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# THE URBANISATION OF INTERNATIONAL LAW - A POST-COLD WAR HISTORY

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**The Urbanisation of International Law – A Post-Cold War History**

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**1 Introduction**

Interest in cities as part of international law’s historiography is a sign of the times. It is a next step in the turn to the city that unfolded in international legal scholarship in the post-Cold War era. While generally invisible in traditional international legal scholarship, the city has moved into the periphery of the discipline’s historiography.<sup>1</sup> The city is now recognised as a relevant entry point of international legal histories, for example, to claim the relation between imperialism and international law<sup>2</sup> or to approach international law as ‘a global (human, economic, and environmental) development project that regulates the periphery within large cities in emerging nations’.<sup>3</sup> The latter refers to the approach taken by for example Luis Eslava in *Local Space, Global Life* (2015), which tells the story of the international turn to the local through the history of Bogotá as a case study of how international law and this global development project have been intertwined since the 1980s and how international law as such changed the urban in many parts of the world.<sup>4</sup> More examples could be given, from the impact of international security practices on cities<sup>5</sup> over the development of global norms of good urban governance<sup>6</sup> to the effect that international law has on cities in the context of the protection of cultural heritage.<sup>7</sup> In other words, a chapter on international law and cities in the *Cambridge History of International Law* matches a more general resurgence of interest in cities in international legal scholarship of the last three decades.

The emergence of the ‘turn to the city’ in international law is met by a ‘turn to international institutions and law’ by cities. These processes are mutually constitutive, non-linear, and rather complex. They unfold in both international life and international law scholarship and they are very much post-Cold War phenomena. As such, they warrant contextualisation and reflection in this volume. What has caused these turns? What are the characteristics of this emerging international law of and for cities? What historical frames have opened up mainstream international law and legal thought to this specific historical turn?

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<sup>1</sup> Liliana Obregón, ‘Peripheral Histories of International Law’, *Annual Review of Law and Social Science* 15 (2019), 437-51.

<sup>2</sup> Wanshu Cong and Frédéric Megret, “‘International Shanghai’ (1863-1931): Imperialism and private authority in the Global City’, *Leiden Journal of International Law* 34 (2021), 915-33; Luigi Nuzzo ‘The Birth of an Imperial Location: Comparative Perspectives on Western Colonialism in China’, *Leiden Journal of International Law* 31 (2018), 569-96.

<sup>3</sup> Obregón, ‘Peripheral Histories’, 438.

<sup>4</sup> Luis Eslava, *Local Space, Global Life – The Everyday Operation of International Law* (Cambridge: CUP, 2015).

<sup>5</sup> Alejandro Rodiles, ‘The global insecure counterterrorism city’ in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021) 214-226.

<sup>6</sup> Helmut Philipp Aust and Anél du Plessis, ‘Good urban governance as a global aspiration: on the potential and limits of SDG 11’ in Duncan French and Louis Kotzé (eds.), *Sustainable Development Goals – Law, Theory and Implementation* (Cheltenham: Edward Elgar, 2018) 201-221.

<sup>7</sup> Lucas Lixinski, ‘Paradoxes of Visibility and Preservation: Cultural Heritage Law and the Making of the City as an International Legal Category’, *Italian Yearbook of International Law* 30 (2021), 37-57.

With the end of the Cold War, geopolitics changed, liberalism surged, and economic globalisation accelerated. The initial optimism about the role of international law was well in tune with the general drunkenness over what some called the victory of liberal democracy and the (international) rule of law.<sup>8</sup> When exactly this optimism started to wane and the fissures of the international (legal) system started to be taken seriously – with the first Iraq War (1991), the Rwanda Genocide (1994), the 2001 attacks on the World Trade Centre in New York City, or urban warfare in Bamako and Mogadishu –, remains to be debated. With the Russian aggression against Ukraine of February 2022 there now seems to be something like a definite endpoint of the post-Cold War era, even though we readily admit that this might be a further attempt at periodization undertaken from a very Western point of view.<sup>9</sup> Until some time ago, the institutional developments spurred by post-Cold War violence and civil wars may have perversely added to the positive outlook of some international lawyers, as the creation of, for example, ad hoc tribunals could be seen as another success story of international law, allegedly and finally being able to ‘respond’ appropriately to mass violence. When we adopt a periodization, the post-1989 period cannot be understood as one single continuum, especially not if it is supposed to make sense for the entire globe. While during the early 1990s, there was at least in the West – rightly or wrongly – hope of a new multilateral order and a new international legal order, in the late 1990s and surely during the two decades that followed, the public outlook turned increasingly distrustful of multilateral institutions and international law.<sup>10</sup> The Post-Post-Cold War world that is now dawning on us has been at least 8-10 years in the making.<sup>11</sup> While we build on Curtis, who draws on Ikenberry,<sup>12</sup> to argue that the global city is the historically specific urban form produced by the specific political configuration of the post-Cold War liberal world order,<sup>13</sup> we also note that the rapidly changing geo-political and geo-economic situation we are witnessing at the time of writing in late 2022 may affect the future of (global) cities profoundly.<sup>14</sup>

That said, during the Post-Cold War years economic globalisation went hand in hand with world-wide urbanisation. Citizens became first and foremost consumers whether living in a state-led economy like China’s or in the US, Europe or Brazil.<sup>15</sup> Economic globalisation affected both cities and rural areas. Cities

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<sup>8</sup> For a sober assessment of this era see Heike Krieger and Georg Nolte, ‘The International Rule of Law – Rise or Decline? Approaching Current Foundational Challenges’ in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds.), *The International Rule of Law – Rise or Decline?* (Oxford: OUP, 2019) 3-30.

<sup>9</sup> See the contrasting assessments by Ingrid (Wuerth) Brunk and Monica Hakimi, ‘Russia, Ukraine, and the Future World Order’, *American Journal of International Law* 116 (2022), 687-97 and Anastasiya Kotova and Nina Tzouvala, ‘In Defense of Comparisons: Russia and the Transmutation of Imperialism in International Law’, *American Journal of International Law* 116 (2022), 710-19 respectively.

<sup>10</sup> Helmut Philipp Aust, ‘The Democratic Challenge to Foreign Relations Law in a Transatlantic Perspective’ in Jacco Bomhoff, David Dyzenhaus and Thomas Poole (eds.), *The Double-Facing Constitution* (Cambridge: CUP, 2020) 345-75, at 350-52. Also, Martti Koskeniemi, *International Law and the Far Right: Reflections on Law and Cynicism* (The Hague: Asser Press, 2019) on facing the crisis of trust with an attitude of truthfulness. Janne E Nijman, ‘Grotius’ “Rule of Law” and the Human Sense of Justice: An Afterword to Martti Koskeniemi’s Foreword’, *European Journal of International Law* 30 (2019), 1105–1114.

<sup>11</sup> Alison Pert, ‘International Law in a Post-Post-Cold War World—Can It Survive?’, *Asia & the Pacific Policy Studies* 4 (2017), 362-375.

<sup>12</sup> J. Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order*. (Princeton, N.J.: Princeton University Press, 2011).

<sup>13</sup> Simon Curtis, ‘Global Cities, World Order and Post-Pandemic Futures’, *Monografias CIDOB* 81 (2021) 27-37.

<sup>14</sup> Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, ‘Toward a Geoeconomic Order in International Trade and Investment’, *Journal of International Economic Law* 22 (2019), 655-76, at 656-57.

