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Global Cities, Climate Change, and Transnational Lawmaking

1.1 INTRODUCTION

On 12 December 2015, when French Foreign Minister Laurent Fabius announced that a new climate change agreement had been signed, cheers erupted in the negotiation hall and elsewhere around the world. States had finally concluded more than two decades of difficult multilateral negotiations. However, there should be no illusions that we are on track to averting dangerous human interference with the climate system. As noted ‘with concern’ in the Paris decision, based on the mitigation pledges that states submitted in advance of the Conference of the Parties (COP) in Paris, global greenhouse gas (GHG) emission levels will reach 55 gigatonnes in 2030. This far exceeds the 40 gigatonne limit necessary to hold the increase in the global average temperature to below 2 °C above pre-industrial levels.

3 Article 2 of the United Nations Convention on Climate Change 1771 UNTS 165 (UNFCCC) states that the ultimate objective of the treaty is the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner. Yamin and Depledge argue that this objective is akin to an environmental quality standard; Farhana Yamin and Joanna Depledge, The International Climate Change Regime: A Guide to Rules, Institutions and Procedures (Cambridge University Press 2004), pg. 60.
4 Para. 21, Decision 1/CP. 21: Adoption of the Paris Agreement, UNFCCC, Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015. The Paris Agreement entered into force on 4 November 2016, thirty days after the date on which at least fifty-five parties to the UNFCCC, accounting in total for at least an estimated 55 per cent of the total global GHG emissions, have deposited their instruments of ratification, acceptance, approval, or accession (Article 21(1)); UNFCCC, ‘The Paris Agreement’, online: http://unfccc.int/paris_agreement/items/9485.php (accessed on 1 December 2016).
levels.\textsuperscript{5} While the Paris Agreement requires states to progressively ratchet up their climate mitigation targets,\textsuperscript{6} it would not be wise to rely on states alone to address climate change. Solving a complex problem in a complex global society will require action beyond what states can shoulder. Tackling climate change requires pragmatic deliberation involving multiple sources of knowledge and experience, not simply the top-down involvement of ‘increasingly detached and under-resourced diplomats paralyzed by geopolitical power plays, hidden value systems, or zero-sum distributional calculations’\textsuperscript{7}.

While government delegates were in marathon negotiating sessions trying to conclude the Paris Agreement, banks, corporations, think tanks, consultancies, and various other organizations were holding ‘side events’ at multiple venues across Paris.\textsuperscript{8} At the Climate Summit for Local Leaders, mayors from around the world gathered to discuss climate change and to highlight the significant role that cities play in reducing GHG emissions and increasing society’s resilience to the impacts of climate change. At the end of the summit, the city leaders delivered a declaration intended to ‘demonstrate their global leadership on climate policies’\textsuperscript{9}. Mayors who signed the Paris City Hall Declaration undertook commitments to ‘[a]dvance and exceed the expected goals of the 2015 Paris Agreement’ and ‘deliver up to 3.7 gigatons of urban [GHG] emissions reductions annually by 2030 – the equivalent of up to 30 per cent of the difference between current national commitments and the 2 degree emissions reduction pathway identified by the scientific community’.\textsuperscript{10}

Following the Paris City Hall Declaration, the Lima-Paris Action Agenda (Focus on Cities) proposed a Five Year Vision to accelerate climate action in cities.\textsuperscript{11} The aim is that, by the year 2020, ‘local action and partnerships should be the new
norm globally’. In an interview with the Financial Times, the mayor of Paris, Anne Hidalgo, said, ‘[Cities] are more practical; we have the capacity to act faster and the decisions are closer to reality. We can mobilize all actors, public and private ... [which is] more complicated for the state’. Mayor Hidalgo’s opinion captures the essence of how cities perceive and situate themselves within the contemporary global effort to govern climate change. Cities do not claim to be simply implementers of international climate policy; they have positioned themselves as central participants and stakeholders, in their own right, of the global climate governance effort. While early efforts by cities to address climate change (1990s–early 2000s) were mainly concerned with driving local action in the face of national recalcitrance and stalemate in international negotiations, cities today aim to play a prominent role in global climate change governance, including the formal international lawmaking process – the United Nations Framework Convention on Climate Change (UNFCCC). In 2010, local and sub-national governments were conferred recognition as ‘governmental stakeholders’ within the UNFCCC regime in the Cancun Agreements.

