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William W. Burke-White

University of Pennsylvania Carey Law School

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Cities and Provinces in a World of States:
Subnational Governments in the International Legal System

William W. Burke-White*

Abstract: Over the past two decades, cities and provinces have emerged as economically and politically powerful actors in global affairs. They have begun to demand access to and participation in the international legal system. Yet, the traditional rules of international legal personality limit full, formal participation to sovereign equal nation states. Nonetheless, in response to the localization of new transnational challenges, subnational governments are finding ways to access international legal processes and influence the development of international legal norms. They are seeking accommodation within existing institutions and legal processes; emulating international law through their own commitments and organizations; incorporating international law directly into municipal and provincial statutes; and invoking international law as a shield and a sword in domestic and global politics. International lawyers have turned a blind eye to these developments. This paper illuminates that subnational blind-spot. Subnational participation in international law, if carefully and deliberately structured, can provide the international legal system much needed political energy, improve legitimacy and normative diversity, and enhance commitment and implementation. For that to happen, however, international lawyers must first recognize and understand the role of the subnational.

On December 5th, 2017, in a packed conference room at the Chicago Sheraton¹, Mayor Rahm Emanuel signed the Chicago Climate Charter, joining more than 50 fellow mayors to commit their cities to carbon emissions reductions significantly more ambitious than those included in Paris Agreement.² After inking his name to the first line of the signature page, Emanuel stated: “The Chicago Climate Charter represents tens of million[s] [of] residents who are committed to confronting climate change head-on. Even as Washington fails to act, cities have the power and will [sic] take decisive action to protect our planet and the health and safety of our residents.”³ In form, structure, and substance, the Chicago Climate Charter is strikingly

* Professor of Law, University of Pennsylvania Law School; Non-Resident Senior Fellow, The Brookings Institution.

¹ *Mayors Sign Climate Charter After Trump Ditches Paris Accord*, NBC CHICAGO (Dec. 5, 2017, 6:18 PM), <https://www.nbcchicago.com/news/national-international/obama-chicago-climate-charter-climate-change/29410/>

² Chicago Climate Charter art. 1(a) (2017), chicago.gov/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2018/June/2018ChicagoClimateCharter.pdf.

³ *Dozens of U.S. Mayors Vow to Achieve Paris Agreement Emissions Goals*, YALE ENVIRONMENT 360 (Dec. 6, 2017), <https://e360.yale.edu/digest/dozens-of-us-mayors-vow-to-achieve-paris-agreement-emissions-goals>.

similar to an international treaty. Yet, with the names of mayors, not heads of state, at the bottom of the agreement, it fails to meet the definition of a treaty as defined by the Vienna Convention and has been largely overlooked by international lawyers.⁴

In 2013, California Air Resources Board Chairman Mary D. Nichols joined her counterparts from Quebec, Jean-Francois Lisee, Provincial Minister of International Relations, La Francophonie, and External Trade, and Yves-Francois Blanchet, Provincial Minister of Sustainable Development, Environment, Wildlife and Parks, to sign an agreement harmonizing and linking the state's and province's carbon cap and trade systems.⁵ Four years later, that agreement was updated to further allow the two governments to accept one another's carbon "compliance instruments."⁶ In a 2017 speech to the House of Commons, Canada's Foreign Minister explained the logic behind the California-Quebec agreement, noting that Canada "will continue to seek opportunities for constructive progress on the environment wherever we can find them...across the great United States at all levels of government."⁷ Though neither a treaty under U.S. nor international law,⁸ the "Agreement Between the California Air Resources Board and the Gouvernement du Québec" significantly enhances the effectiveness of both governments' carbon markets, essentially creating a shared carbon currency.

In October 2018, mayors from more than 25 cities in G20 member states gathered in Buenos Aires for a three-day summit to address shared issues of urban governance, inclusive development, and collective responses to transnational threats.⁹ At the close of the meeting they adopted a communique and Buenos Aires' Mayor Horacio Rodriguez Larreta handed it to then Argentine President Macri, who, in turn, committed to sharing it with the G20 leaders at their soon-to-follow annual meeting in Argentina.¹⁰ In the communique, mayors called on the G20 leaders to "work hand in hand" with them in addressing issues of global concern.¹¹ Even though it was heads of city, not heads of state, around the table, the U20 meeting had much of the pomp and circumstance of, and perhaps even more substance than, the G20 meeting that soon followed.

⁴ Vienna Convention on the Law of Treaties, art. 1, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (defining treaties as "an international agreement concluded between States in written form and governed by international law.").

⁵ Press Release, California Air Resources Board, California and Quebec Sign Agreement to Integrate, Harmonize Their Cap-and-Trade Programs (Oct. 1, 2013), <https://ww2.arb.ca.gov/news/california-and-quebec-sign-agreement-integrate-harmonize-their-cap-and-trade-programs>.

⁶ Memorandum and Order Re: Cross-Motions for Summary Judgment, 2020 WL 3034034, at *7, <https://www.courthousenews.com/wp-content/uploads/2020/03/USCalifQuebecCT-RULING.pdf> [hereinafter US v. California Memo and Order]

⁷ Chrystia Freeland, Minister, Glob. Affs. Can., Address by Minister Freeland on Canada's Foreign Policy Priorities (June 6, 2017), https://www.canada.ca/en/global-affairs/news/2017/06/address_by_ministerfreelandoncanadasforeignpolicypriorities.html.

⁸ US v. California Memo and Order, *supra* note 7, at 19-20.

⁹ *U20: 25 Cities Commit to Work with The G20 in Response to Major Global Challenges*, UCLG (Apr. 18, 2018), <https://www.uclg.org/en/media/news/25-cities-commit-work-g20-response-major-global-challenges>.

¹⁰ *U20 2018 Communiqué to the G20*, C40 KNOWLEDGE (Oct., 2018),

https://www.c40knowledgehub.org/s/article/U20-2018-Communique-to-the-G20?language=en_US.

¹¹ U20, U20 CITIES CALL ON THE G20 TO PRIORITIZE AN URBAN PERSPECTIVE IN TACKLING GLOBAL ISSUES: AN OFFICE COMMUNIQUE FROM URBAN 20 2 (2018).

Together, the Chicago Climate Charter, the California-Quebec Agreement, and the U20 bring into focus a significant shift taking place in the structure of global governance. Subnational actors—notably cities and provinces within federal systems—are assuming a more direct role in global affairs, crafting and implementing collective policy solutions to trans-national threats that effect their citizens. As a climate policy advisor to President Obama observed, “Previously states and others often played second fiddle to the federal government on the international plane. Now, for the first time, governors and mayors are in the international area.”¹² While cities and states in federal systems have arrived in the international arena, the question of where they fit in the international legal order remains unexplored.

The Chicago Climate Charter, the California-Quebec agreement, and the U20 are but three prominent examples of cities and federal entities, mayors and governors claiming a seat at the table of global diplomacy. Mayors Emanuel and Larreta and Resource Board Chairwoman Nichols are far from alone. At a moment when national governments and traditional international institutions are all too often unable or unwilling to address pressing transnational challenges, subnational actors are stepping up to fill the void. Summit-like networks of city and provincial leaders are meeting across borders, entering into transnational agreements, and implementing international norms into municipal ordinances and provincial legislation. Mayors and governors are self-aware of this changing role. As Mayor Emanuel explained during the Chicago Charter signing ceremony: “For a moment in time that requires action, we’re offered by the White House inaction...Cities are stepping into the void of leadership.”¹³ Similarly, in advancing the California-Quebec agreement, former California Governor Jerry Brown observed: “I want to do everything we can to keep America on track, keep the world on track, and lead in all the ways California has.”¹⁴

These subnational engagements with the institutions and processes of international governance fall outside the scope of international law and have, to a large extent, been ignored by international lawyers. After all, the international legal system is a system of States and sovereigns, not one of cities and mayors. The measurable increase in the frequency, range, and implications of subnational engagement in global governance over the past two decades has left a blind-spot in the international legal system. This paper seeks to fill that blind-spot by examining the role of subnational actors—with a particular focus on cities—in global governance, mapping the mechanisms through which subnational actors are utilizing the international legal system, and considering the implications of their here-to-fore overlooked engagement for the future of international legal system. The paper argues that while cities and other subnational actors do not have international legal personality,¹⁵ they have found ways to meaningfully use international law with consequences for the creation, implementation, and enforcement of international legal rules that can no longer be ignored.

¹² Ian Austen, *Canada’s Strategy on Climate Change: Work with American States*, N.Y. TIMES (June 7, 2017), <https://www.nytimes.com/2017/06/07/world/canada/canadas-strategy-on-climate-change-work-with-american-states.html>.

¹³ *Dozens of U.S. Mayors Vow to Achieve Paris Agreement Emissions Goals*, *supra* note 3.

¹⁴ Coral Davenport & Adam Nagourney, *Fighting Trump on Climate, California Becomes a Global Force*, N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/2017/05/23/us/california-engages-world-and-fights-washington-on-climate-change.html>.

¹⁵ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 58 (4th ed. 1990); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (Clarendon Press 1979).

Even characterizing the expanding role of subnational governments in global affairs as a part of international law requires international lawyers to relax basic assumptions about the nature of a system of states. Yet, when those assumptions are relaxed, a wide variety of subnational governmental action becomes apparent that is already influencing the substance and structure of international law. Substantively, city and provincial governments have found ways to use international law that can shape the normative content of the system. Structurally, their activism puts pressure on the rules that define the international legal system itself as they demand a seat at the table. Particularly at a moment of national retrenchment and international gridlock, strategically harnessing the political will and capacity of subnational governments offers a promising way to advance international legal norms and improve rule implementation. Yet, opening the gates of international law to subnational governments, without strategic thought and deliberate design choices, runs the risk of undermining the very identity of a system of law among nation-states.

This paper proceeds as follows. Part I explains how formal rules of international and domestic law subordinate subnational governments and have led international lawyers to overlook the roles of cities and provinces in global affairs. Part II traces the rise of cities and provinces in global governance and considers how they are building meaningful international affairs capabilities. Part III explains how the localization of new transnational challenge and the dual role of subnational governments as both activists and actors is pushing them to engage more directly with the international legal system. Part IV offers a typology—illustrated with numerous examples—of the ways subnational governments are already participating in the international legal system through processes of accommodation, emulation, incorporation, and invocation. Part V considers the opportunities and dangers of such engagement for the international legal system and the goals the system seeks to advance. The conclusion suggests paths forward for subnational engagement with international law that can maximize the potential contribution of the subnational, while avoiding the dangers such engagement may present.

Significantly, this paper does not claim that cities and other subnational actors have or should have international legal personality. It does, however, argue that cities and other subnational actors using and shaping international law in ways that should no longer be ignored. International lawyers need to take stock of this subnational activity, understand its impact on the international legal system, and consider how best to tap the potential of the subnational.

PART I: THE SUBNATIONAL AS SUBORDINATE: IMPLICATIONS OF INTERNATIONAL AND DOMESTIC LAW

For centuries, the nation-state centric international legal system has overlooked the role of city and provincial governments.¹⁶ The classical, positivist model of international law fully subordinates subnational actors to the nation-states of which they are a part. So too, most countries' domestic law severely limits the international authorities of subnational governments. Collectively, these domestic and international legal rules have generated a subnational blind-spot in the practice and study of international law that is quickly becoming unsustainable. This Part considers, first, the place of subnational governments under the classic rules of international law, second, the foreign affairs authorities of city and provincial governments in domestic law,

¹⁶ Daryl J. Levinson & Jack L. Goldsmith, *Law for States: International Law, Constitutional Law, Public*, 122 HARV. L. REV. 1791, 1793 (2009).

particularly in the United States, and, finally, how these rules have led to a subnational blind-spot in the study and practice of international law.

A. *The Law of Nations*

The fact that international law is a system of states is a point so obvious it barely merits restating, but it is a necessary starting point for this analysis. As a nation-based order emerged from the Peace of Westphalia, early international lawyers, such as Grotius and Vattel, saw the international legal system as a universe of states alone.¹⁷ Grotius described international law as “That body of law... which is concerned with the mutual relations among states or rulers of states.”¹⁸ According to Vattel, “the law of nations... teaches the rights subsisting between nations or states, and the obligations correspondent to those rights.”¹⁹ The basic premise of international law is that states alone hold full international legal personality.²⁰ As the Permanent Court of International Justice observed in the *SS Lotus Case* in 1927 at the height of international legal positivism: “Since the Law of Nations is based on the common consent of individual states, and not of individual human beings, States solely and exclusively are the subjects of International Law.”²¹ To the degree international law sought to regulate the conduct of states toward one another, the fact that only states were full participants in the system made sense. As Philip Jessup explains: “The world today is organized on the co-existence of States, and that fundamental changes will take place only through state action, whether affirmative or negative.”²²

An international legal system of states as sovereign equals reflects basic realist assumptions that have been the dominant force in political science and “depict[] international affairs as a struggle for power among self-interested states.”²³ The work of these political realists deeply influenced the thinking of international legal scholars,²⁴ who likewise treated as the exclusive, unitary actors in the international system. At least in classical international law, the state was a necessary intermediary between subnational actors of any sort (individuals, corporations, cities, or federal units) and the international legal system. Where the rights of such actors were harmed by another state, recourse could only be had through diplomatic protection, whereby the state “took up the case” such that it “entered the domain of international law,” and

¹⁷ See HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 5 (Detailing the role of state-to-state collaboration in his description that the “laws of each state have in view the advantage of that state... and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of the great society of states).

¹⁸ GROTIUS, *supra* note 16, Prologomonia at para 1.

¹⁹ EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW xxi.

²⁰ JAMES CRAWFORD, BROWNLIE’S PRINCIPLES OF INTERNATIONAL LAW 105 (9th ed. 2019) (“A subject of international law is an entity possessing international rights and obligations and having the capacity (1) to maintain its rights by bringing international claims and (2) to be responsible for its breaches of obligation by being subjected to such claims.”).

²¹ The Case of S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A), No. 10, at 18 (Sept. 7).

²² PHILIP JESSUP, A MODERN LAW OF NATIONS 17 (Isha Books 2013) (1948).

²³ Stephen M. Walk, *International Relations: One World, Many Theories*, FOREIGN POL’Y, Spring 1988, at 29; see KENNETH N. WALTZ, MAN, THE STATE, AND WAR: A THEORETICAL ANALYSIS (rev. ed. 2001).

²⁴ Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205 (1993).

“became a dispute between two states.”²⁵ International legal rights themselves remained among the sovereign states.²⁶ Similarly, where a subnational actor committed an international wrong, it was the state that bore international legal responsibility.²⁷

In this classic model, international obligations rest solely on states and it is their responsibility to ensure compliance by subordinate organs through domestic law. In the *Pellat* case, the French-Mexican Claims commission observed: “the principle of the international responsibility... of a federal State for all the acts of its separate States which give rise to claims by foreign States.” The responsibility of the State for its subordinates “cannot be denied, not even in cases where the federal constitution denies the Central Government the right of control over the right of control over the separate states or the right to require them to comply, in their conduct, with the rules of international law.”²⁸ This principle, which applies equally to cities as federal states, was reaffirmed in the ICJ in the *Le Grand* case, in which the United States was required to ensure that Arizona “act in conformity with the international undertakings of the United States.”²⁹

In the modern era, there have been a few notable exceptions to this subordination of city and provincial governments in international law. Section XI of the Treaty of Versailles expressly provided for the establishment of the Free City of Danzig “under the protection of the League of Nations.”³⁰ As such, the Treaty of Versailles expressly contemplated a degree of international legal personality for Danzig.³¹ When this principle was tested, the Permanent Court of International Justice found, “the Free city is entitled to care for her own interests [through international law] and to see that nothing is done which is prejudicial.”³² Yet, even in this case, Danzig’s international legal personality flowed not from its municipal status but from its protection under the League of Nations. From 1924 to 1956 the Tangier International Zone had a similar special status. Beyond these rare examples, the classical model of international law largely excludes or even ignores cities and other subnational actors. While a few modern city-

²⁵ *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3, at 12 (Aug. 30); *see* *Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3 (Feb. 5).

²⁶ *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3, at 13 (Aug. 30).

²⁷ As the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts explains, “The conduct of any State organ shall be considered an act of that State under international law, ... whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.” THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES art. 4 (James Crawford ed., 2002). This approach applies equally to “regional or local units” whereby the state itself bears responsibility for their subnational actors, “not withstanding their autonomy.” *Heirs of the Duc de Guise Case* (Fr. v. It.), 8 R.I.A.A. 150, 161 (1951).

²⁸ *Estate of Hyacinthe Pellat* (Fr. v. Mex), 5 R.I.A.A. 534, 536 (1929).

²⁹ *LaGrand Case* (Ger. v. U.S.), Provisional Measures, 1999 I.C.J. 104, ¶ (Mar. 3); *see also* *LaGrand Case* (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶ 81 (June 27) (Explaining Germany’s claim that the procedural default rule is among the US rules makes it impossible to invoke a breach of the notification requirement).

³⁰ Treaty of Peace between the Allied and Associated Powers and Germany art. 102, June 28, 1919, 225 Consol. T.S. 188 [hereinafter Treaty of Versailles]

³¹ *Free City of Danzig and International Labour Organization*, Advisory Opinion, 1930 P.C.I.J. (ser. B) No. 18 (Aug. 26).

³² *Id.*

states—such as Monaco and Singapore—remain, they are in fact small countries, rather than elevated municipalities, that bear full international legal personality.³³

International law has been and remains a system of states. States alone bear full and complete international legal personality. While subnational actors may be relevant to a state’s liability under international law or implementation of international legal obligations, those subnational actors generally gain access to the international legal system only through nation-states, which serve as intermediaries and gate-keepers to the international order. Cities and provinces are therefore never more than indirect participants in international law.

B. Cities and Subnational Governments in Domestic Law

The domestic law of most countries likewise subordinates cities and other subnational governments, strictly limiting their international affairs authorities. Subnational governments are products of countries’ domestic legal systems and the diversity of legal rules across 193 countries makes it impossible to fully explore the different powers and authorities of cities and federal units comprehensively. As a starting point, this section offers a brief overview of how domestic law constrains the foreign affairs authorities of U.S. cities and states.

i. The Foreign Affairs Authorities of US States

Under the U.S. Constitution, foreign affairs authorities are vested with the federal government, rather than with the several states.³⁴ According to Article II(2), the President is the “Commander in Chief,” and has the exclusive power to make treaties with, and appoint ambassadors to, other states. In *Curtis Wright Export*, the U.S. Supreme Court found “the President alone has the power to speak or listen as a representative of the nation,” and emphasized the President’s extensive remit in foreign affairs.³⁵ The legislative branch also has foreign affairs authority as outlined in Article I(8), including the power to “regulate commerce with foreign nations,” “declare war,” “raise and support armies,” “provide and maintain a navy,” and “make rules for the government and regulation of the land and naval forces.”

U.S. states do not have any constitutionally enumerated international affairs powers and are expressly prohibited from “enter[ing] into any Treaty, Alliance, or Confederation.”³⁶ The U.S. Supreme Court has consistently affirmed these limits.³⁷ In *U.S. v. Pink*, the Court observed that the “power over external affairs is not shared by the states; it is vested in the national government exclusively.”³⁸ State laws or regulatory actions, therefore, “must give way if they impair the effective exercise of the Nation’s foreign policy.”³⁹ Even where state actions have

³³ *Le Conseil Communal*, MAIRIE DE MONCAO, <https://www.mairie.mc/mairie-monaco/le-conseil-communal/> (last visited Feb. 21., 2021).

³⁴ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 151-65 (2d ed. 1996). For a discussion, see Flaherty, Martin S. “Are We to Be a Nation-Federal Power vs. States’ Rights in Foreign Affairs.” *U. Colo. L. Rev.* 70 (1999): 1277.

³⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

³⁶ U.S. CONST. art. I, § 10.

³⁷ See generally *United States v. Pink*, 315 U.S. 203 (1942); *Curtiss-Wright Export Corp.*, 299 U.S. 304; *United States v. Belmont*, 301 U.S. 324 (1937); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

³⁸ *Pink*, 315 U.S. at 233.

³⁹ *Zschernig v. Miller*, 389 U.S. 429, 440 (1968).

only a tenuous infringement on the nation's foreign policy, they can be unconstitutional.⁴⁰ Perhaps the most vivid articulation of this limitation on state's foreign affairs powers is found in *Massachusetts v. EPA*, in which the Court observed: "When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India."⁴¹

Despite the clear vesting of foreign affairs powers in the federal government, states do retain some very limited international competencies.⁴² With the consent of Congress, states have the authority to enter into international compacts,⁴³ which must not "encroach upon federal sovereignty."⁴⁴ States are also permitted to regulate certain aspects of foreign trade if it creates dangers to state citizens and the proposed regulation does not present an undue burden on the national government.⁴⁵ States have used these economic powers with disparate effects on foreign countries through targeted economic regulations that are neutral on their face.⁴⁶ The California-Quebec Cap and Trade Agreement is one of the most pronounced recent examples of a state's use of economic authority to wade into foreign affairs. A U.S. federal court held that that agreement was valid precisely because "it does not represent a 'treaty' within Article I of the Constitution" nor, because of its voluntary nature, did it constitute a compact that would "encroach upon or interfere with the just supremacy of the United States."⁴⁷ Through strategic regulatory and legislative action U.S. states can have foreign policy impacts as long as they do not cross the line into areas of national authority.

ii. *The Foreign Affairs Authorities of US Cities*

If U.S. states have only very limited foreign affairs powers, cities have even less.⁴⁸ The leading article on cities and foreign affairs starts from the proposition that, in the international sphere, "cities are not free to do as they please."⁴⁹ Under U.S. law, "municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them."⁵⁰ Their existence "rests in the absolute discretion of the state" and their powers are largely limited to those delegated by the

⁴⁰ *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 383 (2003) (holding that "an exercise of state power that touches on foreign relations must yield to the national government's policy").

⁴¹ *Massachusetts vs. EPA*, 549 U.S. 497, 519 (2007).

⁴² U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

⁴³ Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 824 (1989).

⁴⁴ *US v. California Memo and Order*, *supra* note 7; *Board Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159 (1985); *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 152 (2d ed. 1996).

⁴⁵ *Id.* at 161.

⁴⁶ Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1639 (1997).

⁴⁷ *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1364 (9th Cir. 1986) (citing *Cuyler v. Adams*, 449 U.S. 433, 440 (1981)).

⁴⁸ See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1062 (1980).

⁴⁹ Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1, 1 (2006).

⁵⁰ *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907).

state.⁵¹ With only very limited foreign affairs power themselves, states have little or none to delegate to cities.

Some state constitutions that provide for “Home Rule” may leave cities a scintilla of authority to operate in the international space. These “Home Rule” provisions allow local governments to control issues that relate primarily to local concerns and can include, as described in the Illinois State Constitution, “the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.”⁵² Under Home Rule, these powers may be used in ways that implicate foreign affairs. As a practical matter, within their territorial jurisdictions and delegated authorities, cities do have freedom of action. While cities are bound to follow state laws, “local laws and judicial decisions continue to apply... even if such action may have some international consequences.”⁵³

Where states with the U.S. have granted cities powers through charters of city corporations, cities have implied authority if they can demonstrate that their actions are “essential to the objects and purposes of the corporation as created.”⁵⁴ As a general matter, these authorities can include zoning, water management, transportation, waste, fire services, and other jurisdictionally-bounded issues.⁵⁵ For example, the New York City Charter gives the city authority over “local parks services, street cleaning and refuse collection, housing code enforcement, highway and street maintenance and repair, sewer maintenance and repair, and the maintenance of public buildings.”⁵⁶ Again, these areas of city competence—even if not derived from a foreign affairs authority as such—can and often do have foreign policy implications.

C. A Blind-spot for International Law

Subnational actors face dual constraints in participating in the international legal system. Under international law, they lack the international legal personality necessary to directly access the system. Under U.S. and other domestic law, they lack foreign affairs authorities. It is, therefore, unsurprising that international lawyers have largely ignored cities and other subnational actors. The extent of that ignorance is, however, remarkable.