<sup>15</sup> For an essayistic take on this turn to consumerism see Chuck Klosterman, *The Nineties – A Book* (New York: Penguin Press, 2022) 289 (in the context of Bill Clinton’s electoral campaign in 1992: ‘The innovation was to look at voters as pure consumers’);

pulled people in: transnational and intra-national urbanisation transformed societies around the globe. Today, 55% of the world's population lives in cities, while 80% of global GDP and 60% of global GHG emissions is generated in cities. With cities continuing to grow, the urban comes to the forefront in many sectors. In 2001, then-UN Secretary-General Kofi Annan observed, '(t)he central challenge for the international community is clear: to make both urbanisation and globalization work for all people, instead of leaving billions behind or on the margins.'<sup>16</sup> Globalisation, urbanisation, decentralisation, and most recently digitalization characterize to some degree all three decades since the Fall of the Berlin Wall and together have been conducive to the (self-)constitution of cities as global actors through international law and to the urbanisation of international law more generally.<sup>17</sup>

In this chapter, we examine and explain the ascent of cities in both international law practice and scholarship. First, we historicise the turn to the city in international law and situate it within the post-Cold War era. This turn was perceived earlier in sociology, urban geography, even in some corners of IR scholarship, but a discipline as state-centric as international law had a persistent blind spot for the increasing interactions between cities and international law and institutions well into the 21<sup>st</sup> century, before awareness for the gradual urbanisation of international law has emerged (section 2). In section 3, we zoom in on some implications for international law and institutions as well as for international legal scholarship. Subsequently, we discuss some of the implications for international legal historiography in particular. The lens of the urban in international legal history contributes to the flourishing of scholarship in the context of debates on for instance empire, centre-periphery relations or the materiality and spatiality of international law (section 4). We conclude this chapter by pointing to some anticipated developments in both international law scholarship and practice (section 5). This recent interest in the city has caused a certain 'urban consciousness' in international law and governance, the normative developments testify to a broadening of the categories of international law and to an entanglement of the various normative webs from the local to the global.<sup>18</sup> Looking back at the period since the end of the Cold War, we can hence speak of an urbanisation of international law – a development which has not radically transformed the international legal system, but has enriched it with another level at which important developments in practice as well as in the accompanying scholarship can be observed.

## 2. Historicising the turn to the city in international law

More than thirty years after the end of the Cold War, the urban or city perspective in global affairs is on the verge of becoming established. We only need to note how the world responded to the global pandemic of Covid-19 to see that cities and the urban perspective were very much in the forefront of (international) action

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with respect to the EU Ulrich Haltern, 'Europäische Verfassungsästhetik. Grundrechtscharta und Verfassung der EU im Zeichen von Konsumkultur', *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 85 (2002), 261-272.

<sup>16</sup> Kofi Annan, Foreword, *Cities in a Globalizing World. Global report on Human Settlements 2001*, UN Habitat, (Earthscan, 2001).

<sup>17</sup> Janne E. 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 Andreas Fahrmeir, Gunther Hellmann, and Miloš Vec (eds.), *The Transformation of Foreign Policy: Drawing and Managing Boundaries* (Oxford: OUP, 2016) 209-41, at 216-21.

<sup>18</sup> See further the contributions in Nico Krisch (ed.), *Entangled Legalities beyond the State* (Cambridge: CUP, 2021).

and policy formation to confront this global challenge. UN-Habitat's 2021 report, *Cities and Pandemics: Towards a more just, green and healthy future*, shows for example how global and urban governance are entangled in the confrontation of the global health crisis and how today cities are both the space where these challenges reshape human lives and the actors who come together to act locally to tackle a global problem.<sup>19</sup> As such, the global health crisis highlighted further this more structural ascent of cities in post-Cold War global affairs and what we could call the urbanisation of (in this case) global health law.<sup>20</sup> Similarly, the urbanisation of armed conflict, visible also in the Russian war of aggression against Ukraine, challenges international humanitarian law to urbanize further;<sup>21</sup> a development that in turn may need to involve representatives of local governments. These are just two current examples of how prominent the urban has become in global affairs. While a structural trend of the last thirty years, the rise and reconstruction of the city as both space and global actor surfaced as a research topic rather late in international law and governance scholarship.

This chapter's discussion of Post-Cold War international legal scholarship starts off at a blind spot. Books such as Francis Fukuyama's *The End of History and the Last Man* (1992) and Jean-Marie Guéhenno's *The End of the Nation-State* (1993/1995) are markers of these first few years after 1989.<sup>22</sup> The end of the Cold War sparked discussions on reform of existing international institutions now that geo-politics had changed and a global civil society would become manifest. With the state being challenged nationally and internationally, non-state actors – ranging from businesses to civil society actors – rose to the international stage claiming a role in the making of this new liberal international law. In 1995, a UN Commission on Global Governance published *Our Global Neighbourhood* in which it pointed to the multitude of Non-State Actors (NSAs) and the need for the UN to reform. In 1997, Jessica Mathews heralded 'the Age of Non-State Actors'.<sup>23</sup> In that same year, UN Secretary-General (SG) Kofi Annan published his report *Renewing the United Nations: A Programme for Reform* in which he argued to make the 'the global civil society [...] a true partner in its work'.<sup>24</sup> In 2002 and 2003, the SG again pushed for an agenda of change to reform institutional structures and enhance inclusion. While Kofi Annan did mention cities and local authorities as early as 1997,<sup>25</sup> and since then stressed, eg in 2005, that they had 'a critical role to play' in the realization

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<sup>19</sup> UN-Habitat, 'Cities and Pandemics: Towards a more Just, Green and Healthy Future', Report published in May 2021, available at <https://unhabitat.org/cities-and-pandemics-towards-a-more-just-green-and-healthy-future-1>.

<sup>20</sup> See generally on cities and global health law, Christian Iaione and Elena de Nictolis, 'The role of cities in the global governance of health' in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021) 265-278.

<sup>21</sup> See the speech by Mr Peter Maurer, President of the International Committee of the Red Cross, 'Wars in cities: protection of civilians in urban settings', UN Security Council Open Session, 25 January 2022, available at <https://www.icrc.org/en/document/wars-cities-protection-civilians-urban-settings>; on the trend towards urbanisation of warfare see already previously Stephen Graham, *Cities under Siege: The New Military Urbanism* (London: Verso, 2011); Martin Coward, *Urbicide: The Politics of Urban Destruction* (London and New York: Routledge, 2009); on the relationship between cities and 'urban warfare' see also Mirko Sossai, 'The Place of Cities in the Development of International Humanitarian Law', *Italian Yearbook of International Law* 31 (2021), forthcoming.

<sup>22</sup> Francis Fukuyama, *The End of History and the Last Man* (New York City: Simon & Schuster, 1992); Jean-Marie Guéhenno, *The End of the Nation State* (Minneapolis: University of Minnesota Press, 1995), originally published as *La fin de la Démocratie* (Paris: Flammarion, 1993).

<sup>23</sup> Jessica T. Mathews, 'Power Shift', *Foreign Affairs* 76(1) (1997), 50-66.

<sup>24</sup> UN SG report *Renewing the UN: A Programme for Reform*, UN Doc. A/51/950 (1997), para 51.

<sup>25</sup> UN SG report *Renewing the UN: A Programme for Reform* (1997) (A/51/950), para 207.

of the Millennium Development Goals,<sup>26</sup> this did not lead however to a discussion on the role of cities and local governments in international law and institutions in international legal scholarship. While the changing role of NSAs in international law and governance led to NSAs as one of the main subjects of debate in international legal scholarship, cities were mostly not part of this discussion in the 1990s and 2000s. Anne-Marie Slaughter for example published *A New World Order* in 2004 and zoomed in on the disaggregated state and the organization of global governance through a complex global web of ‘governmental networks’.<sup>27</sup> Slaughter pointed to all kinds of networks among bureaucrats, yet failed to see how cities, mayors and local authorities were becoming rapidly part of the newly emerging networked world order. She was surely not alone in this.

During the Cold War, international law was State-centric and pragmatic.<sup>28</sup> After the Cold War, traditional state-centrism in international relations and international law was challenged and crucial legal concepts such as statehood, sovereignty, or international legal personality were re-examined.<sup>29</sup> Generally, the general mood was upbeat. Michael Reisman, the doyen of the New Haven School, opined that the ‘international political system is at the threshold of a time of hope.’<sup>30</sup> There were voices trying to sober the West and to warn about its victorious attitude and against the buoyance about the implications of the end of the Cold War for the Third World.<sup>31</sup> In the 1990s, initially the end of the Westphalian – inter-state – Order and the collapse of states were central to large parts of international legal scholarship. The myth of the Westphalian Order had defined international legal thought through the Cold War. After the Second World War, the inter-municipal movement of the early 20<sup>th</sup> century had withered away.<sup>32</sup> Arguably, some of it flared though in the sister-cities initiatives and citizen diplomacy of peace movements aimed at overcoming Cold War tensions bottom-up.<sup>33</sup> It would rekindle only well after the Cold War, when it re-energized against the consequences of economic globalization and neoliberal capitalism for the urban and cities around the globe.

In some of these debates, participants also wondered how to include in international law existing transboundary forms of cooperation between subnational actors, which were so far considered to be

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<sup>26</sup> Kofi Annan on 8 September 2005, available at <https://news.un.org/en/story/2005/09/151812-annan-says-global-development-goals-can-be-achieved-through-local-action> (last accessed 16 December 2022).

