

**CITY HALL V. THE WORLD – SEEKING NEW PARADIGMS FOR FOREIGN MISSIONS
MUNICIPAL TAXATION***

Abstract

Studies of international law and cities have been attracting the attention of scholars and policy makers alike in attempts to understand the complex nature of the central versus municipal government relationship in respect of legally binding international frameworks. One example of such an intricate relationship is the implementation of treaty and customary international law in respect of taxation of foreign missions. Alongside its relevance to the day-to-day life and functioning of international relations, this issue can present challenges to policy and decision makers of various layers of government. This paper provides a case study of the foreign missions' taxation around the theme of international law and the city. The discussion focuses on the basics of the applicable regimes and their history and rationales, as well as on the dilemmas associated with more contemporary forms of municipal taxes. Aiming for developing means to address the challenges presented, a new paradigm is presented. This paradigm focuses on new methodologies to bring cities to the table to discuss with state actors how to optimize the balance between the need to facilitate bilateral cross-border relationships and the needs of cities and its residents. In the end, the paper lays out potential lessons for engagement of cities and states in international policy and law making for central and municipal governments. The modality offered can hopefully facilitate the development of processes conducive to enhanced cooperation between cities and states in making and implementing better and more balanced international law.

Keywords: International law, city, taxation, foreign missions, global governance

* **Itai Apter**, Visiting Scholar in Residence, American University; PhD candidate, University of Haifa.
Contact: itaiapter@hotmail.com.

Résumé

Les études sur le droit international et les villes ont attiré l'attention des chercheurs et des décideurs politiques tentant de comprendre la nature complexe de la relation entre les gouvernements centraux et municipaux en ce qui concerne les cadres internationaux juridiquement contraignants. Un exemple de cette relation complexe est la mise en œuvre des traités et du droit international coutumier en matière d'imposition des missions étrangères. Outre son importance pour la vie quotidienne et le fonctionnement des relations internationales, cette question peut causer des problèmes aux responsables politiques et aux décideurs des différents paliers de gouvernement. Cet article propose une étude de cas de la fiscalité des missions étrangères autour des thèmes du droit international et de la ville. La discussion se concentre sur les fondements des régimes applicables, leur histoire et leurs justifications, ainsi que sur les dilemmes associés aux formes plus contemporaines de taxes municipales. Un nouveau paradigme est présenté afin de relever les défis présentés. Ce paradigme se concentre sur de nouvelles méthodologies permettant d'amener les villes à la table de discussion avec les acteurs étatiques sur la manière d'optimiser l'équilibre entre les relations transfrontalières bilatérales et les besoins des villes et de leurs habitants. En conclusion, l'article présente des leçons potentielles pour l'engagement des villes et des États dans l'élaboration de politiques et de normes internationales pour les gouvernements centraux et municipaux. La modalité proposée dans ce texte pourra, espérons-le, faciliter le développement de procédés propices à une coopération renforcée entre les villes et les États dans l'élaboration et la mise en œuvre d'un droit international plus équilibré.

Mots-clés : Droit international, ville, fiscalité, missions étrangères, gouvernance mondiale

INTRODUCTION

Interactions between international law and cities have been recently extensively studied, alongside emerging global governance studies. These studies focus on how cities implement international human rights and trade law. They also highlight the role of cities in forming

international relations and international norms. The ways cities have been defined by legal frameworks and applied them have drawn much attention. Scholars and policy makers alike recognize the key role played by municipal authorities in resident's daily lives and the diminishing impact of central governments.

Straying a bit off the beaten path, this paper focuses on municipal taxation imposed on foreign representations of states, seeking new paradigms to adapt existing frameworks to modern realities. While seemingly not an issue of gravity, taxation payments imposed on such actors can be controversial, potentially impacting bilateral relationships. Regulation of foreign missions' municipal taxation under customary international law represents one of the earliest examples of implementation of international law by cities. Foreign states or foreign sovereigns have always established foreign missions or legations. Privileges and immunities afforded to such missions and their personnel have been considered as very important legal frameworks to prevent and limit domestic intervention in conducting their duties.

The paper begins by describing contemporary trends in studying interactions between international law and cities. This first section highlights the increasing role that cities play in international relations and international law implementation. This role gained prominence in modern times with the increase in the role of disaggregated state actors. The following section surveys early origins and practice of foreign mission municipal taxation which became customary international law. This is followed by an analysis of existing treaty law-based norms, deriving from customary international law, embodying the principle of limiting payments to "services rendered". Analysis also addresses the way the treaties are implemented, and controversies over modern municipal taxation forms.

The fourth section then explores dilemmas of imposing municipal taxation in the context of the taxonomy set earlier. The relevant municipal taxation international norms were

formalized in the 1940's and 1960's, while studies of interrelationships between international law and the cities are of a much more contemporary nature. This disparity necessitates consideration of new paradigms to strike a better balance between different interests: the needs of municipal authorities, local criticism, reciprocity, and the need to ensure the functioning of foreign missions and international relations.

The paper's fifth section considers what lessons can be drawn from the discussion of the new paradigms offered to the debate of municipal taxation of foreign missions. Such lessons can be of relevance to the understating of general themes pertaining to international law and cities. These lessons can be relevant to procedural perspectives on international norm and decision or policy making. Mainly, the purpose it to utilize these new understandings of the relationships between legal frameworks and the conduct of municipalities to facilitate innovative legal solutions to better balance the competing interests previously discussed in the paper.

