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Transnational city networks and their contributions to norm-generation in international law: the case of migration

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ABSTRACT

Local governments and transnational city networks ('TCNs') have been increasingly engaging with norm-generation in the traditionally state-centric international law and migration governance. We identified two modes of this engagement: participation in mainstream state-centric processes, and norm-generation within their own networks. Through four examples, his article identifies four functions of this jurisgenerative activity. The*external function* is bringing local interests and expertise to influence international normative developments. The *internal function* is regulating local governments' behaviour towards their own citizens, creating and upholding standards. Through a *horizontal function*, local governments recruit peers and rally around normative documents that offer a compact, crystallised expression of their interests. The *integrating function* enables local governments to combine fragmented issues of international law in unified, practical toolkits for their own use. All throughout, TCNs challenge state-centric international law and their traditional exclusion from it by demonstrating competence and fluency in international norm-generation relating to migration.

KEYWORDS International law; transnational city networks; human rights; migration; norm-generation; local governments

I. Introduction

At the closing ceremony of the 2018 World Human Rights Cities Forum, in Gwangju, South Korea, the moderator asked the large international audience how they had benefitted from the conference. The microphone was offered to a United Nations (UN) official from the Secretariat of the Advisory Committee to the UN Human Rights Council (HRC) who stated that 'a lot of the input was drawn' by the HRC from a previous session of the same Forum (the 2015 report that the HRC drafted on the role of local governments in the

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promotion and protection of human rights).[1] This statement clashes starkly with the traditional assumption that international law is created by states, and states alone. The Forum is only one of the places that enable local governments and their associations to connect, discuss, inspire, but also to formulate documents which sometimes hold normative statements and commitments as well as foreseeing follow-up and implementation mechanisms – in short, all that which concerns norm-generation.

The growing activity of local governments and the transnational city networks ('TCNs') that they create at the global legal and political stage has received increasing attention in the literature (Davidson et al. 2019; Oomen and Baumgärtel 2018; Aust 2015) and is at the core of this special issue. As also discussed in other contributions to this special issue (such as Bendel a. o.), there are many potential outcomes of such engagement, both practical (sharing information, seeking (financial) support) and symbolic (showcasing, story-telling, shaming national governments) (Oomen 2019). One striking outcome discussed less often, however, is *jurisgenerative*, and involves the setting of standards, often in the form and language of international law. Whereas TCNs have been active in generating norms in a plethora of fields – sustainability, culture, human rights, health, inclusion – many of these fields converge in the governance of migration. This article therefore explores how and why TCNs engage in *jurisgenerative* (norm-generating) practices in the governance of migration that resemble international legal practice. What are the forms (modes) this behaviour materialises in, what are its functions, and how does it contest traditional international law-making?

To tackle these questions, this article first (Section II) introduces the notion of norm-generation in international law by explicating recent changes and trends in international law- and policy making, including its pluralisation. Next, Section III introduces the two modes by which TCNs seek to contribute to international law and governance: (1) by seeking inclusion in state-centric processes and (2) by creating quasi-legal local-centric norms, and the concrete contestations to international law this entails. In this section, we zoom in on migration and human three instances of norm-generation. The UN Habitat Programme, the European Charter for Safeguarding Human Rights in the City, and the Mayors' Marrakech Declaration in relation to the Global Compacts for Refugees and Migration. The final section (IV) moves from the *how* to the *why* of this type of norm-generation by TCNs, discussing, on the basis of the illustrative case of the Cities for Adequate Housing Declaration, the possible external, internal, horizontal and integrating functions behind norm-generation by TCNs as well as the cross-cutting contestation it constitutes to state-centric international law.[2]

The analysis in this article flows from a mixed-methods approach to data collection and analysis, combining a legal analytical reading of normative documents and findings from field research in TCNs.[3] In terms of terminology,

we follow the special issue choice for a focus on Transnational *City* Networks (TCNs) even if networks often represent urban and rural populations as well as a range of other actors, which explains why some scholars have opted to speak of Transnational *Municipal* Networks (Kern and Bulkeley 2009; Oomen 2019). For the purposes of this article, we use the acronym 'TCNs' to refer to both institutionalised networks as well as conferences of local governments shaped around a common purpose such as the adoption of a charter or declaration. With this broader definition, we seek to capture norm-generation processes by local governments in different degrees of organisation and institutionalisation, as well as the dialectic effects between the acts of collectively generating norms and organising around institutionalised networks.

II. Norm-generation in international law

Traditionally speaking, the term international law is used to describe the body of rules and principles that govern the legal relations between nation-states (Shaw 2014; Aust 2010). States have long been considered as the only holders of legal personality, that is to say, the only entities with the capacity to have rights and to bear duties and to make and enforce the law (Klabbers and Wallendahl 2011). This condition, however, was not a given before the consolidation of the so-called 'Westphalian order' nor does it reflect the reality today (Nijman 2016). Starting in the 1950s with the inclusion of international organisations ('IOs') into the elite club of 'subjects of international law', the international legal arena has become much more complex, with diverse actors holding varying degrees of influence and a fragmented body of rules and practices.