<sup>27</sup> Anne-Marie Slaughter, *A New World Order* (Princeton NJ: Princeton University Press, 2004).

<sup>28</sup> Compare the contributions in the following two seminal collections: Ronald St. John Macdonald and Douglas M. Johnston (eds), *The structure and process of international law* (The Hague: Nijhoff, 1983); Ronald St. J. Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden and Boston: Brill, 2005).

<sup>29</sup> See, for instance, James Crawford, *International Law as an Open System* (London: Cameron May, 2002); Daniel Bethlehem, ‘The End of Geography: The Changing Nature of the International System and the Challenge to International Law’, *European Journal of International Law* 25 (2014), 9-24.

<sup>30</sup> W. Michael Reisman, ‘International Law after the Cold War’, *American Journal of International Law* 84 (1990), 859-866, at 866.

<sup>31</sup> Cf B.S. Chimni, ‘Third World Approaches to International Law: A Manifesto’, *International Community Law Review* 8 (2006), 3–27; also, Louise Fawcett and Yezid Sayigh (eds.), *The Third World Beyond the Cold War: Continuity and Change* (Oxford: OUP, 2000).

<sup>32</sup> Helmut Philipp Aust, *Das Recht der globalen Stadt – Grenzüberschreitende Dimensionen kommunaler Selbstverwaltung* (Tübingen: Mohr Siebeck, 2017) 43-47.

<sup>33</sup> Patrick Le Galès, *European Cities – Social Conflicts and Governance* (Oxford: OUP 2002) 105–106; Shane Ewen, ‘Lost in Translation? Mapping, Molding, and Managing the Transnational Municipal Movement’ in Pierre-Yves Saunier and Shane Ewen (eds), *Another Global City – Historical Explorations into the Transmunicipal Movement, 1850–2000* (London: Palgrave Macmillan 2008) 173-184, at 175–176.

irrelevant for the purposes of international law. Christoph Schreuer, for instance, remarked in an article on the ‘waning of the sovereign state’ that

the classification of these arrangements as extra-legal and not properly belonging to the sphere of international law is probably more the expression of an inability to come to terms with this phenomenon than an adequate description of reality.<sup>34</sup>

In spite of these first cracks in the traditional perceptions of the international legal order, the rise of the global city took place initially outside of the field of international law and international organisations. The blindspot for local governments’ transnational initiatives during the Cold War continued initially in the Post-Cold War era even though non-state actors were very visible and the state in its orthodox identity as international actor was problematised.<sup>35</sup> Cities became visible to scholars of international law and global governance only very slowly and initially through the engagement of other disciplines with the implications of economic globalisation for cities.

A real game changer has been the publication of Saskia Sassen’s *The Global City: New York, London, Tokyo* in 1991 – a book that impacted many disciplines.<sup>36</sup> With the notion of the ‘global city’, economist and sociologist Saskia Sassen built on world cities literature, yet pushed it further by taking the changing global economy on board and explicating the new geography of power. Global cities are the *loci* from which global financial-economic players command and control the global economy. With this notion, Sassen captured ‘a historically specific urban form’ that was produced by ‘a historically specific configuration of geopolitical power’.<sup>37</sup> With the End of the Cold War and the collapse of the USSR, US hegemony consolidated and the liberal international order rapidly took shape.

Deregulation, privatization, and general free market-fundamentalism were transforming the state and the social reality within and around it. With her seminal work, Sassen showed how this dynamic was taking place in cities, transforming cities, and contributed to ‘the formation of a transnational system of power which lies in good part outside the formal interstate system’.<sup>38</sup> One of her main concerns was the reconfiguration of state power and the fact that ‘a new private institutional order’ emerged outside the public control of national governments.<sup>39</sup> The initial approach to cities has hence been driven very much by concerns of the global economy. In 2004, for example, Cities Alliance, which is co-chaired by the World Bank and UN Habitat stated that ‘cities and towns are essentially markets’.<sup>40</sup>

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<sup>34</sup> Christoph Schreuer, ‘The Waning of the Sovereign State: Towards a New Paradigm for International-Law?’, *European Journal of International Law* 4 (1993), 447-471, at 450.

<sup>35</sup> See, for instance, the contributions in Jean d’Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (London: Routledge, 2011). Also, Math Noortmann and Cedric Ryngaert (eds.), *Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers* (London: Routledge, 2010).

<sup>36</sup> Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton, NJ: Princeton University Press, 1991).

<sup>37</sup> Curtis, ‘Global Cities, World Order and Post-Pandemic Futures’.

<sup>38</sup> Saskia Sassen, ‘The State and Economic Globalization: Any Implications for International Law?’ *Chicago Journal of International Law* 1 (2000), 109-16, at 110.

<sup>39</sup> *Ibid.*

<sup>40</sup> Cities Alliance, 2004 Annual Report, at 4, available at: [www.citiesalliance.org](http://www.citiesalliance.org).

In other words, international (economic) law mobilised to foster economic globalisation and arrange free trade, liquidity of capital, privatisation, and deregulation reshaped cities. As such, it played a significant role in the emergence of global cities with all its consequences for urbanites living there. Sassen's work warns against the consequences of a global economy that moved the system beyond the control of states and international institutions. In 2000, she calls on international lawyers to think about the implications of this development for international law.<sup>41</sup> Her call remained unanswered for years.<sup>42</sup> While cities surfaced for example when they concluded inter-city transnational trade agreements in the context of NAFTA<sup>43</sup>, the city remained largely invisible in international economic law scholarship. The role of international law in the constitution of the global city has moreover not been focus of much research. Critical scrutiny of how international economic law is implicated in the social injustices that have come with neoliberal globalisation has initially lacked an urban perspective.<sup>44</sup> Only recently, Eslava and Hill have shown how the international turn to cities in the Global South 'is further entrenching the routines of the global political economic order at the local level.'<sup>45</sup>

Around the turn of the millennium, an international financial-economic institution such as the World Bank, pointed to the need to reflect on decentralisation.<sup>46</sup> With the increase in the number of states and the increase of democratically governed states by the late 1990s, local participation in government and therewith in determining living conditions was promoted by cities, their transnational networks and international institutions as diverse as the World Bank and the UN Human Settlements Programme (UN-Habitat). Decentralisation was understood as a process that would not stop. Both institutions pointed to relevant factors for successful implementation of decentralisation and UN-Habitat, for example, developed and adopted the *International Guidelines on Decentralisation and Access to Basic Services* for all.<sup>47</sup> In short, as also Eslava and Hill argue, decentralisation came to define development policies of international institutions more generally.<sup>48</sup> It matched the neoliberal vision on government. But as international institutions and states also started to push problems down, cities had to face the music and act. Social injustices and ecological damages, which the global economy constitutes, and the unravelling of social tissue started to be clearly visible in the urban streets. While states were the actors that shaped the global economic order, cities were

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<sup>41</sup> Sassen, 'The State and Economic Globalization'.

<sup>42</sup> See for a first examination of cities in international economic law, Jorge E. Viñuales and Lucy Lu Reimers, 'The Law of Economic Globalization and Cities', in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021) 279-292; on some of the implications for the question of housing see Kaara Martinez, 'In the Face of Financialization: Cities and the Human Right to Adequate Housing', *Italian Yearbook of International Law* 30 (2020), 107-30; with a particular emphasis on the role of international investment law Daniel Litwin, 'The Urban-Rural Divide: Spatial Inequalities and the Backlash against the Investment Regime', *Italian Yearbook of International Law* 30 (2020) 131-53.

<sup>43</sup> See Viñuales and Reimers, 'The Law of Economic Globalization', at 288.

<sup>44</sup> Cf John Linarelli, Margot E. Salomon, and Muthucumaraswamy Sornarajah, *The Misery of International law. Confrontations with Injustice in the Global Economy*, (Oxford: Oxford University Press, 2018).

<sup>45</sup> Luis Eslava and George Hill, 'Cities, post-coloniality and international law' in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021) 77-89, at 88.

<sup>46</sup> *World Development Report 1999/2000, Entering the 21<sup>st</sup> Century* (Oxford: OUP 2000).

<sup>47</sup> *Ibid.*, at 8 and 107-124.

