities on changes in international law and on the role (outsiders or insiders) of cities in the international legal process, Aust states that “the answer to these questions depends very much on your definition of international law”. According to a traditional, formal definition of international law, “cities simply remain part of the state, they are state organs”. Aust then writes that in his view cities “are both: part of the state and potentially non-state actors”, but he does not delve into detail on this. However, he adds that “this duality makes them much more intriguing and complicated entities than your average non-state actor in international law [...]. I would be careful to put too much emphasis on the non-state actor prism. Being a non-state actor also means that you have to face less legitimacy concerns – you can more or less choose your own constituency. Public actors are different – they are defined by their competences, can only act within these boundaries and can and should be held to account whether they fulfill the functions they are supposed to fulfill” (emphasis added).

<sup>66</sup> DURMUS, *cit. supra* note 2, p. 81. In her essay, this author, criticizing the “positivist vision”, takes a stance in favour of the “New” New Haven School of International Law. These “pluralist scholars [who] have long recognized the power of actors and types of norms not contemplated by ‘official’ international law [...] 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” (emphasis in the original).

<sup>67</sup> On the difficulties of international liberalism and multilateralism see, more recently, KOSKENNIEMI, *International Law and the Far Right: Reflections on Law and Cynicism*, Fourth Annual T.M.C. Asser Lecture, Den Haag, 2019, esp. p. 3 ff.

<sup>68</sup> BLANK, *cit. supra* note 9.

supporters of cities' subjectivity who do not attach so much importance to this issue.<sup>69</sup>

Finally, recent developments such as the fast ratification and entry into force of the Paris Agreement on Climate Change, notwithstanding the withdrawal (now in turn withdrawn by the Biden administration) of the United States, have shown that, despite their flaws and sometimes well-deserved criticisms, nation States remain at the centre of international cooperation.<sup>70</sup> Are we sure that if we replace States with cities and local authorities as subjects of international law this will lead to increased representativeness, accountability, efficiency, and democratic decision-making in international relations?<sup>71</sup> Cities and local authorities can certainly contribute, through inter-city cooperation and through a better dialogue with their central authorities, to find new ways to improve decision-making by States, founded on citizens' interests.<sup>72</sup> In this context one should look at cities as "actors" and "honest brokers" of the future in a world that, especially in certain activities affecting humankind, should reflect on the prospects of a "networked multilateralism" in some crucial fields of international as well as domestic law.<sup>73</sup> If this result is achieved, one could say that cities have had a true impact on international law or even that they have transformed it.

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<sup>69</sup> DURMUS, *cit. supra* note 2, p. 45. See also LIXINSKI's contribution to this Symposium, Sections 1 and 6.

<sup>70</sup> On the crisis of nation States and the role of international law, see the interesting observations by CONDORELLI, "Crisi dello Stato e diritto internazionale: simul stabunt simul cadent?", *Ars interpretandi*, 2011, p. 172 ff. (esp. p. 179).

<sup>71</sup> More recently, KATZ COGAN, "International Organizations and Cities", in AUST and NIJMAN (eds.), *cit. supra* note 1, section IV.

<sup>72</sup> On how the "virtuous circle" of subnational diplomacy and the nation State in foreign and domestic policy is working in different fields and could work in the future, see GARCETTI and HACHIGIAN, "Cities Are Transforming US Foreign Policy. Biden Would Do Well to Work with Them", *Foreign Affairs*, 29 December 2020, available at: <<https://www.foreignaffairs.com/articles/united-states/2020-12-29/cities-are-transforming-us-foreign-policy>>. In more general terms, Beaudoin affirms that "the examination of the relations between cities and states from a legal point of view supports the observation that their interests and strengths are so intertwined that neither have interest in weakening the other too much, and the state remains the only entity not submitted to a higher legal authority" (BEAUDOIN, "Sovereignty", in AUST and NIJMAN (eds.), *cit. supra* note 1, section IV). See also the articles by PAVONI (section 1) and by BAKKER (concluding remarks) in this Symposium.

<sup>73</sup> These are the words recently used by the UN Secretary-General, Antonio Guterres, in his speech that was recalled at the beginning of this article and is available at: <<https://www.un.org/sg/en/content/sg/speeches/2021-04-16/remarks-meeting-leading-mayors-supported-c40-cities>>.