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# Pulling human rights back in? local authorities, international law and the reception of undocumented migrants

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## ABSTRACT

The category of the ‘irregular’ migrant is usually seen as the quintessential non-status under international law, offering states plenty of discretion while providing few practically accessible rights for migrants. At the same time, certain local authorities have struggled to justify more pragmatic responses when dealing with the reception of irregular immigrants. This article explores a recent trend that potentially holds the key to both conundrums: the invocation of international human rights law, in their defence, by local authorities. More specifically, their engagement of human rights can force international institutions to apply and develop norms in this area. Within this story of legal pluralism, nation states are under increasing pressure to live up to the standards that they had previously avoided. Two examples of ‘frontier cities’ operating in very different constitutional and discursive environments will be used to substantiate the argument. The first concerns support by the city of Utrecht of a case concerning emergency social assistance for undocumented migrants before the European Committee of Social Rights. The second example concerns San Francisco as a sanctuary city in the US and a place with a long history of localization of international human rights law. The article closes with a critical reflection on the potential trajectories that this trend might take and what this means for understandings of legal pluralism as well as future research.

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## Introduction

Over the past years, the *de facto* rights of irregular migrants have increasingly become a site of contestation between national and local authorities around the world. In the Netherlands, for instance, an agreement published by the Dutch coalition government in October 2017 paid a great deal of attention to what municipalities are *not* allowed to do when it comes to irregular migrants (VVD et al. 2017, 54; see also Roodenburg in this volume). Such migrants, the Agreement stated, have to leave the country and

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will be held in central locations where they will be helped to do so. If they do not cooperate, they will lose all right to support. Municipalities can shelter individuals for a few days as a public order measure, but not offer what has been called 'bed, bath, bread' (*Bed-Bad-Brood*) in the Netherlands - emergency shelter. One local mayor, of Nijmegen, responded by stating that "this means that if you have structures for undocumented migrants and an asylum request is turned down, you cannot shelter them. What do you think the person will do? Hang around, in illegality. We have to discuss this with the municipalities, because this has to be done differently" (NI 2017).

Similar discussions can be found elsewhere in the Western world. Around the same time, for instance, federal enforcement agencies in the US had arrested a few hundred people in targeted 'raids' of so-called 'sanctuary cities'. In this case, reactions explicitly adopted a legal language, with high-profile immigration litigators criticizing the Trump administration for '[p]ersecuting cities because they are following the constitution and making sure they don't violate people's rights' (Levin 2017a). Both examples highlight how the plight of irregular migrants has not only become a fault line between political parties nationally, but also causes cities to diverge from national policies. In this context, cities advance both pragmatic and principled justifications, at times turning to international human rights law to undergird their divergence (Scholten 2015; Lippert and Rehaag 2013). The substantial media coverage of these cases in both countries can be seen as a reflection of their social and scientific significance.

The 'sanctuary cities' in the United States, just like 'cities of refuge' and their other counterparts in Europe, have not only led to terse political discussions but have also illustrated the legal pluralism resulting from cities 'decoupling' local policies in this field from those adopted nationally (Scholten 2015). Legal pluralism is classically understood as the coexistence of different normative orders within one socio-political space (Von Benda-Beckmann 1997). In early work, the competing normative orders were those developed within the context of the nation state and those generated locally, such as customary law (Griffiths 2002; Griffiths, 1986; Merry, 1988). Over the past decades, scholars have come to describe and theorize the place of international human rights law as a normative order in local settings (De Feyter et al. 2011, Goodale and Merry 2007; Oomen 2014). The dynamic at work here, in which local authorities invoke international human rights law to diverge in their policies from the nation state, however, calls for further analysis and theory formation (Oomen, Davis and Grigolo 2016).

Within this broader discussion, this article seeks to offer one specific angle in suggesting that the developments could hold the key to a protracted 'double conundrum' pertaining to the situation of irregular migrants. More concretely, it will be argued that the engagement of city authorities of human rights law (a) can force international institutions, including judicial and quasi-judicial bodies, to apply and develop international norms to protect persons without a recognised legal status. Within this new story of multilevel governance, national authorities find themselves increasingly under pressure to live up to legal and moral standards that they have so far successfully avoided. Using human rights law thus (b) also provides a new lever for local authorities who have struggled to assert their positions vis-à-vis national authorities. Though focusing on international human rights law, this article therefore

follows recent works that regard urban practices of political contestation as highly illustrative of the changing nature of refugee politics. Darling (2017), for example, has argued that the city ‘may offer a path to contest the exclusions of the nation-state through presenting the urban as a contested yet fertile ground for sequences of critique’.

