

# International law and human rights as a legal basis for the international involvement of local governments | *Antonio Papisca*

## *Summary*

This chapter examines the legal basis for an enlarged international role for local governments beyond that which is generally current. It argues that this basis can be found in international human rights law.

The main argument of the chapter is that local governments' legitimacy to act beyond state borders is justified by two principle sources. First, from their 'responsibility to protect' the internationally recognized fundamental rights of all those living in a municipality; and secondly from their increasing participation, legally argued, in a global governance agenda of human development and human security. The latter is derived from the human right to peace as defined by Article 28 of the Universal Declaration: 'everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized'.

The chapter divides the international agenda of local governments into two parts, one related to international co-operation (from city twinning to more sophisticated programmes of development co-operation, environmental protection, and joint management of parts of the world heritage), the other dealing with extraordinary tasks like peace-building and humanitarian aid. These activities are recognized and reflected in several UN programmes as well as in international NGO and civil society projects. The author also examines the European Charter of Local Self Government and the European Charter for Human Rights in the City as the most advanced expression of the compatibility of local governments and international human rights law.

The chapter concludes that to further their international role, local governments, in their city diplomacy agenda, should commit themselves to and implement initiatives that enhance the Right to Peace, the Right to Development, the Right to a Safe and Sustainable Environment, and other rights derived from international law in force, as well as new forms of territorial co-operation beyond state borders like the 'European Grouping of Territorial Co-operation' established by an EU Regulation of 2006.

## Introduction

This chapter focuses on a growth process in international law. It enquires into the international role of local governments within the perspective of the 'new' universal law rooted in the United Nations (UN) Charter and in the Universal Declaration of Human Rights. Strictly speaking local governments do not have a legal international personality. However, the international law that is developing offers a suitable ground and a vast range of opportunities that legitimize the international role of local governments.

Local governments' legitimacy to act beyond state borders comes firstly from their 'responsibility to protect' the internationally recognized fundamental rights of those living in a municipality; and secondly from their increasing participation in a global governance agenda of human development and human security. 'Protection' primarily regards the life of people, and cities are closer than other public institutions to people's life, and their vital needs. They are becoming indispensable for pursuing goals of positive peace, including the genuine democratization of international politics and institutions. In this perspective, they provide a momentous help to a more humane, thus more sustainable, statehood in the era of globalization and transnationalization.

**Human security and human development** Human security and human development are both anchored to the paradigm of human rights. They are the new frontiers of global multi-level governance. Both hold the human being as their primary subject. 'In broad terms, human security shifts our focus from traditional territorial security to that of the person. Human security recognizes that an individual's personal protection and preservation comes not just from the safeguarding of the state as a political unit, but also from access to individual welfare and quality'<sup>1</sup>. Being at the centre of development, the human being should participate in development policies. Security policies of states should be instrumental to the objectives of human security and human development. Human development and human security are pursued where citizens actually live, thus the importance and role of urban centres. Fundamental rights of citizens allow them to call on the institutions of local government to protect them. It can thus be argued that the municipality's 'responsibility to protect' is even stronger than that of national states. Local governments, that stand closest to citizens, are the guarantors of the international law of human rights.

**Right to the city, right to peace** The international legitimation of local governments also derives from the 'right to the city'<sup>2</sup> of its inhabitants. That is to say the comprehensive right to exercise all rights that are recognized by the international law in force, and that establish universal citizenship, the mother of all individual citizenships (national, local, and European). Article 1 of the European Charter for the Safeguarding of Human Rights in the City, approved in St Denis on the 18th May 2000 and so far signed by 354 Cities, under the heading 'Right to the City' reads as follows: '1. The city is a collective space belonging to all who live in it. These have the right to conditions which allow their own political, social and ecological development but at the same time accepting a commitment to solidarity. 2. The municipal authorities encourage, by all available means, respect for the dignity of all and quality of life of the inhabitants'. Article 2 specifies that 'the rights contained in this Charter apply to all persons who inhabit the signatory cities, irrespective of their nationality'.

1 MacLean (2001), UNDP (1994), Commission on Human Security (2003), UN General Assembly (2005) doc. A/59/2005, UN General Assembly (1986) resolution A/RES/41/128.

2 Mitchell (2003)

The 'European Charter', although not a legal instrument in the strict sense of the word, should be considered as the faithful translation into the living context of cities, of principles and norms set forth by the international law of human rights.

International law also includes the human right to 'a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights can be fully realized'. This is the right to positive peace, proclaimed by article 28 of that Declaration. The assumption of this provision is that peace within the city and international peace are two faces of the same coin. This is challenging, especially in urban areas marked by multi-cultural environments, needs for social cohesion and plural citizenship.<sup>3</sup> The city is legitimized to act to build positive peace as defined by article 28 starting at the local community level and extending to include the worldwide sphere and solidarity with other local governments of the world.

*Sovereignty, citizenship, democracy* States have borders. This involves an exclusionist territorial rationale of sovereignty and domestic jurisdiction. Local governments on the contrary run territories not surrounded by borders, but they do minister to people in them. Local governments are closer to the source of sovereignty – people – than the state. Sovereignty belongs to the people because each of its members has inherent rights, and fundamental rights should be respected and protected where people live. The city's vocation of inclusion corresponds to the philosophy of international law: equality of all humans and the prohibition of all forms of discrimination.