International legal scholarship has basically never addressed subnational governments in any serious or sustained way. Across the 111-year history of the *American Journal of International Law*, only two articles include the word “city” in their title and both are references to case names.⁵⁷ In the entire database of the Oxford Scholarly Authorities on International Law, neither the word “city” nor “municipal” appear in the titles of any entries.⁵⁸ Nor have the leading

⁵¹ *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

⁵² ILL. CONST. art. VII, § 6.

⁵³ Bilder, *supra* note 54, at 826.

⁵⁴ *City of Ottawa v. Carey*, 108 U.S. 110, 121 (1883).

⁵⁵ Robert Hebdon & Patrice Jalette, *The Restructuring of Municipal Services: A Canada - United States Comparison*, 26 ENV'T & PLAN. C: GOV'T & POL'Y 144, 144 (2008).

⁵⁶ N.Y.C. Charter (2004), http://www.nyc.gov/html/records/pdf/section%201133_citycharter.pdf.

⁵⁷ Based on a search of the *American Journal of International Law* performed on Hein on Line, April 2018

⁵⁸ Oxford Scholarly Authorities on International Law Archives,

http://opil.ouplaw.com/noresults?f_0=title&noresults=true&pageSize=10&prd=OSAIL&q_0=municipal&sort=relevance,

http://opil.ouplaw.com/noresults?f_0=title&noresults=true&pageSize=10&prd=OSAIL&q_0=city&sort=relevance

treatises of the era considered a meaningful rule for subnational governments. While Malcom Shaw's 2017 edition of *International Law* runs close to 1,000 pages, it mentions "city" only five times—all in reference to the names of cases and not cities as a distinct concept in international law.⁵⁹ Though these are crude measures of the role of cities in international law, the dearth of legal scholarship reveals the scope of the scholarly blind-spot.⁶⁰ Cities are only rarely the subjects of international treaties or litigation. As Yishai Blank observes: "no international treaty or convention of the UN, and almost no decision of the... ICJ mentions the existence of localities."⁶¹ It is, perhaps, ironic that a plethora of treaties have been named for the city where they were negotiated, even though the cities themselves are largely irrelevant to the treaty's substance.

The structural forces that have led international lawyers to ignore cities have left a significant blind-spot in both international legal scholarship and practice. Focused almost exclusively on action at the national level, international law has overlooked rapid changes in the economic and political power of sub-state governments, failed to recognize the influence these actors have on international outcomes and the development of global norms. So too, it has failed to harness the power of the subnational to implement international legal commitments. Notwithstanding the structural bars to subnational participation in the international legal system, it is time for international lawyers to recognize this blind-spot and consider the role of subnational governance.

PART II: FROM ADVOCATES TO ACTORS: THE RISE OF THE SUBNATIONAL IN GLOBAL AFFAIRS

In 1990, Shanghai had a population of 13 million and a municipal economic output of under \$100 million USD.⁶² Today those numbers have increased to 27.7 million and \$469 billion USD, respectively.⁶³ Then, PuDong was farmland, today a financial capital. Shanghai is not alone. Similar trends can be seen from Santiago to São Paulo, Lagos to Lahore. The incredible rise of the city as a political and economic unit has been well documented in the urban studies literature, but largely ignored by international relations scholars and international lawyers. Similar trends are visible amongst federal units like the U.S. state of California or the German state of North Rhein Westphalia. California alone ranks as the world's fifth largest economy and North Rhein Westphalia 18th, just behind the Netherlands and ahead of Saudi Arabia.⁶⁴ This Part considers the pre-Westphalian place of cities in the international legal system, traces the rise of

⁵⁹ MALCOM SHAW, *INTERNATIONAL LAW*(Cambridge University Press eds., 8th ed. 2017).

⁶⁰ There are, however, a few efforts underway by international lawyers to begin to study cities. Helmut Aust of the Free University of Berlin and Jenne Nijman of the University of Amsterdam have recently launched an effort to produce an edited volume on these issues. Some limited scholarship has also been published in the past few years. See 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 Actor*, in *THE TRANSFORMATION OF FOREIGN POLICY: DRAWING AND MANAGING BOUNDARIES FROM ANTIQUITY TO THE PRESENT* 209-242, (Oxford Scholarship Online, 2016).

⁶¹ Yishai Blank, *The City and the World*, 44 COLUM. J. OF TRANSNAT'L L. 875, 884-885 (2006);

⁶² China CN: GDP: Shanghai, CEIC, <https://www.ceicdata.com/en/china/gross-domestic-product-prefecture-level-city/cn-gdp-shanghai>.

⁶³ Zhou Wenting, *Shanghai First Chinese City to Top 3 Trillion Yuan GDP*, CHINADAILY (Jan. 20, 2018, 9:42 AM), <http://global.chinadaily.com.cn/a/201801/20/WS5a629e9ba3106e7dcc135729.html>.

⁶⁴ Caleb Silver, *The Top 25 Economies in the World: Ranking the Richest Countries in the World*, INVESTOPEDIA (Dec. 24, 2020), <https://www.investopedia.com/insights/worlds-top-economies/>.

the city and provinces as governmental units, and documents their efforts to build the foreign affairs capabilities necessary to engage the international legal system.

A. *Cities and City-States in the Early Law of Nations*

Cities and other subnational governments have taken an unlikely path to relevance in global affairs. While in recent history cities have been excluded from foreign policy-making and international law, city-states were very much a part of international politics and law in the pre-modern era. From ancient Greece to Renaissance Europe, cities were often the bearers of sovereignty and acted directly in the international legal and political systems.⁶⁵ In Europe, cities and city-states regularly maintained direct diplomatic relations with their foreign counterparts, irrespective of national frameworks.⁶⁶ Florence or Venice were “global” powers in their own rights and “could afford to wage their wars on the sea lanes and shake half the peninsula with their quarrels.”⁶⁷ These city-states routinely entered into international agreements on issues ranging from military coordination to trade. From 1232-1492, for example, “Italian mercantile republics,” including Genoa, Venice, and Florence, “played a decisive role in facilitating the external commerce.”⁶⁸ Genoa notably maintained semi-formalized economic relations with local Spanish representatives in Granada.⁶⁹

Throughout the Renaissance era, cities and city-states were routine participants in the international legal system.⁷⁰ For example, the 1454 Treaty of Lodi, a predecessor to modern mutual defense agreements, committed the city-states of Florence, Venice, and Milan to a twenty-five year collective security alliance.⁷¹ A range of similar treaties among cities facilitated both political stability and economic development in the region.⁷² Cities also entered into treaties with unified foreign governments. Cities within the Hanseatic League, for example, formed parallel peace agreements with the Danish government in 1390.⁷³ During this Medieval period, cities were “autonomous communities capable of engaging in legal relations with one another.”⁷⁴ As Janne Nijman explains, these cities “had ‘transnational’ or ‘global’ actorhood” and were “independent subjects of what may be called a medieval law of nations.”⁷⁵

⁶⁵ See LAURO MARTINES, *POWER AND IMAGINATION: CITY-STATES IN RENAISSANCE ITALY* 7 (The Johns Hopkins University Press, eds., 1988) (parenthetical required).

⁶⁶ See generally, GARRETT MATTINGLY, *RENAISSANCE DIPLOMACY* (Borodino Books, eds., 2017); Janne 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*, Centre for International & European Law 1, 11 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2737805.

⁶⁷ See Mattingly, *supra* note 66, at 48.

⁶⁸ Raúl González Arévalo, *Italian Renaissance Diplomacy and Commerce with Western Mediterranean Islam: Venice, Florence, and the Nasrid Kingdom of Granada in the Fifteenth Century*, 18 The University of Chicago Press 215, 215 (2015).

⁶⁹ See Nijman, *supra* note 83, at 10 (parenthetical required).

⁷⁰ See generally, Nijman, *supra* note 83.

⁷¹ See Mattingly, *supra* note 66, at 74.

⁷² *Id.* at 74. See generally Martines, *supra* note 65.

⁷³ See Nijman, *supra* note 83, at 10-11 (parenthetical required).

⁷⁴ WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 12 (Walter De Gruyter GmbH & Co. KG, ed., 2000).

⁷⁵ Nijman, *supra* note 83, at 10-11.

The era of the city-state as an international legal actor largely came to an end in the mid-17th century amidst significant economic and political upheaval. As local economies gave way to regional and global ones, nation-states “proved most successful in providing business security and legal certainty and in rationalising their economies.”⁷⁶ Simultaneously, pandemic disease and changes in shipping and trading routes stagnated city development.⁷⁷ These early geopolitical and economic shifts coincided with the 1648 Peace of Westphalia.⁷⁸ The Treaties of Munster and Osnabruck, which brought an end to the 30 Years War, also marked the beginning of a new era of nation-state power, authority, and sovereignty.⁷⁹

B. *The Rise of the Global City and the Subnational “State”*

In the late 20th and early 21st centuries, after more than 300 years in the background, cities have reemerged on the global stage. The concentration of human populations has increased the power, salience, and clout of cities. John Friedmann’s 1986 *World Cities Hypothesis* sought to explain the emergence of cities as global actors,⁸⁰ showing how changes in labor processes led to a rise in the economic and political significance of the urban. His work launched “a framework for research” around cities’ growing global influence⁸¹ and spurred a generation of scholarship that showed how a “combination of spatial dispersal and global integration has created a new strategic role for major cities...”⁸² in “... the evolution of international society.”⁸³

Urban studies scholars identified a set of economic trends driving the internationalization of the city. Saskia Sassen recognized the rapid increase in cities’ economic clout, transforming cities into “concentrated command points in the organization of the world economy.”⁸⁴ Sassen described how cities, such as New York and London, constructed a “trans-territorial marketplace” as sites of global economic decision making, independent of national authorities.⁸⁵ This newfound global economic autonomy of the city occurred simultaneously with what Susan Strange described as a “retreat of the State” as an effective unit of economic governance.⁸⁶ “Increasing economic transactions” among cities compressed “distances” between them, enhancing their authority at the expense of traditional nation-states.⁸⁷

Economic realignments in favor of the city were both caused by, and causal of, population concentration in urban areas. According to the World Bank, 4.2 billion people (55% of the global

⁷⁶ Nijman, *supra* note 83, at 10-11.

⁷⁷ See CHARLES P. KINDLEBERGER, *WORLD ECONOMIC PRIMACY: 1500 -1990* 66 (Oxford University Press, 1996) (parenthetical required).

⁷⁸ See Peter J. Taylor, *The state as container: territoriality in the modern world-system*, 18 *PROGRESS IN HUM. GEOGRAPHY* 151, 153 (1994).

⁷⁹ *Id.* at 152 (“The state has acted like a vortex sucking in social relations to mould them through its territoriality”). Leo Gross, *The Peace of Westphalia*, 42 *AM. J. OF INT’L. L.* 20, 40 (1948),

⁸⁰ See generally John Friedmann, *The World City Hypothesis*, 17 *DEV. & CHANGE* 69 (1986), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-7660.1986.tb00231.x>.

⁸¹ *Id.* at 1

⁸² SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, London, Tokyo* 3 (Princeton Univ. Press, ed., 2001).

⁸³ SIMON CURTIS, *THE POWER OF CITIES IN INTERNATIONAL RELATIONS* 15 (Simon Curtis, ed., 2014).

⁸⁴ SASSEN, *supra* note 82, at 3.

⁸⁵ *Id.* at 333.

⁸⁶ See SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* [pg. #] (Cambridge Univ. Press, ed., 1996) (parenthetical required).

⁸⁷ Curtis, *supra* note 101, at [pg. #].

population) live in cities, which produce 80% of global GDP.⁸⁸ Metropolitan areas drive global economic expansion, with “the 300 largest metro areas accounting for thirty-six percent of global employment growth and sixty-seven percent of global GDP growth” between 2014 and 2016.⁸⁹ In that same period, growth in “large urban areas averaged 3.3 percent per year, exceeding the global average of 2.6 percent.”⁹⁰ These trends are expected to continue such that by 2030 over sixty-five percent of the global population will be urban.⁹¹ Large cities are ever-expanding, with an expected increase from today's current twenty-eight cities with over 10 million people, to forty-eight cities in 2030.⁹²

So too, sociological shifts in the worldview of urban dwellers have made cities more significant sources of identity.⁹³ For centuries, cities were seen as sources of blight and disease, from London cholera to New York crime.⁹⁴ Over the past decades, however, cities have reconceptualized themselves as desirable loci of human activity and identity and now “play a constitutive part in interest formation.”⁹⁵ In certain circumstances, urban dwellers’ city-based identities have even eclipsed their national ones. After Brexit, for example, many London residents came to identify more closely with London than with the UK.⁹⁶ Similarly, the significance of hyper-local policies in responding to the COVID-19 pandemic has realigned many identities away from the nation-state and toward the local.⁹⁷

States and provinces too are emerging as economic and political forces in their own right. Several U.S. states rank in the top twenty global GDPs. “California’s \$2.6 trillion economy is larger than all but half a dozen countries worldwide. Similarly, Texas’s \$1.6 trillion economy is roughly the same size as the economy of Russia.”⁹⁸ This economic weight alone gives U.S. states

⁸⁸ *Urban Development*, THE WORLD BANK (Apr. 20, 2020),

<https://www.worldbank.org/en/topic/urbandevelopment/overview>.

⁸⁹ Max Bouchet, Sfan Liu, & Joseph Parilla, *Global Metro Monitor: 2018*, METROPOLITAN POLICY PROGRAM AT BROOKINGS [pg. #] (2018), https://www.brookings.edu/wp-content/uploads/2018/06/Brookings-Metro_Global-Metro-Monitor-2018.pdf.

⁹⁰ *Id.* at [pg. #].

⁹¹ *Economy and Finance*, UN HABITAT: FOR A BETTER URBAN FUTURE, <https://unhabitat.org/urban-themes/economy/>.

⁹² World’s Population Increasingly Urban with more than Half Living in Cities, UNITED NATIONS (Jul. 10, 2014), <http://www.un.org/en/development/desa/news/population/world-urbanization-prospects-2014.html>.

⁹³ See generally Muge Riza, Naciye Doratli & Mukaddes Fasli, *City Branding and Identity*, 35 *PROCEDIA—SOC. & BEHAV. SCI.* 293 (2011), <https://reader.elsevier.com/reader/sd/pii/S187704281200403X?token=CB04F6B7504725EF9CD7B161232CA3D12B173E492472F44A9F32AE051277955A281E6B030236BEC6D13FA171DC254885>.

⁹⁴ See Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *Fordham Urban L. J.* 305, [pg. #] (2004), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/scholar?hl=en&as_sdt=0%2C39&q=City+Blight&btnG=&httpsredir=1&article=1884&context=ulj (parenthetical required).

⁹⁵ KRISTIN LJUNGKVIST, *THE GLOBAL CITY 2.0: FROM STRATEGIC SITE TO GLOBAL ACTOR* 18 (Routledge, ed., 2017).

⁹⁶ John Welsh, *City-State Britain: A Counter-Narrative to ‘Brexit’*, *GEOPOLITICS* [pg. #] (2020), <https://www.tandfonline.com/doi/full/10.1080/14650045.2020.1856087>.

⁹⁷ *Id.* at [pg. #].

⁹⁸ Samuel Stebbings & Grant Suneson, *Does Texas or Russia Have the Larger GDP? Here’s How US States Compare to Other Countries*, *USA TODAY* (Apr. 17, 2019, 7:09 AM),

significant global influence. Beyond the US, in 2019, the Australian state of New South Wales had a \$629 billion GSP—just slightly smaller than that of Saudi Arabia⁹⁹—and the Canadian province of Ontario had a \$721 billion GSP—somewhat larger than that of Switzerland.¹⁰⁰

Governors are now using their economic power to assert an independent voice on the global stage. From 1984-2000, “the number of foreign offices operated by the 50 U.S. States more than quadrupled to the point where they nearly equal the number of embassies and consulates operated by the US federal government.”¹⁰¹ When governors travel abroad, they routinely meet with foreign heads of state, conducting their own global diplomacy.¹⁰² When meeting with the Prime Minister of Fiji on global climate issues in 2017, then-California Governor Jerry Brown underscored his legitimacy to speak on global affairs: “We may not represent Washington, but we will represent the wide swath of American people.”¹⁰³ In 2017, Scotland published what amounts to its own foreign policy in the form of an International Framework that “sets out how our international work supports the Government’s central purpose of creating a more successful country” including through direct participation in multilateral institutions.¹⁰⁴

The emergence of cities and other subnational governments on the global stage has been accelerated by a new generation of mayors and governors who recognize that transnational engagement can have political benefit. New York’s Michael Bloomberg is a case in point, using his vast wealth and the bully pulpit of Gracie Mansion to transform him into an “urban diplomat.”¹⁰⁵ Former Chicago mayor Rahm Emanuel doubled down on his national political platform, turning Chicago into a convening point for mayors from around the world.¹⁰⁶ London’s Sadiq Khan has used his opposition to Brexit, criticism of Trump, and commitment to global human rights to raise his own profile.¹⁰⁷ Even mayors from beyond truly global cities, like Quito’s Mauricio Rodas, have used international engagement and international economic investment to raise their national and global profiles.¹⁰⁸ So too, governors such as California’s

<https://www.usatoday.com/story/money/2019/04/17/how-gdp-of-us-states-compares-to-countries-around-the-world/39295197>.

⁹⁹ https://en.wikipedia.org/wiki/List_of_Australian_states_and_territories_by_gross_state_product

¹⁰⁰ https://en.wikipedia.org/wiki/List_of_Australian_states_and_territories_by_gross_state_product

¹⁰¹ Darel E. Paul, *Re-Scaling IPE: Subnational States and the Regulation of the Global Political Economy*, 9 REV. OF INT’L POL. ECON. 465, 466 (2002).

¹⁰² *Id.* at 466-468.

¹⁰³ <https://www.nytimes.com/2017/05/23/us/california-engages-world-and-fights-washington-on-climate-change.html>

¹⁰⁴ *Scotland’s International Framework 2017*, SCOTTISH GOVN’T. (Dec. 8, 2017),

<https://www.gov.scot/publications/scotlands-international-framework-9781788514033/pages/3/>.

¹⁰⁵ *Id.* at 28

¹⁰⁶ *See generally* RAHM EMANUEL, *THE NATION CITY: WHY MAYORS ARE NOW RUNNING THE WORLD* (1st ed. 2020).

¹⁰⁷ Sadiq Khan, *London’s Global & European Future: Mayor of London’s response to the Government White Paper: The United Kingdom’s Exit from and New Partnership with the European Union*, GREATER LONDON AUTH. (March 2017),

https://www.london.gov.uk/sites/default/files/londons_global_and_european_future.pdf; Ceylan Yeginsu, *London Allows Trump ‘Balloon Baby’ for President’s Trip to U.K.*, N.Y. TIMES (July 6, 2018),

<https://www.nytimes.com/2018/07/06/world/europe/uk-trump-baby-blimp.html>.

¹⁰⁸ *Resilient Cities: An Interview with Mauricio Rodas, Former Mayor, Quito, Ecuador*, LEADERS MAG. (Apr. 2019), http://www.leadersmag.com/issues/2020.4_Oct/PDFs/LEADERS-Mauricio-Rodas-Former-Mayor-Quito-Ecuador.pdf.

Jerry Brown and South Australia's Premier, Jay Wetherill have elevated their profiles while delivering benefits to their states' residents through global activism on climate change and trade.¹⁰⁹

C. *Building Subnational Foreign Affairs Capabilities*

Traditionally, the institutional infrastructure and bureaucracy to engage in international affairs and international law has been almost exclusively situated within foreign ministries.¹¹⁰ Reaping the benefits of their new economic clout and independent identities, over the past decade cities and provincial governments have been building and investing in their own international affairs capabilities. Today, numerous cities the world over have an office of international affairs, some with hundreds of staff. While few, if any, of these cities have a dedicated international legal capacity,¹¹¹ most have built connections between their offices of international affairs and that of the city solicitor.¹¹² Although rarely international lawyers, city solicitors have brought legal perspectives to cities' international engagements and, at times, hired external international legal capacity.¹¹³

New York, Los Angeles, London, Bogota, and Quebec offer telling examples of how cities and provinces have built subnational international affairs and international law capabilities and are now able to operate on the global stage. New York City pioneered an Office of International Affairs in 2014.¹¹⁴ Under Mayor Bill de Blasio, the office has a dual mission: (1) to work with foreign government missions in New York, attached to the United Nations, and (2) to promote New York's policies internationally.¹¹⁵ Commissioner Penny Abeywardena describes the Office primarily as a way to "create a political space for formal international engagement."¹¹⁶ Beyond its work with the UN, the Office further facilitates "the local exchange of best practices" on issues ranging from the economy to climate change.¹¹⁷ New York has also integrated international affairs and international law into a number of its other functional offices,

¹⁰⁹ Coral Davenport & Adam Nagourney, *California Engages and Fights Washington on Climate Change*, N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/2017/05/23/us/california-engages-world-and-fights-washington-on-climate-change.html>. *Substantial deals struck during trade mission to China: SA Premier*, ABC NEWS (May 26, 2015), <https://www.abc.net.au/news/2015-05-26/substantial-deals-struck-during-sa-trade-mission-to-china/6499302>.

¹¹⁰ See generally FOREIGN MINISTRIES: CHANGE AND ADAPTATION (Brian Hocking ed., 2016).

¹¹¹ William Burke-White, *Cities and International Lawyers Need to Start Talking to One Another*, DIPLOMATIC COURIER (Nov. 22, 2019), <https://www.diplomaticcourier.com/posts/cities-and-international-lawyers-need-to-start-talking-to-one-another>.

¹¹² Interview with Sozi Tulante, Former City Solic. of Philadelphia in (Apr. 18, 2019). See also Miriam Enriquez & Sozi P. Tulante, *The Sanctuary Cities Debate Explained*, PERRY WORLD HOUSE (May, 2020), <https://drive.google.com/file/d/1t3ThglEgeXybbN17qKjNWB194LTmer7l/view>.

¹¹³ For example, in preparation of a lawsuit challenging the Trump Administration's legal attack on "sanctuary cities," The City of Philadelphia engaged the legal expertise, including international lawyers, of Hogan Lovells, LLP. See Interview with Sozi Tulante, Former City Solic. of Philadelphia in Philadelphia, PA (Feb. 1, 2018).

¹¹⁴ *Mayor's Office for International Affairs*, NYC.GOV, <https://www1.nyc.gov/site/international/index.page>.

¹¹⁵ *Id.*

¹¹⁶ Interview with Penny Abeywardena, in Buenos Aires, Argentina (Oct. 18, 2018).

¹¹⁷ *Id.*

particularly its Office of Climate Policy and Programs. Lolita Jackson, the City’s chief “climate diplomat” explains her role as “cooperating with other cities, nations, and international organizations on climate mitigation and adaptation.”¹¹⁸ Los Angeles has followed New York’s lead, building a formidable international affairs office in 2017, led by former U.S. diplomat Nina Hachigian, who serves as Deputy Mayor for International Affairs. Hachigian has focused the Office particularly on delivering economic benefits to Los Angeles through international trade, investment, and outreach.¹¹⁹ The Office works with “consulates, trade offices, and other institutions from more than 100 countries (and some foreign cities and provinces) to bring economic, cultural, and educational opportunities to Los Angeles.”¹²⁰ Drawing on the Office’s capabilities, Mayor Garcetti has taken an active role as a global city diplomat,¹²¹ hosting a summit on city diplomacy,¹²² undertaking foreign trade missions,¹²³ and meeting with foreign leaders including Mohamad bin Salman¹²⁴ and Shinzo Abe.¹²⁵

Despite limited formal powers, London Mayor Sadiq Khan¹²⁶ has utilized the soft power of his office and the opportunities of international events to assert the city’s global influence. In the aftermath of the Brexit referendum, Khan assumed the responsibility of advocating for London across the content, bypassing the national government and seeking out international investment opportunities. Following the EU referendum, Khan’s #LondonIsOpen campaign sought “to show that London is united and open for business, and to the world,”¹²⁷ in opposition to UK governmental policy.¹²⁸ Khan has been London’s diplomat-in-chief, visiting most European cities to meet with counterparts, national officials, and business leaders to promote an independent role for London post-Brexit.¹²⁹ London’s most dramatic innovation has been the opening of “embassies” in twelve cities around the world—from New York to Mumbai,

¹¹⁸ Interview with Lolita Jackson. Special Advisor for Climate Policy & Programs, NYC Mayor’s Office, by telephone (Feb. 12, 2021).