The ambition to take on a global role may be viewed as a natural extension of the increasingly significant participation of cities in multi-level climate governance arrangements, particularly in the European Union (EU). Within the EU, cities such as Southampton (United Kingdom) and Munich (Germany) are leading in terms of their development of local climate change strategies as well as their active engagement in climate protection networks such as Climate Alliance and Energy Cities. As authority within the EU has not only shifted upwards from member states to European institutions but has also dispersed downwards to sub-national levels, municipal networks cooperate with each other to increase their influence and

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15 It should also be noted that earlier urban climate action efforts primarily focused on ways to link climate change to issues already on the local agenda, such as improving air quality. Since the 2000s, there have been shifts in cities’ climate governance agendas towards the need to scale localized actions and impacts up to the global level in order to achieve aggregate global effects; Harriet Bulkeley, ‘Cities and the Governing of Climate Change’ (2010) 35 Annual Review of Environment and Resources 229.
16 Decision 1/COP.16 The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, para. 7.
17 In terms of number of members, Climate Alliance claims to be the ‘largest European city network dedicated to climate action’; Climate Alliance, ‘About Us’, online: www.climatealliance.org/about-us.html; Energy Cities is a European network of local authorities focused on energy transition and sustainable energy. Amongst its key objectives is ‘to represent [local authorities’] interests and influence the policies and proposals made by European Union institutions in the fields of energy, environmental protection and urban policy’; Energy Cities, ‘Main Objectives’, online: www.energy-cities.eu/Association,8- (accessed on 1 March 2016).
At the same time, these networks can help the European Commission implement EU policies through the exchange of best practices and the production of standards which member cities are required to implement. In brief, cities have evolved from being ‘passive implementers’ to ‘active co-decision makers’ in the EU climate governance context. Their experience of working across various levels of governance and cooperating through networks to develop and implement governance initiatives has created fertile ground for ‘up-scaling’ these efforts to the transnational level.

As global governors – i.e. ‘authorities who exercise power across borders for purposes of affecting policy’ – cities have created networks that connect thousands of cities across the globe. These networks operate across the public-private divide, forming partnerships and cooperating with other actors, be they multinational corporations, global non-governmental organizations (NGOs), or philanthropic foundations. They seek to distil and disseminate authoritative and credible information to their member cities throughout the world. The networks also aggregate the influence of cities so that they have a more prominent collective voice in international forums such as the UNFCCC.

There are four transnational networks working in the area of city-focused and city-driven climate governance: (i) ICLEI – Local Governments for Sustainability (ICLEI), (ii) United Cities and Local Government (UCLG), (iii) the World Mayors Council on Climate Change, and (iv) the C40 Cities Climate Leadership Group (C40). Through these networks, cities around the world create physical and virtual platforms to share best practices and experience. They utilize information and communication technologies to create collective knowledge as well as enhance transparency, which in turn fosters legitimacy.

For ease of reference, this book will refer to these transnational networks of cities as city networks.

19 Ibid.
22 See discussion in Chapter 5.
23 An example drawn from Chapter 5 is the carbonn® Climate Registry. This is an online reporting platform that allows sub-national governments to publicly report their climate actions. Anyone with an Internet connection can gain access to the carbonn Climate Registry to monitor whether a city has fulfilled its climate action commitments. Such transparency mechanisms allow the media, civil society, and citizens to play a quasi-monitoring and enforcement function. On its website, carbonn Climate Registry is described as ‘designed as the global response of local and sub-national governments towards measurable, reportable and verifiable climate action’; online: http://carbonn.org (accessed on 1 July 2016).
1.1 Introduction

Briefly, ICLEI coordinates local government representation in several UN processes related to Agenda 21 and the Habitat Agenda.\textsuperscript{24} It has observer status at the UNFCCC and has been a leading advocate for greater recognition of the role of local and sub-national governments in the international climate change regime.\textsuperscript{25} UCLG’s stated mission is ‘to be the united voice and world advocate of democratic local self-government’, and it facilitates programmes and partnerships to build the capacity of local governments.\textsuperscript{26} UCLG’s global agenda includes disaster risk reduction, the 2030 Agenda for Sustainable Development, water and sanitation, and climate change.\textsuperscript{27} The third network is the World Mayors Council on Climate Change, founded in December 2005 by the mayor of Kyoto (Japan) soon after the Kyoto Protocol entered into force in February 2005.\textsuperscript{28} The network receives technical and strategic support from ICLEI.\textsuperscript{29} Since the adoption of the 2012 Seoul Declaration of Local Governments on Energy and Climate Mitigation, the World Mayors Council on Climate Change has been relatively quiet and primarily involved in supporting other networks (e.g. ICLEI) and initiatives such as the Compact of Mayors (which will be discussed in detail later).\textsuperscript{30} Finally, C40 can be described as being the most well-known network of cities addressing climate change. It has rapidly gained prominence because of its unique focus on global cities and climate change (while the other three networks address climate change as one of many issue areas that they work in) as well as the partnerships it has fostered with high-profile organizations such as the World Bank and the Clinton Foundation.\textsuperscript{31} This book will focus on C40, because both its global city membership and modus operandi render it well suited for a study of how global cities engage in hybrid public-private governance arrangements in addressing climate change and how these arrangements produce norms, practices, and voluntary standards.

