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## THE CITY AND INTERNATIONAL LAW: IN PURSUIT OF SUSTAINABLE DEVELOPMENT

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# THE CITY AND INTERNATIONAL LAW: IN PURSUIT OF SUSTAINABLE DEVELOPMENT

Ileana M. Porras\*

“The battle for sustainable development will almost certainly be decided in cities . . . . We need cities in good shape, wisely using their resources in an innovative and sustainable way, cities for all, for us today and for future generations.”<sup>1</sup>

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\* Visiting Professor of Law, Watson Institute of International Studies, Brown University, Providence, RI. This Article is the fruit of a series of lectures I delivered during the Helsinki Summer Seminar on *International Law, the Environment and Power*, held August 18–29, 2008, at the Erik Castrén Institute of International Law and Human Rights, Faculty of Law, University of Helsinki, Finland. I would like to thank the Institute for their hospitality and the students for their patience. A version of this Article was presented at the Cooper-Walsh Colloquium on Cities and Climate Change at Fordham Law School on November 14th, 2008. I would like to thank the Colloquium participants and especially my commentator, Professor Kirsten Engel, for their insightful comments. I would also like to commend the Fordham Urban Law Journal for organizing an exceptional conference and thank the editors for their hard work on this Article.

1. Euractiv.com, Sustainable Cities, <http://www.euractiv.com/en/sustainability/sustainable-cities/article-175936> (last visited Feb. 14, 2009) [hereinafter Sustainable Cities] (quoting EU Regional Policy Commissioner, Danuta Hübner, addressing the Informal Ministerial Meeting on Urban Development, Leipzig, May 24, 2007).

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### INTRODUCTION

In the past few years, two seemingly unrelated trends have combined to turn the “city”<sup>2</sup> into the privileged international locus of sustainable development: the internationalization of cities and the localization of sustainable development. In this Article, I explore the conjunction of these two trends and argue that while on the one hand, there is something attractive about the willing engagement of cities in addressing sustainable development (and climate change), there are also inherent dangers in allowing the cities to take on the primary function of defining sustainable development.

In a series of articles published in 2006, legal scholars David Barron, Yishai Blank, and Gerald Frug identified and theorized a new phenomenon: the emergence of cities and transnational associations of cities as a new type of actor on the international stage.<sup>3</sup> As these authors have shown, cities, pursuing greater autonomy from the state, have sought in a variety of

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2. In this Article I use the term “city” to refer to any urban area that exhibits some degree of self-government, whether or not it is considered a “city” under the domestic legal or administrative order of its host nation. While the terms “locality,” “local government,” or “local authority,” may be more precise and serve as a useful reminder that these entities have a specific legal character, *see, e.g.*, Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT’L L. 875, 877 n.1 (2006), I have preferred to retain the more evocative “city” because of its non-legal connotations. The city may be a legal construct as Frug reminds us, *see generally* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980), but it is also a community, a polity, a geography, a bounded space, a history, and a mythology. The rise of the city as the privileged international locus of sustainable development is due as much to these familiar imaginative associations as to the role of “local government.” The United Nations General Assembly (“UNGA”) also uses the term “city” to refer to urban settlements. *See* Declaration on Cities and Other Human Settlements in the New Millennium, G.A. Res. S-25/2, ¶ A(2), U.N. GAOR, 25th Sp. Sess., 6th plen. mtg., U.N. Doc. A/Res/S-25/2 (June 9, 2001) [hereinafter UNGA Millennium Declaration on Cities].

3. *See generally* Blank, *supra*, note 2; Yishai Blank, *Comparative Visions of Global Public Order (Part 2): Localism in the New Global Legal Order*, 47 HARV. INT’L L.J. 263 (2006) [hereinafter Blank, *Comparative Visions*]; Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1 (2006).

ways to become active players on the international stage. One strategy they have pursued is to band together to form international “non-governmental” organizations such as United Cities and Local Governments (“UCLG”),<sup>4</sup> in order to gain visibility and voice in a variety of international fora. Basing their arguments on the democratic potential of cities and on the claim that city government is the level of government closest to the people and therefore most responsive to their needs, such groups have advocated for greater decentralization and autonomy for cities.<sup>5</sup> The cities’ assertion of the desirability of greater autonomy has been well received by the international community,<sup>6</sup> which has embraced the city as an alternative interlocutor to the state. Together, cities and international organizations have promoted adoption of the principle of subsidiarity, borrowed from its European context, while, in parallel they have sought to encourage the funneling of international resources, including foreign direct investment, directly to cities, both of which tend to empower the city vis-à-vis the state.<sup>7</sup> Because cities, unlike traditional non-governmental organizations (“NGOs”), are able to lay claim to representative legitimacy, they have emerged as a favored actor within the umbrella of international civil society representatives.<sup>8</sup> Paradoxically, however, in the new world order, cities—despite their democratic credentials—are increasingly losing their strong public government function as traditional public services are privatized and cities begin to resemble private corporations.<sup>9</sup> As cities seek greater autonomy from the

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4. The World Organization of Cities and Local Governments was founded in 2004 and adopted a Constitution in that same year. WORLD ORGANISATION OF UNITED CITIES & LOCAL GOV'TS [UCLG], THE CONSTITUTION OF THE WORLD ORGANISATION OF UNITED CITIES AND LOCAL GOVERNMENTS (2004) [hereinafter UCLG CONSTITUTION], available at <http://www.cities-localgovernments.org/uclg/upload/template/templatedocs/Constitution.pdf>. In their Constitution, UCLG describes its mission: “To be the united voice and world advocate of democratic local self-government, promoting its values, objectives and interests, through cooperation between local governments, and within the wider international community.” *Id.* art. 2. On its website, UCLG makes the impressive claim that its members “represent over half of the world’s population.” United Cities and Local Governments, About Us, <http://www.cities-localgovernments.org> (last visited Feb. 10, 2009) [hereinafter UCLG Website] (follow “About Us” hyperlink). I assume this claim must refer to the half of the world’s population that is today urban, rather than to the actual population of their city members.

5. UCLG Website, *supra* note 4 (follow “About Us” hyperlink).

6. The “international community” referred to consists of the United Nations, World Bank, Organisation for Economic Co-operation and Development, and European Union.

7. On the other hand, as Blank, Frug, and Barron demonstrate, the city has been disempowered vis-à-vis the international community which increasingly claims a regulatory role over the city under the new governance ideology. See generally Blank, *supra* note 2; Frug & Barron, *supra* note 3.

8. See Blank, *Comparative Visions*, *supra* note 3, at 263-65, 270.

9. See generally *id.*; Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23 (1998).

state and more visibility on the international stage, they have perhaps unwittingly become a key conduit for the modern trend away from “government” towards “governance;”<sup>10</sup> a movement strongly encouraged by international organizations such as the United Nations and the World Bank,<sup>11</sup> and one that places them in an ideal position on the stage of sustainable development.<sup>12</sup>

The second trend is the localization of sustainable development—an increasing emphasis on sustainable development as a process that takes root in and through local implementation. The definitional ambiguity at the heart of the concept of sustainable development has been much commented

10. The distinction between government and governance is nicely captured by the following excerpt from UN-HABITAT’s Concept Paper *The Global Campaign on Urban Governance*:

First, governance is not government. Governance as a concept recognizes that power exists inside and outside the formal authority and institutions of government. In many formulations, governance includes government, the private sector and civil society. Second, governance emphasizes “process.” It recognizes that decisions are made based on complex relationships between many actors with different priorities.

U.N. Habitat [UN-HABITAT], *Concept Paper: The Global Campaign on Urban Governance*, ¶ 2.1, U.N. Doc. HS/650/02E (Mar. 2002) [hereinafter *Urban Governance Concept Paper*] (citation omitted), available at [http://www.unhabitat.org/downloads/docs/2099\\_24326\\_concept\\_paper.doc](http://www.unhabitat.org/downloads/docs/2099_24326_concept_paper.doc). Governance is a complex and much controverted concept. At root, however, it incorporates, disaggregates, and displaces government. *Id.* In governance parlance, formal government is only one of a myriad of co-existing sources of regulatory authority, all of which exercise power through a range of practices, standards, and rules that fall across a continuum from hard to soft law. *Id.* Because governance seeks to distinguish itself from government, the emphasis usually falls on the role of civil society and private economic actors. See generally JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000); David M. Trubek & James S. Mosher, *New Governance, Employment Policy and the European Social Model*, in *GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS* 33 (Jonathan Zeitlin & David Trubek eds., 2003); Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 *HARV. INT’L L.J.* 411 (2005); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory, Working Paper No. 17, 2005), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1016&context=nyu/plltwp>.

11. See The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005), available at <http://www1.umn.edu/humanrts/unreport-largerfreedom.html>; Alvaro Santos, *The World Bank’s Use of the “Rule of Law” Promise in Economic Development*, in *THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL* 253 (David M. Trubek & Alvaro Santos eds., 2006) (discussing the World Bank’s approach to governance).

12. Indeed, governance, at least in its popular guise as “good” governance has become officially identified as a precondition for sustainable development. See, e.g., International Conference on the Financing for Development, Monterrey, Mex., Mar. 18–22, 2002, *Monterrey Consensus of the International Conference on Financing for Development*, ¶ 11, U.N. Doc. A/CONF. 198/11 (Oct. 2003).

upon.<sup>13</sup> However, one aspect of this ambiguity has perhaps not received sufficient attention: the tension between the global and the local.<sup>14</sup> The concept of sustainable development was born of the realization that the goals of environmental protection and economic and social development could not be achieved in isolation, and that while at times a trade-off would be needed between the values of economy, environment and equity, the way forward required a complex integration of policy-making at every level of government.<sup>15</sup> Sustainable development emerged from an international context which assumed the need for global cooperation, yet emphasized the primacy of state commitments and programs. From its inception, however, the concept of sustainable development was strongly associated with the demand for public participation.<sup>16</sup> Given the common perception that the terrain most amenable to effective public participation is that of local decision-making, sustainable development has increasingly come to be considered a local matter.

The conjunction of these two trends, the internationalization of cities and the localization of sustainable development has transformed the city into a privileged locus of sustainable development. Cities, and in particular associations of cities, have found in sustainable development an attractive avenue for making themselves indispensable partners in the international arena. Meanwhile, the cities' strategy has found an echo among a host of international organizations, engaged in one way or another in the pursuit of sustainable development. The United Nations, the World Bank, the Organisation for Economic Co-operation and Development (OECD), and the European Union, have all endorsed the proposition that cities are at the cen-

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13. See, e.g., Barbara Stark, *Sustainable Development and Postmodern International Law: Greener Globalization?*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 137, 151-54 (2002).

14. But see, e.g., Hari M. Osofsky, *Defining Sustainable Development After Earth Summit 2002*, 26 LOY. L.A. INT'L & COMP. L. REV. 111, 116 (2003) (including the simultaneously local and global nature of sustainable development as one of the barriers to definition).

15. Martin Purvis, *Geography and Sustainable Development*, in EXPLORING SUSTAINABLE DEVELOPMENT: GEOGRAPHICAL PERSPECTIVES, 33-34 (Martin Purvis & Alain Grainger eds., 2004) ("The concept of sustainable development is distinctive and innovative in pointing to the need for simultaneous attention to maintaining economic growth, meeting social needs and conserving environmental quality."); see also Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Report of the United Nations Conference on Environment and Development*, Annex II, U.N. Doc. A/CONF.151/26/Rev.1 (Aug. 12, 1992) [hereinafter *Agenda 21*]; Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev. 1 (Aug. 12, 1992), reprinted in 31 ILM 874 (1992) [hereinafter *Rio Declaration*].

16. See *Rio Declaration*, supra note 15, at princs. 4-5.

ter of sustainable development, as both problem and solution.<sup>17</sup> The happy coincidence that the year 2008 marked the moment at which “*Homo sapiens* has become *Homo urbanus*”<sup>18</sup>—the moment at which half of the world’s population could be claimed to be living in cities<sup>19</sup>—placed the cities in a seemingly unassailable position. As the world’s attention has turned from the cumbersome complexity of sustainable development to the more pressing (and in some sense more promising) concern with finding a “solution” to climate change, the world’s cities have been left holding the torch of hope.

In this Article, I identify and explore some of the problems and limitations implicit in this approach from the point of view of achieving global sustainable development that addresses the needs of the world’s most vulnerable populations. That cities North and South are disproportionate contributors to global ecological dysfunction and, not coincidentally, the sites of a significant proportion of economically productive activity is not in dispute. It is beyond doubt that cities—with their economies of scale, relative concentration of wealth, people, businesses, and educational institutions—have much to contribute to the pursuit of sustainable development and to

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17. See generally UNGA Millennium Declaration on Cities, *supra* note 2 (recognizing cities as both problem and solution); THE WORLD BANK, CITIES IN TRANSITION: WORLD BANK URBAN AND LOCAL GOVERNMENT STRATEGY 31-35 (2000) [hereinafter THE WORLD BANK], available at <http://www.worldbank.org/urban/forum2002/docs/cities-in-transition.pdf>; Climate-L.org, Role of Cities in Responding to Climate Change, <http://www.climate-l.org/2008/10/oecd-cities-and.html> (last visited Feb. 27, 2009) [hereinafter Role of Cities] (noting a statement by OECD Secretary-General Angel Gurría recognizing that while cities account for 60-80% of emissions, they are key actors in sustainable development); Sustainable Cities, *supra* note 1 (noting that the European Union considers cities at the heart of its sustainable development efforts but also noting the waste generated by cities).

18. Survey: *The World Goes to Town*, ECONOMIST, May 3, 2007, at 3, available at [http://www.economist.com/surveys/displaystory.cfm?story\\_id=9070726](http://www.economist.com/surveys/displaystory.cfm?story_id=9070726). Given that world population figures stand at roughly 6.7 billion, this means that just over 3.35 billion people live in cities today. See generally UN-HABITAT, STATE OF THE WORLD’S CITIES 2006/7: THE MILLENNIUM DEVELOPMENT GOALS AND URBAN SUSTAINABILITY: 30 YEARS OF SHAPING THE HABITAT AGENDA, U.N. Sales No. 06.III.Q.3 (2006) [hereinafter STATE OF THE WORLD’S CITIES]. Urbanization figures and projections are largely based on the data collected by the Population Division, Department of Economic and Social Affairs, of the United Nations. Most recent data can be found at the following database: World Urbanization Prospects: The 2007 Revision, <http://esa.un.org/unup/>. *State of the World’s Cities* assumed the turnover point would occur in mid-2007. However, according to Satterthwaite, the claim was later delayed to mid-2008. It should be noted that there is no unified definition of urban versus rural used by the U.N. Population Division. The distinction is left up to each state which determines the urban-rural divide in accordance with its particular context. For the range of definitions used by states see U.N. DEP’T OF ECON. & SOC. AFFAIRS, WORLD URBANIZATION PROSPECTS: THE 2003 REVISION, *passim*, U.N. Doc. ST/ESA/SER.A/237, U.N. Sales No. E.04.XIII.6 (2004).

19. This is presumably the basis of UCLG’s rather grandiose claim to represent half of the world’s population. See UCLG Website, *supra* note 4.

the response to climate change. Less clear is whether cities alone can deliver. The problems can be roughly divided into three categories. First, there is the problem with cities—in particular, the problem that cities are becoming increasingly privatized which erodes their public function and tends to diminish any sense of community. Second, there is the problem of the scale(s) of sustainable development—in particular, the problem of the extra-territorial responsibility implied by the recognition of the ecological footprint of Northern cities. Third, there is the problem of politics, community, and the practices of public participation—in particular, the need to recognize that since it requires trade-offs, sustainable development is a political decision, and that the communities of interest will be determined by the understanding of sustainable development employed.

In pointing to these limitations I do not mean to imply that cities should not be at the forefront of the pursuit of sustainable development or in seeking meaningful responses to climate change. Rather, I hope that identifying the problems inherent in leaving sustainable development up to the cities, will not only help cities improve their sustainable development policies, but will give the international community pause about the wisdom of seeking to bypass the state in the pursuit of sustainable development.

In Part I of this Article, I address a recent trend I have characterized as the internationalization of cities. Part I begins with a discussion of the traditional view of the state-city relationship as a purely domestic matter in which the balance between local autonomy and state power is periodically redrawn. Drawing on the recent work of legal scholars Frug, Barron, and Blank, I explore the development of an international localist agenda for greater local autonomy promoted by international associations of cities such as UCLG whose sphere of activity is the international. The cities' agenda, I argue, has been well received by international organizations pursuing a liberal internationalist agenda because of a coincidence of values and interests. Cities, relying on a long standing tradition of being the site of self-governing community, and asserting their status as the level of government closest to the people, have convinced the international community that they offer an alternative site of democratization beyond the state. Part I next focuses on decentralization and the principle of subsidiarity as two mechanisms developed by the international community to promote democratization and demonstrates how these serve the cities' localist agenda. Finally, Part I turns to the subject of privatization, a central tenet of the neo-liberal internationalist agenda. Here I suggest that cities, starved for financial resources, have in general welcomed the trend towards privatization of city services and sought to encourage increased foreign investment. I further argue that privatization fits well with the overall liberal internationalist turn from government to an emphasis on governance. I conclude this sec-



tion with the suggestion that in their pursuit of greater autonomy from the state, cities have ironically become creatures of the international.

In Part II, I discuss the localization of sustainable development beginning with an introduction to the concept of sustainable development, emphasizing that sustainable development requires the complex integration of economic, social, and environmental factors in decision making for policy, planning, and management at all levels of government. I then cover the much noted ambiguity of the concept, and argue that it is in part due to the fact that at root sustainable development requires trade-offs between these three important values, and that this requires a political decision in a given context. I further note that from its inception sustainable development had a dual preoccupation with the global and the local. Yet, I argue, in the move to implementation, sustainable development has become an increasingly localized objective, a transition that has been facilitated by the fields' preoccupation with community and public participation.

In Part III, I address the heart of the article, the convergence of the two trends as cities embrace sustainable development as a signature concern of their international localist agenda. In this Part, I begin to raise the question of what this embrace means for the definition and pursuit of sustainable development.

In Part IV, I identify a series of specific problems that are raised by the city-sustainable development conjunction. I return to the subject of the privatization of cities, discussed in Part I and argue that whatever its financial and developmental benefits, the privatization of city services tends to erode the public function of municipal government, stripping it of its primary claim to being the level of government closest to the people; contributes to the fragmentation of the city which tends to destroy any collective sense of community, and is poorly designed to address the needs of the most vulnerable part of the population. The second problem I discuss is that of the scale of sustainable development. Drawing on Rees's concept of the ecological footprint of cities, I argue that cities are ill equipped and poorly placed to take into account their externalization of environmental and social costs on lands and peoples located well beyond city boundaries. In the absence of a national or international mandate, cities are bound to consider local interests only when they engage in the trade-offs required by the pursuit of sustainable development. The third problem I identify in this Part is the degree to which the city-sustainable development conjunction can serve the goal of equity through the much vaunted emphasis on public participation. I argue that while the shift to governance seems to increase the space of public participation for civil society, the formal recognition of private economic actors as stakeholders in the decision-making process is likely to prove far more decisive.