Just as actors have diversified (with IOs, NGOs, armed groups and more), so have the sources of international law. Classic international law recognises only treaties, custom, and general principles of law as sources (Art. 38, Statute of the International Court of Justice). However, the recent decades have seen a shift from the usage of these traditional forms of binding law to the tendency to make and follow so-called 'soft law': rules and principles that, while not designed to be binding, still hold a normative power over international actors (e.g., Chinkin 1989; Hillgenberg 1999; Guzman and Meyer 2010). This shift to softer and non-binding law has developed parallel to the generation of international norms becoming more inclusive of other actors of the international society. For instance, the Sustainable Development Goals (SDGs) adopted in the Agenda 2030 were constructed, negotiated, debated and finally adopted with the inclusion of a wide array of actors: States, international organisations, NGOs, businesses and sub-national authorities. The SDGs are not binding and cannot be used to hold governments accountable before court, but they nonetheless shape the normative perspectives and

behaviour of actors across the field. This represents a preference for multi-stakeholderism in international relations well as an appreciation for governance through partnerships (Kunz 2013) and principles (Black 2008).

Another aspect of the complexity of the international legal arena is that the distinction between binding law and 'soft law' is not absolute. Non-binding instances of policy, principles or guidelines, such as the Universal Declaration of Human Rights, have lain the groundwork for future binding laws by kick-starting advocacy, domestic legislation, and socialisation (Buergenthal 2006). Legal positivist critics of the trend towards soft law point out the lack of coercive force of these types of regulations, which they consider a *sine qua non* requirement for any norm to be considered law (Weil 1983). On the other hand, international law, as opposed to domestic law, lacks a central enforcement mechanism altogether and depends on its persuasive power to be upheld by states and other actors. Scholars of the New Haven School of Law have gone a step further to look beyond the dichotomy of binding vs non-binding and seen a complex system of norms which are created, interpreted, challenged and enforced by competing norm-generating communities with varying persuasive power and authority (Berman 2007). These norms travel among international actors and governance levels in a constant multi-directional process that influences, challenges, counters and alters them (ibid.). This process, in turn, informs the identities and perceived interests of the actors in a community (ibid.), i.e., by 'socialising' them into following the norms. Normative claims brought forward by actors also open up debates offering higher chances for error correction, bringing a wider field of legal imagination to the attention of others and granting some successful candidates the status of binding law (Berman 2007, 303). This is the understanding of norm-generation that we will apply in this article, as we look at norms– binding or non-binding– formulated in an international context and exerting a 'normative pull' (Franck 2006). We will not be engaging in the empirical question of whether these norms are followed or in the legal doctrinal question of whether the cities generating these norms have the authority to do so, but only with the socio-legal observation of the processes of their creation, the contestation they constitute to traditional state-centric law, and their purposes.

III. Two modes of international norm-generation by TCNs

Local governments have been increasingly active both in migration governance, in particular (Ahouga 2018), and in international normative processes worldwide, in general (for human rights, see Durmuş 2021). Their normative engagement has constituted a contestation to international law in three fundamental ways[4]: the demand for the inclusion of local governments in multilateral *jurisgenerative* processes developing mainstream international

norms, the negotiation of the boundaries of local competences vis-à-vis central and regional governments through reference to international law (see Oomen, Baumgärtel, and Durmuş 2021), and the assertion of local governments' autonomous capacity to create norms. These contestations will become tangible in the analysis of the case studies below.

Our case studies focus not on all normative engagement by local governments but practices in their non-state and autonomous rather than substate character (as state organs) (Nijman 2016; Durmuş 2020). This autonomous, contesting normative engagement of local governments remains underexamined in literature and by IOs whereas the substate character (UNGA 2008, Art. 4) is increasingly recognised (see HRC 2015).

Another demarcation concerns our emphasis on the *jurisgenerative* aspect of local governments' normative engagement (Berman 2006). There are many instances of local governments acting in their autonomous capacity, sometimes in actual defiance of central government policies, taking steps in relation to instruments of international law which are already constituted as binding law, though perhaps not for their respective State, such as San Francisco's ratification of the The Convention on the Elimination of All Forms of Discrimination Against Women (1979) (Davis 2016). These practices, though valuable and autonomous, do not generate new international norms, and are thus outside the scope of this article.

The instances we will focus on instead in this article are the UN Habitat Programme and the development of the Right to Housing, the European Charter for Safeguarding Human Rights in the City, the Mayors' Marrakech Declaration and the Cities for Adequate Housing: Municipalist Declaration of Local Governments for the Right to Housing and the Right to the City (hereinafter 'the Housing Declaration'). The thematic variance in these cases, all of which relate to migration in their content and application, is an illustration of the fact that laws and regulations governing migration are not found neatly in a single document governed by a single institution. Laws and policies governing migration are located in an intersection of different international legal regimes such as human rights, development, humanitarian law, refugee law, and EU law – being an exemplary (international) regime complex (Alter and Raustiala 2018). The cases presented were selected from an initial pooling and mapping of 21 normative documents and TCN charters relating to migration for their variation in terms of temporal placement, degree of institutionalisation of the network of local governments, and the (aspired) legality of the norms generated, thus enabling broad exploration of the *jurisgenerative* engagement of TCNs.