National citizenship, based on the principle of exclusion, is consistent with the philosophy of states. Universal citizenship, based on the principle of inclusion, is consistent with the natural identity of local government. The international legal recognition of human rights obliges us to re-construct citizenship starting not from state institutions (traditional top-down citizenship), but from its original holder, the human being with his/her inherent rights internationally recognized (bottom-up citizenship).

Sovereignty based on the nation-state has proven to be insufficient to protect the true elements of democracy. Nation-states were the fertile kindergarten of democracy, but they do not suffice today when faced with worldwide interdependence and globalization. The practice of democracy, in its twofold articulation of representative and participatory democracy, should be extended and deepened: upward for international and cosmopolitan democracy and downward in local direct democracy.<sup>4</sup> By extending democratic practice beyond its historical territorial space, the local territory becomes a new frontier.

Being so close to and involved with democracy, local governments are the primary stakeholders in good global multi-level governance.

A relatively recent and promising perspective regarding the legal development of the role of local governments in international politics is the European Grouping of Territorial Co-operation (EGTC). The EGTC as established in 2006 by the EU<sup>5</sup> can be considered not only an advanced achievement but also a good starting ground for further formal and substantive

3 Papisca (2007) pp. 457-480.

4 Papisca (1982) pp. 136-163, Papisca (2006-A) pp. 187-194

5 Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial co-operation (EGTC).

progress in recognizing the international role of local governments. It could hopefully be envisaged that, within the framework of the UN, an international framework convention be adopted to establish the 'International' Grouping of Territorial Co-operation.

This chapter enquires into international law and human rights as legal basis for an enlarged international role for local governments. The above mentioned relatively recent historical developments are described and explained in more detail and extended with further examples. Legal (and political science) arguments for an enhanced role of local governments in global affairs are put forward.

## The city in the context of worldwide interdependence

*De-territorialization of politics* In today's globalized world, it is increasingly difficult to distinguish what is 'national' (intranational, sub-national, local) from what is 'international' (supranational, transnational, multinational). The division of tasks between stakeholders in world politics is also undergoing a process of re-definition and re-distribution. The political demand coming from local communities, local governments and from civil society organizations, and addressed to international institutions is to ignore state borders. People, and the organizations that represent them, are asking international institutions to provide the same things they ask of national governments: security, economic well-being, environmental protection, and the protection of fundamental rights. The local-international mix is de-territorializing politics.

The scenario offers great promise – the dynamics of worldwide interdependence can mean many things:

- Increased awareness from all actors;
- Possibility to pursue objectives of just global governance;
- The use of international and supra-national institutions to equitably distribute common global goods of human security and human development.

The ongoing processes of structural change are affecting local governments as providers of services, including those related to security. This is becoming more important as the capability of states alone to shield and order their inner social and political processes dwindles. A crisis of democracy is closely linked with the structural changes of national statehood. Crucial decisions are increasingly being taken in extra-national contexts: transparently in the case of some international institutions, less transparently at other venues. The nation-state can no longer properly guarantee the functioning of democracy as what must be legitimized and controlled is often no longer a domestic process.

*Citizenship from below* A useful way of addressing this situation is to re-conceptualize citizenship starting from below. That is from the roots of the political community up to the institutions of governance. The latter must then be seen in the light of their purpose and democratic legitimacy before considering them as sources of authority, power and capability.

Such a bottom-up view is even more urgent if we consider the conflicts in many territories (regions, cities, streets) where different ethnic, religious and cultural groups live, where xenophobia and discrimination may be growing, and where migrant people of different cultures rightly advocate the same citizenship rights as the nationals.

## Human rights: the genetic change of international law

*State-centric vs human-centric* The preceding section described how a changing political landscape is now occupied by more local actors significant for both domestic and international politics. States are no longer the exclusive actors of international politics. But are local governments legally entitled to act in the system of international relations on 'dramatic' issues like peace and security? These issues traditionally pertain to states' foreign policies. The question can be answered with strong arguments.

The first of these is that the legal field has undergone a genetic mutation. International legal recognition of human rights has changed the driving force, the rationale of international law, from state-centric to human-centric. This has many implications.

The process is the outcome of a long historic movement marked by peoples suffering and reacting, intellectual endeavour, mass mobilizations, and political commitment that has brought democratic processes inside states. With the UN Charter and the Universal Declaration of Human Rights the 'constitutional' rationale has been extended to the world level, overreaching the borders of state sovereignty. For the first time in the history of humanity, the human being, the person, has been recognized as subject, not as mere object, of International Law.

So the human-centric rationale is constantly being reinforced by the 'new' international law, or pan-human law, that is developing as a coherent body of principles and norms that complement and update the first part of the UN Charter. This body includes principles such as the universality of human rights, their interdependence and indivisibility, the proscription of war, the prohibition of the use of force for the settlement of international disputes, the rule of law, the universality of international criminal justice, personal responsibility for war crimes, crimes against humanity, and genocide.<sup>6</sup>

*States as derived entities* The next argument is that the human-centric position means that states and international organizations are simply derived entities, instrumental to pursuing the primary aims of human rights and fundamental freedoms. To underline the primacy of the human being over derived systems, article 28 of the Universal Declaration proclaims the right to positive peace as a fundamental right.<sup>7</sup>

The analysis so far in this section is about interpreting existing law. If we extend the argument on state-centric and human-centric law, a revolutionary implication follows. The 'right to war' and the 'right to peace' are the strongest claims of state sovereignty. But if peace is a human right, the right to war cannot but disappear from the dictionary of state claims, endowments and inter-state relationships. And to positively confirm this position, the right of states to peace must be complemented by a duty to peace.