¹¹⁹ Nina Hachigian, *Cities will Determine the Future of Diplomacy*, FOREIGN POL’Y (Apr. 19, 2016), <https://foreignpolicy.com/2019/04/16/cities-will-determine-the-future-of-diplomacy/>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *The First Los Angeles Summit on City Diplomacy*, UNIV. S. CA. CTR. ON PUB. DIPL. (April 17, 2018), <https://uscpublicdiplomacy.org/story/first-los-angeles-summit-city-diplomacy>.

¹²³ Press Release, Embassy of the Kingdom of Saudi Arabia, Crown Prince Mohammed bin Salman Meets with Mayor Eric Garcetti, (Apr. 4, 2018), available at <https://www.saudiembassy.net/news/crown-prince-mohammed-bin-salman-meets-mayor-eric-garcetti>.

¹²⁴ *Id.*

¹²⁵ Johnathan Karp, *Shinzo Abe Visits Los Angeles, and Speaks to Asia Society Southern California*, ASIA SOC’Y S. CA. (May 1, 2015), <https://asiasociety.org/southern-california/shinzo-abe-visits-los-angeles-and-speaks-asia-society-southern-california>.

¹²⁶ Feargus O’Sullivan, *What can London’s Mayor Actually Do for the City*, BLOOMBERG (Feb. 24, 2017), <https://www.citylab.com/equity/2017/02/sadiq-khan-london-mayor-powers-agenda/517617/>.

¹²⁷ *London is Open | London City Hall*, OUR #LONDONISOPEN CAMPAIGN, <https://www.london.gov.uk/about-us/mayor-london/londonisopen>.

¹²⁸ *Id.*

¹²⁹ Press Release, London Mayor’s Office, Mayor to take message to Europe that ‘London is open’ (Feb. 8, 2017) (available at <https://www.london.gov.uk/press-releases/mayoral/taking-message-to-europe-that-london-is-open>).

Shenzhen to Bangalore.¹³⁰ These representative offices are designed both to promote trade and investment, and to ensure “London remains a globally competitive city.”¹³¹

Investment in international affairs infrastructure reaches beyond the U.S. and European cities. In 2012, Gustavo Petro was elected Mayor of Bogota, Colombia and established a Directorate of International Affairs, staffed with a “large and skilled team of urban diplomats,” “raising Bogota’s capacity to act on the global arena.”¹³² Mayor Petro launched a “Bogota Global” strategy to “mobilize global support for the Mayor’s political agenda centered on peace, human rights ... and the fight against climate change.”¹³³ In furtherance of the Bogota Global strategy, the Directorate of International Affairs convened international climate summits on behalf of the city in 2012 and 2015.¹³⁴ While Bogota Global may be viewed as a pet project of Mayor Petro, it succeeded in raising the city’s global profile and many of the capacities built during his term remain in place today.

Similar patterns of investment in international capabilities are evident among states and provinces. The Canadian Province of Quebec, known for asserting its independence from Canada, has long had a Ministry of International Relations and La Francophonie, whose purpose is to “promote and defend Quebec’s interests internationally.”¹³⁵ Minister Nadine Girault describes her mission as “increasing Québec’s economic strike force abroad, shaping its access to the billion potential consumers provided by European and Asian free trade areas, and attracting more foreign investment and skilled labour.”¹³⁶ Quebec maintains representative offices in thirty-three cities around the globe and “exercises its constitutional jurisdiction by participating in the work of international forums,”¹³⁷ including Organisation Internationale de la Francophonie (OIF) and UNESCO. Quebec claims a broad diplomatic remit for its work through the OIF, including “maintain[ing] and develop[ing] ties with diplomatic representatives of the member states of the organization” and “promot[ing] and defend[ing] Quebec’s interests in institutional and diplomatic circles.”¹³⁸ Scotland and Catalonia, among other federal entities with ambitions for independence, have followed suit, building similar structures for independent international engagement.¹³⁹

¹³⁰ Press Release, London Mayor’s Office, Mayor bangs the drum for London as he increases international presence (Nov. 17, 2017) (available at <https://www.london.gov.uk/press-releases/mayoral/mayor-increases-international-presence>).

¹³¹ *Id.*

¹³² Emmanuelle Pinault & Simon Hansen, *Mayors on the Global Stage – a Political Star is Born*, https://www.djoef-forlag.dk/openaccess/oep/files/2018/3_2018/3_2018_9.pdf, at 77.

¹³³ *Id.*

¹³⁴ *Id.* at 77-78.

¹³⁵ <http://www.mrif.gouv.qc.ca/en/>

¹³⁶ Press Release, Ministry of Int’l Rel. and of the Francophonie, Gov’t. of Quebec, Minister’s Message (June 30, 2020) (available at <http://www.mrif.gouv.qc.ca/en/message-de-la-ministre>).

¹³⁷ *Quebec Government Offices Abroad*, GOV’T. OF QUEBEC (2021), <https://www.international.gouv.qc.ca/en/general/representation-etranger>.

¹³⁸ *Francophone and Multilateral Affairs Delegation*, GOV’T OF QUEBEC (2021), <https://www.international.gouv.qc.ca/en/affaires-francophones-multilaterales>.

¹³⁹ See *International Relations*, SCOTTISH GOVN’T., <https://www.gov.scot/policies/international-relations/> (last visited Feb. 28, 2021). See also *Government Offices in Sydney, Tokyo and Dakar Approved*, CATALAN NEWS (Oct. 6, 2020), <https://www.catalannews.com/politics/item/government-offices-in-sydney-tokyo-and-dakar-approved>.

PART III: FROM INTERNATIONAL AFFAIRS TO INTERNATIONAL LAW

With the desire and capacity to participate in global affairs established, as shown in Part II, many cities and provinces have set their sights on more direct engagement with international law. Two trends are motivating this effort to move from political to legal engagement. First, new transnational challenges to which international law is responding have localized global affairs, increasing both the incentives of subnational actors to participate in the design of those responses and the salience of subnational policies in their implementation. Second, subnational governments have come to recognize that, at least with respect to these localized global challenges, they can be both advocates and actors in the international legal system. Through the strategic manipulation of these two roles, subnational governments can both shape international norms and harness the power of international law, even without formal rights to participation in the international legal system.

A. *The Localization of Transnational Challenges*

For most of the 20th century, international law has largely addressed the challenges of cooperation and coordination among nation-states—from arms control to the use of force, international trade to territorial disputes.¹⁴⁰ Fundamentally, these were issues of national concern and subnational governments were impacted only indirectly as nation-states served as a consistent intermediary between relevant external threats and local impacts. In contrast, a new category of 21st century global challenges—including pandemic disease, climate change, and cybersecurity—are not constrained by traditional nation-state borders. They localize transnational threats, putting subnational governments at the frontline of defense and response. As international law is used to structure responses to these challenges, cities and provinces have new incentives to legalize their international affairs activities.

As “public international law comprises a set of rules and practices governing *interstate* relationships,” it largely addresses issues of concern to nation-states.¹⁴¹ Guided by the principle in Article 2(1) of the UN Charter, “matters which are essentially within the domestic jurisdiction of any state” were outside the remit of international legal interference.¹⁴² The issues regulated by international law rarely pierced the veil of the nation-state to directly implicate subnational actors. Even the human rights movement of the second half of the twentieth century, while protecting individuals, was fundamentally built on obligations undertaken by national governments.¹⁴³ Subnational governments, therefore, had little direct interest in the international legal system and could rest assured that their respective nation-states would represent what interests they did have.

¹⁴⁰ This focus on inter-state cooperation and dispute settlement is particularly evident in the caseload of the ICJ. See *List of All Cases / International Court of Justice*, INT’L. CT. JUST. (last visited Feb. 22, 2021), <https://www.icj-cij.org/en/list-of-all-cases>.

¹⁴¹ See Robert O. Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L. ORG. 457 (2000).

¹⁴² U.N. Charter art. 2, ¶ 6.

¹⁴³ See International Covenant on Civil and Political Rights art. 2, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

Today, while the international legal system continues to address traditional issues of interstate relations, the focus of international law is gravitating toward the provision of global public goods and the response to transnational threats.¹⁴⁴ As Bruce Jones, Carlos Pascual, and Stephen Stedman wrote in 2008: “The twenty-first century will be defined by security threats unconstrained by borders—threats from climate change, nuclear proliferation, and terrorism to conflict, poverty, disease, and economic instability.”¹⁴⁵ International law is now the fundamental mechanism for “building partnerships and institutions for cooperation that can meet th[ose] challenge[s]” through the coordinated provision of global public goods.¹⁴⁶ The transnational threats which international law now addresses localize global affairs, directly connecting subnational governments with the international legal system. The impacts of climate change, pandemic disease, and human movement penetrate national borders. So too, actions within the jurisdictional authorities of subnational governments are indispensable to the implementation of solutions to such challenges.

The spread of pandemic disease is illustrative of these new connections between subnational governance and international legal rules. Epidemiological trends, hospitalization rates, and economic contractions caused by pandemic disease show its disparate impact at the subnational level as “urban areas have become the epicenter of the pandemic.”¹⁴⁷ In responding to pandemics, international law must ensure the transnational coordination of local policy interventions, which have become the front line against disease proliferation.¹⁴⁸ A similar structural dynamic is evident in the international legal response to climate change. The climate crisis powerfully effects the subnational—from the damage caused by unusual storms to

¹⁴⁴ See William Burke-White, *A Strategic Roadmap for Reentry 2021 and Beyond: Advancing Institutional Commitments in a New Geostategic Environment*, BROOKINGS (Feb. 2021), <https://www.brookings.edu/research/a-strategic-roadmap-for-reentry-2021-and-beyond/>.

¹⁴⁵ Bruce Jones, Carlos Pascual, & Stephen John Stedman, *Power & Responsibility Building International Order In An Era Of Transnational Threats*, BROOKINGS INST. PRESS (2009), <https://pdfs.semanticscholar.org/c69a/084ff276bc147061d352f1b2c334b4ee4e85.pdf> at 19.

¹⁴⁶ Id. Gregory Schaffer explains: “International law is both required to produce global public goods and can potentially impede dynamic processes that are needed address global public goods challenges.” Gregory Shaffer, *International Law and Global Public Goods in a Legal Pluralist World*, 23 EUR. J. INT’L. L. 669, 673 (2012); see also Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT’L. L. 1 (2014).

¹⁴⁷ *Policy Brief: Covid-19 in an Urban World*, U. N. (July 2020), https://www.un.org/sites/un2.un.org/files/sg_policy_brief_covid_urban_world_july_2020.pdf.

¹⁴⁸ Ayyoob Sharifi, Amir Reza Khavarian-Garmsir, *The COVID-19 Pandemic: Impacts on Cities and Major Lessons for Urban Planning, Design, and Management*, 749 SCI. TOTAL ENVIRONMENT 2 (2020) (noting that “integrated urban governance strategies that involve long-term visioning, pre-event planning, adequate investment in primary healthcare systems, early warning, and coordination of activities of different sectors and stakeholders are more conducive to timely and effective response mechanisms to pandemics and disease outbreaks in cities.” See also Ravi Duggal, *Mumbai’s Struggles with Public Health Crises from Plague to COVID-19*, 55 ECON. POL. WKLY. (2020); Pham Thanh Thoi, *Ho Chi Minh City- The Front Line Against COVID-19 in Vietnam* 32 CITY & SOC’Y. (2020).

differential implications of rising seas,¹⁴⁹ with significant regional and local variation.¹⁵⁰ Again, policies within the direct jurisdictional authorities of subnational governments are essential to transnational responses to climate change.¹⁵¹ Local policies can directly address the carbon contribution of transportation,¹⁵² construction,¹⁵³ and electricity production.¹⁵⁴ The differential impact of pandemic disease and climate change on subnational governments and their necessity to policy responses motivates their new engagement with international law.¹⁵⁵ As Harriet Bulkeley explains: “Perhaps one of the most surprising responses to climate change ... has been the growing involvement of municipal governments ... in efforts to reduce emissions of greenhouse gases (GHGs) and increasingly to adopt adaptation measures.”¹⁵⁶

The direct subnational impact of new transnational threats and the authorities of subnational governments in policy responses thereto is leading to what has been dubbed a “glocalization” of international affairs and international law.¹⁵⁷ This glocalization merges the generalized global challenges with particularized local responses. It puts municipal and provincial governments at center stage as they “represent loci where globalizing forces and flows are re-articulated”¹⁵⁸ as they take “international problems” and mold them into local concerns.”¹⁵⁹ Former Quito Mayor, Mauricio Rodas, explains how this glocalization animated his engagement with international law: “As mayor, it was important to me to address these issues [climate change

¹⁴⁹ William Burke-White & Laura Barron, *The Changing Landscape of Climate Governance The Role of Cities as Political Actors and Policy Implementers*, PENN INST. URB. RES. (Feb. 2018), https://pennur.upenn.edu/uploads/media/Barron,_Burke-White.pdf; Cynthia Rosenzweig & William Solecki, *Hurricane Sandy and Adaptation Pathways for New York: Lessons from a First Responder City*, 28 GLOB. ENV'T. CHANGE 395, 395 (2014).

¹⁵⁰ *Special Report Global Warming of 1.5 °C*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <https://www.ipcc.ch/sr15/> at ch. 3. (emphasizing that “regional changes in climate are assessed to occur with global warming up to 1.5C”).

¹⁵¹ As Chatham House has observed: “While the range of their individual authority varies significantly, many have particular responsibility in crucial areas such as building standards, transport, water and waste policy, as well as climate adaptation.” Jill Duggan, *The Role of Sub-state and Non-State Actors in International Climate Processes: Subnational Governments*, CHATHAM HOUSE ROYAL INST. INT’L. AFF. (Jan. 2019), <https://www.chathamhouse.org/sites/default/files/publications/2019-01-23-Duggan.pdf>.

¹⁵² Greg Marsden & Tom Rye, *The Governance of Transport and Climate Change*, 18 J. TRANSP. GEOGRAPHY 669 (2010).

¹⁵³ Robert A. Enker & Gregory M. Morrison, *The Potential Contribution of Building Codes to Climate Change Response Policies for the Built Environment*, 13 ENERGY EFFICIENCY 789 (2020).

¹⁵⁴ Jennie C. Stephens et al., *Getting smart? Climate Change and the Electric Grid*, 4 CHALLENGES 201 (2013).

¹⁵⁵ Mi, Zhifu, et al., *Cities: The Core of Climate Change Mitigation*, 207 J. CLEANER PROD. 582 (2019).

¹⁵⁶ Harriet Bulkeley, *Cities and the governing of climate change*, 35 ANN. REV. ENV’T. & RES. (2010).

¹⁵⁷ Roland Robertson, *Glocalization*, INT’L. ENCYCLOPEDIA. ANTHROPOLOGY 1 (2018). Glocalization results in a “simultaneous occurrence of both universalizing and particularizing tendencies in contemporary social, political, and economic systems” or, in this case, in international law

¹⁵⁸ MICHELE ACUTO, *GLOBAL CITIES, GOVERNANCE, AND DIPLOMACY THE URBAN LINK 4* (Routledge, ed., 2013). Sofie Bouteligier similarly discusses the city’s growing legitimacy in the international arena, attributing their deepening international capacity to increased networking between cities, motivated in part by efforts to control climate change. SOFIE BOUTELIGIER, *CITIES, NETWORKS, AND GLOBAL ENVIRONMENTAL GOVERNANCE* [pg. #] (Routledge, ed., 2013).

¹⁵⁹

and the construction of a low carbon emissions metro] globally, working with international institutions from the World Bank to the UNFCCC.”¹⁶⁰

B. Advocates and Actors: The Dual Role of City and State Governments in International Law

The glocalization of international affairs allows mayors and governors to simultaneously serve as actors in and advocates for international law. Subnational officials have long been advocates on issues of global concern, using the bully pulpits of their offices to articulate and elevate global issues of interest to their constituents. Serving as issue advocates, cities and provinces have resembled NGOs, operating expressly and intentionally outside formal international legal institutions. Sister-City initiatives exemplify this form of limited global advocacy based on “person-to-person connections”¹⁶¹ that capitalize on the fact that “there are things we can do as people that sometimes the government cannot.”¹⁶² Similarly, mayors and governors have frequently made pronouncements on issues of global concern, ranging from California Governor Newsom’s recent “Proclamation Declaring Day of Remembrance of the Armenian Genocide”¹⁶³ to Barcelona Mayor Ada Colau’s commemoration of the Universal Declaration of Human Rights.¹⁶⁴ As issue advocates alone, the voices of subnational officials could be lumped with other non-state actors in global and international legal affairs—perhaps relevant politically, but not to the direct creation or implementation of international law.

Yet, the glocalization of international affairs is a powerful reminder that subnational governments are distinct from NGOs and other substate actors in two critical ways—they have *de jure* powers within their respective jurisdictions and carry an imprimatur of governmental authority even outside their legal realms. As a result, mayors and governors approach international law as both activists and actors. When a mayor raises the urgency of climate action in accordance with the Paris Agreement as an advocate, she can also take steps within her jurisdiction to mitigate carbon emissions, from changes to the local transportation grid to

¹⁶⁰ Interview with Mauricio Rodas, Former Mayor of Quito, Ecuador, in city, state (Date) [hereinafter Rodas Interview].

¹⁶¹ Deirdre McPhillips, *Grassroots Diplomacy In an Era When Even Traditional U.S. Alliances are Strained, Sister Cities International Fosters Global Connections*, U.S. NEWS & WORLD REP. (Aug. 13, 2018), <https://www.globaltiesus.org/member-home/advocacy-resources/1397-amid-international-tension-the-sister-cities-program-promotes-grassroots-diplomacy>.

¹⁶² *Id.*

¹⁶³ Press Release, Office of Ca. Mayor Gavin Newsome, Governor Newsom Issues Proclamation Declaring Day of Remembrance of the Armenian Genocide (Apr. 24, 2020) (available at <https://www.gov.ca.gov/2020/04/24/governor-newsom-issues-proclamation-declaring-day-of-remembrance-of-the-armenian-genocide-4-24-20/>).

¹⁶⁴ Press Release, Barcelona City Gov’t, Barcelona commemorates the 70th anniversary of the Universal Declaration of Human Rights with the international conference “Cities For Rights” (Dec. 12, 2018) (available at https://ajuntament.barcelona.cat/relacionsinternacionalsicooperacio/en/noticia/barcelona-commemorates-the-70th-anniversary-of-the-universal-declaration-of-human-rights-with-the-international-conference-cities-for-rights_845686).

modification of building codes.¹⁶⁵ This potential to link advocacy with action gives mayors and governors a unique entry point into the international legal system. Where, due to rules of international legal personality, they lack access to or participatory rights in international law they can approach the system as advocates from the outside. Where they have institutional access or relevant jurisdictional authorities, they can be actors and implementors in their own rights.

Subnational governments have used this dual role as a backdoor into the international legal system, gaining access to international legal fora and processes as activist observers—part of broader efforts to engage civil society in international law.¹⁶⁶ Yet, once admitted to the proverbial room, they can quickly transform themselves into actors—whether making commitments on behalf of their constituents, committing to policy changes within their jurisdictions, or designing coordinated policy responses with other subnational entities.

This dual role of subnational officials gives them an appearance of authority, even when they are primarily activists. They are, of course, government officials, albeit without the “full powers” to represent the state—even when they speak on issues beyond their jurisdictional authorities.¹⁶⁷ While as a formal matter subnational officials lack the authority to shape customary international law, their words and actions as activists could well be invoked as evidence of *opinio juris* given their official status.¹⁶⁸ In an era in which “modern custom is derived by a deductive process that begins with general statements of rules rather than particular instances of practice,”¹⁶⁹ statements of subnational governmental officials—even if *ultra vires*—may have influence in shaping customary law.¹⁷⁰ Through what Michael Reisman describes as a “divergence of formal authority and effective power” in the formation of custom, subnational officials can “infect international legislative efforts.”¹⁷¹

Mayors and governors have become increasingly effective at blurring their activist and actor roles. Los Angeles Mayor Eric Garcetti and Deputy Mayor Nina Hachigian explain: “This new era of subnational diplomacy has significant implications not just for cities but for the United States as a whole. Although local governments do not command troops or negotiate binding trade agreements, they work with international partners every day to bring benefits to

¹⁶⁵ Cathleen Kelly, *A Framework for Local Action on Climate Change 9 Ways Mayors Can Build Resilient and Just Cities*, CTR. FOR AM. PROGRESS. (Sept. 28, 2017), <https://www.americanprogress.org/issues/green/reports/2017/09/28/439712/framework-local-action-climate-change/>.

¹⁶⁶ Cullen, Holly, and Karen Morrow. "International civil society in international law: The growth of NGO participation." *Non-State Actors and International Law* 1.1 (2001): 7-39.

¹⁶⁷ Vienna Convention, *supra* note 4, art. 7; *see also Full Powers Foreign and Commonwealth*, NAT'L ARCHIVES Mar. 11, 2008, <https://webarchive.nationalarchives.gov.uk/20080311155440/http://www.fco.gov.uk/servlet/Front?pagina me=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1044360164016>.

¹⁶⁸ Mayors and governors presumably lack the authority to provide “evidence of a belief [on the part of the state] that this practice is rendered obligatory by the existence of a rule of law requiring it.” *North Sea Continental Shelf Case (Germany v. Denmark; Ger. v. Neth.)*, Judgment, 1929 I.C.J. Rep. 3 at ¶ 77 (Feb. 20). That formality may not, however, prevent issue advocates from seizing on subnational statements as evidence of opinion juris.

¹⁶⁹ Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001).

¹⁷⁰ J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 452 (2000).

¹⁷¹ W. Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 CAL. W. INT'L. L. J. 133, 136-7 (1987).

their communities and advance U.S. values and priorities—in ways that both shape and guide American foreign policy more broadly.”¹⁷² Hachigian explains that Mayor Garcetti recognizes that when he meets with foreign leaders he may be seen as speaking for more than just the city.¹⁷³ Looking at the work of mayors across the globe, former US State Department Official Ian Klaus observes: “the speeches, advocacy, and policy support that were once the business of the foreign policy apparatus might well now become that of cities.”¹⁷⁴

PART IV: FOUR PATHWAYS OF SUBNATIONAL ENGAGEMENT WITH INTERNATIONAL LAW

As subnational governments engage the international legal system, they confront the reality that they lack international legal personality and foreign affairs authorities. Without a clear definition of their “place” in international law, subnational governments have traded on their roles as activists and actors to carve out four distinct forms of engagement with international law: accommodation, emulation, incorporation, and invocation. Through a series of examples, this Part examines these forms of engagement and the pathways through which subnational governments are accessing and using international law. While each form of participation is theoretically distinct, many examples of subnational efforts to influence or harness international law utilize multiple pathways simultaneously.

Given international law’s ambivalence toward the subnational, these pathways have largely been built from the bottom up, as subnational governments have sought ways to constructively influence or employ international law notwithstanding barriers to formal participation. At times, these efforts have led to more formal recognition of the subnational by traditional state and supranational actors. At other times, their efforts have gone under the proverbial radar. None of these pathways directly asserts the international legal personality of subnational governments. Yet, each represents a concerted effort by subnational governments to participate in the international legal system, to harness the power of international law, and to shape the norms of international behavior.

A. Accommodation

Through the process of accommodation, subnational governments request, demand, or even cajole their way toward participation in formal international legal processes. Nation-states and international institutions, in turn, make room for city or provincial governments, albeit with highly circumscribed roles and limited access. Subnational governments may demand or be invited to participate in international legal meetings as observers, provide input into treaty drafting, or submit commentary or data to an international institution. This technique of accommodation has previously been used by NGOs and corporations, themselves seeking some

¹⁷² Eric Garcetti & Nina Hachigian, *Cities are Transforming U.S. Foreign Policy Biden Would do Well to Work with Them*, FOREIGN AFF. (Dec. 29, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-12-29/cities-are-transforming-us-foreign-policy>.

¹⁷³ Interview with Nina Hachigian, Deputy Mayor of Int’l Aff., Los Angeles Mayor’s Off., by telephone (March 24, 2018).