The UN Habitat, for one, forms the most institutionalised participation avenue for local governments in established international governance. Local governments have acquired UN accreditation and seats at UN bodies through this process, thus contributing to the codification of the Right to

Housing – one of the earliest substantive entry points for local governments in the subject-matter of international law. They have also organised their own institutionalisation in parallel to the international processes, demonstrating the 'rallying' function of norm-generation, which will be discussed below. The European Charter is, on the other hand, the most well-recognised and influential quasi-legal normative document drafted autonomously by local governments, characterised by its solid legal structure. The Charter had an influence from Gwangju to Montreal (Garcia-Chueca 2016; Frate 2016, 70) and is drafted with the intention of carrying legal value. The Marrakech Declaration, finally, perfectly demonstrates the interplay between seeking inclusion in state-centric processes and TCNs generating their 'own' norms (in this case, the Declaration). This Declaration, as the most recent document selected for analysis, also explicitly deals with migrants and refugees and seeks to contest and contribute to the latest developments in the global governance of migration and asylum. These first three instances (UN Habitat, the European Charter, the Marrakech Declaration) will be analysed in the present Section as dissimilar cases showing the spectrum of *jurisgenerative* TCN activities, particularly demonstrating the two modes of norm-generation: seeking inclusion in state-centric processes and creating local-centric norms. The last instance, the Cities for Adequate Housing: Municipalist Declaration of Local Governments for the Right to Housing and the Right to the City (hereinafter 'the Housing Declaration') will be used in Section IV to illustrate the cross-cutting findings on the external, internal, horizontal and integrating functions of norm-generation by TCNs in migration governance.

The findings below are based primarily on desk research into policy documents and a close legal analytical reading of normative documents complemented by field research, in particular, in Marrakech at the adoption of the Mayors' Marrakech Declaration.[5] Desk research was further complemented through participant observation (attended at times as an observer, at times as participant) in *jurisgenerative* meetings of TCNs such as the 2018 World Human Rights Cities Forum, a 2018 UN HRC session in which local governments were invited to discuss their role concerning human rights, the 2018 Barcelona Cities for Rights Conference, and the Human Rights Cities meeting at the 2019 Fundamental Rights Forum as well as three in-depth interviews.[6] Data were analysed in QSR-Nvivo.

A. *Seeking inclusion in state-centric law-making processes*

As discussed, local governments increasingly seek involvement in both processes of law-making and decision-making in regional and global governance (Aust 2015; Blank 2006), with TCNs as an important vehicle. Representing their constituent local governments, TCNs have sought inclusion in important

global norm-generation processes, thus contributing to the creation of binding as well as soft law. Local governments' engagement in the process leading to the adoption of Agenda 2030 and their rigorous and successful lobbying for the inclusion of SDG 11 on safe, inclusive and sustainable communities provide examples of processes of generating non-binding but nevertheless highly meaningful norms (Aust and de Plessis 2018). This recognition of SDG 11 has also provided an entry point for local governments to localise the SDGs and voluntarily report on their local progress highly relevant to, for instance, migrants (de Visser 2018). On the other hand, local governments and the TCNs that amplify their voices have also been involved in the processes of development of hard law such as the Paris Climate Agreement (Aust 2019; Tollin 2015).

The inclusion of TCNs and thus local governments is often encouraged by international organisations, which find in them helpful partners to implement their international objectives at the local level, at times even seemingly circumventing the national level which might, at the time, be advocating for more isolationist policies (for the case of migration, see Ahouga 2018). The varying degrees of appreciation international organisations demonstrate for addressing local governments is often reflected in the strength and quantity of the institutional structures in place for an ongoing inclusion of local governments in both law-making and decision-making processes. Whilst most UN organisations remain conservative and strongly oriented towards states, the UN Habitat Programme forms an exception, opening up to include local governments and TCNs, allowing them to be continuously involved in the generation of norms relevant for migration and human rights, such as the Right to Housing.

a. The UN habitat programme

The UN Centre for Human Settlements (later, the Habitat Programme) has over the years offered the most reasonable, practical and necessary entry point and testing ground for local governments' engagement with the United Nations system, as well as a process for local governments to organise around. The need for a more coordinated global movement and organisation for local governments was first formulated during the 1992 UN Conference on Environment and Development in Rio de Janeiro (Habitat AGRED 2004, para.3). Then, in 1996, the first World Assembly of Cities and Local Authorities constituting of national and international associations for local governments took place during the Habitat II Conference in Istanbul, with a focus on adequate shelter for all and sustainable human settlements (Habitat II 1996, 139, para.8). The agenda points of adequate housing for all and sustainable human settlements were strongly advocated by local governments and successfully added to the conference agenda despite vehement protest by countries such as the US (Future Cities and Habitat II 1996, 3).