City halls can be in constant confrontation with the world (or foreign missions) on municipal taxes. This confrontation, embodying inherent conflicts between states' international obligations and the interests of municipalities and local residents serves as an interesting case study of tensions in the framework of the broader theme of international law and city. The paper offers new paradigms to consider practical and theoretical dimension of the municipal taxation case study. The aim is to suggest overbroad thematic proposals on how to achieve optimal results for international law, states, cities and city residents.

PART 1. CITIES IN INTERNATIONAL LAW – LATEST TRENDS

Traditionally, only states were considered as the principal actors of international law.¹ States were not only subjects of international law but also its sole creators, with little or no place of actors of any other type in the design of international norms.² The advent of globalization changed this perception. Increasingly, other actors began to attain dominance in the international law playing field, ranging from international organizations to individuals. This led to different perceptions of how rules of international law were created and applied.³ If in the past, international law was viewed as a creation of ministries of foreign affairs or White House or Downing 10 type institutions (foreign office model), recent decades have brought on the realization that international norms were much more a creation of what is frequently termed as global governance.⁴ In the past few years with the advent of events like Brexit and the relatively frequent withdrawal from treaties by states, the idea of global governance is considered to have suffered some sort of setback, with sovereignty making a comeback. However, it seems that global governance and its main protagonists still play an important role.

As new actors and subjects became more visible in international arena, scholarship turned to viewing various components of the state as playing an important role in international law making. This was termed as the disaggregated state theory, viewing the state as comprising of various types of actors which can have an impact alongside the more traditional central

¹Angela M. Banks, 'The Growing Impact of Non-State Actors on the International and European Legal Systems' (2003) 5 *International Law Forum du droit International*, 293.

²Robert McCorquodale, 'Sources and Subjects of International Law: A Plurality of Law Making Participants' in Samantha Besson, Jean D'aspermonts J (eds), *The Oxford Handbook of the Sources of International Law* (OUP, 2007) 749.

³Antoniett Hilderling, *International Law, Sustainable Development and Water Management* (Eburon Publishers 2005) 66.

⁴Anna Cavnar, 'The Foreign Office Model Versus the Global Governance Model: An Introduction' (IILJ NYU Course Material) <<https://www.iilj.org/wp-content/uploads/2016/08/Cavnar-The-Foreign-Office-Model-Versus-the-Global-Governance-Model-2008.pdf>> accessed 22 May 2021.

government actors.⁵ Viewing the state, or its sovereignty, as an aggregate of all its actors can facilitate providing such actors with an independent role in international law,⁶ including their emergence as subjects of regulation. One of these actors is a city, especially if it is considered as a “global city”.⁷ Global cities are considered as such when they serve as hosts for international activities ranging from trade to culture and to politics.⁸

Global cities, like other disaggregated state actors, can be part of global networks, possibly bypassing the state.⁹ Such networks can support the creation of new norms,¹⁰ while encouraging cities to implement existing norms even if the state wishes to avoid them, as was the example in the context of the Paris Climate Accords.¹¹ Networks of non-state actors play an important role in promoting values and interests in the global governance framework. Such values might be in conflict with the interests of central government actors, leading to mobilization for common goals.¹²

In recent decades, municipal authorities (cities) attained significant power and influence on the global plain.¹³ This increase in influence has resulted in increased attention of international law scholarship and policy making not only in respect of voluntary

⁵ Jan Wouters, ‘International Law, Informal Lawmaking and Global Governance in Times of Anti-Globalism and Populism’ in Hieke Krieger., Georg Nolte, Andreas Zimmermann (eds), *The International Rule of Law – Rise or Decline*, (OUP, 2019) 242, 254.

⁶ Peter J. Spiro, ‘Disaggregating US Interests in International Law’ (2004), 67 *Law and Contemporary Problems*, 195.

⁷ Helmut Aust, ‘Cities as International Legal Authorities - Remarks on Recent Developments and Possible Future Trends Research’ (2020), 4(1) *Journal of Comparative Urban Law and Policy*, 82, 86.

⁸ For a discussion of the concept of the global city in the context of globalization processes see Saskia Sassen, ‘The Global City: Introducing A Concept’ (2005) XI(2) *Brown Journal of World Affairs* 27.

⁹ Saskia Sassen ‘Global Cities and Diasporic Networks’ in Marlies Glasius, Mary Kaldor, Helmut Anheier (eds) *Global Civil Society Yearbook* (OUP, 2002), 217, 218.

¹⁰ Chrystie Swiney, ‘The Urbanization of International Law and International Relations: The Rising Soft Power of Cities in Global Governance’ (2020), 41(2) *Michigan Journal of International Law* 227, 243-244.

¹¹ Kayla Clark, ‘The Paris Agreement: Its Role in International Law and American Jurisprudence’ (2018), 8(2) *Notre Dame Journal of International & Comparative Law* 107, 129.

¹² Jinseop Jang, Jason McSparren, and Yuliya Rashchupkina , ‘Global Governance: Present and Future’ (2015) *Palgrave Communications* 4, <doi: 10.1057/palcomms.2015.45>.

