

Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law

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Abstract

The growing influence and self-confidence of local authorities count among the most interesting recent phenomena in global governance. While not entirely oblivious, international law as a field has struggled to get ahead of this dynamic, focusing instead on how to integrate local authorities into static conventional frameworks firmly based on the notion of state sovereignty. However, as a discussion of the global state of affairs and a focus on human rights cities shows, local actors increasingly claim and obtain a key role in the realization of international law. Additionally, they hold important potential to address some of the most pressing challenges to international human rights law concerning its efficacy and legitimacy. This article therefore calls for a proactive approach to the study of local authorities that considers local authorities as a ‘new frontier’ in international law generally and in human rights law specifically. It proposes a critical research agenda for this purpose that could produce important new insights into (i) the continued relevance and legitimacy of human rights as a discourse of governance; (ii) the bearing of domestic constitutional arrangements on the implementation of human rights law and (iii) questions of, and possible shifts in, legal subjecthood in the contexts of ‘state failure’.

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1 Introduction

Could the city, equipped with new rights and a greater sovereignty, open up new horizons of possibility previously undreamt of by international law?¹

The first-ever United Nations (UN) Summit on Refugees and Migrants, which was held in 2016, received some of its most important support from actors who were not invited to the table. During the summit, the mayors of New York, London and Paris wrote an op-ed in the *New York Times*, depicting their cities as being at the frontline of helping those fleeing violence or persecution.² They called for decisive UN action and, in standing for inclusivity, promised to do their part, for instance, via a municipal identification programme and the #Londonisopen campaign. They argued that investing ‘in the integration of refugees and immigrants is not only the right thing to do, but also the smart thing to do’. The article provides an example of the increased self-confidence with which local authorities have come to respond to global challenges in recent years. With nation-states often in crisis or political deadlock, local authorities have increasingly asserted themselves as an alternative with greater legitimacy and more hands-on impact, and they are recognized as such by policymakers, scholars and international and regional organizations alike. This development is visible in all fields of international law, and international human rights law forms no exception. Increasingly, cities – large and small – are not only symbolically ratifying treaties but also explicitly enforcing them, positioning themselves as human rights cities and invoking international human rights law locally *vis-à-vis* national governments and in international fora and networks.

This emerging practice has captured the attention of social science scholars for a while, but it has received much less notice by international lawyers.³ However, as both the process and the corresponding literature have gathered pace, it is time for an assessment of the direction in which international law scholarship is heading. How has it coped with the rise of local authorities, and has it done justice to the developments? This article argues that international law as a field has struggled to get ahead of this (r)evolution, being focused on the question of how to integrate local authorities into static conventional frameworks firmly based on the premise of state sovereignty. While this is understandable, it constitutes a missed opportunity as a more fundamental engagement with the phenomenon could make a significant contribution to reforming the discipline. This is particularly evident in the field of human rights law,

¹ J. Derrida, speaking at the inauguration of the International Cities of Refuge Network in 1995, available at www.icorn.org/article/cities-freedom-does-road-changing-world-go-through-city-hall.

² De Blasio, Hidalgo and Khan, ‘Our Immigrants, Our Strength’, *New York Times* (20 September 2016).

³ The social science literature on the rise of global cities and city networks is too vast to cite here but was largely spurred by Sassen’s work on the global city. S. Sassen, *The Global City: New York, London, Tokyo* (2001). See, e.g., M. Acuto, *Global Cities, Governance and Diplomacy: The Urban Link* (2013). One of the few legal articles on the topic, Accardo, Grimheden and Starl, ‘The Case for Human Rights at the Local Level: A Clever Obligation?’, in W. Benedek (ed.), *European Yearbook on Human Rights* (2012) 33, makes a similar point. See also Oomen and Baumgärtel, ‘Human Rights Cities’, in A. Mihr and M. Gibney (eds), *The Sage Handbook of Human Rights* (2012) 709.

which has recently come under increasing scrutiny in regard to its legitimacy and efficacy. We argue that local authorities as actors hold the potential to make – and have already made – an effective contribution to addressing these challenges. Based on this insight, we call for a more open and proactive approach to the study of local authorities in international law; one that indeed considers cities and similar local actors as a new ‘frontier’. This article offers a critical research agenda for this purpose for the domain of human rights, focusing on (i) the relevance and legitimacy of human rights as a discourse of governance in the city context; (ii) the bearing of domestic constitutional arrangements on the implementation of human rights law and (iii) questions of, and possible shifts in, legal subjecthood, especially in moments of ‘state failure’.

While targeting a wider international law audience, the focus of most (though not all) of the article’s examples will be human rights law in Europe, including European Union (EU) law. ‘Local authorities’ are defined specifically as the lowest tier of public administration within a given state. The argument will be elaborated in four parts. The following section summarizes the international law scholarship on local authorities and shows how it has, above all, sought to integrate the rise of local authorities in its conventional frameworks. In the next section, we turn to human rights as an area under mounting pressure in terms of legitimacy and efficacy and show how the rise of ‘human rights cities’, and their increasing ‘legalization’, constitute some of the most interesting and promising responses. The fourth part discusses how these empirical developments correspond to the *lex lata* in the context of a ‘multilayered system’ of human rights in Europe, including the UN treaties, the European Convention on Human Rights (ECHR) and EU law. A critical research programme incorporating the three aforementioned elements is proposed in the fifth section.

2 Local Authorities and International Law: The Story Thus Far

While it is safe to say that the role of local authorities in international law is under-researched, it can no longer be argued that it is completely novel. Whereas the scope of this article does not allow for a comprehensive discussion, it summarizes some of the important contributions while trying to distil their common concerns.⁴ More specifically, it will be argued that, despite their generally reflective outlooks, they still are primarily concerned with ‘disciplining’ the phenomenon and with the consolidation of established frameworks of international law. To this end, it is important to note, first, that the emerging literature is a reaction to the increasingly assertive posture that cities and other local actors take on the international level. Of course, this development has origins that reach further back in time. There have long been bilateral forms of

⁴ The focus point of this particular section are only those works that are primarily geared to an (international) law audience, thus excluding other literature that has shaped the discussions in the field but that originates from other disciplines. For a recent discussion of such contributions (from an international law perspective), see Aust, ‘Shining Cities on the Hill? The Global City, Climate Change, and International Law’, 26 *European Journal of International Law (EJIL)* (2015) 255.

international cooperation and city networks concerned with global issues, be it apartheid, combating racism or otherwise. In addition, the EU established the Committee of Regions as an advisory body in 1994, in the same year that the Council of Europe formed its Congress of Local and Regional Authorities as its ‘third pillar’.⁵ Over the past years, however, the number of city networks has increased, as has their ambition, with city leaders emerging as a ‘transnational force beyond the top down world of international negotiations or the bottom-up advocacy of civil society groups’.⁶

The paradigmatic example of this evolution lies arguably in the field of climate change.⁷ The UN’s special envoy for cities and climate change, former New York City Mayor Michael Bloomberg, played a key role in setting up the Covenant of Mayors for Climate and Energy, which unites 7,500 cities from 199 countries in the fight against climate change.⁸ Formed in 2016, it unites a wealth of earlier initiatives like the C40 Climate Leadership group, the International Council for Local Environmental Initiatives, Climate Alliance, Energy Cities, Eurocities and United Cities and Local Government (UCLG).⁹ Together, these cities commit to achieving or surpassing national commitments made in the context of the UN Paris Agreement.¹⁰ The Charter of the Covenant departs from the notion of regional covenants, in which signatories agree to reduce their carbon emissions by 40 per cent by 2030.¹¹ Similarly, mayors in the USA symbolically ratified the Kyoto Protocol, set up the mayors’ climate network committed to realizing the Paris Agreement and closed individual climate change agreements.¹² In terms of setting binding norms and including them, such steps ‘imitate’ the activities of other actors recognized by international law.¹³ Climate change, however, is not the only area in which such initiatives can be observed. As set out in the next section, similar activities and processes are also visible in the subfield of international human rights law.

⁵ Its predecessor, the Conference of Local and Regional Authorities of Europe was set up in 1957. Affholder and Lambrecht-Feigl, ‘The Congress of Local and Regional Authorities: European Co-Operation Close to the Citizen’, in T. Kleinsorge (ed.), *Council of Europe* (2015) 182.