Following a brief introduction of the ‘double conundrum’ posed by the arrival of ‘irregular’ migrants, this article will discuss two prominent examples to substantiate this argument. Both of them concern highly visible ‘frontier cities’ (Oomen and Baumgärtel 2018) that also have a history of invoking international law locally. Yet, they are set within very different constitutional and discursive environments, which, so we claim, account for the different role that human rights come to play in debates concerning irregular migration. In the Netherlands, the city of Utrecht was actively involved in a legal case concerning emergency social assistance for irregular migrants before the European Committee of Social Rights (ECSR). The second example concerns San Francisco as both an important sanctuary city in the United States and a local authority with a long history on the localization of international human rights law that, however, has not (yet) engaged the latter to reinforce its defiant stance. The article closes with a critical reflection on the potential trajectories that this trend might take and what this means for understandings of legal pluralism as well as future research.

### **The two conundrums posed by ‘irregular’ migration**

Where local authorities invoke international human rights law in a context of receiving irregular migrants, the opportunity arises to overcome of two long-standing impasses, which this section briefly introduces. The first part looks at the problematic relation between international human rights law and situations of irregular migration, in which irregular migrants will be understood as people who enter, stay or work in a destination country without the necessary authorization or documents required under immigration regulations (IOM, 2019). This will be followed by a discussion of the difficulty that local authorities have often encountered where they planned to assert themselves against national authorities in the migration domain.

### ***International human rights and the ‘non-status’ of irregular migrants***

There is something decidedly awkward about the relationship between irregular migrants and human rights law. On the one hand, it is a ‘silly question’ (Groenendijk 2004, xix) to ask whether these migrants are human beings. The obvious conclusion to draw is that international and regional human rights treaties are, with very few explicit exceptions such as the right to vote or hold political office, applicable to *all* human beings and irrespective of their status of residence. One also will not find any treaty reservations or other legal or interpretative declarations that exclude persons without a status from the purview of international human rights law. On the other hand, it has been shown that irregular migrants ‘routinely see their human rights violated’ (Dembour and Kelly 2011, 2), often living as ‘outlaws in the original sense of

that term' (Commissioner for Human Rights 2007, 3). A host of explanations have been proposed to account for this condition, all plausible depending on the vantage point taken. On a personal level, it seems sensible to point to a fear of detection (and deportation) upon engaging courts and generally low rights awareness in unfamiliar legal systems (FRA 2011, 54-55). According to such an account, human rights exist but will remain uninvoked or dormant until more conducive conditions are created, for example through the introduction of 'firewalls' that separate migration enforcement from other public authorities (Crépeau and Hastie 2015). A more political explanation of the same phenomenon will stress the prevalence of a regulatory logic which 'posits irregular migration within the realm of criminality and security' and is 'fundamentally at odds with a human rights approach' (UNGA 2013, paras. 31 and 75).

The central problem in this context is one of rights implementation that could counteract political agendas that are questionable, if not even in outright breach of human rights law. The most radical accounts, however, underline the existence of an irremediable contradiction between the universal aspiration of human rights and the inherently particularistic political systems that are in place for their enforcement, an argument initially proposed by Hannah Arendt (1973) in *The Origins of Totalitarianism*. Transposing the argument to the contemporary context, Krause argues for example that irregular migrants are subject to a state of 'total domination' which leaves them 'defenceless' not only against the actions of state authorities, but also against exploitation by employers and other private parties (Krause 2008). The dismal experience of undocumented migrants has hence become the most critical piece of evidence for scholars convinced of the necessity of what Arendt originally referred to as a primordial 'right to have rights' (Agamben, 1998).

If the troubles in the relation between human rights and (irregular) migration are complex and deep-seated (Baumgärtel 2019), it does not come as a surprise that the traditional institutions and strategies for the promotion of international human rights have failed to overcome the inertia. The UN's approach to the issue, for example, has been described as both wanting in terms of implementation and as legally fragmented (Grant, 2011). In contrast to other groups, attempts to establish clearer and more powerful norms for migrants have not brought about the expected progress. The UN Convention on the Rights of All Migrant Workers and Members of Their Families, while legally binding and with an ambitious range of rights for unauthorized workers, has had a 'disappointing' ratification record (Ruhs 2013, 1).<sup>1</sup> Some scholars have therefore argued that 'soft law' instruments would be better placed to close the normative gap (Betts 2010), though this proposition has turned out to be equally questionable. Statements issued by the UN Office of the High Commissioner for Human Rights (OHCHR) or the Global Migration Group usually reiterate already existing legal obligations but have failed to instigate any legal change that could overcome the practical difficulties attached to the rights of undocumented migrants (OHCHR 2006; OHCHR 2010). Similar conclusions must be drawn about regional initiatives such as Resolution 1509, formulated by the Parliamentary Assembly of the Council of Europe in 2006, which also proposed a range of civil, political, social and economic rights as well as concrete steps to assure their implementation.<sup>2</sup> With little if any traceable

legal progress on the international plane (but see Vonk 2015, 88),<sup>3</sup> it has not been difficult for scholars to come to harsh conclusions. For example, Nash's sociological account of the contemporary human rights system describes irregular migrants as 'un-citizens' who inhabit the lowest tier of this stratified global regime (Nash 2009, 1078–1079).