¹³ Barbara Oomen, Moritz Baumgarntel, ‘Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law’ (2018), 29(2) *EJIL* 607, 629-630, <<https://doi.org/10.1093/ejil/chy021>>.

implementation of norms by cities but also in respect of mandatory compliance. This is because cities are expected to comply with international law. The leading examples discussed in the scholarship are the potential obligations of municipal administrations to abide by international human rights law,¹⁴ and implications of international trade law.¹⁵ The role of cities can be enhanced when their policies are in conflict with the central government apparatus. One interesting US example demonstrating this disparity is the decision by some municipalities to apply a “sanctuary city” policy regarding undocumented immigrants in direct conflict with the policies of the federal administration at the time.¹⁶

Cities might be parties to dispute resolution processes for failure to abide by the commitments undertaken by states,¹⁷ or can even trigger the international responsibility of the state under international law. One prominent example in this respect are international arbitration cases revolving around the use of municipal powers regarding the use of land in connection with foreign investments, adjudicated in accordance with bilateral investment treaties, such as NAFTA.¹⁸

Interestingly, this attribution of the act of municipalities to that of a state is not a contemporary creation, but is embodied in the 2001 International Law Commission Draft

¹⁴ Barbara Oomen, Elif Durmus, ‘Cities and Plural Understandings of Human Rights: Agents, Actors, Arenas’ (2019), 51(2) *The Journal of Legal Pluralism and Unofficial Law* 141, 142. <doi: 10.1080/07329113.2019.1596731>.

¹⁵ Christine Cote, Saul Estrin, Daniel Shapiro, ‘Expanding the International Trade and Investment Policy Agenda: The Role of Cities and Services’ (2020), 3 *J. Int’l. Bus. Policy* 199, 217. <<https://doi.org/10.1057/s42214-020-00053-x>>.

¹⁶ Estefanía Cruz Lera, ‘The Spectrum of Sanctuary Cities in the United States: Contrasting the Genesis and Practices of Pro-immigrant Local Policies’ (2019), 20 *Estudios Fronterizos* <https://doi.org/10.21670/ref.1908029>.

¹⁷ Janne Elisabeth Nijman J.E, Helmut Aust, ‘The Emerging Roles of Cities in International Law - Introductory Remarks on Practice, Scholarship and the Handbook (November 23, 2020)’ T.M.C. Asser Institute for International & European Law - Asser Research Paper 2020-13 Forthcoming in: Helmut Aust, and Jane Elisabeth Nijman, J.E. (eds.), *Research Handbook on International Law and Cities* (Edward Elgar, 2021), 10.

¹⁸ For an extensive analysis of such cases see Gerald E. Frug and David J. Barron, *International Local Government Law*, 38 *Urban Law* 1 (2006).

Articles on State Responsibility.¹⁹ According to this central international law instrument, a municipality is considered as an organ of the state.²⁰ This definition is critically important when considering that municipal acts undertaken by cities can also trigger disputes under dispute resolution clauses included in bilateral investment treaties.²¹

This proposition that cities can also violate international law obligations undertaken by states can go beyond the dispute framework to allegations that municipal governments can abuse city majorities to harm minority residents.²² According to some Third World Approaches to International Law (TWAIL) scholars, cities sometimes implement policies, with international law implications, which facilitate the imposition of Western values to the third world.²³ In this sense, cities can arguably be considered to be no different from state actors implementing international law in a manner which preserves the hegemony of capitalism and colonialism based values of international law.²⁴

Recent scholarship urges cities to take a more active role in the design of international norms to benefit the lives of their residents, and to utilize their influential “informal” power on the global sphere.²⁵ Scholars like Blank view cities as important and vital mediators between local communities and international law.²⁶ Others highlight the potential of increased

¹⁹ Nijman, Aust (n 17) 6.

²⁰ Article 4, Commentary (6), Draft Articles on State Responsibility.

²¹ See for example in the context of a denial by a municipality of a construction permit amounting to an act of expropriation. Ralf Dolzer ‘The Impact of International Investment Treaties on Domestic Administrative Law’ (2005) 37 International Law and Politics 953, 960.

²² Ileana M. Porras, ‘The City and International Law: In Pursuit of Sustainable Development’ (2009), 36(3) Fordham Urban Law Journal 537, 451.

²³ Nijman, Aust (n 17), 7-8.

²⁴ Larrisa Ramina, ‘TWAIL – “Third World Approaches to International Law” and Human Rights: Some Considerations’ (2017) 5(1) Revista de Investigações Constitucionais 262, 263 <<https://doi.org/10.5380/rinc.v5i1.54595>>.

²⁵ Swiney (n 10) 275-276.

²⁶ Yishai Blank, ‘The City and the World’ (2006) 44 Colum. J. Transnat'l L. 875, 938-939.

involvement of cities, big and small, to address intentional problems such as global climate change.²⁷

In some arenas, cities have answered the call of scholarship to play a more active role in shaping international norms and lobbying for policies aimed at benefiting their residents. Pursuing this aim, cities have created various networks under the auspices of bodies like the OCED and UN HABITAT.²⁸ In some cases, these networks have even achieved concrete results like the inclusion of “sustainable cities and communities” as an integral part of the 2030 UN Sustainable Development Goals, a key guidance document for the international community.²⁹ This brief survey of the various roles that cities play in contemporary international law scholarship is far from complete or exhaustive as this ever-evolving field of study by international lawyers and international relations scholars is continuously developing. Nevertheless, this survey does bring to the fore the undeniable prominent role of some cities, including “global cities”, in international law and in facilitating international relations.