When a legal system is founded on human rights, it enters a new stage of human-centric maturation. We are passing beyond the phase of international relations as primary system; we are no longer in the Westphalian era, that which was first formally based upon nation-based sovereignty.

<sup>6</sup> Papisca (2002) pp.25-36.

<sup>7</sup> Roche (2003), Papisca (2006-B) pp.289-297.

## Evidence for the liberation of 'territoriality' in the world system

**De-territorialization** The international law of human rights acts as the genetic core of a global legal system becoming increasingly involved in supervising human rights respected 'by' and 'within' states. When referring to 'within states' we mean their territorial articulation in the cities, municipalities and local communities: in places and institutions where people live their day-to-day life.

Domestic territorial jurisdiction is becoming instrumental to the purpose of safeguarding human rights and fundamental freedoms. It can be surpassed in appeals to international bodies. And the local dimension becomes important as the space of life and peace, thus of the realization of human rights, especially of social rights. All in all leading to a clear de-territorialization of politics.

The fact that human beings are no longer an object of international law implies that the 'common house' in which they live and are entitled to claim their fundamental rights, that is local communities and habitats, become not only relevant but important in the international legal system. In other words, individuals, recognized as original legal subjects at the world level, confer to their respective local governments the seal of legal entitlement at the same world level.

**Cities claiming their role** Political and legal evolution works against the monopolistic management of states, a process that has all too often been abused in the name of the principles of territorial integrity and national interest. The rational, sensible and legal choice is that local governments take advantage of the enlarged opportunities to develop their own identity, an urban space dedicated to the practice of inclusion and positive peace, and give international evidence of this. In this perspective of sustainable statehood,<sup>8</sup> the city can actually claim due legal recognition for the role it is playing in the decision-making processes of global governance, both at regional and world level.

So what are these international roles of local governments claimed on the basis of rational legal argument in actual practice? Three types of roles can be identified for local governments within the international political system:

- participation in programmes of international organizations;
- formal representation in the decision-making and thus functioning of international organizations;
- autonomous management of programmes through their associational structures.

**Participation in programmes of international organizations** The international agenda of local governments can be divided into two main parts, one related to international co-operation (from city twinning to more sophisticated programmes of development co-operation, environmental protection, and joint management of elements of world heritage), the other dealing with extraordinary tasks like peace-building<sup>9</sup> and humanitarian aid.

8 Papisca (1994) pp. 273-307.

In the UN system the growing role of local governments is being implemented and appreciated within many programmes:

- the Joint UN Programme on HIV/AIDS and the City Aids Programme
- policies for the prevention of urban crime in the framework of the UN Office on Drugs and Crime;
- ART, the Urban Millennium Partnership and the World Alliance of Cities against Poverty in the broad framework of the United Nations Development Programme;
- programmes on the planning and management of the urban environment and on water-related issues in the framework of the United Nations Environment Programme;
- the Management of Social Transformation Programmes, Growing up in Cities Programme, Small Historic Coastal Cities Programme, and the 'regime' committed to World Heritage and intercultural and inter-religious dialogue within UNESCO.

Worth noting is also the involvement of local governments in the activities of the regional commissions of the UN; in the World Bank the programmes for the improvement of urban living environments and local governance; and the World Health Organization which has among others the Healthy Cities Programme.

The UN Habitat is particularly significant with its agenda of principles and objectives that must be pursued in and by local governments. Those are respect of human rights, a democratic, transparent, representative and efficient local government that is reliable and just in all sectors, the true participation of civil society, capacity building and institutional development (Habitat Agenda 1996).

We can clearly see that local governments are being called upon to co-operate to put into practice a broad political agenda for the realization of human rights and social development.

In particular the City Diplomacy agenda is also striving to develop a more 'glocal'<sup>10</sup> democracy, fostering intercultural dialogue, building inclusive local governments, developing plural citizenship, and in general mainstreaming human rights in all of its operative guidelines inside and outside the city.

Within all of these activities of public international utility it is vital to comply with international law principles and norms, in particular with the value tenets of the global legal system. They are an integral part of a coherent and comprehensive strategy for the creation of a peaceful, democratic and more just world order.

As stated, the EU system provides the most advanced legal recognitions of local and regional governments' roles as well as an intensive involvement in programmes with high political profile such as the management of Structural Funds, INTERREG, the New Neighbourhood Policy-Wider Europe, the European Network of Cities for local integration policies for migrants (CLIP), Eurocities, gender equality, policies for children and family welfare, and sustainable local development (European Network of Cities for the Social Economy). Furthermore, there are the EU Territorial Dialogue and especially the EGTC which is addressed later in this chapter.

- 9 Kenneth Bush in this book further defines peace-building as 'a twofold process of deconstructing the structures of violence, and constructing the structures of peace, [...] two inter-related, but separate, sets of activities which must be undertaken simultaneously'. The Preamble of the UNESCO Constitution is brought to mind here which recalls: 'That since wars begin in the minds of men, it is in the minds of men that the defence of peace must be constructed'.
- 10 An often used word in this thematic field indicating a mixture between 'global' and 'local'.

