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City-led domestic climate litigation

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Suggested Citation

Rocha A. Climate Governance: Cities as Global Actors. Lisbon Public Law Working Paper Series No 2023-03.

CLIMATE GOVERNANCE: CITIES AS GLOBAL ACTORS

Armando Rocha¹

Summary: 1. Introduction; 2. Cities as Norm-Drivers and Norm-Sustainers; 3. Cities' Participation in International Law Fora; 4. Cities' Participation in International Litigation; 5. Conclusion

Abstract: Despite their lack of a formal status as subjects of international law, cities have been performing a relevant activity in the context of global climate governance. In fact, coping with climate change requires action from all levels of governance. The vulnerability of cities to climate change and its effects, hand in hand with their contribution to global GHG emissions, explain why cities have been particularly active in testing new rules, standards, and practices, which might be later codified as a treaty-based or a domestic statutory rule. Furthermore, cities have been pledging to comply with targets and deadlines of GHG emissions reduction, namely through local ordinances, if their Constitutions mandate cities to pursue environmental or climate goals. Cities' pledges do not bind their States but sustain their States' international commitments and help complying with the goals and obligations under the UNFCCC and the Paris Agreement. Finally, cities can participate as observers in the meetings of the Conference of the Parties to the UNFCCC and the Paris Agreement, where they can contribute to the shaping of treaty rules, and offer a decisive help in climate-related litigation before international bodies. The role of cities as global actors is short, but it has proved to be efficient and there is still potential for broadening their contribution to global climate governance.

Keywords: Cities; Climate action; Global governance; Local governments; Norm-driving; Norm-sustaining.

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1. Introduction

1. On September 4, 2013, former New York mayor Michael Bloomberg tweeted “While nations talk, cities act.”² And in fact, the dismaying results of climate change negotiations under the meetings of the Conference of the Parties to the UNFCCC, the Kyoto Protocol, and the Paris Agreement, hand in hand with the failure in adopting strong mitigation or adaptation policies worldwide, has led cities to step-in and to adopt measures aimed to orchestrate our societies towards a carbon-neutral future.³ In this context, compared with States, cities have proved to be surprisingly more “agile, flexible, responsive, assertive and influential governance actors”⁴ — and they do not hesitate to affirm *urbi et orbi* that they are more capable and more efficient in pursuing climate goals.⁵

It is easy to understand the concern shared by cities worldwide. Climate change events threaten the survival of coastal cities as a result of sea level rise — but ultimately no city is immune to climate change. The risks lying ahead may seem more or less threatening, but all cities face the ultimate challenges of our century: how to endure, adapt, and secure communal life in a city under climate distress? And how to contribute decisively to the global mitigation effort?

In fact, cities may be *victims* of climate change, but they are also responsible for most of the GDP creation, for most of GHG emissions, for most of the natural resources’ consumption, for most of the energy consumption, and for most of the retention of heat. This helps to explain why cities are “the most visible expression of human influence on the planet,” and why “[t]he growth of cities is therefore a characteristic feature of the Anthropocene.”⁶ Furthermore, by 2030, it is estimated that 60% of the

² <<https://twitter.com/mikebloomberg/status/375346397870313473?lang=en>> (last consulted April 30th, 2023).

³ E.g., Helmut Philipp Aust & Janne E. Nijman, “The Emerging Role of Cities in International Law — Introductory Remarks on Practice, Scholarship and the *Handbook*”, in Helmut Philipp Aust & Janne E. Nijman (ed.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021) 1-15, p. 4; Jeroen van der Heijden, “City and Subnational Governance: High Ambitions, Innovative Instruments and Polycentric Collaborations?”, in Andrew Jordan, Dave Huitema, Harro van Asselt & Johanna Forster (ed.), *Governing Climate Change: Polycentricity in Action?* (Cambridge: Cambridge University Press, 2018) 91-96, p. 48; Armando Rocha, “Alterações Climáticas”, in Carla Amado Gomes & Heloísa Oliveira, *Tratado de Direito do Ambiente*, vol. II (Lisbon: ICJP/CIDP, 2022) 30-113, pp. 92-93.

⁴ Louis J. Kotzé, “Cities, the Anthropocene and Earth System Law”, in Aust & Nijman (n 2) 354-367, p. 362. See also, more generally, Christie Swiney, “The Urbanization of International Law and International Relations: The Rising Soft Power of Cities in in Global Governance” (2020) 41 *Michigan Journal of International Law* 227-278, p. 227.

⁵ Anouche Beaudouin, *Droit international des villes* (Paris: Mare & Martin, 2021) p. 97.

⁶ Jan Zalasiewicz, Mark Williams, Alan Haywood & Michael A. Ellis, “The Anthropocene: A New Epoch of Geological Time” (2011) 369 *Philosophical Transactions of the Royal Society* 1938, 835-841, p. 836.

world population will live in cities;⁷ and nearly 60% of all cities having at least 300,000 inhabitants are as of today already highly exposed to natural disasters, including extreme weather events⁸.