In Part V, I turn to the particular case of climate change and cities. Cities and their associations, I argue, have found a natural home for their localist agenda in the international fight against climate change. The commitment of cities to a meaningful city led response to climate change is to be generally commended. However, in this Part, I focus primarily on a series of concerns that will need to be addressed by cities and the international community if the city-climate change conjunction is to lead to progress on the sustainable development front. First, is the extent to which responding to climate change has come to be treated as co-extensive with sustainable development. The problem as always is one of diversion of resources. To the extent that climate change seems more pressing than sustainable development, and to the extent that the fight against climate change becomes localized, then it is to be expected that the bulk of financial resources available for the purpose of combating climate change will be targeted at addressing adaptation measures in wealthy northern cities to prevent against future and uncertain risks rather than devoted to addressing the sustainable development crisis in the world today. Other concerns addressed in this section parallel the critique of the city-sustainable development conjunction.

In Part VI, I conclude that in identifying the problems inherent in leaving sustainable development up to cities, this article intends both to help cities improve their sustainable development policies and to give the international community pause about the wisdom of seeking to bypass the state in the pursuit of sustainable development. Properly understood, sustainable development requires a multi scalar, multi-level definition. The choice need not be between decentralized, autonomous cities and a powerful state that excludes city power and self-determination. Rather than imagine the state as necessarily unwieldy, closed off, inflexible and unresponsive, we should emphasize the role of the state in providing a generous space for the exercise of local autonomy and remember that community and community interest are always in the process of construction.

### I. THE INTERNATIONALIZATION OF CITIES

From a legal perspective, the city has traditionally been constructed from within a national legal order.<sup>20</sup> As Jerry Frug has detailed in his seminal work on American local government law, two competing ideas of the city have always co-existed: first, the city as the creature of the state, subservient to the state, dependent on the state, and exercising delegated powers (the bureaucratic model); and second, the city as a quasi-sovereign, a space

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20. See Frug, *supra* note 2.

of limited but real autonomy, from within which city citizens can pursue their collective vision of the “commonwealth,” with minimal state interference (the democratic model).<sup>21</sup> At different points in history, and in different places, one or the other of these legal models has been dominant, but rarely, if ever, has the tension between the two collapsed. Two competing narratives about the state-city relationship have evolved out of this tension. The first, speaks of the city’s role as protector of citizen interests against the encroachments of oppressive state power.<sup>22</sup> The second, presents the state in the role of protector of minority interests against abuse of power by city majorities.<sup>23</sup> As in any multi-dimensional system of government, each level of government periodically seeks to aggrandize its particular power at the expense of the other. Furthermore, even when the distribution of powers and responsibilities between the two levels of government is set by a state’s constitutional order, it is not necessarily fixed. Rather, this “balance” is always under review and subject to negotiation/re-negotiation based on specific issues, context, and history. The temporary accommodation of these tensions, the settling of the balance of powers, and responsibilities between the city and the state has, however, traditionally been considered a purely domestic matter, not a proper matter of concern to the international community.

The general consensus regarding the purely domestic character of the city-state relationship has been recently put into question by a series of developments that collectively have led to what we may call the internationalization of cities. Of greatest interest for our purposes is not the growth of the relative handful of megacities, with their claims to an international existence beyond the state (and beyond international institutions) through their participation in non-state based global networks (including transnational flows of information, services, resources, and people),<sup>24</sup> though these have certainly contributed to the breakdown of the traditional view. Of greater interest is the sudden proliferation of transnational alliances and networks

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21. See GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 19-25 (1999); Frug, *supra* note 2, at 1062-75; see also Blank, *supra* note 2, at 895 (pointing out the tension between the bureaucratic and democratic conception).

22. See FRUG, *supra* note 21, at 26-53.

23. *Id.*

24. See generally GLOBALIZING CITIES: A NEW SPATIAL ORDER? (Peter Marcuse & Ronald van Kempen eds., 2000) (examining changes in global cities); SASKIA SASSEN, THE GLOBAL CITY (1999) (describing how large cities became command centers for the global economy and emphasizing the formation of cross-border dynamics which allowed cities to form strategic transnational networks); WORLD CITIES IN A WORLD SYSTEM (Paul Knox & Peter Taylor eds., 1995) (examining the nature, demands, and relationships of world cities such as New York, Tokyo, and London).

of cities seeking a voice at the international table.<sup>25</sup> Such alliances and networks pursue local agendas through international strategies and promote a unified vision of proper city-state relationship in which, not surprisingly, city powers and resources would grow vis-à-vis the state.<sup>26</sup>

Among the most successful of these transnational city associations so far is UCLG, which includes over a thousand cities across ninety-five countries as direct members of the organization, in addition to a hundred and twelve so called “national associations,” each representing all the cities and local governments in a single country.<sup>27</sup> One of the primary goals of UCLG is to internationalize its localist agenda through a strategy of increasing co-operation with international organizations, including the United Nations, its agencies and programs, such as UN-HABITAT<sup>28</sup> and the World Bank,<sup>29</sup> and to position itself as the unified voice of cities worldwide. Indeed, UCLG was virtually consecrated as the voice of cities worldwide, when the 2004 *Report of the Panel of Eminent Persons on United Nations-Civil Society Relations* (the “Cardoso Report”), submitted to UN General Secretary Kofi Annan, recommended specifically that “the United Nations should regard United Cities and Local Governments as an

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25. An example of such transnational alliances and networks of cities is United Cities and Local Governments. See *infra* note 27 and accompanying text.

26. See Blank, *supra* note 2, at 888.

27. UCLG, headquartered in Barcelona, was created through the unification of the two then largest international local government associations, the International Union of Local Authorities (“IULA”) and the United Towns Organization (“UTO/FMCU”). See UCLG CONSTITUTION, *supra* note 4, at pmbl. Unification was driven by the desire to enable cities to present a single voice in the international arena and be recognized as a U.N. interlocutor. See UCLG Website, *supra* note 4.

28. Links between local government and the United Nations are ensured through strong partnerships between United Cities and Local Governments and United Nations agencies and programmes such as the United Nations Human Settlements Programme, U.N. Habitat, with which UCLG has a cooperation agreement. UCLG also works with the U.N. Development Programme (“UNDP”); the U.N. Development Fund for Women (“UNIFEM”); the U.N. Training and Research Institute (“UNITAR”); the UN Education, Scientific and Cultural Organisation (“UNESCO”); and the U.N. Office for the Coordination of Humanitarian Affairs (“OCHA”). UCLG Website, *supra* note 4 (follow “Policies and Partners” hyperlink; then follow “UN Relations” hyperlink); see also UCLG CONSTITUTION, *supra* note 4, at arts. 2, 3(c), 4(a)-(c).

29. In February 2006, the President of the World Bank, Paul Wolfowitz, announced that the Bank wishes to develop its partnership with UCLG and is looking to develop new instruments in order to lend directly to local authorities without sovereign guarantee. UCLG and World Bank representatives decided to continue to intensify their dialogue to strengthen institutional links in order to identify quick, straightforward, and effective solutions for city development, and therefore for global development. UCLG Website, *supra* note 4 (follow “Policies and Partners” hyperlink; then follow “UN Relations” hyperlink).

advisory body on governance matters.”<sup>30</sup> In keeping with its new “civil society” NGO-like role, promoting the interests of its members, UCLG sees itself explicitly as connecting its members directly to the international domain without the intermediary of the state. Indeed, among the premises for the world organization’s *raison d’être* listed in UCLG’s 2004 Constitution is “that the traditional role of the State is profoundly affected by [economic, technological, demographic, environmental, social and economic trends] . . . and that states *cannot centrally manage and control* the complex integrated cities and towns of today and tomorrow.”<sup>31</sup> In other words, at least according to UCLG, the state is *passé* and has little to offer the cities. In contrast, the UCLG Constitution presents “local government” as “vital” and a “force” for *inter alia* sustainable development, good governance, Human Rights (civil, political, social and economic), peace and solidarity.<sup>32</sup> The tone and tenor of UCLG’s various declarations and other official statements are consistent with this post-state position. Indeed, in most instances the state is mentioned only in order to reiterate UCLG’s demand that the states must grant a greater degree of power and resources to local governments so that they can better fulfill their mission: a mission, which implicitly, the state is unable to fulfill.<sup>33</sup>

The success of UCLG and other city associations in introducing a localist agenda into the international domain can be attributed primarily to a recent coincidence of values and interests between cities and international organizations. Furthermore, cities have been particularly effective at presenting their cases in terms that reflect back the dominant international agenda. Among the values that unite the localist and internationalist agendas are an emphasis on the virtues of community and its potential to drive democratization through increased public participation in decision making.

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30. Fernando Henrique Cardoso, *Report of the Panel of Eminent Persons on United Nations–Civil Society Relations*, Proposal 18, *delivered to the General Assembly*, U.N. Doc. A/58/817 (June 11, 2004). UCLG followed up on the Cardoso Report recommendation in its Local Government Millennium Declaration calling on the States and Heads of government to “[e]stablish a formal advisory role for local government within the UN on issues of global governance.” UCLG Local Government Millennium Declaration: Bringing the Millennium Development Goals Back Home (June 10, 2005), [http://www.cities-localgovernments.org/uclg/upload/template/templatedocs/ENG\\_Mill\\_Decl.pdf](http://www.cities-localgovernments.org/uclg/upload/template/templatedocs/ENG_Mill_Decl.pdf) [hereinafter Local Government Millennium Declaration].

31. This is the sole reference in UCLG’s Constitution to the “State.” See UCLG CONSTITUTION, *supra* note 4, at pmb1. (emphasis added).

32. *Id.*

33. For instance, in its Local Government Millennium Declaration, the UCLG calls on the Heads of States and Governments convening to discuss the Millennium Summit +5 in 2005 to “[p]rovide local governments with the necessary resources and powers to play their full part on behalf of their citizens in meeting the Goals and Targets in each country.” Local Government Millennium Declaration, *supra* note 30.

In a fragmented world, in which national space seems rife with competition and conflict, cities have managed to present themselves as the natural geography of community formation. Cities have sought not merely recognition and support of their aims by international organizations but also direct access to international financial resources.<sup>34</sup> They have thus sought to displace the state as exclusive interlocutor. In doing so, their purposes have been promoted by the fact that the preferred vehicles employed by the international organizations to support community formation and democratization include decentralization and the principle of subsidiarity,<sup>35</sup> both of which, at least in theory, tend to encourage a move towards greater power at lower levels of government. In addition, cities have managed to tag their localist agenda onto a related internationalist trend: the turn from a traditional conception of government to that of governance.<sup>36</sup> The turn to governance has opened the door to an officially recognized and countenanced decision-making and regulatory role for private economic actors and civil society. Cities, financially strapped and seeking to increase their autonomy have welcomed this development. They have been adept at presenting themselves as the truest locus of government and as the harbingers, through privatization and the development of public-private partnerships, of a new wave of governance. In this respect, cities, in seeking autonomy from the state, have ironically become the creatures of the international arena.

#### A. The City and the Promise of Community

The city, the *polis*, has long been associated with notions of community, self-government, and citizenship. Indeed, it is hard to think of the city without invoking the various traditions of the ancient Greek city,<sup>37</sup> the medieval corporate town, the European city-state, or even the New England Township described by de Tocqueville in the 1830's,<sup>38</sup> each with its strong claims to political community, self-rule, territorial jurisdiction, and economic self-determination. To some extent, the relative advantage of cities

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34. Examples of institutions that currently lend directly to local governments are the European Bank for Reconstruction and Development and the Inter-American Development Bank. UNITED CITIES & LOCAL GOV'TS, UCLG POLICY PAPER ON LOCAL FINANCE 40 (2007), available at [http://www.cities-localgovernments.org/uclg/upload/template/template\\_docs/local\\_finance\\_policy\\_paper\\_en.pdf](http://www.cities-localgovernments.org/uclg/upload/template/template_docs/local_finance_policy_paper_en.pdf).

35. *E.g.*, UNGA Millennium Declaration on Cities, *supra* note 2, at princ. 12.

36. *See Urban Governance Concept Paper*, *supra* note 10, ¶¶ 2.0-2.4.

37. *See generally* MOGENS HERMAN HANSEN, POLIS: AN INTRODUCTION TO THE ANCIENT GREEK CITY-STATE (2006) (providing an introduction to the polis, the ancient Greek city-state, which represents the largest of all city-state cultures).

38. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 45-55 (Sanford Kessler ed., Stephen D. Grant trans., 2000).

in this respect was related to scale. Cities and towns were thought to be small enough that citizens could, in theory at least, know one another and have face to face interactions with those elected (or appointed) to govern. Furthermore, at the city level, the issues addressed by government would be of direct consequence to citizens who would therefore be more likely to pay attention and even get involved. Whatever the historical reality, these ideal cities of the past continue to exercise fascination because, history, as Frug might put it, has not been kind to cities.<sup>39</sup> The modern city, while it retains some degree of local government, is generally characterized by relative powerlessness vis-à-vis the state and consequently low levels of public participation in local politics.<sup>40</sup> Paradoxically, however, despite their modern powerlessness, cities have proven quite adept at marshalling the traditional nexus between the local, public participation and the forging of political community to justify their claims on the international.

In spite of the general evidence that few city-dwellers consistently exercise their civic duty to vote for city officials and that a negligible proportion of voters ever participate in city affairs,<sup>41</sup> cities continue to present themselves as privileged spaces of democratization and public participation.<sup>42</sup> Documents put out by international associations of cities and those emerging from international organizations all contain the assertion that local government is the level of government “closest to the people.”<sup>43</sup> This

39. See FRUG, *supra* note 21, at 26-53.

40. *Id.*

41. For example, in Boston, “voter turnout for general municipal elections vary from 11% to 48% over the last two decades, with similar [results] in Buffalo, Philadelphia, and Seattle.” Neal Caren, *Big City, Big Turnout? Participation in Recent U.S. Mayoral Elections*, 29 J. URB. AFF. 1, 31-46 (2007).

42. Famously, Alexis de Tocqueville expressed much admiration for local government and its role in promoting democracy through public participation and the forging of community in his classic *Democracy in America*. See DE TOCQUEVILLE, *supra* note 38, at 509-13 (discussing individualism); *id.* at 513-17 (discussing public associations); *id.* at 664-705 (discussing the influence that democratic ideas and sentiments exert upon political society).

43. See, e.g., *UCLG Constitution*, *supra* note 4, at pmbl. (“[L]ocal government is one of the main foundations of any democratic society, being the level of government closest to the people.”). The European Charter of Local Self-Government of 1985 (a.k.a. the Strasbourg Declaration) states that “[p]ublic responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen.” Eur. Consult. Ass., *European Charter of Local Self-Government*, art. 4(3), Oct. 15, 1985, E.J.S. Doc. No. 122 [hereinafter *European Charter of Local Self Government*]. “Sustainable human settlements development can be achieved ‘through the effective decentralization of responsibilities, policy management, decision-making authority and sufficient resources, including revenue collection authority, to local authorities, closest to and most representative of their constituencies.’” United Nations Human Settlements Programme [UN-HABITAT], Governing Council, *Draft Guidelines on De-Centralization and the Strengthening of Local Authorities*, U.N. Doc. HSP/GC/21/2/Add.2 (Dec. 1, 2006) [hereinafter *Draft Guidelines on Decentralization*] (emphasis added).

ubiquitous reference is used to convey a series of related claims around what we might call the virtue of localism.<sup>44</sup> To be “closest to the people” thus evokes government attuned and responsive to local needs and concerns, and adept at setting priorities. It suggests an intimate relationship between the governing and the governed and the forging of a community of interest, through the construction of a space where the “people” can be most invested in political/policy choices that matter to them.<sup>45</sup> In this way, “local” government becomes a promise of fulfillment of the highest ideals of the participatory rights of self-government and the incubator of the natural democratic impulse.<sup>46</sup> The intimacy invoked by the allusion to government “closest to the people” thus also lays claim to a high degree of legitimacy. In addition, to the extent that urban citizens have come to be viewed not only through the lens of citizenship but as consumers of city services, the closeness of local government serves to reinforce the sense that through its self-government each city is free to establish the package of services/benefits most congruent with the resident-citizen’s particular mix of desires and capacities, which in turn produces a city which in theory reflects the community.<sup>47</sup>

Like all other human communities the city is imagined and constructed, and not in any sense natural, necessary or closed.<sup>48</sup> Nonetheless, as we have seen, the city continues to capture and encapsulate a series of overlap-

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44. See, e.g., Blank, *supra* note 2, at 936. Of course, localism is not an unambiguous good, and historically it has been deployed strategically in pursuit of particular political programs. See, e.g., Joan Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 117-18 (1986). For a useful summary of the pros and cons of local autonomy see INT’L COUNCIL ON HUMAN RIGHTS POLICY, LOCAL RULE: DECENTRALISATION AND HUMAN RIGHTS (2002) [hereinafter LOCAL RULE], available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/JBRN-7LPK5G/\\$file/ICHRP\\_Jan2002.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/JBRN-7LPK5G/$file/ICHRP_Jan2002.pdf?openelement).

45. The nexus between the right to public participation, democracy, and local government is the basis of the European Charter of Local Self Government: “Considering that the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member States of the Council of Europe; Considering that it is at local level that this right can be most directly exercised.” European Charter of Local Self Government, *supra* note 43, at pmb1.

46. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 3 (1927) (“Democracy must begin at home, and its home is the neighborly community.”). Dewey endorsed the idea, espoused by de Tocqueville, that public participation in decision making at the local level trains the citizen to democracy, and was greatly concerned that the demise of local participation was leading to the erosion of democratic capacity at the national level. *See id.*

47. See generally Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For an analysis and critique of Tiebout’s position, see Frug, *supra* note 9.

48. See, e.g., Blank, *Comparative Visions*, *supra* note 3, at 277 n.61 (“[T]he very concept of the ‘local’ has been invented and made possible only by the evolution of national systems throughout the world.”).



ping powerful images and promises. The local is where things happen. When UCLG refers to the local as “vital” and a “force,” the organization is tapping into a powerful ethos. An ethos with a built-in double edge, for to the extent that the local is where public participation is really possible—where government can be responsive to local needs and provide urban consumers with the right package of services and benefits in order to co-create the ideal community—no other level can hope to compete.<sup>49</sup> By contrast, the national level is painted as a space where community and public participation are weak or non-existent.<sup>50</sup> In contrast to the local, the national is posited as “distant” from the people and unresponsive to community needs.<sup>51</sup>

In theory, the international level is even further removed from the people, and by implication should be viewed as the least responsive and the least legitimate level of government. Paradoxically, however, the strategy of the cities has been to tender their local legitimacy to cure this defect of the international. Cities, in other words, have embraced the international and encouraged international organizations such as the United Nations, the European Union and the World Bank to make a space for and enable the local. Through the local, cities seem to promise that the international can, at last, achieve its aims and promote its deepest values.<sup>52</sup>

### **B. Leaving the State Behind—The Forging of Local-International Relations**

The cities’ common localist agenda—the pursuit of city self-determination—has been pursued aggressively in a variety of international venues, from the Council of Europe, to the European Union, the United Nations, the World Bank and the OECD.<sup>53</sup> But cities’ interest in engaging the international has not been limited to obtaining the moral and political endorsement of their goals by international organizations. Rather, cities have

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49. According to Frug, “cities can provide the kind of personal, day-to-day contact among citizens and between citizens and their elected officials that community building requires.” FRUG, *supra* note 21, at 12.

50. Frug, *supra* note 2, at 1069 (“[I]ndividual involvement in decision-making is impossible except on a small scale”).

51. *See id.* at 1068.