## Formal representation of local governments in International institutions

*The United Nations system* In tandem with the involvement of local governments in the programmes of the UN and other international organizations there is their participation in the functioning of these institutions through formal representation. It is worthy of note that many intergovernmental organizations are more effective than states at giving visibility to subnational (territorial) entities and their associations. Strategically it is a way for international institutions to foster their own functional autonomy in a supranational environment, and for local governments to obtain additional contributions to their international legitimation. The Cardoso Report underlines that 'local authorities have been playing a growing role in both UN policy debates and in achieving global goals; they are a key constituency for the UN, but they are not non-governmental'. It proposes that the General Assembly be urged to adopt a resolution affirming and respecting the principle of local autonomy as a universal principle to underscore the growing importance of this constituency.<sup>11</sup>

A distinction must be made between the 'consultative status' conferred to associations of local governments as non-governmental organizations (NGOs), for instance United Cities and Local Governments, and the formal representation of local governments inside organs and bodies of intergovernmental organizations. Formal representation is greater at the regional level, in particular in the systems of the Council of Europe and the European Union (EU). In the UN system, the most significant example is provided by UN-Habitat which established the first representative cell of local governments within the UN system, that is the UN Advisory Committee of Local Authorities (UNACLA). UNACLA pursues its objective to develop a coherent international dialogue on decentralization by comparisons with what is taking place in a more structured way in the EU system with the 'Territorial Agenda' and related 'Territorial Dialogue'.

*The European Union system* In the EU system the greatest visibility to formal representation of regional and local governments is given by the EU Committee of the Regions. Subnational territorial actors can however represent their specific interests in a multitude of consultative committees. At the heart of the EU Territorial Agenda lies the strategic, infrastructural objective to promote trans-national competitive and innovative clusters of regions, networking in a polycentric pattern, as motors of Europe's development. In this context the networks of urban areas are considered strategic to the development of the whole of European integration dynamics. Though the Committee of the Regions has consultative power, it should be noted that its 'opinions' are fully formal acts. It has focused on the theme of human rights, both civil and political, as well as economic, social and cultural rights, on active citizenship and on the role of civil society organizations.

*The Congress of Regional and Local Authorities of the Council of Europe* The Congress of Regional and Local Authorities must be regarded as pioneer of local autonomy not only within the Council of Europe but also at the world level. The role of the Congress is particularly significant in promoting a coherent and organic standard-setting starting with

<sup>11</sup> Panel of Eminent Persons on UN - Civil Society Relations (2004) p.51. The Panel was chaired by the former president of Brazil, Fernando Cardoso.

the farseeing European Outline Convention on Transfrontier Co-operation of 1980 and the European Charter of Local Self-Government of 1985, subsequently enriched by other Conventions and Protocols. Furthermore the Council of Europe adopted the European Convention on the participation of foreigners in local political life, whose implementation directly involves the responsibility of local governments.

**Formal and informal local government networks** The international role of local governments is carried out mainly by permanent organized structures of co-operation in the form of NGOs, some having consultative status at intergovernmental organizations. The roster includes United Cities and Local Governments; Global Metro City-The Global Forum; Mayors for Peace; the International Council for Local Environmental Initiatives; Metropolis; Sister Cities International; Energie-Cités; EUROCITIES; Cities of Human Rights; Cities for Peace Prize (Unesco realm); European Network of Cities and Regions for the Social Economy; Cities for Children; European Network of Medium-sized Cities; Union of the Baltic Cities. There are many more. The practice of formal and informal networking, a strategy that also involves national associations and federations of cities and local governments, many of which have transnational aspirations, has become increasingly common.

A separate discourse should be dedicated to structures of trans-frontier and inter-regional co-operation where there is a greater formal use of territorial autonomy. The formal status of these entities varies: it can be based on a simple memorandum of understanding and co-operation, or a statute of an association of private law or it can even be established by intergovernmental agreement. However the personality of international law is still lacking.

### Quantitative and qualitative increase of the role of local governments in the developing dynamics of International Law

**Legal personality of local governments** How is international law reacting to the changing situation? Is it ready to provide formal legal acknowledgment and international legal personality to non-state actors and specifically local governments? The question was raised, in general terms, some decades ago at the International Court of Justice (ICJ), when the ongoing world processes of structural change were not so evident and far advanced. The ICJ's response was far-seeing: 'The subjects of law in any legal system are not necessarily identical in their nature or the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of states has already given rise to instances of action upon the international plane by certain entities which are not states. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the UN'.<sup>12</sup>

For the purpose of the present chapter, it is enough to point out that the farseeing ICJ considers international law as a developing, growing reality. What is quoted above highlights

<sup>12</sup> The ICJ further argues referring to the UN: 'The Organization is an international entity. That is not the same thing as saying that it is a state, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state'.

the revolutionary potential of international law as defined by the UN Charter and the Universal Declaration of Human Rights. In 1945-1948 it was international law, which since the 1648 Westphalia Peace had been regulating relations between states as the exclusive subjects of that Law, that underwent the genetic change whose effects are still having their repercussions. Needless to recall that the Westphalian law was a territorialized law as it was based on state sovereignty, state-centric by nature. Rights and duties pertained to states. No other entities, apart from a very few exceptions, possessed legal rights and duties in the old state-centric system. The human being was conceived and treated as an object, not as a subject of international law. In other words, for centuries the territorial dimension of governance was the prerogative and monopoly of states that rested on the assumption of indivisibility and indissociability of the state and its borders.