¹⁷⁴ Ian Klaus, *What Should a City’s Foreign Policy Look Like*, BLOOMBERG (Feb. 14, 2017), <https://www.bloomberg.com/news/articles/2017-02-14/what-should-a-city-s-foreign-policy-look-like>.

access to the international legal system¹⁷⁵ and has proved an effective way of bringing new voices into the system without expanding formal participation.

Accommodation of and by subnational governments presents both opportunities and challenges different from those facing NGOs that seek international legal voice.¹⁷⁶ These distinctions give subnational governments unique opportunities to influence international law, but also make their participation more threatening to nation-states. First, the opportunity: the dual roles of subnational governments, discussed above, mean that when subnational governments are accommodated, they arrive in international legal processes with an official voice as a government actor. Second, because subnational governments are also constituent elements of a nation-state that is a formal participant in the international legal process, they may be able to influence the policies of their respective national governments as well as the international legal process itself. Simultaneously, the accommodation of subnational governments poses a challenge to nation-states. Not only does subnational participation potentially dilute nation-state influence by expanding the number of participating voices, it can also undermine a nation-state's claim to exclusive representation of their country's interests.¹⁷⁷ Given these opportunities, subnational governments have pushed hard for accommodation, yet given the potential threat that participation poses, national governments and international institutions have largely resisted the broad accommodation of the subnational.

An important advantage of participation through accommodation is that it is relatively easy to implement and can be tailored by national governments and international institutions to meet competing objectives. Accommodation can require as little as the provision of an "observer" badge at an international meeting or involve more significant openings such as giving subnational actors voting rights. Accommodation is also flexible over time, with subnational governments using initial rights of access to international meetings to gradually increase their voice and influence. Yet, accommodation is often an unsatisfactory solution for subnational governments. Even where subnational governments gain access to international legal fora, the space they are afforded by national governments and international institutions is often perceived as insufficient and they report feeling disenfranchised, unheard, and under-appreciated.¹⁷⁸ Nevertheless, accommodation is becoming an increasingly prevalent pathway for subnational governments to participate in international law as illustrated through the following examples.

i. The United Nations Human Settlement Program: UN HABITAT

Perhaps not surprisingly, accommodation of the subnational began within international institutions devoted to urban issues. The first significant accommodation of cities and provinces in the landscape of international law was the establishment of the UN Conference on Human Settlements in 1976, followed by the formation of UN Habitat, a UN organ focused in cities and promoting "socially and environmentally sustainable human settlements development," in

¹⁷⁵ William Burke-White & Anne-Marie Slaughter, *An International Constitutional Moment*, 43 U. PA. L. SCHOOL. L. SCHOLARSHIP REPOSITORY 1, 13-16 (2002).

¹⁷⁶ Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348 (2006).

¹⁷⁷ For a discussion of the challenges recognition of different types of actors presents to traditional notions of sovereignty, see Stephen D. Krasner, *Sovereignty*, BLACKWELL ENCYCLOPEDIA SOCIOLOGY (2007).

¹⁷⁸ Rodas Interview, *supra* note 205.

1977.¹⁷⁹ UN Habitat began as a way for nation-states to address city and urban issues in a UN framework, rather than as a means of engaging or accommodating subnational governments. Through UN Habitat, states sought to implement the Millennium Development Goals and, subsequently, the Sustainable Development Goals by coordinated action on urban issues.¹⁸⁰ Meeting in Quito, Ecuador in October 2016, UN Habitat adopted a New Urban Agenda, an agreement that includes goals for cities such as to “establish a connection between the dynamics of urbanization and the overall process of national development.”¹⁸¹

While UN Habitat has addressed issues of concern to cities and created a focal point for urban issues in the global governance architecture, it remains a state-based institution. Although the organization works with cities and other partners, it is governed by the UN Habitat Assembly, “a universal body composed of the 193 member states of the United Nations.”¹⁸² Cities, however, have demanded a more direct role in the organization’s activities, rightly claiming their expertise and experience on urban issues. During the 2016 Habitat III Conference in Quito, Ecuador, for example, more than 2,000 “local and regional governments” demanded access and eventually “received accreditation.”¹⁸³ UN Habitat has recognized the benefits of more direct city participation in its deliberations and organized “participatory processes and wide stakeholder participation, including local authorities.”¹⁸⁴ Although many of these local authorities were visibly represented through city-pavilions and other displays, they were not themselves full participants.

UN Habitat reflects both the benefits and limitations of accommodation as a means of subnational participation. In preparation for the drafting of the New Urban Agenda outcome document from the 2016 summit, the UN General Assembly expressly called for “improved participation of local authorities and other stakeholders in the preparatory process and the conference itself.”¹⁸⁵ That process included a series of “Urban Dialogues” to “gather views from all interested players” through an “inclusive and consultative platform.”¹⁸⁶ Hence, subnational governments were able to inform the process. The final negotiation of the outcome text, however, was a largely closed-door state-to-state process that left city representatives standing by their respective pavilions, rather than in the negotiation room. As the President of UN Habitat’s Global Alliance of Partners, Genie Birch, describes: “Although the member states, as the only entities with the standing to craft agreements under international law, negotiated the final document, its contents were the product of innovative forms of participation from within

¹⁷⁹ *UN-HABITAT: Our Mission*, U.N Habitat, <http://mirror.unhabitat.org/categories.asp?catid=10>. For a background on the establishment of UN Habitat, see Eugenie L. Birch, *A Midterm Report: Will Habitat III Make a Difference to the World's Urban Development?*, 82 J. AM. PLANNING ASSOC. 398, 399-400 (2016).

¹⁸⁰ *History, Mandate & Role in the UN System*, U.N. HABITAT, <https://unhabitat.org/history-mandate-role-in-the-un-system/>.

¹⁸¹ *The New Urban Agenda*, U.N. HABITAT, <http://habitat3.org/the-new-urban-agenda/>.

¹⁸² *Governance | UN-Habitat*, U.N. HABITAT, <https://unhabitat.org/governance>; G.A. Res. 73/239 (Jan. 17, 2019).

¹⁸³ *Participants – Habitat III*, HABITAT III, <https://habitat3.org/the-conference/participants/>.

¹⁸⁴ G.A. Res. 68/239 (Feb. 5, 2014).

¹⁸⁵ G.A. Res. 73/239 (Jan. 17, 2019).

¹⁸⁶ *Urban Dialogue Reports – Habitat III*, HABITAT III, <https://habitat3.org/the-new-urban-agenda/preparatory-process/urban-dialogue-reports/>.

the UN family and among members of civil society.”¹⁸⁷ In many ways Birch’s description reflects the limits of accommodation: subnational voices can be heard, subnational governments can be present, but at the end of the day, international law remains a system of states.

This use of accommodation is particularly common in international institutions whose work addresses issues of some interest to the subnational. For example, while UNESCO focuses on cultural heritage, cities and provinces have much to contribute to and interests in its work. Since 2006, UNESCO has held annual meetings to address problems faced by historic cities, including the promotion of economic growth while preserving historic sites.¹⁸⁸ Again, however, cities and other subnational governments are only accommodated to a degree, participating but not voting.¹⁸⁹ The World Bank has established a City Resilience Program aimed at providing support to cities during disasters.¹⁹⁰ Since its formation in 2014, the City Resilience Program has collaborated with cities for strategic investment and as well as disaster relief.¹⁹¹ Yet, the Program remains subject to the Bank’s overall governance structure, with cities consulted and accommodated, but not full participants.¹⁹²

ii. *The United Nations Framework Convention on Climate Change and the Global Compact for Safe, Orderly, and Effective Migration*

The United Nations Framework Convention on Climate Change (UNFCCC) and the Global Compact for Safe, Orderly and Effective Migration both represent important steps forward in the accommodation as they involve participation by subnational governments in legal processes not expressly devoted to urban or provincial issues. It is, perhaps, natural that cities have some voice at UN Habitat, given the organization’s mandate. Cities have sought participation in and been accommodated at the UNFCCC and the Global Compact because of their substantive interest in and capacity to address climate and migration issues, rather than their status as cities. As such, the UNFCCC and the Global Compact may offer models for the accommodation of the subnational across a wider set of international legal issues.

The UNFCCC is an international treaty, the parties to which are states.¹⁹³ The Conference of Parties (COP), again comprised of states, as the “supreme body of th[e] Convention” is tasked

¹⁸⁷ Eugenie Birch, *More than Window Dressing? Stakeholder and Participants in the UN Global Agreements on Sustainable Development An Exploration of Agreements to Move toward Pluralistic Global Governance*, PENN CURRENT RES. ON SUS. URB. DEV. 3 (Feb. 2018), <https://penniur.upenn.edu/uploads/media/Birch.pdf>.

¹⁸⁸ *World Heritage Centre - World Heritage Cities Programme*, UNESCO, <https://whc.unesco.org/en/cities>.

¹⁸⁹ Unesco Constitution art. II & art. IV(C)

¹⁹⁰ *City Resilience Program*, WORLD BANK (Dec. 21, 2020), <http://www.worldbank.org/en/topic/disasterriskmanagement/brief/city-resilience-program> (last visited Feb. 24, 2021).

¹⁹¹ *City Resilience Program: Comprehensive Financial Solutions for City Resilience Conference*, WORLD BANK, <http://www.worldbank.org/en/events/2017/11/06/city-resilience-program-comprehensive-financial-solutions-for-city-resilience-conference> (last visited Feb. 24, 2021).

¹⁹² See Articles of Agreement, International Bank for Reconstruction and Development art. 2(1) (June 27, 2012), available at <http://pubdocs.worldbank.org/en/722361541184234501/IBRDArticlesOfAgreement-English.pdf>.

¹⁹³ United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, 1771 U.N.T.S. 107, available at <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

with “decisions necessary to promote the effective implementation of the Convention.”¹⁹⁴ Over time, the COP came to recognize that subnational action—along with coordinated national efforts—is necessary to address climate change. So too, as described above, cities and provinces understood the impact climate change has within their jurisdictions and the potential of subnational climate adaptation and mitigation. While COP has not admitted cities and other subnational governments as members, it has begun to directly address them in its work. COP-16, meeting in Cancun in 2010, recognized “local and sub-national governments” as “stakeholders” and established a “dialogue of local and sub-national leaders with the COP Presidency.”¹⁹⁵ COP-19, meeting in Warsaw in 2013, formally recognized a “Cities Day” as part of the negotiation process¹⁹⁶ and saw the benefit of the “sharing among Parties of experiences and best practices of cities and Sub-national authorities, where appropriate, in identifying and implementing opportunities to mitigate greenhouse gas emissions.”¹⁹⁷

Over these years, city and provincial governments showed up at the COP meetings with greater frequency and numbers, seeking greater involvement, access, and input into the international legal processes around climate change. Their demands for accommodation paid off at COP 21 in Paris in 2015. COP21 also marked the first time a city or provincial delegation was formally recognized by the meeting’s presidency. In Paris, the Government of Catalonia promoted the Catalan Agenda, which the French Presidency recognized, noting “the excellence of initiative, which culminated in the participation of a wide-ranging institutional and expert delegation in Paris that year.”¹⁹⁸ After significant effort by subnational governments to show their value to the climate change mitigation process, the Paris Climate Accord expressly recognized: “the importance of the engagements of all levels of government and various actors” in addressing climate change.¹⁹⁹ The actual text of the Paris Agreement references the subnational twice, with States committing to “recognize that adaptation is a global challenge faced by all with local, subnational, national, regional and international dimensions...”²⁰⁰ and to engaging “the national, subnational and local levels” of government in capacity building.²⁰¹ Even the Paris framework, however, fails to fully take advantage of the unique capacity of subnational

¹⁹⁴ *Id.* art. 7.

¹⁹⁵ Giogia Rambelli, Lena Donat, Gilbert Ahamer, & Klaus Radunsky, *An Overview of Regions and Cities With-in the Global Climate Change Process – a Perspective for the Future*, at 7 (2017), https://www.researchgate.net/profile/Gilbert-Ahamer/publication/311946334_An_overview_of_regions_and_cities_within_the_global_climate_change_process_-_a_perspective_for_the_future/links/591982464585159b1a4aaa27/An-overview-of-regions-and-cities-within-the-global-climate-change-process-a-perspective-for-the-future.pdf; G.A. Dec. 1 CP/16, The Cancun Agreements, at para. 7 (Mar. 15, 2010).

¹⁹⁶ *COP Presidency Cities and Sub-national Dialogue*, (Nov. 21, 2013), https://unfccc.int/files/meetings/warsaw_nov_2013/application/pdf/131121_cop_presidency_subnational_dialogue.pdf.

¹⁹⁷ *See Warsaw Climate Change Conference - November 2013*, U.N. CLIMATE CHANGE (Nov. 2013), http://unfccc.int/meetings/warsaw_nov_2013/meeting/7649.php; Report of the Conference of the Parties on its Nineteenth Session, held in Warsaw from 11 to 23 November, at para 5.b, Decision 1/CP19 (FCCC/CP/2013/10/Add.1).

¹⁹⁸ *Attendance at International Summits and Conferences*, EXTERIORS GENERALITAT DE CATALUNYA (last updated Oct. 16, 2019), https://exteriors.gencat.cat/en/ambits-dactuacio/afers_exteriors/afers-globals/cimeres/

¹⁹⁹ Paris Climate Accord Preamble 15, *opened for signature* Apr. 22, 2016.

²⁰⁰ *Id.* art. 7.2

²⁰¹ *Id.* art. 11.2

governments to implement climate mitigation and adaptation strategies within their jurisdictions, grouping subnational governments together with other “non-party-stakeholders.”²⁰²

With formal, albeit, limited recognition,²⁰³ in the Paris agreement, a more robust set of dialogues could be established for subnational governments in the UNFCCC process.²⁰⁴ The Marrakech Partnership for Global Climate Action, launched at COP 22 in 2016 and the subsequent Talanoa Dialogue,²⁰⁵ launched at COP23 in Bonn in 2017, both sought to “encourage collaboration between governments, cities, business and investors to act on climate change and implement the Paris Agreement.”²⁰⁶ A number of subnational governments, including “with California, Nagano Prefecture, the city of Kyoto and the Scottish government” have directly engaged in these processes.²⁰⁷

Recent UNFCCC meetings, such as COP 25 in Madrid in 2019, are indictive of both the potential and the limits of accommodation. They are robust gatherings, including state parties, civil society, businesses, and subnational governments. Over 100 mayors and subnational officials from at least 40 countries were present in Madrid²⁰⁸ and frequently appeared on the conference and side event program.²⁰⁹ Similarly, governors from states in the US, Mexico, Brazil, Indonesia, and Peru, among others were present.²¹⁰ Cities and subnational governments hosted events including “Climate Change and Adaptation in a Multilevel Governance Context” or “City Climate Action! Activating the Potential of Cities for Low Carbon and Resilient Development.”²¹¹ At times, subnational officials are even given formal roles in the UNFCCC process. California Governor Jerry Brown served as the Special Advisor for States and Regions at the 2017 COP and “former mayor of New York City, Michael Bloomberg, has also been designated as the U.N. Special Envoy for Cities and Climate Change.”²¹² Subnational

²⁰² Report of the Conference of the Parties on its twenty-first Session, at para 133, 1/CP.21, <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>.

²⁰³ Rambelli et. al., *supra* note 235, at 59.

²⁰⁴ Jill Duggan, *The Role of Sub-state and Non-State Actors in International Climate Processes: Subnational Governments*, CHATHAM HOUSE ROYAL INST. INT’L. AFF. (Jan. 2019), <https://www.chathamhouse.org/sites/default/files/publications/2019-01-23-Duggan.pdf>., at 4.

²⁰⁵ Preparations for the Implementation of the Paris Agreement and the First Session of the Conference of the Parties to the Paris Agreement, at Annex II, FCCC/CP/2017/L.13, Nov. 2017, <https://unfccc.int/resource/docs/2017/cop23/eng/l13.pdf#page=1>.

²⁰⁶ Duggan, *supra* note 204, at 4.

²⁰⁷ *Id.*

²⁰⁸ *2019 United Nations Climate Change Conference, CITIES & REGIONS IN THE UNFCCC PROC.*, <https://www.cities-and-regions.org/cop25/> (last visited Feb. 26, 2021).

²⁰⁹ Press Release, Penn Inst. Urban Resch., Current and Former Mayors to Join COP25 Panel on Climate Finance and Sustainable Cities (Dec. 6, 2019), (available at <https://penniuir.upenn.edu/press-room/announcements/current-and-former-mayors-to-join-cop25-panel-on-climate-finance-and-sustai>).

²¹⁰ *Governors from Brazil, Peru, Indonesia, and Mexico Tackle Climate Change At COP25*, GOV. CLIMATE & FORESTS TASK FORCE (Dec. 16, 2019), <https://www.gcftf.org/governors-from-brazil-peru-indonesia-and-mexico-tackle-climate-change-at-cop25/>.

²¹¹ *SEORS, Side Events/Exhibits Archive*, U.N. CLIMATE CHANGE, <https://seors.unfccc.int/applications/seors/reports/archive.html> (last visited Feb. 26, 2021).

²¹² Sharmila L. Murthy, *States and Cities as “Norm Sustainers”*: A Role for Subnational Actors in the Paris Agreement on Climate Change, 37 VA. ENV’T L. J. 1, 18 (2019).

governments are now shaping the discourse at COP, bringing new ideas to the table, and offering a refreshing break from the monotony of formal negotiations.²¹³

Neither cities nor other subnational governments, however, are participants in the formal, legal negotiations within the UNFCCC. At COP25, they influenced debate but had no direct voice in the outcome documents. One city network described its frustration with “not always [being] fully incorporated into the ... implementation process. In many [conversations] there is no explicit mention of the role subnational governments play in achieving national climate goals.”²¹⁴ Ultimately, the structure of COP symbolizes the challenges of accommodation: subnational actors were present but denied access to “the inner circle of state-to-state diplomacy” “accessible only with the right color badge.”²¹⁵

Subnational governments similarly sought accommodation at the Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Effective Migration, a multiyear UN effort to develop a global legal framework around migration. As with climate change, subnational governments framed their demands to participate around the direct impacts of migration on the subnational and their capacities to implement assimilation policies for migrants. As Scholten and Rinus describe, “the local turn of [migrant] integration policies...has led to ... a decoupling of national and local policies,”²¹⁶ and provides a sound basis for local participation in international discussions on migration. Subnational leaders have expressly “call[ed] on the international community to acknowledge their key role in the implementation of the Compact and how they play an essential part in migration governance.”²¹⁷

The UN General Assembly recognized subnational governments, calling on the drafters of the Global Compact to ensure that “relevant stakeholders, including civil society, scientific and knowledge-based institutions, parliaments, local authorities, the private sector and migrants themselves, will be able to contribute views” to the process.²¹⁸ As with most examples of accommodation, local participation was arranged through “informal dialogues to which [city and provincial governments] will be invited by the [nation-state] cofacilitators.”²¹⁹ Mayors and other subnational leaders seized the opportunity presented by this recognition, establishing a Mayoral Forum on Human Mobility, Migration, and Development in 2013.²²⁰ The Forum is an “annual

²¹³ William Burke-White, *At Climate Summits, the Urgency from the Streets Must be Brought to the Negotiating Table*, BROOKINGS (Dec. 16, 2019), <https://www.brookings.edu/blog/planetpolicy/2019/12/16/at-climate-summits-the-urgency-from-the-streets-must-be-brought-to-the-negotiating-table/>.

²¹⁴ ICLEI, CITIES AND REGIONS TALANOA DIALOGUES: LEVERAGING SUBNATIONAL ACTION TO RAISE CLIMATE AMBITION 15 (2018), <https://e-lib.iclei.org/wp-content/uploads/2019/01/Cities-and-Regions-Talanoa-Dialogues-2018-ICLEI.pdf>.

²¹⁵ Burke-White, *supra* note 250.

²¹⁶ Peter Scholten & Rinus Penninx, *The Multilevel Governance of Migration and Integration, in* INTEGRATION PROCESSES AND POLICIES IN EUROPE: CONTEXTS, LEVELS AND ACTORS 100 (Blanca Garcés-Mascareñas & Rinus Penninx eds. 2016).

²¹⁷ *Local and Regional Governments Call to Recognize Their Key Role in Migration Governance*, CISDP, <https://www.uclg-cisd.org/en/printpdf/5302>.

²¹⁸ G.A. Res. 71/280, at 2 (Apr. 6, 2017).

²¹⁹ *Id.*

²²⁰ THE 6TH MAYORAL FORUM ON HUMAN MOBILITY, MIGRATION AND DEVELOPMENT, FROM LARGE MOVEMENTS TO THE GLOBAL COMPACTS: CITIES AS FIRST RESPONDERS, GFMD (Jan. 22, 2020), https://www.gfmd.org/files/documents/concept_-_2019_mayoral_forum.pdf [hereinafter CITIES AS FIRST RESPONDERS].

gathering of mayors and city leaders that promotes policy dialogue, fosters the exchange of experiences in governing migration, and strategizes on how to work collectively” through deeper integration into the inter-governmental architecture of migration governance.²²¹ Throughout the preparatory phase of the Global Compact, the Mayoral Forum convened annually to “supplement existing regional and international initiatives by connecting with the inroads being made at the subnational level.”²²² These meetings led to negotiated outcome documents, including the 2014 “Call of Barcelona,” the 2015 “Quito Local Agenda”, and the 2017 Berlin Declaration that informed intergovernmental negotiations.²²³

The Global Compact process culminated in a 2018 intergovernmental meeting in Marrakech.²²⁴ Again, subnational leaders demanded a seat at the table through the 5th Mayoral Forum on Mobility, Migration and Development. More than “150 mayors and their delegates from all over the world” met just prior to and in parallel with the formal state-to-state negotiations.²²⁵ To ensure a continued mechanism for engagement, these subnational leaders established the Mayors Migration Council with the mandate of “enhanc[ing] their voice, action and influence on migration and refugee issues.”²²⁶ The assembled Mayors also adopted the Marrakech Mayoral Declaration “Cities Working Together for Migrants and Refugees,”²²⁷ which “expressly committed [their cities] to the Global Compacts on Migration and on Refugees and to undertaking a wide range of actions in the field of immigrant reception, inclusion, and collaboration.” He Declaration (also a form of emulation, discussed infra) “calls for the full and formal recognition of the role of local authorities in the implementation, follow-up and review of both Global Compacts.”²²⁸

The expansive role of subnational officials in the Global Compact shows “unprecedented local engagement with an — already rather unique — inter-governmental meeting and process

²²¹ *Introduction to the Mayoral Forum on Human Mobility, Migration and Development*, OPEN DEMOCRACY (Sept. 28, 2016), <https://www.opendemocracy.net/en/introduction-to-mayoral-forum-on-human-mobility-migration/>.

²²² *Id.*

²²³ *Call of Barcelona: Mayoral Forum on Mobility, Migration and Development*, ILO, https://www.ilo.org/dyn/migpractice/migmain.showPractice?p_lang=en&p_practice_id=172 (May 18, 2015); Mayoral Forum on Mobility, Migration and Development “Call of Barcelona”, ILO (June 20, 2014), <https://www.ilo.org/dyn/migpractice/docs/305/Barcelona%20Declaration.pdf>; THE LOCAL AGENDA ON MIGRATION AND DEVELOPMENT THE SECOND MAYORAL FORUM ON MOBILITY, MIGRATION AND DEVELOPMENT QUITO OUTCOME DOCUMENT (2015), MIGRATION FOR DEVELOPMENT (Nov. 13, 2015), www.migration4development.org/sites/default/files/quito_outcome_document_en.pdf.

²²⁴ G.A. Res. 72/244, pmb. (Jan. 22, 2018), https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/72/244.

²²⁵ Barbara Oomen, *Decoupling and Teaming up: The Rise and Proliferation of Transnational Municipal Networks in the Field of Migration*, 54 INT’L MIGRATION REV. 913, 914 (2020).

²²⁶ MAYORS MIGRATION COUNCIL, mayorsmigrationcouncil.org (last visited Feb. 25, 2021).

