

## **FEDERALISM STRIKES BACK: IS THE ONE-VOICE DOCTRINE IN DECLINE?**

The Panel was convened at 13.00 a.m., Thursday, March 28, 2019, with opening remarks by its moderator, Marissa Jackson, New York City Commission on Human Rights. She introduced the panel and its speakers: Michael J. Glennon of the Fletcher School of Law and Diplomacy, Tuft University; David Moore of the U.S. Agency for International Development; Janne E. Nijman of the University of Amsterdam and T.M.C. Asser Instituut; Dan Sarooshi QC of the University of Oxford; and Shana Tabak of the Tahirih Justice Center.

## **THE URBAN PUSHBACK: INTERNATIONAL LAW AS AN INSTRUMENT OF CITIES**

*By Janne E. Nijman\**

For a start, I would like to thank Veronika Fikfak for the invitation and initiating this Panel. In my brief remarks, I aim to do three things. First, I would like to discuss briefly the development of the relationship between ‘cities and international law’ and consequently the formation of a new research field. I will illustrate this formation by mentioning briefly two projects I am leading with friend and colleague Helmut Aust (Berlin): the ILA Study Group on ‘The Role of Cities in International Law’ and a research handbook on the theme of cities and international law. I will end with some remarks regarding a paper I am currently working on: ‘The Urban Pushback’. The relationship between cities and international law is complex and multi-faceted. For the purpose of this Conference’s Panel, my remarks focus on how international law has become an instrument of cities.

### *A New Relationship?*

Early 2005, a brief news clip in the International Herald Tribune caught my eye. It reported on the announcement by the Mayor of Seattle, Greg Nichols, he would implement the Kyoto norm in Seattle despite the USA Senate’s rejection of the ratification of the Kyoto Protocol. Nichols initiated the ‘U.S. Mayors Climate Protection Agreement’ and today 1060 mayors have signed on. At the time, André Nollkaemper and I were working on the volume ‘New Perspectives on the Divide between National and International Law’, which focused on judges and courts as the conduits of international law into the national legal orders. In the concluding chapter, ‘Beyond the Divide’, we referred to this initiative as a ‘form of deformalisation’ of international law.<sup>1</sup> Anne-Marie Slaughter’s *A New World Order* (2005) built on the concept of ‘disaggregation of the State’ and analysed global governance as a complex global web of ‘government networks’, yet these transnational inter-city government networks were unmentioned. At the time, it reflected the state-of-the-art of international law (scholarship): local governments were simply invisible to the international lawyer. International law was a state affair. On the “internationalization” of the city (of which the aforementioned ‘transnationalization’ is part), the only available scholarship was that of pioneering scholar

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<sup>1</sup> Janne Nijman and André Nollkaemper (Eds.), *New Perspectives on the Divide between National and International Law* (OUP, 2007).

Yishai Blank,<sup>2</sup> and the article by his supervisor at Harvard, Gerald E. Frug, together with David J. Barron, published in 2006.<sup>3</sup>

Initially, I wondered indeed whether this development was indeed – in the words of this panel – a form of ‘Federalism strikes back’: a failing Washington D.C. made individual States and local governments step up. Nichols’ action stood however not on its own, it was part of a global phenomenon: around the world mayors and local governments, individually and jointly in national and transnational city networks, engaged directly with international law and global policy. The ‘Cities for CEDAW’ is another case in point.<sup>4</sup> While the U.S. Senate refused to ratify the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), cities took up its implementation while not being formally bound to do so. San Francisco eg inserted CEDAW verbatim in an Ordinance<sup>5</sup> and designated the Commission on the Status of Women to implement and monitor CEDAW locally. There are more examples of cities engaging with international or regional human rights law. The Human Rights Cities Network aims to promote the development of human rights in Europe and beyond.<sup>6</sup> The Child-Friendly City Network aims to promote the implementation of the UN Convention on the Rights of the Child at the local level. Obviously, there are the Sanctuary Cities in Canada, the UK and the US which ground their migration policies on international human rights and migration law. There is the world organization United Cities and Local Governments (UCLG), there are global city networks such as the C40 on Climate Change, ICLEI on sustainable development, and regional networks such as Eurocities, Asian Network of Major Cities 21, the Union of Baltic Cities, and the African Clean Cities Platform to share knowledge and promote the Sustainable Development Goals (SDGs) on waste management in Africa with the aim of African countries realizing clean and healthy cities. Around the globe, cities organise themselves in transnational networks, which in turn often go on to engage with international conventions and/or global policy goals to ground their urban policies and legislation.