52. Horst Rutsch, *Decentralization Promotes Cooperation*, U.N. CHRON., Mar.–May 2001, at 22, available at <http://www.un.org/Pubs/chronicle/2001/issue1/0101p22.htm> (“National and regional governments cannot faithfully reflect the needs of urbanized centers; they are too far removed from the day-to-day at the local level, from the root of the human system. . . . We need the United Nations to recognize local governments as essential partners.”).

53. *See* Blank, *Comparative Visions*, *supra* note 3, at 267.

leveraged their claims to city self-determination to pursue the more practical goal of obtaining direct international funding for city based projects.<sup>54</sup> The ability to gain access to significant external financial resources is for cities not only a sign of their growing enfranchisement from state authority but a necessary condition if they are to enjoy the capacity to forge their own destiny.

The cities' ambitions have been met by an almost universal approval among international organizations. Indeed, it is possible to identify a convergence of interests between cities and international organizations and the forging of a common agenda. The main tenets of the common agenda are the promotion of greater local autonomy, decentralization, subsidiarity, and good governance. International organizations have endorsed localist claims and their agenda of increasing relative power vis-à-vis the state,<sup>55</sup> but they have done so in large measure because they were already bent on a similar path under the aegis of "good governance." A critique of the "good governance" international agenda is beyond the scope of this paper.<sup>56</sup> Nonetheless, it is important to note that while the idea of governance (either descriptively or programmatically) has no inherent political or ideological valence, in its current international manifestation, "good governance" is strongly associated with the neoliberal commitment to world-wide privatization and open markets for services.<sup>57</sup> In other words, good governance has come to mean those institutional and regulatory conditions or reforms which will enable a well-functioning market for goods and services to emerge. Because it is inscribed within the neoliberal agenda, good governance has also been used to discredit the state, which is viewed as a hindrance and the primary source of market distortion. The state's traditional role as mediator among competing interests and political visions, its social justice responsibility, and its allocative and redistributive justice function and powers, are from this perspective, viewed as so many impediments to the market.<sup>58</sup> The focus on good governance has thus sought to erode tra-

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54. See Frug & Barron, *supra* note 3, at 59 (discussing how a city might accept funding from an international source to accomplish a city project but may create privatization instead of city empowerment as a result).

55. *Id.* at 31 ("Much of the literature about the international push for good governance seems to have in mind reform of national government practices and national legal rules.")

56. See generally Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT'L L. 199 (2005).

57. See Frug & Barron, *supra* note 3, at 58 (discussing Cities Alliance's position that cities are markets and that the emphasis should be modernizing their economies through private investments).

58. While the Washington Consensus and the neoliberal agenda that it spawned began to come under increasing criticism beginning in 1995, reform movements have hardly made a dent in the general assumption that the market is, if appropriately managed and monitored,

ditional models of government and politics, substituting in its place the adoption of best practices, a commitment to formal mechanisms of stakeholder participation in decision making, and the pursuit of public-private partnerships and foreign direct investment. Furthermore, since the concentration of power and resources at the state level was perceived as a significant part of the problem, it became a tenet of the new orthodoxy that decentralization and multilevel governance should be the order of the day.

When cities turned to international organizations, they thus found a receptive audience and a ready embrace. Among international organizations, perhaps the Council of Europe can be credited with being the cities' foremost advocate. Its European Charter of Local Self-Government adopted in 1985 is still today considered the defining legal statement on the principles of local self-government.<sup>59</sup> Meanwhile, the UN<sup>60</sup>, UN-HABITAT,<sup>61</sup> and the World Bank,<sup>62</sup> each in its own way accepted the cities' claims regarding the relative virtues of the local. The state, bureaucratic, unwieldy, often corrupt and in many cases captured by undemocratic regimes had disappointed the hopes of international organizations pursuing not only a form of economic development but the transformation of societies in the neo-liberal

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better able than the state to provide efficient public services, and that the state should, as far as possible, get out of the way of private market actors and foreign direct investment seeking to enter the market for services. For a succinct account of the major post-1995 critiques of neoliberalism see David Kennedy, *The "Rule of Law", Political Choices and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 11, at 95.

59. See European Charter of Local Self Government, *supra* note 43. Because many of the European countries, members of the Council of Europe and parties to the European Charter on Local Self-Government are also members of the European Union, the principles from one arena slowly migrated into the other. A similar influence and migration is, of course, found in the context of the European Convention of Human Rights, a Council of Europe treaty. Within this new context, the cities' claims for empowerment were re-articulated in the European language of subsidiarity, and re-framed to speak to the debate over democratic legitimacy.

60. See, e.g., Declaration on Cities and Other Human Settlements in the New Millennium, G.A. Res. S25/2, Annex, U.N. Doc A/RES/S-25/2/Annex (Aug. 21, 2001).

61. The United Nations Human Settlements Programme (UN-HABITAT), which grew out of the United Nations Centre on Human Settlements, was established as a fully fledged U.N. Programme under the auspices of the Economic and Social Council in 2002. Its mission is to fulfill the mandate of the Habitat Agenda and the Istanbul Declaration of 1996: "To promote socially and environmentally sustainable human settlements, developments and the achievement of adequate shelter for all." See United Nations Human Settlements Programme, Mission Statement, <http://www.unhabitat.org/categories.asp?catid=10> (last visited Feb. 16, 2009). For a summary of the history of the evolution of the United Nations Human Settlements Programme see Blank, *supra* note 2, *passim*.

62. THE WORLD BANK, *supra* note 17 (presenting the World Bank's vision of its mission with respect to cities and painting the image of cities as the "ground troops" of development—a curiously militarized metaphor).

image. By contrast, the city was considered to offer the greatest potential for democratic empowerment, accountability, flexibility, responsiveness to major stakeholders (including international organizations, public and private investors) and local knowledge. Furthermore, properly managed, it was thought, cities could deliver economic efficiencies to development projects. The result was that international organizations, responding to cities' demands, have adopted the city as an ideal partner to realize their development goals.<sup>63</sup> One concrete result is that the international community has begun to act as a conduit for direct financing of urban projects in conjunction with the promotion of private financing in the form of foreign direct investment.<sup>64</sup> More and more projects are being funded at the local level, with minimal national participation.

While it is unclear whether the new intimacy between cities and international organizations has substantially transformed the state-city relationship, there is no question that the vision of the ideal city (like the image of the ideal liberal state before it) is increasingly being shaped by international organizations. For instance, the World Bank, in its report *CITIES IN TRANSITION*, begins by identifying four urban trends that it claims the Bank is responding to: urbanization, decentralization, globalization and government renewal (governance and privatization).<sup>65</sup> Based on these urban trends that the Bank claims to be following, rather than leading, the Bank proceeds to map out four dimensions that it has determined are key to a conception of "sustainable cities": (1) livability; (2) competitiveness; (3) being well governed and managed; and (4) being bankable.<sup>66</sup> World Bank funding of urban projects will naturally be driven by, and conditioned on, the degree to which a city meets or is pursuing these goals. Meanwhile, in support of the Habitat Agenda<sup>67</sup> and the Istanbul Declaration<sup>68</sup> goal of "sustainable human settlements development in an urbanizing world,"<sup>69</sup>

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63. Blank describes the general consensus regarding the desirability of decentralization and local empowerment as driven by a conjunction of three disparate ideological justifications: (1) economic efficiency and development; (2) localities as instruments for community empowerment and pluralism; and (3) vehicles for spreading democracy around the world. See Blank, *supra* note 2, at 880.

64. See, e.g., THE WORLD BANK, *supra* note 17, at 15 (explicitly noting that the Bank's urban strategy requires that it engages with cities directly rather than working through states).

65. *Id.* at 32-35.

66. *Id.* at 35.

67. Conference of Non-Governmental Organizations Consultative Relationship with the United Nations, Istanbul, Turk., June 3-14, 1996, *Report of the United Nations Conference on Human Settlements (Habitat II)*, Annex I, U.N. Doc. A/CONF.165/14 (June 14, 1996).

68. *Id.* at Annex I.

69. *Id.* at Annex I, ¶ 1.

Habitat launched a Global Campaign on Urban Governance in 1999.<sup>70</sup> This campaign seeks “to contribute to the eradication of poverty through improved urban governance . . . [and seeks to] increase the capacity of local governments and other stakeholders to practice good urban governance.”<sup>71</sup> Not surprisingly, on the side of the cities the agenda has begun to sound rather similar: “Effective local governance can make cities more competitive, more efficient and more attractive to investors and workers by promoting the sustainable development of the urban environment.”<sup>72</sup>

1. *Decentralization—In Search of Democratization*

“Decentralization has quietly become a fashion of our time,”<sup>73</sup> popular among all political tendencies and countries with every kind of regime, from the most democratic to the most authoritative. The object of decentralization is to disperse real power (authority and responsibility) to lower levels of decision-making. Unlike a hierarchical centralized authority which delegates responsibilities to lower levels but retains overall control over planning, management, and implementation of centrally established policies, in a decentralized system, lower level authorities are empowered to determine their own policy choices and implementation strategies with minimum interference from the higher levels. In a highly decentralized system, lower levels of governance may achieve substantial autonomy. The two main benefits that decentralization is said to deliver are allocative

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70. United Nations Human Settlements Programme, Global Campaign on Urban Governance, <http://www.unhabitat.org/content.asp?cid=2095&catid=25&typeid=24&subMenuId=0> (last visited Feb. 16, 2009). The goal of the campaign according to the concept paper is an “inclusive city, a place where everyone, regardless of wealth, gender, age, race or religion, is enabled to participate productively and positively in the opportunities cities have to offer.” U.N. Human Settlements Programme [UN-HABITAT], *Concept Paper, The Global Campaign on Urban Governance*, U.N. Doc HS/650/02E (Mar. 2002) [hereinafter *Global Campaign Concept Paper*].

71. *Global Campaign Concept Paper, supra* 70, at 3.

72. THE CITIES ALLIANCE, LIVEABLE CITIES: THE BENEFITS OF URBAN ENVIRONMENTAL PLANNING, at xvii (2007) [hereinafter LIVEABLE CITIES], available at [http://www.unep.org/urban\\_environment/PDFs/LiveableCities.pdf](http://www.unep.org/urban_environment/PDFs/LiveableCities.pdf).

73. PANEL ON URBAN POPULATION DYNAMICS & NAT'L RESEARCH COUNCIL, CITIES TRANSFORMED: DEMOGRAPHIC CHANGE AND ITS IMPLICATIONS IN THE DEVELOPING WORLD 372 (Mark R. Montgomery et al. eds., 2003) [hereinafter CITIES TRANSFORMED] (quoting J. MANOR, THE POLITICAL ECONOMY OF DEMOCRATIC DECENTRALIZATION (1999)). See also WENDY S. AYRES, WORLD BANK, SUPPORTING DECENTRALIZATION: THE ROLE AND EXPERIENCE OF THE WORLD BANK (2005), available at [http://www.ciesin.org/decentralization/English/General/World\\_Bank\\_exp.pdf](http://www.ciesin.org/decentralization/English/General/World_Bank_exp.pdf). At the country level a remarkable example of decentralization is that of Brazil. See generally Edésio Fernandes, *Constructing the “Right to the City” in Brazil*, 16 SOC. & LEGAL STUD. 201 (2007).

efficiency and improved governance.<sup>74</sup> Though the objective of decentralization promoted by cities has been broadly accepted at the national, regional and international levels,<sup>75</sup> there is no single model of decentralization. Among the most sensitive subjects in a decentralized system of government is the extent to which lower levels are granted revenue raising powers and fiscal autonomy in budget setting.<sup>76</sup> A related problem is that even in strongly decentralized systems, the allocation of powers and responsibilities over specific domains is rarely exclusive.<sup>77</sup>

In an organizational setting, the strategy of decentralization has been justified mostly on efficiency grounds.<sup>78</sup> In the political realm, on the other hand, the primary justification has been the claim that lower levels of government are naturally more democratic (or have a greater democratic potential).<sup>79</sup> There is, however, a close connection between the two. The primary virtue of democratization at the lower level is not simply that of public participation as identity formation and destiny fulfillment, rather the underlying assumption is that public participation and more narrowly confined democratic processes will produce better results, that is, policies more tailored to the practical context and actual needs of the community.<sup>80</sup> Furthermore, liberal political theory, which stresses the voluntary character of political ordering, is committed to the idea that political legitimacy is corre-

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74. See Johannes Jütting et al., *Decentralization and Poverty in Developing Countries: Exploring their Impact 8-9* (Organisation for Econ. Co-operation and Dev., Working Paper No. 236, 2004), available at <http://www.oecd.org/dataoecd/40/19/33648213.pdf>.

75. See, e.g., Blank, *Cooperative Visions*, *supra* note 3, at 267 (noting EU and UN-Habitat acceptance).

76. There is extensive literature on fiscal decentralization, which is distinguished from political decentralization, and considered by many a *sine qua non* of successful decentralization. See, e.g., *id.* at 15. For a thorough treatment of the subject see HANDBOOK OF FISCAL FEDERALISM (Ehtisham Ahmad & Giorgio Brosio eds., 2006).

77. The principle of subsidiarity is an attempt at giving a rational and consistent solution to this problem. For a discussion of subsidiarity as it relates to cities see *infra* note 90.

78. See LOCAL RULE, *supra* note 44, at 16.

79. See *id.*

80. The United Nations Development Programme (“UNDP”) has, for instance, a very active service line in support of decentralisation, local governance, and urban/rural development. According to its 2004 report, it supports decentralization activities in two thirds of the countries in which it is involved. See U.N. DEV. PROGRAM, DECENTRALISED GOVERNANCE FOR DEVELOPMENT: A COMBINED PRACTICE NOTE ON DECENTRALISATION, LOCAL GOVERNANCE AND URBAN/RURAL DEVELOPMENT (2004), available at [http://www.undp.org/governance/docs/DLGUD\\_PN\\_English.pdf](http://www.undp.org/governance/docs/DLGUD_PN_English.pdf). UNDP’s support for decentralization is premised on the assumption that more responsive local authorities will be more effective at responding to the needs of the most vulnerable sectors of society. *Id.* at 2. But see STATE OF THE WORLD’S CITIES, *supra* note 18, at xii (making the case that in fact centralized systems have, so far, done better at meeting the Millennium Development Goal target of slum reduction).

lated to the degree of opportunity for public participation in decision-making.<sup>81</sup> In the governmental realm, then, decentralization promises both democratic legitimacy and political efficiency, not least because the smaller the governmental unit, the more accountable and transparent it is expected to be.

Cities are well placed to benefit from a strategy of political decentralization for they have a pre-existing claim to democratic legitimacy. Indeed, the vast majority of cities around the world, regardless of their actual degree of autonomy, are governed by officials elected through a democratic process.<sup>82</sup> In the national context, cities have learned to marshal their democratic legitimacy claims in their struggle to gain (or retain) relative autonomy from the state. In the international context, decentralization to the local level has become a call to arms in defense of worldwide democratization,<sup>83</sup> and is being promoted as a necessary element, in the pursuit of good governance.<sup>84</sup>

From the states' perspective, decentralization is often perceived as a mixed blessing. State governments are not averse to enabling cities to take on a greater degree of responsibility for day to day decision-making and policy implementation.<sup>85</sup> However, central governments are rarely prepared to grant a significant degree of autonomy to their cities, especially in

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81. See Blank, *supra* note 2, at 896.

82. Blank, *supra* note 2, at 936 (“Localities throughout the globe have, by and large, maintained their basic democratic aspect, since in many of them some form of democratic elections are mandated by the law in order to choose local officials.”).

83. The final day of the Congress also saw the launch of The *Global Report on Decentralization and Local Democracy*, the world’s first study dedicated to decentralization. See UNITED CITIES AND LOCAL GOVERNMENTS, GLOBAL REPORT ON DECENTRALIZATION AND LOCAL DEMOCRACY IN THE WORLD (2008), available at [http://www.cities-localgovernments.org/gold/Upload/gold\\_report/gold\\_report\\_en.pdf](http://www.cities-localgovernments.org/gold/Upload/gold_report/gold_report_en.pdf). Structured around chapters featuring comparative studies of decentralisation in different continents, the report observes that a “quiet democratic revolution” is spreading across the world as the local democracy movement gathers momentum. Cities Alliance, Mayors Vow to Fight Climate Change at Second UCLG World Congress, <http://www.citiesalliance.org/publications/homepage-features/nov-07/vow-uclg-congress.html> (last visited Feb. 16, 2009) [hereinafter Mayors Vow to Fight Climate Change].

84. *Draft Guidelines on Decentralization*, *supra* note 43, ¶ A(1) (“Political decentralization to the local level is an essential component of democratization, good governance and citizen engagement; it should involve an appropriate combination of representative and participatory democracy.”).

85. CITIES TRANSFORMED, *supra* note 73, at 7 (“Solutions to urban problems are increasingly being sought at the local level as central governments cede responsibilities in basic service delivery, giving local authorities more opportunity to take charge of services that affect the daily lives of their residents.”).

respect of fiscal and budgetary matters.<sup>86</sup> States, in other words, even when they favor decentralization, wish to control the process and shape the outcome. In many cases, such decentralization resembles delegation rather than an effective disaggregation of power. For cities—hungry for more autonomy and ready to take up the reins of their own destiny—delegation style decentralization is a poor second best. International organizations, it appears, have, for the most part taken the side of the cities in the struggle over the scope of decentralization.<sup>87</sup> Perhaps because international organizations must always contend against states' criticism of their own democratic illegitimacy, or because states sometimes stand in the way of development agendas crafted for them by international organizations, many international organizations have adopted as their own the decentralization strategy of the cities.<sup>88</sup>

## 2. Globalization, Subsidiarity and the City

While political decentralization and the principle of subsidiarity refer to distinct goals and processes, in practice they are closely linked. Indeed, subsidiarity is said to serve the goal of decentralization and both decentralization and subsidiarity are associated with the ideal of public participation in decision making.<sup>89</sup> Thus, both hold out the promise of providing new democratic legitimacy. In Europe, the principle of subsidiarity is closely tied to a concern with the infamous “democratic deficit” of the EU.<sup>90</sup> This principle arose from a context in which an international organization was thought to be exercising excessive regulatory power, without democratic

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86. A similar concept is found within the concept of federalism and the distribution of power among municipal, state, and national governments. See Roderick M. Hills, Jr., *Is Federalism Good For Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 195-96 (2005) (noting that advocates of decentralization believe that local governments should face “hard budget constraints”).

87. See Blank, *Comparative Visions*, *supra* note 3, at 267.

88. See *infra* note 105 and accompanying text.

89. This again is analogous to the concept of federalism in both the United States and Europe. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 405 (1994) (noting arguments that subsidiarity increases public participation); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 611 (2007) (linking decentralization to increased public participation).