²²⁷ MARRAKECH MAYORS DECLARATION, THE FIFTH MAYORAL FORUM ON HUMAN MOBILITY, MIGRATION AND DEVELOPMENT (Dec. 8, 2018), <https://static1.squarespace.com/static/5df133ed5c523d063ce20693/t/5ea5fe595aaf842048077e95/1587936857584/Marrakech+Mayors+Declaration.pdf>.

²²⁸ ‘*Cities Working Together for Migrants and Refugees*’: *Notes from the 5th Mayoral Forum*, MEDIUM (Dec. 18, 2018), <https://medium.com/@UNmigration/cities-working-together-for-migrants-and-refugees-notes-from-the-5th-mayoral-forum-6539b2ff2ca4>.

on migration and refugees.”²²⁹ The text of the Global Compact draws on the Cities Working Together Declaration and contains 41 references to the role of local data, authorities, or actions.²³⁰ Yet, even this level of accommodation was seen by many subnational governments as inadequate, nothing that the UN General Assembly Resolution convening Global Compact process had affirmed “the intergovernmental nature of the negotiations” must “be fully respected.”²³¹ This separation between the subnational participants and the intergovernmental formal process was underscored by the physical layout of the Marrakech meetings, which were held in fully separate buildings with only limited points of physical connectivity. After Marrakech, subnational leaders have sought new approaches to accommodation with closer connection to formal intergovernmental negotiations. The 2020 Mayoral Forum in Quito, was both physically and chronologically integrated into the annual summit of the Global Forum on Migration and Development, thereby creating “an important precedent in city diplomacy by granting [local and regional authorities] access to a state-led process.”²³² Whether Quito model can overcome the frustrations of limited participation characteristic of accommodation, remains to be seen.

iii. Sustainable Development Goals: Voluntary Reviews

The United Nation’s Voluntary Review of implementation of the Sustainable Development Goals illustrates a deeper version of accommodation that includes express recognition of subnational governments by the UN itself. Through innovation and flexibility in these voluntary reviews, subnational governments have found ways to participate in a traditional international legal monitoring mechanism.

The United Nations 2030 Agenda for Sustainable Development (SDGs) encourages “Member States to conduct regular and inclusive reviews of progress at the national and subnational levels.”²³³ Even if these reviews were intended to consider subnational implementation of the SDGs, they were expressly mandated to be “country led and country driven.”²³⁴ Notwithstanding these limitations, New York City’s aforementioned Office of International Affairs saw this voluntary review process as a potential opportunity for more direct participation in the UN High Level Political Forum. Borrowing directly from the National Voluntary Review process, the city undertook its own voluntary local review, entirely separate from the US’ review process.²³⁵ The review offers a deep and reflective look at New York’s efforts toward their realization. In 2018 New York decided to submit its review to the UN, with no certainty that it would be accepted.²³⁶ The city justified its submission of the “first-ever Voluntary Local Review” on the grounds that “the 2030 Agenda recognizes the critical role that

²²⁹ Oomen, *supra* note 264.

²³⁰ Global Compact for Safe, Orderly and Regular Migration, July 11, 2018, <https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf>.

²³¹ G.A. Res. 71/280, at 8 (Apr. 6, 2017).

²³² CITIES AS FIRST RESPONDERS, *supra* note 259.

²³³ G.A. Res. 70/1, at 79 (Oct. 21, 2015).

²³⁴ *Id.*

²³⁵ Interview with Penny Abeywardena, Comm’r for Int’l Affs. of N.Y.C., in Buenos Aires Argentina, October 14, 2018 [hereinafter Abeywardena].

²³⁶ Abeywardena, *supra* note 276.

local authorities and communities have in achieving the Global Goals”²³⁷ A cover note from Mayor Bill DeBlasio included in the city’s 2019 review explains the city’s desire to partner with the UN: the City “remains steadfast in its commitment to partner with the UN to help achieve the 2030 Agenda.”²³⁸

Perhaps most significantly, the UN decided to accept New York’s voluntary local review. While the 2030 Agenda requires that reviews be “country led,” the UN Department of Economic and Social Affairs treated New York’s review as a separate category of submission not expressly barred by the 2030 Agenda. The Department explains: “While the VLRs hold no official status, the process of undertaking these subnational reviews is providing multiple benefits to the entities engaging in them and to SDG implementation at large.”²³⁹ Upon the submission of VLRs in 2019, an Assistant Secretary General “recognized the great work being done by local and regional governments to implement the” SDGs and pledged that “the Department of Economic and Social Affairs” would “support this “Voluntary Local Review” process.”²⁴⁰ To date, 24 city governments, including those of Buenos Aires, Guangzhou, Pittsburgh, and Helsinki, and 12 state governments, including Valencia, North Rhein Westphalia, Oaxaca, have submitted such reviews.

The formal reception of these Voluntary Local Reviews by the United Nations represents a significant advance in subnational accommodation. On the submission of his city’s VLR, Helsinki Mayor Jan Vapaavuori explained the significance of this partnership with the UN: “The dialogue with the United Nations...is crucial in ensuring that in the future, cities will not be mere implementers of the global project, but are part of setting the agenda in collaboration with nation-states.”²⁴¹ New York’s effort to conduct a VLR and the UN’s acceptance of these VLRs offers a promising model for accommodation whereby, through innovative and creative approaches, subnational governments can both inform and participate in an international legal process typically open to nation-states alone.

B. Emulation

Emulation offers a second distinct pathway for subnational engagement with the international legal system and involves city and provincial governments mimicking international legal processes in their relations with one another to lock-in commitments or coordinate policies. Unlike accommodation, emulation does not require access to and participation in existing

²³⁷ N.Y.C. MAYOR’S OFF. FOR INT’L AFFS., VOLUNTARY LOCAL REVIEW: NEW YORK CITY’S IMPLEMENTATION OF THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT (2018), https://www1.nyc.gov/assets/international/downloads/pdf/NYC_VLR_2018_FINAL.pdf.

²³⁸ N.Y.C. MAYOR’S OFF. FOR INT’L AFFS., VOLUNTARY LOCAL REVIEW: NEW YORK CITY’S IMPLEMENTATION OF THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT (2019), <https://sdgs.un.org/sites/default/files/2020-09/International-Affairs-VLR-2019.pdf>.

²³⁹ *Voluntary Local Reviews*, UN DEPT. OF ECON. & SOC. AFFS., <https://sdgs.un.org/topics/voluntary-local-reviews> (last visited Feb. 25, 2021).

²⁴⁰ U.N. Assistant Sec’y-Gen. for Pol’y Coordination & Inter-Agency Affs., Opening Remarks Local and Regional Governments Commit to the Voluntary Local Review Declaration (Sept. 25, 2019), <https://www.un.org/development/desa/statements/asg/ms-spatolisano/2019/09/opening-at-vlr-declaration.html>.

²⁴¹ Jan Vapaavuori, *Local Action on the Global Agenda: Helsinki and NYC Lead with the Voluntary Local Review*, GLOBAL NYC (Apr. 12, 2019), <https://medium.com/@globalnyc/local-action-on-the-global-agenda-helsinki-and-nyc-lead-with-the-voluntary-local-review-189f242aedb7>.

international legal processes. Rather, the core of emulation is the conscious effort by substate actors to adopt the proscribed forms of international legal processes in their relations with one another and thereby garner recognition, legitimacy, and, perhaps, compliance. While emulation “looks and feels” like international law, it is separate from the formal international legal system because the subnational governments emulating international law lack international legal personality. Even to the degree subnational actors know they hold a different status than nation-states, they intentionally seek to blur that status through emulation of international law.

The emulation of international law improves subnational actors’ abilities to structure cooperation and participate in global affairs in a number of ways. First, international law offers a tried, tested, and effective mechanism for norm creation, rule generation, and commitment. Even where the formal mechanisms of the international legal system are unavailable to subnational actors, approaches, processes, and institutional designs borrowed from international law can provide a strong foundation for city and provincial cooperation. Second, by emulating international law, subnational actors can deepen commitment and enhance the likelihood of compliance, even where enforcement is unavailable. By structuring their relations as if they were binding legal commitments or formal international organizations, subnational actors can harness a “compliance pull” that flows from the legitimacy of international legal forms and processes.²⁴² The commitments of subnational governments may then become “internalized and incorporated,” promoting compliance.²⁴³ Finally, by emulating international law, subnational governments may harness its authority, enhancing the stature of subnational governments on the global stage.²⁴⁴

i. Emulation through Norm Generating Commitments: Climate Change, Economic Development, and Human Rights

Over the past twenty years, subnational governments have begun to shape international norms by making public commitments that emulate international treaties. Such subnational commitments seek to address transnational challenges that cross the aforementioned “glocal” divide, such as climate change, economic development, and human rights. These subnational efforts emulate both the form and substance of international law. They expressly seek to mimic international treaties as instruments of commitment. Substantively, these acts of emulation are intended to legalize—or at least have the appearance of legalizing—subnational commitments. As Judith Goldstein and her co-authors explain, “legalization represents a specific set of dimensions along which institutions vary.”²⁴⁵ While subnational commitments are not fully legalized, they show marked increases in “the degree to which they are obligatory, the precision of ... the rules, and the delegation of some functions of interpretation, monitoring and implementation to a third party.”²⁴⁶ While subnational emulations will never meet the “ideal type

²⁴² THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 25 (1990).

²⁴³ Harold H. Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 625, 628 (1998-1999).

²⁴⁴ For an explanation of how entities seeking statehood use international legal process to gain recognition, see JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2d ed. 2007).

²⁴⁵ Judith Goldstein et al., *Introduction: Legalization and World Politics*, in *LEGALIZATION AND WORLD POLITICS* 3 (Judith L. Goldstein et al. eds., 2001).

²⁴⁶ *Id.*

of legalization, they allow city and provincial governments to formalize their commitments on each of the dimensions of legalization.²⁴⁷ Since the mid-2000s, the number of these agreements has increased markedly and now includes the Chicago Climate Charter mentioned in the introduction, the Bonn-Fiji Agreement, the African Mayors Climate Change Declaration, the “We are Still In” Declaration, the Mexico City Pact, and the US-China Climate Leaders Declaration, among others. The evolution of these agreements overtime shows marked increases in legalization.

The climate space offers a window into the evolution of subnational emulation of international law. The Mexico City Pact, launched in 2010 as part of the World Mayors Summit on Climate and signed by over 185 cities provides an early example.²⁴⁸ The Pact evidences many of the hallmarks of an international treaty, but its signatories are mayors not heads of state. In form, it is structured like an international legal agreement, with language reminiscent of an international treaty.²⁴⁹ So too, the Pact shows early signs of an intention of legalization on two dimensions. It creates an obligation—albeit a soft one—at Article 1, committing cities to “reduce our local greenhouse gas emissions.” Article 4 makes a significant move toward delegation, requiring that cities “register our emission inventories, commitments, climate mitigation and adaptation measures and actions in a measurable, reportable and verifiable (MRV) manner.” The Carbon Cities Climate Registry,²⁵⁰ which developed from the Pact, provides a mechanism for monitoring under the supervision of the Bonn Center for Local Climate Action and Reporting.²⁵¹

The 2015 US-China Climate Leaders Declaration of 2015 makes a further advance in municipal emulation of international treaties.²⁵² More specifically, it is modeled on and designed to operate in parallel with an existing state-to-state legal commitment: the 2014 Joint Announcement on Climate Change, an effort between then President Obama and President Xi Jinping. Signed by 49 Chinese and 17 American cities, the Declaration borrows its form and language from the Xi-Obama agreement. The Declaration also demonstrates advances on all three dimensions of legalization. It shows an intent to establish obligation, with cities “solemnly declar[ing] ... willingness and determination to lead climate actions.”²⁵³ It creates a mechanism for highly precise, albeit voluntary commitments, as cities made individualized emissions targets within the framework of the Declaration. Chinese cities subsequently further specified their

²⁴⁷ Kenneth W. Abbott et al., *The Concept of Legalization*, in LEGALIZATION AND WORLD POLITICS 17-18 (Judith L. Goldstein et al. eds., 2001).

²⁴⁸ CARBONN CITIES CLIMATE REGISTRY, THE MEXICO CITY PACT 'GLOBAL CITIES COVENANT ON CLIMATE' AND THE CARBONN CITIES CLIMATE REGISTRY 4 (2011), https://carbonn.org/fileadmin/user_upload/cCCR/MXCP_cCCR_4-pager/MXCPact_cCCR_4-pager_English.pdf.

²⁴⁹ *Id.*

²⁵⁰ *Carbonn Climate Registry*, CARBONN CENTER, <https://carbonn.org/entities> (last visited Feb. 25, 2021)

²⁵¹ https://unfccc.int/sites/default/files/mxcpact_cccr_final.pdf.

²⁵² U.S.- China Climate Leaders’ Declaration on the Occasion of the First Session of the U.S.-China Climate-Smart/Low-Carbon Cities Summit Los Angeles, CA, U.S. - China, Sept. 15-16, 2015, https://obamawhitehouse.archives.gov/sites/default/files/us_china_climate_leaders_declaration_9_14_15_730pm_final.pdf [hereinafter U.S.- China Climate Leaders’ Declaration].

²⁵³ China-U.S. Climate Leaders Declaration On the Occasion of the Second China-U.S. Climate-Smart / Low-Carbon Cities Summit Beijing, China, U.S. - China, June 7-8, 2016, https://ccwgsmartcities.lbl.gov/sites/all/files/panel-files/US-China%20Climate%20Leaders%20Declaration_6_8_final%20%281%29.pdf.

particular commitments through the formation of the Alliance of Peaking Pioneer Cities, an network that grew out of the Declaration and sets specific emissions and energy reform goals.²⁵⁴

The Chicago Climate Charter represents perhaps the most developed and formalized example of subnational treaty emulation. Stewarded by Rahm Emanuel, the Charter sought to expand the responsibility of cities on climate mitigation. Former New York Mayor Bloomberg, emphasized the goal of replicating the Paris Agreement, noting that the Charter “sends a strong signal to the world that we will keep moving forward toward our Paris goal, with or without Washington.”²⁵⁵ Both the process of its drafting and the text itself evidence the formality of international law and the legalization expected of international treaty commitments.

The Charter exemplifies many of the formal components of international treaties. To an untrained observer, the Charter appears to be an international treaty and would meet the Vienna Convention definition of a treaty, but for the names on the signature page.²⁵⁶ It is written and drafted as if it were a binding international legal document, with a preamble, operative articles, and a signature process.²⁵⁷ It is self-aware of its relationship with the Paris Agreement, invoking it three times in the preamble alone. In signing the Charter, the host city of Chicago sought to imbue the agreement with the trappings of legitimacy and formality, including a speech by President Obama.²⁵⁸

The Chicago Charter also shows a significant move toward legalization on all three dimensions of obligation, precision, and delegation. First, in the operative text, mayors undertake an obligation, “affirm our collective commitment,” and invoke their legal authorities to speak on behalf of their “local jurisdictions.” Second, the agreement evidences growing precision of obligation.²⁵⁹ Through the Charter, cities commit to “achieve a percent reduction in greenhouse gas emissions equal to or greater than our nation’s Nationally Determined Contributions to the Paris Agreement.”²⁶⁰ Finally, in terms of delegation, the agreement seeks to harness the compliance inducing aspects of public commitment and collective monitoring. Emanuel explains: “We made pledges not just to one another but also to our residents and the world,” suggesting that cities would be held to account by domestic constituents and international observers.²⁶¹

²⁵⁴ New Report Outlines Ambition of Chinese Peaking Pioneer Cities, ICLEI (Nov. 8, 2016), kcc.iclei.org/newsdetails/article/new-report-outlines-ambition-of-chinese-peaking-pioneer-cities.html

²⁵⁵ Press Release, Rahm Emanuel, Mayor of Chicago, Mayor Emanuel, Global Covenant of Mayors for Climate and Energy, and C40 Cities Leadership Group Announce Chicago Will Host Inaugural North American Climate Summit and 2017 C40 Cities Bloomberg Philanthropies Awards (Sept. 18, 2017), https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2017/september/GlobalClimateSummit.html.

²⁵⁶ Vienna Convention, *supra* note 4, at art. 1.

²⁵⁷ Chicago Climate Charter, *supra* note 2.

²⁵⁸ John Byrne, *Obama at Climate Event in Chicago Doesn't Mention Trump's Name; Says U.S. in an 'Unusual Time'*, CHI. TRIB. (Dec. 5, 2017), <https://www.chicagotribune.com/politics/ct-met-barack-obama-rahm-emanuel-climate-summit-20171205-story.html>.

²⁵⁹ INTERNATIONAL ORGANIZATIONS AS ORCHESTRATORS (Kenneth W. Abbott et al. eds., 2015); Abbott et al., *The Concept of Legalization*, 51 INT’L ORG. 401 (2000).

²⁶⁰ Chicago Climate Charter, *supra* note 2.

²⁶¹ The Chicago Climate Charter North American Cities Taking Action on Climate, COUNCIL ON GLOB. AFFS., <https://digital.thechicagocouncil.org/chicago-climate-charter#cover> (last visited Feb. 25, 2021).

Subnational emulation of international law extends beyond climate. For example, the Global Cities Economic Partnership between Chicago and Mexico City was signed by Chicago Mayor Rahm Emanuel and Mexico City Mayor Miguel Angel Mancera in 2013.²⁶² The agreement seeks to facilitate innovation, expand imports and exports, and improve each city's competitive advantage. So too, the agreement reflects and invokes the broader legal relationship then existing between the US and Mexico, referencing and borrowing text from NAFTA in seeking to "establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement."²⁶³ So too, the Tripartite Economic Alliance was formed in 2014 through a Memorandum of Understanding by the mayors of Los Angeles, Auckland, and Guangzhou. The alliance seeks to strengthen business partnerships and increase market exchanges between the three cities.²⁶⁴ The Memorandum of Understanding establishing the alliance again borrows the form of an international agreement,²⁶⁵ evidencing a degree of obligation through specific commitment to undertake "coordinated initiatives."²⁶⁶

ii. *Emulation Through the Creation of International Institutions: from the C40 to the U20*

Subnational governments also emulate the international legal system by establishing international networks and formal organizations comprised of city and provincial governments modeled on traditional international institutions. While many of these organizations were initially established as informal groupings to facilitate the sharing of best practices, they are increasingly borrowing from the repertoire of international law to formalize their relationships. This institutionalization of subnational relations invokes the legality and authority of formal international institutions to enhance the connectivity, legitimacy, and influence of subnational action on the global stage. Through this institutionalization, cities are moving beyond mere

²⁶² David Jackson, *Announcing the Global Cities Economic Partnership Between Chicago and Mexico City*, BROOKINGS (Nov. 14, 2013), <https://www.brookings.edu/blog/the-avenue/2013/11/14/announcing-the-global-cities-economic-partnership-between-chicago-and-mexico-city/>; Memorandum of Understanding to Establish the Global Cities Economic Partnership between Chicago and Mexico City, Chi. - Mexico City, Nov. 14, 2013, https://www.brookings.edu/wp-content/uploads/2016/07/GCEP-CHI-MEX-MOU_FINAL.pdf.

²⁶³ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

²⁶⁴ *Mayor Garcetti advances tripartite economic alliance; signs business-to-business MOU with Auckland and Guangzhou*, OFF. L.A. MAYOR (May 16, 2016), <https://www.lamayor.org/mayor-garcetti-advances-tripartite-economic-alliance-signs-business-business-mou-auckland-and>.

²⁶⁵ Memorandum of Understanding Tripartite Economic Alliance between Auckland, Guangzhou and Los Angeles, Auckland-Guangzhou-L.A., Nov. 16, 2014, https://www.aucklandnz.com/sites/build_auckland/files/media-library/documents/Finalised%20A2%20Tripartite%20MoU.pdf.

²⁶⁶ *Id.*

nodes in a networked global space²⁶⁷ to establish institutions that exhibit the centralization and independence of intergovernmental organizations.²⁶⁸

The C-40 is among the earliest and most prominent of these organizations that connect cities across the globe. It began squarely as what Anne-Marie Slaughter would describe as a networked web of global connections among cities, but has evolved toward a more formalized institutional structure.²⁶⁹ Formed in 2005 by then London Mayor Ken Livingstone to advance city contributions to climate change mitigation, the C40 launched with a mere 18 cities. It has strategically sought to garner international attention so as to expand its membership through, for example, highly visible participation in the 2009 UN Climate talks in Copenhagen.²⁷⁰ The C40 now includes nearly 100 cities that collectively represent 700 million citizens.²⁷¹ It C40 hosts multiple annual summits, offers a wide variety of trainings, facilitates city-to-city partnerships, and champions city diplomacy.²⁷²

The C40 serves at least three key functions characteristic of formal international legal institutions: exchange of ideas and best practices; norm development; and the creation of accountability mechanisms for norm compliance.²⁷³ The C40 originated as a forum for the exchange of best practices and it has honed that ability over time. As the C40's 2019 Annual Report explains: "member cities use a science-based approach and exchange of best practices to take the urgent and effective action needed to confront the climate crisis and keep global heating below 1.5°C."²⁷⁴ Similarly, the organization produces "Good Practices Guides" that "offer mayors and urban policymakers roadmaps for tackling" difficult issues of common concern.²⁷⁵ The C40 has also set a course toward norm creation through city diplomacy. The organization seeks to "lead globally with agenda-setting declarations and events."²⁷⁶ Initiatives such as Deadline 2020, help cities advance those norms by, for example, implementing the goals of the Paris Agreement among 61 member cities and setting CO2 emissions targets.²⁷⁷ The C40 has also developed mechanisms to promote monitoring and compliance by member cities. The

²⁶⁷ See ANNE-MARIE SLAUGHTER, *THE CHESS-BOARD & THE WEB: STRATEGIES OF CONNECTION IN A NETWORKED WORLD* (2018) [hereinafter *CHESS-BOARD & THE WEB*]; ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2005).

²⁶⁸ Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 *J. OF CONFLICT RESOL.* 3, 9 (1998).

²⁶⁹ See *CHESS-BOARD & THE WEB*, *supra* note 315.

²⁷⁰ C40 CITIES, *10 YEARS OF RESULTS* (2016), https://c40-production-images.s3.amazonaws.com/fact_sheets/images/11_C40_on_its_10-year_anniversary_reOct2016.original.pdf?1475504972.

²⁷¹ *About C40*, C40, <https://www.c40.org/about> (last visited Feb. 25, 2021).

²⁷² C40 CITIES ANNUAL REPORT 2019 (2019), https://c40-production-images.s3.amazonaws.com/other_uploads/images/2574_C40_2019_Annual_Report.original.pdf?1587634742.

²⁷³ See Abbott & Snidal, *supra* note 316, at [pg. #] (parenthetical required).

²⁷⁴ C40 CITIES ANNUAL REPORT 2019 3 (2019), https://c40-production-images.s3.amazonaws.com/other_uploads/images/2574_C40_2019_Annual_Report.original.pdf?1587634742 [hereinafter *C40 CITIES ANNUAL REPORT 2019*].

²⁷⁵ *Good Practice Guides*, C40 CITIES, https://www.c40.org/other/good_practice_guides (providing guidance on issues like "climate change, reducing climate risk and encouraging sustainable urban development").

²⁷⁶ C40 CITIES ANNUAL REPORT 2019, *supra* note 274, at 2.