2. Accordingly, cities cannot ignore climate change, since they are victims, aggressors, and necessarily part of the antidote at the same time⁹ — but what can they do as *global* actors? The purpose of this chapter is to provide a brief understanding of the role of cities as global actors in the pursuit of climate mitigation and/or adaptation goals. To that end, this chapter first assesses how, in a context of multilevel governance, cities can act as norm-drivers and norm-sustainers, namely by testing and establishing best practices and standards, and by pledging to commit to GHG emissions reduction targets. Second, this chapter assesses how cities have been engaged in the works of the meetings of the Conference of the Parties to the UNFCCC and the Paris Agreement, where they push for the adoption of specific rules. Third, this chapter assesses the limited role and potential of city indirect participation in climate-related litigation.

Having in mind that there is no international law concept of city, for the purposes of this chapter, the word “city” is used in a broad sense to mean any local government which is not a federated State or an autonomous region, although in many cases the international activity of cities is performed by means of agreements or coalitions with some of these federated States and autonomous regions.

2. Cities as Norm-Drivers and Norm-Sustainers

3. According to the established understanding of international law, cities are not international legal persons, since they fit in the concept of State for the purposes of international law. This explains why, *in their capacity of State agents*, cities bear rights and obligations under international law and thus need to implement their States’ international commitments;¹⁰ and more importantly, it explains why cities’ conduct is directly attributable to the State under the rules of customary international law

⁷ United Nations — Department of Economic and Social Affairs, *The World's Cities in 2018* (New York: United Nations, 2018) p. 3.

⁸ United Nations — Department of Economic and Social Affairs, *World Urbanization Prospects — The 2018 Revision* (New York: United Nations, 2019) p. 4.

⁹ Anél du Plessis, “Climate Change Law and Sustainable Development”, in Aust & Nijman (n 2), 187-200, p. 189.

¹⁰ Aust & Nijman (n 2) p. 5; Beaudouin (n 4) p. 116; Yishai Blank, “International Legal Personality/Subjectivity of Cities”, in Aust & Nijman (n 2) 103-120, p. 108; Kotzé (n 3) 354-367, pp. 354-355; Sharmila L. Murthy, “States and Cities as ‘Norm Sustainers’” (2019) 37(1) *Virginia Environmental Law Journal* 1-51, p. 3.

on State responsibility for wrongful act (as authoritatively outlined by the ILC's Draft Rules).¹¹ This is evidence of the complete subjection of cities to State authority and, as a result, of their "invisibility" in the international legal system.¹² After a period of dominance of the international sphere by leagues of cities and city-States, the eclipse of cities in international law was intentional, since one foundational premise of the Westphalian system is the idea that infra-State entities cannot break the glass ceiling and have any international legal status autonomous to their States'. Ultimately, international law was devised as a tool to centralize power and to pursue the complete submission of cities and other infra-State entities to State authority. The inclusion of cities in the international law concept of State also has implications in terms of lawmaking capacities, since cities cannot negotiate or sign treaties, or bind their States to any international agreement; and their conduct cannot be viewed as evidence of customary international law.¹³ Taken together, this suggests that the role of cities as global actors can only work at the fringes of international law.

Nonetheless, reality is much richer than what is presented in the textbooks of international law and can accommodate alternative forms of cities' participation in shaping values, rules, and expectations at the international level, even if not formally under international law.¹⁴ Some areas are more prone to cities participation in making such values, rules, and expectations — but climate action is the best example of how cities have successfully claimed a decisive role as global actors.¹⁵ In the case of international environmental law in general, treaties are only the "the tip of the normative iceberg. The majority of norms develop through more flexible and dynamic processes, which result in formally non-legally binding decision."¹⁶ The same is valid with regards to climate change decision-making processes.

¹¹ See Article 4(1) of the 2001 Articles on Responsibility of State for Internationally Wrongful Acts, as adopted by the International Law Commission. See, also, Aust & Nijman (n 2) p. 7; Yishai Blank (n 9) pp. 106-107, & "The City and the World" (2006) 44 *Columbia Journal of Transnational Law* 868-931, pp. 883-886; Katja Creutz, "Responsibility", in Aust & Nijman (n 2) 135-146, p. 137; Heijden (n 2) p. 81; Murthy (n 9) p. 3; Rocha (n 2) p. 93; Mirko Sossai, "Invisibility of Cities in Classical International Law", in Aust & Nijman (n 2) 64-76, p. 70.

¹² Mirko Sossai (n 10); Swiney (n 3) p. 228.

¹³ Although, as State agents, their conduct, might be viewed as an element of State practice. See Aust & Nijman (n 2) p. 8.

¹⁴ See, *inter alia*, Daniel Bodansky, *The Art and Craft of International Environmental Law* (Cambridge: Harvard University Press, 2011) p. 117; Murthy (n 9) p. 6.

¹⁵ *E.g.*, Aust & Nijman (n 2) p. 9.

¹⁶ Daniel Bodansky, Jutta Brunnée & Ellen Hey, "International Environmental Law: Mapping the Field", in Daniel Bodansky, Jutta Brunnée & Ellen Hey (ed.), *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007), 1-27, p. 21.