The World Assembly of Cities and Local Authorities, which would later become United Cities and Local Governments (UCLG) – the largest and most representative organisation of local governments today – gathered in meetings parallel to the conference and decided to 'institutionalize the coordination mechanisms that had been established to prepare for the Conference' (Habitat AGRED 2004, para.8). The Assembly also committed 'to pursuing closer partnerships with the United Nations in the implementation of the Habitat Agenda and to continuing their efforts in pursuit of a global charter for local self-government (Habitat II 1996, 139, para.11). This partnership would 'continue in the form of regional, national and international processes and networks that would continue after Habitat II' (Ibid, para.9).

While Habitat II was an important milestone for the efforts to codify the Right to Adequate Housing for all, Habitat III in Quito (Ecuador) was truly the step towards developing the international law in the field, especially with regards to the laying out of the elements for the security of tenure (Marcenko 2019). The explicit local government involvement with the New Urban Agenda that was adopted at the conference resulted in the inclusion of 'the Right to the City' as a new concept in international law: a collective right that considers cities as commons for the realisation of all human rights including environmental rights (Habitat III. 2017). The notion, which is continuously contested and developed, was clearly promoted by TCNs with the interests of migrants in mind. UCLG, for instance, points out how it includes 'multicultural and welcoming cities, which value the richness of migration' (Habitat III. 2017).[7] When the former centre became the UN Habitat Programme, its Rules of Procedure included an official accreditation clause for local governments that allowed them to directly engage in the United Nations for the first time without prior permission of their national governments.[8] The UN Habitat Programme now also encompasses the United Nations Advisory Committee for Local Authorities in which heads of different TCNs represent the local governments of the world, and many Habitat campaigns and projects have had local governments or TCNs directly in their executive positions (Habitat AGRED 2004, paras. 5–6).

B. Facilitating local-centric norm-generation

A focus on the *jurisgenerative* activities of TCNs, however, also reveals another mechanism of norm-generation. This second mode of norm-generation constitutes a larger challenge and contestation to international law and established assumptions, both substantively and formally.

Part of this local-centric (led primarily by local governments, as opposed to state-centric) norm-generation constitutes generation of norms that substantively fit within the subject-matter of international law but are created for and by a single locality. The declarations and related political and institutional

innovations brought forward by Human Rights Cities form one example of these processes that are deeply relevant to the position of migrants in cities worldwide (Oomen, Davis, and Grigolo 2016). This article will, however, deal with local-centric norm-generation that has been conducted not within and for a single local territory but through TCNs (both permanently institutionalised TCNS as well as those loose networks gathered around an ad hoc *jurisgenerative* objective) and designed to be applicable for multiple localities. Two cases with particular salience to migration, the European Charter for the Safeguarding of Human Rights in the City and the Mayors' Marrakech Declaration, illustrate how TCNs offer innovation to existing positive international law and how interrelated local-centric norm-generation is with the mode discussed above.

a. European Charter for the Safeguarding Human Rights in the City

The European Charter for the Safeguarding of Human Rights in the City is the first human rights charter drafted by local governments collectively. It was adopted in Saint Dennis, France, in 2000, following a succession of two-yearly meetings in different European cities (European Charter 2000, Address). The Charter explains its own raison d'être in addressing 'the men and women of the city "(Ibid)"'. It acknowledges that there is the Universal Declaration of Human Rights, as well as the European Convention on Human Rights, which provides legal, justiciable human rights protection, but points out that the effectiveness of these rights on the ground is unsatisfying and that citizens find it difficult to access through 'the labyrinth of legal and administrative procedures, which is where the City comes in (Ibid). Additional reasons given for a separate Charter are the urbanisation of the world, with increasing rural-urban migration into cities, as well as the city being now 'where the future of mankind lies (...) above all, for those foreigners who arrive seeking freedom and new experiences and looking for employment, to live here temporarily or permanently' (Preamble, 1) bringing about a need for a practice of city-based 'cityzenship' (Vrasti and Dayal 2016; Oomen 2020). In terms of the content of human rights norms, the Charter states that urban life requires, on the one hand, rights to be *redefined within the urban context*, such as is the case with employment and mobility, and on the other hand, *for new rights to emerge from the urban context*, such as a respect for the environment, the guarantee of sound food, tranquillity, possibilities of social interchange and leisure, etc.

A striking element of the Charter is the legal format, the legal language and the intended legal value. The drafters intended to write a binding document and used strong legal language and the formatting of an international treaty. Similar to traditional international legal texts, the Charter's Preamble lists the UDHR and international and regional treaties whose creation local governments have not been a part of (Preamble, para.1). In addition to this, the Preamble refers to and places itself within the framework of former local-

centric normative documents, endorsing the European Charter of Local Autonomy and the Barcelona Agreement (1998), adopted at the European Cities Conference on Human Rights. Readers with a background in international law notice how the documents created in the process of the TCNs also possessed increasingly binding legal titles implying a gradual increase of normativity: 'Agreement' first and 'Charter' later.