The United Nations (UN) has also embraced the urban agenda. For example, in support of the previously mentioned Five Year Vision, the UN has formed a ‘sub-national action hub’ that will entail a wide mobilization of UN agencies to help cities and regions increase the scale and number of climate actions and plans.\textsuperscript{32}

\begin{itemize}
\item ICLEI at COP21, online: www.iclei.org/activities/advocacy/cop21.html (accessed on 1 July 2016).
\item United Cities and Local Government, online: www.uclg.org/en (accessed on 1 July 2016).
\item Ibid.
\item World Mayors Council on Climate Change, online: www.worldmayorscouncil.org/home.html (accessed on 1 July 2016).
\item Ibid.
\item Ibid.
\item Lima-Paris Climate Agenda, ‘Cities and Regions Launch Major Five-Year Vision to Take Action on Climate Change’. The UN agencies include the UN Environment Programme (UNEP), the UN Development Programme (UNDP), UN-Habitat, the World Health Organization (WHO), the World Bank, and the UN Industrial Development Organization (UNIDO).
\end{itemize}
In 2018, the Intergovernmental Panel on Climate Change (IPCC) will hold a major scientific conference to further develop scientific understanding of climate change and cities, a key recognition of the role of cities in addressing climate change. The Sustainable Development Goals (SDGs) finalized by negotiators from UN member states in September 2015 also recognize the significance of the urban unit in determining the state of the environment. SDG 11 challenges policymakers and governments to ‘[m]ake cities and human settlements inclusive, safe, resilient and sustainable’. Cities are also working directly with international organizations like the UN Human Settlements Programme (UN-Habitat) and the World Bank to address climate change as part of a larger, multipronged urban sustainable development agenda. In doing so, cities are engaging in transnational relations that bypass national governments and forging a direct link between the local level and international organizations.

1.2 THE SUBJECT MATTER OF THIS BOOK: THE LAWMAKING ROLE OF FIVE CITIES IN TRANSNATIONAL CLIMATE CHANGE GOVERNANCE

Although there is a large body of literature on ‘cities and climate change governance’ that continues to grow rapidly, few scholars have considered the legal effect and normative relevance of cities’ governance activities. This book aims to fill this gap in the literature by examining the emergence of cities as actors that are producing and implementing norms, practices, and voluntary standards that transcend state boundaries to steer the behaviour of cities towards reducing GHG emissions and...
developing low-carbon alternatives for the future. These norms, practices, and voluntary standards impose limitations on how cities develop by requiring them to take climate risks into account and to consciously develop practices, policies, and regulations to reduce their emissions of harmful GHGs from, for example, landfills, transportation systems, and buildings. On the basis of the impact or effect that voluntary standards and practices have on cities and their authorities, it can be argued that they constitute normative products.

In this book, I adopt a pluralistic conception of what constitutes law and therefore use the term law in a broader sense. It includes statements and guidelines that are not, strictly speaking, part of law but would be considered part of a broader normative or legal process. The divide between law and non-law has been the subject of long-standing discourse amongst legal theorists, and I do not intend to delve into that debate. This book situates itself firmly within the tradition that eschews a binary conception of law (i.e. an instrument is either law or it is not) and regards legal normativity as a sliding scale of varying degrees of normativity. Within this tradition are the ‘law as process’ school and the New Haven school of international law. Former president of the International Court of Justice Rosalyn Higgins, for example, is a proponent of law as process and has argued that ‘[i]nternational law is not rules’ or ‘accumulated past decisions’, but rather a continuous process from the formation of rules to their refinement through specific application by various actors, including governments, multinational corporations, international courts, and tribunals. According to the New Haven school, lawmaking is a ‘process of authoritative decision by which members of a community clarify and secure their common interests’. It is a broad social phenomenon deeply embedded in the practices and beliefs of a society and shaped by interactions within and amongst societies.