The appearance of cities at the forefront of climate mitigation and adaptation policies is unsurprising: although there are no local solutions for global problems, local action has proved to be pivotal in tackling climate change. First, because cities are richer than rural areas and, since they are closer to the sources of GHG emissions, they are able to exercise control over such emissions with a view of curbing them down. Second, because local politics are more attuned to concrete problems of individuals, they might be less ideology-driven and more able to tone down divisiveness among citizens. Third, because the benefits of climate action can be presented at the local level in small-scale terms, which means it can be presented in terms more understandable by citizens and more leveled up with the sacrifices required to these latter. Fourth, city action has access to the low-hanging fruit, which explains why it can be more intuitive and comparatively easier to enforce measures at the local level.¹⁷ And finally, because informality and working “at the fringes” of international law actually provides more flexibility to local action. “*Glocal*”, thus, became the keyword to express how local action is a valuable help in dealing with global concerns such as climate change.¹⁸

In any case, the main reason for the emergence of cities as key players in climate action at the international level (although not *under international law*) is connected with the fact that their action is comparatively less intrusive for States’ sovereignty. In other cases, such as the laws of war or assistance to refugees or migrants, cities’ action can be seen as conflicting with State sovereignty. Saskia Sassen mentioned, the rise of cities at the international level is an inevitable outcome of the decline of the nation-State, and further contributes to that same erosion of the sovereign nation-State.¹⁹ However, in environmental and climate change action, city action is not alternative but complimentary to State action. The rise of cities as global actors is not an act of defiance against State authority, but a corollary of the pervasive nature of climate change and the need of having an intervention of a multiple array of actors. Governing climate change, therefore, is not a zero-sum game: accomplishing the goals set out in the UNFCCC legal complex requires a complimentary and intertwined action of all levels of governance, including cities, non-State actors, or international bodies such as the UNFCCC Secretariat. To some extent, the augmented role of cities in climate change governance is not an upgrade of their legal status, but rather a result of the fact that climate

¹⁷ Heijden (n 2) p. 84.

¹⁸ Beaudouin (n 4) p. 28.

¹⁹ Saskia Sassen, *A Sociology of Globalization*, 1st edition (New York: Norton & Company, 2007) p. 106.

action lies at the “no man’s land between international law and politics.”²⁰ Accordingly, the Paris Agreement,²¹ the Glasgow Climate Pact,²² and the Sharm-el-Sheik Implementation Plan²³ explicitly acknowledge the role of cities in climate action, even if only restrictively.

As global actors, cities can work as norm-drivers and norm-sustainers: in the first case, cities can contribute to the shaping and emergence of rules, standards, and practices (although they formally lack international lawmaking capacity); in the second case, cities contribute to their States’ adherence to their international commitments to preserve a healthy atmosphere and a stable climate under the UNFCCC legal complex, namely by pledging to comply with a share of their States’ international effort, *regardless* of their States commitment.

4. As mentioned, cities cannot create rules of international law. Being norm-drivers or norm-entrepreneurs, therefore, does not equal to actually adopting treaty rules. What it means is that cities can work as sanctuaries of innovation and laboratories for testing new solutions and standards which may be transposed into different cities.²⁴ If tested and successful, these rules, standards, and practices might be incorporated in soft law instruments and even poured into formal treaties signed by States.

In fact, “[g]ood cities do not come about by accident,” or “through spontaneous urbanization.”²⁵ they require an intentional and rational method of designing urban spaces in order to cope with the problems arising out of communal urban life. However, current cities were planed having in mind present needs and past climate patterns and experiences — but climate change requires cities to be redesigned and prepared for a future and unpredictable climate pattern. Cases such as the *Carême*²⁶ and the *Verein KlimaSeniorinnen*²⁷ before the ECtHR in part refer to the mismatch between city design and the vulnerability of special groups. Although the collection of past information or the

²⁰ Stephen J. Toope, “Formality and Informality”, in Bodansky, Brunnée & Hey (n 15), 107-124, p. 112.

²¹ Article 7(2) (on adaptation) and Article 11(2) (on capacity-building).

²² Decision 1/CMA.3, Chapter II. (*Adaptation*), §9, Chapter VI. (*Loss and damage*), §62, Chapter VIII. (*Collaboration*), §88.

²³ Decision -/CP.27, Chapter VI. (*Loss and damage*), §§22 and 25, Chapter XVI. (*Enhancing implementation: action by non-Party stakeholders*), §51.

²⁴ E.g., Heijden (n 2) p. 82.

²⁵ ONU Habitat, *Time to Think Urban* (New York: United Nations, 2013) p. 6.

²⁶ ECtHR, *Carême v. France*, (App. No. 7189/21).

²⁷ ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (App. No. 53600/20).

understanding of current needs may be of limited value for adapting to climate change and building city resilience, the current experience of other cities may be key to adopting decisive action at the local level.