Despite everything, it should not be forgotten that irregular migrants still hold agency that can sometimes be quite significant. As McNevin (2011) explains, '[i]n recent years, irregular migrants have marched, occupied buildings, rioted, gone on strike, petitioned, blogged, written manifestoes, and generally brought attention to their long-term presence in states where they live with the constant threat of deportation' (4). The emblematic example of such agency has been the *sans papier* movement, whose attempts to 'create a public stage' (Gündogdu 2015, 193) have been extensively discussed by influential scholars such as Balibar (2000) and Gündogdu (see also Siméant 1998). In the Dutch context, the arguably most famous action consisted of the occupation by about 100 refused asylum seekers of a church in Amsterdam in 2012. While the persons were eventually evicted from the 'refuge church' (*Vluchtkerk*), they remain active in an organization called 'We Are Here' (*Wij Zijn Hier*). However, rather than representing examples of conventional human rights claims, such exercises of agency fall outside, and thus represent a formidable challenge to the positivist frameworks that dominate international law.

### ***The uphill battle of local authorities against national migration policy***

Irregular migrants using their legal 'non-space' are not the only actors to challenge national migration policies. Local authorities are also becoming more and more vocal in their opposition to national governments, sometimes even of the same or coalescing political parties, to make their own demands. While the question of the complex reasons for cities to take a conflicting standpoint will be taken up in the next sections, it suffices to mention here that there are legal, discursive, identity-formative and scalar aspects to categorize different types of urban practices (Bauder 2017; Darling and Squire 2012). As will be outlined below, the Dutch example hints towards the existence of also more pragmatic considerations including public order and public health, as has been corroborated in previous works (Kos, Maussen, and Doomernik 2016, 365). Shared by all these different initiatives is a 'dissatisfaction with exclusionary national policies towards migrants and refugees, and the desire to elevate the urban as the scale at which membership in the community and the polity is enacted' (Bauder 2017, 183).

At this stage, it is important to realize that this second conundrum posed by irregular migration increasingly takes the form of a standoff between different levels of governmental authority in various countries. Many municipalities still side with their national counterparts, in some cases even emerging as the most committed and creative enforcers of local politics of exclusion (Rodriguez 2017; Gilbert 2009; Ambrosini 2013). Nonetheless, there are good reasons to believe that the challenge posed by local authorities will continue to grow as they take critical or resistant stances towards restrictive immigration policies at the national level. On the one hand,

such policies are not self-executing. Research in the Netherlands, for instance, has shown that local authorities may be prepared to ‘cushion’ or resist national policies (Kos, Maussen, and Doornik 2016, 363). Street-level bureaucrats in particular are reluctant to play the ‘local bogeymen’ (Ellermann 2006, 301), hence focusing their enforcement efforts on those migrants that they perceive as ‘deviant’ (Leerkes, Varsanyi, and Engbersen 2012). In contrast to Spencer (2018) who presents such ‘shadow politics’ as distinct from overt resistance, we propose that this dichotomy can be porous and that local authorities may escalate a conflict where national governments turn more repressive. On the other hand, devolution policies have engendered situations in which divergences in practice can be observed between towns and even individual officers as regards immigration enforcement (Varsanyi et al. 2012, 152; Provine et al. 2016). As discretionary spaces abound, local actors may gradually develop expectations and approaches that diverge from the national priorities (Armacost 2016, 1218–1222). Where international human rights law undergirds such developments, we may be confronted not just with instances of ‘simple’ fragmentation but rather competing norms within a context of increasing legal pluralism.

In the meantime, the problems created by disobedient local authorities have also been recognized by proponents of tighter immigration policies, particularly in the US. Long before the threats issued by the Trump administration, those trying to curb irregular migration through deterrence and ‘attrition’ have underlined the need to counteract the emergence of sanctuary cities (Kobach 2007, 155). One important topic from a legal point of view is hereby the increase of laws issued by US states that ‘pre-empt’ divergent local policies (Rodriguez 2017, 532–535; see more generally Riverstone-Newell 2017). Such counterstrategies are admittedly somewhat rarer in Europe where cities and towns have not ‘benefitted’ to the same extent from a devolution of regulations concerning immigration law enforcement. Consequently, they have struggled more than their US counterparts to assert their positions within the ‘quintessentially national’ legal domain of (and indeed the ‘fight’ against) irregular migration (Dauvergne 2008, 7). In both contexts, however, localities are facing an uphill battle against state authorities that, as a matter of domestic law, are usually well-placed to restrict their initiatives either through legislative override (such as pre-emption laws) or through judicial and political means. It is precisely in such situations that international human rights law, by creating a context of legal pluralism, provides an opportunity to local authorities to face such challenges overtly rather than by taking the road of ‘shadow politics’, as has been implied elsewhere (Spencer 2018).