Climate change, trade, human rights, dispute resolution and TWAIL concerns are inherently relevant in the design of relationships and interactions between international legal frameworks and the conduct of municipalities at the heart and focus of scholarly attention. At the same time, when considering practicalities there is no better case study of potential everyday conflicts between states over implementation of international law by cities than the issue of municipal taxation of diplomatic activity.

PART 2. MUNICIPAL TAXATION OF FOREIGN MISSIONS UNDER INTERNATIONAL LAW

²⁷ Hari M. Osofsky, 'Suburban Climate Change Efforts: Possibilities for Small and Nimble Cities Participating in State, Regional, National, and International Networks' (2012) 22 Cornell J. L. & Pub. Pol'y 395, 406.

²⁸ The National Urban Policy Programme Overview (2019) <<https://www.oecd.org/cfe/cities/NUPP-overview.pdf>,> accessed 23 May, 2021.

²⁹ United Nations SDG 11, <<https://sdgs.un.org/goals/goal11>>, accessed 23 May, 2021.

Since the dawn of international relations, one of the key factors in communication between states was the existence of emissaries representing the interests of one state in the other. The work of such emissaries was essential to conducting international relations, especially in times before technology made it possible to directly communicate beyond borders.³⁰ If at first, such emissaries traveled from one state to the other in the name of the sending ruler (or states), in recent centuries, the practice of establishing permanent missions or legations fully developed to its current contemporary form.³¹

Foreign missions were always considered to be a manifestation of the foreign state, entitling them to special privileges in order to ensure their uninterrupted functions. The regimes developed reflected the concerns that domestic authorities will interfere with the work and operation of the foreign mission.³² In the past two centuries, a special, reciprocity-based regime developed under customary international law (state practice and *opinion juris*) (CIL). Following failed attempts by the League of Nations to codify diplomatic and consular privileges and immunities in the 1920's, including in respect of taxation,³³ the regime was later embodied in the Diplomatic (1961) (VCDR) and Consular (1963) (VCCR) Conventions.³⁴

Both the VCDR and VCCR include privileges and immunities provided to foreign missions and their personnel. The regime concerning municipal taxation is similar in both Conventions, focusing on exemptions from any such payments unless they represent payment for services rendered (VCDR, Art. 23(1), VCCR, Art. 23(1)). The underlying rationale of this

³⁰ Eileen Denza 'Vienna Convention on Diplomatic Relations – Introductory Note', UN Audiovisual Library of International Law, 1 <<https://legal.un.org/avl/ha/vcdr/vcdr.html>> accessed 14 April 2021.

³¹ Lasa Francis Oppenheim, *International Law – A Treatise* (Longmans, Green, 1921) 437.

³² *ibid*, 460-469.

³³ Richard Langhorne, 'The Regulation of Diplomatic Practice: The Beginnings to the Vienna Convention on Diplomatic Relations, 1961' (1992) 18(1) *Review of International Studies* 3, 10.

³⁴ The 1961 Vienna Convention on Diplomatic Relations, UNTS 500, 95; The 1963 Vienna Convention on Consular Relations UNTS 596, 261.

regime is clear and is intended to avoid imposition of taxation which would place obstacles to the operation of the foreign mission, reflecting long standing practice.³⁵ Alongside the multilateral frameworks, exemptions from municipal taxation could also be granted on the basis of bilateral conventions, which can regulate taxation of foreign missions between host and sending states.³⁶

Implementing these provisions host states either fully exempt foreign missions of paying any municipal taxes, other than for services rendered,³⁷ or require the sending state to pay a certain percentage of the overall municipal taxation imposed on residents of a city (in addition to payments for services rendered).³⁸ In the UK, for example, even though this so called “beneficial portion” rate is only 6%, it has been reported that foreign states fail to abide by the demand.³⁹

The “beneficial portion approach” might reflect an attempt by the host state to achieve an appropriate balance between the need to afford a special status to the foreign mission and the need to offset the expenses borne by the municipality and the service providers. Nevertheless, issues might arise when new forms of taxation are imposed by cities outside the general taxation theme. Examples vary, but can include, lighting, security, new road construction, schooling services and limiting pollution. The emergence of new types of services

³⁵ Wm. W. Bishop, Jr, ‘Immunity from Taxation of Foreign State-Owned Property’ (1952) 46(2) AJIL 239, 247.

³⁶ For a discussion of one such bilateral treaty between France and South Korea see Namhee Kwon, ‘Diplomatic and Consular Immunities in Republic of Korea’ (2020), p, 16, <<http://yearbookdiplomatielaw.com/wp-content/uploads/2020/03/Diplomatic-and-Consular-Immunities-in-Republic-of-KoreaKWON.pdf>> accessed 24 July, 2021.

³⁷ See for example in the Netherlands, Article 11.9, ‘Protocol Guide for Diplomatic Missions and Consular Posts (2021)’, Government of the Netherlands, <<https://www.government.nl/documents/leaflets/2015/04/15/protocol-guide-for-diplomatic-missions-en-consular-posts>> accessed 24 July, 2021.