⁶ Acuto, ‘City Leadership in Global Governance’, 19 *Global Governance: A Review of Multilateralism and International Organizations* (2013) 481, at 486.

⁷ D. Hoornweg, M. Freire and M.J. Lee, *Cities and Climate Change: Responding to an Urgent Agenda* (2011).

⁸ Covenant of Mayors for Climate and Energy, 22 June 2016, available at www.globalcovenantofmayors.org/.

⁹ Aust, *supra* note 4.

¹⁰ Charter for the Global Covenant of Mayors for Climate and Energy, available at www.compactofmayors.org/globalcovenantofmayors. Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

¹¹ See Covenant of Mayors for Climate and Energy, available at www.covenantofmayors.eu.

¹² US Conference of Mayors Climate Protection Agreement, <http://www.usmayors.org>; Climate Mayors, <http://climatemayors.org>; Government of California of the United States of America and the Ministry of Science and Technology of the People’s Republic of China, Memorandum of Understanding on Research, Innovation, and Investment to Advance Cooperation on Low-Carbon Development and Clean Energy Resources, 6 June 2017; Alvarez, ‘Mayors, Side-Stepping Trump, Vow to Fill the Void on Climate Change’, *New York Times* (26 June 2017).

¹³ Aust, ‘Auf dem Weg zu einem Recht der globalen Stadt? “C40” und der “Konvent der Bürgermeister” im globalen Klimaschutzregime’, 73 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2013) 674, at 694.

In observing these developments, international law scholarship has so far followed a predictable pattern that, in our view, is predisposed to accommodate, rather than challenge, conventional frameworks. The first step has been to document and classify the developments. Yishai Blank seminally presents an account of four major ‘modalities’ to help ‘define localities’ new place in the global order’: (i) they have become bearers of international rights, duties and powers; (ii) they are increasingly objects of regulatory efforts at the international level; (iii) they have come to have a stake in their enforcement and (iv) they have shown a tendency to form global networks.¹⁴ Interestingly, not all four aspects have subsequently received the same attention. The second and third modalities, for example, are usually discussed in tandem. An influential contribution by Gerald Frug and David Barron, for example, argues that the scope of powers of local authorities is increasingly shaped by international legal rules and organizations.¹⁵ In the future, these are likely to take the shape of tangible international standards of ‘good urban governance’.¹⁶

Ileana Porrás shows that cities, moreover, have become the ‘privileged locus’ for achieving sustainable development, an agenda heavily promoted by the UN, the World Bank, the Organisation for Economic Co-operation and Development and the EU.¹⁷ More recently, Helena Lindemann has provided a comprehensive ideological and a legal assessment of ‘city concepts’ as propagated by UN Habitat and the World Bank.¹⁸ The other focal point of the ‘stocktaking’ part of the literature has been the fourth aspect concerning the proliferation of city networks as the most visible expression of the growing relevance of local authorities. The UCLG features prominently as an example of a successful and effective network.¹⁹ Helmut Aust discusses at some length the history of the ‘C40’, a fairly exclusive alliance of megacities and ‘innovator cities’ that seeks to take the lead in climate governance.²⁰ In another article, he compares the C40 to the more inclusive Covenant of Mayors for Climate and Energy but shows how they share several commonalities including, *inter alia*, their legitimation strategies, the use of international law vocabulary and private–public partnerships.²¹ Taking these aspects together, these works join the chorus of social science scholarship that describes a close and almost dialectical relationship between global and local actors.²²

¹⁴ Blank, ‘Localism in the New Global Legal Order’, 47 *Harvard International Law Journal* (2006) 263, at 266–269; Blank, ‘The City and the World’, 44 *Columbia Journal of Transnational Law* (2006) 875, at 898 (in more detail). For a strikingly similar breakdown, see Nijman, ‘The Future of the City and the International Law of the Future’, in Sam Muller *et al.* (eds), *The Law of the Future and The Future of Law* (2011) 213, at 219–227.

¹⁵ Frug and Barron, ‘International Local Government Law’, 38 *The Urban Lawyer* (2006) 1.

¹⁶ Nijman, *supra* note 14, at 226.

¹⁷ Porrás, ‘The City and International Law: In Pursuit of Sustainable Development’, 36(3) *Fordham Urban Law Journal (FULJ)* (2009) 537. See also Nijman, *supra* note 14, at 220–221.

¹⁸ H. Lindemann, *Kommunale Governance: die Stadt als Konzept im Völkerrecht* (2014).

¹⁹ See Frug and Barron, *supra* note 15, at 24–26; Porrás, *supra* note 17, at 547–549; Nijman, *supra* note 14, at 220–221; Lindemann, *supra* note 18, at 14–15.

²⁰ Aust, *supra* note 4, at 261–263.

²¹ Aust, *supra* note 13, at 692–695.

²² *Ibid.*, at 695.

In the second instance, scholarship has sought to assess the relevance of these processes using established categories of international law. This turned out to be a difficult exercise from the start, as is illustrated by an early 2002 volume on the topic.²³ Visibly struggling to make the connection, the contributors ended up stressing the key role of domestic law in the definition of the competences of the local authorities²⁴ and concluding that local authorities only make a ‘modest’ contribution to the development of international law.²⁵ Discussing the issue from the perspective of international legal responsibility, James Crawford and Murielle Mauguin assert that the prospect of bypassing the state is simply impractical.²⁶ Subsequent scholarship, however, has identified two ways to overcome this impasse. Rather than addressing the challenging issue of legal subjecthood right away, the initiatives of international organizations have inspired a refocus on cities as the objects of international norms. This shift was strongly promoted by Frug and Barron, who, on this basis, called for a totally novel field of research: ‘[I]nternational local government law.’²⁷ The other way has been to stress that the activities of cities (in particular, within the context of their networks) may count as ‘soft law instruments [with] some degree of international normativity’.²⁸ Following the literature on soft law,²⁹ this feature has the advantage of allowing local authorities to borrow (formal) legal language while also projecting an image of flexibility and progressiveness.³⁰ Unsurprisingly, the question of ‘formal law’ nonetheless looms large for some authors, leading them to call for a formal membership of localities in the UN³¹ or to make bold predictions about a future ‘urbanisation of international law’.³² Aust, for his part, elegantly sets aside the question, stating that ‘[i]t might not be possible to identify a precise tipping point where the assertion of authority is successful’.³³

Finally, some of the international law scholarship adopts a normative perspective on the rise of cities and other local authorities. Jean-Marc Sorel, for example, muses whether their formal inclusion would not lead to a political world that is even more

²³ Société Française pour le Droit International, *Les collectivités territoriales non-étatiques dans le système juridique international* (2002).

²⁴ Sorel, ‘La prise en compte des collectivités territoriales non-étatiques par les organisations internationales à vocation universelle’, in Société Française pour le Droit International, *Les collectivités territoriales non-étatiques dans le système juridique international* (2002) 140.

²⁵ Dominicé, ‘Les collectivités territoriales non-étatiques et la formation du droit international’, in Société Française pour le Droit International, *supra* note 24, 62.

²⁶ Crawford and Mauguin, ‘Les collectivités territoriales non-étatiques et le droit international de la responsabilité’, in Société Française pour le Droit International, *supra* note 24, 165.

²⁷ Frug and Barron, *supra* note 15. See also Nicola and Foster, ‘Comparative Urban Governance for Lawyers’, 42 *FULJ* (2014) 1.

²⁸ Nijman, *supra* note 14, at 225. Soft law is also very significant insofar as the ‘city concepts’ of international organizations are concerned. See Lindemann, *supra* note 18, at 163–165.

²⁹ E.g., Hillgenberg, ‘A Fresh Look at Soft Law’, 10 *EJIL* (1999) 499.

³⁰ Aust, *supra* note 13, at 693.

³¹ Blank, *supra* note 14, at 280. Blank himself readily acknowledges the ‘seeming preposterousness of such a suggestion’.

³² Nijman, *supra* note 14, at 228.

³³ Aust, *supra* note 4, at 273.