In this context, cities can work as a *lab* for testing and nurturing new strategies and solutions which might then be transposed into different legal ecosystems. Here, (micro-)testing includes a very broad spectrum of measures, namely adjustment of adaptation and mitigation measures, assessment of climate impact, or prevention and amendment of maladaptive choices. It includes, therefore, measures related to the ecology *in* the city (such as greening) and measures related to the ecology *of* the city (such as energy and building efficiency, restrictions to transport use, reducing the dependency on long-distance goods, or assessing why people commute for such long distances between their houses and workplaces). And in fact, practice suggest that cities have been testing and transfusing their experiments across borders, shaping rules, standards, and practices adopted by other cities and/in other States.²⁸

If tested and validated, innovative measures provide a glimpse of hope for other cities and other countries. In this case, cities work as norm-drivers or norm-entrepreneurs, since they shape a rule, standard, practice, or concept which, if acknowledged by others as a valuable contribution, is ultimately incorporated in a formally binding statutory norm or international treaty.²⁹ Such indirect influence is more obvious with respect to the home State of the city, but nothing prevents best practices to be influential for other cities and other States,³⁰ because tested and refined knowledge is overall perceived as a benchmark of what is expected to be adopted and replicated by others.³¹

When cities refine knowledge, they are concerned how to best cope with the challenges posed by climate change, not with the formal status of their solutions. Therefore, these standards and practices may formally qualify as soft law and hold a unique legal status.³² — but if they are followed and if they shape behaviour and expectations, they are already within the realms of transnational *law making*: if a rule, a standard, or a practice provides a template of expected behaviour and encourages compliance,

²⁸ E.g., Hari Osofsky, “Is Climate Change ‘International’? Litigation’s Diagonal Regulatory Role” (2009) 49(3) *Virginia Journal of Environmental Law* 585-650, pp. 637-638.

²⁹ Bodansky (n 13) pp. 146-147.

³⁰ Murthy (n 9) p. 27.

³¹ Yukiko Takashiba, “Sources and Law-Making”, in Aust & Nijman (n 2) 121-134, p. 124.

³² Beaudouin (n 4) p. 57.

it is called *law* regardless of its formal qualification. As Bodansky mentions, “what makes a norm ‘hard’ is not that violations can be sanctioned, (...) or that the norm can be applied by courts. Instead, what matters is the state of mind of the actors that comprise the relevant community (...) a sense that the norm represents an obligation and that compliance is therefore required rather than optional.”³³

This shows two things. On the one hand, that cities have been contributing to the global effort of mitigation and adaptation to climate change, although their contribution is overall informal and unacknowledged, and works at the fringes of international law. As referred by Takashiba, “cities’ normative activities have been largely off the radar, as they are not captured by state-focused subjectivity or sources doctrines traditionally resorted to when identifying international law.”³⁴ On the other hand, this shows that a part of the global effort on mitigation and adaptation to climate change is being performed not as a result, or in implementation of, the UNFCCC and other treaties that comprise its legal complex, but rather as a result of a bottom-up effort of local communities who can assess *in loco* the effects of climate change-related events and understand the importance of reducing GHG emissions, building resilience, and adapting for an unpredictable climate pattern. This means that cities are not merely acting as State agents who implement or “download”³⁵ international law into their codes and ordinances: they are creatively pushing for new the adoption of new rules, standards, or practices, which may eventually be transposed into statutory norms or treaty-based rules. Each of their contributions might be a “micro-contribution” to the global effort, but over time the collection of cities’ contributions worldwide helps shaping values and creating hard rules.³⁶

5. On the other hand, committing to GHG emission reduction targets is a guarantee of compliance with the targets and deadlines set out in the Paris Agreement, but also allows cities to act as norm *sustainers* — i.e., of promoting compliance with those targets and deadlines irrespective of their States’ mitigation policies. Norm-sustaining is possible, on the one hand, because local authorities are mandated by domestic law to pursue environmental and climate goals and, on the other hand,

³³ Bodansky (n 13) p. 101.

³⁴ Takashiba (n 30) p. 121.

³⁵ To use the expression of Harold Koh, “Why Transnational Law Matters” (2006) 24(4) *Penn State International Law Review* 745-753, 745-746.

³⁶ Hari Osofsky & Janet Koven Levit, “The Scale of Networks: Local Climate Change Coalitions” (2007) 8(2) *Chicago Journal of International Law* 409-436, p. 429.

because of the referred polycentric nature of climate change governance, which requires action from all levels of authority, including at the city level.³⁷

An empirical observation confirms that, when States fail to adopt or comply with international obligations, cities have been committing to specific targets and deadlines on GHG emissions reduction from their urban areas, and using their regulatory and enforcement powers in general to that end.³⁸ In fact, already in 1990, two years before the adoption of the UNFCCC, Toronto committed to reducing its net GHG emissions to 20% below 1988 levels by 2005.³⁹ In 2019, the *Global Climate Action from Cities, Regions and Businesses* report⁴⁰ noted that more than 6.000 cities and regions, from 10 high emitting countries, were making quantifiable efforts of GHG emissions reduction, with an overall reduction average of 27%. The 2021 report noted that the trend of pledges by cities was broadening, although the aggregate of their pledges was not increasing substantially or in proportion.⁴¹

By pledging to adopt specific targets and deadlines on GHG emissions reduction from their urban areas, cities' contribution to sustaining compliance with international climate change law is twofold: on the one hand, the information provided by cities help tracking States' mitigation policies; on the other hand, from a symbolic angle, pledging to reduce GHG emissions from their urban areas flags a bottom-up commitment with the goals and aspirations of the UNFCCC and the Paris Agreement.