<sup>48</sup> See also Helmut Philipp Aust and Alejandro Rodiles, 'Cities and local governments: International development from below?' in Ruth Buchanan, Luis Eslava and Sundhya Pahuja (eds.), *The Oxford Handbook of International Law and Development* (Oxford: OUP, 2023, forthcoming).



confronted with its negative consequences and started to regroup, nationally and transnationally.<sup>49</sup> With, for example, the Barcelona Declaration ‘Local Authorities and the New Generation of Free Trade Agreements’, local governments in Europe expressed profound concern about the secrecy around the EU commission’s negotiations of TTIP and CETA and demanded negotiations to be suspended and a new mandate renegotiated.<sup>50</sup> They ‘recognise[d] the importance of the trade of goods and services for citizen wellbeing, but [...] stress[ed] that competitiveness and economic growth should not be the only criteria used to determine [these] free trade agreements’.<sup>51</sup> Their concern moreover was very much about how ‘these treaties will put at risk [their] capacity to legislate and use public funds (including public procurement), severely damaging [their] task to aid people in basic issues such as: housing, health, environment, social services, education, local economic development or food safety.’<sup>52</sup> This urban contestation of some dimensions of international economic law can be understood as part of a bigger urban anti-capitalist movement of which the revival of ‘the right to the city’ as a new collective human right in the last two decades is another manifestation.<sup>53</sup>

Building on the internationalisation of the city and its increasing role in eg the areas of climate change, human rights, urban development and global (urban) governance, global city-networks lobbied successfully for an urban sustainable development goal (SDG). SDG 11 was adopted in 2015 to make cities and human settlements inclusive, safe, resilient and sustainable. UN-Habitat was reformed to strengthen its role in the implementation of the New Urban Agenda, which was adopted at the UN Conference on Housing and Sustainable Urban Development (Habitat III) in Quito, Ecuador, 20 October 2016.<sup>54</sup> The New Urban Agenda may be understood as part of the reflections on urban governance at the global level. It reflects the more general developments of the globalisation of urban governance and the urbanisation of global governance. Within the discourse on good urban governance and pursuant to the realisation of the global sustainable development agendas, such as the SDGs and NUA, city networks such as UCLG propagate decentralisation and local democracy and many put human rights and the right to the city at the heart of local policies.<sup>55</sup> With research into sustainable development and in particular the SDGs, global urban governance surfaced as a field of scholarly interest.<sup>56</sup>

Finally, in more recent years, digital urban infrastructure and surveillance systems are reshaping our cities. The smart sustainable city projects suggest digital technologies will improve (responsive) urban governance

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<sup>49</sup> See further Janne E Nijman, ‘The Urban Pushback: International Law as an Instrument of Cities’, *Proceedings of the Annual Meeting of the American Society of International Law* 113 (2019), 119-23.

<sup>50</sup> See on this also Viñuales and Reimers, ‘The Law of Economic Globalization’, at 287-88.

<sup>51</sup> Barcelona Declaration ‘Local Authorities and the New Generation of Free Trade Agreements’ adopted 21 April 2016, available at [https://ajuntament.barcelona.cat/bombers/en/noticia/first-pan-European-meeting-of-local-authorities-and-the-new-generation-of-free-trade-agreements-was-held-in-barcelona\\_537550](https://ajuntament.barcelona.cat/bombers/en/noticia/first-pan-European-meeting-of-local-authorities-and-the-new-generation-of-free-trade-agreements-was-held-in-barcelona_537550) (last visited 16 December 2022).

<sup>52</sup> Ibid.

<sup>53</sup> Cf David Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* (London: Verso, 2012); with a specific focus also on Barcelona see Michele Grigolo, *The Human Rights City – New York, San Francisco, Barcelona* (London and New York: Routledge, 2019).

<sup>54</sup> UN Doc. A/RES/71/256. The New Urban Agenda was endorsed by the United Nations General Assembly at its sixty-eighth plenary meeting of the seventy-first session on 23 December 2016.

<sup>55</sup> <https://www.uclg.org/> (last visited 16 December 2022).

<sup>56</sup> See further Aust and du Plessis, ‘Good Urban Governance’.

and the delivery of urban services, and help find local solutions to global challenges such as climate change, waste management, security, the distribution of energy or social inequality and exclusion.<sup>57</sup> The governance challenges are particularly complex in the Anthropocene and new technology applied at a city-scale are often presented to support the achievement of sustainable development and closing the social inequality gap.<sup>58</sup> The increase in the use of ICT in cities ties in well with interest in urban design, architecture, and infrastructure, in short, with sustainable urban development. This use of new data-driven technologies is in turn reshaping urban governance. The ITU has established a Focus Group on Smart Sustainable Cities (FG-SSC) to guide the transition towards SSC by a step by step approach.<sup>59</sup> In 2016, the World Telecommunication Standardization Assembly adopted Resolution 98, 'Enhancing the standardization of Internet of things and smart cities and communities for global development', aimed at making ITU a platform for smart cities standardization efforts. The UN initiative, United for Smart Sustainable Cities (U4SSC), aims to mobilize smart city technologies to realize the SDGs.<sup>60</sup> It is in these and other areas that international law and institutions became relevant to cities and *vice versa*, and a gradual urbanisation of international law has emerged.

### 3 The Urbanisation of International Law in Practice and Scholarship

This development derives from the practice of cities and their networks. While we cannot provide for an exhaustive overview of what happened in this regard, we show with examples from three particularly pertinent areas of international law how the advent of cities and their networks has impacted upon the actual practice of international law. Following that, we turn to the careful embrace that this development has found in the scholarship of international law, before turning to some of the possible future implications of this trend.

More generally, the limited openings in international law came gradually into sight for most international legal scholars initially through the increasing role of cities in international climate law, international migration law, and international human rights law. In the climate change context, the activities of cities consisted in forming networks like ICLEI<sup>61</sup> and the C40 – Climate Leadership Group<sup>62</sup> as part of an effort to fill the governance gap which was created by insufficient action on the inter-state level, especially in years following the Kyoto Protocol when finding a pathway towards a follow-up agreement proved to be

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<sup>57</sup> Peter Gailhofer, 'Governance in the Smart City: Sketches of a Research Programme in Legal Theory' in Helmut Philipp Aust and Anél du Plessis (eds.), *The Globalisation of Urban Governance – Legal Perspectives on Sustainable Development Goal 11* (London and New York: Routledge, 2019) 227-246.

<sup>58</sup> Helmut Philipp Aust and Janne E Nijman, 'Planetary Boundaries *Intra Muros*: Cities and the Anthropocene' in Duncan French and Louis J. Kotzé (eds.), *Research Handbook on Law, Governance and Planetary Boundaries* (Cheltenham: Edward Elgar, 2021) 103-123.

<sup>59</sup> See <https://www.itu.int/en/ITU-T/focusgroups/ssc/Pages/default.aspx> (last visited 16 December 2022).

<sup>60</sup> Resolution 98 'Enhancing the standardization of Internet of things and smart cities and communities for global development', World Communication Standardization Assembly, Geneva, 1-9 March 2022, available at <https://www.itu.int/pub/T-RES-T.98-2022> (last visited 16 December 2022).

<sup>61</sup> <https://iclei.org/> (last visited 16 December 2022).

<sup>62</sup> <https://www.c40.org/> (last visited 16 December 2022).

elusive.<sup>63</sup> The activities of these city networks consist mostly in exchanging best practices, pooling knowledge and purchasing power and exerting political pressure on national governments and other actors through a specific form of virtue signalling. Yet, the practice of city networks extends beyond that and has intimate connections with international legal processes. ICLEI, for example, is a spin-off of the 1992 Rio declaration and its call to formulate ‘Local Agenda 21’ documents.<sup>64</sup> In a way, this call to arms foreshadows later acknowledgments in decisions of the Conferences of the Parties (COPs) of the United Nations Framework Convention on Climate Change in which the role of cities and local governments for the implementation of climate change law is expressly acknowledged.<sup>65</sup> What is more, C40 – a network with a more elitist mindset than the egalitarian-structured ICLEI – has established ties with the World Bank with a view to standard-setting for urban development processes.<sup>66</sup> While these various forms of recognition and interaction between cities, IOs and the formal world of international law are still somewhat removed from traditional forms of international lawmaking through treaty or customary international law, they show that cities and their activities creep into international law due to an ongoing process of informalization of international law.<sup>67</sup> While we will return to this issue below, it can already be said here that the more international law informalizes with respect to its structures and outputs, the easier it becomes for less established categories of actors to be part of the game.