90. The principle of subsidiarity was introduced into European law in Article 3b of the Maastricht Treaty establishing the European Community. Treaty on European Union, Art. 3b, Feb. 7, 1992, 1992 O.J. (C 325) 41-42.



accountability, while overstepping the domestic choices of the Member States.<sup>91</sup>

The failed Draft Constitutional Treaty for Europe<sup>92</sup> incorporated a number of provisions which sought to strengthen and broaden Europe's commitment to the principle of subsidiarity as a means to correct its apparent democratic deficiency. Among the gains, from the perspective of cities, were the Draft Treaty's new inclusive definition of subsidiarity to include the regional and local levels,<sup>93</sup> and the new Protocol on Subsidiarity and Proportionality.<sup>94</sup> In addition, for the first time in a European treaty document, the Draft Constitutional Treaty included explicit mention of the principle of local and regional self-government. Subsequent to the defeat of the Constitutional Treaty, following the French and Dutch 'no' votes, representatives of Europe's cities and the Committee of the Regions<sup>95</sup> reiterated their firm commitment to the European project. Arguing that the Treaty's defeat demonstrated the disenchantment of many citizens with the excessive centralizing trends at the national and European levels, the cities and regions insisted not only on retaining the constitutional gains made in the failed Treaty, but proposed that any new Treaty should "include reference to the European Charter of Local Self-Government which now effectively forms part of our common 'acquis.'"<sup>96</sup>

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91. *See generally* Bermann, *supra* note 91. The claim of a "democratic deficit" has led to a lively debate among academics. Regardless, whether the European Union is in any meaningful way less "democratic" than other political entities, including the Member States, many of its reforms have been driven by this perception of a "lack."

92. *See infra* note 97 and accompanying text.

93. *Id.*

94. *See* Protocol on the Application of the Principles of Subsidiarity and Proportionality, Dec. 16, 2004, 2004 O.J. (C 310) 208 [hereinafter Protocol on Subsidiarity and Proportionality].

95. The Committee of the Regions (CoR), set up as an advisory body of the EU by the Maastricht Treaty of 1992, is composed of representatives of the regions and local governments. The Treaty on European Union requires the Commission and the Council to consult the CoR in areas such as "regional policy, the environment, education and transport." Europa.eu, The Committee of the Regions, [http://europa.eu/institutions/consultative/cor/index\\_en.htm](http://europa.eu/institutions/consultative/cor/index_en.htm) (last visited Feb. 16, 2009). *See also* Treaty on European Union, art. 198c, Feb. 7, 1992, 1992 O.J. (C 224) 87. The role of the Committee of the Regions is to put forward the local and regional points of view on EU legislation. It does so by issuing opinions on Commission proposals. It has, however, no legislative function and is not considered an institution of the EU.

96. COUNCIL OF EUROPEAN MUNICIPALITIES AND REGIONS, INNSBRUCK, AUSTRIA, DECLARATION ON THE FUTURE OF PUBLIC SERVICES IN EUROPE: MEETING THE NEEDS OF OUR CITIZENS § I(8) (2006) [hereinafter INNSBRUCK DECLARATION], available at [http://www.ccre.org/docs/innsbruck\\_declaration\\_finale\\_en.doc](http://www.ccre.org/docs/innsbruck_declaration_finale_en.doc).

While the cities and regions of Europe were not successful in extending their gains, the new Treaty of Lisbon does retain the language of the Constitutional Treaty in respect to subsidiarity at the regional and local levels:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.<sup>97</sup>

Despite the rhetoric, there is scant evidence that the European Union's embrace of the principle of subsidiarity since 1992 has so far led to any positive results in terms of increased powers for cities. European Court of Justice ("ECJ") decisions involving city powers, for instance, treat cities and their activities as indistinguishable from the central government and therefore equally obligated under EU disciplines.<sup>98</sup>

Thus, it is not clear that Europe's cities and regions have so far been net gainers in terms of real autonomy as a result of their host state's accession to the European Union, (in contrast to the gains achieved through the

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97. Treaty of Lisbon, art. 5(3), Dec. 17, 2007, 2007 O.J. (C 306) 50 (emphasis added). The Treaty of Lisbon also retains the Protocol on Subsidiarity and Proportionality. *See supra* note 94. Since the Irish "no" vote on ratification on June 12, 2008, the future of the Treaty of Lisbon is presently unknown. It appears, however overwhelmingly probable that whatever instruments are ultimately adopted by the EU as it moves forward, the gains of the cities and regions will be safe. For gains made and preserved in the Treaty of Lisbon see *Mandate Given to the IGC Retains Gains Secured by Europe's Cities and Regions Under the Constitutional Treaty*, REGIONS AND CITIES OF EUROPE (Committee of the Regions, Brussels, Belg.), Oct.-Dec. 2007, at 8, available at [http://www.cor.europa.eu/migrated\\_data/newsletter\\_en\\_57.pdf](http://www.cor.europa.eu/migrated_data/newsletter_en_57.pdf).

98. *See* Yishai Blank (unpublished manuscript on EU and cities on file with author); *see also* Fernanda Nicola (unpublished manuscript on EU and cities on file with author). If anything it appears that the ECJ has been cropping away city privileges even when these have been specifically recognized within the internal order of the Member State. In effect, any time that city power intrudes into free movement principles, the ECJ has deemed city privilege illegitimate. While the effect of these decisions has been to reduce the scope of city powers, however, it has not been to the advantage of the host state. Rather, both cities and their host states have emerged as losers in so far as their common determination about appropriate city powers has been undermined by the court. The position of cities and regions relative to the ECJ may, however, be about to change significantly. If and when the Treaty of Lisbon (or its functional equivalent) is ratified by the Member States, the Committee of the Regions, which represents the interests of both cities and regions, will for the first time be granted *locus standi* before the ECJ in cases where the Committee considers that the EU has breached the principle of subsidiarity. *See* Protocol on Subsidiarity and Proportionality, *supra* note 94. The Treaty of Lisbon incorporates the Protocol as an Appendix. This new potential visibility of the particular concerns and interests of cities and regions in subsidiarity cases before the ECJ, may very well help cities establish the principle that their claims to functional autonomy are real, and that their rights and powers are not to be dismissed by the ECJ as indistinguishable from their host state's.

Council of Europe's endorsement of the European Charter of Local Self-Government). On the other hand it does appear that the European Commission has begun to acknowledge the special role of cities and regions. Not only is the Commission now seeking new opportunities to provide direct funding to cities and regions, but it is calling on them to play a more active international role.<sup>99</sup>

While the principle of subsidiarity is closely associated with the development of the European Union, and was originally promoted by the Member States who sought a means to curb the "competence creep" of the community and its regulatory expansion into fields once reserved to the nation state,<sup>100</sup> the principle has now migrated beyond its original context. For instance, the proposed draft World Charter for Local Self-Government (1998) endorses the principle<sup>101</sup> and states: "In accordance with the principle of subsidiarity, public responsibilities shall generally be exercised by those authorities which are closest to the citizen. In the same spirit, any allocation of responsibility to another authority must be based on the requirements of technical or economic efficiency."<sup>102</sup>

99. As one official stated:

Globalisation increases the need for subsidiarity, and that is no paradox. For the regions are now the leading territorial units at which level knowledge is transferred and local innovation systems are built and which vie with each other to attract investment. . . . This is why I am calling on the regions of Europe to connect to the world, to give their economies an international dimension, to attract researchers, to strengthen the fabric of small businesses, to create centres of excellence and to enter fully into the international network economy.

Jose Manuel Durao Barroso, President of the European Comm'n, Regions and Cities in a Challenging World, Address at Open Days 2008: European Week of Regions and Cities (Oct. 6, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/493&format=HTML&aged=0&language=EN&guiLanguage=en>.

100. There is a nice irony in the fact that a principle that was promulgated to guard the member states' prerogatives from untoward intrusion by the European institutions has come to serve the joint ends of the Union and the local authorities.

101. The project for a World Charter for Local Self-Government ("WACLAC") was a joint project undertaken by WACLAC and UN-HABITAT following the 1996 Istanbul "Cities Summit." The European Charter, a Council of Europe Treaty, which predates the introduction of the principle of subsidiarity into EC/EU instruments, not surprisingly makes no reference to "subsidiarity." Given that the European Charter was the model for the World Charter, we can see the principle of subsidiarity migrating from the EU to the World Charter through the active participation of the leaders of cities whose host states are both members of the EU and parties to the Charter.

102. United Nations Human Settlements Programme & World Ass'ns of Cities and Local Authorities Coordination, *Draft Joint Consultation Document: Towards a World Charter of Local Self-Government*, art. 4(3) (May 1998) [hereinafter *Draft Joint Consultation Document*], available at <http://www.gdrc.org/u-gov/charter.html>. The Preamble draws a strong connection between the principle and the values of democracy and participation: "Convinced that the principle of subsidiarity is the basis for democratic and participatory devel-

The project for a World Charter for Local Self-Government is for the moment derailed.<sup>103</sup> City associations and their partner, UN-HABITAT, however, have for now accepted a less ambitious goal of softer “guidelines.”<sup>104</sup> Like the Draft World Charter, the Draft Guidelines continue to promote the underlying goal of decentralization and strongly endorse the principle of subsidiarity: “[t]he principle of subsidiarity constitutes the rationale underlying to the process of decentralization. According to that principle, public responsibilities should be exercised by those elected authorities, which are closest to the citizens.”<sup>105</sup>

### C. Privatization and the City

Privatization of public services in cities is a trend that has been well documented around the world. No city service, however traditional, is immune to privatization. Cities have been transformed from providers to contract managers. Justification for privatization is largely economic. On the one hand, we are told, cities cannot afford the rising costs of service provision.<sup>106</sup> Furthermore, city provision of services makes poor economic sense as local governments are poor business managers, services are provided on a non competitive basis, and public employees are overpaid and under-worked. The result has been antiquated equipment, the deterioration of existing infrastructure, and the inability to provide services to all city residents. Private corporations have been brought in to build new infrastructure and to manage existing infrastructure. Corporations inject needed investment, business savvy, and the advantages of market specialization. But the accelerated urban privatization of the past two decades is also the result of the transposition of the international ideology of free markets to the realm of services and capital investment.<sup>107</sup> Thus, not only have once

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opment and that any allocation of tasks and responsibilities should abide by this principle.” *Id.* at pmb1.

103. See United Nations Human Settlements Programme, From a World Charter to Guidelines on Decentralization, <http://ww2.unhabitat.org/unacla/decentralisation.asp> (last visited Feb. 16, 2009).

104. Among the most significant differences between the *Draft World Charter* and the *Draft Guidelines on Decentralization* is that the former would have given cities procedural rights against their host states. See Blank, *supra* note 2, at 913.

105. *Draft Guidelines on Decentralization*, *supra* note 43, at B(1)(1).

106. As a result, “those who seek to save money through privatization rely in large part on cheapening the cost of labor.” Frug, *supra* note 9, at 88.

107. *But see* INNSBRUCK DECLARATION, *supra* note 96, ¶¶ 17-23 (demonstrating a desire among European municipalities for traditional public services to be treated as a distinct category, not subject to the EU disciplines for EU commercial services). It is too early to know whether municipalities will be successful in this attempt.

urban public services been privatized, they are increasingly provided by corporations fully or partially owned by foreign investors.

The fast growing cities of the global South are in particularly desperate need of additional infrastructure investment if they are to meet the most basic service needs of large segments of their residents. Fifty years of international development strategies have failed to address the needs of the world's poorest and most vulnerable urban residents, one billion of whom today live in slum conditions, including inadequate access to clean water and the most basic forms of sanitation.<sup>108</sup> The Millennium Development Goals ("MDGs"), approved by the international community under the auspices of the United Nations, have once again focused the world's attention on the unfulfilled promises of five decades of development strategies.<sup>109</sup> Though apparently ambitious, the actual MDG targets are relatively modest in relation to actual needs. Thus, for instance MDG 1, to "end poverty and hunger" by 2015, is in effect a commitment to halve the number of people whose income is less than \$1 a day.<sup>110</sup> Meanwhile, MDG 7, to "ensure environmental sustainability," includes among its four targets the commitment to halve the proportion of people without sustainable access to safe drinking water and basic sanitation<sup>111</sup> and by 2020 to have significantly improved the lives of 100 million slum dwellers.<sup>112</sup> The modesty of these ambitions in the face of the overall need shows the MDGs to be a creature of their time. Another way in which the MDGs reflect the ethos of their time is the fact that they acknowledge that the goals will not be met by government bounty alone. Instead, the emphasis is—as it has been increasingly in the past decade or two—on public-private partnerships and the contribution of the private sector.<sup>113</sup>

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108. UN-HABITAT's operational definition of slums focuses on five indicators at the level of the household: lack of water, lack of sanitation, overcrowding, non-durable housing structures, and lack of secure tenure. See STATE OF THE WORLD'S CITIES, *supra* note 18, at x-xi.

109. The eight Millennium Development Goals and their related targets are derived from the UN Millennium Declaration by which world leaders committed to a new global partnership to reduce extreme poverty by 2015. See generally G.A. Res. 55/2, U.N. Doc A/55/L.2 (Sept. 8, 2000) [hereinafter Millennium Declaration]. See also <http://www.un.org/millenniumgoals/>. For the most recent report see U.N. DEP'T ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2008 (Aug. 2008) [hereinafter MDG REPORT 2008], available at [http://www.un.org/millenniumgoals/2008highlevel/pdf/newsroom/mdg%20reports/MDG\\_Report\\_2008\\_ENGLISH.pdf](http://www.un.org/millenniumgoals/2008highlevel/pdf/newsroom/mdg%20reports/MDG_Report_2008_ENGLISH.pdf).

110. See MDG REPORT 2008, *supra* note 109, at 6.

111. See *id.* at 40.

112. See *id.* at 43.

113. See Millennium Declaration, *supra* note 109, §§ 20, 30; see also G.A. Res. 60/1, ¶¶ 21(e), 23(d) - (e), 24(d), 25(c), 68(c), 172-75, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter 2005 World Summit Outcome]; MDG REPORT 2008, *supra* note 109, at 4.

In May 1999, the World Bank in partnership with UN-HABITAT, launched Cities Alliance to serve as “a multi-donor coalition of cities and their development partners.”<sup>114</sup> Housed at the World Bank, but devoted to the pursuit of UN-HABITAT’s dual priorities of “cities without slums” and “city development strategies,” Cities Alliance is designed to “bring cities together in a *direct dialogue with bilateral and multilateral agencies and financial institutions*” and to “help cities develop sustainable financing strategies, and attract long-term capital investments for infrastructure and other services.”<sup>115</sup> Interestingly, UCLG is the recognized local government partner in the Consultative Group within the organizational structure of Cities Alliance.<sup>116</sup> Nonetheless, while Cities Alliance is targeted to achieving UN-HABITAT goals, it is also a vehicle designed to further the World Bank’s own New Urban and Local Government Strategy as set out in CITIES IN TRANSITION.<sup>117</sup> According to the World Bank, local authorities, rather than national authorities, are in practice responsible for the implementation of policies that will deliver basic services to city residents on an equitable basis.<sup>118</sup> The Bank’s turn to cities is arguably a strategy about enabling the private sector’s direct involvement in urban development by ensuring that local government has the capacity to facilitate and support these investment opportunities. From this viewpoint, local government then becomes the conduit for deep privatization of services as it contracts out its traditional functions to the private sector. Ultimately, then, the World Bank’s strategy envisages the transformation of the local government itself into a quasi-private economic actor, freed from excessive national control, able to enter and play the market game, while shedding some of its traditional public responsibilities.<sup>119</sup> The privatization of city services need not, of course, be considered a negative development. Indeed,

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114. See THE CITIES ALLIANCE, CHARTER, 1-2 (2006), <http://www.citiesalliance.org/doc/charter/charter-english-nov-dec-06.pdf>.

115. See About Cities Alliance, <http://citiesalliance.org/about-ca/about-ca.html> (last visited Feb. 16, 2009) (emphasis added).

116. See CITIES ALLIANCE, *supra* note 114, at § 22.

117. THE WORLD BANK, *supra* note 17 *passim*.

118. Municipalities bear the basic responsibilities of government at its lowest tier for allocating resources and promoting social equity, within constraints set by higher levels of government (which assign functions and fiscal authority), and for ensuring the provision of local public goods and services through partnership with the private sector and civil society. *Id.* at 44.

119. Mr. Cobbett once again highlighted the importance of mayors being in the driver’s seat of these processes and of all city interventions in his remarks at the Congress’s closing ceremonies, adding that “*Cities Alliance will strategically target direct grant funding to mayors, rather than to donor partners or national governments.*” See Mayors Vow to Fight Climate Change, *supra* note 83 (emphasis added).

some public services in some cities may well be most efficiently and equitably provided by the private sector.

Furthermore, if properly regulated or monitored, private provision of public services may serve as a healthy reminder that being private need not be incompatible with public responsibility. This is, perhaps, what the adoption of the terminology of public-private partnership is seeking to encourage. "Partnership" has both a personal and an economic relationship association. It connotes a shared interest in a particular set of goals. But of course, partnership does not necessarily mean equality and it remains to be seen whose interests, public or private, will shape the joint projects.

#### D. Conclusion

The joint cities and international organizations' ambition for greater autonomy and decentralization (based on the principle of subsidiarity) may seem attractive to the extent we associate this trend with community formation and democratic impulses. It is important to recognize, however, that it is also an attempt to shift the balance of powers, at a global scale, between the city and its host state. Indeed, the cities' new "autonomy," may turn out to be little more than illusion, in the face of the increasing regulatory role of the international institution, which has been tasked with, among other things, regulating the city-state relationship.<sup>120</sup> Moreover, in pursuit of their strategy, cities may contribute to the erosion of the belief in the very possibility of legitimate politics and community at the national level, a development which has potentially significant negative consequences. Furthermore, since at the city level, cities are embarking on a transition from government to governance, embracing not only the idea of increased public participation but the full participation of the private sector as stakeholders in local-decision making processes, it is unclear where significant political (versus policy) decisions are to be made.

Thus we could read the international turn to cities from at least two different perspectives. First, it could be viewed as driven by the identification of cities, hungry for additional resources to support their developmental and infrastructure needs, and accustomed to the reality of the need to compete for limited resources, as relatively hospitable sites for the introduction of a neo-liberal development agenda in which privatization of public services will play a significant role. Second, we could view the global trend,

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120. See Blank, *Comparative Visions*, *supra* note 3, at 267 (pointing out that decentralization implies some form of central authority beyond the state to decide between them, which ultimately tends to empower the relevant international institutions); Frug & Barron, *supra* note 3, at 6-11 (providing examples of recent international arbitral decisions that ignore the existing state-local authority division of powers).

in part, as evidence of the ways in which practices, principles and ideologies tend to migrate across regulatory fields. Thus, for instance, the principle of subsidiarity and the insistence on local empowerment have both entered the global discussion on the role and function of local government from the European zone.<sup>121</sup> European cities and their associations have taken the lead role in seeking to take their localist strategy global. They have been active participants in the launching of the worldwide UCLG and garnering support for the Draft Guidelines on Decentralization<sup>122</sup> and they continue to be active at the European level.<sup>123</sup> Whatever its causes, the one thing that is certain, is that the “global aspiration” of cities for local self-government, has been met more than halfway by the localist aspiration of international organizations promoting a brand of development that relies extensively on ensuring a regulatory and political environment that enables significant private sector investment.

## II. THE LOCALIZATION OF SUSTAINABLE DEVELOPMENT

In its 1987 report, “Our Common Future,” the Brundtland Commission adopted the concept of “sustainable development” to challenge the dominant paradigm of development as equivalent to economic growth.<sup>124</sup> The *Brundtland Report* is a long, conceptually ambitious and insightful document which makes a powerful case for the need to abandon “business as usual.”<sup>125</sup> At the heart of the Commission’s elaboration of the concept of sustainable development is the recognition that the three values of economic development, environmental protection, and equity (or social development) are, in practice, intimately interdependent and cannot, therefore, be achieved in isolation from one another.<sup>126</sup> Unfortunately, the bulk of the *Report* has receded into oblivion, whereas the first rather elliptical sentence of its “definition” of sustainable development has taken on a life of its own,

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121. Not just the Europe of the EU but also that of the Council of Europe.