'unmanageable' (*ingérable*) than it already is.³⁴ Even more forceful are critiques that question, both theoretically and empirically, the intention of local authorities. Porras underlines, for example, that cities and city-based agendas are equally, if not even more, susceptible to neo-liberal calls for privatization.³⁵ Of course, this would negate any of the alleged advantages of improved political participation.³⁶ Lindemann demonstrates how the implementation of city concepts by the World Bank and UN Habitat (which are also supported by many cities) in promoting universal conceptions of 'good urban governance' disguises private interests and local power asymmetries.³⁷ The most vocal sceptic, however, is Aust, who frames his critical discussion of 'shining cities on the hill' in explicit juxtaposition to Benjamin Barber's optimistic outlook in *If Mayors Ruled the World*.³⁸ On the one hand, he points out, in reference to the exclusive C40, how 'power relationships seem to reproduce hierarchies known from the state system'.³⁹ On the other, he warns against a premature rejection and 'demonization' of the state, which could have detrimental political consequences even in the field of climate policy.⁴⁰

This short discussion illustrates how international law scholarship on local authorities has come quite a long way from its modest beginnings. A genuine interest exists to understand the rise of cities and other 'localities' and to integrate them into the discipline. This last point, however, is in a way also the greatest limitation of existing scholarship. In our view, the combined emphasis on cities as 'objects' of international law, the prevalence of 'soft law' and the potential problems of their increased relevance precludes a more fundamental engagement with the topic that could, as we will argue, make a real contribution to the further development of international law. To be sure, our intention is not to reject the many valuable insights provided by the aforementioned works. Rather, our argument is that research on the role of local authorities in international law needs a shift in purpose; instead of disciplining the conceptual challenge posed by the rise of local authorities, the latter should be used to challenge the concepts of the discipline.⁴¹ The next section makes a case for viewing cities as a 'frontier' in international law by looking specifically at human rights law as a subfield. Here, local authorities hold the potential to respond to some of the most pressing concerns – namely, the challenges of legitimacy and efficacy.

3 Legalization from Below? The Rise of Human Rights Cities

Even if international human rights law as a field has expanded immensely over the past decades, it has also come to face considerable critique, with both scholars and

³⁴ Sorel, *supra* note 24, at 143. Blank strikes a somewhat similar tone in asking how precisely localities would be represented, e.g., in an 'international legislature'. Blank, *supra* note 14, at 276.

³⁵ Porras, *supra* note 17, at 583–591.

³⁶ As defended, e.g., in Blank, *supra* note 14, at 274–276.

³⁷ Lindemann, *supra* note 18.

³⁸ Aust, *supra* note 4, at 264–268.

³⁹ *Ibid.*, at 277.

⁴⁰ *Ibid.*, at 268, 277.

⁴¹ Aust seems to identify a similar tendency in noting that the legal system (in this case, international law) often reacts to new phenomena by denying them any formal relevance. Aust, *supra* note 13, at 696.

policymakers expressing concern on the effectiveness and the legitimacy of human rights. Where it concerns the ability of international human rights to actually deliver, Emilie Hafner-Burton and Kiyoteru Tsutsui underline the ‘paradox of empty promises’ that is involved.⁴² Related to this, the legitimacy of human rights is also increasingly questioned, not only within countries in the global South but also by scholars and politicians focusing on Europe.⁴³ Local authorities hold the potential to address these concerns, both because of their key role in service delivery and because of their closeness to the population.

Not only have such local authorities, within and outside of Europe, increasingly started to engage with international human rights law over the past decades, but this engagement has also acquired more and more of a formal legal character, both within the local context and *vis-à-vis* the national government. Sally Engle Merry and colleagues set out how international human rights does not only concern a system of law but also ‘an ideology of justice and a practice of claims-making’.⁴⁴ Over the years, however, local engagement with international human rights law has moved from a mere reference to ideology and practice towards a more systematic and legal engagement and, thus, a commitment on the part of local actors to play a role as human rights duty bearers, both individually and collectively, within the context of networks. One ultimate consequence is that local authorities invoke responsibilities derived from international human rights law to ‘decouple’ their policies from those adopted nationally.⁴⁵

Of course, the responsibilities of local authorities for international legal obligations is classically considered a matter of national constitutional law and regulated very differently in constitutional settings ranging from centralized to federalist and from monist to dualist.⁴⁶ All of the examples quoted here, however, concern instances in which local authorities directly engage with international human rights obligations, irrespective of their formal rights and responsibilities in this field within the national context. Developments both within international human rights law and within a variety of national contexts facilitate this development. Since its inception, international human rights law has increasingly stipulated the precise legal obligations that come with the ratification of core UN treaties, thus strengthening the justiciability of civil and political rights as well as social, economic and cultural rights.⁴⁷ Simultaneously, over the

⁴² Hafner-Burton and Tsutsui, ‘Human Rights in a Globalizing World: The Paradox of Empty Promises’, 110 *American Journal of Sociology* (2005) 1373. See also S. Hopgood, *The Endtimes of Human Rights* (2013).

⁴³ A. Follesdal, J. Karlsson Schaffer and G. Ulfstein, *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (2014).

⁴⁴ Merry *et al.*, ‘Law from Below: Women’s Human Rights and Social Movements in New York City’, 44 *Law and Society Review* (2010) 101, at 102.

⁴⁵ Scholten, ‘Between National Models and Multi-Level Decoupling: The Pursuit of Multi-Level Governance in Dutch and UK Policies towards Migrant Incorporation’, 17 *Journal of International Migration and Integration* (2015) 973; E.A. Filomeno, *Theories of Local Immigration Policy* (2016).

⁴⁶ Human Rights Council, Role of Local Government in the Promotion and Protection of Human Rights: Final Report of the Human Rights Council Advisory Committee, UN Doc. A/HRC/30/49, 7 August 2015.

⁴⁷ S. Fukuda-Parr, T. Lawson-Remer and S. Randolph, *Fulfilling Social and Economic Rights* (2015); O. de Schutter, *International Human Rights Law: Cases, Materials, Commentaries* (2014).

past decades, national governments all over the world have decentralized and devolved powers to local authorities, particularly in the domains of social and economic policies, for instance, bestowing the formal responsibility for social policies directly upon local authorities. The fact that these transfers of power have also often been accompanied by budget cuts has made it particularly important to make hard choices based on norms that have been universally agreed upon.⁴⁸ In addition, the increase in the sheer number of people who live in cities and the enhanced diversity of the city population has contributed to local willingness to engage with international law.⁴⁹

In the following section, the way in which certain local authorities have come to consider and carve out their role in formulating and enforcing international human rights law, also *vis-à-vis* national authorities, will be illustrated using examples of human rights cities, in general, and the provision of emergency shelter to undocumented migrants in the Netherlands, in particular.

A The Rise of Human Rights Cities

One striking and little-noticed development in the field of human rights law over the past decades has been the rise of human rights cities.⁵⁰ In discursive terms, the engagement of local authorities with the concept of universal rights became particularly manifest following the publication of Henri Lefebvre's 1968 book *Le Droit à la ville*, which essentially concerned the freedom of all inhabitants to participate in shaping a city.⁵¹ This notion of the 'right to the city' is by now included in the national constitutions of many countries, including, for instance, Brazil, and in the local ordinances in cities like Montreal and Mexico City.⁵² The degree to which the local authorities involved also feel responsible for the development of international law is illustrated by the history of the European Charter for the Safeguarding of Human Rights in the City, which originated at a conference destined to commemorate the 50th anniversary of the Universal Declaration of Human Rights in 1998 and has by now been signed by over 400 cities.⁵³ The text sets out classic human rights as codified in the International

⁴⁸ Accardo, Grimheden and Starl, *supra* note 3.

⁴⁹ Data derived from the World Health Organization's Global Health Observatory Data on urban population growth 2014, available at www.who.int/gho/urban_health/situation_trends/urban_population_growth/en/.

⁵⁰ See, however, Oomen and Baumgärtel, *supra* note 3; B. Oomen, M. Davis and M. Grigolo, *Global Urban Justice: The Rise of Human Rights Cities* (2016); People's Movement for Human Rights Education, *Human Rights Learning and Human Rights Cities. Achievements Report* (2007); Wexler, 'The Promise and Limits of Local Human Rights Internationalism', 37 *FULJ* (2010) 599;

⁵¹ Translated in Lefebvre, 'The Right to the City', in E. Kofman and E. Lebas (eds), *Writings on Cities* (1996) 147; D. Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* (2012).

⁵² See, e.g., Sanchez Rodriguez, 'The Recognition of the Right to the City in Mexico City: The Charter', and Frate, 'Human Rights at a Local Level: The Montreal Experience', both in Oomen, Davis and Grigolo, *supra* note 50, 276 and 85; Fernandes, 'Constructing the Right to the City in Brazil', 16 *Social and Legal Studies* (2007) 201.