6. To begin with, report of information is critical under the UNFCCC legal complex, since the assessment of compliance with the targets, deadlines, and obligations under the UNFCCC and the

³⁷ Murthy (n 9) pp. 29-31.

³⁸ Blank (n 9) p. 110.

³⁹ Lachlan Umbers, "Sub-National Climate Duties — Addressing Three Challenges", in Jeremy Moss & Lachlan Umbers (ed.), *Climate Justice and Non-State Actors — Corporations, Regions, Cities, and Individuals* (London: Routledge, 2020) 29-44, p. 29.

⁴⁰ NewClimate Institute, Data-Driven Lab, PBL Netherlands Environmental Assessment Agency, Deutsches Institut für Entwicklungspolitik & Blavatnik School of Government of the University of Oxford, *Global Climate Action from Cities, Regions and Businesses: Impact of Individual Actors and Cooperative Initiatives on Global and National Emissions — 2019 Edition* (2019), pp. 19 & 87, available at <https://newclimate.org/sites/default/files/2019/09/Report-Global-Climate-Action-from-Cities-Regions-and-Businesses_2019.pdf> (last consulted April 30th, 2023).

⁴¹ NewClimate Institute, Data-Driven EnviroLab, Utrecht University, Deutsches Institut für Entwicklungspolitik & Blavatnik School of Government of the University of Oxford, *Global Climate Action from Cities, Regions and Businesses — 2021 Edition* (2021), pp. 5-6, available at <https://newclimate.org/sites/default/files/2021/06/NewClimate_GCC_June21_2.pdf> (last consulted April 30th, 2023).

Paris Agreement is basically limited to means of States' self-report. More specifically, under the UNFCCC, information is to be provided by each State Party to the Conference of the Parties and the UNFCCC Secretariat,⁴² and reviewed by the Subsidiary Body for Implementation,⁴³ although this review is limited to "assess[ing] the overall aggregated effect of the steps taken by the Parties."⁴⁴ The same is applicable under the Paris Agreement, which sets out that States "shall regularly provide (...) (b) Information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4"⁴⁵ — information that "shall undergo a technical expert review,"⁴⁶ consisting of a "consideration of the Party's (...) implementation and achievement of its nationally determined contribution."⁴⁷ However, the review performed by the Subsidiary Body for Implementation is limited to the same "overall" terms,⁴⁸ and taken into account by the Conference of the Parties only with the goal of assessing the "global stocktake" of nationally determined contributions.⁴⁹

Cities cannot participate in this protocol of report of information, since they are not government agents or representatives — and in any case, the information reported by cities is limited to emissions from their urban areas, which do not cover the full extension of a State's territory or jurisdiction. However, disclosing information to the public provides data that can be used to track and assess official State information.⁵⁰ This information cannot be (openly) used by the institutional bodies of the UNFCCC legal complex — but NGOs and civil society can use it to assess how reliable is the information disclosed by States; and, in case of under-reporting of GHG emission, to it can be weaponized in order to expose States and pressure them to adopt more stringent mitigation policies. One good example is the NAZCA (i.e., the Non-State Actor Zone for Climate Action, launched at the 2014 Conference of the Parties in Lima, Peru), which works as an online platform aimed to track and aggregate mitigation commitments and actions adopted by cities and other non-State actors. Another

⁴² Article 12(1) of the UNFCCC.

⁴³ Article 10(2)(a) of the UNFCCC.

⁴⁴ *Idem*.

⁴⁵ Article 13(7)(b) of the Paris Agreement.

⁴⁶ Article 13(11) of the Paris Agreement.

⁴⁷ Article 13(12) of the Paris Agreement.

⁴⁸ Article 10(2)(a) and (b) of the UNFCCC, applicable *ex vi* Article 18(1) of the Paris Agreement.

⁴⁹ Article 14(1) of the Paris Agreement.

⁵⁰ Murthy (n 9) p. 33.

good example is the case of the American cities under the *We Are Still In* Declaration,⁵¹ which disclose the steps and progresses that are being made domestically at the bottom level.⁵² In this sense, cities' pledges to curb down GHG emissions from their urban areas, hand in hand with the disclosure of information regarding compliance with their pledges, can be used by civil society in order to assess information and compare it with States' reports to the UNFCCC institutional bodies — and thus to encourage other States to comply with their own nationally determined contributions.⁵³

7. On a different level, cities' pledges also perform a function of norm-sustaining by signaling to the international community a bottom-up commitment with the goals of the UNFCCC legal complex. This process of norm-sustaining is uncontroversial in cases where cities' pledges are aligned with their States international commitments — but may create frictions in more delicate cases, such as when a State has not ratified yet, or withdraws from, the UNFCCC, the late Kyoto Protocol, or the Paris Agreement. As an empirical rule valid for any international action of cities, “the more a city is engaged in international activities, the higher the risk of divergence and conflict with its own [S]tate's *international* policies or engagements.”⁵⁴