²⁷⁷ *Id.*; see *Deadline 2020*, C40 CITIES, <https://www.c40.org/other/deadline-2020>.

organization's structure as a club conditions membership on meeting the C40 Participation Standards, using the desirability of participation as a leverage point to ensure accountability.²⁷⁸ Initiatives such as the C40 Air Quality Network provide both monitoring and public accountability around C40 commitments.²⁷⁹

Over time, the C40 has transformed itself from a city network into a more centralized and independent organization, modeled on its nation-state-based counterparts. The organization is led by a Board of Directors, chaired by Michael Bloomberg.²⁸⁰ It has a steering committee comprised of fifteen cities, from Boston to Stockholm.²⁸¹ It has a rotating chairperson—a sitting mayor of a major global city—currently, Los Angeles Mayor Eric Garcetti. Over time, the C40 has built a professional staff of over 200, allowing it to function with significant centralization, organization, and coordination across its member cities. The C40 has even begun to show signs of independence. It has a \$34 million annual budget, allowing institutional action separate from its member cities.²⁸² And while the C40 takes its lead from member cities, it now advances a distinct agenda that some observers have described as a “political inspiration.”²⁸³

While the C40 is the oldest and perhaps most influential city network, a number of other subnational organizations are now emulating traditional state-based international organizations. The Global Parliament of Mayors, for example, models itself on the UN General Assembly. Founded in 2016, the Global Parliament of Mayors is a “governance body of, by and for mayors...with a vision to the world in which mayors...are equal partners in building global governance.”²⁸⁴ The organization “convene[s] a Global Parliament of Mayors to facilitate debates between mayors, national governments, and international organizations” that can drive “systematic action.”²⁸⁵ This mission is laid out in The Hague Declaration, signed by mayors from around the globe. The Declaration situates the Global Parliament in the broader international institutional landscape as a partner with “the United Nations, the OECD, COP21, [and] HABITAT III...”²⁸⁶ in advancing shared solutions to transnational challenges. Like the C40, the Global Parliament hosts numerous training and capacity building sessions and convenes an annual global summit.²⁸⁷

The Global Parliament of Mayors goes a step further than the C40 in seeking to generate and promote international norms. Like the UN General Assembly, it issues declarations on issues

²⁷⁸ C40 CITIES ANNUAL REPORT 2019, *supra* note 274, at 3.

²⁷⁹ Akshatha M., *Bengaluru hosts first meeting of C40 Air Quality Network*, THE ECONOMIC TIMES (Jul. 31, 2018, 6:58 PM), <https://economictimes.indiatimes.com/news/politics-and-nation/bengaluru-hosts-first-meeting-of-c40-air-quality-network/articleshow/65215629.cms>.

²⁸⁰ Board of Directors, C40 CITIES, https://www.c40.org/board_of_directors.

²⁸¹ Steering Committee, C40 CITIES, https://www.c40.org/steering_committees.

²⁸² C40 CITIES ANNUAL REPORT 2019, *supra* note 274, at [pg. #].

²⁸³ Emmanuelle Pinault, *The C40 Experience: From Technical Experiment to Political Inspiration*, 10 GLOBAL POLICY 697 (2019).

²⁸⁴ *Uniting Mayors: Local Solutions to Global Climate Challenges*, GLOBAL PARLIAMENT OF MAYORS, <https://globalparliamentofmayors.org>.

²⁸⁵ *Id.*

²⁸⁶ BENJAMIN BARBER, *IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS, RISING CITIES* PG# (Yale Univ. Press 2013).

²⁸⁷ *Events*, GLOBAL PARLIAMENT OF MAYORS, <https://globalparliamentofmayors.org/about-us-2/>.

ranging from the prevention of violence in cities to the right to adequate housing.²⁸⁸ Bristol Mayor Marvin Rees notes that the declaration on violence prevention was signed by more than sixty cities and is a “response to the violence we continue to see in our global cities.”²⁸⁹ The Parliament’s declarations are routinely presented to the UN so as to create connecting points and cross influence between subnational and interstate institutions. In 2020, UN Secretary General Guterres expressly recognized the Parliament’s contributions, welcoming “the efforts of the Global Parliament of Mayors and of local governments worldwide to step up the campaign against urban violence” and “invit[ing] every city to adopt and implement the United Nations System-Wide Guidelines on Safer Cities and Human Settlements.”²⁹⁰ The Global Parliament ultimately envisions a world in which it sits side by side with the UN as co-equal contributors to global governance.

A more recent innovation in the subnational institutional architecture is the U20 (Urban 20), which models itself on the G20. The U20 developed out of a C40 initiative to better connect subnational diplomacy to the burgeoning G20 as a forum for global governance. Paralleling the G20’s role as the “premier forum for international economic cooperation,”²⁹¹ the U20 focuses on economic issues and sustainable development, including promoting climate action, preparing for changes in the labor market, and improving urban infrastructure. Consisting of 25 global cities, the organization was launched in 2017 by the Mayors of Buenos Aires and Paris.²⁹² With a goal of “bringing the local perspective to the G20 agenda,” the U20 hosts an annual summit in conjunction with the annual G20 heads of state meeting and runs a year-long Sherpa process in advance thereof.²⁹³

The U20 has sought to develop “a platform for cities to collectively inform G20 negotiations.”²⁹⁴ At each annual summit, hosted to date in Buenos Aires, Tokyo, Riyadh, and Milan, the U20 issues a communique that in both form and substance emulates the G20 communique for that year. The 2020 Riyadh summit produced more than ten white papers, researched and negotiated over the course of the year in a process similar to that undertaken by the G20 sherpas.²⁹⁵ The summit culminated in the 2020 U20 Communique, which outlined a series of urgently needed steps to respond to COVID-19 while promoting sustainable economic development.²⁹⁶

²⁸⁸ *GPM Resolution on Reducing Violence in Cities*, GLOBAL PARLIAMENT OF MAYORS, <https://globalparliamentofmayors.org/resolution-3/>; *The impact of COVID-19 on the right to adequate housing: local government perspectives*, GLOBAL PARLIAMENT OF MAYORS, <https://globalparliamentofmayors.org/webinar-right-to-adequate-housing/>.

²⁸⁹ GPM Resolution on Reducing Violence in Cities, *supra* note 288.

²⁹⁰ U.N. Secretary-General, *Message to Global Parliament of Mayors on Peace in our Cities and Pathfinders for Peaceful, Just and Inclusive Societies*, (Nov. 18, 2020), <https://globalparliamentofmayors.org/wp-content/uploads/2020/12/parliamentofmayors-nov2020-003.pdf>.

²⁹¹ *Id.*

²⁹² <https://www.urban20.org>.

²⁹³ *Pittsburgh, United States 2009*, OECD, <https://www.oecd.org/g20/summits/pittsburgh/>.

²⁹⁴ <https://www.urban20.org>.

²⁹⁵ See Eugenia Birch and William Burke-White, “Aligning the Governance Architecture After COVID-19: City Diplomacy and International Institutions” forthcoming, *Columbia Journal of International Affairs* (2021); *What is the G20?*, OECD, <https://www.oecd.org/g20/about/> (parenthetical required).

²⁹⁶ See COMMUNIQUÉ FROM THE URBAN 20 (U20) [pg #] (2020), <https://www.urban20.org/wp-content/uploads/2020/10/U20-2020-Communique.pdf> (parenthetical required)..

The U20 has sought to develop a mechanism to inform and influence the G20. At the conclusion of each U20 summit, the mayor of the host city formally presents the U20 Communique to the head-of-government of the host country, who, in turn presents it at the G20 summit.²⁹⁷ As Buenos Aires Mayor Larreta handed the 2018 Communique to Argentine President Macri, he observed: the “Urban 20 seeks to collaborate and enrich the agenda of the G20 with an urban perspective, for that we will work together with the big cities of the world.”²⁹⁸ While enriching the work of the G20, the U20 also emulates the G20, borrowing its structure, working processes, and goals to elevate and legitimate city participation in the global governance of sustainable economic development.

The emulation of international institutions by subnational governments is not limited to the multilateral space and also includes bilateral institutions. The US-Mexico Border Mayors Association was founded by mayors of cities on the Mexico-US border in 2011 and seeks to facilitate cross-border cooperation and economic development. Established at the urging of the then Commissioner of U.S. Customs and Border Protection, the Association responds to the fact that “border mayors... have struggled over the years to create and sustain forums in which they can get to know each other and work together on a common agenda.”²⁹⁹ It models itself, in many ways, on the US-Mexico High Level Economic Dialogue, an institutionalized platform for US-Mexico engagement at the national level. The High Level Economic Dialogue “meets annually at the cabinet level” to “promote competitiveness and connectivity; foster[] economic growth, productivity, entrepreneurship, and innovation; and partner[] for regional and global leadership.”³⁰⁰ Similarly, the US-Mexico Border Mayors Association is intended to meet annually to address cross-border issues of security, transportation, infrastructure, environment, emergency management, and economic development.³⁰¹

The Association shows increasing signs of legalization, centralization, and independence, marking a move from an informal network of mayors to a more institutionalized structure. Its Charter evidences a goal of “being recognized as a leader and authority for Mexico and the United States border region” and “to make recommendations... to Congress that will help the Mexico and United States border region grow and prosper economically.”³⁰² The Association hosts annual summits at which it concludes “joint resolutions,”³⁰³ which call for action in a unified and independent voice. The 2017 Resolution, for example, advocates for “clear, straight forward rules of trade” and demands that “tariffs and fees generated and collected at all borders” be used to “support border infrastructure.”³⁰⁴

²⁹⁷ *2018-Buenos Aires*, URBAN20, <https://www.urban20.org/u20summit/2018-buenos-aires/>.

²⁹⁸ *Bringing the Local Perspective to the G20 Agenda*, URBAN20, <https://www.urban20.org>.

²⁹⁹ Elliot Spagat, *US-Mexico border mayors worry about NAFTA makeover*, THE SEATTLE TIMES (Jul. 27, 2017, 1:03 AM), <https://www.seattletimes.com/nation-world/us-mexico-border-mayors-convene-amid-high-stakes-debates/>.

³⁰⁰ <https://mx.usembassy.gov/our-relationship/policy-history/u-s-mexico-high-level-economic-dialogue-hled/>

³⁰¹ UC San Diego, *About the Association*, CENTER FOR U.S.-MEXICAN STUDIES, <https://usmex.ucsd.edu/events/borders-mayors-assoc/index.html> (last visited Feb. 26, 2021).

³⁰² The University of Arizona & The University of Texas, El Paso, *US MX Border Mayors Charter*, CENTER FOR U.S.-MEXICAN STUDIES, https://usmex.ucsd.edu/_files/documents_border_mayors_charter.pdf.

³⁰³ UC San Diego, *Past Border Mayors Summits*, CENTER FOR U.S.-MEXICAN STUDIES, <https://usmex.ucsd.edu/events/borders-mayors-assoc/past-summits.html> (last visited Feb. 26, 2020).

³⁰⁴ *Resolution 2017*, U.S.-MEXICO BORDER MAYOR’S ASSOCIATION, https://usmex.ucsd.edu/_files/documents_resolution_2017.pdf.

Emulation of both international legal treaties and international organizations has proved a powerful tool for subnational actors to generate norms, structure cooperation, and influence traditional international institutional processes. Unlike accommodation, emulation does not depend on national and supranational actors giving subnational governments space to participate. Through emulation, subnational governments have been able to define the terms of their engagement, modeling their activities on the international treaties entered into and international organizations established by national governments. The difficulty of emulation, however, is that it is often disconnected from formal institutions and legal processes. The connective fabric between these subnational emulations of international legal process and the international legal and institutional systems themselves is often weak or missing. For example, it is not clear how the Chicago Climate Charter fits into the broader range of agreements addressing climate change. Nor is it clear whether a U20 Communique, handed by a mayor to a president and in turn to the G20 leaders, actually influences international outcomes.

C. Incorporation

Incorporation offers a third form of subnational engagement with international law. Joseph Raz describes incorporation as “legislating or otherwise making a standard into a law of the relevant legal system by a rule that refers to it and gives it some legal effect.”³⁰⁵ For our purposes, incorporation involves the direct reception of international legal rules into municipal or provincial legislation. Incorporation as used here differs notably from the traditional model of international law, in which a nation-state would undertake an international legal commitment and ensure compliance with it by imposing subsequent obligations through domestic legislation on subnational governmental units. In contrast, through incorporation subnational governments skip over that national level of commitment and legislation, incorporating an international rule directly into municipal or provincial law. Notably, subnational governments can do so even where their respective nation-states have not ratified the relevant international legal instrument.

Incorporation of international law offers subnational governments several advantages. First, it gives a municipal or provincial government a ready-made template for a widely accepted legal solution to an issue at the intersection of local and global affairs. Such templates can serve as powerful rule-of-law promotion devices.³⁰⁶ Second, the direct incorporation of international law may give subnational officials the legitimacy, credibility, and even mandate to overcome political resistance. The penumbra of “legitimate authority” of international law can generate “duties of obedience” that may make otherwise impossible subnational action viable.³⁰⁷ Finally, direct incorporation of international law affords subnational governments the chance to side-step

³⁰⁵ Joseph Raz, *Incorporation By Law*, 10 LEGAL THEORY 1, 10 (2004).

³⁰⁶ See “*Brahimi Report*”: *Report of the Panel on United Nations Peace Operations (2000)*, UN CONFERENCES, MEETINGS AND EVENTS, https://www.un.org/en/events/pastevents/brahimi_report.shtml (last visited Feb. 26, 2020); U.N. Secretary-General, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, N. Doc. A/55/305/S/2000/89 (Aug. 17, 2000), <http://undocs.org/A/55/305>. See also Wendy S Betts, Scott N. Carlson, & Gregory Gisvold, *The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT’L L. 371, 383 (2000).

³⁰⁷ Samantha Besson, *The Authority of International Law-Lifting the State Veil*, 31 SYDNEY L. REV. 343, 344 (2009).

national authorities that have either failed to ratify the relevant rule of international law or have otherwise blocked its implementation. This is particularly valuable where there is significant normative divergence between national and subnational governments or in countries like the United States where international legal commitments are often non-self-executing and relevant domestic implementing legislation may be lacking.³⁰⁸

i. The Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW]

Municipal authorities, particularly in the United States, have aggressively incorporated international human rights for women into local legislation. CEDAW entered into force on September 3, 1981 and serves as a template for these incorporation efforts.³⁰⁹ As of March 2018, the CEDAW has been ratified by 189 UN member states. While President Jimmy Carter signed CEDAW in 1980, the US has failed to ratify the treaty.³¹⁰ The significance of CEDAW in protecting women's rights coupled with the US failure to ratify the convention, has led US cities to look for alternative mechanisms to bring the CEDAW commitments home. In 1998 San Francisco became the first city to unilaterally adopt an ordinance reflecting the key principles of CEDAW. Seeking to "make the global local," San Francisco's Department on the Status of Women drafted municipal legislation building on CEDAW. Chapter 33A of San Francisco's Administrative Code is titled "Local Implementation of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women"³¹¹ and includes most of the key applicable provisions of the international legal treaty. In an effort to ensure effective monitoring and compliance, San Francisco established an implementation and reporting task force to track the city's progress.³¹²

The US continued failure to ratify CEDAW coupled with the success of San Francisco's efforts led to the establishment of the "Cities for CEDAW" campaign in 2014. The campaign advances and supports city governments' efforts to incorporate CEDAW into binding local ordinances.³¹³ A draft resolution produced by Cities for CEDAW in cooperation with the United States Conference of Mayors affirms: "City and County governments have an appropriate and legitimate role in affirming the importance of international law in communities as universal norms and to serve as guides for public policy."³¹⁴ The resolution sets clear goals for "local

³⁰⁸ See, e.g., Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law*, 1 CHI. J. INT'L. L. 327 (2000).

³⁰⁹ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf> [hereinafter CEDAW].

³¹⁰ CEDAW, *supra* note 309. The Senate Foreign Relations Committee voted in July 2002 to recommend ratification of CEDAW but the treaty has never come before the full Senate for the requisite vote. *A Fact Sheet on CEDAW: Treaty for the Rights of Women*, AMNESTY INT'L (Aug. 25, 2005), https://www.amnestyusa.org/files/pdfs/cedaw_fact_sheet.pdf.

³¹¹ S.F., Cal., (1998) §12K, <http://sfgov.org/dosw/cedaw-ordinance>. Today it is found at Chapter 33A, https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_admin/0-0-0-59862

³¹² *Id.* at § 33A.

³¹³ *Welcome to the Cities for CEDAW Weblog*, CITIES FOR CEDAW, <https://citiesforcedaw.wordpress.com/welcome-to-the-cities-for-cedaw-weblog/> (last visited Feb. 26, 2021).

³¹⁴ *Id.*

CEDAW ordinance[s]” that should include” three standards: a gender analysis of city departments and commissions, an oversight body to ensure that appropriate and timely actions are taken, and funding to support the implementation of the principles of CEDAW.”³¹⁵ Cities for CEDAW also provides technical assistance, including a model ordinance, for cities drafting their own municipal legislation.³¹⁶

Cities for CEDAW has been highly effective in promoting city incorporation of the Convention. In 2004 Los Angeles announced a new executive directive, calling on all LA city departments to implement CEDAW’s provisions, culminating in a formal ordinance.³¹⁷ Subsequently, 71 counties and municipalities have passed CEDAW ordinances.³¹⁸ Nine cities and counties across the US have passed CEDAW-specific ordinances, including Cincinnati, OH; Honolulu, HI; Los Angeles, CA; Miami-Dade County, FL; Pittsburgh, PA.³¹⁹ A further sixty-one local jurisdictions have either enacted a resolution affirming support for CEDAW principles or made clear an intent to do so —notably including New York, Philadelphia, Houston, Washington, and Boston.³²⁰

US states have joined these CEDAW incorporation efforts. In February 2018, the California Senate affirmed statewide support of CEDAW and put forward a draft resolution endorsing it.³²¹ In August 2018, Hawaii became the first state to pass a CEDAW resolution in every county of the state.³²² The Hawaii legislation, for example, decries the fact that the US is in the company of Sudan and Iran in failing to ratify CEDAW. It notes that “adoption of [CEDAW] as local law has proven effective in addressing the barriers that reduce the quality of life and equity of opportunity for women and girls.” The legislation “affirm[s] the principles of [CEDAW]” and mandates action by state authorities to advance the rights of women.³²³

ii. *The Convention on the Rights of the Child*

³¹⁵ *Resolution Supporting Cities for CEDAW Initiative by the United States Conference of Mayors and Support of Individual Cities Passing Resolutions and Ordinances to Implement the Principles of the UN Convention on the Elimination of all Forms of Discrimination Against Women at the Local Level*, UNITED STATES CONFERENCE OF MAYORS (2014), <https://citiesforcedaw.files.wordpress.com/2014/06/cedaw-uscm-resolution-draft-52014.pdf>.

³¹⁶ *Local Implementation of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, UNITED STATES CONFERENCE OF MAYORS (2017), <http://citiesforcedaw.org/wp-content/uploads/2020/03/2017-09-15-cedaw-ordinance-template-3.docx>

³¹⁷ Cities for CEDAW: A Campaign the Make the Global Local, http://citiesforcedaw.org/wp-content/uploads/2017/01/CEDAW-toolkit_May-2016.pdf; *Cities for CEDAW: Promoting Women’s Equality in Your Community*, UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA 4 (year) <https://www.intermix.org/cedaw/UNAWomenCEDAWToolkit.pdf>.

³¹⁸ Austin Ruse, *Feminists Want American Cities to Support UN CEDAW Treaty Claiming a “Right” to Abortion*, LIFENEWS.COM (Aug. 16, 2018, 4:14 PM), <https://www.lifenews.com/2018/08/16/feminists-want-american-cities-to-support-un-cedaw-treaty-claiming-a-right-to-abortion/>.

³¹⁹ <http://citiesforcedaw.org/resources/>

³²⁰ *Id.*

³²¹ See S. Con. Res. 78, 2017-2018 Reg. Sess. (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SCR78.

³²² *Hawai’i First to Pass CEDAW Legislation in Every County*, BIG ISLAND NOW (Aug. 12, 2018, 10:30 AM), <http://bigislandnow.com/2018/08/12/hawaii-first-to-pass-cedaw-legislation-in-every-county/>.

³²³ H.R. Res. 88, 2016 Leg., 28th Sess. (Haw. 2016), https://www.capitol.hawaii.gov/session2016/bills/HR88_.HTM.

The success of the Cities for CEDAW campaign has spurred similar efforts among US cities and municipalities to incorporate the UN Convention on the Rights of the Child [CRC]. The CRC is the first international treaty to protect children through the establishment of comprehensive standards for health care, education, and legal and social rights in addition to articulating more basic needs such as the right to free expression and the right to relax.³²⁴ Entering into force in September 1990,³²⁵ it has quickly become the most widely ratified international human rights treaty, with the glaring exception of the United States.³²⁶ Hence, cities and states have seen an opportunity, to sidestep Washington and incorporate the CRC directly into municipal and state law.

New York led the way, passing legislation in support of the CRC in 1989 as part of a broad, but failed, effort to secure US ratification of treaty.³²⁷ New York is among nine US cities and five US states that have adopted resolutions in support of the treaty.³²⁸ Chicago has joined New York as a leader in advancing the goals of the CRC through municipal legislation. The “City of Chicago Resolution Adopting the UN Convention on the Rights of the Child” commits “the Mayor and members of the City Council of Chicago ... [to] advance policies and practices that are in harmony with the principles of the Convention on the Rights of the Child in all city agencies and organizations that address issues directly affecting the City's children.”³²⁹ In an effort to ensure the city remains accountable to this commitment, Chicago became a “UNICEF Child Friendly City,”³³⁰ with reporting and monitoring obligations. To expand the network of cities committing directly to CEDAW through municipal legislation, the Chicago City Council partnered with Northwestern Law School to publish a toolkit to assist other municipalities in undertaking similar legislative action.³³¹

iii. *Quebec Charter of Human Rights and Freedoms and Montreal Charter of Rights and Responsibilities*

³²⁴ Convention on the Rights of the Child, 1577 U.N.T.S. 3 (1989), https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_united_nations_convention_on_the_rights_of_the_child.pdf?_ga=2.164262391.951365319.1539263228-206262269.1539263228.

³²⁵ *Id.*

³²⁶ How We Protect Children’s Rights with the UN Convention on the Rights of the Child, UNICEF, <https://www.unicef.org.uk/what-we-do/un-convention-child-rights/> (last visited. Feb. 26, 2021).

³²⁷ Toolkit for the Adoption of the Convention on the Rights of the Child by City Councils and State Legislatures, BLUHM LEGAL CLINIC, NW. UNIV. SCHOOL OF L. 8 (Nov. 2009), <http://www.law.northwestern.edu/legalclinic/cfjc/documents/crc-toolkit-11-2009.pdf> [hereinafter Toolkit for CRC].

³²⁸ *Id.*

³²⁹ City of Chicago Resolution Adopting the UN Convention on the Rights of the Child (Chi. 2009), <http://www.law.northwestern.edu/legalclinic/cfjc/documents/ChicagoCityCouncil-Resolution.pdf>.

³³⁰ *Id.*

³³¹ Toolkit for the Adoption of the Convention on the Rights of the Child by City Councils and State Legislatures, BLUHM LEGAL CLINIC, NW. UNIV. SCHOOL OF L. 8 (Nov. 2009), <http://www.law.northwestern.edu/legalclinic/cfjc/documents/crc-toolkit-11-2009.pdf> [hereinafter Toolkit for CRC].

Quebec and Montreal have joined this path of direct incorporation of international human rights instruments into provincial and municipal legislation. The Quebec Charter of Human Rights and Fundamental Freedoms offers an early Canadian example. The provincial law was enacted in June 1976 and is a “fundamental law” in the province.³³² While the Charter is essentially a provincial bill of rights, it very consciously draws on international human rights law. Specifically, it incorporates many of the provisions enumerated in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.”³³³ The legislative history of the Charter suggests that provincial officials were inspired by the negotiation of the two international human rights Covenants that were, at that time, being drafted.³³⁴ The text of the Charter is forward leaning for its time, enumerating key internationally recognized human rights and establishing both a provincial Human Rights Commission and a Human Rights Tribunal with the capacity to hear individual complaints.³³⁵ Although not a direct copy and paste of an existing treaty, the Quebec Charter demonstrates the potential for a provincial government to pool international legal norms into a broad piece of provincial legislation, thereby domesticating international human rights law.

The Montreal Charter of Rights and Responsibilities exemplifies similar efforts at the municipal, rather than provincial, level. The Charter was enacted in January 2006 and frames itself as a “social contract that calls for the concrete commitment of Montreal...”³³⁶ to international human rights norms. It takes the form of a municipal by-law, binding on all Montreal elected officials and city employees.³³⁷ While the Charter cannot serve as the basis for judicial remedy,³³⁸ the Office of the Ombudsman³³⁹ is empowered to ensure local compliance, and has been granted exceptional jurisdiction “to intervene and investigate decisions that were voted by City Council, the Executive Committee or a Borough Council.”³⁴⁰

The Charter takes a wider approach to human rights incorporation than that used by the US. Rather than directly incorporating a single international human rights treaty, it commits the city to the range of both civil & political and social & economic rights. Its preamble references the Universal Declaration of Human Rights; the United Nations World Conference on Human

³³² *Charter of Human Rights and Freedoms*, COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE QUEBEC, <https://www.cdpcj.qc.ca/en/your-rights/the-laws-protecting-your-rights/charter> (last visited Feb. 26, 2021).