³⁸ Brian Cleave ‘United Kingdom’ in Micheal Lang, Pasquale Pistone, Josef Schuch, Claus Staringer, Alfred Storck (eds.) *Tax Rules in Non-Tax Agreements* (IBFD, 2012) 835, 838.

³⁹ ‘Foreign Embassies Rack Up £1.5 MILLION Business Rates Debt’ (*The Altus Group*, 18 December 2018) <<https://www.altusgroup.com/property/insights/foreign-embassies-rack-up-1-5-million-business-rates-debt/>> accessed 21 July, 2021

can be especially challenging in case the host state opts for a full exemption, but still requires the sending state to pay for taxes which increase the value of the property, including a “betterment levy”.⁴⁰

If city hall imposes taxes on residents for the above cited examples and foreign missions are exempted from them, one might consider that missions are indirectly benefiting from services provided even though they do not pay for them.⁴¹ However, unsurprisingly, there could be differences of view between the foreign government and the relevant municipality about what payment is considered as a “tax” and what is considered as payment for services.

In case a new municipal tax is imposed, the sending state might argue for an exemption according to the “direct benefit” or “services rendered” criteria.⁴² Such controversy might seem mundane and negligent, but it might go to the core of bilateral relationships when exemption is based on reciprocity (as introduced above).⁴³ Sometimes, disagreements can reach the highest levels. The most prominent example is the reported discussion between the US Ambassador to London and the British Queen on the classification of the London congestion charge. In this discussion, the Queen expressed her view that the US Ambassador was right in his assertion that the congestion charge was indeed a tax, i.e., that the London municipality did not provide any related services in exchange for the payment of the charge.⁴⁴

Municipal administrators or officials might find it difficult to understand why they should exempt foreign missions from their taxation policy. Foreign missions benefit from

⁴⁰ Netherlands Guide (n 36) Article 11.9.2.

⁴¹ Eileen Denza, *Diplomatic Law – Commentary on the Vienna Convention for Diplomatic Relations* (OUP, 4th ed., 2018) 154.

⁴² *ibid.*

⁴³ Diplomatic Tax Exemptions (*US State Department*) <<https://www.state.gov/about-us-diplomatic-tax-exemptions/>> accessed 14 April, 2021.

⁴⁴ ‘The Queen Hits Out at Congestion Charge Tax’ (*Londonnet*, 16 January, 2012) <<https://www.londonnet.co.uk/london-news/the-queen-hits-out-at-congestion-charge-tax>> accessed 15 April, 2021.

municipal services like everybody else, and the city invests funds and allocates budgets in order to provide them.⁴⁵ Moreover, unlike the common resident which will face heavy fines or other punitive actions for failure to pay municipal taxes, foreign states can just refuse to pay. Under international law, no enforcement action can be undertaken against them due to immunity protections for foreign mission bank accounts according the relevant CIL and treaty law.⁴⁶ Even if municipal officials recognize that these immunity provisions are important and are aimed at facilitating a working bilateral relationship with foreign states, it can be assumed that they would view the matter as problematic and a burden on the municipal budget.

This can place city governments in direct confrontation not only with the foreign state, but also with their own residents who have no choice but to pay the taxes imposed or even higher taxes to cover the deficiencies resulting from the exemptions.⁴⁷ Central government departments might also find themselves caught in a quagmire. This is can occur when they are required by city governments to be provided with some tools to resolve the issue, especially in cases where the debts to the municipality significantly accumulate.⁴⁸ Seeking means to address these challenges, the central state apparatus has to consider potential implications for reciprocity. If the host state decides to require payment for certain municipal taxes, or to authorize the municipality to pursue enforcement measures, it must bear in mind the potential

⁴⁵ Diane Cardwell, 'Deadbeat Diplomats Should Pay, Lawmakers Say' (*NY Times City Room Blog*, 20 March, 2008), <<https://cityroom.blogs.nytimes.com/2008/03/20/deadbeat-diplomats-should-pay-lawmakers-say/>> accessed 15 April, 2021.

⁴⁶ August Reinisch 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17(4) *EJILw*, 803, 808; Diplomatic Convention (n 34), Article 22(3) , referring to the inviolability of embassy property, interpreted as including bank accounts.

⁴⁷ Fiscal Affairs of the District of Columbia 1949-1950, *Hearings on H.R. 1937*, 93.

⁴⁸ See for example the demands of NY senators from "Washington" to address the problem of payment of property taxation by UN missions of several countries. William Sherman and Bob Port, 'New-York Owed Millions by Other Countries', *Chicago Tribune* (Chicago, 31 October, 2004). While this example does not represent a directly relevant example in the context of taxation of diplomatic and consular missions, the example provides an illustration of tensions between the municipal and state apparatus.

reciprocity impact. The sending state might respond in kind, requiring the foreign missions of the host state to pay similar taxes.

Analysis in this section demonstrated the challenges posed by the applicable international legal regimes, manifested in bilateral and multilateral instruments, for taxation of foreign missions. Discourse also considered the dilemmas faced by central and municipal administration when considering the appropriate balance between the need to facilitate the functioning of foreign missions and the interests of municipalities (and domestic residents). Ultimately, as the discourse illustrated, there are inherent tensions between the principle of exemption of foreign missions from municipal taxation and the need of municipalities (city hall). Addressing these tensions might benefit from reconsideration of the municipal taxation of foreign missions, as discussed in the next section.