The remainder of this article discusses two case studies, the first from the Netherlands and the second from the US, to explore how the local invocation of human rights in relation to the plight of irregular migrants may not only create situations of local legal pluralism but also holds promise for the development of international human rights law. The cities discussed, Utrecht and San Francisco, were selected because they can be considered ‘frontier cities’ in shaping local policies with respect to irregular migration that differ from those adopted nationally, which allows for careful consideration of the dynamics at play (Oomen and Baumgärtel 2018). At the same time, these local authorities are situated within very different constitutional

contexts – a centralist and a federal system, respectively – in which the powers of local authorities differ substantially. This illustrates the global relevance of this trend. In addition, the cities form dissimilar cases in their discursive engagement with human rights in the area of migration, with their different strategies accounting for the degree to which their defiant stance reinforces legal pluralism in the field of human rights law. Methodologically, the way in which human rights law is invoked by local authorities in these two cities was assessed by analysis of laws, policies, debates with the municipal councils and other grey documentation, supplemented with interviews held with lawyers, officials and politicians in Utrecht between 2011 and 2018.

### **‘Bed, bath, bread’: Utrecht and the reception of failed asylum seekers**

One instance of a local authority invoking and working towards specification of international human rights is the city of Utrecht, a university town with over 330,000 inhabitants in the centre of the Netherlands. The city has actively engaged with human rights since 2009, with as a result a policy report on the way in which the municipality gave effect to international treaties, participation in a research network on ‘human rights and the city: mapping the meaning of international standards in strengthening urban social policies’ and the formation of a local human rights network (Gemeente Utrecht 2011). The city was even named the ‘first human rights city in the Netherlands by Navanethem Pillay, then the UN High Commissioner for Human Rights, in 2012 (Oomen and Van den Berg 2014, 170. In reflecting on this process one of main civil servants involved described it as an instance of a ‘universal narrative slowly but surely transforming into a local social practice activating and connecting communities’ (Sakkers 2017, 367).

One of the human rights issues addressed in Utrecht’s human rights policy from the very start concerned the position of irregular migrants, and more specifically of rejected asylum seekers who have remained in the city. Here, the 2011 document also formed a response to the effects of the *Aliens Act* of 2000, which held that people whose asylum application was denied in the final instance did not have the right to be sheltered by the government. This, however, did not lead to the establishment of adequate national facilities for people unable or unwilling to leave the Netherlands. In response, the policy document stated that ‘[t]he municipality of Utrecht finds it unacceptable that asylum seekers who have exhausted their remedies end up on the streets in dire circumstances. The municipality has decided, in accordance with its duty of care, aspects of public health and public order, to nevertheless continue creating emergency shelter for groups that the central government does not shelter’. As a result of this policy, Utrecht noted, the emergency shelter (which was also open to other irregular migrants) led to permanent resolution in the form either of a residence permit, another status or return to the country of origin in 96% of the cases.

The main legal foundations for the Utrecht policy described in the 2011 document were both the ‘duty of care’ for social affairs that municipalities hold on the basis of the constitution, and their responsibilities for public order, but not human rights (Vonk 2016). This is an important distinction, as the social and economic rights



included in international human rights treaties often create more subjective, and thus enforceable rights for individuals.<sup>4</sup> It is exactly for this reason that key actors from Utrecht, in cooperation with lawyers and civil society, have also tried to solicit an 'international explication of general norms that can then be taken back to the locality'.<sup>5</sup> Civil servants working with undocumented migrants in Utrecht described how, initially, human rights seemed rather lofty and abstract ('New York, Geneva, 1948, you know').<sup>6</sup> The explicit engagement with human rights and the involvement in international networks, did however lead to more human rights awareness and strategic interaction between the municipality, NGOs and lawyers in setting out the obligations of the local authority in this field.

It also helped shaped two cases lodged by NGOs against the state of the Netherlands in 2014 that would explicate the relevance of human rights to local policies. In the first, the *FEANTSA* case, the ECSR held that the denial of emergency social assistance to homeless people and irregular migrants violated the obligations that the Netherlands had under the European Social Charter.<sup>7</sup> Concerning a second complaint, put forward by the Conference of European Churches, the ECSR held that a large majority of irregular adult migrants in the Netherlands were not offered emergency social assistance including food, water and clothing and were denied access to emergency shelter.<sup>8</sup> In this case, the ECSR also referred to other human rights instruments like the Convention on the Rights of the Child in stating that the Netherlands violated art. 13(4) of the Charter. One key paragraph stated that emergency care cannot be made conditional upon people cooperating with their own expulsion. In speaking about the role of local authorities and the responsibility of the government, the monitoring committee held that:

It 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, and it is also true that this is done by third parties such as non-governmental organisations, churches and individuals. However, in a situation where notably this delegation of tasks or responsibilities is not based on any legal, administrative or financial agreements or safeguards agreed upon between the government and the bodies factually providing assistance and in order to provide for legal certainty, the prevailing situation cannot fulfil the positive obligations assumed under Article 13§4.