**Universality of human rights** The fact that the new international law is increasingly being influenced by global civil society actors and networks is a good indicator that the universality of human rights is being adopted in the conscience of people worldwide. This also means that in case of violations, even gross violations, the current international law keeps its highly binding legal nature intact.

The 'logic' of universality has received clear international recognition in the course of the 20th century. Before that time, legal recognition took place within each national legal system, separately, giving way for instance to a practice of discriminatory treatment of non-national citizens. France's declaration of 1789 is entitled 'Déclaration des Droits de l'Homme et du Citoyen'. In fact, national acknowledgment of 'universal' rights lay in the logic of privilege and added value for national citizens alone.

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The question here is not whether a state is obliged to protect human rights in the international sphere as in the domestic sphere. The principle of the protection of human rights is derived from the concept of man as a person and his relationship with society which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a state; either internally by its laws or any other legislative measure, nor internationally by treaty or custom in which the express or tacit will of a state constitutes the dominant element. A state or states are not capable of creating human rights by law or convention; they may only confirm their existence and give them protection. This meta-judicial and ultra-constitutional claim has been translated in written form into positive law by the UN Charter.<sup>13</sup>

Once again we stress that human rights protection is not an exclusive business of states alone. While it is linked to state sovereignty it is being removed from the merchant game of inter-state relations.

### The right to peace

On the one hand the UN Charter deprives states of the 'right to war', on the other, it establishes the system of collective security. We have previously quoted article 28 of the Universal Declaration that proclaims positive peace as a fundamental right of the individual. The UN Declaration of 12 November 1984 extends the Right to Peace to peoples. The integral

<sup>13</sup> Reports of Judgments, Advisory Opinions and Orders South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Second phase Judgment of 18 July 1966, dissenting opinion of Judge Tanaka.

text is significant and worth quoting.<sup>14</sup> Peace as a human right and a right of peoples is complemented and reinforced by other principles of international law included in the UN Charter. In particular, the proscription of war (banned as a scourge), prohibition of the use of force to settle international disputes with the exception, rigorously circumscribed, of article 51, the duty of peaceful settlement of conflicts.<sup>15</sup> In particular the rejection of war, together with the fundamental right to life of each human being, is central to international law currently in force. Furthermore it is useful to recall Article 20 of the International Covenant on Civil and Political Rights: 'Any propaganda for war shall be prohibited by law'.

Thus has *ius ad bellum* (just war theory) of states been cancelled once and for all, and the use of force, for purposes radically different from those pursued through 'classical' war operations, has been subsumed by the UN in the framework of the system of collective security that is expected to operate along the principle of supranational authority.

Since the UN Charter establishes international peace and security as primary objectives of states, the international law in force is the law for peace and in peace, *ius ad pacem and ius in pace*, that must be complied with at all times, not only in times of peace. And it is for peace because it is for the life of all human beings. Article 4 (state of exception clause) of the International Covenant on Civil and Political Rights confirms this interpretation.. It is likewise worth noting that 'Peace-loving' is a statutory expectation in the process of becoming a member of the UN (Art. 4 of the Charter).

This 'new' law is demolishing the barrier of state sovereignty that for centuries monopolized human life, international legal personality, the use of force, and citizenship. The repositioning of this frontier of universal law is naturally disturbing many politicians.

### New citizenship, democracy, inter-cultural dialogue

Democracy is linked to human rights, as such it is a human right and at the same time the appropriate method for the realization of all human rights. Democracy is rooted in human

- 14 The UN Declaration on the Right of Peoples to Peace (1984) Reads in part as follows. 'The General Assembly, reaffirming that the principal aim of the UN is the maintenance of international peace and security, bearing in mind the fundamental principles of international law set forth in the Charter of the UN, expressing the will and the aspirations of all peoples to eradicate war from the life of mankind and, above all, to avert a world-wide nuclear catastrophe, convinced that life without war serves as the primary international prerequisite for the material well-being, development and progress of countries, and for the full implementation of the rights and fundamental human freedoms proclaimed by the UN, aware that in the nuclear age the establishment of a lasting peace on Earth represents the primary condition for the preservation of human civilization and the survival of mankind, recognizing that the maintenance of a peaceful life for people is the sacred duty of each State,:
1. Solemnly proclaims that the peoples of our planet have a sacred right to peace;
  2. Solemnly declares that the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of each state;
  3. Emphasizes that ensuring the exercise of the right of peoples to peace demands that the policies of states be directed toward the elimination of the threat of war, particularly nuclear war, the renunciation of the use of force in international relations and the settlement of international disputes by peaceful means on the basis of the Charter of the UN';

- 15 Papisca (2005) pp.13-28.

rights ontology: power belongs to the people because the people is sovereign, and it is sovereign because each of its members has inherent rights, that is he-she is sovereign *pro quota*.<sup>16</sup>

*International-transnational democracy* Today's passionate and creative reality of civil society organizations and social movements, and of local governments acting across and beyond state borders demonstrate that civic and political roles, that is active citizenship, are no longer limited to the intra-state space, and the geometry of democracy is extending and growing in world space. The traditional inter-state system has always been an exclusive club of 'rulers for rulers'. Now it is citizens, especially through their transnational organizations and movements, who are claiming a legitimate role, and showing their visibility in the world's constitutional space. Democratizing international institutions and politics in the true sense of democracy – does not mean 'one country, one vote' (a procedural translation of the old principle of states' sovereign equality), but more direct legitimacy of the relevant multilateral bodies and more effective political participation in their functioning – has become the new frontier for any significant human-centric and peaceful development of governance. Advocating an international-transnational democracy is already putting new citizenship into practice.