In this context, cities cannot create rules of international law, or overrule their State's commitments (for they lack international law-making capacity) — but that does not exclude a privileged role in shaping values and expectations at the domestic and international levels. For instance, the *Déclaration de l'Hôtel de Ville de Paris*, adopted on 4 December 2015, was an attempt by cities of pre-pledging their commitment to the Paris Agreement goals, in the hope of inspiring (and pressuring) States to ratify that treaty. A more critical example is the withdrawal of the United States from the Kyoto Protocol, which lead 1054 mayors, representing 5% of the US cities and 30% of its population, to pledge to meet their share of the United States commitments under the Kyoto Protocol. The United States has also withdrawn from the Paris Agreement, but its major cities committed with its targets under the *We Are Still In* Declaration — i.e., *An Open Letter to the International Community and Parties to the Paris Agreement from U.S. State, Tribal, Local, and Business Leaders*. In this Declaration, cities confirmed that they “will continue to support climate action to meet the Paris

⁵¹ Available at <<https://www.wearestillin.com/about>>.

⁵² Murthy (n 9) p. 7.

⁵³ Murthy (n 9) pp. 12-13 & 30.

⁵⁴ Anouche Beaudouin (n 4) p. 89, and “Sovereignty”, in Aust & Nijman (n 2) 173-185, p. 178.

Agreement.” “In the absence of leadership from Washington,” the Declaration goes on, “[federated] states, cities, counties [and other non-State actors] will pursue ambitious climate goals, working together to take forceful action and to ensure that the U.S. remains a global leader in reducing emissions.”

Although cities’ pledges might be unaligned with their States’ international commitments, they provide a sense of direction — and emphasize that changes at the top level are epidermic and do not affect the commitment of a national community with climate action; they evidence “that the norms have not been rejected at all levels.”⁵⁵ This is particularly visible in the *We Are Still In* Declaration, where the signatories argued that “[i]t is imperative that the world knows that in the U.S., the actors that will provide the leadership necessary to meet our Paris commitments are found in city halls (...). Together, we will remain actively engaged with the international community as part of the global effort to hold warming to well below 2° and to accelerate the transition to a clean energy economy that will benefit our security, prosperity, and health.”

In this sense, cities’ pledges help sustaining the rules of the UNFCCC legal complex, namely by securing compliance at the domestic level with the targets and deadlines of the UNFCCC and the Paris Agreement *despite* the official policy of their State; and moreover, cities’ pledges “[keep] those norms alive”⁵⁶ and thus pave the way for “a future national government to build on their efforts”⁵⁷ and to return to the UNFCCC legal complex.

8. Norm-sustaining leads to obvious problems of international and constitutional law if they are not aligned with their States’ international commitments: namely, are cities entitled to contradict States’ international activity?

In fact, by pledging to comply with certain targets and deadlines on the reduction of GHG emissions from their urban areas, cities are not repealing States’ statutory norms, replacing their States as parties to the treaties, or committing their States internationally, since they lack the constitutional and international capacity to that. But the simple fact that cities pledge to reduce GHG emissions from their urban areas in a manner which is not consistent with their States’ international

⁵⁵ Murthy (n 9) p. 26.

⁵⁶ Murthy (n 9) p. 47.

⁵⁷ Murthy (n 9) p. 45.

commitments leads to a possible “rivalry” or “competition” between cities and States.⁵⁸ In fact, if a State does not ratify, or withdraws from, a climate treaty, that does not prohibit their cities from committing to targets and deadlines on curbing down GHG emissions. Non-ratification and withdrawal of a treaty does not preclude the pursuit of climate goals by cities pursuant to their constitutional powers — for instance, because it may just be the case that a State is uneasy with the final balance of interests resulting of that treaty negotiations. However, cities’ pledges (even if aligned with their States’ international commitments) always always expose a latent “tension”, since they feed the idea of declining State sovereignty and defy the centrality of their national governments at the domestic and at the international level.⁵⁹

However, if the reader allows the redundancy, cities’ pledges are just *pledges*. The 2014 Compact of Mayors is a good example of an instrument which gathers pledges from 447 cities (representing 5,39% of the world population) to curb down GHG emissions from their urban areas. These pledges cannot even be qualified as a legal obligation, justiciable or not. These pledges are just a declaration issued by cities through which they signal to others (including at the international level) that they will use the powers conferred to them under their domestic law to comply with the targets and deadlines set out in that pledge. Pledges are consistent with (domestic) law.⁶⁰ and impact global climate governance — but they cannot be qualified as a conduct regulated by international law. Cities’ pledges are only a form of *de facto* participation in the global governance of the climate system which does not amount to a *de jure* participation in international law. In this sense, pledges do not dent the bedrocks of international law.⁶¹

The problem, therefore, is to see if cities have a constitutional mandate to pursue climate goals. As State-like entities, cities are genetically equipped with *regulatory* powers. As a result, city innovation and leadership is possible *if* cities are equipped by their constitutions with the necessary prescriptive and enforcement powers on climate and environmental issues,⁶² namely with regards to the

⁵⁸ Beaudouin (n 4) p. 88.