⁵³ European Charter for the Safeguarding Human Rights in the City, UCLG Committee on Social Inclusion, Participatory Democracy and Human Rights, 18 May 2000, available at www.uclg-cisd.org/sites/default/files/CISDP%20Carta%20Europea%20Sencera_baixa_3.pdf. Universal Declaration of Human Rights, GA Res. 217, 10 December 1948.

Bill of Human Rights, together with principles like those of international municipal solidarity, in which ‘cities particularly encourage financial agents as well as the population at large to participate in cooperation programmes, with the purpose of developing a feeling of solidarity, eventually achieving full equality between peoples, which transcends urban and national frontiers’ (Article 6(3)), and subsidiarity, which, according to Article 7(1) has to be ‘negotiated and managed in a new and vigilant way to prevent the central state and other competent administrations from neglecting their own responsibilities in the cities’.⁵⁴

Apart from, and partially in succession to, the right to city movement, local authorities started to explicitly engage with international human rights in the late 1990s, eventually calling themselves human rights cities. While this development was initially strongly driven by civil society with a focus on the discourse and practice of human rights, local authorities have increasingly come to accept the formal legal consequences.⁵⁵ Barcelona, for instance, introduced a human rights policy and set up a Department of Civil Rights and two municipal services to protect human rights (the Office for Non-Discrimination and the Office of Religious Affairs), a local ombudsman, a Human Rights Observatory and a local charter (the 2010 Barcelona Charter of Rights and Duties).⁵⁶ Graz, another instance of a human rights city, put in place a Human Rights Council with stakeholders from civil society, government and academia and a mechanism for monitoring rights at the local level.⁵⁷ The World Human Rights Cities Forum, which defines a human rights city as ‘both a local community and socio-political process in a local context where human rights play a key role as the fundamental values and guiding principles’, draws hundreds of participants every year and has vowed to further institutionalize the concept in its 2017 meeting.⁵⁸

All of this concerns international human rights in general. A parallel development, however, can be seen in how cities concentrate their efforts on particular human rights treaties. In the USA, for instance, a number of cities have adopted the Convention on the Elimination of All Forms of Discrimination against Women as a local ordinance, in spite of the fact that it has not been ratified by the federal government.⁵⁹ Similarly,

⁵⁴ For a more extensive discussion, see Garcia Chueca, ‘Human Rights in the City and the Right to the City: Two Different Paradigms Confronting Urbanisation’, in Oomen, Davis and Grigolo, *supra* note 50, 132.

⁵⁵ Accardo, Grimheden and Starl, *supra* note 3; Oomen, Davis and Grigolo, *supra* note 50.

⁵⁶ Grigolo, ‘Human Rights and Cities: The Barcelona Office for Non-Discrimination and Its Work for Migrants’, 14 *International Journal of Human Rights* (2010) 894, at 896; Grigolo, ‘Building the “City of Rights”: The Human Rights Policy of Barcelona’, in United Cities and Local Government (eds), *Inclusive Cities Observatory* (2011), available at www.uclg-cisdp.org/sites/default/files/Barcelona_2010_en_final_0.pdf. Barcelona Charter of Rights and Duties (2010), cited in Grigolo, ‘Human Rights and Cities’, *ibid*.

⁵⁷ Starl, ‘Human Rights and the City: Obligations, Commitments and Opportunities’, in Oomen, Davis and Grigolo, *supra* note 50, 179.

⁵⁸ The definition is derived from the Gwangju Declaration on Human Rights City, adopted at the 2011 World Human Rights Cities Forum on 17 May 2011. The commitment towards further institutionalization was made in the World Human Rights Cities Forum, Final Declaration World Human Rights Cities Forum (2016).

⁵⁹ Stacy Laira Lozner, ‘Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative’, 104 *Columbia Law Review* (2008) 768. Convention on the Elimination of All Forms of Discrimination against Women 1979, 1249 UNTS 13.

cities in Europe have taken the lead in ‘symbolically ratifying’ the Convention on the Rights of Persons with Disabilities and implementing its provisions in municipal ordinances, long before the nations concerned followed suit.⁶⁰ Another example of a UN treaty taken forward locally is the Convention on the Elimination of All Forms of Discrimination against Racial Discrimination, which forms the basis for the European Coalition of Cities against Racism launched by the UN Education, Scientific and Cultural Organization in 2004 to commit to a 10-point plan of action and its subsequent monitoring on the basis of city reports.⁶¹

B *The Instance of Emergency Shelter for Undocumented Migrants*

The degree to which an explicit engagement with international human rights law can also lead local authorities to depart from national laws and policies can be illustrated with a Dutch case. In the Netherlands, the theme of *Bed–bad–brood* (bed–bath–bread) has been a political and legal bone of contention, essentially revolving around the question whether local authorities are allowed to, or even should, provide emergency shelter for undocumented migrants. After the central government prohibited municipalities from offering such shelter in 2012, the human rights implications were questioned by international human rights bodies and Dutch local authorities alike.⁶²

The European Committee of Social Rights (ECSR) decided in 2014 that the denial of emergency social assistance to homeless people and irregular migrants was not in line with the Dutch obligations under the European Social Charter.⁶³ After the Netherlands indicated that it would not comply with the ruling since it considered the Charter to be non-binding and had not accepted its jurisdiction for non-nationals, the Committee of Ministers issued a statement reiterating the ECSR’s findings.⁶⁴ In the same year, the three UN special rapporteurs on extreme poverty and human rights, on the right to adequate housing and on the rights of migrants issued a joint statement, reminding the Dutch government of earlier rulings by international, regional and national human rights bodies ‘that the exclusion of homeless migrants in an irregular situation in the Netherlands from emergency assistance violates human rights law’. One of

⁶⁰ Oomen and Van den Berg, ‘Human Rights Cities: Urban Actors as Pragmatic Idealistic Human Rights Users’, 8 *Human Rights and International Legal Discourse* (2014) 160. Convention on the Rights of Persons with Disabilities, Doc. A/RES/61/106, 13 December 2006.

⁶¹ See European Coalition of Cities against Racism, available at www.eccar.info. Convention on the Elimination of All Forms of Discrimination against Racial Discrimination 1965, 660 UNTS 195.

⁶² Volkspartij voor Vrijheid en Democratie and Partij van de Arbeid, *Bruggen Slaan: Regeerakkoord VVD – PvdA*, 29 October 2012, at 30, available at www.parlement.com/9291000/d/regeerakkoord2012.pdf. For an extensive background, see De Meij, ‘Het Recht Van Vreemdelingen Op Een Menswaardig Bestaan En De Rol Van De Rechter’, 90 *Nederlands Juristenblad* (2015) 668; PICUM (ed.), *Book of Solidarity: Providing Assistance to Undocumented Migrants: Belgium, Germany, the Netherlands, the UK* (2002).

⁶³ European Committee of Social Rights (ECSR), *European Federation of National Organisations Working with the Homeless (FEANTSA) v. The Netherlands*, Complaint no. 86/2012, 10 November 2014. See also ESCR, *Conference of European Churches (CEC) v. The Netherlands*, Complaint no. 90/2013, 10 November 2014. European Social Charter 1961, 529 UNTS 89.