*A 'new' concept of citizenship* This mobilization is further being legitimized in a specific and innovative way by the UN Declaration 'on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms'.<sup>17</sup> By virtue of this instrument, known as the 'Magna Carta of Human Rights Defenders', 'everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at national and international levels' (article 1). Emphasis is put on the right to overfly domestic borders. Article 7 states that 'everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance'. Article 18, points 2 and 3, goes on:

'Individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes. Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized'.

The 'new' concept of citizenship implies huge changes in legal systems at all levels. In fact, internationally recognized human rights are the rights of every human being, not of the human being as a simple citizen of a given state.

The big challenge that lies ahead is for politics and education to help change culture, harmonize national legal systems with the international law of human rights, carry out proper national and international social policies, and foster the inclusion of all in the

<sup>16</sup> Papisca (2004) 40-49.

<sup>17</sup> Endorsed by the General Assembly Resolution A/RES/53/144 on 8 March 1999.

framework of a multi-level architecture of governance. In the meantime a new frontier for human promotion and democracy development has been launched.

Since 'the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' (Universal declaration), and respect for human dignity and human rights should be guaranteed where people live, the city that provides equal opportunities to all those living in it, the inclusive city, is the ground(work) of a peaceful and just world order. In such a city, particularly through intercultural dialogue, the evolutionary dynamics of identities will develop in a universalist, trans- and meta-territorial, and trans-cultural direction.

New citizenship in tandem with the impact of the necessary intercultural dialogue aimed at democratic inclusion can revitalize the public sphere in a perspective of multi-level and supra-national governance. And it is in fact the phenomenology 'in the plural' of citizenship, dialogue and inclusion that obliges institutions to redefine themselves and therefore to open up and develop multiple channels of representation and democratic participation.

### The 'responsibility to protect' is inherent to cities

States are legally obliged to account to the international community with regard to human rights, a task that in the past was embedded into the domestic jurisdiction of each state. But as mentioned, international recognition and protection of fundamental rights is disengaging territory from the border sovereignty of states. This revolutionary process is taking place in parallel with the de-territorialization of politics.

Local governments are the venue of vital administrative and social services, incorporating artistic and cultural heritage. They share together with states the responsibility of protecting all those who live there. Furthermore local governments committed to defend life as they are, are entitled to claim active participation in the construction of a peaceful world order following article 28 of the Universal Declaration and the 1999 UN Declaration on the Right and Responsibility of Individual, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

Readers will recall that principles related to human rights, including the proscription of war and the ban on the use of force, are *ius cogens* (compelling law). As this in particular concerns prohibition of war, article 20 of the International Covenant on Civil and Political Rights that prohibits propaganda for war states clearly: '1. Any propaganda for war shall be prohibited by law'.

***Principles of the responsibility to protect*** The responsibility of local governments to protect underscores their rights and duty to actively participate in the processes and institutions of global governance. But the very 'responsibility to protect' as presented by the 'Report of the International Commission on Intervention and State Sovereignty' (ICISS)<sup>18</sup> is assumed to lie with the sovereignty of states. The report sets out the following basic principles. 'A. State sovereignty implies responsibility, and the primary responsibility for protection of its people lies with the state itself. B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in

18 ICISS (2001)

question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect' (p.XI) and '*Evolving international law* has set many constraints on what states can do, and not only in the realm of human rights. The emerging concept of human security has created additional demands and expectations in relation to the way states treat their own people. And many new actors are playing international roles previously more or less the exclusive reserve of states' (p.7, italics added). Furthermore it points out that 'what has been gradually emerging is a parallel transition from a culture of sovereign impunity to a culture of national and international accountability. International organizations, civil society activists and NGOs use the international human rights norms and instruments as concrete point of reference against which to judge state conduct' (p.14).

The UN Secretary General Report 'In larger freedom: towards development, security and human rights for all' of March 2005 refers to 'an emerging norm that there is a collective responsibility to protect'. It largely follows the ICSS Report<sup>19</sup>.

***How local governments link with the responsibility to protect*** The current official doctrine of the responsibility to protect emphasizes the role of states saying that they are in the front line and the UN in the second. It calls upon the international community to intervene in internal affairs even by using force, though only as last resort. To avoid the abuse of exceptions that allow the use of force, it should be stressed once again that the matrix of the responsibility to protect lies with the concept of human security more than with that of state sovereignty, and that it is a right and duty inherent to local governments, thus the sovereignty of states is 'instrumental', not 'foundational' or fundamental. The ICISS says it as follows: 'emphasis in the security debate is shifting from territorial security, primarily through armaments, to all-encompassing security through human development with access to food and employment, and environmental security' and 'The traditional narrow perception of security leaves out the most elementary and legitimate concerns of ordinary people regarding security in their daily lives' (p.15).

In order to be effective in pursuing goals of security in the daily lives of citizens, local governments should have more suitable channels of access to decision making processes on the international plane. They can rightly claim to be formally recognized as human security (and human development) public stakeholders.