⁵⁹ Beaudouin (n 4) p. 88; Benjamin Barber, *If Mayors Ruled the World — Rising Cities, Declining Nation States* (New Haven: Yale University Press, 2013) p. 432.

⁶⁰ Beaudouin (n 4) p. 119; Blank (n 9) p. 112.

⁶¹ Blank (n 9) p. 113.

⁶² Blank (n 9) p. 113.

individual or collective use of transport, building's energy efficiency (e.g., by providing tax advantages), or the greening of the city.

However, in most cases, cities have to walk a fine line to avoid infringing their Constitutions.⁶³ And this is connected with a prior cultural understanding of devolution or conferral of powers. In theory, all constitutions are proud to announce their favourable views on providing powers to local communities — but in the end, what is ultimately key is whether a State shares a bottom-up understanding of power (according to which regulatory competences are relatively intrinsic to local communities) or a top-down view of decentralization (according to which local communities' regulatory competences are exceptional and to be interpreted restrictively).⁶⁴ In the United States, a bottom-up understanding of power is culturally ingrained, which helps to explain why cities feel more comfortable with defying their States' international commitments: using a Charles Dickens' terminology, it helps to explain why it seems “as though we live in two different countries.” “At the federal level, all policy makers oppose all efforts to control GHG emissions;” “[i]n contrast, policy initiatives at the state level generally take the opposite approach.”⁶⁵ France, for its turn, is a good example of a State sharing a top-down understanding of power, which is visible in *Code général des collectivités territoriales*, whose Article L1115-1 states that “*Dans le respect des engagements internationaux de la France, les collectivités territoriales et leurs groupements peuvent mettre en œuvre ou soutenir toute action internationale annuelle ou pluriannuelle de coopération (...). A cette fin, les collectivités territoriales et leurs groupements peuvent, le cas échéant, conclure des conventions avec des autorités locales étrangères (...).*” In other words, this provision sets out as a condition that these agreements can only be adopted if aligned with France's international commitments.

Furthermore, by informally engaging in international activities, cities also bring tension to the internal structure of their States: for instance, by comparing their level of autonomy, the powers they are equipped with under domestic law, or the culture of sovereignty shared within their States, cities can challenge their own State and ask more competences and more autonomy.⁶⁶ Accordingly, if from an international law angle nothing precludes cities' pledges, constitutional law might raise some

⁶³ Murthy (n 9) p. 5.

⁶⁴ E.g., Rocha (n 2) pp. 93-94.

⁶⁵ David Hodas, “State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?” (2004) 21 *Pace Environmental Law Review* 53-81, p. 53.

⁶⁶ Beaudouin (n 4) p. 179.

obstacles to cities' pledges to reduce GHG emissions from their urban area, if cities do not have a constitutional mandate to pursue climate policies, or if these pledges are inconsistent with States' international commitments.

9. A major problem of cities' action as norm-drivers or norm-sustainers is *visibility*. Some cities may be influencers in our global society — but most are not. To that end, the creation of global coalitions not only favours the exchange of information and testing the same solutions under different conditions — they also provide transnational visibility to city action and create the conditions so that their “best standards and practices” may be influential downstream. To that end, cities have been forging new partnerships and atypical ties at the international level.⁶⁷

There is no rule of customary or treaty law that allows cities to form alliances, coalitions, or any kind of a legal association among them. The creation of these associations, as a result, is only possible if based on domestic law:⁶⁸ on the one hand, the association itself must be created pursuant to the domestic law of one of the constituting cities; on the other hand, the domestic laws of the other cities must allow for their participation as associates.⁶⁹ What remains controversial, from a substantive standpoint, is what is the applicable to the relations among the associates.⁷⁰ One example is the World Organisation of United Cities and Local Governments, created in 2004 under the Spanish Law,⁷¹ which comprises more than 240,000 cities and local governments, representing 70% of the world population and 140 countries. This association is been responsible for pursuing interests common to cities and local governments, although it is not focused on climate action. To pursue climate goals, cities have been resorting to informal networks. Good examples are the C40 Cities or the Global Covenant of Mayors for Climate and Energy, which are not based on any legal system specifically, but have a remarkable activity in assisting, galvanizing, coordinating, and testing climate action at the local level, and thus in pushing for cities' pledges to curb down GHG emissions from their urban areas. In these latter cases, a vibrant activity takes place outside any formal link with an international

⁶⁷ Blank (n 9) p. 112.

⁶⁸ Beaudouin (n 4) p. 47.

⁶⁹ Beaudouin (n 4) pp. 137-138.

⁷⁰ Beaudouin (n 4) p. 138.