The main body of the Charter is divided into Articles as they are in international treaties and their text addresses the 'signatory cities', 'local authorities' or 'the municipality' in third-person plural – similar to the terms 'signatory States' or 'State Parties' in international treaties. The tense used is simple present, or the imperative form, which strengthens the sense of obligation. For example, 'The signatory cities develop policies designed to improve the access of the citizens to Law and Justice.' (Art. XXV, para.1) – strengthens a sense of obligation. Under the section titled 'Final Provisions – Legal Significance of the Charter and Mechanisms for its Application', the Charter becomes one of the rare so-called 'soft law' documents to address the question of its own legal status. The Charter does not foresee an explicit date or condition for its entry into force. However, it stipulates that when it is 'passed' it will remain open for the signature of localities 'which want to endorse its aims' (Final Provisions, para.1.). While the Charter refers to 'signatory cities,' the terms 'pass', 'endorse' and 'aims' are indicative of an intention to create soft law and cannot be found in the Vienna Convention on the Law of Treaties as the formal acts by which an actor is bound by a legal text. These choices could be accepted as signs of the drafting local governments' recognition of the fact that local governments still do not have the competences to fully become 'party' to a 'treaty' and to possess 'obligations' following 'ratification'.

Nevertheless, the drafters do clearly intend the Charter to be implemented, by, for instance, requesting signatory cities to 'incorporate into their local ordinances the principles and standards and guarantee mechanisms contemplated in this Charter and mention it explicitly in the legal reasoning for municipal actions' (Final provisions, para.2). They also refer to the Charter in all ordinances 'as the primary legal standard binding the city' (para.4). In addition, the signatory cities are also pushed to 'recognize the *irrefutable legality* of the rights stated in the Charter' and to 'undertake to reject and terminate all legal transactions, particularly municipal contracts, the consequences of which would militate against the implementation of those rights, and to act in such a way that all other legal entities will also recognise the legal significance of these rights' (para.3.) As an internal monitoring mechanism, the signatory cities are to create a (local) commission to assess the application of the Charter every two years and publicly announce the results (Final Provisions, para.5).

The Charter also places its drafters and City-parties within a multi-level constitutional structure (Preamble, para.4). This principle is explicated in the main text as the Principle of Subsidiarity which regulates the division of labour between the central, regional, and local governments, and should be agreed upon in a way that will prevent the central and regional governments from both neglecting their obligations in the locality and also from trespassing into municipal competence (Art. VII). This acknowledges local authorities' limited and diverging constitutional competences across the map while arguably adding to the maturity and self-awareness of the normative document. Recognition of this multi-level constitutional structure also places the document within a wider system of legal commitments entered into by different levels of government, thus giving the document a realistic and decent chance of implementation in different contexts. The determination of what local government competences per country are is then left for the individual signatory cities.

Concerning the norms generated, and thus the substantive contestations and innovations vis-à-vis existing established international law, there are, for instance, the reaffirmation of the Right to the City, as a cross-cutting principle applicable to all the rights contained in the Charter. In addition, the Principle of Equality and Non-Discrimination are to be upheld for all persons 'who inhabit the signatory cities, independently of their nationality' (Arts. I–II). This contrasts with international law and legal practice which often allows for states to provide different levels of rights protection for persons of different status, especially national citizenship. The way in which the Charter underlines the absolute universality of the rights it enshrines contests a state-centric notion of citizenship and replaces it with a local-centric 'cityzenship' promising the highest possible level of equality amongst inhabitants of the locality (Oomen 2020; Vrasti and Dayal 2016).

Another very interesting substantive innovation vis-à-vis international human rights law is the Duty of Solidarity enshrined in Art. V of the Charter. In international human rights law, Art. 29(1) of the UDHR mentioned the general duties that everyone has towards the community, but this was never worked out in binding law. The Charter, in contrast, bestows this duty upon the local community towards its own members (including the local governments which participate in this duty by 'promoting the development and quality of public services') and is foreseen to be carried out by local associations and networks of solidarity. In addition, an article on International Municipal Cooperation (VI) obliges cities to 'undertake to cooperate with regional and local authorities from developing countries in the areas of infrastructure, protection of the environment, health, education and culture, and to involve the maximum number of citizens' at the same time that it urges 'financial agents' of developing cities to participate in financing programmes while enabling access of as many of their citizens to the said funds. Therefore, a duty of solidarity and

cooperation both within the territory of the locality and across its borders is explicated and specified with greater detail than it is in international human rights law.