These rulings, which all stipulated the human rights at stake in local government policies, were immediately invoked in court cases in Utrecht and in the work of civil servants seeking to provide shelter to undocumented migrants.<sup>9</sup>

The rulings by the European human rights body might have been welcomed warmly in Utrecht, but they lead to a severe backlash at the national level. Here, the prohibition of emergency shelter to irregular migrants, and even the criminalization of 'illegality' had been a cornerstone of the government that took office in 2012 (VVD and PvdA 2012, 30). In contrast to what happened in Utrecht, the government protested against the ECSR decisions, stating how the Committee's decisions were non-binding and how the Netherlands had not recognized application of the European Social Charter to non-nationals.<sup>10</sup> In April 2015, however, the Council of Europe Committee of Ministers, endorsed the ECSR decision, and decision that nearly led to the fall of the VVD-PvdA government in 2015.<sup>11</sup> After heated negotiations, the governing parties came to an agreement that held that rejected asylum

seekers could only get limited shelter in five municipalities, and only on the condition that the people concerned cooperated with their expulsion. If not, they would be put out in the streets.<sup>12</sup> Municipalities, the State Secretary wrote to Parliament, would not be allowed to offer any shelter to those irregular migrants who did not cooperate with their expulsion and would be financially sanctioned if they did.<sup>13</sup> All this was to be the content of an intergovernmental agreement (*bestuursakkoord*) to be closed with the municipalities. The response from the municipalities was highly critical. The Netherlands Association of Municipalities, in its formal response, expressed deep concerns, pointing out how there would always be people unable or unwilling to cooperate with their own expulsion and how giving people temporary shelter often made it easier to expel them later on.<sup>14</sup> In news articles, the municipalities went as far as characterizing the agreement as ‘impossible to implement, based on short-term thinking and pathetic’ and describing the compromise as ‘the reality of the Hague versus the realities at the local level’ (Jonker 2015, 4).

In their quest for the right to offer shelter to irregular migrants the municipalities were supported by not only the ECSR decision, but also by UN Special Rapporteurs. One of the points of the national government had been that irregular migrants could apply for a *buitenschuldverklaring*, stating that they could not be blamed for not being able to leave the Netherlands. When the three UN Special Rapporteurs responded to the April 2015 agreement early 2016 they indicated that such a ‘no-fault policy’ violated international law.<sup>15</sup> After revising all the relevant treaties they stated how ‘international human rights law imposes a clear obligation on the Netherlands to provide, at the very least, a minimum essential level of the right to housing as well as other related economic, social and cultural rights for irregular adult migrants on its territory’ and how ‘the provision of these human rights cannot be made conditional on cooperation with expulsion’.<sup>16</sup> In pointing out how ‘[m]unicipalities are left to fill the gaps in the national system, although the central government wants to stop local governments from performing this gap-filling role’, they urged the central government to take up its role in this regard.

The city of Utrecht was amongst the many local authorities to point out the unenforceability and the undesirability of the government agreement. In a letter to the municipal council, the Mayor Jan van Zanen and the aldermen pointed out how ‘[t]he government agreement does not provide a consistent (*sluitende*) approach, which is why we cannot implement it’. The Mayor and aldermen indicated that they would try to come to an *intergovernmental agreement* that was ‘humane and based on practical experience, and effective for that reason’.<sup>17</sup> The ensuing debate in the municipal council explicitly invoked the decision of the ECSR, and the different interpretations held by the Council of Europe and the Dutch government.<sup>18</sup> One of the municipal councillors also emphasized how a human rights city like Utrecht should explicitly distance itself from the government agreement. A large majority of the Council voted for a motion stating the government agreement would force municipalities to put irregular migrants who did not cooperate with their return out on the streets, that some people cannot return to their home country and that this would cause these people to be out in the streets in inhumane conditions, and that all of this violated international treaties and the ECSR ruling.<sup>19</sup>

The issue, to date, remains unresolved. The intergovernmental agreement between the central government and the municipalities announced in the April 2015 accord never materialized. In November 2016 the State Secretary informed parliament that an agreement on closing down emergency reception facilities at municipal level and opening of *Lokale Vreemdelingenvoorzieningen (LVVs, national facilities)* could not be realized.<sup>20</sup> In a follow-up letter, the State Secretary announced that he would stop all financial compensation to the municipalities that offered the bed-bath-bread facilities.<sup>21</sup> In response, a number of municipalities stipulated once again that that the system proposed would hardly be watertight, and vowed to then pay for the facilities themselves (Von Hebel 2016). After protracted negotiations this led to an agreement in which the national government and local authorities agreed to work together in a pilot program geared towards developing the right 'approach, structure and mode of collaboration'.<sup>22</sup>

In all, the desire to offer basic human rights to rejected asylum seekers and to take a stance that is more humanitarian than that of the national government motivated Utrecht to stimulate the development of international human rights law and to invoke it, even if this led to tensions with the national government. Let us now turn to the United States to examine how similar tensions play out there.