⁷¹ Article 1, §1, of the Constitution of the World Organisation of United Cities and Local Governments.

organization or association⁷² — although data suggests that only already well-performing cities are likely to join networks or associations specifically engaged with climate action.⁷³

3. Cities' Participation in International Law Fora

10. Norm-driving and norm-sustaining has been coordinated at the global level (and questioned at the constitutional level), but they work at the *fringes* of international law.

What is interesting to assess is how cities can be players within international law processes, even if cities are largely perceived as being mere “subordinate appendages” of their States, since “[f]ormally and institutionally, cities have no voice, no official seat or platform (...) within the current international policymaking system.”⁷⁴ One cannot ignore that cities have been very vocal at the side events of the meetings of the Conference of the Parties to the UNFCCC and the Paris Agreement, but “side events (...) are exactly that — side events, not formal parts of the negotiations.”⁷⁵

In fact, international law is reluctant to upgrade city participation, in part because it pierces the veil of sovereignty and the fiction of State unity. The rise building of international law as a State-centred legal system was only possible by ruling out alternative models of governance (such as the German leagues of cities or the Italian city-States)⁷⁶ and by subjecting cities to the complete authority of the State. Therefore, the Paris Agreement, the Glasgow Climate Pact, and the Sharm-el-Sheik Implementation Plan acknowledge the role of cities — but only vaguely and only at the domestic level.

But more ecumenical readings are possible and confirmed by Rule 7 of the Procedure of the UNFCCC Conference of the Parties, which states that any body or agency, *governmental* or not, may be admitted as *observer*. This is an explicit States' endorsement of city participation in the meetings of Conference of the Parties. In 2022, in Sharm el Sheik, local governments represented 2,1% of the observers accredited in the Conference of the Parties, up from 1% in 2016. This goes hand in hand with an increasing trend of international organizations to include cities and local governments among

⁷² Beaudouin (n 4) p. 57.

⁷³ Heijden (n 2) p. 89.

⁷⁴ Swiney (n 3) pp. 228-229.

⁷⁵ Heijden (n 2) p. 81.

⁷⁶ Hendrik Spruyt, *The Sovereign State and Its Competitors* (Princeton: Princeton University Press, 1994).

their observers..⁷⁷ Nonetheless, data does not support the view that increased city participation increases the likelihood of an agreement, better or more stringent mitigation or adaptation solutions, or even the inclusion of references to local action in the final agreement.

In any case, since in the institutional architecture of the UNFCCC the Conference of the Parties is responsible for the upstream production of international climate change law, cities' participation as observers allows provides them a limited forum to influence and shape the content of future treaty-based rules, pushing for the inclusion of their values, standards, practices, and expectations..⁷⁸

4. Cities' Participation in International Litigation

11. Where cities' participation could be promising is in the litigation under or beyond the UNFCCC legal complex. Only a brief word is needed, since the established understanding of international law conceives cities as being included in the concept of State, and therefore as lacking any standing before international judicial bodies..⁷⁹

However, there are some reasons to uphold cities' participation in international climate-related litigation. To begin with, cities can easily engage in fact-finding, fact-checking, and fact-reporting activities, which are especially relevant not only in the field of mitigation policies, but also in the fields of resilience building and adaptation policies, which are genetically community-driven. Fact-finding, fact-checking, and fact-reporting may seem to be a minor form of contribution, but establishing facts is the key for winning in court.

Furthermore, whereas States are complex entities comprised of different actors that are not necessarily united in belief⁸⁰, cities represent a collection of geographically determined and unified individuals and interests. In that sense, cities can work as incubators of civil society, and therefore as rooters of climate litigation. In this hat, cities will not be admitted, for instance, to the European Court of Human Rights — but they can help mobilizing civil society and support the submission of petitions before the Strasbourg Court. This is relevant with regards to climate litigation, where the establishment of facts regarding damages or causal links is more feasible and more visible if broken

⁷⁷ Beaudouin (n 4) p. 83.

⁷⁸ Beaudouin (n 4) p. 98.

⁷⁹ Moritz Baumgärtel, "Dispute Settlement", in Aust & Nijman (n 2) 147-157.

⁸⁰ Bodansky (n 13) pp. 112-113.

down locally. In other words, if the applicant is able to circumscribe spatially what conduct has caused what damages — therefore transforming a global problem affecting everyone into a localized event affecting one person or one group, thus highlighting victimhood. This is possible, because cities autonomize and offer “tangible, comprehensible evidence of the extent, depth and different dimensions of human impacts and their associated differentially distributed patterns of vulnerability.”⁸¹

5. Conclusion

12. In conclusion, cities have been performing a vibrant activity as global actors when norm-driving, norm-sustaining, observing international meetings, and mobilizing and supporting climate-related litigation. The role of cities within the domestic legal system is more intuitive, including when they create and interact in networks with other cities. The outcome of their work at the global level is interesting, but it is still very short. It does not mean that their effort is unmerited, but perhaps that we are too tied to old conventions regarding international law and global governance. However, just as these forms of cities’ participation at the international level were unpacked by cities in the absence of any legal framework, creativity may foster other forms of cities’ participation as global actors in the future.

⁸¹ Kotzé (n 3) p. 361.