122. See INNSBRUCK DECLARATION, *supra* note 96, at II(29) (“Our commitment to local self-government and the strengthening of local and regional government is not limited to the European continent, but is indeed a global aspiration.”).

123. For example, Eurocities, a network of more than 130 cities in over thirty countries in Europe, “gives cities a voice in Europe, by engaging in dialogue with the European institutions on all aspects of EU legislation, policies and programmes that have an impact on cities and their citizens.” Eurocities.eu, <http://www.eurocities.eu> (follow “about EUROCITIES” hyperlink) (last visited Feb. 27, 2009).

124. See Gro Harlem Brundtland, *World Commission on Environment and Development: Our Common Future*, Annex, delivered to the General Assembly, U.N. Doc. A/42/427 (Mar. 20, 1987).

125. *Id. passim*.

126. *Id.* ch. 2.



becoming the most commonly cited definition.<sup>127</sup> The term “sustainable development” was endorsed at the massive United Nations Conference on Environment and Development (“UNCED”) at Rio de Janeiro, Brazil in 1992,<sup>128</sup> and thereafter entered our common vocabulary. In a sense, both the *Rio Declaration*<sup>129</sup> and *Agenda 21*<sup>130</sup> sought to elaborate and frame the concept. In line with the emphasis of the *Brundtland Report*, these UNCED products were particularly attentive to equity issues and called for the complex integration of economic, social and environmental factors in decision-making for policy, planning and management at all levels of government.<sup>131</sup> In the years since the 1992 Earth Summit, the term “sustainable development” has been generally adopted by all sectors of society including government, civil society and private business, at the local, national and international levels and it has been touted as norm, legal principle, goal, action item, and process.<sup>132</sup> Yet, as is commonly remarked, the term suffers from a severe case of definitional ambiguity, which some have come to consider its greatest strength.<sup>133</sup> Strength or weakness, the term’s ambiguity is due in large part to the fact that like the terms “fairness” or

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127. *Id.* ch. 2 (“[S]ustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”). See also DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 200 (3d ed. 2007) (citing Michael Jacobs, *Sustainable Development as a Contested Concept*, in FAIRNESS AND FUTURITY: ESSAYS ON ENVIRONMENTAL SUSTAINABILITY AND SOCIAL JUSTICE 21-45 (Andrew Dobson ed., 1999)); PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 252-66 (2d ed. 2003); Osofsky, *supra* note 14; Stark, *supra* note 13, at 151-52. See generally Christopher D. Stone, *Deciphering “Sustainable Development”*, 69 CHI.-KENT L. REV. 977 (1994).

128. Also known as the Earth Summit, UNCED’s historical importance should not be overlooked. Beyond its substantive agenda, UNCED’s significance was due to the fact that it was the first major UN event scheduled to be held after the official end of the Cold War (when the demise of the Soviet Union was beyond doubt). The lead up to the Earth Summit was thus invested with the hope for a new era in international cooperation. It also marked the coming of age of the NGO movement. Announced as the second major global ‘environment’ conference it drew an unprecedented participation of NGOs in both the official events and in the parallel international civil society conference. Unfortunately, the historical moment also marked the advance of the neoliberal development model based on the so-called Washington Consensus at a time when it seemed that Western style capitalism had won the day and become universal dogma.

129. See generally *Rio Declaration*, *supra* note 15.

130. See generally *Agenda 21*, *supra* note 15.

131. See, e.g., *id.* ch. 8.

132. See, e.g., *id.* at princ. 8 (noting sustainable development as a goal and action item, and process).

133. See HUNTER ET AL., *supra* note 127, at 200 (arguing that the term’s “brilliant” ambiguity has allowed broad endorsement). The inherent ambiguity of the term in English is of course magnified in translation. In a similar vein, Stark considers the term to be “an intentional oxymoron, a paradox.” Stark, *supra* note 13, at 152.

“nuisance” it points to a standard rather than a definite measure.<sup>134</sup> At the root of the definitional problem is that sustainable development requires trade-offs between three important values, yet can tell us nothing determinate about the right balance. The concept’s insistence on environmental protection as a limit on development is only one side of the coin, for under certain circumstances the equity (social development) claims of the most vulnerable populations, may well tip the balance in favor of some development at the cost of the environment, while key environmental values may at times defeat both equity and economic development claims. The principle of sustainable development can guide us by reminding us of these competing needs and values, but ultimately, the trade-offs will depend on a political decision.

### A. The Geography of Sustainable Development

Born in the paradigmatic international fora of the Brundtland Commission and UNCED at a time of heightened awareness of global environmental challenges,<sup>135</sup> as a new, more complex, understanding of globalization was emerging; the concept of sustainable development was framed primarily in global terms. Furthermore, this period was also characterized by a newly invigorated post Cold War North-South dialogue, which is strongly reflected in the UNCED documents, with their insistence not just on interdependence but on the need for a new basis for North-South global cooperation.<sup>136</sup> Development strategy, for its part, has traditionally been framed as a national objective and, from this source, sustainable development inherited a national orientation. Nonetheless, from its inception the concept was not exclusively oriented towards the global or even the na-

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134. Jacobs makes a similar point, referring to sustainable development as a “contestable concept” not unlike democracy, liberty, and social justice. According to Jacobs such concepts are complex and normative, and bear two levels of meaning. The first level is unitary but vague, defined by a series of core ideas on which everyone can agree; while the second level is where the political contest occurs, as different users argue for different interpretations of the concept in practice. See HUNTER ET AL., *supra* note 127 (citing Michael Jacobs, *Sustainable Development as a Contested Concept*, in FAIRNESS AND FUTURITY: ESSAYS ON ENVIRONMENTAL SUSTAINABILITY AND SOCIAL JUSTICE, *supra* note 127, at 21-45).

135. Foremost among the common global environmental challenges that shaped attitudes was the global crisis of the depletion of the ozone layer which riveted international public attention in the mid-eighties, and led in 1987 to adoption of the breakthrough Montreal Protocol on Substances that Deplete the Ozone Layer. In this same period, two significant environmental disasters with international dimensions garnered considerable media attention: the Bhopal Union Carbide industrial accident (1984) and the Chernobyl nuclear disaster (1987).

136. See generally Ileana Porras, *The Rio Declaration: A New Basis for International Cooperation*, in GREENING INTERNATIONAL LAW 20 (Philippe Sands ed. 1994).

tional arena. Rather, sustainable development gained a dual preoccupation with the local and the global from its precursor in international environmental law and policy, as captured by the famous injunction to “think globally, act locally.”<sup>137</sup> Furthermore, from domestic environmental law and policy, sustainable development also inherited a strong concern with public participation in decision-making,<sup>138</sup> which also tends to emphasize the local. The idea that implementation must take place at the local level, has, if anything, gained ground in the time since UNCED. The result has been that despite its origins in the international arena sustainable development has become a predominantly localized objective.

### B. Short History of Local Sustainable Development—Local Agenda

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Already in 1987, the *Brundtland Report* highlighted the importance of cities for sustainable development.<sup>139</sup> The *Report* alluded to the increasing urbanization of the world in general, and in particular, to the unsustainable conditions in the fast growing cities of the developing world. The *Report* decried the trend towards greater centralization,<sup>140</sup> emphasized the need to strengthen local governments,<sup>141</sup> and promoted citizen involvement.<sup>142</sup> In 1992, following the lead of the *Brundtland Report*, UNCED’s *Agenda 21* addressed the sustainable development challenges of the city as a distinct geographical area in a chapter entitled “Promoting Sustainable Human Settlement Development.”<sup>143</sup> The chapter makes passing reference to rural settlements and to cities in developed countries. However, the bulk of the chapter is devoted to sustainable development objectives of particular concern to the large, poor, and growing cities of the developing world.<sup>144</sup> In addition, *Agenda 21* identified local authorities as a “major group”<sup>145</sup> con-

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137. A phrase usually credited to microbiologist René Dubos, who reportedly used the phrase while chairing an advisory panel during the United Nations Conference on the Human Environment, Stockholm 1972. See RALPH KEYES, THE QUOTE VERIFIER: WHO SAID WHAT, WHERE, AND WHEN 78 (2006).

138. See *Rio Declaration*, *supra* note 15, at princ. 4.

139. See *Brundtland*, *supra* note 124, at 235-58.

140. *Id.* at 240.

141. *Id.*

142. *Id.* at 247. In this respect, the *Brundtland Report* maps the cities’ localist agenda almost perfectly.

143. See *Agenda 21*, *supra* note 15, ch. 7.

144. *Id.*

145. See *id.* ch. 28 (“As the level of governance closest to the people, [local authorities] play a vital role in educating, mobilizing and responding to the public to promote sustainable development.”). Other major groups identified by *Agenda 21* include: Women; chil-

cerned in the process of sustainable development, under the umbrella of public participation.<sup>146</sup> Endorsing a proposal put forward by the International Council for Local Environmental Initiatives (“ICLEI”)<sup>147</sup> and a consortium of local government representatives and associations, UNCED encouraged local authorities to establish local initiatives referred to as Local Agenda 21, in support of the objectives of *Agenda 21*, recommending *inter alia* the establishment of international cooperation among local authorities in this field.<sup>148</sup> Furthermore, *Agenda 21* specifically called for the “decentralization of government services (relating to water services management) to local authorities, private enterprises and communities.”<sup>149</sup> As with the rest of *Agenda 21*, the emphasis throughout these chapters is on stakeholders, broad participation in decision-making, cooperation, and partnerships.

*Agenda 21* was a self-consciously ambitious global plan of action that was premised on significant additional financial resources being committed by, in particular, developed countries. However, even by the end of the Earth Summit, it had become clear that beyond the rhetoric there was little support for making the necessary additional financial commitments.<sup>150</sup> Nonetheless, the idea of sustainable development had been launched and quickly became a mainstay of international discourse. From 1992 onwards, no text emerging out of an international conference, whether intergovernmental or non-governmental, seemed complete without at least a passing reference to sustainable development,<sup>151</sup> a trend that continues to this day.

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dren and youth; indigenous people; NGOs; workers and trade unions; business and industry; scientific and technological communities; and farmers. *Id.* chs. 23-32.

146. *Id.* ch. 23 (“One of the fundamental prerequisites for the achievement of sustainable development is broad public participation.”).

147. International Council for Local Environmental Initiatives (ICLEI), an international cities association, was founded in 1990. In 2003, the organization was officially renamed “ICLEI-Local Governments for Sustainability” to better reflect the challenges facing local governments. Today, ICLEI counts over a thousand local governments as members. Its mission is to provide technical consulting, training, and information services to build capacity, share knowledge, and support local government in the implementation of sustainable development at the local level. International Council for Local Environmental Initiatives, ICLEI-Local Governments for Sustainability, <http://www.iclei.org/index.php?id=global-about-iclei> (last visited Feb. 16, 2009).

148. *See Agenda 21, supra* note 15, ch. 28.

149. *Id.* ch. 18.12.(o)(i).

150. *See generally* Press Release, Dev. & Human Rights, U.N. De’t of Pub. Info., Earth Summit Review Ends with Few Commitments (July 1997), *available at* <http://www.un.org/ecosocdev/geninfo/sustdev/es5final.htm>.

151. An interesting example is the inclusion of sustainable development as an “objective” of the WTO in the Marrakech Agreement Establishing the World Trade Organization. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994). Less surprising, perhaps, is

Among those most receptive to the new term were local governments and their associations, who starting in 1992, aggressively promoted the adoption of Local Agenda 21 initiatives, aided and abetted by urban experts, spatial planners and myriad environmental activists.<sup>152</sup>

On the international scene, as already mentioned above, environmental sustainability was listed as a central commitment of the Millennium Development Goals.<sup>153</sup> While neither cities nor local authorities were specifically mentioned in the UN Millennium Declaration, one of the targets committed to by the international community, and later placed under the MDG head of achieving “environmental sustainability,” was to substantially improve the condition of 100 million slum dwellers by the year 2020.<sup>154</sup> Furthermore, while the MDGs are global and not specific to cities, UN-HABITAT and others have successfully claimed the MDGs as their own<sup>155</sup> and in recent years it has become common place that cities are key sites and crucial partners for the achievement of the MDGs.<sup>156</sup>

the prominence of the concept in the Copenhagen Declaration on Social Development which states in part:

We are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of *sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people*. Equitable social development that recognizes empowering the poor to utilize environmental resources sustainably is a necessary foundation for sustainable development. We also recognize that broad-based and sustained economic growth in the context of sustainable development is necessary to sustain social development and social justice.

World Summit for Social Development, Copenhagen, Denmark, Mar. 6–12, 1995, *Report of the World Summit for Social Development*, Annex I, ¶ 6, U.N. Doc. A/CONF.166/9 (Apr. 19, 1995) (emphasis added). Sustainable development was also part of the agenda at the United Nations International Conference on Population and Development (ICPD), September 5–13, 1994, in Cairo, Egypt and at the Fourth UN Conference on Women, September 1995 in Beijing, China.

152. PETER BRAND & MICHAEL J. THOMAS, *URBAN ENVIRONMENTALISM: GLOBAL CHANGE AND THE MEDIATION OF LOCAL CONFLICT* 24 (2005) (describing a certain post Rio euphoria among urbanists and local authorities).

153. See *supra* note 109, at 7. The eight Millennium Development Goals and their related targets are derived from the UN Millennium Declaration which refers repeatedly to the need to achieve “sustainable development.”

154. See MDG REPORT 2008, *supra* note 109, at 45. This commitment was based on the “Cities Without Slums” action plan developed by the Cities Alliance in July 1999. See generally Cities Alliance, *Cities Without Slums Action Plan*, [http://www.citiesalliance.org/citiesalliancehomepage.nsf/Attachments/Cities+Without+Slums+Action+Plan/\\$File/brln\\_ap.pdf](http://www.citiesalliance.org/citiesalliancehomepage.nsf/Attachments/Cities+Without+Slums+Action+Plan/$File/brln_ap.pdf) (last visited Apr. 6, 2009).

155. See generally STATE OF THE WORLD’S CITIES, *supra* note 18.

156. For instance, Secretary General Kofi Annan noted in 2007 that “[w]hile our [Millennium Development] Goals are global . . . they can most effectively be achieved through action at local level.” *Development Goals Can be Achieved Through Local Action: Annan*,

The need to move beyond an ambitious agenda—such as *Agenda 21*—to implementation was the focus of the World Summit on Sustainable Development (“WSSD”) in Johannesburg 2002.<sup>157</sup> At Johannesburg, the international community reiterated its existing commitments, particularly those of Rio along with the MDGs. In a sign of the times, the Johannesburg Summit embraced the model of public-private partnerships as the best mechanism for implementing sustainable development, which for good or ill came to be identified as its defining feature.<sup>158</sup> The Summit’s emphasis on the need to move beyond agenda setting to a phase of implementation is also reflected in the main documents produced by the conference, the *Political Declaration*<sup>159</sup> and the *Plan of Implementation*.<sup>160</sup> No text coming out of the conference focuses on the city specifically or on the particular challenges of urbanization. For this reason, it has been argued that at Johannesburg cities receded back into the background.<sup>161</sup> Nonetheless, the texts produced at Johannesburg reflect the fact that by 2002, the international community had embraced the idea that local government (usually referred to as local authorities or local level) must be invoked alongside national and regional governments or levels whenever sustainable development is mentioned.<sup>162</sup>

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GLOBAL VOLUNTEER UPDATE, Oct. 2005, [http://newsletter.worldvolunteerweb.org/e\\_article000468232.cfm?x=b11,0,w](http://newsletter.worldvolunteerweb.org/e_article000468232.cfm?x=b11,0,w).

157. See generally World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26–Sept. 4, 2002, *Report of the World Summit on Sustainable Development*, U.N. Doc. A/CONF.199/20.

158. See generally Ved P. Nanda, *Sustainable Development, International Trade, and the Doha Agenda for Development*, 8 CHAP. L. REV. 53, 69 (2005) (noting the promotion of public-private partnerships as a special feature of the Johannesburg Summit); S. Jacob Scherr & R. Juge Gregg, *Johannesburg and Beyond: The 2002 World Summit on Sustainable Development and the Rise of Partnerships*, 18 GEO. INT’L ENVTL. L. REV. 425 (2006) (noting the emphasis on “partnerships” at the Johannesburg Summit). Today the general consensus is that private-public partnership model has failed to deliver. Among the greatest disappointments to advocates is that the private sector has initiated very few such partnerships. Beyond that, the public-private partnership model has failed to produce significant new funding for development projects.

159. World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26–Sept. 4, 2002, *Johannesburg Declaration on Sustainable Development*, U.N. Doc. A/CONF.199/L.6/Rev.2 (Sept. 4, 2002) [hereinafter *Johannesburg Declaration*].

160. World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26–Sept. 4, 2002, *Johannesburg Plan of Implementation*, Res. 2, Annex, U.N. Doc. A/CONF.199/20.

161. See BRAND & THOMAS, *supra* note 152, at 25.

162. *Johannesburg Declaration*, *supra* note 159, ¶ 5 (“Accordingly, we assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development—economic development, social development and environmental protection—at the *local, national, regional and global levels*.”(emphasis added)).

### C. Sustainable Development, Community and Public Participation

From its inception in the late eighties and early nineties, sustainable development has been strongly connected to the new demand for democratization as “public participation,”<sup>163</sup> a concern which it inherited from its precedents in international and national environmental law and policy. Indeed, sustainable development is often understood and defined as, not only a goal, but a process, which requires a high degree of public participation. The assumption is that somehow, giving participation rights, including information rights, to communities will lead to better and more equitable decision making.<sup>164</sup> While the developing international norm of public participation has both an international and a domestic dimension, the force of the principle is strongest at the domestic and local levels, where effective participation seems more realizable.

Critics of traditional development strategies and of what I have elsewhere termed “binge development,”<sup>165</sup> usually emphasize that the result of “major” projects is that the poor are sacrificed.<sup>166</sup> Indeed, in a

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163. The Rio Declaration states:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

*Rio Declaration*, *supra* note 15, at princ. 10. While it is true that *Rio Declaration* Principle 10 avoided the use of “rights” terminology, *see* Marc Pallemmaerts, *International Environmental Law from Stockholm to Rio: Back to the Future?*, in GREENING INTERNATIONAL LAW, *supra* note 136, at 12, it is nonetheless far reaching in scope and detail, and served as the basis for the further development of public participation rights and processes at the international, regional, and national levels. *See, e.g.*, Fourth Ministerial Conference Environment for Europe, Aarhus, Den., June 23–25, 1998, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, U.N. Doc. ECE/CEP/43 (Apr 21, 1998) [hereinafter *Aarhus Convention*].

164. Brundtland, *supra* note 124, ch. 1, ¶ 96 (“Making the difficult choices involved in achieving sustainable development will depend on the widespread support and involvement of an informed public and of NGOs, the scientific community, and industry. Their rights, roles and participation in development planning, decision-making, and project implementation should be expanded.”).

165. I use the term “binge development” to describe development practices pursued as though there were no limits or constraints, at a time when sustainable development has been acknowledged as the norm. *See* Ileana Porras, *Panama City Reflections: Growing the City in the Time of Sustainable Development*, 4 TENN. J.L. & POL’Y 357 (2009).