### **A strong but inchoate link: San Francisco's 'City of Refuge Ordinance' and human rights**

Just as is the case in the Netherlands, the position of irregular migrants has become a bone of contention between the national government and local authorities over the past years in the United States, here under the discursive header of 'sanctuary cities'. In the American context, the term sanctuary city usually describes a situation where local law enforcement declines to aid the federal government in locating and detaining undocumented immigrants (Critchley and Trembly 2017, 32), though such policies may extend beyond anti-enforcement measures (Motomura, 2014). The US sanctuary cities originated in the 'Sanctuary City movement' in the 1980s, when churches and religious organizations, first in the South and later in other places such as San Francisco, sought to protect people from El Salvador and Guatemala, who did not generally receive asylum because of the close political ties of the US with the regimes in power (Gregorin 2011, 178-182). The federal government responded by measures like the 1996 Illegal Immigration Reform and Immigrant Responsibility Act that prohibited any federal, state, or local government entity from restricting another state or local agency or officials to communicate to the Immigration and Naturalization Service individual breaches of immigration laws.<sup>23</sup> The movement regained momentum after the terrorist attacks of 11 September 2001, which were followed by a heightened emphasis on security (Critchley and Trembly 2017, 33). One relevant policy measure, the 'Secure Communities Program' of 2008, mandated local law enforcement agencies to run the fingerprints of arrested people through a database, which would alert Immigrations and Customs Enforcement (ICE) where there was a case of an undocumented migrant. The program received much critique, with governors, mayors and state and local law enforcement officials refusing to cooperate, instead signing executive orders to prevent others from doing so. The program was

therefore replaced by the Priority Enforcement Program, in which local agencies only had to notify the ICE when releasing or transferring the migrant to another agency. Still, a number of cities refused to comply with this measure as well.

As of May 2019, about 300 jurisdictions (including counties, cities, and eight states) had enacted sanctuary policies (Griffith and Vaughan 2019). Following the election of Donald Trump as president in 2016, sanctuary cities also turned into sites and symbols of protest against the new administration's restrictive view on immigration. They have, in turn, been the target of a 'crack down' by the Republican President (Lasch et al. 2018). The legal debate concerning sanctuary policies remains heated: in April 2019, the US Court of Appeals for the Ninth Circuit upheld California's sanctuary state law against challenges from the US government (Sanchez 2019). As it is beyond the scope of this article to disentangle the complexities regarding the compatibility of sanctuary policies with US federal and constitutional law, the remainder of this section will look at the case of San Francisco, one of the very first sanctuary cities, from the perspective of international human rights law.

For many years, San Francisco has been both a sanctuary and a human rights city. In 1985 the mayor signed a 'City of Refuge Resolution' as a part of the general protest against the treatment of migrants from Salvador and Guatemala (Villazor 2010, 583). This initial step was followed by a 'City of Refuge Ordinance' in 1989, which was initially conceived of, and eventually passed by the city's Human Rights Commission (HRC). More concretely, one of the leaders of the sanctuary movement, Father Peter Sammon, was appointed on the Commission in 1988 (Mancina 2013, 213-214). Initially only seeking to enforce already existing sanctuary resolution, Father Sammon came to spearhead a small team that would draft the ordinance under the umbrella of the HRC, which was also the first municipal body to approve it.<sup>24</sup> San Francisco thereby joined other cities like Berkeley, Los Angeles, Seattle, Chicago, St. Paul, Cambridge, Ithaca and New York City, which had already passed similar ordinances (Mancina 2013, 225). Essentially amounting to a 'don't ask, don't tell' policy, the ordinance prohibits city employees to disseminate and to share with immigration law enforcement any information about the immigration status of an individual (Villazor 2010, 583-584). What is more, city resources are not to be used to assist or cooperate with the ICE.<sup>25</sup> One of the practical outcomes of the Ordinance has been a better access of undocumented migrants to city services, including law enforcement, as questions about immigration status disappeared from many intake forms and interviews (Ridgley 2008, 71). Reviewing compliance with the Ordinance has been entrusted to the HRC,<sup>26</sup> which also mediates conversations between conflicting parties and offers a more extensive training program for municipal officers.

The central role of the HRC within the context of San Francisco's sanctuary policy should not be dismissed as accidental as San Francisco was also one of the very first human rights cities in the US. In fact, the county's HRC dates back to the 1960s and has carried important political weight. Aside from the question of the rights of undocumented migrants, San Francisco has also been 'a pioneer in integrating human rights domestically' (Davis 2016, 38), most famously through its adoption of the Convention on the Elimination of all Forms of Discrimination Against Women into municipal law in 1998. The San Francisco Department on the Status of Women even

went beyond discharging local functions in submitting a general report on sex-based discrimination in the American workplace for the UN Human Rights Committee review of US compliance with the ICCPR in 2014 (Davis 2016, 32).