⁶⁴ Council of Europe, Committee of Ministers, Resolution CM/ResChS(2015)5, *Conference of European Churches (CEC) v. The Netherlands*, Complaint no. 90/2013, 15 April 2015.

the rapporteurs' key concerns was the lack of legal, administrative and financial support offered by the Dutch government to the municipalities that, 'to their credit, have attempted to compensate for the discriminatory terms and conditions of the national policy by setting up local assistance schemes'.⁶⁵

Such rulings and recommendations were explicitly invoked by those human rights cities that did seek to provide emergency shelter to undocumented migrants in seeking to avoid central government sanctions. After the Committee of Ministers' resolution had nearly led to the fall of the government in 2015, the central government presented a compromise in which undocumented migrants could only get limited shelter in five municipalities on the condition that the people concerned would cooperate with their expulsion. Should they not do so, they would be put out in the streets.⁶⁶ As the compromise made clear, municipalities would not be allowed to offer any shelter to undocumented migrants who did not cooperate with their expulsion and would receive financial sanctions if they did. Many local authorities protested against this, invoking both principled and pragmatic arguments. One example was Utrecht, a city that was characterized by the UN High Commissioner for Human Rights as the first Dutch human rights city and one that has a formal human rights policy.⁶⁷ In Utrecht, the municipal council adopted a motion stating that some people could not go back to their country and would end up in the streets 'in inhumane conditions', which is not in line with international law and the ECSR decision, classifying the Cabinet agreement as 'undesirable, unacceptable and unworkable' and deciding that the municipality of Utrecht would continue to give unconditional shelter and support to undocumented migrants.⁶⁸ Amsterdam also took the ECSR's decision as a basis for its local policies, which were increasingly based upon international human rights law and in line with the city's human rights agenda.⁶⁹ The Dutch Association of Municipalities, finally, voiced strong concerns on the compromise, stating that there would always be people unable or unwilling to cooperate with their expulsion.⁷⁰ Highly critical of the disconnect between the reality in The Hague and the realities at the local level,

⁶⁵ Office of the United Nations High Commissioner for Human Rights (OHCHR), Mandates of the Special Rapporteurs on Extreme Poverty and Human Rights; on Adequate Housing As a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context; and the Special Rapporteur on the Human Rights of Migrants, Allegations Concerning the Failure of the Government of the Netherlands to Provide Emergency Assistance to Homeless Irregular Migrants, Doc. JUA NLD 1/2014, 12 December 2014.

⁶⁶ Ministry of Safety and Justice, Letter to Parliament on the Resolution of the Committee of Ministers, Doc. 40647, 22 April 2015.

⁶⁷ N. Pillay, Speech upon the opening of the Netherlands Institute for Human Rights, Utrecht, 3 October 2012; Gemeente Utrecht, *Human Rights in Utrecht: How Does Utrecht Give Effect to International Human Rights Treaties? An Urban Quest for Social Justice* (2011).

⁶⁸ Municipality of Utrecht, *Minutes Utrecht Council Meeting, Motion 34*, 30 April 2015, available at <http://ibabsonline.eu/Agenda.aspx?site=utrecht&agendaid=577&FoundIDs=&year=2015>.

⁶⁹ See Gemeente Amsterdam, *De Amsterdamse Mensenrechtenagenda*, available at www.amsterdam.nl/bestuur-organisatie/organisatie/sociaal/onderwijs-jeugd-zorg/diversiteit/amsterdamse/.

⁷⁰ Dutch Association of Municipalities, Letters to the Chair of the Parties in Parliament, Doc. ECSD/U201500740, 28 April 2015.

the association called the agreement ‘impossible to implement, based on short-term thinking and pathetic’.⁷¹

The Administrative High Court also addressed the degree to which local authorities are under an obligation to comply with human rights law. It characterized the shelter offered by the municipality of Amsterdam to undocumented migrants as *buitenwettelijk begunstigend beleid* (extra-legal benignant policy), stating that:

there is no legal or international duty upon the municipal council to provide shelter to undocumented migrants. The State Secretary of Safety and Justice, after all, provides shelter in so-called detention centers. Additionally, the local authority has no specific power to provide shelter to undocumented migrants.⁷²

In taking this position, the Court thus departed from the ECSR, which had held that ‘[i]t is undisputed between the parties that the local authorities may grant emergency assistance to adult migrants in need of such assistance when in an irregular situation’.⁷³ Taken together, these two examples illustrate how the entrance of local authorities to the stage of human rights can (and already does) enhance the effectiveness of human rights law and contribute to its legitimacy. The fact that local authorities endorse human rights as discourse, practice and law serves as proof of their persistent appeal even beyond the established ‘echo chamber’.⁷⁴

4 Recognition from Above? The Position of Local Authorities under International and European Human Rights Law

The above sections have set out how certain ‘frontier cities’ have sought to identify as human rights actors, thus contributing to the realization of international human rights law and support for its objectives. The next question concerns the degree to which such positioning and activities receive recognition in international law. Generally, the status of the city as a legal concept has long bewildered lawyers, and discussions on the status of cities under international law is no exception.⁷⁵ In contrast to the wide range of activities employed by local authorities in the international realm, and the policy interest in them, both international and European law are remarkably silent on their formal position as human rights duty bearers. The following

⁷¹ As quoted in OHCHR, Mandates of the Special Rapporteur on Extreme Poverty and Human Rights; the Special Rapporteur on Adequate Housing As a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context; and the Special Rapporteur on the Human Rights of Migrants, Follow-Up Letter Regarding the Failure to Provide Emergency Assistance to Homeless Migrants in an Irregular Situation, Doc. A/HRC/32/53, JAL, NLD1/2016, 25 February 2016.

⁷² Appeals Division of the Council of State, Case 201601948/1/V1, 29 June 2016.

⁷³ ESCR, *Conference of European Churches (CEC) v. The Netherlands*, Complaint no. 90/2013, 10 November 2014, at 13.4.

⁷⁴ Mutua, ‘Is the Age of Human Rights Over?’, in S.A. McClennen and A. Schultheis Moore (eds), *The Routledge Companion to Literature and Human Rights* (2015) 450.

⁷⁵ Frug, ‘The City as a Legal Concept’, 93 *Harvard Law Review* (1980) 1057.

sections, focusing on international and European human rights law and EU fundamental rights law respectively, briefly set out the rights and responsibilities of cities under the current regime, the way in which these have developed in the international realm and the limits to legal standing in these realms.

A International Human Rights Law

In international law, the classic position is that the state is regarded as one single entity, bound by the obligations in the treaties to which it is a party, regardless of whether it is federal or unitary and what the administrative division of powers are. The state is thus responsible for violations of human rights law by local authorities. This conception is implicit in Article 27 of the Vienna Convention on the Law of Treaties, which states that a state party ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty’ but was made explicit with the adoption by the UN General Assembly of the International Law Commission’s (ILC) 2001 Articles of the Responsibility of States for Internationally Wrongful Acts.⁷⁶ Here, Article 1 holds that ‘every internationally wrongful act of a State entails the international responsibility of that State’. Article 4 clarifies how ‘[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, 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’, thus clearly including local authorities. This state attribution even applies when the organ of state concerned has exceeded its powers or contravened instructions (Article 7). Possibly as a result, international law textbooks are remarkably silent on the place of local authorities in international law.⁷⁷ The upsurge of recent literature on the diffusion of global norms tends to focus either on courts or on non-state actors like non-governmental organizations (NGOs) and business.⁷⁸

This being said, there are instances of international legal provisions that do explicitly bind all other state organs and directly create legal obligations for them, such as Article 3 of the Convention on the Rights of the Child, which holds that ‘[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.⁷⁹ Next to this, the monitoring bodies of a number of human rights treaties have also addressed the obligations of local authorities. In setting out the general obligations imposed upon state parties under Article 2 of the International Covenant on Civil and Political Rights, for instance, the Human

⁷⁶ International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility), UN Doc. A/RES/56/83, 28 January 2002.

⁷⁷ Key textbooks like P. Alston and R. Goodman, *International Human Rights* (2013); M. Haas, *International Human Rights: A Comprehensive Introduction* (2013); H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals* (2000), do not mention local authorities or municipalities at all.

⁷⁸ See, e.g., R. Goodman, D. Jinks and A.K. Woods, *Understanding Social Action, Promoting Human Rights* (2012).

⁷⁹ Convention on the Rights of the Child 1989, 1577 UNTS 3.

Rights Committee held that '[a]ll branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party'.⁸⁰ Concerning the International Covenant on Economic, Social and Cultural Rights, the UN Committee on Economic, Social and Cultural Rights held that the Convention called not only for judicial, but also administrative, remedies that would 'in many cases, be adequate', and emphasized how 'those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making'.⁸¹

It was the relative lack of attention for local government obligations under international human rights law that brought the Human Rights Council to call for research on local government and human rights, pointing at the wider trend of 'glocalization' and recalling how 'states and local governments have a shared responsibility and a mutually complementary role in the domestic implementation of international human rights norms and standards'.⁸² The final report drew attention not only to the wide variety of local governments but also to their specific regulatory power. Central government might have the primary responsibility for the promotion and protection of human rights, but local authorities have a complementary role, which is not only about complying with international obligations and respecting, promoting and fulfilling human rights but also about translating national human rights policies into action.⁸³ In addition, the report called for guiding principles for local government and human rights, taking into account existing standards related to the role of local government and the city in implementing internationally recognized human rights.⁸⁴

In terms of international legal standing, one of the results of the centrality of the state in international law is a lack of formal recognition of the many activities that local governments develop internationally.⁸⁵ Some local government networks, like the UCLG and Mayors for Peace are among the over 4,000 NGOs that hold special consultative status with the UN Economic and Social Council. They do not, however, have a formal position in negotiating the treaties that often impact them directly and that they help to implement in some cases.