Similar processes can be observed with respect to the fields of human rights protection and migration. Human rights cities have taken it upon themselves to integrate their respective state’s human rights obligations into their policies or, in some cases, even to go beyond these legal requirements and to make up for a lack of ratification or political will on the part of central governments by orienting their city policies along the lines of international agreements.<sup>68</sup> The most famous example for such a move pertains to the city of San Francisco ‘incorporating’ the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) via a city ordinance.<sup>69</sup> From a traditional and formalist perspective, such an alignment of local practices with international law can be considered as irrelevant. Such a practice does neither purport to create binding international law nor is it able to contribute easily to processes of treaty interpretation in the sense of Article 31, para. 3, lit. b) of the Vienna Convention on the Law of Treaties or to the generation

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<sup>63</sup> Helmut Philipp Aust, ‘The Shifting Role of Cities in the Global Climate Change Regime: From Paris to Pittsburgh and Back?’, *Review of European, International and Comparative Environmental Law* 28 (2017) 57-66.

<sup>64</sup> Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), UN Doc. A/CONF.151/26 (Vol. I + II), Annex II, Rio Declaration, Agenda 21, Chapter 28 – Local Authorities’ Initiatives in Support of Agenda 21.

<sup>65</sup> See the various references to the local level in UN Doc. FCCC/CP/2015/10/Add.1 – Decision 1/CP.21 – Adoption of the Paris Agreement.

<sup>66</sup> See further Michael Riegner, ‘Development cooperation and the city’ in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021), 251-64, at 256.

<sup>67</sup> See Jean d’Aspremont, ‘The Politics of Deformalization in International Law’, *Goettingen Journal of International Law* 3 (2011), 503; Alejandro Rodiles, *Coalitions of the Willing and International Law – The Interplay between Formality and Informality* (Cambridge: CUP, 2018).

<sup>68</sup> See further the contributions in Janne E. Nijman, Barbara Oomen et al (eds.), *Urban Politics of Human Rights* (London and New York: Routledge, 2023).

<sup>69</sup> Karen Knop, ‘International Law and the Disaggregated Democratic State: Two Case-Studies on Women’s Human Rights and the United States’ in Claire Charters and Dean R. Knight (eds.), *We, the People(s): Participation in Governance* (Wellington: Victoria University Press, 2011) 75-116.

of state practice for generating customary international law.<sup>70</sup> But similar to the climate change context, a traditional and formalist view is no longer uncontested. And in the context of the UN system of human rights protection, it has been emphasised multiple times that cities and local governments can play meaningful roles for the implementation of human rights agreements.<sup>71</sup>

Finally, in the field of migration, we can see how cities defy national governments through various practices ranging from joining networks of cities of refuge to non-cooperation with government agencies in the context of forcible removals of migrants with an irregular status of residence.<sup>72</sup> Again, we can attest on the one hand that many of these practices will fly under the radar of established international legal categories. But at the same time, some cities constructively contribute to processes in which the content of international law is re-negotiated. In the Netherlands, for instance, court cases between the national government and city administrations have contributed to a clarification of the required standard of the protection of social, cultural and economic rights for migrants without a regular status.<sup>73</sup>

The urban as an illuminating lens for looking at the world to discern its problems and possible solutions more clearly, got into focus in international law scholarship only gradually in the first decade of the new millennium. Elsewhere we have stated that '[t]he turn [by cities] to international law and governance can also be read as an attempt to respond to that *global* "urban crisis"'.<sup>74</sup> Cities came to claim a role, individually and collectively, in addressing the negative socio-economic implications of the global economy on cities. The rising role of cities and local governments in for example the implementation of international (human rights) law and governance is related to what is often identified as a situation of 'state failure' and 'political deadlock' at the level of national government around the globe. Organised in networks, local governments articulate an imaginary of cities as political saviours and effective solvers of global problems. This grounded their claim to be legitimate global players along the lines of Benjamin Barber's book *If Mayors Ruled the World: Dysfunctional Nations, Rising Cities* (2013).<sup>75</sup> Variations of then New York City Mayor Bloomberg's tweet 'When Nations talk, Cities act' persist as the recent expression of the urban imaginary

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<sup>70</sup> But see for careful openings ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of international agreements, with commentaries, reprinted in UN Doc. A/73/10, Conclusion 5, para. 7; Sir Michael Wood, Second Report on the Identification of Customary International Law, UN Doc. A/CN.4/672 (2014), para. 34 with footnote 78; for a different view see, however, ILA, London Conference 2000, Committee on the Formation of Customary (General) International Law, Final Report of the Committee, Statement of Principles Applicable to the Formation of General Customary International Law, reprinted in: ILA (ed.), Report of the Conference, vol. 69 (2000), Vol. II, 712, at 727-728.

<sup>71</sup> Role of local government in the promotion and protection of human rights – Final report of the Human Rights Council Advisory Committee, UN Doc. A/HRC/30/49 (2015); Local government and human rights – Report of the UN High Commissioner for Human Rights, UN Doc. A/HRC/42/22 (2019); Guidelines for the Implementation of the Right to Adequate Housing, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/HRC/43/43 (2019).

<sup>72</sup> Barbara Oomen, 'Cities, refugees and migration' in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021) 240-50.

<sup>73</sup> See on these processes Moritz Baumgärtel and Barbara Oomen, 'Pulling human rights back in? Local authorities, international law and the reception of undocumented migrants', *The Journal of Legal Pluralism and Unofficial Law* 52 (2019), 172-91; see also Lisa Roodenburg, 'Urban approaches to human rights: tracking networks of engagement in Amsterdam's debate on irregular migration', *The Journal of Legal Pluralism and Unofficial Law* 51 (2019), 192-212.

<sup>74</sup> Aust and Nijman, 'Planetary boundaries', at 110.

<sup>75</sup> Benjamin Barber, *If Mayors Ruled the World: Dysfunctional Nations, Rising Cities. Dysfunctional Nations. Rising Cities* (New Haven: Yale University Press, 2013).

as also London Mayor Sadiq Khan shows: ‘In cities, we are the doers, in contrast to national governments who are the delayers, kicking the can down the road to 2040 or 2050.’<sup>76</sup>

A first turn of international legal scholars to the ascent of the city occurred in and around 2006, when Yishai Blank and Gerald Frug in tandem with David Barron published three articles that pointed to the development of a body of norms which they termed ‘international local government law’ and to how local governments started to participate in international law and governance at the international level next to states.<sup>77</sup> The changing relations between international institutions, the state, and the city were brought to light.<sup>78</sup> Elsewhere we have discussed more extensively this urban turn in international legal scholarship.<sup>79</sup>

In hindsight, the blind spot for cities in international legal scholarship started to shrink when it became visible in the practice fields we have just discussed, ie climate change, human rights law or migration.<sup>80</sup> Once noticed, slowly the changing relationship between cities and international law and governance started to move from these thematic fields to more general international law scholarship. Considering the often idealistic bent of these scholarly communities, scholarship stayed initially rather close to the urban imaginary expressed by leading mayors and networks. Once the enhanced role of cities became visible in these fields, international legal scholarship realised that there was something worth studying.

For international law as an academic discipline this provokes the question of whether these developments have legal relevance. Has there been an urban turn not just in international law scholarship, but also within the legal categories of international law? An important recent contribution by Giuseppe Nesi, a member of the UN International Law Commission, sets forth considerable scepticism in this regard. While acknowledging that the international activities of cities are worthy of analysis also for international lawyers, his engagement with the existing literature on cities in international law leads him to plead for caution. In particular, Nesi describes the debate on cities as ‘sometimes confusing and often nebulous’.<sup>81</sup> Nesi focuses in particular on the question of subjectivity. The result of his writing is that there has certainly not been a

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<sup>76</sup> ‘Cities act on climate while nations delay, Sadiq Khan tells COP 26’, *The Guardian* of 11 November 2021, available at <https://www.theguardian.com/environment/2021/nov/11/sadiq-khan-cop26-cities-climate-electric-buses> (last visited 16 December 2022).

<sup>77</sup> Gerald Frug and David J. Barron, ‘International Local Government Law’, *The Urban Lawyer* 38 (2006), 1-62; Yishai Blank, ‘The City and the World’, *Columbia Journal of Transnational Law* 44 (2006), 868-939; Yishai Blank, ‘Localism in the New Global Legal Order’ (2006) 47 *Harvard International Law Journal* 263-81.