When it comes to the main body of the Charter– the substantive rights–the Charter's division into parts demonstrates a perfect example of local governments' awareness and appropriation of the systemic categories of international law in combination with their contestation. Next to the classic division of civil and political rights vis-à-vis economic, social and cultural rights, the Charter introduces a new category of rights: Rights Relative to the Local Democratic Administration, which include the articles on 'Efficiency of Public Services' and the 'Principle of Transparency'. These are supplemented with a whole range of new substantive rights, such as a General Right to Public Services of Social Protection, the Right to the Environment, the Right to Harmonious and Sustainable City Development, the Right to Circulation and Tranquillity in the City and the Right to Leisure. Even under articles containing rights already existing in international law, local government drafters of the Charter have placed deliberate contestations of the content of those rights. To cite a few examples amongst many, Article XVI stipulates the Right to a Housing. This right to a 'proper, safe and healthy housing', ensured by the municipality by creating an appropriate offer of homes and district amenities for all without distinction on the basis of persons' resources, recognises the special needs of the homeless, women who are victims of violence, those attempting to flee prostitution, as well as the rights of nomads 'to stay in the city in conditions which are compatible with human dignity'., the Article is more elaborate than its equivalent in the ICESCR (where it is hardly individually recognised) and more socially progressive in its terminology. This is visible in the obligations that it imposes upon the municipality and its defragmentation and integration[9] of different areas of international law (e.g., women's rights, rights of nomadic peoples such as the Roma).

In all, no article in the Charter is a simple copy and endorsement to a right that is currently, in the same wording, established in international law. In contrast, all content of the Charter includes some level of contestation and intention to progressively develop the rights and their protection mechanisms for all who live in the city, including migrants.

b. Mayors' Marrakech Declaration

Another example of norm-generation within TCNs, geared specifically towards migrants, is the Mayors' Marrakech Declaration. This 2018 Declaration was drawn up by the Mayor's Migration Council, an initiative closely related to three TCNs: C40 Cities, the UCLG and the Global Taskforce of Local and Regional Governments.[10] This Council was formed at the fifth Mayoral Forum on Human Mobility, Migration and Development meeting in the margin of the large UN Intergovernmental Conference on the Global

Compact for Migration (GCM), in Marrakech in December 2018. Cities had already contributed by means of side events and input documentation to the New York Declaration for Refugees and Migrants that formed the basis for the two Global Compacts discussed at the Conference, ensuring that the UN recognised both the needs of local authorities as the 'first receivers of migrants' as well as the need for a multi-stakeholder approach in developing migration policy (New York Declaration 2016, paras.54, 69).

In Marrakech, mayors from all over the world, some from countries that withdrew from the UN process, such as Italy and the US, met in the Mayoral Forum in the days preceding the Conference to draw up their own commitments pertaining to migration.[11] The result of this process was a Declaration which contains local government commitments and calls to action directed towards the international community, national governments and the private sector, but also a number of underlying norms. It was read out by Toronto Mayor Valérie Plante in between statements from NGOs and other UN organisations, in a conference tent set up next to the tent in which governmental representatives read out their commitment to the Global Compact. This was a vivid illustration of the awkward position that local governments hold at international conferences – neither fully state, nor non-state actor.[12]

In terms of its contents, the Marrakech Declaration differs from the two UN documents that were discussed by UN member states, in parallel, in terms of both its objects and its substance. In terms of the object of norm-generation, the mayors recognised that the legal binary between refugees and migrants is artificial and often not helpful in terms of policy making. Instead, they issued one Declaration, committing to advancing 'the principles and objectives of both compacts in unison', a testimony to what Benjamin Barber dubbed the 'pragmatic politics' of local government (Barber 2013). In addition, before listing their commitments, they iterated their commitment under the wider objective of 'inclusive, safe and sustainable societies' (SDG11), thus subtly shifting the focus from the regular, safe and orderly migration that was the object of the documents produced by the UN member states. The norm thus put forward (a right to inclusion, to security, to sustainability) might be closely related to the existing human rights and the SDGs, but are – at present – not laid down in the binding instruments of international law. In addition to highlighting these overall norms, signatories of the Marrakech Declaration also committed to 'accelerate our efforts to advance four priority objectives': addressing and reducing vulnerabilities, providing all migrants with safe access to essential services, empowering migrants to realise full inclusion and social cohesion and eliminating discrimination (MMC 2018, 3–4).

The Marrakech Declaration also demonstrated local governments' strong interest in a roadmap for being included in the formal and informal monitoring and follow-up mechanisms of the Global Compacts, seeking to help

ensure their realisation in case national governments lose their enthusiasm. These efforts led to the next (sixth) Mayoral Forum on Mobility, Migration and Development (subtitled: 'City Leadership in Implementing the Global Compacts') to be included for the first time in history as an integral part to the Global Forum on Migration and Development[13] in Quito 2020. As part of this mechanism, cities could sign a city action pledge with a strong emphasis on local action, national, and international advocacy.[14] In this manner, the Mayors' Marrakech Declaration of 2018 and its follow-up form a perfect example of how interrelated the two modes of norm-generation by TCNs are, as cities seek the highest possible inclusion into the state-centric processes of the Global Compacts and seek to influence the outcome documents (GCM, GCR) but at the same time issue their own normative document with their uncensored vision on what international law on the topic as well as what their own role in realising it should be.