⁸⁰ Human Rights Committee, General Comment no. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, at 4. International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

⁸¹ Committee on Economic, Social and Cultural Rights, General Comment no. 9, The domestic application of the Covenant, 3 December 1998, at 9.

⁸² Human Rights Council, Report of the Advisory Committee on Its Ninth Session, UN Doc. A/HRC/AC/9/6, 14 August 2012, at 19.

⁸³ *Ibid.*, at 21.

⁸⁴ *Ibid.*, at 78.

⁸⁵ 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 A. Fahrmeir, G. Hellmann and M. Vec (eds), *The Transformation of Foreign Policy: Drawing and Managing Boundaries from Antiquity to the Present* (2016) 209.

B European Human Rights Law

The position of local authorities in European human rights law is more or less similar. As is set out in Article 1 of the ECHR, it is up to the state parties to ‘secure to everyone within their jurisdiction’ the rights and freedoms in the Convention. State parties are thus formally the duty bearers under international human rights law, and it is up to each state to ‘secure domestic efficacy’ for the provisions concerned.⁸⁶ The fact that the rights in the ECHR are generally self-executing means that they can be invoked by both individuals and the state *vis-à-vis* the judicial and administrative authorities in the state concerned.⁸⁷ As a result, a glance at the European Court of Human Rights’ case law suffices to make clear how often local authorities are the organs of state that actually violate the Convention and, thus, clearly have obligations for the realization of a wide range of Convention rights.⁸⁸

One aspect that clarifies to what extent local authorities are considered to be part of nation-states in the European human rights framework is the fact that they themselves cannot be plaintiffs in the ECtHR’s proceedings. In *Austrian Communes v. Austria*, for instance, the Commission held that local government organizations such as communes, which exercise public functions on behalf of the state, are clearly ‘governmental organisations’ as opposed to the ‘non-governmental organisations’ that can file applications.⁸⁹ This position was repeated in a number of cases, including *Danderyds Kommun v. Sweden*, where the Court held that it is not only the ‘central organs of the State that are clearly governmental organisations, as opposed to non-governmental organisations, but also decentralised authorities that exercise public functions, notwithstanding the extent of their autonomy vis-à-vis the central organs’.⁹⁰ In *Glyfada v. Greece*, the Court reiterated this position, stating that in international law the expression ‘governmental organisation’ cannot be held to refer only to the government or the central organs of the state and that, where powers are distributed along decentralized lines, it refers to any national authority that exercises public authority.⁹¹

All of this sets out how the responsibilities bestowed upon local government as part of the national constitution can lead to specific obligations in the field of human rights law. However, it does not touch on what the autonomous obligations of local authorities are – as opposed to the state party – in instances where the state parties do not

⁸⁶ J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (1987), at 3. See also M.W. Janis, R.S. Kay and A.W. Bradley, *European Human Rights Law: Text and Materials* (2008), at 830; C. Grabenwarter, *European Convention on Human Rights: Commentary* (2014), at 3.

⁸⁷ Grabenwarter, *supra* note 86, at 5.

⁸⁸ As an illustration, a Hudoc search in the case law of the European Court of Human Rights for [local authorit*] yielded 1,092 results, and for [municipalit*] 2,351 results on 25 November 2016.

⁸⁹ ECtHR, *Austrian Communes and Some of Their Councilors v. Austria*, Appl. no. 5765/77, Judgment of 31 May 1974. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

⁹⁰ ECtHR, *Danderyds Kommun v. Sweden*, Appl. no. 52559/99, Judgment of 7 June 2001. See also ECtHR, *Commune Rothenthurm v. Switzerland*, Appl. no. 13252/87, Judgment of 14 December 1988; ECtHR, *Province of Bari, Sorrentino and Messeni Nemagna v. Italy*, Appl. no. 41877/98, Judgment of 22 March 1998; ECtHR, *Municipal Section of Antilly v. France*, Appl. no. 45129/98, Judgment of 23 November 1999; ECtHR, *Ayuntamiento de Mula v. Spain*, Appl. no. 55346/00, Judgment 1 February 2001.

⁹¹ ECtHR, *Glyfada Municipal Council v. Greece*, Appl. no. 46259/99, Judgment of 27 January 2000.

comply with their Convention obligations. Here, EU fundamental rights law offers more insight.

C *European Fundamental Rights Law*

Given the increased importance of the EU for both the formulation and the realization of fundamental rights, it is important to also consider the fundamental rights obligations of local authorities under EU law. Here, possibly even more surprising than where it concerns international law, the basic point of departure is the same – namely, respect for the sovereignty of member states and their internal organization. The preamble of the EU Charter of Fundamental Rights (CFREU), for instance, emphasizes how the EU preserves and develops common values ‘while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels’.⁹² Some provisions in the CFREU might address public authorities in general, like Article 11 on the freedom of expression and information and Article 24 on the rights of the child, but the organization needed to implement fundamental rights obligations is, again, firmly within the realm of state sovereignty.⁹³ Formally, the EU, as is the case in public international law, is ‘blind’ to the internal territorial and constitutional arrangements of member states:⁹⁴

It does not depend on EU law if the application of legal instruments adopted by EU institutions is in the hands of the legislative or executive authorities of Member States, if it is trusted to central or local authorities or even to agents or bodies more or less autonomous from the state or from local authorities.⁹⁵

In this scheme, local authorities do not fall under the immediate jurisdiction of the Court of Justice of the European Union (CJEU), as this would ‘undermine the institutional balance provided for by the Treaties’.⁹⁶ However, similar to international law, since *Costa v. ENEL*, states cannot invoke domestic legal provisions, ‘however framed’, to not comply with EU law.⁹⁷

Simultaneously, as is the case in the field of international law, local authorities are directly bound by the EU in an ever-increasing variety of ways. The CJEU, for instance, explicated in *Fratelli Costanzo v. Comune di Milano* how local authorities themselves are autonomously bound by the duty of sincere cooperation in Article 4(3) of the Treaty

⁹² Charter of Fundamental Rights of the European Union, OJ 2012 C 326/02.

⁹³ Hessel, ‘European Integration and the Supervision of Local and Regional Authorities-Experiences in the Netherlands with Requirements of European Community Law’, 2 *Utrecht Law Review* (2006) 91.

⁹⁴ Weatherill, ‘The Challenge of the Regional Dimension of the European Union’, in S. Weatherill and U. Bernitz (eds), *The Role of Regions and Subnational Actors in Europe* (2005) 1, at 1.

⁹⁵ Constanta, ‘The Relation between the State and Local Authorities in the Application of Eu Law’, *AGORA International Journal of Juridical Sciences* (2011) cclxiii, at 168.

⁹⁶ Case 95/97, *Région Wallonne v. Commission* (ECLI:EU:C:1997:184), para. 6. Thies, ‘The Locus Standi of the Regions before EU Courts’, in C. Panara and A. de Becker (eds), *The Role of the Regions in EU Governance* (2010), 25.

⁹⁷ Case 6/64, *Flaminio Costa v. ENEL* (ECLI:EU:C:1964:66). See also De Witte, ‘Art. 53: Level of Protection’, in S. Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014) 1523.

on European Union.⁹⁸ In case of a conflict between a provision of national law and a directly effective provision of EU law, administrative authorities are obliged to set aside national law if consistent interpretation of the latter is not possible and, eventually, to apply directly effective provisions of Union law instead.⁹⁹ This also applies in the case of unimplemented or incorrectly implemented directives. The implications here are far-reaching; local and regional authorities can, for instance, on the basis of this principle, be obliged to disregard national legislation that incorrectly implements a directive and even to apply a directly effective provision of a directive to the advantage of a citizen. Presumably, this also applies in the ever-expanding field of fundamental rights law.