#### *Four global trends behind the internationalization of the city*

Initially, the global scale of this phenomenon could be explained by *three* global trends reinforcing each other: urbanization, globalization, and decentralization. In the past decades, urbanization has steadily increased: ‘In 2018, an estimated 55.3 per cent of the world’s population lived in urban settlements. By 2030, urban areas are projected to house 60 per cent of people globally and one in every three people will live in cities with at least half a million inhabitants.’<sup>7</sup> The world’s cities are growing both in size and number. There is a strong relationship between urbanization and globalization. As former UNSG Kofi Annan has put it: ‘The central challenge of the 21st century will be how to make both *globalization* and *urbanization* work for all the world’s people, instead of benefiting only a few.’<sup>8</sup> The 2015

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<sup>2</sup> “The City and the World”, 44 *Columbia Journal of Transnational Law* 875 (2006); “Localism in the New Global Legal Order”, 47 *Harvard Journal of International Law* (2006).

<sup>3</sup> Gerald E. Frug and David J. Barron. “International Local Government Law.” *The Urban Lawyer* 38, no. 1 (2006): 1-62.

<sup>4</sup> <http://citiesforcedaw.org/>

<sup>5</sup> <https://sfgov.org/dosw/cedaw-ordinance>

<sup>6</sup> <https://humanrightscities.net/>

<sup>7</sup> United Nations, DESA, *The World’s Cities in 2018—Data Booklet* (ST/ESA/ SER.A/417).

<sup>8</sup> UN Habitat, *Cities in a Globalizing World: Global Report on Human Settlements*, 2001.

Sustainable Development Goal 11 (SDG11) - '[m]aking cities inclusive, safe, resilient and sustainable' - and the 2016 New Urban Agenda (NUA) are presented as a global agenda of the international community to take on this challenge. A third factor is the global tendency to decentralize tasks and resources from the central to the *local*, municipal level. Cities themselves also drive these decentralization efforts, arguing that moving authority and resources to a level of government closest to the people is favourable from a democracy, legitimacy, and efficiency perspective. Local governments reach out to the international level to actively seek more autonomy and decision-making power. There, cities - mostly through UCLG - lobby for example at the EU, the AU, and the UN, for the adoption of policy to strengthen their level of government. In the UN context, the Advisory Group on Decentralisation of UN-Habitat – in which eg UCLG has a seat - developed 'Guidelines on *Decentralisation* and the Strengthening of Local Authorities [as] a key instrument to promote *good governance* at all levels and to strengthen local authorities'.<sup>9</sup> Urban and global governance are increasingly intertwined.<sup>10</sup> Lately, these three global trends have come to be reinforced by a fourth trend accelerating the internationalization of the city as a whole: the hyperconnectivity-revolution.

### *International law as an instrument of cities, locally and globally*

Already, I gave examples of how cities, individually and jointly, engage with and implement - voluntarily and possibly in deviation from national policies - international law and global policy (goals) within their urban borders. Cities' commitment to the implementation of the Paris Agreement (2016), the SDG11 and the NUA are cases in point. International law then is an instrument to shape local policy decisions and to craft legislation.

Cities and transnational city networks are constituted by international law and institutions, yet they in turn use international law and institutions, and global policy, to constitute themselves as a global actor. I have discussed this (self-)constitution extensively elsewhere through the prism of social constructivism.<sup>11</sup> Cities construct themselves as global actors by mimicking foreign policy, international relations, and international law practices of states and international organisations. The language and organisation of UCLG is eg modelled on the UN. Cities copy treaty-making and/or use international law as a framework for inter-city agreements.<sup>12</sup>

A striking example of cities mobilizing international norms and policies is their lobby campaign for an urban SDG - as part of the 2030 Agenda (2015) - and the NUA. Together, SDG11 and the NUA push global urbanization into focus of the UN system and create space for municipal governments to claim a role within it. For a few years now there has been

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<sup>9</sup> Approved by the UN-Habitat Governing Council A/62/8, Resolution 21/3, 20 April 2007.

<sup>10</sup> Helmut Aust and Anél du Plessis (Eds.), *The Globalisation of Urban Governance. Legal Perspectives on Sustainable Development Goal 11* (Routledge, 2019).

<sup>11</sup> 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*, in *The Transformation of Foreign Policy: Drawing and Managing Boundaries*, ed. by Fahrmeir&Hellmann&Vec (OUP, 2016) pp. 209-241.