IV. Exploring the functions of international norm-generation by TCNs

It is clear, by now, that TCNs adopt both the form and language of international law, (co-) generating new norms both in mainstream state-centric processes as well as their own local-centric gatherings and organisations. The question is, however, why TCNs would frame their normative ideals in the form and language of international law. Here, an analysis of the documents generated and the processes around them reveals four main functions of *jurisgenerative* practices in the field of international law: an external, an internal, a horizontal, and an integrating function. These functions, deduced from empirical analysis of these documents, in turn, draw a comprehensive picture of TCNs' role as actors within the norm-generating community that is the international legal order and their contestation of a conception of international law that rejects this pluralism and excludes them. Let us illustrate these four functions of norm-generation through the example of a normative document highly relevant for migration that very clearly encapsulates all of them: the 'Cities for Adequate Housing: – Municipalist Declaration of Local Governments for the Right to Housing and the Right to the City' (2018) ('the Housing Declaration').

Let's begin with the *external* function of norm-generation. Local governments seek to inform and influence the global agenda, (or the mainstream, State-centric international law-making processes), whether these concern soft or binding law. By crystallising ideals in the compact legal form of the normative document, TCNs add legitimacy to the expressed interests and values and also demonstrate competence and fluency in the legal language which is necessary to meaningfully participate and be taken seriously in the international norm-generation process. In this manner, they are both

empowered by the pluralising and 'softening' international legal order gradually recognising them as stakeholders and also behave as 'actors' seeking to improve and cement their position therein. When they are taken seriously, they can arguably help create better norms internationally, those which include the local interests, experience and creativity. This reflects the 'error-correction' function of pluralist and inclusive norm-generation according to the New Haven School (Berman 2006, 303). The addressee of a normative document produced through the second mode of norm-generation often reveals the degree to which the drafters carried such an external intention. The Housing Declaration primarily targets national governments and international organisations. It demands for local governments to be endowed with more public authority to regulate the private housing sector in order to realise the Rights to the City and the Right to Adequate Housing. This demand can only be realised by domestic legislative changes within their States while international organisations and their pressure can encourage the process. The Housing Declaration also lists some core elements of the signatory cities' understanding of the content of the two rights, endorsing the perspectives of local governments on the currently developing law. The Declaration can thus be understood as the advocacy of a normative proposal, competing with other proposals of varying degrees of persuasive authority in the international realm as the New Haven School observes.

At the same time, the Housing Declaration reveals the *internal (regulatory)* function of achieving on the ground results concerning social justice within the TCNs' constituencies. This is the core function of norm-generation in general, as expressions in the imperative form intend regulation and demand compliance (Onuf 1985). But how could this be, when local governments are not legal subjects of international law with official law-making capacity? The answer is that while positive international law seeks to freeze in time conditions of being an 'insider' to international relations, this does not stop officially excluded actors from generating their own norms, with just as much *jurisgenerative* intention. This is what the legal analytical reading of normative documents reveals, when these refer to substantive rights, obligations, commitments, enforcement mechanisms, and legal value. While not as clearly mimicking the language of international law as the European Charter, the regulatory internal function of the Housing Declaration is seen in specific practical demands or commitments that – when realised – are expected to increase the well-being of local residents. Signatories of the Housing Declaration, for instance, demand 'more legal and fiscal powers to regulate the real estate market *in order to fight against speculation* and *guarantee the social function of the city*' (Housing Declaration 2018, 1) and commit to 'planning mixed, compact and polycentric cities where housing (. . .) *contributes to the social, economic and environmental sustainability of the urban fabric*' (Ibid., 2).

Simply having been assigned this regulatory function in no way guarantees generated norms persuasive power, compliance, and finally, on-the-ground change. Instead, the power of these documents in generating change lies in the premise that normative engagement increases actors' ownership of the norms that they create or endorse, compared to those imposed upon them (Ryngaert 2008). Koh argues that engagement with (binding) law and its contestation is both an identity-building and interest-building process (1996). When local governments come together, through TCNs, to engage with, negotiate, and formulate norms that they can stand behind, this process constitutes them in return, and contributes to their identity – such as 'Cities for Adequate Housing' or 'Cities Against Racism'. Participation in these norm-generative processes also shapes local governments„ understanding of what is in their interest, according to what others believe is in their interest. Thus, ownership develops.

There is also a third, *horizontal* function to TCNs crystallising their interests in the compact legal form of normative documents. Norm-generation processes can be both a rallying means and a rallying end. Local governments come together around the formulation of normative texts, both when the said texts are products of State-centric international legal processes and when they are local-centric norms. When local governments gathered in parallel to the Habitat II and created their first World Assembly, they sought to inform and influence the Habitat process. At the same time, that first worldwide gathering functioned as a starting point for further organisation and institutionalisation. When it comes to the Housing Declaration, the website of UCLG, the largest TCN worldwide, explains how 'at the initiative of the City of Barcelona, UCLG initiated the process for a declaration *aimed at rallying local governments worldwide* to fight the financialization of cities.'[15] The Declaration, which itself includes the statement 'We also propose joining forces to call for more resources and powers from both national and international supra-municipal bodies' (Housing Declaration, Point 5) was launched 'during the first Forum of Local and Regional Governments ever held within the framework of a UN's High-Level Political Forum (HLPF)'[16] with the intended purpose to serve as a compact communication of the signatories' interests vis-à-vis other potential allies (external function).