In recent times, EU scholars have increasingly started examining the lack of legal subjectivity in regional and local authorities under European law.¹⁰⁰ The fact that regions are subject to – often directly enforceable – obligations bestowed upon them by EU law, but have no direct access to law-making procedures, leads to concerns.¹⁰¹ The combination of imposing substantial obligations, but allowing local authorities little access to both policymaking and judicial control, is deemed to be ‘imbalanced’.¹⁰² In writing on ‘invisible cities’ in EU law, Fernanda Nicola criticizes the degree to which European jurisprudence views them either as mere subsidiaries of the state or as private market actors, thus creating a tension with the concept of multi-level governance.¹⁰³

In all, international and European law bestow a wide range of human rights responsibilities upon local authorities. These authorities, however, only have a marginal position in formulating these responsibilities at the international level and cannot be directly held accountable for them. This becomes problematic when local authorities, as in the cases described above, take their responsibilities much more seriously than the nation-state and seek support for this position internationally.

5 Local Authorities and International Human Rights Law: A Critical Research Agenda

From the above discussion, it follows that the rise of local authorities is not only a challenge to conventional frameworks of international law but also offers an opportunity

⁹⁸ Treaty on the European Union, OJ 2010 C 83/13.

⁹⁹ Case 103/88, *Fratelli Costanzo v. Comune di Milano* (ECLI:EU:C:1989:256). See M. Finck, *Subnational Authorities in EU Law* (2017), at 155; Verhoeven, ‘The “Costanzo Obligation” and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap?’, 3 *Review of European Administrative Law* (2010) 23; Weatherill, *supra* note 94, at 5.

¹⁰⁰ See, e.g., van Zeben, ‘Local Governments as Subjects and Objects of EU Law: Legitimate Limits?’, in E. Fahey and S. Bardotszy (eds), *Framing the Subjects and Objects of Contemporary EU Law* (2017) 123; van Nuffel, ‘What’s in a Member State-Central and Decentralized Authorities before the Community Courts’, 38 *Common Market Law Review* (2001) 871.

¹⁰¹ There are, of course, many forms of indirect access, like the advisory role of the Committee of the Regions and the variety of lobbying activities that regions, and associations of local authorities, deploy in Brussels. See Weatherill, *supra* note 94, at 14.

¹⁰² Weatherill and Bernitz, *supra* note 94.

¹⁰³ Nicola, ‘Invisible Cities in Europe’, 35 *FULJ* (2012) 1282.

to gain new and important insights that could contribute to developing international law as a discipline. Building on the observation that local authorities hold the potential to reinforce the legitimacy and effectiveness of international law, this section introduces three elements that could offer new perspectives into human rights law research.

A The Relevance of International Human Rights as a Discourse and Praxis of Governance

The relation between human rights obligations and the emergence of non-state actors (in the broad sense) has attracted the attention of academics for quite a while now.¹⁰⁴ In fact, scholarship has been voluminous in some cases, as can be seen in the literature on the responsibilities of transnational corporations and other commercial actors.¹⁰⁵ The key concern of these works has been to clarify the ‘horizontal’ effect of human rights obligations given that legal duties originally pertained first and foremost to state actors.¹⁰⁶ There has also been some focus on the ‘accountability’ of international organizations,¹⁰⁷ the main question being the extent to which they have an individual or shared responsibility (along with state parties) for the human rights violations of their officials. A common thread in these discussions is that the relevance of international human rights, while not incidental, is often overlooked by the actors concerned. Like states, some corporations and international organizations (though surely not all) are gradually ‘socialized’ to comply with human rights standards through practices of blaming and shaming.¹⁰⁸

By contrast, the examples discussed here show that focusing on local authorities as a peculiar type of ‘non-state actor’ gives us the opportunity to move international law beyond the notion of human rights as imposition. Where favourable to human rights, cities will often have made a deliberate choice to rely on them as a discourse or a praxis that can help them achieve their policy goals. Such decisions are not to be taken lightly for many local authorities are formally tasked with a broad range of

¹⁰⁴ Most notably A. Clapham, *Human Rights Obligations of Non-State Actors* (2006); P. Alston (ed.), *Non-State Actors and Human Rights* (2005).

¹⁰⁵ See, e.g., M.K. Addo, *Human Rights Standards and the Responsibility of Transnational Corporations* (1999); Weissbrodt and Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’, 97 *American Journal of International Law (AJIL)* (2003) 901; J.G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013); S. Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (2012).

¹⁰⁶ Knox, ‘Horizontal Human Rights Law’, 102 *AJIL* (2008) 1.

¹⁰⁷ E.g., Reinisch, ‘Securing the Accountability of International Organizations’, 7 *Global Governance* (2001) 131; Mégret and Hoffmann, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’, 25 *Human Rights Quarterly* (2003) 314; J. Wouters et al., *Accountability for Human Rights Violations by International Organisations* (2010) and, most recently, M. Heupel and M. Zürn (eds), *Protecting the Individual from International Authority: Human Rights in International Organizations* (2017).

¹⁰⁸ T. Risse-Kappen, S.C. Ropp and K. Sikink (eds), *The Power of Human Rights: International Norms and Domestic Change* (1999); R. Goodman and D. Jinks, *Socializing States: Promoting Human Rights through International Law* (2013).

administrative responsibilities, which means that the choice to add human rights obligations is far from obvious. This distinguishes them from other non-state actors, such as corporations, for example, whose strife for monetary profit is more straightforward and, hence, easier to conceptualize. However, even if we accept that engagement with human rights is at least sometimes '[w]indow dressing [or] catering for liberal and left-leaning constituencies', the question still remains why the local authorities concerned do not invoke other ideologies such as equality, solidarity or justice.¹⁰⁹ The study of local authorities therefore offers a novel and unique perspective into the process of political decision making on human rights with potentially important insights into their legitimacy and effectiveness in different contexts. In some instances, it will also reveal the concrete and personal motivations behind these acts since decisions for or against human rights in local contexts are frequently made by a small circle of policymakers or even individuals such as mayors. At least some might regard such individual perspectives as a welcome change to increasingly abstract analyses framing the appeal of human rights in the grand terms of a 'movement'¹¹⁰ or a 'last utopia'.¹¹¹

B The Impact of Domestic and Constitutional Arrangements on the Implementation of Human Rights

Another fascinating aspect of the study of local authorities is that it can provide new outlooks on the interrelationship between international and domestic law (or, as it indeed often used to be referred to by international lawyers, 'municipal law'). As has already been suggested in other fields, a strong argument can be made that the rise of local authorities is itself the product of geopolitical realignments – in particular, the devolution of authority and the dismantling of the 'strong' welfare state in the last decades. Simon Curtis, for example, noted recently that the emergence of 'global cities' is linked to a 'contemporary shift from an international political order rooted in the society of states, to a more diffuse form of global order, which relies upon the interaction of a variety of non-state actors operating at different scales'.¹¹² John Friedmann's famous 'world city hypothesis' about the close interconnection between an increasingly internationalized economic system dates back to the 1980s.¹¹³ In short, these contributions describe the changing role of cities and the evolution of international politics as parallel or even mutually reinforcing processes.

As discussed above, international lawyers initially struggled to connect local authorities to international law – that is, the local to the global level. The breakthrough contribution by Frug and Barron conceptualizes an 'international local government law' that targets cities as objects by means of an emerging 'set of international legal rules

¹⁰⁹ As hypothesized in Aust, *supra* note 4, at 266.

¹¹⁰ Kennedy, 'International Human Rights Movement: Part of the Problem?', 15 *Harvard Human Rights Journal* (2002) 101.

¹¹¹ S. Moyn, *The Last Utopia: Human Rights in History* (2010).

¹¹² Curtis, 'Cities and Global Governance: State Failure or a New Global Order?', 44 *Millennium* (2016) 455, at 467.

¹¹³ Friedmann, 'The World City Hypothesis', 17(1) *Development and Change* (1986) 69.

and regulations for cities'.¹¹⁴ Yet, while they do refer to the literature on 'comparative analysis of urban governance',¹¹⁵ the authors largely set aside another important question: how do domestic factors and, in particular, the distribution of competences as laid down in the constitution influence the way in which these international legal standards are being created and implemented? The first systematic inroads into these areas have only recently been made by comparativists, so the scholarship is still in its infancy.¹¹⁶ However, insofar as there already is some scattered work by domestic lawyers and political scientists, it has been cited regrettably scarcely in international law contributions.¹¹⁷ For example, some legal scholars have criticized domestic legal arrangements such as the prevailing 'home rule' principle in the USA for their inappropriateness in times of globalization.¹¹⁸ German political scientists have found local responses to the 2015 refugee surge to be influenced by legal arrangements that are highly reflective of larger and more long-standing conflicts over the orientation of migration policy at the federal level.¹¹⁹

In our view, such works are likely to be only the tip of the iceberg. Our hypothesis is that the highly political question of the implementation of human rights norms is, in most cases, decisively influenced by the legal relations between national, sub-national and local entities. The task, then, is to document and to analyse the differences between localities through comparative studies of the constitutional status and the strategies adopted by various local authorities. Deepening our understanding of these aspects is very likely to bring us closer to *knowing about the conditions required for the successful implementation and enforcement of human rights*.