<sup>12</sup> See eg the MoU to establish the "Chicago – Mexico City Global Cities Economic Partnership" to '[f]oster trade in goods and services in key sectors, as included in Annex A, compliant with the rules of NAFTA.' [https://www.brookings.edu/wp-content/uploads/2016/07/GCEP-CHI-MEX-MOU\\_FINAL.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/GCEP-CHI-MEX-MOU_FINAL.pdf)

discussion on reforming UN Habitat and even the UN. It is no secret that Member-States are not eager to reform UN-Habitat, let alone the UN. Some cities and city networks seem to take SDG 11 and the NUA serious as an instrument of government, others engage more superficially. International organizations increasingly recognise local governments as relevant and necessary partners in the realisation of human rights, good governance, democracy, social justice, and equality.<sup>13</sup> Collaboration potentially enhances their own efficacy and legitimacy. This may empower cities to claim a more central role within the UN system and other IOs. The creation of a World Urban Forum, which is however of a technical, non-legislative nature, caters to this claim.

The coming month of May, the first UN Habitat Assembly will take place. It is the first yield of heated discussions on UN Habitat and UN reform, which I am sure will continue. To illustrate this use of SDG11 and the NUA as instruments to claim a role within the UN, the High-Level Political Forum of the summer of 2018, which dealt with SDG11, is relevant. There, city governments campaigned with the *#listen2cities* to include the urban perspective in the global policy agenda(s) and to claim their seat at the main table. UN Deputy Secretary General Amina Mohamed comments: “The driving force and creative energy of local and regional governments is instrumental to reframe how the world implements the Global Agenda.” She observed moreover UN-Habitat reform to be the “litmus test” for UN Reform more generally. In short, cities and the UN may be reconstituting each other. The use of international law and global policy by cities as instruments of (legal) governance, locally and globally is a truly global phenomenon.

### *An Urban Pushback?*

Finally, let me mention two ongoing collective research projects as well as a paper I am working on. The complexities of the growing engagement of cities with international law and the increasing interactions between international organizations and cities is stimulating new and exciting research. Helmut Aust and I initiated the ILA Study Group on ‘The Role of Cities in International Law’ and a Research Handbook on International Law and Cities. While Helmut and I each initially shared a certain enthusiasm about the progressive nature of cities’ engagement with international law and global policy, we both have come to be concerned also about the (potentially) darker side of the rise of the city. Helmut rightly points to a tendency of idealisation with his title ‘Shining cities on the hill’.<sup>14</sup> As Martha Davis points out, ‘[h]istory underscores that there is nothing inevitably progressive about city politics’.<sup>15</sup> In both projects we aim to analyse critically the changing relationship between cities and international law.

To end, let me point at what I would like to call an ‘Urban Pushback’. In this paper, I argue that cities (may) instrumentalize international (human rights) law and the global policy

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<sup>13</sup> See eg GA Res 70/210 para 5.

<sup>14</sup> Helmut Aust, *Shining Cities on the Hill?*, 26(1) EJIL 2015, 255-278.

<sup>15</sup> Martha Davis, *Design Challenges for Human Rights Cities*, *COLUMBIA HUMAN RIGHTS LAW REVIEW* Vol 49 (2017) 27. I will discuss these complexities more extensively in the upcoming paper.

objectives of eg SDG11 to pushback the local implications/consequences of global neoliberalism. To illustrate this preliminary claim, let's turn briefly to Amsterdam.

In recent years, the city of Amsterdam is changing rapidly due to the implications of the global economy. In particular the real estate market is affected. This has not gone unnoticed by eg the IMF. Our newspaper, *Het Parool*, sums it up with a headline “IMF: Amsterdam houses are prey to [international] investors”.<sup>16</sup> The IMF recognizes cities like Amsterdam, Berlin, Barcelona, London and many others, also in the Global South, are reconstituted/reconfigured by the neoliberal global economy. Amsterdam is looking for adequate responses. Its government has sought transnational cooperation with other cities around an international human rights norm, the right to housing as eg included in the ICESCR, to then address jointly the United Nations. This has resulted in the ‘Municipalist Declaration of Local Governments for the Right to Housing and the Right to the City’.<sup>17</sup> The ‘signatory cities’ - notice the mimicking of treaty law (language) - participated in the aforementioned UN 2018 HLPF to follow up on SDG11 in New York, where they presented the Declaration together as the ‘Cities for Housing’ coalition.<sup>18</sup> It is of course intriguing who or what exactly is the addressee of this declaration. *Het Parool* reports: ‘Cities ask the UN for help to protect housing market’.<sup>19</sup> Indeed, the cities turn to the UN with the presentation of the declaration at the HLPF. In it local governments claim a central role in securing ‘equitable, inclusive, and just cities’ and ‘actual access to “adequate housing”’. They ‘demand more legal and fiscal powers to regulate the real estate market in order to fight against speculation and guarantee the social function of the city.’ I will not jump ahead of myself and the research I am currently doing, but this little story about Amsterdam merely aims to illustrate a much bigger, global development of cities that increasingly use international law as an instrument.