PART 3. FOREIGN MISSION MUNICIPAL TAXATION RECONSIDERED

Reconsideration of the current international legal regimes for foreign mission taxation can be done from procedural and substantive perspectives. Contemporary international law understanding emphasizes the prominence of global administrative law (GAL) in determining legal outcomes.⁴⁹ GAL can play an important role in impacting normative outcomes. This means that in some cases, decision and norm-making process can be outcome determinative and that if different procedural rules are adopted the resulting norms would be different.⁵⁰ Commentators advocating this approach call upon the international community to adopt good governance inspired procedures for international norm making to enhance the legitimacy of

⁴⁹ Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17(1) EJIL, 187, 189.

⁵⁰ Sabino Cassese, Elisa Deltario, 'Introduction' in *Global Administrative Law: The Casebook*, Sabino Cassese, Bruno Carotti, Lorenza Casini, Elenora Cavalieri & Euan MacDonald (eds.) (IRPA IILJ, 2012) 1–24.

normative outcomes.⁵¹ Moreover, procedural structures developed in order to facilitate and support the design of international norms can contribute to the accountability of those responsible for their creation.⁵² This can be particularly important in the context of the state-municipal government inherent tensions in respect of municipal taxation of foreign missions. Accordingly, the analysis in this section suggests paradigms and processes reflecting the increasing status of the city as an international law actor, highlighted in the second section of this paper. If the city indeed has the potential of playing an important and prominent role in the international norm making field, the assessment of a new paradigm necessitates thinking about providing the city with a new place at the table in norm-making settings.

Intuitively, resolving the ambiguity in treaty law on definition of municipal taxes and services rendered could address many of the controversies. Instead of the current formulation of the “services rendered” term, a new definition could refer to an exhaustive list of different types of municipal taxes based on current practices. Alternatively, a new definition can refer to an agreed percentage of the overall municipal taxation payment. In case consensus can be reached on a new definition, this might resolve many of the current controversies. It could also be agreed that exceptions could apply in certain circumstances, such as emergencies, and that technical dispute resolution mechanisms can resolve differences. Agreements on these changes will likely necessitate consensus between the member states of the VCDR and VCCR, which constitute a wide majority of the states in the world.⁵³

⁵¹ Daniel C. Etsy, ‘Good Governance at the Supranational Scale: Globalizing Administrative Law’ (2006), 115 Yale LJ 1490, 1561.

⁵² Benedict Kingsbury, Nico Krisch, Richard B. Stewart, & Jonathan B. Wiener, ‘The Emergence of Global Administrative Law: Forward: Global Governance as Administration- National and Transnational Approaches to Global Administrative Law’ (2005) 68 Law & Contemp. Prob. 1, 13.

⁵³ 180 States are members of the VCCR, and 192 States are members of the VCDR (*UNTC*) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&clang=_en; https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=_en> accessed 24 May 2021

If such a process will include representatives of “global” cities (where foreign missions are mostly located), the outcome might be very different from what exists today. Cities unsatisfied with the current state of affairs might insist that new arrangements better reflect the interests of their residents and contemporary budgetary constraints of municipalities around the globe.

One possible way to incorporate such new arrangements could be through amending the treaty regime.⁵⁴ Such amendments could include for example modifying diplomatic and consular privileges and immunities.⁵⁵ The underlying rationale for making this change, as suggested in other contexts,⁵⁶ could be that foreign missions are abusing the municipal tax exemption (or the reduced rate) in order to avoid making necessary contributions to the city’s welfare.

Recognizing the theoretical possibility of such amendments, the basic principles “enshrined” in the treaty regime are not likely to be amended.⁵⁷ This is demonstrated by the lack of any recent attempts to modify existing diplomatic and consular legal frameworks even in the face of repeated abuses of immunities, in some cases resulting in accidental deaths.⁵⁸

In contrast to amending the treaties, a more realistic option is to use existing forums for developing shared understandings and interpretations of the existing treaty regimes. The use of existing forums for addressing the issue of foreign missions’ taxation could be preferable to creating new ones, as establishing them might pose formidable obstacles.

⁵⁴ 1966 Vienna Convention on the Law of Treaties, UNTS 1155, 331, Article 40.

⁵⁵ Alison Pert, ‘Diplomatic Immunity: Time to Change the Rules’ (*The Interpreter*, 15 October, 2019), <<https://www.lowyinstitute.org/the-interpreter/diplomatic-immunity-time-change-rules>> accessed 15 April, 2021.

⁵⁶ *ibid.*

⁵⁷ Jonathan Brown, ‘Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations’ (1988), 37(1) *International and Comparative Law Quarterly* 53, 85.

⁵⁸ Pert (n 55).

Alongside the decision or norm-making process, the choice of the most appropriate forum can also be of paramount importance. This is because different forums can perform varied functions. If the forum chosen, for example, can only produce soft law tools,⁵⁹ or is not comprised of relevant actors, its outcomes might not produce the required impact or may be inconducive to address current gaps.