C Challenging Notions of Legal Subjecthood under International Human Rights Law

In discussing the works of political science on the global rise of cities, Aust is particularly critical of what he perceives to be an oversimplification of the role of the nation-state in global politics. The 'portrayal of the state as a *bête noire*' is, according to him, particularly developed in the work of Benjamin Barber: 'He portrays states as essentially dysfunctional. One could extrapolate from his book the finding that today all states are failed states.'¹²⁰ As we can see, Barber's forceful (and sometimes admittedly overstated) argument for a 'rule of mayors' provokes responses (not only among international lawyers) that rush, in many ways just as problematically, to the

¹¹⁴ Frug and Barron, *supra* note 16.

¹¹⁵ *Ibid.*, at 5–8.

¹¹⁶ See Nicola and Foster, *supra* note 27.

¹¹⁷ See, however, Albert, 'L'action externe des collectivités infra-étatiques', in Société Française pour le Droit International, *Les collectivités territoriales non-étatiques dans le système juridique international* (2002) 35, which provides an in-depth account of the French constitutional system.

¹¹⁸ Stahl, 'Local Home Rule in the Time of Globalization', 2016 *Brigham Young University Law Review* (2016) 177.

¹¹⁹ H. Schammann and B. Kühn, *Kommunale Flüchtlingspolitik in Deutschland* (2016), at 7.

¹²⁰ Aust, *supra* note 4, at 261, 265, in response to B. Barber, *If Mayors Ruled the World: Dysfunctional Nations, Rising Cities* (2013).

defence of the state against the presumed allegation of systemic ‘state failure’.¹²¹ The truth is somewhere in between; while the inter-state system remains a reality, it has a very mixed record when it comes to resolving political problems. For instance, it is not surprising that cities have been particularly proactive in the area of climate change, which was characterized by years of international political deadlock.¹²² Europe’s permanent refugee issue is another case in point as the example of emergency shelters in the Netherlands has illustrated. Given the failure of governments and the EU to implement a durable and effective response, local authorities suddenly see their own role elevated.

However, if we accept the reality that states will fail to resolve every (or even most?) of the important political challenges of today, and if local authorities stand ready to move in precisely at that point, then what does this mean for international law? In our view, the most important consequence is that it undermines the conventional notion that the legal status of local authorities in international law is to be limited merely to the imputability of their actions to the state, according to Article 4 of the ILC’s Articles on State Responsibility.¹²³ Is it really sensible to insist on the ‘particular non-status in international legal discourse’, according to which the autonomous decisions of local authorities entail liability but do not have any relevance whatsoever in terms of law-making, be it in terms of treaty or customary international law?¹²⁴ Is international law supposed to pay heed to seemingly vain constitutional arrangements even if the *de facto* control exercised by local authorities over a certain domain becomes a more permanent state of affairs? Is it impossible to imagine circumstances under which the absence of actions by a central government could be seen as a delegation of powers by acquiescence?

The answer to all of these questions must be a clear ‘yes’ if our main concern remains to avoid ‘fragmentation, or even disintegration of the state which might lose its capability of maintaining a unified and coherent foreign policy’.¹²⁵ However, is less always more? As the evolution of EU law has shown, it is not a long way from establishing the responsibility of all domestic actors, including local authorities, to enforce international obligations to a modification of the relation between the various levels of national authorities, at least insofar as the executive and the judicial branches of government are concerned.¹²⁶ We should remind ourselves that the CJEU, in developing the twin principles of direct effect and supremacy and, thus, in creating a ‘symbiosis’ especially with lower domestic level courts, used this strategy precisely to make the EU legal order much more effective.¹²⁷ What is more, if our goal is to strike a somewhat

¹²¹ See also Curtis, *supra* note 112, at 455–456.

¹²² See, e.g., the emergence of the C40 as discussed in Aust, *supra* note 4.

¹²³ Articles on State Responsibility, *supra* note 76.

¹²⁴ Aust, *supra* note 4, at 267.

¹²⁵ *Ibid.*, at 268.

¹²⁶ Evidently, legislation in the European Union has remained subject to tight regulation (‘competences’) in which governments, represented in the Council, remain firmly in the driver’s seat.

¹²⁷ Weiler, ‘A Quiet Revolution: The European Court of Justice and Its Interlocutors’, 26 *Comparative Political Studies* (1994) 510.

fairer balance between ‘legalism’ and ‘instrumentalism’, free from ‘anxieties’ about globalization and its impact on international law,¹²⁸ we ought to also approach the topic of legal subjecthood without any preconceptions. This holds true above all for the domain of human rights where the effectiveness principle is in fact an important part of the canon of legal interpretation.¹²⁹

6 Conclusion

To return to Jacques Derrida’s rhetorical question at the beginning of this article, international lawyers have not so far shown the audacity to dream about ‘new horizons of possibility’. The rise of local authorities has mostly been viewed as a source of discomfort that calls for the application of an ‘arsenal of strategies’, which the field has developed in its many encounters with new actors and forms of action.¹³⁰ While rightly looked upon with some normative suspicion, local authorities have regrettably also been reduced to objects of international law and to the role of creators and enforcers of ‘soft law’ outside the boundaries of ‘real’ international law. Focusing on recent developments in the area of human rights law, we have argued that there is more to the rise of local authorities. What may have begun as occasional (and, perhaps even, opportunistic) initiatives have taken on a life of their own. From the creation of an increasingly dense network of networks to the symbolic ratification of treaties to playing a crucial role in guaranteeing the minimum rights of refugees during the 2015 surge, local authorities are gradually becoming an established actor in the field. Particularly at a time when the legitimacy and the efficacy of human rights law has come under pressure, their entry onto the stage ought to be welcomed from the perspective of the effectiveness and legitimacy of human rights, as the example of human rights cities and emergency shelter in the Netherlands has illustrated.

Where does this realization lead us? First of all, this article has drawn attention to the fact that, at least within Europe’s ‘multi-layered’ human rights system, the question of legal responsibilities is not as simple as sometimes suggested. While human rights law has admittedly always been more open to the idea of extending the classical canon of subjecthood, a relegation of local authorities to the ‘peripheries’ of informality and soft law is likely to also be simplistic in other areas. Still, a certain skewedness in favour of responsibility to the detriment of a role in law-making remains undeniable. Moving beyond the open question of formal law, this article has also introduced a research programme on local authorities, consisting of three aspects whose investigation could contribute to human rights law specifically and possibly to

¹²⁸ Koskenniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization’, 8 *Theoretical Inquiries in Law* (2007) 9.

¹²⁹ The principle is reflected in the maxim ‘*ut res magis valeat quam pereat*’, which can be translated as: ‘That the thing may rather have effect than be destroyed.’ In the words of the European Court of Human Rights, guaranteed rights are not intended to be ‘theoretical or illusory but ... practical and effective’. ECtHR, *Airey v. Ireland*, Appl. no. 6289/73, Judgment of 9 October 1979, para. 24.

¹³⁰ Aust, *supra* note 13, at 700.

international law as a field generally. First, local authorities may teach us valuable lessons about the current appeal of international law as a praxis and a discourse of governance given that they exercise a wide range of public functions. Second, the level of local authorities might be the new frontier to the study of how the effectiveness of international law is influenced by domestic law and constitutional arrangements in particular. In the final instance, the actions of local authorities do pose serious questions about prevailing conceptions of legal subjecthood, especially in situations where the central government, for whatever reason, is unable to divest its power.

On a final note, it is our hope that this article will not only lead to a slightly different investigation, but also to more investigations, on the rise of local authorities. After all, certain scholars might find it more exciting to work on a topic that represents a frontier within the discipline rather than an area in need of conceptual classification. In the case of ‘frontier cities’, we might well be looking at the first consideration – a new horizon of still unexplored possibilities and understandings.