One last noteworthy function is the *integrating* function of TCNs' norm-generation. Local governments demonstrate a significant knowledge on the fragmentation in international law, which is the process of international law branching out and specialising further and further into a more complex system (Brems and Ouald-Chaib 2018; Oomen 2014). Local governments, arguably to make the system more foreseeable for themselves and to be able to consult fewer sources and documents containing obligations and commitments to different legal fields, seek to bring together fragmented

aspects of international law and connect them into an integrated system. One example of this process is the defragmenting and integrating effect of the European Charter as described above. In the Charter, consumer rights, rights of nomads, rights of women, rights of migrants, refugees, foreigners, the urban poor, and other groups are incorporated into one single text, as opposed to the international legal system which addresses most of these vulnerable groups in separate legal texts. In the Housing Declaration, issues around housing, inclusion of refugees and migrants, economic equity, and sustainability are harmonised into one crystallised ideal.

V. Conclusion

Amongst their multitude of activities, TCNs generate norms, including those that relate to migration and human rights, presenting them in the language and the form of international law. They do so in two distinct modes and institutional settings: by seeking inclusion in mainstream State-centric international law-making processes and by creating local-centric norms in processes without the inclusion of States that, however, look, feel, and seek to work like international law. This norm-generation leads to a three-fold contestation: pushing for the recognition of local governments' actorhood and capacity in international norm-generation, using international law to protect and (re-)negotiate local competences and autonomy, and asserting local governments' (Berman, 2006). Such new norms often emphasise inclusion and the relevance of rights to all who live in the local authority, thus holding important promise for migrants and for the realisation of social justice more broadly.

As discussed above, the choice for norm-generation seems to have four distinct functions. Externally, TCNs seek to inform and influence the agenda and development of international law and policy. Internally, such norm-generation "seeks" to shape and regulate the local governments„ behaviour towards their own localities, contributing to rights-realisation and social justice on the ground, with the added 'stick' of follow-up and monitoring mechanisms agreed upon in the TCN context. The horizontal function of norm-generation is that of rallying local governments around similar interests and values crystallised within a compact set of norms expressed in legal language. Both the process of norm-generation and the formulated norms can help bring local governments together. The fourth integrating function of local governments' norm-generation is the effort to make the complex and fragmented system of international law easier to apply, seeking to defragment and harmonise different norms and subfields of international law with each other. All this TCN activism in the legal field thus – transnationally – critically contributes to international law and underlying objectives of global justice. At the same time – sub-nationally – the generation, contestation and

invocation of international norms serves as an important bridge towards local justice in fields like housing and inclusion of migrants. In the Special Issue context of TCN activism in the governance of migration, this research, above all, constitutes an initial analysis of some *jurisgenerative* activities of TCNs and offers valuable insights. The full potential of such TCN activity can, however, only be understood through a wider and deeper empirical research into all norm-generation conducted by TCNs. This includes an assessment of TCNs normative power (how (much) they influence actors), and their longitudinal influence on the development of international law.

Notes

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3. This research was conducted as part of the Cities of Refuge funded by the VICI grant of the Netherlands Scientific Organisation (NWO). Cities of Refuge explores the relevance of human rights as law, praxis and discourse in how local governments in Europe receive and integrate refugees. www.citiesofrefuge.eu @UUCoR.
4. We would like to thank the anonymous reviewer for this suggestion.
5. 12 formal interviews, as well as participant observation during the Mayoral Forum and the Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, Marrakech, 8–10 December 2018.
6. With two anonymous key figures in TCNs focusing on human rights and cities, and one high-level official of an active local government.
7. https://www.uclg-cisdp.org/en/activities/right-to-the-city/Habitat-III/new-urban-agenda.
8. Rules of Procedure of the UN Habitat Programme, adopted December 2003, Rule 64.
9. Fragmentation refers to international law branching out ever further in specialised sub-fields that become detached from each other and start regulating similar factual circumstances with different norms. See (Young 2012).
10. https://www.mayorsmigrationcouncil.org/.
11. Observations and interviews with mayors (of Malaga, Rabat, Kampala, Montreal, Los Angeles) and the vice-mayor of Athens and Milan in Marrakech, 8–10 December 2019.
12. Personal observation by the 2nd author, 10 December 2019.
13. The GFMD is an informal, non-binding and state-led framework born, from an proposal by former UN Secretary-General Kofi Annan, that promotes practical, evidence-based outcomes and cooperation between governments as well as non-government stakeholders. http://gfmd.org/process/background.
14. UCLG, MMC, IOM, Call to Local Action on Migration: Cities Working together for Migrants and Refugees (2019), https://gfmd.org/files/documents/mm_call_to_action_on_local_migration_flyer_final_v1.pdf.

15. https://www.uclg.org/en/media/news/cities-adequate-housing-call-action-ensure-right-housing.
16. Ibid.

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