166. *See, e.g.*, David M. Driesen, *Sustainable Development and Market Liberalism’s Shotgun Wedding: Emission Trading Under the Kyoto Protocol*, 83 IND. L.J. 21, 43-42 (2008) (noting collateral effects on the poor from sustainable development projects).

sense, sustainable development, will often require “sacrifice” due to its ideal of balancing the interests of the present generation against those of future generations, and its almost explicit trade-off between the values of economic growth, environmental integrity, and equity concerns. Yet, in practice, only the poor are asked to sacrifice. Proponents of increased public participation assume that the more local involvement there is in decision making, the more likely the outcomes will reflect the diversity of interests, and in particular, the more likely the poor and vulnerable communities’ needs will be addressed.<sup>167</sup>

### III. THE CONVERGENCE OF TWO TRENDS: CITIES EMBRACE SUSTAINABLE DEVELOPMENT

Cities, it seems, have become the natural site for sustainable development and thus, the international community’s best hope for its achievement. Cities, and their worldwide associations, in turn, have embraced sustainable development, and in its wake—as I discuss in Part V below—have taken the lead in addressing climate change. The two trends that I have described above—the internationalization of cities and the localization of sustainable development—despite their different origins, have converged. Indeed, it turns out the two trends were never as far apart as we might have expected. Both drew to some extent on a common pool of values implicit in the claims of “local community” and the possibility of public participation in local decision making. Furthermore, both were shaped by the neoliberal development agenda that characterized the mid-eighties and nineties and that has left its imprint well into the twenty-first century, with its emphasis on good governance over government, and its insistence on foreign direct investment, privatization, and public-private partnerships as the best means to finance development projects. Finally, both trends, each in their own way, responded to growing world wide urbanization, giving the city and its problems greater prominence.<sup>168</sup> The synergy between the two

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167. For a variety of interesting literature on the subject see Rachael Unsworth, *Making Cities More Sustainable: People, Plans and Participation*, in EXPLORING SUSTAINABLE DEVELOPMENT: GEOGRAPHIC PERSPECTIVES, *supra* note 15, at 128-55; Sheila Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527 (2006); M. Lyons, C. Smuts & A. Stephens, *Participation, Empowerment and Sustainability: (How) Do the Links Work?* 38 (8) URB. STUD. 1233-51 (2001); D. Mitlin & J. Thompson, *Participatory Approaches in Urban Areas: Strengthening Civil Society or Reinforcing the Status Quo?*, 7(1) ENV’T & URBANIZATION 231-50 (1995).

168. For a sampling of the literature on global urbanization, see CITIES TRANSFORMED, *supra* note 73; STATE OF THE WORLD’S CITIES, *supra* note 18; WORLDWATCH INSTITUTE, STATE OF THE WORLD 2007: OUR URBAN FUTURE (2007); David Satterthwaite, *The Scale of Urban Change Worldwide 1950-2000 and its Underpinnings* (2005) (Human Settlements



trends has, in any case, made it seem natural that the privileged locus of sustainable development is the city, a claim that is taken up by cities, UCLG, the World Bank, the UN, UN-HABITAT, and a multiplicity of other international institutions as well as many academics and think tanks.<sup>169</sup>

Through their embrace of sustainable development—a matter of recognized global concern—cities have joined a worldwide community of interest, and have thereby achieved unprecedented visibility at the international level.<sup>170</sup> Indeed, the international community's pursuit of sustainable development has perhaps been one of the most significant drivers for the emergence and acceptance of a transnational association of cities at the international table.

### A. Sustainable Development and the City

Many city governments, as well as city associations, have explicitly committed themselves to sustainable development.<sup>171</sup> The problem, as David Satterthwaite and others have pointed out, is that “[s]uch a diverse range of environmental, economic, social, political, demographic, institutional and cultural goals have been said to be part of ‘sustainable development’ that most governments or international agencies can characterize some of what they do as contributing towards sustainable development.”<sup>172</sup> It thus becomes important to determine what is meant by sustainable development in the city. This is no easy matter—the literature on sustainable cities is vast and has grown by leaps and bounds in the last decade. It encompasses subjects as diverse as architectural design, preservation of cultural patrimony, new urbanism and smart growth,<sup>173</sup> green cities, transpor-

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Discussion Paper, International Institute for Environment and Development), available at <http://www.iied.org/pubs/pdfs/9531IIED.pdf>.

169. *Supra* note 17 and accompanying text.

170. Thus it comes as no surprise that UCLG stresses in the Preamble to its Constitution, “the vital role of local government as a force for sustainable development, good governance, sustainable urbanization and promotion of the rights of the citizen.” UCLG CONSTITUTION, *supra* note 4, art. 2 (emphasis added).

171. Satterthwaite, *supra* note 168, at 30.

172. David Satterthwaite, *Sustainable Cities or Cities that Contribute to Sustainable Development?*, 34 URB. STUD. 1667, 1668 (1997).

173. Smart growth and new urbanism, which are essentially land-use planning movements, did not arise out of a concern with sustainable development. They have, however, quite effectively capitalized on the idea. Smart growth, in particular, with its anti-sprawl philosophy, seems to coincide with at least some sustainable development concerns—yet its main selling points are the promise of community and quality of life issues. Neither smart growth nor the new urbanism are much concerned with either social justice issues or environmental issues per se. Nonetheless, their focus on higher density, walkability, public

tation policy, energy efficiency, technology pushing strategies, environmental justice, job creation, economic growth, poverty, renewable resource use, generation and disposal of biodegradable and non-biodegradable wastes, water supply, sanitation, health care, air pollution, migration, affordable housing, secure tenure, green spaces and parks, city ecology, security, and so on.<sup>174</sup> That the list of potential sustainable development concerns of the city is seemingly endless should not be surprising, given that the concept requires attention to the three important dimensions of economy, environment, and equity. In a sense, sustainable development has simply turned a new triple lens onto the familiar landscape of urban challenges and problems.

That sustainable development can encompass such a broad range of issues need not be considered a critical flaw, yet, it does present some difficulties. Which of these issues are to become the defining issues? How should a city set its sustainable development priorities and goals? Under what circumstances will it be legitimate for a city to claim it is pursuing sustainability? Or, for that matter, that it has become sustainable? One plausible response would be that we should let a thousand (sustainable development) flowers bloom. After all, cities are diverse, and we should expect their sustainable development policies to be diverse. Thus, for instance, we might expect that sustainable development priorities are likely to be different for cities in wealthy countries of the North, than for cities in poor Southern countries.

There is some truth to this assumption. In wealthier parts of the world, sustainability is more likely to be concerned with reducing energy consumption, addressing the inefficiencies of sprawl and creating a social, physical and cultural environment that will attract the right kind of private investment and residents; in other words, with preserving and enhancing a certain quality of life that has already been achieved. In most cities of the global South, by contrast, the emphasis is likely to be on addressing the immediate crisis of adequate shelter, safe water provision, sanitation, waste management and reliable energy; in other words, with responding to the conditions of poverty and extreme poverty. Nonetheless, cities of the North must also contend with reducing environmental hazards, especially that to which their most marginalized populations are exposed, while Southern cities must attend to the need of their residents for education,

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transportation, mixed-use (and mixed housing types) along with their focus on green spaces, public areas, and preservation, have given them some green appeal.

174. For a review of a variety of sustainable development literature see The Ctr. for Sustainable Dev., *Sustainable Development: A Review of International Literature*, 7 INT'L J. SUSTAINABILITY HIGHER EDUC. 4 (2006).

health care and employment opportunities. In either case, whatever cities consider to be their sustainable development priorities, the one constant is that to achieve their goals they will have to grow their economies. Paradoxically, growing the economy thus becomes the universal sustainable development goal, from which all other sustainable development goods will (it is hoped) flow.

Cities we are told are engines of growth.<sup>175</sup> “Cities are where many environmental problems are concentrated, but they are also the economic drivers, the place where business is done and investments are made.”<sup>176</sup> The quality of the urban environment affects quality of life, which in turn affects the attractiveness of a given city to prospective investors, employers, and employees. From this perspective, cities must strive to address their social and environmental problems *in order* to make themselves attractive, and competitive.<sup>177</sup> Cities Alliance, in its recent report on the benefits of environmental planning endorses this logic suggesting that:

a successful city must offer investors security, infrastructure and efficiency, *and should also* put the needs of its citizens at the forefront of all its planning activities . . . *Effective local governance can make cities more competitive, more efficient and more attractive to investors and workers by promoting the sustainable development of the urban environment.*<sup>178</sup>

What appears at first as a strained form of backward logic is nonetheless consistent with the World Bank’s own assessment of the four dimensions of sustainable cities:

If cities and towns are to promote the welfare of their residents and of the nation’s citizens, they must be sustainable, and functional, in four respects. First and foremost, they must be *livable*—ensuring a decent quality of life and equitable opportunity for all residents. *To achieve that goal*, they must also be *competitive, well governed and managed*, and financially sustainable, or bankable.<sup>179</sup>

For the Bank, as for the European Union and Cities Alliance, competitiveness (and for the Bank bankability or creditworthiness)<sup>180</sup> must come

175. See, e.g., Leipzig Charter on Sustainable European Cities 2, May 24, 2007 [hereinafter Leipzig Charter]; UNGA Millennium Declaration on Cities, *supra* note 2, § A(3).

176. *Communication from the Commission to the Council and the European Parliament on Thematic Strategy on the Urban Environment*, at 2, COM (2005) 718 final (Nov. 1, 2006).

177. See, e.g., Leipzig Charter, *supra* note 175, at 3 (proposing strategies to strengthen the competitiveness of European cities, including *inter alia* the creation of high quality urban spaces and modernizing infrastructure and improving energy efficiency).

178. LIVEABLE CITIES, *supra* note 72, at xvii (emphasis added).

179. THE WORLD BANK, *supra* note 17, at 46 (emphasis added).

180. *Id.* at 50-51.

first. Quality of life, environmental, and equity issues will be given priority, if at all, only to the extent that they affect the investment environment. According to the World Bank, the basic conditions for competitiveness of cities are efficient markets: “In competitive cities output, investment, employment and trade respond dynamically to market opportunities.”<sup>181</sup> Building infrastructure or parks that make the city more attractive to investors will be encouraged while local policies to promote urban equity or provide social safety nets will be frowned upon if they tend to distort the market.

This is the vision of sustainable development that is being promoted by international organizations and that has been adopted by associations of cities.<sup>182</sup> Cities may have different sustainable development priorities, but before they can get to the substantive agenda, they are being encouraged to smarten up and make themselves more attractive to potential investors. To the extent that sustainable development is increasingly being identified as a city matter, the question of the meaning of sustainable development in the city has become more pressing, for the meaning and implications of sustainable development as a general concept are likely to be shaped by that association. In other words, it matters what the cities make of it, for they will define the problems and devise the solutions. Resources will be devoted only to those facets of sustainable development deemed relevant to the city. There is, however, a significant possibility, that most cities will never get beyond the point of making themselves more attractive, for the pursuit of competitiveness is never ending.

### B. Sustainable Cities?

What then is a sustainable city? Is there more to the hope of achieving sustainable development through the city than seems apparent from this vision of the city, a product that must first be marketed to investors, workers, and residents? Focus on the city in the last couple of decades has been driven in part by the sense that humanity has reached a demographically defining moment, becoming for the first time in history truly *Homo urbanus*.<sup>183</sup> The recent pattern of urbanization<sup>184</sup> has given rise to renewed de-

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181. *Id.* at 48.

182. See generally Frug & Barron, *supra* note 3.

183. *Homo urbanus* is the moment at which over half of the world's population lives in cities and towns. See *supra* note 18 and accompanying text.

184. Urbanization is defined as the change in the proportion of the national population residing in urban areas. See THE WORLD BANK, *supra* note 17, at 32. In fact, globally, the annual rate of population growth in urban areas is slowing down. The average annual rate of growth from 1950–2007 was 2.6%, whereas it is expected to be 1.8% from 2007–2050.

bate over the advantages and disadvantages of urban life. From a sustainable development perspective, urban life has much to recommend it. In theory, at least, urban centers—with their concentrations of economic, educational, and cultural opportunities—can serve their residents well, while taking advantage of the economies of scale for infrastructure and service provisions. Moreover, it seems cities power the national economy, contributing disproportionately to gross domestic product. Research suggests there is a positive correlation between levels of urbanization and national wealth.<sup>185</sup> For the most part, in any case, cities, small, medium, large and mega continue to grow both from natural internal population growth and through migration, as rural migrants seek urban futures, and immigrants from poorer countries pursue employment opportunities in wealthier cities.

From the perspective of managing the world's limited natural resources, increased urbanization may not be a bad thing. A number of factors, however, raise particular concerns for sustainable development in the city. First, urbanization is not a uniform process. If present patterns persist, much of the projected urban growth will swell the already large proportion of urban dwellers that live in inadequate conditions in the world's squatter settlements or slums.<sup>186</sup> For many years, the operating assumption was that despite inadequate conditions, the urban poor were still better off and had better life prospects than their rural cousins, because at least in the city they had some access to employment, education, health care and other services. Recent research, however, suggests otherwise and it has become increasingly clear that slum dwellers' quality of life, in terms of life expectancy, hunger and literacy is no better than that of the rural poor, and in some instances, such as malnourishment and security, slum dwellers may be worse off.<sup>187</sup> Secondly, across the world, cities are suffering from growing income inequality, segregation and the displacement of the poorer sections of

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U.N. Dep't of Econ. & Soc. Affairs, World Urbanization Prospects: The 2007 Revision, at 4, U.N. Doc. ESA/P/WP/205 (Feb. 2008). More than half of the population of the developed world was already urbanized by 1950, and today that proportion has reached between 72% in Europe to over 80% in North America. The regions that will experience the highest rate of urban growth between now and 2050 are those presently least urbanized: Asia and Africa, with India and China projected to account together for a third of the increase in the urban population in the next few decades. *See id.*; *see also* CITIES TRANSFORMED, *supra* note 73, at 1-12, 128-54 (discussing problems of measurement).

185. Often, the reason for this is because cities support and encourage specialization of work. *See, e.g.*, Christian C. Day, *Dispersed Capital and Moral Authority: The Paradox of Success in the Unregulated 19th Century New York Capital Markets*, 12 LAW & BUS. REV. AM. 303 (2006).

186. *See generally* U.N. Habitat, *The Challenge of Slums: Global Report on Human Settlements 2003*, U.N. Doc. HS/686/03E (Nov. 2003).

187. *See* STATE OF THE WORLD'S CITIES, *supra* note 18, at 102-49.

the population to less central or less desirable areas as urban centers gentrify or are taken over as business districts.<sup>188</sup> The result in terms of disparities of service provision, quality of infrastructure, employment and educational opportunities also contributes to a rise in social unrest and security concerns for all city residents. Third, while density of population does offer some sustainable development advantages in terms of economies of scale, cities and city life styles are also, generally speaking, more intensely resource consumptive. Cities may be engines of growth, but they impose a disproportionate burden on ecosystem services. In this respect, while environmental degradation and health hazards are more immediately visible in the cities of the developing world, the environmental impact of cities of the developed world is most acute.<sup>189</sup>

All cities externalize their environmental and social costs, and many of the world's most attractive and liveable cities do so disproportionately.<sup>190</sup> Cities are essentially consumers. The basic necessities of life, energy, water, food, and raiment must all be imported from outside city limits: the richer the city, the higher the standard of living, the higher the rate of consumption. Construction, manufacturing, industry are all resource intensive activities, and these resources must also be imported. Meanwhile, life-in-the-city produces many byproducts including household and industrial wastes, air pollution, and water pollution, and these are often exported beyond city limits. It is no secret that as countries and cities develop, and they become richer and more health conscious, their dirtier industries migrate to cheaper, less regulated locations. Nor is it surprising to discover that the air and water pollution that is poisoning China's cities is subsidizing the production of cheap consumer goods used predominantly by Western urban dwellers.

If cities are to make a difference in terms of achieving sustainable development, they will, North and South, have to find ways to reduce and mini-

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188. See generally Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1451 (2000).

189. See generally U.N. ENV'T PROGRAMME, GEO-3: GLOBAL ENVIRONMENT OUTLOOK (2002), available at <http://www.unep.org/geo/geo3/english/406.htm>. The real issue from the perspective of sustainable development is neither increased urbanization per se, nor net population growth. As the popular IPAT formula [Impact=Population x Affluence (or Consumption) x Technology], most commonly associated with the work of Paul R. Erlich, reminds us environmental impact is determined not only by population size, but also by patterns of consumption and the availability of more sustainable technologies. It is undeniable that each additional human being (or consumer) adds to the pressure on the earth's "carrying capacity." However, at present each new London or Phoenix area resident can be expected to have a much greater environmental impact than each new resident of Lagos or Mumbai.

190. See generally *Strategy for the Internalisation of External Costs*, COM (2008) 435 final (EC) (July 21 2008).

mize their disruption of the ecosystems which make life in general, and the life of cities, in particular, possible. Pursuing competitiveness to support economic growth in order to improve the quality of life in cities (and thereby enhance competitiveness and ensure sustained economic growth that supports continuing improvement of quality of life, and so forth) may be necessary and worthwhile goals but they cannot deliver a sustainable city. Sustainable development reminds us not only of the interconnection between issues of economy, environment and equity; it speaks to the reality of limits and, just as powerfully, to the fact of interdependence. Cities may reach for sustainability, but they can only get close to it once they take into account not only internal conditions of city life, but their environmental and social impacts beyond city limits and realize their co-responsibility for achieving sustainable development not only at the local scale, but at the national, regional and global scale.<sup>191</sup>

#### IV. PROBLEMS OF THE CITY-SUSTAINABLE DEVELOPMENT CONJUNCTION

Given that half of the world population lives in urban centers today, cities will clearly have much to contribute to the achievement of sustainable development. Thus, it is commendable that cities across the globe are engaging in locally based programs to address a variety of sustainable development issues (even if for the most part their understanding of the concept is somewhat constrained).<sup>192</sup> Cities can indeed be founts of vitality and

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191. As part of the internationalization of cities trend, cities and their associations have become increasingly active in what has been termed "city-diplomacy." City diplomacy, a movement which has received a mixed response among states and international organizations, refers to direct city involvement in foreign affairs. See Frug & Barron, *supra* note 3, at 8; see also *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee and committee of the regions, Local Authorities: Actors for Development*, at 3-6, COM (2008) 626 final (Aug. 10, 2008) (describing a number of examples of local authorities engaged in international development work). The posture of cities in the arena of city-diplomacy is often akin to an assertion of sovereignty. In other words, cities would substitute themselves for states when engaging in foreign relations (with other cities in particular). This extension of city interest not only beyond city borders, but beyond the host state, is echoed in the statements of city associations that adopt a cities position on matters of international concern. A good example would be the Declaration of the 23rd General Assembly of European Municipalities and Regions which ends with a call to action within Europe for local governments to become more involved in promoting international development commitments, making special reference to the MDGs. See INNSBRUCK DECLARATION, *supra* note 96, §§ 24-29. Such statements, however, not unlike similar statements by states re-affirming earlier commitments, fail to engage with the deeper question of responsibility.