As discussed earlier in the paper, cities have responded to their increased role in the formation of international law norms, creating various networks in order to influence decision making by states.⁶⁰ These networks can have some influence on state actors but can be limited by the fact that they are mainly comprised by the cities themselves without the participation of state actors.⁶¹ Consequently, their capacity to introduce modifications to customary international law-based treaty concepts can face significant obstacles. In this respect, while resolutions such forums might issue could draw attention or provide insight, their legal significance is limited. In order for the forum to have a true impact it would need to be one which facilitates participation of both cities and states.

Appropriate existing forums for facilitating the debate can be universal, such as the UN Sixth Legal Committee, or regional in organizations like the Organization of American States (OAS) or the Council of Europe Committee of Legal Advisers (COE CHADI), where legal advisers of Ministries of Foreign Affairs from COE member states and observers share views on implementation of public international law. Participation of representatives of relevant

⁵⁹ Soft law is an important tool for reaching consensus. CM Hinkin, 'The Challenge of Soft Law: Development of International Law' (1989) 38 *International and Comparative Law Quarterly* 850, 866. At the same time, it ultimately does not have any mandatory legal character.

⁶⁰ For a discussion in the context of climate change see Tadeong Lee, 'Global Cities and Transnational Climate Change Networks' (2013), 13(1) *Global Environmental Politics* 108-127. <https://doi.org/10.1162/GLEP_a_00156>.

⁶¹ *ibid* 110-111.

cities in such deliberations, including municipal taxation officials, together with delegates from central government could facilitate an “experts meet diplomats” dialogue.⁶²

In the past, such forums have proved challenging and complicated but outcomes have been largely constructive.⁶³ It is important to note that when different actors with different perspectives need to arrive at consensus. This might be a very difficult task to achieve. At the same time, experience in forums of mixed participation, such as the United Commission on International Trade Law (UNCITRAL), has demonstrated that differences on international law making can be overcome if delegations of state and non-state actors share a common goal of reaching consensus.⁶⁴ In the case of UNCITRAL, the main goal is to arrive at consensus when making decisions rather than resort to voting.⁶⁵ UNCITRAL delegates represent a wide variety of actors, ranging from government officials to academics and private practitioners.⁶⁶ The deliberative process in UNCITRAL can be akin to the envisioned future discussions between government officials, city administrators and representatives of city residents, which should all strive to consensus on interpretations of the treaty regime.

Deliberations on agreed implementation and interpretation of treaty regimes can be afforded with enhanced legitimacy if they would be conducted in a transparent manner. This could be achieved by broadcasting deliberations or publicly sharing their recordings and

⁶² Matti Joustén Adam Graycar, ‘When Experts and Diplomats Agree: Negotiating Peer Review of the UN Convention Against Corruption’ (2012), 18 *Global Governance*, 425-439 <<https://doi.org/10.1163/19426720-01804003>>.

⁶³ See for example in the context of the 2019 overview on the experience of reaching consensus in the negotiations on the United Nations Convention on International Settlement Agreements Resulting from Mediation (The Singapore Convention), Natalie Morris-Sharma, ‘The Singapore Convention is Live, and Multilateralism Alive!’ (2019), 20 *Cardozo J. of Conflict Resolution* 1009-1022.

⁶⁴ Alan Boyle, Kasey McCall ‘Transparency in International Law Making’ in Andrea Bianchi, Ann Peters (eds) *Transparency in International Law* (Cambridge University Press, 2013), 419-435.

⁶⁵ Anthea Roberts, ‘UNCITRAL and ISDS Reforms: The Divided West and the Battle for the Rest’, (*EJIL:TALK!*, 30 April, 2019) <<https://www.ejiltalk.org/uncitral-and-isds-reforms-the-divided-west-and-the-battle-by-and-for-the-rest/>> accessed 28 July, 2021.

⁶⁶ *A Guide to UNCITRAL – Basic Facts about the United Nations Commission on Trade Law* (United Nations, 2013) 8.

documents. Ideally, deliberations can also encourage active participation by accepting submissions from residents of cities directly impacted by the exemptions provided to foreign missions.⁶⁷

As discussed, foreign mission municipal taxation regimes have attained binding CIL status. i.e. that all states are bound by these regimes regardless of whether they have adhered to the VCDR or the VCCR, unless they have persistently objected to the relevant arrangements.⁶⁸ The CIL status of the treaty based regimes might require consensus-based decisions by a wide majority of states in order to modify state practice and *opinio juris* to effectively change long established customary norms.⁶⁹ This type of modification and the creation of new shared understandings or interpretations, might be very hard to come by even if the actors involved share a common purpose.⁷⁰

Acknowledging the difficulty in attaining an almost global change in interpretation and approach, one possible alternative route could be to develop bilateral understandings between states which can take the form of treaties. As agreements on the methodology of treaty application and the calculation of municipal taxation could be of a very technical nature, they can also be embodied in non-binding MOUs or exchange of letters.⁷¹ These understandings can include arrangements on specific percentages out of the overall municipal tax or agreed definitions on what constitutes a tax or payment for services rendered.

⁶⁷ Esme Shirlow., 'Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures' (2017) 8(1) *Göttingen Journal of International Law*, 73, 77.

⁶⁸ ILC Draft Conclusion on the Identification of Customary International Law, Conclusion 15 (2018).