41 Levi offers an account of ‘bottom-up international lawmaking’ in which lawmaking ‘is a process whereby practices and behaviors gel as law’ and both public and private actors ‘join with others similarly situated in avocation (although often quite distant in location) to share experiences and standardize practices towards shared goals’; Janet Koven Levit, ‘Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law’ (2007) 32 Yale Journal of International Law 393, pg. 409.
Adopting these conceptions of international lawmaking, this book argues that when cities construct and implement norms, practices, and voluntary standards, they are making and implementing law. The emergence of cities as jurisgenerative actors in the context of transnational climate change governance is the focus of this book.42

The participation of cities in transnational legal processes invites us to re-examine theories of international lawmaking that posit the state as the only legally relevant actor in international affairs. From a classical international law perspective, a city does not have international legal personality because it is deemed to be a part of the state in which it is physically and jurisdictionally embedded. Therefore, according to classical international law, the actions of cities are attributable solely to their states. If Rotterdam undertakes to reduce its GHG emissions, it simply counts towards the Netherlands’ international legal obligations to mitigate climate change and does not have independent relevance for the purposes of public international law. The norms, practices, and voluntary standards that cities develop and convey through their transnational networks are also not recognized to be international law, as they are not amongst the traditional sources identified in Article 38(1) of the Statute of the International Court of Justice.

However, in the first decade of the twenty-first century, international law scholars (and those studying law and globalization more generally) increasingly recognize that we inhabit a world of multiple normative communities. After globalization, privatization, and trade liberalization swept through the world in the 1980s and 1990s, regulation and standard setting ceased to be the exclusive domain of states and international organizations. Business actors, professional associations, and NGOs have become involved in developing and implementing regulatory initiatives and voluntary codes of conduct, for example.43 Of course, these norms have varying degrees of impact, ‘but it has become clear that ignoring such normative assertions as somehow not “law” is not a useful strategy’.44 Accordingly, what we see emerging are approaches to international law drawn from legal pluralism and transnationalism. Through its examination of cities as an emerging normative community in the sphere of transnational climate change governance, this book seeks to contribute to the larger discussions about the

42 Steven Wheatley argues, ‘[t]he defining characteristic of a non-state “jurisgenerative” actor is its capacity to establish international governance norms that frame the context for action by states, corporate entities and individuals’. Further, it can be said that non-state actors exercise political authority, an activity traditionally associated with the state, when their jurisgenerative efforts have practical effect; Steven Wheatley, ‘Democratic Governance beyond the State: The Legitimacy of Non-State Actors as Standard Setters’ in Anne Peters et al. (eds), Non-State Actors as Standard Setters (Cambridge University Press 2009), pg. 220.

43 See Section 6.2 for discussion.

1.2 The Subject Matter of This Book

Thousands of cities are members of networks like C40, the Covenant of Mayors for Climate and Energy,47 the Carbon Neutral Cities Alliance,48 and...
Eurocities,\textsuperscript{49} to name a few. These networks have emerged to facilitate the exchange of ideas, information, and best practices amongst cities. Some networks also seek to give collective representation to urban interests and engage in political advocacy at the international level (e.g. ICLEI) and at the regional level (e.g. Eurocities). Many mid-sized cities are members of multiple networks and at some point may decide to consolidate their resources and focus on participating in networks that confer the most benefits.\textsuperscript{50} Many cities are not likely to have the resources to participate in transnational networks that are geared towards scaling up city climate actions to the global level. For example, a vice-mayor of a mid-sized city in Greece shared in an interview that her city participated in many networks. In 2016, the mayor’s office decided that it was a priority for the city to become a member of Eurocities, the regional network that is the active lobbyist for urban interests at the EU level.\textsuperscript{51} The annual membership fee of 15,000 euros is considered hefty for a city of its size. The city’s government therefore decided to withdraw from all networks that required membership fees in order to pay for the Eurocities membership. In light of this type of situation, a working assumption I adopted at an early stage of research for this book is that not all cities have the motivation and/or the resources to become globally relevant actors in climate governance. The cities that are proactive leaders in the climate change arena tend to be those that command significant political and economic resources. These are often hubs of global trade, transnational capital, and cultural flows. In other words, the cities that are leading the current wave of urban climate action are what Saskia Sassen calls \textit{global cities}. Sassen defines today’s global cities as ‘(1) command points in the organization of the world economy, (2) key locations and marketplaces for the...