192. See, e.g., Lorraine C. Cardenas & Arpaporn Buranakanits, *The Role of APEC in the Achievement of Regional Cooperation in Southeast Asia*, 5 ANN. SURV. INT'L & COMP. L. 49, 71 (1999) (discussing programs implemented in Manila, Philippines).

creativity, and may be able to tap into all sorts of public and private energy, resources and good will. Cities, where a disproportionate degree of global consumption occurs, will also undoubtedly play a significant role in shaping a new sustainability culture. While there are no doubt many advantages to the conjoined trend of cities and international organizations working to install sustainable development, it is important to highlight some significant problems that will need to be addressed. In this section, I focus briefly on three sets of issues relating to: (1) the privatization of cities; (2) the scales of sustainable development; and (3) the limits of public participation. In the following section, I turn to an additional issue that raises concerns for the achievement of sustainable development in the city, that is, the recent introjections of climate change adaptation and mitigation as the primary frame from which to consider sustainable development in the city.

#### A. Privatization and the City

As Jerry Frug has so compellingly argued, the city could be a formidable locus for public engagement and for the equitable political negotiation of compromises around public goods.<sup>193</sup> A city government with the power, the resources, and the will, could re-invent the meaning of city-living and community formation by engaging in both traditional and nontraditional service provision. It could use its power to distribute and allocate resources equitably in response to the disparate needs of its residents, in the process building a sense of cohesion and identity. In practice, however, the trend has been two-fold in the contrary direction: the privatization of entire cities and city neighborhoods as developers carve out, and sometimes wall-in, self-governing oases of so called voluntary communities<sup>194</sup> and the incremental privatization of public services across the city. This privatization trend has resulted in a panorama of city authorities acting increasingly as little more than contractors for the provision of an ever decreasing array of public goods, and consequently a downward spiral in the resources that are available for redistribution at the city level.

The new privatized city can hardly claim to be privileged site of democratic engagement. Privatization of traditional city services and the surge of private enclaves within cities have led to a high degree of atomization of community. Though it is often associated with the first world, and the United States in particular, this trend has affected many developing country cities perhaps even more profoundly. For instance, gated communities are already a familiar phenomenon across the length of Latin America from

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193. See Frug, *supra* note 9, *passim*. See generally FRUG, *supra* note 21.

194. An example would be private developments such as The Villages in Florida.



Mexico to Brazil, Argentina and Chile.<sup>195</sup> Meanwhile neoliberal policies promoted by the World Bank and international aid agencies, have transformed cities such as Bogota into fragmented spaces suffering from a diminishing sense of neighborhood and a loss of community allegiance.<sup>196</sup>

The conjunction of interests between cities and the international community seems, at first, to offer cities a new way of asserting themselves relative to their host states. After all, both the World Bank and the European Union seem to be promising cities more direct access to financing for local projects as a means of ensuring “ownership” by those who will have to implement it.<sup>197</sup> Cities, as we have seen, are staking out the right to an international presence beyond representation by their host state. But, the city that is emerging from this process is a shadow of the ideal, imagined city. While political and fiscal decentralization, without question, free the city from a certain degree of subservience to the state, the new “autonomous” city is expected to exercise its public capacity only to the point of ensuring a free market environment amenable to private investment and to ensure that residents who can afford them will be efficiently provided with good services. The outsourcing of traditional municipal public services, such as water provision, sanitation facilities and education to private corporations may help defray some of the costs associated with the initial capital investment typically necessary for major infrastructure development, which otherwise might fall entirely on the municipality. Yet, there are many dangers inherent in public authority withdrawal.<sup>198</sup> One significant problem is that the private sector has no responsibilities aside from those they voluntarily undertake. While municipalities may seek to encourage or even require private corporations to provide services in a publicly responsible manner, they rarely have any real leverage and must rely on the good will of the company and its voluntary undertakings.<sup>199</sup> Furthermore, unlike

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195. See *Generally* BLAND ATKINSON, *GATED COMMUNITIES: INTERNATIONAL PERSPECTIVES* (Rowland Atkinson & Sarah Blandy eds., 2006).

196. Andrés Ortiz-Gómez & Roger Zetter, *Market Enablement and the Reconfiguration of Urban Structure in Colombia*, in *MARKET ECONOMY AND URBAN CHANGE: IMPACTS IN THE DEVELOPING WORLD 185-98* (Roger Zetter & Mohamed Hamza eds., 2004).

197. See The World Bank, *Policies to Broaden Access to Finance*, <http://www.worldbank.org> (last visited Feb. 26, 2009) (follow “Data & Research” hyperlink; then follow “Policy Research Reports” hyperlink; then follow “Finance for All? Policies and Pitfalls in Expanding Access (2007)” hyperlink; then follow “Main Themes” hyperlink; then follow “Policies to Broaden Access to Finance” hyperlink).

198. For example, the La Paz Bolivia water fiasco and the fact that four private companies share the global water market today.

199. Roger C. Wesley, *Expropriation Challenge in Latin America: Prospects for Accord on Standards and Procedures*, 46 TUL. L. REV. 232, 284 (1971) (“Private corporations that have accepted public responsibility, for example, the Creole Petroleum Company in Vene-

municipalities, private corporations enjoy a notorious ability to exit if their economic calculations and projections have failed to materialize.<sup>200</sup>

In terms of the objectives of sustainable development, there are three main disadvantages of privatization of public services. First, it tends to diminish the quintessentially public function of municipal government which in turn reduces the relevance of public participation and the nature of political decision-making. Second, it contributes to fragmentation of the city and erosion of its residents' sense of a shared community as public services have traditionally emerged in response to expectations of the community and served to foment it. Finally, it is poorly designed to respond to the needs of the more marginalized sections of society who are either unable or less able to pay for city services.

### B. Scales of Sustainable Development

As previously discussed, sustainable development is a concept that is multipolar, multidimensional and multiscalar in character. It is multipolar in that it requires attention to the competing values of economic development, environmental protection and equity (social development); it is multidimensional in that it speaks of the necessity of continued economic growth to meet the needs of the poor, of natural limits and constraints on growth set by natural ecosystems, while reminding us of the normative demand for equity within the present generation (horizontal) and over time between generations (vertical); and it is multiscalar in that it refers to a geographically indeterminate space which both acknowledges and ignores boundaries. Its claims cut across the global and the local.

Each of the triad of economy, environment, and equity, has a global, national, and local dimension. The narrative of globalization has made us aware that it is not possible to ignore the global dimension of local economic and environmental decisions. Local decisions to address seemingly local issues can and do have both a direct and an indirect effect on individuals, families and communities separated from the decision makers in space and time. In the case of cities engaged in the pursuit of sustainable development, this raises some acute issues of responsibility and design.

Sustainable development, even when it is being implemented at the local level, is by definition a matter of global concern. Cities may strive to be

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zuela and the United Fruit Company in Central America, have earned the good will of the local community.”).

200. In the private-public partnerships set up though Johannesburg, there was little incentive for private entities to lead the way. Not surprisingly their initiatives correspond to their corporate interests—they are not a response to a set of priorities designated by the public levels.

“green” or “greener.” They may adopt ambitious sustainable development programs or claim they have achieved carbon neutrality.<sup>201</sup> They may, become more liveable and bankable in the World Bank’s estimation. But there can be no such thing as a self-sustaining city. In an important 1992 article, William Rees introduced the concept of the ecological footprint of cities.<sup>202</sup> Rees defined the “ecological footprint” of a city as “the total area of land required to sustain an urban region.”<sup>203</sup> In Rees’s terms, from an ecological economic perspective:<sup>204</sup> “However brilliant its economic star, every city is an ecological black hole drawing on the material resources and productivity of a vast and scattered hinterland many times the size of the city itself.”<sup>205</sup>

As Rees emphasized, in the process of improving local conditions, every city is of necessity externalizing environmental and social costs. But, Rees’s point was not merely about the externalization of costs. Rather, Rees’s notion of the distinctive ecological footprint of cities was related to the concept of the earth’s limited carrying capacity and the idea of a total natural capital base that can be unsustainably depleted. In adapting the concept of carrying capacity from its natural ecology context (where it is defined as the “population of a given species that can be supported indefinitely in a given habitat without permanently damaging the ecosystems upon which it depends”) to the human context, Rees takes into account human beings’ radically differential rates of consumption.<sup>206</sup> Thus Rees’s thesis was that for human beings, the ecological concept of carrying capacity<sup>207</sup> could be stated as the maximum rate of consumption and waste discharge that could be “sustained indefinitely in a given region without progressively impairing the functional integrity of relevant ecosystems.”<sup>208</sup> Rees’s normative point was that wealthy nations and wealthy cities in par-

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201. For instance, in 2008, the City of Sidney announced that it became the first carbon neutral government in Australia. City of Sidney, Carbon Neutral, <http://www.cityofsydney.nsw.gov.au/environment/GreenhouseAndAirQuality/WhattheCityisdoing/CarbonNeutral.asp> (last visited Feb. 8, 2009).

202. See William E. Rees, *Ecological Footprints and Appropriated Carrying Capacity: What Urban Economics Leaves out*, 4 ENV’T & URBANIZATION 121-30 (1992).

203. *Id.* at 121.

204. According to Rees, “the ecological perspective sees the human economy as an inextricably integrated, completely contained, and wholly dependent subset of the ecosphere.” *Id.* at 122.

205. *Id.* at 125.

206. *Id.*

207. *Id.*

208. *Id.*

ticular,<sup>209</sup> appropriate more than their fair share of the planet's carrying capacity.<sup>210</sup> His theoretical point was that in order to speak of sustainability, we needed to stop thinking of cities as geographically discrete and bounded entities. Rather, Rees argued, if we take the concept of ecological footprints seriously, we will recognize that cities "occupy" land that lies far outside of their legal borders, in so far as they appropriate the ecological services and human productivity of those regions.<sup>211</sup> The rhetoric of "occupation," with its military and colonial undercurrents, is strong language indeed, but Rees's intention is to raise the specter of legitimacy. By what right do cities appropriate an unfair share of the earth's limited natural capital?

Rees's insight poses a number of significant challenges for cities pursuing sustainable development, all of which relate back to the fundamental question of the scale of the cities' responsibility. When cities undertake an action plan to promote sustainable development, three assumptions inform their approach: (1) that resource use and environmental degradation of a local place can be calculated with some degree of reliability; (2) that local government is the most suitable actor to effect decisions concerning sustainability inside the local boundaries; and (3) that a distinct local community exists which can be mobilized in the cause of sustainability.<sup>212</sup> Each of these assumptions, I would argue, is put into question by the introduction of the concept of the city's ecological footprint in the context of the earth's carrying capacity.

First, as an empirical matter, the notion of ecological footprint complicates the calculation of resource consumption and environmental impact that can be attributed to a given locality and its residents at any given time. For instance, while it may be possible to measure at the aggregate level the rate of energy and water consumption of a city if we concentrate only on consumption that takes place within the city, it is much more complicated to account for energy and water consumption associated directly and indi-

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209. For Rees, it was obvious that the ecological footprint of wealthy cities was much greater and deeper (per capita) than that of cities in poor countries. *See id.* at 121, 126.

210. *Id.* at 121. Rees' focus on the importance of different rates of consumption is nicely encapsulated by the transposition of the concept of relative ecological footprint to the individual level. From an ecological impact perspective this points out that "[o]ne Donald Trump is equivalent to several million low-income households in some parts of the World." Peter Newman, *The Environmental Impact of Cities*, 18 ENV'T & URBANIZATION 275, 281 (2006).

211. *Id.*

212. *See* David Satterthwaite et al., *Adapting to Climate change in Urban Areas: The Possibilities and Constraints in Low-and-Middle Income Nations 52-70* (2008) (International Institute for Environment and Development, Working Paper), available at <http://www.iied.org/pubs/pdfs/10549IIED.pdf>.

rectly with the production of goods and services outside of the city that are ultimately consumed in the city by city residents. A typical sustainable development program to address freshwater provision at the local level will be designed to achieve the overriding goal of ensuring that the city and its residents have secure and sustainable access to freshwater. Given that few cities have sufficient water catchment capability within their own borders, such programs will generally include a range of policies, from those designed to reduce consumption, promote conservation, reduce pollution of waterways and groundwater, and improve drainage and sanitation. Typically, where possible, cities will also seek to appropriate new sources of freshwater, however distant these may be from the city. An ecological footprint approach to sustainable development, however, would require the city to consider reducing water consumption and ecological degradation associated with the production of goods and services for the city, including that involved in the production of food and energy.<sup>213</sup> Furthermore, an ecological footprint approach would require close attention to measuring the ecological stress placed on a non-city based ecosystem whose watershed services are diverted and appropriated to city use and implementing effective means to mitigate those harms. Finally, while it would be a complex calculation, a city might be required to determine, in a region specific manner, what its “fair” share of water is, taking into account not only competing present uses for freshwater, but the needs of future generations. A city’s water responsibility would thus stretch much further under an ecological footprint approach to sustainable development than what is typically done.

Once we broaden the range of concerns that should be properly considered by a city under an ecological footprint approach to sustainable development, then the second and third assumptions underlying the city-sustainable development conjunction are also put into question. The city may be the economic center and end-user of many resources, but if the city’s activities have a significant impact much beyond the city’s borders (in areas outside the city’s control), but the city is unwilling or unable to consider those impacts within its sustainable development policies, then it becomes harder to justify allowing cities to make crucial sustainable development determinations for the future. In addition, once the scale of sustainable development concern grows beyond city boundaries, it becomes

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213. It is often stated that the agricultural sector is a greater offender than cities in terms of water consumption, waste, and pollution. While this may be so, an ecological footprint approach reminds us to consider that agricultural products are produced for consumption in cities. In that respect, cities are the end consumers of the water use.

difficult to see how city based communities of interest could form to support the hard choices that will be necessary.

### C. Equity and the Limits of Public Participation

One of the most attractive points of intersection of the two trends discussed at the beginning of this article—the internationalization of cities and the localization of sustainable development—is their insistence on the importance of public participation in decision-making. In this respect, both trends could be said to support a broader global democratization movement. The good of public participation is multifaceted. At the individual level, it enhances self-fulfillment and a deepening of citizenship, while at the group level, it advances the project of community formation through personal engagement in group projects that require the elaboration of common positions, and the investment of energy, resources, knowledge, and time. Among the most important objectives served by public participation, however, is improved decision-making as those most affected by a choice of policies or actions will have the opportunity to be heard, contribute local knowledge and be given a chance to shape alternative responses.

The merits and limitations of public participation have been much debated, in terms of representation, scale and equity. If the goal of public participation is good decision-making, then ideally all those affected by the decision should have the option and ability to participate. The city's claim to being a superior site for public participation is based, at least in part, on the assumption that certain issues are essentially of local concern, and choices should be left up to the local community who is best situated to make informed decisions and effect necessary trade-offs in light of the local context, community needs, and priorities. The theory does not require that there be unity of interest; rather it assumes that competing interests and conflict can best be mediated at the local level and that, through a process of open and transparent negotiation as well as deliberation, a fair and generally acceptable compromise can be achieved. This assumption has been somewhat overstated to the extent that almost all local activities have spill-over effects. In other words, most substantive local decision-making could be framed as concerning persons and communities beyond the city.<sup>214</sup> For instance a local land-use zoning determination excluding a particular use such as the building of multi-unit housing, will likely lead to displacement of the excluded use to a neighboring community. This displacement will likely have both economic and social effects on the neighboring community, even though they had essentially no say in the local decision. Since

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214. See, e.g., FRUG, *supra* note 21, at 86.

the problem of externalities can never be fully avoided, if we think local decision-making nevertheless has significant value, a preliminary decision must be made about which issues should be treated as essentially local and which have a significant enough external impact to require a decision-making process that takes the interests of outsiders into account. This can be done either by increasing the level at which decisions must be made—which removes the decision-making process from the city level to a metropolitan, regional or national level—or by opening up local processes to outsiders. Obviously, the decision regarding whether an issue is purely local cannot be left to the city alone, as we would assume that the city would act in a self interested way.

A further difficulty with the ideal of public participation is that, in practice, the capacity to participate is unevenly distributed across economic sectors. To some degree, the disparity is due to the fact that in many places property ownership, if not technically a prerequisite for participation, is nonetheless considered to automatically confer an extra degree of interest and therefore an extra-strength “right” of participation beyond the right of the mere resident. The poor and marginalized communities—though they are often negatively affected by the existing uneven distribution of city services, live in the vicinity of hazardous activities and polluting industry, and suffer from environmental degradation of their neighborhoods and deteriorating infrastructure—face great difficulties of access to meaningful participation. While there are numerous inspiring examples of effective organizing and activism by such communities, they tend to arise in response to extreme situations, and group cohesion is often issue based. Sustained participation by individuals and groups in the day to day working of city governance is an onerous task, participation by the poor and marginalized, who typically enjoy less discretionary time, is even harder to achieve. Once we consider the possibility and even necessity of participation by those beyond city borders, the disequilibrium becomes even greater. Modern communication technologies, the construction of neighborhood level representative bodies, and other techniques designed to facilitate and enhance participation, may serve to correct for some of these deficiencies, but they cannot cure them.

Furthermore, it is important to recognize that in the shift from government to governance the function of public participation has changed significantly. As discussed above in Part I, the new good governance ideology has opened up the decision-making process not only to the “public” but to all “stakeholders” which embraces both civil society and the private sector. Businesses and organized associative groups have always, of course, contributed to and influenced the political and administrative process. Today, however, their contribution and influence have been granted a new le-

gitimacy. Under the new governance construct, the interests of the private sector are to be placed on par with the interests of other sectors of society such as the “public.” All stakeholders are being granted participation rights. In the new stakeholder participatory economy, the private sector has certain advantages over the public sector. For one thing, the private sector has a relatively simple set of calculations to make. It is no secret that the private sector’s interests are primarily economic and profit driven. Furthermore, the private sector’s ability to “exit” is much more pronounced than the equivalent capacity of the “public” sector, especially that part of the public that is poor and marginalized and whose options are constrained. To the extent that the private sector determines that it has an interest in engaging a stakeholder in decision-making processes, it will have little difficulty sustaining that participation. Furthermore, given that the common understanding of sustainable development that is emerging from the cities is that sustainable development requires—as a preliminary matter—economic development, private actors may be assumed to be privileged stakeholders, whose interests are to be met whenever possible since they must be encouraged. As for the public, and particularly that part of the public which is poor and marginalized, their participation is likely to be truly welcomed only insofar as it produces compliance and acceptance by individuals and the community that sustainable development trade-offs must of course be made and that will require sacrifices.

#### V. THE PARTICULAR CASE OF CLIMATE CHANGE AND CITIES

Due to the fortuitous conjunction of two trends, the internationalization of cities and the localization of sustainable development, cities are increasingly defining the concept of sustainable development. While the commitment of cities to sustainable development is to be commended and should be encouraged, the identification of cities as the privileged sites of sustainable development presents a number of challenges. One such challenge that deserves special attention is the extent to which the goal of sustainable development has come to be treated as co-extensive with responding to climate change. The tendency to equate responding to climate change and sustainable development is not unique to cities, but it has been most accentuated in cities. Indeed, if sustainable development helped put cities and their associations on the screen of the international community, climate change has put them front and center.