### **The new legal frontier of territorial co-operation**

To involve local governments fully as public stakeholders in the responsibility to protect, international legal instruments are needed. At the European regional level, both the Council of Europe and the European Union are producing innovative rules that will hopefully be translated, with due adaptations, into the United Nations system. This section contains a survey of that pioneering work.

With regard to legal status, a distinction must first be made between the facilities provided by the UN and other international organizations to the associations of local governments and local authorities, and the legal recognition of entities created for 'territorial co-operation' and in which institutional issues of territorial governance are formally at stake. As announced, the greatest advance was achieved in the EU Law with the Regulation

<sup>19</sup> UN General Assembly (2005) p.35.

n.1082/2006 jointly adopted by the Council and the European Parliament. It is the most progressive international legal instrument in the field because it formally recognizes co-operation between subnational territorial bodies.

*Transfrontier co-operation between territorial communities or authorities* Within the European context, the ground was prepared and fertilized by the Council of Europe through the formal international recognition of the value-principle of territorial autonomy starting with the Outline Convention of 1980 and the European Charter of Local Self-Government, of 15 October 1985. Article 10 of this founding instrument establishes that 'local authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of law, to form consortia with other local authorities in order to carry out tasks of common interest'. Moreover states pledge to recognize 'the entitlement of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local authorities'.

The European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, of 21st of May of 1980, is the pioneering international legal instrument with which member states of the Council of Europe 'undertake to facilitate and foster transfrontier co-operation between territorial communities or authorities within their jurisdiction and territorial communities or authorities within the jurisdiction of other Contracting Party'.

It is worth noting that within the general legal framework established through agreements among states, local or regional governments are allowed to stipulate agreements among themselves that also contain new statutes of bodies of transfrontier co-operation, including groupings with legal personality. The matter covered by these agreements varies from spatial planning to creating and managing transfrontier parks, from civil protection to the institution of a transfrontier school curriculum up to a vast array of economic and social co-operation arrangements. The First Protocol to the Outline Convention lays out precise provisions on the competences, responsibilities and powers of transfrontier co-operation bodies, established through agreements among local authorities.

Protocol No.2 of 1998 launches the new horizon of 'interterritorial co-operation', overcoming and extending mere transfrontier co-operation, starting with the consideration that 'territorial communities or authorities are increasingly co-operating not only with neighbouring authorities of other states (transfrontier co-operation), but also with non-neighbouring authorities having common interests (interterritorial co-operation), and are doing so not only within the framework of transfrontier co-operation bodies and associations but also at the bilateral level'.

Standard-setting work by the Council of Europe underlines the constant development of co-operation among the local governments of different countries. The range of co-operation between sectors then becomes very large, and starting from territorially contiguous co-operations, many more co-operations worldwide are being created

*European Groupings of Territorial Co-operation* It should be emphasized that the Council of Europe Protocol clearly paves the way to Regulation (EC) No 1028/2006 of the European Parliament and of the Council of 5 July 2006 'on a European Grouping of Territorial Co-operation', which is the most advanced instrument on exercising territorial autonomy in the international system today. The preparation of this document was enriched

in 2004 by an opinion of the Congress of Local and Regional Authorities on the outlook report of the EU Committee of the Regions on 'A new legal instrument for cross-border co-operation' (Opinion 24 (2004)). This opinion proves useful. It defines three types of co-operation among local governments. 'Cross-border co-operation' implies bi-, tri- or multilateral co-operation between local and regional authorities operating in geographically contiguous areas. 'Interterritorial co-operation' implies bi-, tri- or multilateral co-operation between local and regional authorities operating in non-contiguous areas. Trans-national co-operation is co-operation between national, regional and local authorities in respect of programmes and projects and covers larger contiguous areas and involves players from at least two EU member states and/or non-EU states. The Congress believes that the term 'decentralized co-operation' should be avoided in the context of the would-be European Grouping as it refers only to activities of 'decentralized' authorities, i.e. in the view of the Congress public authorities with no legislative power, whereas all infra-state public authorities – with or without legislative or international powers – also develop cross-border or interterritorial co-operation outside the realm of international public law.

The EU Regulation bases itself on the assumption that 'the harmonious development of the entire Community territory and greater economic, social and territorial cohesion imply the strengthening of territorial co-operation'. It is therefore 'necessary to institute a co-operation instrument at Community level for the creation of co-operative groupings in Community territory, vested with legal personality, called the 'European groupings of territorial co-operation'. Article 1 prescribes that 'the objective of an EGTC shall be to facilitate and promote cross-border, transnational and/or interregional co-operation, hereinafter referred to as 'territorial co-operation'. An EGTC 'shall have in each member state the most extensive legal capacity accorded to legal persons under that member state's national law. The members of an EGTC shall be member states, regional authorities, local authorities, bodies governed by public law.' (art.3).

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The European Grouping shall be governed by a convention and its own statutes. Its tasks shall be 'limited to the facilitation and promotion of territorial co-operation to strengthen economic and social cohesion', with this peremptory limitation: 'police and regulatory powers cannot be the subject of a convention'. As noted, the line adopted is the one traced by the Council of Europe: the legal personality achieved in a EU member state is automatically recognized by all other member states.