#### REMARKS BY MICHAEL J. GLENNON\*\*

I'm going to say a few brief words this afternoon about one of the great myths in American constitutional law. That's the myth that the federal government has exclusive power over foreign affairs, the myth that the United States is always required to speak internationally with one voice. That myth is flat wrong. It's belied by the constitutional text, by subsequent practice, and by the functional purposes of federalism. Consider each in turn.

First, the constitutional text. The text confers no general foreign affairs power on anyone, certainly not on the president alone, not even on the federal government. The converse is also true. The text contains no prohibition against the states engaging in foreign affairs. It does set out a short list of things the states can't do in the foreign affairs realm. They can't enter into a treaty, alliance, or confederation, or grant letters of marque and reprisal. But that's it. That list would make no sense if the Constitution were read to exclude the states categorically from any action whatsoever in the realm of foreign affairs. If it did, why spell out subcategories?

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<sup>16</sup> Het Parool, 11 April 2018.

<sup>17</sup> New York, 16th July 2018.

<sup>18</sup> By May 14th, 2019, the website enlists 36 endorsing cities from all over the world.

<sup>19</sup> Het Parool, 16 July 2018.

Unsurprisingly, there's nothing in the original constitutional materials to suggest that the Framers favored federal exclusivity.

Historical custom and practice also undercut claims of federal exclusivity. As Sarah Cleveland and David Moore have pointed out, from the very beginning states and cities engaged in significant foreign affairs activities. Look at the modern record. They've concluded hundreds of compacts with foreign governments, implemented unratified treaties such as the Kyoto Protocol, declared nuclear free zones and sanctuary cities, established over 200 state offices in foreign countries, sent hundreds of trade delegations to foreign countries headed by mayors and governors; and offered economic incentives to attract businesses from those countries. They've adopted policy statements about numerous international issues from Iraq to Vietnam to Nicaragua, enacted anti-apartheid limitations, Buy America statutes, sanctions on Iran, laws to discourage illegal immigration, and data privacy laws that protect their citizens in other countries. They've set up over a thousand sister city relationships with educational and cultural exchanges for teachers, artists, and students. And that's only a tiny fraction of what they've done. In Justice Frankfurter's words in the *Steel Seizure Case*, the states have engaged in a systematic, unbroken practice, long pursued to the knowledge of Congress and seldom questioned, carried out by hundreds if not thousands of state and local officials all of whom have taken an oath to support the Constitution. That practice has created a gloss on the constitutional text, a gloss that refutes claims of federal exclusivity.

Obviously there are limits on state power. If states or cities violated constitutional limits set out in the Bill of Rights and elsewhere, the courts can and should stop them. If Congress and the president believe there's a need for National uniformity in a given situation, they can simply say that, and under the Supremacy Clause states and cities are then preempted from acting. But a Draconian insistence on federal exclusivity would disrupt settled practice that stretches back over 200 years and bar the states from doing almost everything I just described. And to what purpose? Most of those activities are constructive or at worst innocuous.

This point bears underscoring. It's hard to find any instance in which any malevolent action by any state or city has triggered retaliatory action against the United States as a whole. State and local governments act in plain sight. Congress and the president have been fully aware of what they have been doing. If they want to stop it, they can stop it. To substitute the judiciary's judgment for their own would work a massive transfer of power from the political branches and the states to the federal courts.

We have a federal system for a reason. Federalism, we all know, promotes important functional values--freedom, efficiency, and innovation. These do not suddenly disappear with a claim of "foreign affairs".

Consider freedom. The framers guarded against autocracy by setting ambition against ambition, horizontally with separation of powers and vertically with federalism. The risk of autocracy is all the greater when the justification of foreign affairs is claimed. This is where the Constitution becomes a struggle for the privilege of directing American foreign policy, as Corwin said. Struggle, of course, implies cacophony--not one great national choir of 330 million people all singing in harmony from the same hymn book.

Second, innovation. States, as Justice Brandeis said, are laboratories of democracy. Massachusetts experimented when it imposed sanctions on Burma. Three months later, Congress followed Massachusetts' lead. It benefited from Massachusetts experiment when it pre-empted Massachusetts' sanctions and enacted different sanctions of its own. That's federalism in action.

Finally, efficiency. Many citizens find it easier to participate in government at the local level. It's natural and healthy for them to express their views in person to real people who actually listen to what they're saying. As my friend Richard Bilder has said, state and local involvement in foreign affairs represents a strengthening, not a weakening, of our democratic process. We should not be trying to stop it. We should be trying to encourage it.