<sup>78</sup> Among the first contributions to follow this initial wave of articles were Ileana M. Porras, ‘The city and international law: In pursuit of sustainable development’, *Fordham Urban Law Journal* 36 (2009), 537-601; Janne E. Nijman, ‘The Future of the City and the International Law of the Future’ in Sam Muller et al (eds.), *The Law of the Future and the Future of Law* (Oslo: Torkel Opsahl Publishers, 2011) 213-229; Helmut Philipp Aust, ‘Auf dem Weg zu einem Recht der globalen Stadt? C40 und der Konvent der Bürgermeister im globalen Klimaschutzregime’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 73 (2013), 673-704.

<sup>79</sup> Cf Helmut Philipp Aust and Janne E Nijman, ‘The emerging roles of cities in international law – introductory remarks on practice, scholarship and the *Handbook*’ in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021) 1-15.

<sup>80</sup> See Grigolo, *The Human Rights City*; Martha Davis, ‘Finding international law “close to home”: the case of human rights cities’ in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021) 227-239; Oomen, ‘Cities, refugees and migration’.

<sup>81</sup> Giuseppe Nesi, ‘The Shifting Status of Cities in International Law? A Review, Several Questions and a Straight Answer’, *Italian Yearbook of International Law* 30 (2020), 17-36, at 21.

paradigm shift in international law, which would have led to an unequivocal recognition of cities and their networks as subjects of international law. What is more, he asks whether the world will be better off ‘if we replace States with cities and local authorities as subjects of international law’ and whether this will lead to ‘increased representativeness, accountability, efficiency and democratic decision-making in international relations’.<sup>82</sup> While we readily admit that there are indeed many uncertainties pertaining to the doctrinal aspects of what cities do internationally, we submit that the latter questions rest on a misunderstanding of the normative premises of most current international legal scholarship on cities. While certain political science scholars and public intellectuals like the late Benjamin Barber might have given in to considerable hyperbole in insinuating that indeed cities and their mayors could replace dysfunctional states<sup>83</sup>, this is a claim which is, at least to our knowledge, virtually non-existent in the international law literature.

Rather, what most scholars working on the intersection between cities and international law argue for is much more nimble. We are certainly neither seeing nor seeking a displacement of the state as the central actor and key subject of international law. But it is far from clear that the established doctrinal categories can all easily accommodate the practice of cities and their networks. But what is ever more difficult to deny is that there are cracks in the established categories – cracks which make room for other actors and new forms of normativity, lawmaking processes and forms of cooperation between established actors like states and IOs on the one hand and more unusual actors like cities and their networks on the other. Accordingly, cities lobby on the side-lines of the negotiation of international agreements and other high-profile policy documents<sup>84</sup>, enter into formally non-binding but still important agreements with international organizations like the World Bank<sup>85</sup> and generally play an increasing role in what has been called by Jacob Katz Cogan ‘the operational system’ of IOs – a system which differs considerably from the formal rules of the founding treaties of most IOs.<sup>86</sup>

If very rigid categories of subjectivity and sources doctrine are employed, it is of course still possible to side-line these developments and to relegate them to a realm of politics or global governance through non-legally regulated mechanisms. However, we argue, this posture is at odds with other structural developments in international law. Since the end of the Cold War, international law has undergone a significant transformation. This transformation cannot easily be characterized and in any case does not signify that there has been any form of linear development, let alone progress.<sup>87</sup> If we look at this period from the perspective of the early 2020s, the ascendancy of human rights and community interests seems to have

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<sup>82</sup> Nesi, ‘The Shifting Status’, at 36.

<sup>83</sup> Barber, *If Mayors Ruled the World*; for a critical assessment of this book see Helmut Philipp Aust, ‘Shining Cities on the Hill? The Global City, Climate Change and International Law’, *European Journal of International Law* 26 (2015), 255-78, at 265-67.

<sup>84</sup> Oomen, ‘Cities, refugees and migration’, at 246-248.

<sup>85</sup> Riegner, ‘Development cooperation and the city’, at 254-256.

<sup>86</sup> Jacob Katz Cogan, ‘International organizations and cities’ in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar 2021) 158, 170; see also Jacob Katz Cogan, ‘Cities in the Shadows of International Institutional Law’, *International Organizations Law Review* 18 (2021), 133-37.

<sup>87</sup> See further Krieger and Nolte, ‘The International Rule of Law’, at 3; on progress narratives see Tilmann Altwicker and Oliver Diggelmann, ‘How is Progress Constructed in International Legal Scholarship?’, *European Journal of International Law* 25 (2014), 425-44.

waxed and waned.<sup>88</sup> More persistent is, however, a turn towards an informalization of international law<sup>89</sup>, a point we have already briefly addressed above in the context of the engagement of cities with the global climate change regime. As it has been assessed empirically in the literature, there has been a downturn in international lawmaking through binding multilateral agreements since the early 2000s.<sup>90</sup> Instead, states and IOs alike increasingly resort to non-binding agreements<sup>91</sup> or, if bindingness is still considered to be useful, experiment with highly flexible structures of obligation as it has been the case with the 2015 Paris Agreement on Climate Change.<sup>92</sup> Important normative aspirations of the international community are formulated through non-binding goals – such as in the case of the Global Compact for Migration – which are nonetheless highly significant for global governance and, arguably, also spill over in terms of effects into the world of formally binding law.<sup>93</sup> In particular, these policy documents directly affect cities and urban governance, as evidenced most clearly by SDG 11 and the New Urban Agenda.<sup>94</sup> In addition, cities and their local governments need to take into account that their conduct can violate obligations under international human rights law or the law of international investment protection. While these latter obligations are directed towards states, local governments are state organs and can hence trigger state responsibility if an internationally wrongful act occurs.<sup>95</sup>

Our point is here that all these developments create openings for cities and their international activities. Also the traditional world of international law has changed and expanded – and with it the opportunities for new actors to reclaim a voice for them in this development. Formal categories only help so much when a realistic picture of the operation of today’s international legal system is to be painted. Assessing the international activities of cities from an international legal perspective could of course be another form of what Jean d’Aspremont has called in a different context the ‘self-serving quest’ for new materials, i.e. the attempt to write about new social phenomena in order to control them with the vocabularies and argumentative patterns that lawyers deploy.<sup>96</sup>

We hold that, to the contrary, international legal scholars have a responsibility to attune their work to new developments. International law is a social medium which enables the exercise of power, but is also in place to constrain it. Its mechanisms of control may not be extremely powerful, but its language, doctrinal

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<sup>88</sup> Cf Eyal Benvenisti and Georg Nolte (eds.), *Community Interests Across International Law* (Oxford: Oxford University Press, 2018).

<sup>89</sup> Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds.), *Informal International Lawmaking* (Oxford: OUP, 2012).

<sup>90</sup> Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, ‘When Structures become Shackles: Stagnation and Dynamics in International Lawmaking’, *European Journal of International Law* 25 (2014), 733-63.

<sup>91</sup> On some of the legal implications see Andreas Zimmermann and Nora Jauer, ‘Legal Shades of Grey? Indirect Legal Effects of “Memoranda of Understanding”’, *Archiv des Völkerrechts* 59 (2021), 278-99.

<sup>92</sup> On the normative structure of the Paris Agreement see Lavanja Rajamani, *Innovation and Experimentation in the International Climate Change Regime* (The Hague: Hague Academy, 2020), 129 et seq.

<sup>93</sup> For an analysis on the potential contribution of the Compact to the development of human rights law see Daniel Thym, ‘Viel Lärm um nichts? Das Potential des UN-Migrationspakts zur dynamischen Fortentwicklung der Menschenrechte’, *Zeitschrift für Ausländerrecht* (2019), 131-136.

<sup>94</sup> See note 54.

<sup>95</sup> See Article 4 of the Articles on the Responsibility of States for Internationally Wrongful Acts, reprinted in the Annex to UN Doc. A/RES/56/83 (2001) ; see further Katja Creutz, ‘Responsibility’ in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021) 135-146.

<sup>96</sup> Jean d’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials’, *European Journal of International Law* 19 (2008), 1075-93.

structure and argumentative sensibilities exist in order to provide another layer of analysis on top of the political processes which occur in the real world. If cities and their networks operate in increasingly close connection with the established inter-state and IO-based system of international law, this is something that international lawyers should account for as well as scrutinise. And this they should do with a sensibility for the inherent ambivalences of this development.