This significant step in promoting the role of local governments is highlighted by three indicators: the legal basis is provided, once and for all, by a supranational legal instrument and not by single ad hoc agreements among states; within the 'European Grouping', regional and local authorities have the same ranking as states. Moreover, as a principle and in analogy with the Council of Europe rules, local authorities of third countries can join the European Grouping provided that their legislation or agreements with member states permits it. Organization of the European Grouping may thus become extremely complex and potentially have a spill-over both in geographic terms and scope. Complementary legal sources of this innovative undertaking include: possible agreements among states that regulate neighbourhood issues; the rules of the Council of Europe; bilateral framework agreements among states; mechanisms of community law on Interreg; internal law of the state in which the European Grouping has its headquarters as a subsidiary source. Though enjoying ample legal capacity in exercising its competences, the Grouping must respect the limits defined by the statutes according to a principle of functional specificity that excludes exercising competences in the field of public order and foreign affairs, but that does not reduce the strategic importance of this new transnational territorial entity endowed with a legal personality of community law.

## Conclusions: towards an International Grouping of Territorial Co-operation with legal personality

According to international law in force that is founded on the paradigm of human rights - thus law for peace, *ius ad pacem* - the 'responsibility to protect' the life of human beings and human communities belongs not only to states but also to local governments. States therefore should not hinder the international initiatives of local governments that comply with that legal-moral principle especially where life and peace are in danger.

To further affirm their international role, it is important that local governments dedicate a part of their city diplomacy agenda to supporting the effectiveness of international law and commit themselves to initiatives that enhance the Right to Peace, the Right to Development, the Right to a safe and sustainable Environment, and all other human rights recognized by international law. Local governments can be natural allies of international institutions in the defence of human rights and can do a great deal to help them function with greater legitimacy and effectiveness. For instance, local governments should be concerned with the functioning of the Human Rights Council and the Peace-building Commission, and be active in enhancing the implementation of the Action Programmes issued by UN world conferences.

In particular, local governments must actively work to contribute to implement those international legal conventions that directly affect the governance of cities: for instance, the Convention on the Rights of Persons with Disabilities, the European Convention on the Participation of Foreigners in Political Life at Local Level, and the UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expressions. It is important for local governments to actively participate in the reform of the UN, especially for its democratization by means, among others, of the establishment of a UN Parliamentary Assembly.<sup>20</sup> In this context an alliance with NGOs should be developed on initiatives that include sensible issues like nuclear disarmament, a ban on weapons of mass destruction, the control of the arms trade and production, especially of small arms. To carry out all the above mentioned tasks, local governments must be equipped with the right structures and offices, a true human rights and international relations infrastructure, with trained staff that work in close collaboration with ombudspersons, NGOs and civil society organizations that include schools, firms and universities

The Italian case is interesting and unique from a strictly legal point of view. In 1991, municipalities and provinces were allowed by a national Bill to exercise a larger degree of autonomy in revising their statutes. The result was that thousands of new statutes include the so-called 'peace human rights norm' that reads as follows: 'The Commune x (the Province x), in conformity with the Constitution principles that repudiate war as a means to resolve international disputes, and with the principles of the international law on human rights, recognizes peace as a fundamental right of the human being and of peoples. To this purpose it is committed to take initiatives and co-operate with civil society organizations, schools and universities'. By this statutory rule, Italian communes and provinces formally pledged to comply with the principles enshrined in the UN Charter and in the international legal instruments on human rights, in particular with article 28 of the Universal Declaration. Owing to this 'norm' many communes and provinces established councillors and

<sup>20</sup> Papisca and Mascia (2004); Papisca and Mascia (2007); Papisca (2006-B), pp. 8-12; Papisca (2004-C) pp.125-132; Bummel (2004); Kauppi et al (2007); European Parliament (2004); Parliamentary Assembly of the Council of Europe (2006); Pan-African Parliament (2007).

departments dealing specifically with human rights, peace education, development co-operation and international solidarity. This field is actively co-ordinated by the 'National Network of Local Governments for Peace and Human Rights' which currently includes more than 700 communes, provinces and regions, representing over half of the Italian population.

With regard to the formal status of local governments in the UN system, the Cardoso Report is a precious source of proposals that deserve consideration. It says among other things that 'local authorities have been playing a growing role in both UN policy debates and in achieving global goals; they are a key constituency for the UN, but they are not non-governmental (...) As a result of its consultations with mayors, the Panel proposes that the General Assembly be urged to adopt a resolution affirming and respecting the principle of local autonomy to underscore the growing importance of this constituency', and that 'The General Assembly should debate a resolution affirming and respecting local autonomy as a universal principle'.<sup>21</sup> It goes on to recommend reinforcing existing links of the UN system with local governments, and to explore an institutionalized link with United Cities and Local Governments.

Finally, thinking about the future in a radically progressive way, something else could be envisaged following the European legal advancements as regards the legal status of transnational territorial bodies. The establishment of the EGTC is an opportunity that ought to be seized to affirm the peaceful involvement and support of local governments in the international system. As a first step to enlarge the European experience to the world level, European local governments should whenever possible extend membership of the EGTC to local governments in third countries. In parallel, a process towards the recognition of the legal personality of an International Grouping of Territorial Co-operation in the name of the principles of local autonomy, self-government and democracy, should be undertaken to gain a UN framework Convention with the same criteria adopted by the EU Regulation. Once the International Grouping of Territorial Co-operation is established, a Committee of Territorial Co-operation within the UN could be envisaged with formal advisory functions.

<sup>21</sup> Panel of Eminent Persons on UN–Civil Society Relations (2004) p.51