To date, the link between international human rights and San Francisco's sanctuary policy remains inchoate despite the strong human rights identity of both San Francisco and its 'City of Refuge Ordinance'. In other words, unlike in the case of Utrecht, *international* human rights law is not explicitly invoked in this context although they arguably could have been. Among the reasons for this are the specific grounds that have turned out to be the most forceful challenge to this policy. In 2008, the Ordinance came under criticism after a citizen of El Salvador fatally shot a father and his three sons at a stop in the midst of San Francisco traffic.<sup>27</sup> A second killing, again allegedly at the hands of an undocumented migrant, took place in 2015 when a young woman named Kate Steinle was killed at the city's waterfront (Lagos 2017). As a result of such incidents (and similar ones in the past), a lot of attention has been paid to the effects of sanctuary policies on crime rates (e.g. in Gonzalez O'Brien, Collingwood and Omar El-Khatib 2019), with the debate being strongly politicised even at national level. During his presidential bid, Trump thus turned the Steinle killing into 'a touchstone he returned to again and again' (Tolan 2017). By contrast, liberal discourses revolve around the question on when to (and who should) inform federal immigration authorities when an irregular migrant is implicated in a violent felony (Lagos 2017). There have also been discursive countermoves to stress the significance of the ordinance for local security. Faced with the threat of a funding ban by the Trump government, San Francisco City Attorney Dennis Herrera thus stated that the city's 'police and deputies are focused on fighting crime, not breaking up hard-working families' (McGreevy 2017).

In October 2017, California officially adopted the 'California Values Act', which is so far 'the most expansive "sanctuary state" law in the US' (Levin 2017b). Building on the many local sanctuary ordinances issued by San Francisco and other cities, the bill strikes mostly a pragmatic tone as it stresses the need 'to ensure effective policing, to protect the safety, well-being, and constitutional rights of the people of California, and to direct the state's limited resources to matters of greatest concern to state and local governments'<sup>28</sup>. At the same time, the Act begins by declaring that immigrants are 'valuable and essential members of the California community'<sup>29</sup>, thus reiterating the existence of 'local citizenship' in the eyes of the Californian legislature.<sup>30</sup> It also mentions 'constitutional concerns' regarding potential violations of the Equal Protection Clause or 'denied access to education'<sup>31</sup>. Both the idea of a rights-based community and specific civil and economic rights are therefore present in the current debate, but without reference to *international* human rights.

These recent developments show that sanctuary policies remain in flux. While many of these processes are driven by imminent judicial battles and legal contestations (Lasch et al. 2018), they are also shaped by changing perceptions regarding what it means to belong to a city such as San Francisco (Villazor 2010). Particularly in 'frontier cities' like these, international human rights norms have in other areas proven to be influential over time (Wexler 2010, Grigolo 2019). It would therefore not be surprising if, once the dust of constitutional law battles has settled, human

rights are ‘rediscovered’ as tools for social and legal mobilization by local actors including municipal governments in a place like San Francisco. This would be likely especially if domestic law turns out to be less effective than expected: leading immigration lawyers such as Motomura (2014) are sceptical about the value of human rights law mostly because they believe that ‘constitutional law and other national frameworks for individual rights are more robust in practice’ (93). The strengthening of the international human rights norms pertaining to irregular migrants, possibly driven by initiatives of other localities such as Utrecht, is another factor that could change this equation.

### Concluding remarks

At the time of writing, one may be tempted to think that the human rights of irregular migrants will not be strengthened any time soon. If anything, the ever-increasing securitization and externalization of border control appears to erode even the most basic human rights norms at the state level. While such worries are very real, this article sought to draw attention to a parallel development based on the understanding that human rights law, characterised by legal pluralism, is shaped by the different and often competing notions of human rights held by multiple actors including cities (see introduction to this issue). This becomes clear when looking at the Dutch case of Utrecht, which this article puts forward as an example of how local invocation of international law, through engaging with a supranational human rights institution such as the ECSR, can further legal developments more broadly. Making the connection between three dots – irregular migrants, local authorities, and the usage of international human rights – thus allows us to highlight the contingent character of the legal marginalization of irregular migrants and to provide a somewhat more hopeful image of a future where some seemingly irresolvable problems could be overcome.

To be sure, the challenges to its realization are still formidable both in structural terms and within a political climate that is currently unfavourable both to immigration and to human rights (Alston 2017). The examples of Utrecht and San Francisco prove, however, that our propositions are plausible. Utrecht has benefitted substantially from ‘linking up’ to the ECSR as it managed to increase the pressure on the central government to allow for ‘bed, bath, and bread’ for rejected asylum seekers. This was undoubtedly an important victory for migrant rights defenders. By contrast, the example of San Francisco shows that human rights may linger in the background even where, for various reasons, their discourse has not been invoked yet. More specifically, we are confronted with a historically deep connection between municipal authorities, local migrants and the human rights legacy in a city that passed its ‘City of Refuge Ordinance’ almost 30 years ago. While it has created a lot of debate over time primarily regarding its impact on crime and law enforcement, the Ordinance remains firmly in place and has most recently been supplemented by the ‘California Values Act’. From our European perspective, we get the impression that international human rights have not yet been tapped as a resource in San Francisco in what has become, to borrow the term, a war of ‘attrition’. Yet, a closer look at the ‘City of

Refuge Ordinance' shows that human rights could offer inspiration, a ground for mobilization, and even institutional support.