⁶⁹ *ibid*, Conclusion 8. In order for a CIL norm to be formed, or changed, there must be consistent and general state practice of adherence to the norm.

⁷⁰ Dapo Akande, 'What is the Meaning of "Consensus" in International Decision Making?' (*EJIL TALK*, 8 April, 2013) <<https://www.ejiltalk.org/negotiations-on-arms-trade-treaty-fail-to-adopt-treaty-by-consensus-what-is-the-meaning-of-consensus-in-international-decision-making/>> accessed 15 April 2021

⁷¹ For a recent discussion of the nature and impact of such MOUs see Andreas Zimmermann, Jauer, Nora, Possible Indirect Legal Effects under International Law of Non-Legally Binding Instruments (May 2021). KFG Working Paper Series, No. 48, May, 2021, Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?', Available at SSRN: <https://ssrn.com/abstract=3840767>

In the past, understandings on municipal taxation of foreign missions were based on bilateral agreements between states.⁷² The analysis offered by the paper can facilitate consideration by state actors to involve the relevant cities not only in the negotiation process but possibly as parties to agreements or to soft law non-binding instruments such as MOUs.⁷³ As these non-binding MOUs would not necessarily be considered as international agreements,⁷⁴ adopting this approach might not be considered as revolutionary. Rather, it could be framed as a necessary adaptation of foreign missions' municipal taxation regimes to contemporary realities.

Alternatively, agreements can refer to specific municipal authorities in the text of the agreement itself with their consent. Applying this approach could constitute an important feature of contemporary international law making defined as “nothing about us without us”. This was a term employed, for example, in respect of the relatively recent adoption of the Convention on the Rights of Persons with Disabilities (CRPD).⁷⁵ The practical manifestation of this principle was the active and leading involvement of civil society representatives of disabled persons in the negotiations of the CRPD.⁷⁶ Similarly, cities and their residents should be involved in implementing treaty regimes in respect of foreign missions' municipal taxation directly implicating them.

Ironically, involving cities in developing universal or bilateral foreign mission municipal taxation regimes would mark a significant departure from past practices, as these

⁷² Cleave (n 38) 850.

⁷³ Andrew Bodifrod, ‘Cities in International Law: Reclaiming Rights as Global Custom’(2020), 23(1) City University of New-York Law Review, 1, 23, 25-26.

⁷⁴ VCLT (n 54), Article 3.

⁷⁵ Gauthier de Beco, Alexander Hoefman, ‘National Structures for the Implementation and Monitoring of the United Nations Convention on Persons of Disabilities’ in Gauthier de Beco (ed), *Article 33 of the UN Convention on the Rights of Persons with Disabilities* (Martinus Nihjuf Publishers, 2013), 9, 56.

⁷⁶ Para 1, General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, CRPD/C/GC/7, 9 November, 2018.

issues are a hallmark of diplomatic negotiations. Nevertheless, such an approach could appropriately reflect the changes in thinking about international law and cities and the role of the city in creating and implementing international law. This might be the case even if ultimately it would be diplomats and states making the final call.

CONCLUSION: LESSONS LEARNED FROM THE FOREIGN MISSION MUNICIPAL TAXATION CASE STUDY

Contemporary approaches to law and the city highlight the important role local municipal governments can play in shaping legal norms, including for such matters as refugees and asylum seekers.⁷⁷ In some cases, legal frameworks are imposed by central governments but their practical application by the municipal government can become a determinative factor.⁷⁸ At the same time, municipal actors can be constrained by national legislation limiting their independent decision-making, including in respect of legislation pertaining to everyday lives of residents. This is a natural component of modern government which is unlikely to change, even if the role of municipal authorities is enhanced. The foreign mission municipal taxation case study provides an interesting setting for examining relationships between national and municipal governments when global cities are concerned.

Distinctively from some other legal fields, the CIL and treaty-based taxation regime presents some flexibility of interpretation which can allow for more room for influence by municipal actors, albeit in the confines of reciprocity. Moreover, the flexible nature of

⁷⁷ Elif Durmus, 'A Typology of Local Governments' Engagement with Human Rights: Legal Pluralist Contributions to International Law and Human Rights' (2020), 38(1) Netherlands Quarterly of Human Rights, 30, 31-32.

⁷⁸ William Salet, Jochem De Vires, 'Contextualisation of Policy and Law in Sustainable Urban Development' (2019), 62(2) Journal of Environmental Planning and Management 189, 190. <https://doi.org/10.1080/09640568.2017.1418304>.

international norm making can also provide a platform for increased active participation by such municipal actors as well local resident groups.

The potential of this active participation in norm-making can be attractive, considering the relatively limited sensitivity of the issue of foreign missions' municipal taxation, at least in comparison to other diplomatic privileges and immunities or international law dilemmas like protection of human rights. Unlike for these latter subject matters, it might be that states would be less reluctant to allow cities and city residents a place at the table in international norm and decision-making processes.

If proposals suggested in the previous section are adopted by central government actors, the outcome could be a more balanced regime adapted to the needs of a modern city and a more balanced and equitable approach. This kind of outcome could showcase how cities, central governments and residents, can work together. Cooperation in this realm in cross-border contexts to develop new common contemporary understandings of traditional legal precepts has potential to succeed even where the legal precepts were developed many years ago, resulting from longstanding policy and practice.