It might be that cities can aim at providing for a different kind of ‘international law from below’.<sup>97</sup> In 2007, when she compared the New Haven School that answered to Cold War political realism with the New Haven School that had to answer to the realism of the nationalist power-based realism of the neo-cons in the post-Cold War era, Janet K Levit pointed to how international lawmaking may also consist in ‘complex’, ‘diverse’, and ‘decentralized’ processes involving non-state actors, among which transnationally acting sub-state actors such as municipalities. Such a sociolegal reality may develop into formal or hard law eventually through what she called ‘bottom-up lawmaking’.<sup>98</sup> It is likely that bottom-up international lawmaking will persist as a sociolegal reality and this would allow for the further accommodation of cities in international law(making). In a more recent edited volume, Nico Krisch discerns ‘norms from different origins’ to be ‘entangled rather than ‘integrated’. As a concept ‘entanglement’ may also assist us in making sense of the developing relation between cities and international law.<sup>99</sup> But it is equally plausible that the international activities of cities cannot easily escape structures pre-configured elsewhere in the international system. As Simon Curtis has also observed global cities as understood in the formative 1990s literature are ‘urban forms that are intrinsically and inseparably linked to the specific era of globalisation that followed from this economic restructuring.’<sup>100</sup>

#### **4 Implications for the methodology and historiography of international law**

The ascent of cities in the post-Cold War era has been a real world development with implications for the discipline of international law. As demonstrated above, the practices of this ascent of cities in international law and governance gave rise to scrutiny in various sub-fields of international law. The implications concern however the scholarship of international law equally and by implication also its historiography. The recognition of the city or the urban as an illuminating lens for the examination of international law puzzles of the post-Cold War era seems to be entangled with at least three interrelated developments in international law scholarship: a ‘turn to method’, a ‘turn to history’, and attempts to move beyond eurocentrism in international law.

First, with the epistemological decentralisation of the state in international law after the end of the Cold War and the shift to NSAs referred to above, the discipline started to look for methods and methodologies that

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<sup>97</sup> A formulation coined by Balakrishnan Rajagopal, *International Law from Below – Development, Social Movements and Third World Resistance* (Cambridge: CUP, 2003).

<sup>98</sup> Janet K Levit, ‘Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law’, *Yale Journal of International Law* 32 (2007), 393-420.

<sup>99</sup> Nico Krisch, ‘Framing Entangled Legalities beyond the State’ in Nico Krisch (ed.), *Entangled Legalities Beyond the State* (Cambridge: CUP, 2021) 1-32, at 1.

<sup>100</sup> Curtis, ‘Global Cities, World Order and Post-Pandemic Futures’, at 28.



allowed for understandings of international law that were less state-centric. The aforementioned interest in the localisation or urbanisation of human rights may be understood as part and parcel of international law's turn to method and in particular to the socio-legal and anthropological or ethnographic approaches that entered international law.<sup>101</sup> Luis Eslava's interest in 'The Everyday Operation of International Law and Development' as the subtitle of *Local Space, Global Life* (2015) goes, made him pursue an ethnographic study of Bogotá and therewith into frictions within the international law turn to the city.<sup>102</sup> Eslava's work has been decisive in moving 'the global city' debate in international law from cities such as London and New York to 'the global periphery'. A focus on the urban certainly helps overcoming the traditional state-oriented perspectives which kept law quite detached from 'the social' and the 'everyday' – contexts on which the very operation of international law necessarily depends. This embrace of the city has allowed surpassing traditional outlooks that prevented critical reflection on international law and institutions and therewith on the power-structures it reproduced. With the epistemological shift to the local or the urban, the monolithic nature of the state dissolves and state-centrism crumbles. This methodological turn also implies to take into consideration practices which were beforehand not considered as 'relevant' for international law. By including local actors, social movements and other dissident voices in the repertoire of international law's practice, it is not necessarily implied that these contributions to the practice of international law carry the same weight as state practice or resolutions adopted in the context of international organizations. But the message is clear: if international law is cut off from local processes of its enforcement, implementation but also contestation, the picture remains incomplete.

Second, a turn to critical history has accompanied these methodological moves. Alongside a consistent interest in the global economy and in how international law has been implicated in the misery produced by the global economy,<sup>103</sup> came a historiographical interest in the colonial legacies of international law. The turn to history has to a significant degree been a turn to the examination of international law as a Western imperialistic project shaped by metropole-colonies relations. Scholars such as Luigi Nuzzo examine how 19<sup>th</sup> century international legal scholars pushed cities out of international law and concentrated fully on European forms of statehood as the standard for subjectivity in international law.<sup>104</sup> In the international law and empire literature,<sup>105</sup> metropolis-periphery dynamics became critically examined.

The imperial perspective allowed the city to return in international legal historiography. Therewith, an opening up of the discipline to new actors such as the city occurred, but also a move beyond Eurocentrism and attempts at provincializing Europe.<sup>106</sup> Histories of, for example, Chinese cities such as late nineteenth and early twentieth century Tianjin or Shanghai offer windows not just on the past but also on the present

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<sup>101</sup> Cf eg Merry, Sally Engle. 'Anthropology and International Law', *Annual Review of Anthropology* 35 (2006) 99–116.

<sup>102</sup> Eslava, *Local Space, Global Life*.

<sup>103</sup> Linarelli, Salomon and Sornarajah, *The Misery of International Law*.

<sup>104</sup> Luigi Nuzzo, 'Cities and International Law: an imperial perspective' in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021) 52-63, at 52.

<sup>105</sup> Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law 1800-1850* (Cambridge, MA: Harvard UP, 2016).

<sup>106</sup> Dipesh Chakrabarty, *Provincializing Europe. Postcolonial Thought and Historical Difference* (Princeton: Princeton UP, 2000).

of international law.<sup>107</sup> In the latter study for example the focus on the treaty port city of Shanghai helps to demonstrate the structural role of private power in the formation of international law. Wanshu Cong and Frédéric Mégret connect this theme with contemporary questions and discussions when they relate to Eslava's work and quote him: "International Shanghai" can be seen as a remote but revealing precedent of contemporary international law's turn to the local – making the local "both an object and project of international legal order".<sup>108</sup>

Alongside more general trends in the work of historians, those working on the history of international law have attempted to connect their work to approaches of global history. Such a call was made, for instance, in the introduction to the *Oxford Handbook on the History of International Law* by editors Bardo Fassbender and Anne Peters in 2012. They wrote:

This Handbook is inspired by a global history approach. ... In simplified terms, these schools are the answer of (Western) historians to globalization. ... Global history no longer takes the nation-state as the traditional object of historical analysis.<sup>109</sup>

While it quickly became a subject of debate whether this handbook lived up to the expectations formulated in its introduction,<sup>110</sup> there is an intense debate in the field of historiography itself about the relative merits and shortcomings of a global history approach. Interesting for our purposes is how proponents and critics of such forms of history writing negotiate the relationship between the global and the local. According to key contributions to the stream of global history writing, this approach is characterized by a particular interest for the local:

Global history pays particular attention to the highly specific ways in which local communities have been and are affected by global change and how local changes transformed global connections. ... Global history explores the complex and fascinating ways that the global and the local entwine and entangle, and it sees in these entanglements the constitutive elements of both the global and the local.<sup>111</sup>

And further: 'For global history, as for other areas of history, the local conditions the global: the world of global history is not flat.'<sup>112</sup> Against such claims, historians like Jeremy Adelman and David Bell have

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<sup>107</sup> Luigi Nuzzo, 'The Birth of an Imperial Location: Comparative Perspectives on Western Colonialism in China', *Leiden Journal of International Law* 31 (2018), 569-96; Cong and Mégret, 'International Shanghai'.

<sup>108</sup> Cong and Mégret, 'International Shanghai', at 933, citing Eslava, *Local Space, Global Life*, at 10.

<sup>109</sup> Bardo Fassbender and Anne Peters, 'Introduction: Towards a Global History of International Law' in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: OUP, 2012) 1-26, at 8-9.

<sup>110</sup> For critical remarks in this regard see Anne-Charlotte Martineau, 'Overcoming Eurocentrism? Global History and the *Oxford Handbook of the History of International Law*', *European Journal of International Law* 25 (2014), 329-336.