## **FEDERALISM STRIKES BACK: BREXIT AND THE POTENTIAL DECLINE OF THE ONE-VOICE DOCTRINE?**

**BY DAN SAROOSHI QC\*\*\*\***

I am going to discuss today three issues relating to the One Voice Doctrine arising from 'Brexit' which is short for the British Exit from the European Union.

The Brexit story started most recently when the UK Government led by former Prime Minister David Cameron decided in 2015 to organise a referendum to decide on whether the UK should remain or leave the European Union. The Government put before Parliament draft legislation and Parliament then adopted an Act that authorised a referendum to be put to the British people. But the Act said nothing about what should happen in terms of implementing the outcome of the referendum.

Of course it is well known that the British people voted by a relatively narrow majority of 51.9% to 48.1% to leave the European Union. So far, relatively straightforward.

But then the key legal question arose of how this referendum decision was to be implemented in practice: for present purposes, the issue was "whose voice" was to be heard: was it the executive Government or should it be Parliament who had the final say on whether the UK was going to leave the EU?

The UK Government – led at the time by Theresa May – took the firm view that it was the Government who had the power to terminate the UK's membership of the EU and that this was not a matter for Parliament.

The Government was subsequently sued by a number of people including the brave Gina Miller who took a different view.

The case went on an expedited basis up to the UK Supreme Court and was heard by all 13 Justices of the Court. This was the first case to have had all 13 Justices hear the case.

The main UK Government argument before the Court was that since the Government had an exclusive power to conclude and terminate treaties on the international plane then it was only the Government who could take the decision to terminate the UK's membership of the EU since in legal terms this represented withdrawing the UK from various Treaties, including the first European Economic Community Treaty and the most recent Treaty of Lisbon.

The UK Supreme Court did not however agree with the Government. This had to do with the special nature of EU law which is automatically binding and applies within EU Member States. In the case of the UK, the way that this EU law travelled into the UK was over the bridge that was constructed by an Act of Parliament, called the 1972 European Communities Act.

Put simply the Supreme Court said that since the 1972 Act provided the bridge for EU law to apply automatically in the UK and since it was only Parliament who had the right to change the content and sources of law applicable in the UK, then it must be Parliament and not the executive Government who takes the final decision on whether to leave the European Union.

I now turn to examine another key issue raised by the Brexit saga: what role should the regional legislatures and governments in the United Kingdom play in deciding on how or even whether the UK should leave the EU?

As this audience knows, the UK is not a Federal but a Unitary State. However, it has decided to devolve certain legislative powers to regional legislative assemblies in Scotland, Wales, and Northern Ireland. So for example, in Scotland the Scottish Parliament has decided not to charge university fees for students studying in Scottish Universities; while students studying in England certainly have to pay fees though they are still a bargain compared to what I understand are the fees being charged for private US universities.

At the same time, there are MPs who are elected from these constituent parts of the UK who serve in the UK Parliament in London. So in Scotland for example there are persons elected as MSPs or Members of the Scottish Parliament.

But it is the UK Parliament which remains sovereign over all of the UK and technically the UK Parliament could decide to revoke the devolution of powers made to these regional assemblies.

In addition to these regional legislative assemblies, there are persons from these regions who are also elected to serve as Members of the UK Parliament. So for example from Scotland there are Members of the UK Parliament elected but as I have already said they also have people elected as Members of the Scottish Parliament. Now this has caused an issue since England – the largest constituent unit of the United Kingdom – does not have its own regional parliament but is governed solely by the UK Parliament in London.

However in the context of Brexit what has happened is that the Scottish Parliament for example has consistently fought to keep the Scotland in the EU. In the **Brexit** case in the Supreme Court one of the issues the Court decided was whether the terms of devolution of powers gave the regional legislatures any voice in the Brexit decision. The Supreme Court overwhelmingly decided that the regional legislatures had no such role. But this has not stopped them from continuing to try. For example, only yesterday the Scottish Parliament voted on a resolution that the UK Government should revoke its notice to leave the EU.

The final issue I shall consider and that has arisen within the UK Parliament is that the Government does not have a clear majority in Parliament and depends on the votes of the Members of Parliament that come from Northern Ireland to vote with the Government for it to pass legislation or win votes on resolutions that are before Parliament.



This has caused an unholy mess and is one of the reasons why the UK Government is struggling to get Parliament to vote in favour of the terms of the deal for the UK to leave the EU since the Northern Ireland MPs are unhappy with a key element of the present deal.

I think it is clear that much like the Brexit process I could go on for much longer, but let me exercise judicial economy and stop now. Thank you.