³³³ Colleen, Sheppard, *The Promise and Practice of Protecting Human Rights: Reflections on the Quebec Charter of Human Rights and Freedoms*, MÉLANGES PAUL-ANDRÉ CRÉPEAU, (YVON BLAIS) 641, 648 (1997).

³³⁴ *Id.*

³³⁵ *Id.* at 650-663.

³³⁶ *Montreal Charter of Rights and Responsibilities* (2006) (Can.), https://ville.montreal.qc.ca/pls/portal/docs/page/charte_mtl_fr/media/documents/charte_montrealaise_english.pdf

³³⁷ *Montreal Charter of Rights and Responsibilities*, OMBUDSMAN DE MONTRÉAL, <https://ombudsmantemontreal.com/en/our-services/montreal-charter-of-rights-and-responsibilities> (last visited Feb. 26, 2021).

³³⁸ *Montreal Charter of Rights and Responsibilities*, supra note 336, at §86.1.

³³⁹ *The Ombudsman de Montréal in a Nutshell*, OMBUDSMAN DE MONTREAL (2011) <https://ombudsmantemontreal.com/en/about-us/in-a-nutshell>.

³⁴⁰ *Montréal Charter of Rights and Responsibilities*, OMBUDSMAN OF MONTREAL (2011), <https://ombudsmantemontreal.com/en/our-services/montreal-charter-of-rights-and-responsibilities>.

Rights; and the Convention on the Rights of the Child³⁴¹ The Charter is structured around seven fundamental themes: democracy; economic and social life; cultural life; recreational, physical activities and sports; environment and sustainable development; safety; municipal services.³⁴² In addressing each of these themes, the Charter invokes international law and adapts it to the municipal context. For example, ICCPR Article 25, which provides that “Every citizen shall have the right ... to take part in the conduct of public affairs...” is translated into several Charter provisions, including Article 15, which states: “Citizens exercise their voting rights and participate, within their means, in Montreal’s affairs... and may respectfully express informed opinions in view of influencing decisions.”

D. Invocation

Invocation offers a fourth pathway for subnational engagement with international law. Invocation occurs when a city or provincial government references an existing rule of international law to advance its own political or policy agenda. In contrast with incorporation, invocation does not involve the passing of local legislation to codify the relevant rule of international law. Instead, through invocation, subnational governments reference an external rule of international law as a political or bargaining tool. At times, invocation involves calling out a national government for failure to comply with international legal obligations. At other times, subnational governments invoke international law in support of their own local policies. Subnational governments use invocation as both a shield and a sword. As a shield, invocation provides subnational governments with a political and policy tool to resist actions by superior governance bodies with which they disagree. As a sword, invocation facilitates subnational governments engaging in criticism of foreign governments.

The invocation of international law by subnational governments, whether as a sword or as a shield, fits with several political logics. Perhaps most importantly, invocation can legitimate a subnational government’s policy preference. As Martha Finnemore and Katherine Sikkink explain, “international legitimation is important insofar as it reflects back on a government’s domestic basis of legitimation and consent and thus ultimately on its ability to stay in power.”³⁴³ Second, invocation can position the subnational government as part of a broader group which shares the policy preference, generating senses of “conformity” and “esteem.”³⁴⁴ By demonstrating that their behavior confirms with this international rule, subnational governments can offer what Robert Axelrod calls a “social proof” of belonging.³⁴⁵ Third, the invocation of international law may impact national governments’ policy choices. When international law is invoked as a shield, the vertical transnational legal process may put pressures on national

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L. ORG. 887, 903 (1998).

³⁴⁴ *Id.*

³⁴⁵ Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095, 1105 (1986).

governments.³⁴⁶ When used as a sword in targeted “naming and shaming” efforts, it can have “collateral consequences”³⁴⁷ similar to traditional international sanctions.³⁴⁸

i. Invocation as a Shield: US “Sanctuary Cities” Saga

Perhaps the most visible use of international law as a shield arises in the context of US sanctuary city litigation in response to President Trump’s crackdown on undocumented immigrants. The term “sanctuary city” is subject to significant definitional ambiguity, but generally refers to municipal government protection of undocumented aliens in the face of national efforts for deportation.³⁴⁹ So called sanctuary cities may, for example, prohibit the use of local funds to assist Immigration and Customs Enforcement (“ICE”) “in enforcing federal civil immigration law,” bar “local officials [from] requesting or obtaining individuals immigration status,” and impose “a requirement that ICE provide a judicial criminal warrant to hold undocumented persons or take them into federal custody.”³⁵⁰ In short, sanctuary cities have made a policy choice not to use local resources to facilitate federal enforcement of immigration law. Well over 300 US cities, counties, and states have committed to follow sanctuary city policies in some way.³⁵¹

Although sanctuary city policies are entirely governed by US domestic law, many US cities have used international law as a shield in advocating for their protection of undocumented aliens in the face of federal enforcement activity.³⁵² One study links Philadelphia’s sanctuary city policies to its Quaker heritage and “a preexisting set of transnational solidarity movements supporting human rights movements in ... Latin America.”³⁵³ With this historical legacy, “the work of sanctuary continues as a project of promoting and protecting human rights.”³⁵⁴ San Francisco’s original 1989 ‘City of Refuge Ordinance’ adopted by the city’s Human Rights

³⁴⁶ Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 204 (1996). Through the transnational legal process, “transnational actors interact, ... creat[ing] patterns of behavior and generat[ing] norms of external conduct.” *Id.*

³⁴⁷ Oona A. Hathaway, *Between Power and Principle: an Integrated Theory of International Law*, 72 U. CHI. L. REV. 492, 496 (2005) (noting that “treaty violations have “collateral consequences” that “arise from the anticipated reactions of” other actors to a rule violation and “affect the state’s material and other interests.”).

³⁴⁸ Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT’L. ORG. 689 (2008) (discussing the ways in which naming and shaming can influence compliance).

³⁴⁹ *The Sanctuary Cities Debate Explained*, PERRY WORLD HOUSE (May, 2020), at 8, <https://drive.google.com/file/d/1t3ThglEgeXybbN17qKjNWB194LTmer7l/view>.

³⁵⁰ *Id.* at 9.

³⁵¹ Jessica M. Vaughan & Bryan Griffith, *Map: Sanctuary Cities Counties and States*, CTR. FOR IMMIGR. STUD. (Oct. 20, 2020), <https://cis.org/Map-Sanctuary-Cities-Counties-and-States>.

³⁵² See Juan Luis Manfredi-Sánchez, *Sanctuary Cities: What Global Migration Means for Local Governments*, 9 SOC. SCI. 1 (2020).

³⁵³ Dominic Vitiello, *Sanctuary and the City*, METROPOLE, <https://themetropole.blog/2019/03/06/sanctuary-and-the-city/> (last visited Feb. 26, 2021).

³⁵⁴ *Id.*

Commission (HRC), with explicit links to the international human rights movement.³⁵⁵ Los Angeles’ sanctuary city resolution declares the city a “City of Sanctuary, protecting the human rights of all our residents.”³⁵⁶ Mayors have frequently referenced international human rights obligations in defending sanctuary policies. Newark mayor Ras Baraka, for example, describes the city’s sanctuary policy as a “fight to protect these people’s basic human rights.”³⁵⁷ In each of these examples, “using human rights law ... provides a new lever for local authorities who have struggled to assert their positions vis-à-vis national authorities.”³⁵⁸

The Trump administration challenged these sanctuary city policies, threatening to “withhold funds from sanctuary cities unless they comply with specific conditions that favor ICE.”³⁵⁹ A series of lawsuits, largely focused around preemption doctrines in US law and the conditionality of federal funding, have tested the legality of both sanctuary city policies and federal efforts to limit them.³⁶⁰ The results are mixed and the domestic legal issues at the heart of these cases are outside the scope of this paper.³⁶¹ While cities themselves have largely limited their legal argument to technical questions under US law,³⁶² several amicus briefs filed in these cases have invoked international human rights law. One brief filed on behalf Human Rights Watch and the Center for Constitutional Rights in support of Miami’s sanctuary policies argues that efforts to disrupt city’s sanctuary policies “violate[] US obligations under the Convention on the Elimination of All Forms of Racial Discrimination [CERD] and the International Covenant on Civil and Political Rights” and thereby “run[] afoul of national human rights obligations.”³⁶³ International law thus becomes a tool of political and legal resistance when it is invoked against a city’s own national government.

US cities are not alone in these efforts. The city of Utrecht in the Netherlands has sought to protect asylum seekers from national deportation efforts, citing the city’s “duty of care” under

³⁵⁵ Mortiz Baumgaertel & Barbara Oomen, *Pulling Human Rights Back In? Local Authorities, International Law and The Reception of Undocumented Migrants*, 51 J. LEGAL. PLURALISM & UNOFFICIAL L. 172 (2019).

³⁵⁶ Dakota Smith & Matthew Ormseth, *It Took A While, but L.A. Formally Declares Itself a ‘City of Sanctuary’*, L.A. TIMES (Feb. 8, 2019), <https://www.latimes.com/local/lanow/la-me-ln-city-of-sanctuary-cedillo-20190208-story.html>.

³⁵⁷ Press Release, City of Newark, Statement by Mayor Mayor Ras J. Barakas, (Feb. 16, 2020), <https://www.newarknj.gov/news/mayor-baraka-defends-sanctuary-cities>.

³⁵⁸ Baumgaertel & Oomen, *supra* note 355.

³⁵⁹ *The Sanctuary Cities Debate Explained*, PERRY WORLD HOUSE (May, 2020), at 11, <https://drive.google.com/file/d/1t3ThglEgeXybbN17qKjNWB194LTmer7l/view>.

³⁶⁰ *See Major Developments Relating to “Sanctuary” Cities Under the Trump Administration*, AM. C.L. UNION. (2021), <https://www.aclu.org/other/major-developments-relating-sanctuary-cities-under-trump-administration> (providing a timeline of the key cases).

³⁶¹ Annie Correal, *Trump Can Withhold Millions from ‘Sanctuary’ States, Court Rules*, N.Y. TIMES (Feb. 26, 2020), <https://www.nytimes.com/2020/02/26/nyregion/sanctuary-cities-funding.html>. Previously, three other appellate courts had sided with cities in favor of their sanctuary policies. *The Sanctuary Cities Debate Explained*, PERRY WORLD HOUSE (May, 2020), at 11, <https://drive.google.com/file/d/1t3ThglEgeXybbN17qKjNWB194LTmer7l/view>.

³⁶² Brief for appellees, *New York v. Department of Justice*, 951 F.3d 84 (2d Cir. 2020), (No. 19-267), available at https://ag.ny.gov/sites/default/files/byrne_jag_-_state_appellees_response_brief_as_filed.pdf.

³⁶³ Press Release, Ne. U. Sch. L., Professor Martha Davis Represents International Human Rights Groups in Florida Sanctuary Cities Lawsuit (Dec. 10, 2019) (available at <https://www.northeastern.edu/law/news/announcements/2019/davis-sanctuary-cities.html>).

international law.³⁶⁴ Similarly, when Italy passed a new restrictive immigration decree in 2018, Palermo Mayor Leoluca Orlando, invoked international law in justifying his city’s resistance. In violation of the national decree, Orlando has continued to grant residency rights to immigrants, noting that Italy’s national policies “violate the migrants’ human rights.”³⁶⁵ A number of Italian states have now initiated lawsuits challenging the national immigration decree on the grounds that it violates international and domestic law.³⁶⁶ As a result of these invocations of international law, “national authorities find themselves increasingly under pressure to live up to legal and moral standards that they have so far successfully avoided.”³⁶⁷

ii. *Invocation as a Sword: Subnational “Sanctions”*

As cities and provinces have become more vocal actors in foreign affairs, they have also more regularly voiced public criticisms of foreign governments, often framing those critiques around a foreign government’s failure to comply with international law. In so doing, they use international law as a sword to tarnish the reputation of the foreign government and, potentially, influence its compliance. Even where cities and provinces lack the traditional sanctions tools of trade, aid, and diplomacy,³⁶⁸ they recognize that their criticisms of national government policies can impose reputation costs and may result in a “social outcasting” of the rule violator.³⁶⁹

Two prominent examples demonstrate both the potential of invocation as a sword through the use of subnational sanctions, and the domestic law limitations on such efforts. Cities were active participants in the imposition of sanctions on South Africa for its conduct of Apartheid. Starting in the 1960s, a number of UK cities imposed boycotts on South African products. The Strathclyde Regional Council in Scotland, for example, imposed such a ban in 1975.³⁷⁰ In the early 1980s, the Local Authorities Against Apartheid movement was launched, ultimately leading Sheffield, Cambridge, Newcastle, Glasgow and most London Boroughs to declare “Apartheid Free Zones” and divest from pension investments in South Africa. In 1981, Sheffield adopted a Declaration on Apartheid, casting South Africa’s conduct as “illegal” and imposing direct sanctions through rules barring “purchasing goods which originate in South Africa” and “withdraw[al of] investments held by the Council in companies with South African interests.”³⁷¹

³⁶⁴ Baumgaertel & Oomen, *supra* note 355.

³⁶⁵ Jason Horowitz, *Italy’s Crackdown on Migrants Meets a Grassroots Resistance*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/world/europe/italy-mayors-migrants-salvini-security-decree.html>.

³⁶⁶ *Id.*

³⁶⁷ Baumgaertel & Oomen, *supra* note 355.

³⁶⁸ Navin A. Bapat & Bo Ram Kwon, *When are Sanctions Effective? A Bargaining and Enforcement Framework*, 69 INT’L. ORG. 131 (2015).

³⁶⁹ Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L. J. 252 (2011).

³⁷⁰ *Local Authorities Against Apartheid*, ANTI-APARTHEID MOVEMENT ARCHIVES, <https://www.aamarchives.org/who-was-involved/local-authorities.html> (last visited Feb. 27, 2021).

³⁷¹ *Ias01 The Sheffield Declaration Against Apartheid*, ANTI-APARTHEID MOVEMENT ARCHIVES, <https://www.aamarchives.org/archive/history/boycott-movement/las01-sheffield-declaration-against-apartheid.html> (last visited Feb. 27, 2021). For other UK city resolutions relating to South Africa, see *Local Authorities and their Involvement with Anti-Apartheid*, ANTI-APARTHEID MOVEMENT ARCHIVES, <https://www.aamarchives.org/who-was-involved/local-authorities.html#click-here-for-local-authorities-documents-pictures> (last visited Feb. 27, 2021).

The City of London recognized the unique leverage its banking sector could generate to sanction South Africa, with the City Council actively “discourage[ing] economic links between Greater London and Apartheid South Africa.”³⁷² By 1985, 120 local governments in the UK had imposed some form of sanction on South Africa.

US cities were quick to follow suit. Los Angeles, for example, instituted several ordinances that required the city to halt buying goods and services from the government of South Africa and allowed the city to refuse to contract with companies who had business ties there.³⁷³ Over 100 US cities and states—from Boston to San Francisco, Topeka to Camden—eventually adopted similar policies.³⁷⁴ These municipal actions were found to impact \$1.5 billion in investments and significantly increased the growing pressure on South Africa to end its illegal practice of Apartheid.³⁷⁵

Yet, US cities faced significant pushback from the federal government as they invoked international law to impose targeted sanctions. The Reagan administration brought suit against Baltimore, arguing that the city’s South Africa sanctions violated the Commerce Clause.³⁷⁶ Ultimately, the Supreme Court found sufficient local interest in the allocation of the city’s pension funds as a means of condemning racial discrimination and held that “the Ordinances’ burden on the interstate sale of securities does not outweigh these unique and profound local concerns.”³⁷⁷ While the Baltimore ordinance survived the Reagan administration challenge, not all cities were equally savvy. New York’s ordinance, which sought to withhold contracts from companies doing business in South Africa, was repealed by Mayor Koch after the US Justice Department threatened to cut the city’s federal transportation funding.³⁷⁸ Modern global cities have built the economic clout to impose meaningful financial sanctions for violations of international law, but their freedom to do so may well be circumscribed by domestic law.

US states have also tested their capacity and authority to impose sanctions for violations of international law. In 1996 Massachusetts passed the “Burma law” in “response to Myanmar’s military government refusal to recognize the results of democratic elections held in 1990 and

³⁷² *Ias03 Greater London Council Declaration Against Apartheid*, ANTI-APARTHEID MOVEMENT ARCHIVES, <https://www.aamarchives.org/archive/history/boycott-movement/las03-greater-london-council-declaration-against-apartheid.html> (last visited Feb. 27, 2021).

³⁷³ Cynthia R. Fischer, *Federal Preemption and the South African Sanctions: A Survival Guide for States and Cities*, 10 LOY. L.A. INT’L & COMP. L. REV. 693 (1988).

³⁷⁴ Brentin Mock, *When Cities Fought the Feds over Apartheid*, BLOOMBERG (May 24, 2017), <https://www.bloomberg.com/news/articles/2017-05-24/when-baltimore-battled-the-feds-over-apartheid>; Memorandum Opinion from Charles J. Cooper, Assistant U.S. Att’y Gen., Off. Legal Couns. to Assoc. Att’y Gen., Constitutionality of South African Divestment Statutes Enacted by State and Local Governments (Apr. 9, 1986) (available at <https://www.justice.gov/file/23821/download>) [*hereinafter* Memo on Constitutionality of Divestment Statutes].

³⁷⁵ Memo on Constitutionality of Divestment Statutes, *supra* note 374; Memo Brief for Human Rights Watch et. al. as Amici Curiae Supporting Respondents, City of South Miami, et al., v. Ron Desantis, et al., (2019) (No. 19-cv-22927), <https://www.docketbird.com/court-documents/City-of-South-Miami-et-al-v-Desantis-et-al/Memorandum-Brief-of-Amicus-Curiae/flsd-1:2019-cv-22927-00076-001>.

³⁷⁶ See *Board of Trustees v. Baltimore*, 562 A.2d 720, [pg. #] (4th Cir. 1989); Brentin Mock, *When Cities Fought the Feds Over Apartheid*, BLOOMBERG CITYLAB (May 24, 2017, 10:50 AM), <https://www.bloomberg.com/news/articles/2017-05-24/when-baltimore-battled-the-feds-over-apartheid>.

³⁷⁷ *Board of Tr. v. Baltimore*, *supra* note 376, at [pg. #].

³⁷⁸ Mock, *supra* note 376.

engaging in an ongoing pattern of human rights abuses.”³⁷⁹ The law limited state purchases from firms doing business in and with Burma and led to the blacklisting of 44 US and 281 foreign companies.³⁸⁰ The Burma law’s sponsor described the goal in international legal terms, namely to “expresses the Commonwealth’s own disapproval of the violations of human rights committed by the Burmese government.”³⁸¹ Over the next four years, 24 other municipal and state governments adopted similar legislation targeting Burma for violations of human rights and international law.³⁸² Ultimately, the US government successfully challenged Massachusetts’ Burma law as an interference with federal foreign affairs power. Citing *Zchernig v. Miller* (1968), the Court found that “state laws that have more than an ‘incidental or indirect effect’ on foreign countries and that have ‘great potential for disruption [of] or embarrassment’ in the conduct of U.S. foreign policy violate powers that ‘the Constitution entrusts solely to the Federal Government.’”³⁸³

Despite federal pushback and judicial setbacks, subnational governments have sought to leverage their increased economic power to invoke international law against foreign nations. In addition to the South Africa and Burma examples, cities and US states have adopted similar “measures expressing opposition to Castro’s government in Cuba, ethnic strife and human rights violations in Nigeria, the Chinese occupation of Tibet, Indonesia’s actions in East Timor, and the Swiss banks’ holding of Holocaust victims’ property.”³⁸⁴ Several of these sanctions efforts have led to WTO challenges, not with respect to the authority of cities to impose them, but whether such city ordinances in turn represent violations by the national government of GATT obligations.³⁸⁵

While the Supreme Court decision on Massachusetts’ Burma Sanctions and the WTO cases against the US in relation thereto have curtailed new city and state efforts to impose formal sanctions in the form of purchasing restrictions, subnational governments have become ever more adept in the imposition of reputational sanctions. Reputational sanctions—essentially

³⁷⁹ Peter L. Fitzgerald, *Massachusetts, Burma, and the World Trade Organization: A Commentary on Blacklisting, Federalism, and Internet Advocacy in the Global Trading Era*, 34 CORNELL INT’L L. J. 1, 4 (2001).

³⁸⁰ *Id.* At 6.

³⁸¹ Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38, 46-47 (1st Cir. 1999); Crosby v. Nat’l Foreign Trade Council, 120 S.Ct. 2288 (2000).

³⁸² Fitzgerald, *supra* note 379, at 9.

³⁸³ Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999), *cert. granted*, 68 U.S.L.W. 3353 (U.S. Nov. 29, 1999) (No. 99-474).

³⁸⁴ Fitzgerald, *supra* note 379, at 41 (citing the Brief for the European Communities and their Member States as Amici Curiae, 2000 WL 177175).

³⁸⁵ See Fitzgerald, *supra* note 379, at 36. Challenges are based on purported violations of most favored nation provisions. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. 1, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. Both the European Union and Japan challenged the GATT-compatibility of Massachusetts Burma sanctions. WTO, *United States - Measure Affecting Government Procurement: Request for Consultations by the European Communities*, WT/DS88/1, GPA/D2/1 (June 26, 1997); WTO, *United States - Measure Affecting Government Procurement: Request to Join Consultations: Communication from Japan*, WT/DS88/2 (July 2, 1997). The US federal government was put in the unusual position of having to defend international sanctions imposed by its subnational governments which it was simultaneously challenging in domestic court. Fitzgerald, *supra* note 379, at 40-43. For the EU response, see Brief for the European Communities and their Member States as Amici Curiae, 2000 WL 177175. *Id.* at 41.

statements critical of foreign governments—avoid both domestic and international legal challenges associated with traditional economic sanctions yet can elevate the subnational government’s critique by linking it to an international legal rule. The result may be to tarnish the reputation of the violating state.³⁸⁶

US President Donald Trump received significant criticism by subnational governments in foreign countries for what they framed as violations of international law. In anticipation of Trump’s summer 2018 London trip, a number of UK city officials critiqued his administration’s disregard for international law. The mayor of Sheffield released a statement that Trump was “banned” from the city “for issuing his ridiculous, racist Muslim-ban, for stupidly withdrawing from the Paris Climate Agreement, [and] ... for forcing the imprisonment of children at borders.”³⁸⁷ Invoking international legal norms, London mayor Sadiq Khan linked Trump to “the fascists of the 20th Century,” describing him as a “growing global threat” that undermines hard-won rights and freedoms” and allowed protestors flying a giant Trump baby over London during the visit.³⁸⁸

Israel has also been a target of such reputational sanctions by subnational governments. While serving as Mayor of South Bend, Indiana and running for the Democratic nomination for President, Pete Buttigieg took on Israeli President Benjamin Netanyahu. Specifically, he described the settlement “policies of the Israeli right wing government” as illegal and voiced concerns at “disturbing signs that the Netanyahu government is turning away from peace.”³⁸⁹ Similarly, Scottish National Party President, Michael Russell issued a public statement on twitter and a statement to the Palestinian ambassador condemning Israeli occupation/annexation of any territory in the West Bank as a violation of international law.³⁹⁰

PART V: THE OPPORTUNITY OF SUBNATIONAL ENGAGEMENT WITH INTERNATIONAL LAW

³⁸⁶ Edward M. Iacobucci, *On the Interaction Between Legal and Reputational Sanctions*, 43 THE J. OF LEGAL STUD. 189, [pg #] (2014).

³⁸⁷ Morgan Gstalter, *Mayor of City in England ‘Bans’ Trump*, THE HILL (Jul. 5, 2018, 12:04 PM), <http://thehill.com/homenews/administration/395609-mayor-of-sheffield-england-bans-trump-from-city>; Amanda Erickson, *A British Mayor Wearing a Sombrero has ‘Banned’ Trump From His City*, THE WASH. POST (Jul. 5, 2018, 2:30 PM), <https://www.washingtonpost.com/news/worldviews/wp/2018/07/05/a-british-mayor-wearing-a-sombrero-has-banned-trump-from-his-city/>.