<sup>111</sup> Sven Beckert and Dominic Sachsenmaier, 'Introduction' in Sven Beckert and Dominic Sachsenmaier (eds.), *Global History, Globally – Research and Practice around the World* (London: Bloomsbury Publishing, 2018) 1-18, at 4.

<sup>112</sup> Beckert and Sachsenmaier, 'Introduction', at 7.

argued that a turn to global history would shift away the focus from what happens at the ‘smaller scales of history’<sup>113</sup>, a claim vigorously refuted by those inclined to broaden the horizons of global history writing.<sup>114</sup>

It is not for us to come down on the respective merits of either approach, but it seems possible for us to take away something from both positions. Turning to global history approaches, certainly comes with the risk of reifying connections between different entities at the expense of what happens in concrete situations on the ground. But at the same time, the claim of the advocates of global history should be taken seriously that their conception of the global does not come at the expense of the local and that, quite to the contrary, it is often the local which conditions what globality can mean in the first place.

Such a sensitivity strikes us as attractive for the historiography of (international) law: it allows to account for the way that international law plays out at the local level and how it is at the same time shaped by local actors. Through its interest in the global level itself, it avoids giving up on the aspiration of international law to be a normative order for the international community in its entirety. But it acknowledges that this universalist aspiration can never be taken to mean that international law will mean the same at all conceivable places in the world.<sup>115</sup>

We argue that re-reading the history of international law also in light of its urban dimensions will provide for crucial openings of both global history and the historiography of international law. For the time period under analysis for this contribution, this might be obvious and the openings of international law for the practices of cities and their networks will be an important element of future histories of international law. But also going back to previous times, such a change will be welcome. International law has not developed out of the blue, the Westphalian model has not fallen from the sky. As recent contributions to the *Research Handbook on International Law and Cities* have demonstrated, there is a rich array of historical practices in which cities and international law loosely defined interacted, be it in the context of Silk Road cities<sup>116</sup>, cooperation between cities of the Hanseatic league<sup>117</sup> or in imperial settings.<sup>118</sup> Eventually, the ‘invisibility’ of cities in traditional international law might need to be assessed again.<sup>119</sup>

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<sup>113</sup> See Jeremy Adelman, ‘What is global history now’, Aeon, 2 March 2017, available at <https://aeon.co/essays/is-global-history-still-possible-or-has-it-had-its-moment> (last visited 16 December 2022); David Bell, ‘This is what happens when historians overuse the concept of the network’, *New Republic*, 26 October 2013, available at <https://newrepublic.com/article/114709/world-connecting-reviewed-historians-overuse-network-metaphor> (last visited 16 December 2022).

<sup>114</sup> See Richard Drayton and David Motadel, ‘Discussion: the futures of global history’, *Journal of Global History* 13 (2018), 1-21.

<sup>115</sup> See further Anthea Roberts, *Is International Law International?* (Oxford: OUP, 2017).

<sup>116</sup> Valerie Hansen, ‘Silk Road cities and their co-existing legal traditions’ in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021) 17-28.

<sup>117</sup> Tobias Boestad, ‘Legitimizing interurban cooperation in the Middle Ages: the legal system of the Hanse’ in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021) 29-40.

<sup>118</sup> Nuzzo, ‘Cities and international law: an imperial perspective’ at 52.

<sup>119</sup> Mirko Sossai, ‘Invisibility of cities in classical international law’ in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021) 64-76.

In short, we see three different, yet interrelated movements constitutive to the urbanisation of international law: the turn to method has liberated international law from some of its previous and inter-state minded constraints, which allowed cities also to come into focus. The accompanying turn to critical history writing has been able to piggyback on this development and reassess traditions of international law differently, in particular in their colonial and imperial dimensions. These developments in scholarship reach out way back before the post-Cold war era. At the same time, the historical developments continue to cast shadows over the current international legal system. In a time in which the legitimacy of the international order is a concern for many different actors, the colonial and imperial roots of international law cannot and should not be easily ignored. Both movements have significance for and feed into current debates about a move beyond Eurocentrism in history writing not just for international law, but on a more general scale. One of the most salient debates in this respect concerns the methodological premises and outlook of so-called approaches of global history. As the previous section has detailed, proponents of global history approaches underline that their works aspire to unearth the various ways in which the global and the local are intertwined. We take our cue from these approaches: the lens of the city or the urban allows us to ‘expand’<sup>120</sup> the histories of international law and to make international legal historiography critical and more diverse with respect to its methodology, more inclusive with respect to the stories and historical patterns that it analyses, and more critical by contributing to a widening of the material which is considered to fall within the ambit of histories of international law.

## 5 Concluding Observations

In the last three decades, cities moved from the extra-legal to the legal sphere and international legal scholarship starts to conceive of an international law of and for cities. While this may initially have been understood as a law of and for global cities, historically contingent on particular geopolitical and geoeconomic factors, soon it became clear that cities of any scale could engage, for instance, with climate change norms, human rights norms, and the SDGs.<sup>121</sup> This engagement now exceeds mere implementation of international norms and policies.

It is an open question how further shifts in the geoeconomics and geopolitical order will affect the future of international law.<sup>122</sup> But if the future international order will be shaped to a greater extent by China, it will be particularly interesting to see how this will impact on the role that cities will be able to play in this context. If Western cities have often deployed a rhetorical structure which emphasizes their greater democratic legitimacy due to the closeness to ‘the people on the ground’ and how their international activities will be beneficial for global common goods like the earth’s climate, this might change with an ascendancy of Chinese cities. As Shisong Jiang has argued, a Chinese focus on the global role of cities will most likely not ask the question ‘what are the contributions that cities can make to international law on the

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<sup>120</sup> Martti Koskenniemi, ‘Expanding Histories of International Law’, *American Journal of Legal History* 56 (2016), 104-112.

<sup>121</sup> See the emerging practice of the Voluntary Local Review, which reports local progress on the implementation of the SDGs to the United Nations, see further Penny Abeywardena, ‘Remarks’, *Proceedings of the Annual Meeting of the American Society of International Law* 114 (2020), 362-364.

<sup>122</sup> See Roberts, Choer Moraes and Ferguson, ‘Towards a Geoeconomic Order’.

occasion of state failure’, but instead, ‘rather, more strategically how can sovereign states make full use of their cities to contribute to their interests in international law and the further development of international law as a whole’?<sup>123</sup> Contestations of the global city ideal might hence take different forms: they can come ‘from below’ and find inspirations in emancipatory ideals of a ‘right to the city’, but they could also unfold in the light of major shifts in geopolitical developments.

Increasingly, cities are understood as part of and as a meaningful lens on the transformation of international law and international institutions. In his 2021 report *Our Common Agenda*, UN Secretary-General Guterres emphasised the need for ‘a stronger, more networked and inclusive multilateral system’. He called to ‘strengthen our collaboration with subnational authorities through the creation of an Advisory Group on Local and Regional Governments.’<sup>124</sup> Whether this resolution will actually hold strong remains to be seen. Currently, international organisations open up to cities to strengthen their bottom-up approach to (informal) law- and policy-making, to organize feedback – eg on health regulations or ITU smart and sustainable city standards – from cities, and to include cities in their knowledge production practices. How member states will respond when seemingly technical or operational topics become more politicized remains to be seen. Will they repress city participation or on the contrary allow for further participation, for instance in the reshaping of formal international law? Will cities increasingly demand an international law that serves their responsibilities and mandates better? While their participation change law-making in some shape or form? Numerous questions come up. How will the role of cities change with a new geopolitical and geoeconomic order shaping up in the post-post Cold war era? As these questions show, there is still a considerable degree of uncertainty around the international law of and for cities.

### Further reading

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<sup>123</sup> Shisong Jiang, ‘Marching to an International Law Powerhouse Through Cities: An Ideational Reflection on China’s “Belt and Road” Initiative’ in Giuseppe Martinico and Xuejan WU (eds.), *A Legal Analysis of the Belt and Road Initiative* (Palgrave Macmillan 2020) 221-51, at 236-37; see also Shisong Jiang, ‘Serving the national on the global plane: disentangling Chinese cities’ practice of international law’, *Urban Research and Practice* (2022), advance version online.

<sup>124</sup> *Our Common Agenda: Report of the UN Secretary General* (2021), p. 75, available at <https://www.un.org/en/content/common-agenda-report/#download> (last visited 16 December 2022).

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