While this article focused only on two case studies, there are many other cities like Utrecht and San Francisco that are challenging national policies towards irregular migrants, increasingly also in an explicit manner and by invoking legal arguments. This suggests, in our view, that some of the trends and strategies outlined will become more commonplace in the future. This would further reinforce the legal pluralism that already characterizes this social field. For example, local authorities are connecting more frequently to international organizations by forming transnational city networks with possible implications for their agendas and even the norms that they create (Oomen, Baumgärtel and Durmus 2018). However, this article has also shown that it is of vital importance to consider, amongst other factors, the constitutional and discursive environments in which such actions are taking place. Further case studies and comparative research of localities will be required to understand whether, and how cities can 'pull' human rights 'back in', thus strengthening legal pluralism, but also impacting upon the lives of irregular migrants.

## Notes

1. At the time of writing in October 2017, only 51 states had ratified the Convention, excluding all migrant-receiving states in the global North.
2. Parliamentary Assembly, 'Human rights of irregular migrants', Council of Europe, 27 June 2006, Resolution 1509 (2006), available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17456> (accessed 16 October 2017)
3. The Dutch case, as discussed below, features prominently among the (still limited) number of instances provided by Vonk (2015) to argue for an 'increasing number' of decisions that can 'offer relief' (88).
4. Technically, international human rights have prevalence over constitutional rights in the Netherlands on the basis of Article 94 of the Constitution. This provision, however, only concerns 'subjective rights' and the Dutch legislator and judiciary have generally stated that social and economic rights like the right to education, access to housing and access to work, as included in treaties like the ICESCR and the CRC concern due process rights only. This is also the reason why the Netherlands has yet to ratify the Optional Protocol to the ICESCR, that creates an individual complaints procedure (see Vlemminx 2006; Oomen, 2014).
5. Discussion with lawyer P. Fischer, Middelburg, 20 May 2011.
6. Interview held by E. van den Berg, 19 June 2013.
7. ESC, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, published 10 November 2014. The ruling was critiqued by the Dutch government because the ESC only has limited personal application
8. ESC, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, published 10 November 2014.
9. See, for instance, Utrecht Court, 23 December 2014, ECLI:NL:RBDHA:2014:15958 and the presentation by senior civil servants J. Braat and Niene Oepkes on 16 December 2014, available via: <https://api1.ibabs.eu/publicdownload.aspx?site=utrecht&id=12617>
10. House of Representatives II, Parliamentary proceedings 2014-2015, 19637-1940, *Brief van de Staatssecretaris van Veiligheid en Justitie*, 18 December 2014. The argument stating that the ESH is not binding does not stroke with the fact that the Netherlands had recognized the complaints procedure. Additionally, as for instance De Meij (2015) has

- pointed out, the rights concerned are also codified in the ICESCR and the CRC (see also Krommendijk 2016).
11. Council of Europe, Committee of Ministers, Resolution CM/ResChS(2015)5, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, *Adopted by the Committee of Ministers on 15 April 2015 at the 1225th meeting of the Ministers' Deputies*.
  12. Ministry of Safety and Justice, Letter to Parliament on the Resolution of the Committee of Ministers, 22 April 2015, 640647.
  13. Ibid.
  14. Netherlands Association of Municipalities, Letters to the Chair of the Parties in Parliament, 28 April 2015, ECSD/U201500740
  15. 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, NL 1/2016, 25 February 2016
  16. Ibid., p. 18
  17. Letter from the College van B & W Utrecht to the Utrecht Municipal Council, *Bed, Bad en Brood*, 29 April 2015.
  18. Minutes meeting Utrecht Municipal Council, 6th meeting, 30 April 2015, p. 15.
  19. Motion 34, adopted by the Utrecht Municipal Council on 30 April 2015.
  20. Ibid.
  21. Ibid.
  22. Ministry of Safety and Justice and the Dutch Association of Municipalities, *Cooperation agreements Landelijke Vreemdelingen Voorziening (LVV)*, 29 November 2018
  23. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (see Gregorin 2011, 188).
  24. It was then passed on to the Board of Supervisors of San Francisco and eventually to the Mayor (Mancina 2013, 214-215).
  25. 'Sanctuary City Ordinance', *San Francisco Office of Civic Engagement and Immigrant Affairs*, available at <http://sfgov.org/oceia/sanctuary-city-ordinance-0> (accessed 17 October 2017).
  26. San Francisco, California, Administrative Code, para. 12H.4.
  27. For a recount of the murders of the Bologna family and the lawsuit that ensued, see Villazor 2010, 585-587.
  28. CA Senate Bill No. 54 (2017), ('California Values Act'), para. 7284.2.f.
  29. Ibid., para. 7284.2.a.
  30. The reality and importance of local citizenship is highlighted in the discussion on San Francisco's 'City of Refuge Ordinance' in Villazor 2010.
  31. 'California Values Act', para. 7284.2.e.

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