³⁸⁸ Matthew Weaver, *Timeline: Donald Trump’s Feud with Sadiq Khan*, THE GUARDIAN (Jun. 15, 2019, 10:03 PM), <https://www.theguardian.com/us-news/2019/jun/03/timeline-donald-trump-feud-with-sadiq-khan>; Ceylan Yeginsu, *London Mayor Allows ‘Trump Baby’ Balloon for President’s Trip to U.K.*, THE N.Y. TIMES (Jul. 6, 2018), <https://www.nytimes.com/2018/07/06/world/europe/uk-trump-baby-blimp.html>; Stephen Castle & Austin Ramzy, *Trump Won’t Visit London to Open Embassy. His U.K. Critics Say He Got the Message*, THE N.Y. TIMES (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/world/europe/trump-london-embassy-opening.html>.

³⁸⁹ Eliza Relman & John Haltiwanger, *Pete Buttigieg Says US Won’t ‘Help Foot the Bill’ if Israel’s Netanyahu Annexes West Bank Settlements, Setting Himself Apart From 2020 Demcrats*, BUS. INSIDER (Jun. 11, 2019, 3:19 PM), <https://www.businessinsider.com/pete-buttigieg-us-bill-israel-annex-west-bank-settlements-2019-6>.

³⁹⁰ <https://twitter.com/feorlean/status/1277207979272650752>; <https://morningstaronline.co.uk/article/b/snp-rejects-claim-from-msp-over-palestinian-exodus>

Over the past decades, subnational engagement with the international legal system has become frequent, perhaps even ubiquitous. Through accommodation, emulation, incorporation, and invocation, city and provincial governments have been able to gain access—albeit limited—to the processes of international law, commit themselves to international targets, resist the policies of national governments, raise their own profiles, and advance shared interests on transnational threats. As the economic and political power of city and provincial governments continues to increase, transnational threats more directly implicate subnational interests and global responses to those threats more often require coordinated action across multiple levels of governance, there is every reason to expect a continued demand by subnational governments for a seat at the table of international law. While the international legal system has not, as a general matter, warmly welcomed subnational participation, the accommodation, the emulation, incorporation and invocation of international law by subnational governments continues to expand. This subnational engagement with international law offers real opportunities to improve the effectiveness and legitimacy of international law.

i. New Political Energy

The effective functioning of the international legal system requires political energy to overcome the costs of coordination, facilitate commitments, monitor compliance, and enforce rules.³⁹¹ For most of the past seventy-five years, the United States and Europe—independently and collectively—have provided much of that needed political heft.³⁹² Today, the political energy for national leadership of the international legal system is in jeopardy. After four years of the Trump administration, the US finds itself a relative outsider in the international legal order it helped create. Notwithstanding the Biden administration's desire to reengage, the combined effects of exits from multilateral commitments under Trump, China's growing global influence, and a divided US government will continue to limit US leadership capacity.³⁹³ Across the Atlantic, BREXIT, a rising tide of populism and nationalism, and continued economic stagnation is curtailing Europe's capacity to fill the void.³⁹⁴ Globally, the emergence of a multipolar order defined by US-China competition further limits the prospects of transnational cooperation necessary for international law making.³⁹⁵ So too, international institutions find themselves

³⁹¹ See Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 372 (2005). For a review of scholarship on power, see generally Richard H. Steinberg & Jonathan Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64 (2006).

³⁹² William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT'L L. J. 1, 4 (2015).

³⁹³ "A Roadmap for Reentry" explains how a new geostrategic environment for multilateral diplomacy will constrain the Biden administration. William Burke-White, *A Strategic Roadmap for Reentry 2021 and Beyond: U.S. Institutional Commitments in a New Geo-strategic Environment*, BROOKINGS (2021), https://www.brookings.edu/wp-content/uploads/2021/02/fp_20210218_engagement_report_v2.pdf.

³⁹⁴ See, e.g., Matthias Matthijs, *Europe After Brexit: A Less Perfect Union*, FOREIGN AFF. (2017), https://www.foreignaffairs.com/articles/europe/2016-12-12/europe-after-brexit?cid=otr-matthijs-europe_after_brexit-121416&t=1481733730; Bertjan Verbeek & Andrej Zaslove, *Populism and Foreign Policy*, THE OXFORD HANDBOOK OF POPULISM 384 (2017).

³⁹⁵ See Burke-White, *supra* note 392, at 1; MATTHEW HAPPOLD, *INTERNATIONAL LAW IN A MULTIPOLAR WORLD* (Routledge, 2013).

“gridlocked” as a result of both global politics and institutional decay.³⁹⁶ Some have gone so far as to claim that “against this background, any hope of a return to the previous liberal order” that facilitated the effectiveness of international law and was “premised on US power is now extinguished.”³⁹⁷

For international law to remain relevant as a tool to structure international cooperation, advance normative commitments, and address transnational challenges, it will need a source of political energy and a normative agenda beyond national governments. To some degree, the political pressure from non-state actors and the opening of some international legal processes to individuals have imbued international law with a new vitality.³⁹⁸ Subnational governments have the capacity to take this a step further, offering an additional and, perhaps, critical source of both political commitment and normative direction for the international legal system. Part IV documented the range of ways subnational governments are interacting with the international legal system. Evidence from the partial opening of international adjudication to individuals and corporations—through, for example, direct human rights claims at the ECtHR or investment arbitrations—shows that the more actors that have access to the system, the more it will be utilized.³⁹⁹ Even partial access to the international legal system by subnational governments can increase the use of the system and help motivate international lawmaking, adjudication, and compliance.

Cities and provinces use international law because they perceive an alignment between their own interests and international legal norms. Subnational governments are willing and able to expend their own political and economic capital on international law precisely because they believe the international legal system will help them advance their underlying preferences.⁴⁰⁰ For example, when they are accommodated into existing institutions and when they invoke international law, cities and provinces generate pressures for nation-states and international institutions to act through formal channels.⁴⁰¹ When they emulate international law, they can help shape norm evolution and drive normative consensus.⁴⁰² While the participation of cities and provinces in international law will never fully replicate the leadership and commitment of national governments, it offers a promising and much needed supplement thereto.

³⁹⁶ THOMAS HALE, DAVID HELD, & KEVIN YOUNG, *GRIDLOCK: WHY GLOBAL COOPERATION IS FAILING WHEN WE NEED IT MOST* (Wiley, ed., 2013); Mark Copelovitch & Jon CW Pevehouse, *International Organizations in a New Era of Populist Nationalism*, 14 *THE REV. OF INT’L ORG.* 1, [pg. #] (2019).

³⁹⁷ *Survival: Global Politics and Strategy December 2020—January 2021*, 62 *INT’L INST. FOR STRATEGIC STUD.* (2020), <https://www.iiss.org/publications/survival/2020/survival-global-politics-and-strategy-december-2020-january-2021>.

³⁹⁸ See Mette Eilstrup-Sangiovanni & J. C. Sharman, *Enforcers Beyond Borders: Transnational NGOs and the Enforcement of International Law*, 19 *PERSPECTIVES ON POL.* 131, [pg. #] (2019); Robert O. Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 *INT’L ORG.* 457, [pg. #] (2000).

³⁹⁹ Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L. J.* 273, [pg. #] (1997).

⁴⁰⁰ Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 *INT’L ORG.* 513, [pg. #] (1997).

⁴⁰¹ The climate space offers a clear example of this, see William Burke-White, *At Climate Summits, The Urgency From the Streets Must Be Brought to the Negotiating Table*, *BROOKINGS* (Dec. 16, 2019), <https://www.brookings.edu/blog/planetpolicy/2019/12/16/at-climate-summits-the-urgency-from-the-streets-must-be-brought-to-the-negotiating-table/>.

⁴⁰² Murthy, *supra* note 256.

iii. *Enhanced Democratic Legitimacy and Normative Diversity*

The active engagement of subnational governments in the international legal system has the potential to bolster the democratic legitimacy and normative diversity of international law, two important systemic values that can enhance effectiveness. International law has long suffered from a real or perceived lack of democratic legitimacy, criticized for its distance from the people it should ultimately serve by non-representative governments, archaic institutional structures, and a disconnect between national interests and individual ones. As Michael Kirby observes “international law ... does not have legitimacy of democratic endorsement by anyone.”⁴⁰³

The participation of subnational governments in the international legal system offers a potential response. Armin von Bogdandy explains that “the democratic legitimacy of international law” can be “substantially enhanced” “if new forms of civic participation are adopted.”⁴⁰⁴ While Bogdandy’s claim was founded on “enabling the participation of non-governmental organizations (NGOs), as exponents of the international civil society,” subnational governments offer a similar legitimation.⁴⁰⁵ At the subnational level the processes of preference and policy formation afford the governed increased opportunities for direct participation and deliberation. Subnational governments generally represent a smaller number of individuals and often employ more open and transparent representative processes.⁴⁰⁶ So too, subnational governments often attract the engagement of the governed who may believe they can have an impact on issues of direct relevance to their lived experience.⁴⁰⁷ The result is often a closer sense of connection between the government and the governed at local, municipal, or even provincial levels.⁴⁰⁸

Subnational participation also promises to increase the normative diversity of international law by expanding the number and perspective of voices in the system. There are over 10,000

⁴⁰³ Michael Kirby, *Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit*, 98 GEO. L.J. 433, 455 (2009); see also Matthias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT’L L. 907, 907 (2004) (discussing the legitimacy crisis in international law). See Robert Dahl, *Can International Organizations Be Democratic? A Skeptic’s View*, in DEMOCRACY’S EDGES 19 (Ian Shapiro & Casiano Hacker-Cordon, eds., 1999). See also Andrew Moravcsik, *Is There a ‘Democratic Deficit’ in World Politics? A Framework for Analysis*, 39 GOV’T. & OPPOSITION 336 (2004).

⁴⁰⁴ Armin Von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EUR. J. INT’L L. 885, 903 (2004).

⁴⁰⁵ *Id.* at 903.

⁴⁰⁶ See Tina Nabatchi & Lisa Blomgren Amsler, *Direct Public Engagement in Local Government*, 44 AM. REV. PUB. ADMIN. 44, 63S (2014) (noting that in local governance it is possible for “individuals are personally and actively engaged in a process ... to address issues of public importance.”).

⁴⁰⁷ Richard Briffault *Our Localism: Part I--The Structure of Local Government Law*, 90 COLUM. L. R. 1, 3 (1990) (listing the issues of focus for local governments).

⁴⁰⁸ Of course, there will be exceptions to this rule, where cities are themselves unrepresentative or act as an echo chamber for national policies as seems to be the case with some Chinese cities today. Ian Klaus, *The State of Diplomacy*, URBANISATION (2020), <https://journals.sagepub.com/doi/abs/10.1177/2455747120913186>

cities in the world with populations greater than 50,000.⁴⁰⁹ Even if only a small percentage of them chose to engage with international law, doing so will exponentially increase the number of voices in the system, promoting pluralism. There are, of course, drawbacks to such an increase in the participants in international legal process as more voices will add complexity and may limit consensus. To reap the benefits of this new pluralism, subnational engagement must be carefully structured and limited by the functional contributions subnational actors can offer.

Expanding the participation of subnational governments also promotes pluralism by shifting the substantive issues of relevance to international law. A legal system comprised exclusively of states is, not surprisingly, focused on issues of state concern. Even where processes of representative democracy translate subnational interests into a nation's foreign policy, local interests are often attenuated by the time they reach the international level. More direct engagement of the subnational will result in new champions for issues of predominantly local concern—from education to transportation, from the assimilation of migrants to the local climate adaptation. Even with respect to traditional issues of international law, subnational governments will have alternate perspectives, changed priorities, and different issue framings. The result will be an increase in normative diversity and pluralism in the rules and norms of international law. As I have argued elsewhere, the “respect of legitimate difference inherent in such a pluralist conception may actually enhance the effectiveness of international law by increasing the legitimacy and political acceptability of international legal rules.”⁴¹⁰

iv. New Opportunities for Commitment

Subnational participation in international law—even without full international legal personality—opens new pathways for commitment to legal rules, particularly important with respect to legal rules with universal aspirations—such as international human rights—and for rules designed to address transnational threats—such as climate change—that require broad, coordinated responses. So too, such opportunities for commitment can help ameliorate the difficulties of traditional ratification of international legal rules in politically divided societies or in governmental structures, such as the US, where high barriers to legal ratification.

The direct engagement of subnational governments offers two distinct new pathways to commitment. As discussed in Part IV above, when subnational governments emulate international law through agreements like the Chicago Climate Charter or the California-Quebec Cap and Trade Agreement, they commit themselves to international legal rules and to further policies that advance those rules. Even while such agreements are not formally treaties nor enforceable through international adjudication, they represent a deliberate, public, and visible commitment to an international norm. A strand of scholarship has shown that such public debate and deliberative process of commitment—rather than the threat of adjudication—that often makes the greatest contribution to a state's compliance.⁴¹¹ So too, the greater recognition of the

⁴⁰⁹ Gregory Scruggs, *There Are 10,000 Cities on Planet Earth. Half Didn't Exist 40 Years Ago*, NEXT CITY (Feb. 12, 2020), <https://nextcity.org/daily/entry/there-are-10000-cities-on-planet-earth-half-didnt-exist-40-years-ago>.

⁴¹⁰ William Burke-White, *International Legal Pluralism*, MICH. J. INT'L L. 25 963, 978 (2003).

⁴¹¹ BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

status of such commitments can enhance normative consensus and offer opportunities for monitoring and other managerial forms of compliance enhancement.⁴¹²

The incorporation of international legal rules into municipal and provincial statutes offers another, underappreciated, pathway to commitment. While such incorporation is, fundamentally, part of domestic rather than international law, it allows subnational governments to make binding commitments to international legal norms. Depending on domestic legal structures, those commitments may even be enforceable by individuals against city and provincial governments.⁴¹³ Municipal and provincial incorporation of international law will never replace traditional ratification and national implementing legislation, but again it offers a promising pathway toward both normative consensus and legal compliance.

v. *New Pathways for Implementation*

Subnational participation also opens new pathways for implementation of international legal commitments. The presence of subnational governments in international legal processes can inform nation-state participants of the importance of local, municipal, and provincial implementation of international legal rules. For example, at the COP climate negotiation, the vigorous activity of subnational governments in side-events alongside the formal negotiations keeps subnational implementation high on negotiators' agendas.⁴¹⁴ That awareness can lead to the development and articulation of rules that recognize and harness the authorities and powers of subnational government as partners in rule implementation. On issues ranging from human rights to climate change, where subnational action has direct bearing on ultimate compliance, subnational action can facilitate commitment, even in the face of reluctant national governments. Subnational participation also offers the prospect of local experimentation, which can lead to more efficient and effective implementation.⁴¹⁵

A bold step further in implementation could involve international law directly imposing duties on cities and provinces. Traditionally, international law has left the regulation of subnational conduct to the nation-state.⁴¹⁶ Shifting that approach could place direct international legal obligations on subnational governments as well as national governments. While numerous treaties contemplate that subnational governments will have to comply with international legal

⁴¹² On managerial compliance, see ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1998).

⁴¹³ Winston H. Hathaway, *Legal Liability of Municipalities and Officials*, 47 J. AM. WATER WORKS ASS'N 389 (1955).

⁴¹⁴ Burke-White, *supra* note 243.

⁴¹⁵ See Michele Acuto, *City Leadership in Global Governance*, 19 GLOB. GOVERNANCE: A REV. MULTILATERALISM & INT'L ORGS. 481 (2013); David J. Gordon, *Between local innovation and global impact: cities, networks, and the governance of climate change*, 19 CAN. FOREIGN POL'Y J. 288 (2013). On democratic experimentalism, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998). See also, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J. dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

⁴¹⁶ The 1936 Trail Smelter Arbitration, for example, found Canada responsible for the company's transnational harms, observing that it was Canada's responsibility to ensure the company's conduct conformed with the country's international legal obligations. *Trail Smelter Case (U.S. v. Can.)*, 3 R.I.A.A. 1905 (1941).

rules, they rarely if ever impose those obligations directly. The Paris Climate agreement, for example, recognizes the need for subnational participation, but does not impose obligations directly on the subnational.⁴¹⁷ Expanded subnational participation could facilitate such direct obligations or allow for the articulation of tailored subnational actions as constituent elements of a nation-state's overall obligations.

This approach could also extend to imposing liability on subnational governments. The ICSID system has already taken a step in this direction in investor-state arbitration, allowing states to designate subnational governmental units as potential defendants in investment claims.⁴¹⁸ The goal of the ICSID model is to put direct liability on the governmental entity best positioned to alleviate or remedy the harm, with the national government serving as a liability backstop. Such an approach need not upend the basic rule, articulated in Article 4 of the Articles on State Responsibility that the state ultimately bears responsibility for any state organ.⁴¹⁹ Through mechanisms similar to designations under the ICSID Convention or through even more direct participation by subnational governments, multiple layers of legal responsibility can be established that hold both the subnational government and the national government responsible, creating new incentives for compliance.

VII: CONCLUSION: THREE PATHS FORWARD FOR INTERNATIONAL LAW AND THE SUBNATIONAL

Expanded participation by subnational governments offers intriguing prospects for international law. It may imbue international law with much-needed new political energy. It can help address the democratic deficit, while simultaneously promoting normative pluralism. It offers new mechanisms for commitment and new opportunities for implementation. That said, participation of subnational governments in international law is, by no means, a panacea. One driver of international law's traditional effectiveness is its limited membership of just under 200 states. Expanding the number of actors formally recognized within the system threatens potentially impossible coordination challenges.⁴²¹ So too, greater subnational participation might undermine the sovereign equality of international legal actors, destabilizing the system.⁴²² While the goals and interests of the subnational actors that have chosen to engage the international legal system to date are largely aligned with the normative commitments of international law, there is no guarantee that alignment will continue. Recognition of subnational voices could well alter the

⁴¹⁷ Paris Agreement, Dec. 12, 2015 art. 7.2, U.N. Doc. FCCC/CP/2015/10/Add. 1; *Id.* at 11.2.

⁴¹⁸ The ICSID Convention allows "subdivisions or agencies" of a contracting state to consent to jurisdiction with the approval of the State in question. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25(3), Mar. 18, 1965, 575 U.N.T.S. 159; Douglas Pivnichny, *Treaty-Based Claims Against Subdivisions of ICSID Contracting States*, 16 Wash. U. Glob. Stud. L. Rev. 125 (2017).

⁴¹⁹ Responsibility of States for Internationally Wrongful Acts art. 4, G.A. Res. 56/83 (Dec. 12, 2001).

⁴²¹ *See* MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION* (1965). When the relevant group of actors grows, "the farther it will fall short of providing an optimal supply of a collective good". *Id.* at 48. "[U]nless the number of individuals in a group is quite small . . . rational, self-interested individuals will not act to achieve their common or group interests." *Id.* at 2.

⁴²² Philippe Cullet, *Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations*, 10 EUR. J. INT'L L. 549 (1999).

norms of international law in less favorable directions.⁴²³ These are real and durable concerns that militate against simply opening the gates of the ICJ to subnational governments as full participants in international law.

Given the frequency and significance of subnational engagement with and even penetration into the international legal system documented in this paper, the time has come for international lawyers to consider the role such actors are and should be playing in the international legal system. This paper has sought to fill in the subnational blind-spot in the vision of international lawyers and the content and procedures of international law. While it is beyond the scope of this project to provide a definitive answer for how international law should address the rise of subnational governments to the global stage, there are at least four potential paths can structure a much needed conversation.

First, international law can continue to largely ignore the subnational. Doing so is fully consistent with existing rules and is the path of least resistance. However, as subnational pressures mount and city and provincial governments demand greater access, it may be unsustainable. If excluded from the system, subnational governments may use their more visible global platforms to question international law's legitimacy. They will also continue to find and enlarge cracks in the formal rules of international law to expand their role in ways that might well be counterproductive. Continued ignorance of the subnational is, therefore, dangerous.

A second option is to move from accommodation to acceptance. Part IV traced many of the ways that subnational governments have been accommodated by the international legal system. International law and institutions could move from limited accommodation to a number of different forms of acceptance. On a more cautious end of that spectrum, subnational governments could be welcomed as non-voting participants in international legal negotiations such as COP or the Global Compact on Migration, discussed earlier. They could be encouraged to directly sign a new generation of international treaties that could be opened to subnational governments, even if as unofficial signatories in parallel with official national commitments. At the bolder end of the spectrum, a rethinking of international legal personality could base membership in the international legal system not on statehood, but on a functional willingness and capacity to contribute to addressing particular transnational challenges.⁴²⁴ The result would be a much more variegated international legal system. On any issue, a range of different governments—national, municipal, provincial—would earn the right to participate in a given legal process based on their willingness and ability to contribute.⁴²⁵ Such a functionalist approach to

⁴²³ On Chinese cities' approaches to global governance challenges, see Ian Klaus, *What Should a City's Foreign Policy Look Like*, BLOOMBERG (Feb. 14, 2017), <https://www.bloomberg.com/news/articles/2017-02-14/what-should-a-city-s-foreign-policy-look-like>.

⁴²⁴ Such an approach would draw on the ICJ decision in the *Reparations for Injuries Case* that assigned international legal personality to international organizations based on their functional needs. *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11); see also Janne Elisabeth Nijman, *Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality*, AMSTERDAM CTR. FOR INT'L L. (2009); William Thomas Worster, *Relative International Legal Personality of Non-State Actors*, 42 BROOK. J. INT'L L. 207 (2016).

⁴²⁵ A basis for this approach to variegated international legal personality draws on Chayes & Chayes vision of sovereignty and participation as rights a state earns through its own actions, rather than flowing from statehood itself. CHAYES & CHAYES, *supra* note 461.

international legal personality and a broad inclusion of subnational governments may well be a step too far for many international lawyers, but its consideration highlights ways that today's accommodation of the subnational could be improved to strengthen the overall global governance architecture.

A third path forward for international law and subnational governments involves the encouragement of subnational emulation of international law through instruments like the Chicago Climate Charter. Embracing emulation as separate from, but complementary to, international law may result in a parallel, quasi-international law and institutions. Yet, there could be real benefits. Without diluting or complicating the formal structures of international law, subnational governments could be recognized as norm-entrepreneurs. They could lock-in commitments. They could better coordinate policies among themselves across jurisdictional boundaries. The real drawback of this approach is its disconnect from formal international legal institutions. Without those connections international law will not benefit from subnational political energy, legitimacy, and perspective. The success of this approach thus turns on designing new and more effective linkages between efforts at subnational emulation and traditional nation-state international law and institutions. The model, discussed above, whereby the mayor of the host city of the U20 passes a communique to the President of the host country who may or may not share it at the G20 is both inadequate and ineffective. New kinds of connective fabrics will be needed to link the layers of multilevel governance that allow for cross-influence, mutual-reinforcement, and sustained dialogue.

A final path, compatible with the prior two, involves an explicit recognition of subnational actors as partners in implementation of international legal commitments—at least those that address transnational challenges with subnational consequences. For example, treaties among states could be drafted to include distinct subnational commitments. Traditional international legal rules and institutions could promote capacity building at the subnational level to help such governments implement international legal commitments within their jurisdictions. International rules and institutions could facilitate monitoring of subnational compliance (as in the UN's acceptance of New York's Voluntary Sustainable Development Review) or even establish direct liability for subnational compliance failures. Such partnerships would at the least harness the implementation capacities of subnational governments, even if not their potential broader contributions to the international legal system.

The careful, deliberate, and strategic engagement of subnational governments could do much to enhance the legitimacy and effectiveness of international law. By turning a blind eye to the ever-growing role of the subnational in global governance, international law and international lawyers are missing the opportunity to fully take advantage of the real and potential contributions of subnational governance. So too, they are running the risk that pressures for greater access and participation from the subnational yield developments that threaten the integrity of the international legal system. The time has come for careful thought and deliberate action to better structure subnational participation in international law and institutions in ways that advance the shared goals of the many layers of authority that constitute a multi-level global governance system.