As economic engines and home to major populations, cities are significant energy consumers and disproportionate contributors to global climate



change emissions from both stationary and non-stationary sources.<sup>215</sup> Furthermore, growing cities continue to expand—covering ever more land with artificial structures and pavement—in the process, reducing the quantity of green spaces and tree cover that might otherwise serve as carbon sinks. Yet cities are also exceedingly vulnerable to the expected negative effects of climate change, from rising water levels to diminished precipitation and rising temperatures. The rationale for city involvement in devising strategies to combat climate change is thus analogous to that for their participation in the pursuit of sustainable development, and the problems it gives rise to are similar. Cities are major contributors to the problem and stand to suffer disproportionately if the global community fails to take the necessary actions.<sup>216</sup> Furthermore, cities, understood as the level of government closest to the people, can, it is believed, be counted on to deliver what the people really want. In the absence of strong state leadership on climate change, cities have offered to step into the breach, and they have been welcomed with open arms by the international community. City associations have been able to capitalize on their climate change credentials and have sought to mobilize significant resources to advance city climate change initiatives.<sup>217</sup> Naturally, in tandem, they have sought to advance the city's central ambition of empowerment, and therefore promoted the goals of decentralization, autonomy and subsidiarity.

The conflation of climate change protection and sustainable development gives rise to a series of problems (and opportunities) that deserve more in-depth treatment than can be attempted in this Article. At root, however, the main problem is that conflation of these two quite distinct concerns has resulted in an approach to sustainable development largely

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215. See Role of Cities, *supra* note 17.

216. My underlying assumption is that the science of the causes and risks of climate change are today firmly established and reasonably well understood. The scientific consensus is reflected in a series of important reports by the International Panel on Climate Change (IPCC). For the most recent IPCC Reports see Intergovernmental Panel on Climate Change, <http://www.ipcc.ch/index.htm> (follow “IPCC Reports” hyperlink) (last visited Mar. 6, 2009).

217. For some of the most significant city association climate change programs and initiatives, see C40 Cities Climate Leadership Group, C40 Cities: An Introduction, <http://www.c40cities.org/> (last visited Feb. 8, 2009); International Council for Local Environmental Initiatives, Cities for Climate Protection (CCP), <http://www.iclei.org/index.php?id=800> (last visited Feb. 8, 2009); United Cities and Local Governments, Climate Change Campaign, <http://www.cities-localgovernments.org/uclg/index.asp?> (follow “Policies and Partners” hyperlink; then follow “Climate Change” hyperlink) (last visited Feb. 8, 2009). National associations of cities involved in climate change initiatives include the important U.S. Conference of Mayors. See Mayors Climate Change Protection Center, List of Participating Mayors, <http://www.usmayors.org/climateprotection/list.asp> (last visited Feb. 8, 2009).

shaped by the response to climate change. While it may be possible to argue that under conditions of sustainable development the risk of climate change will be diminished and that an effective strategy to combat climate change will further the goals of sustainable development, it is far from certain whether policy choices to achieve one would be the same if the goal was to achieve the other. Part of the problem, of course, is that sustainable development requires a complex matrix of trade-offs amongst a series of competing values, whereas climate change protection, despite many unknowns and uncertainties, is nonetheless driven by an overriding single goal: the net reduction of anthropomorphic climate change emissions to the point of stabilization.

How does this conflation affect cities in particular? I will address two issues briefly: The first concerns the choice of mitigation versus adaptation as a response to climate change. The second touches on the question of the alternatives that might be available to cities in the developing world if the frame of reference were sustainable development rather than climate change. Adaptation and mitigation are the two alternative strategies that are today being proposed to address climate change.<sup>218</sup> In the early days of climate change science and policy, it was generally assumed that mitigation—the net reduction of climate change emissions—was the appropriate response.<sup>219</sup> Emissions reductions were to be achieved by a mix of technology-fixing approaches driven by economic instruments such as carbon taxes or emissions trading regimes, and by increasing (or at least reducing the ongoing loss of) carbon sinks. More recently, fear of the potential escalating costs of mitigation approaches and the realization that there would be an inevitable time lag between mitigation and stabilization of the atmosphere have combined to produce new interest in the exploration of adaptation measures needed to cope with the pernicious effects of climate change.<sup>220</sup> Most climate change experts and policy-makers recognize that adaptation and mitigation are not mutually exclusive strategies but must, on the contrary be employed in tandem. Nonetheless, there is a certain temptation to emphasize one approach over the other.

The vulnerabilities of the world's cities, especially those of coastal and low lying cities, those already suffering from water scarcity, or those subject to heat waves and other extreme weather events, are addressed in the

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218. See John C. Dernbach, *Achieving Early and Substantial Greenhouse Gas Reductions Under a Post-Kyoto Agreement*, 20 GEO. INT'L ENVTL. L. REV. 573, 577 (2008).

219. See Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1658 (2007).

220. *Id.* at 1659-60.

Intergovernmental Panel on Climate Change's ("IPCC") reports<sup>221</sup> and are further detailed in a number of recent studies.<sup>222</sup> The threat to human health is among the gravest threats posed by climate change in human settlements. The combination of deficient city infrastructure, a greater incidence of pathogens, and greater susceptibility to diseases is expected to affect poor urban residents in particular. In addition, to the extent that climate change affects agricultural production, urban food security will be heavily compromised, further exacerbating the condition of poor urban communities. The impoverished inhabitants of the world's squatter settlements in developing countries are most at risk. Not surprisingly then, the literature on climate change that focuses on the cities of the developing world increasingly emphasizes the need to implement adaptation strategies rather than wait for mitigation strategies in the developed world to take effect.<sup>223</sup>

The influential Stern Report<sup>224</sup> on the economics of climate change was a call to action. Stern stressed the fact that the costs of addressing climate change mitigation today might be high, but they paled in comparison to the eventual costs of no action (or insufficient action).<sup>225</sup> The world, according to Stern, could simply not afford to wait and see.<sup>226</sup> In his report, Stern adopted the perspective that also guides the design of the United Nations Climate Change Convention and its Protocols, that is, the idea that the rich industrial nations of the world have historically contributed and continue to contribute a disproportionate share of the world's climate change emissions and must therefore take primary responsibility for mitigation.<sup>227</sup> Recognizing the need for costly pre-emptive adaptation in developing country cities, Stern called for additional resource flows from wealthy states.<sup>228</sup> In addition, according to Stern, developing countries will also need to implement mitigation strategies including both emissions reduction and the preservation of forests (the world's carbon sinks). As is well known, developed

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221. See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS (2007), available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr\\_spm.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf). The *Synthesis Report* was based on the assessment carried out by the IPCC's three Working Groups.

222. See Alistair Hunt & Paul Watkiss, Organisation for Economic Co-operation and Development *Literature Review on Climate Change Impacts on Urban City Centers: Initial Findings*, U.N. Doc. ENV/EPOC/GSP(2007)10/FINAL (Dec. 6, 2007).

223. See, e.g., NICOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW 404-47 (2007); Satterthwaite et al., *supra* note 212, at 52-70.

224. STERN, *supra* note 223.

225. *Id.* at 39-40.

226. See *id.* at 191.

227. *Id.* at 537.

228. See *id.* at 536-37. See generally Satterthwaite et al., *supra* note 212.

countries continue to insist that developing countries, especially those that are rapidly industrializing, should accept emissions reduction targets in the near future. There is, however, little evidence that significant additional resource flows to pay for adaptation in the world's developing country cities are about to materialize. As Satterthwaite et al. point out, "international funding pledged to support adaptation in low and middle income nations is dwarfed by the investments being made or planned for adaptation in high-income nations."<sup>229</sup>

There is, of course, nothing new in the fact that, despite the rhetoric and general commitments, wealthy nations are not ready to invest significantly in the needs of cities in developing countries. Nonetheless, in the absence of significant new investments flowing to third world cities, there is a certain danger if the focus on cities results in the conviction that cities have the primary responsibility for addressing climate change adaptation because it is a "local" issue. First, such cities do not have the necessary resources; and second, they should not be asked to bear the burden of a harm that is the result of the benefits received by those in the West. The greatest dilemma, however, is that cities' ability to make their own sustainable development determinations will be constrained by the overriding concern with climate change and its effects. The few resources that might have been made available to sustainable development programs will be devoted to climate change adaptation strategies—which may or may not have been at the top of the city's sustainable development list.

Climate change is without question a significant threat to the world's urban population. Nonetheless, its greatest risks are still future risks. In other words, adaptation measures are measures that need to be taken to prevent future harms. Such preventive action makes a good deal of sense if we hope to prevent the great catastrophes to which large urban populations are likely to be exposed. Yet, in fact, the living conditions of many city dwellers in developing countries today are already catastrophic. The question this raises is whether the attention of international organizations, NGO's, and now city associations to climate change issues will divert attention away from the present crisis and injustice to worsened conditions in the future? While it makes sense for Northern cities to collaborate intensively on the pursuit of emissions reductions today given their excessive exploitation of a joint and limited resource—this may not be the best use of limited developing country capacities. Of course, unfettered growth in emissions is undesirable wherever it takes place, but the needs of the poorest segments of developing countries should take precedence.

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229. Satterthwaite et al., *supra* note 212, at 89.

## CONCLUSION

These reflections on the conjunction of two trends—the internationalization of cities and the localization of sustainable development—that have resulted in what we may term city-based sustainable development, are a response to a certain optimism that pervades the literature on sustainable development (and climate change) in which the city is presented as purveyor of possibility, hope, action, and implementation. While this literature acknowledges, in passing, the emergence of international and regional associations as well as networks of cities, the activities of cities in the realm of sustainable development and climate change are still presented as city-specific and city-driven.

The international desires of cities and the embrace of cities by the international community has so far been under-theorized. Among legal theorists, Barron, Blank, and Frug are among the few exceptions to this trend. Despite their differences, all three are proponents of localism and while all three have reservations about recent developments, they all share the basic conviction that empowering cities is on the whole, a good thing.<sup>230</sup> International law throughout its history has exhibited a longing for access to the “real” international community that could function as a counterweight to the narrow and conflict producing selfishness of states’ self-interest countenanced by the sovereign prerogative at the heart of classical international law. Despite some resounding assertions in their founding documents, international organizations created by states, such as the UN, could never quite escape the charge that, at best, they spoke for the international community of states. Nonetheless, as they pursued their broadly interpreted mandates, many international organizations sought for a way to access the authentic voice of the world’s people. In the past two decades, the role of standing-in for the global international community—the citizens of the world—has been ascribed to the vast array of “voluntary” associations known variously as non-governmental organizations or civil society asso-

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230. In their joint work, Barron and Frug are primarily interested in the encroachments of international players on the traditional domestic domain of local government law, whereby each state determines for itself its preferred division of powers and responsibilities between the levels of government. In particular Barron and Frug are concerned with evidence suggesting that international arbitration bodies might, through the vehicle of investor protection provisions in bilateral trade agreements, impose a uniform model of appropriate state/local government relationship across the board, leading to homogenization and an effective loss of power/autonomy for cities. *See generally* Frug & Barron, *supra* note 3. Blank, on the other hand, seems to generally celebrate the presence of cities and their associations on the international plane because it is a means for cities to break out of their natural parochialism, while nevertheless retaining the virtues of localism. *See generally* Blank, *Comparative Visions*, *supra* note 3.

ciations. Welcomed and advanced by many international organizations despite some initial reservations, NGO's have proved surprisingly successful at penetrating the apparently hermetic world of international law.<sup>231</sup> Agile, focused, well organized and passionate, NGO's of many stripes have come to play essential roles as promoters, monitors and implementers of international law. Consequently, their democratic and representative *bona fides* have come under increasing scrutiny, and their claim to represent the international community has been weakened.

Local government has, it seems, become the latest bearer of international law's aspiration for a direct connection to the always elusive global community. Cities and local governments have capitalized on the tradition connecting the city to the *demos* at a time when the ideology of subsidiarity has become *de rigueur*. The easy conflation between the local, the city, and "community" has served to distinguish local government not only as "the level of government closest to the people," but as the level of government most representative of "community" interests and most responsive to their needs. This "closeness," serves as a counterpoint to the increasing sense of distance between the governed and their nation-states. Transnational associations of cities and local governments are emerging as strong new players on the international scene. As transnational associations of non-state actors, these organizations have, despite the governmental character of their members, benefitted from recognition as a new species of NGO. While the official recognition by international organizations of transnational associations of cities and local governments as NGO's may at first surprise, it must be remembered that there is a tradition of thinking of cities as "chosen" communities.<sup>232</sup> From this perspective, the city is a "voluntary" association, and their transnational organizations are simply voluntary associations of voluntary communities, not unlike many an international NGO. Unlike traditional NGO's, however, these transnational organizations of cities bring to the table unimpeachable democratic credentials. Indeed, since many local governments are elected, the further and quite profound claim of cities and local governments is that they are the democratic fulcrum of the world, able—especially with the help and resources from international organizations—to deliver true democratic self-government without reference to the nation state. While this claim is clearly exaggerated, it has proved compelling. Thus, cities and their trans-

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231. Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 348 (2006); see also Annelise Riles, *Rights Inside out: The Case of the Women's Human Rights Campaign*, 15 LEIDEN J. INT'L L. 285, 285 (2002).

232. Some of this tradition was started by the work of Charles Tiebout who applied a market approach to urban residence. See generally Tiebout, *supra* note 47.

national associations have benefitted from something like a double accreditation as representatives of civil society; both voluntary and governmentally democratic. Two seemingly incompatible ideas of the city—the city as a geographically delineated space and regulatory environment and the city as “voluntary” community—combine to produce the powerful form of the city as “real” democratically constituted community. In combination with others of its kind, the city manages the seemingly impossible feat of transferring the virtues of the local to the global, as transnational associations of cities and local governments offer the possibility of a global local community existing in a space inhabited by increasingly irrelevant states.

My argument is not that cities and their transnational associations should be frozen out of the realm of international governance. On the contrary, they clearly have a great contribution to make, whether as recognized NGO's or through other traditional and non-traditional mechanisms. While cities, their transnational associations, and their promoters (including the World Bank and UN-HABITAT) undoubtedly exaggerate the extent to which cities are either voluntary associations or democratic havens, cities and local governments could, if given the right tools and the right incentives, help empower the most vulnerable sectors of their populations. There is every reason to believe that cities could help unleash a new wave of creative and democratic politics that lead to policies that work to the overall benefit of local communities while addressing the legitimate needs of those who bear their burden. The concern is, however, twofold. First, cities and local governments do not, in fact, seem at present to view themselves in a contestary role vis-à-vis the dominant development paradigms. At most, in the case of cities seeking to promote a “green” agenda, they can be said to be pursuing a modified strategy of development which may or may not be in line with the national development plan of their “host” state. However, it seems transnational associations of cities have embraced as their own, the overall development paradigms of the international organizations whose attention and funding they seek to attain. Democratization, decentralization, subsidiarity, privatization of services and infrastructure, and the encouragement of foreign direct investment are being offered and have been accepted by city associations as the uncontroversial strategy for economic growth and development and the primary means of poverty alleviation. Second, cities seem already set on a trajectory away from being providers of public goods and the arena for political contestation, and towards a privatization model in which governance is achieved through a combination of administrative intervention and public-private partnerships. In such a context, sustainable development's demand for public participation can too easily become one more input in the decision-making processes which

serve to bolster the legitimacy of the process without producing much more than the appearance of democracy or politics.

Beyond these concerns, however, is a more pressing dilemma that both raises serious issues about the role of cities and city associations in sustainable development and raises a fundamental question about the meaning of global community. Application of an ecological footprint approach to sustainable development in cities suggests that cities, and first-world cities in particular, will have to take much more dramatic action to achieve sustainable development than is presently envisaged by most local sustainable development plans and projects. A meaningful sustainable development program cannot stop at making the city either more economically sound or more “attractive,” even if these goals may have a certain sustainable development pay-off. The city’s sustainable development responsibility requires attending to its unsustainable (and inequitable) resource use, which, like its footprint, extends far beyond city borders. This is a tall order and one for which cities are not particularly well-situated, especially if city sustainable development decision-making is left to city residents. Proponents of an ideal international community beyond states often imagine a so-called cosmopolitan community, able to recognize and act on a global commonality of interests. Such a community, however, simply does not exist as a political matter. Cities, whose natural tendency is to be parochial, cannot serve.

Tempting though it is, we need to defend ourselves against an easy romanticism in which we imagine that either the environment, sustainable development, cities, or community will somehow of their own accord produce a more communitarian recognition of shared interests, which will help us get beyond self-interest. While all of these terms (and their associations) are appealing, there is little evidence that they are in fact likely to produce a more participatory or democratic polity which is able to consider the interests of others.<sup>233</sup> The general assumption that because cities are not states they are more open to a cosmopolitan sensibility<sup>234</sup> is hardly borne out in practice.<sup>235</sup> The smaller the community, the more self-serving and focused

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233. The sentiment expressed by de Tocqueville that, “by making men pay attention to things other than their own affairs, they combat that individual selfishness that is like rust in society,” DE TOCQUEVILLE, *supra* note 38, at 274, may apply to city and even national politics, but the effect is harder to contemplate the greater the distance between our own affairs and those of others.

234. See Saskia Sassen, *The State and Globalization: Denationalized Participation*, 25 MICH. J. INT’L L. 1141, 1143, 1149 (2004). But see Saskia Sassen, *Local Actors in Global Politics*, 52 CURRENT SOC. 649, 662 (2004) [hereinafter Sassen, *Local Actors*] (arguing that cities are not “cosmopolitan”).

235. “Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their



on its own welfare it often is. The desire for international connections of cities is as much driven by the desire to improve cities' direct access to foreign markets in order to strengthen cities' economic well-being and performance. This is perhaps as it should be. After all, the city's origin was anchored not only in collective self-defense but in the corporate desire to secure and develop the economic environment for its citizens. The absence of strong sentiments of nationalism, patriotism, etc. in the city does not necessarily translate into more compassion for others or less self-interest, nor does the modern city call forth a sense of responsibility or civic duty. This can be changed to some extent of course, but it cannot be imposed.

While the willingness of cities across the world, but perhaps most evidently in the globalized North, to undertake ambitious strategies regarding climate change may be read as evidence of a growing global sensibility of cities in a context of the twin challenges of globalization and climate change, yet it is unclear to what extent this new global orientation will extend to a global vision of sustainable development, with its broader understanding of responsibility. That particular actors rooted in localities are able to imagine themselves as acting on an international plane may have, as Saskia Sassen suggests, the potential for producing at least the aspiration towards a truly transnational political practice.<sup>236</sup> Certainly, particular struggles over issues of sustainable development are globally distributed in that they recur in locality after locality, thus providing the possibility for the creation of "cross-border public spheres."<sup>237</sup> Yet, sustainable development has an irreducibly global character in all three of its dimensions: economy, environment, and equity. To the extent that the definition and implementation of sustainable development are left up to multiple localities, each ultimately concerned with pursuing its own best interest, however, it seems unlikely that such aspirations will be transformative.

In pointing to these limitations I do not mean to imply that cities should not be at the forefront of the pursuit of sustainable development. Rather, I hope that identifying the problems inherent in leaving sustainable development up to the cities will not only help cities improve their sustainable development policies, but will give the international community pause about the wisdom of seeking to bypass the state in the pursuit of sustainable development. Sustainable development requires a multi-scalar, multi-level definition. Instead of side-lining the state as ineffective in a globalized world and insufficiently representative of local interests (lacking closeness

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own responsibility *and in the interests of the local population.*" European Charter of Local Self-Government, *supra* note 43, at 2 (emphasis added).

236. See Sassen, *Local Actors*, *supra* note 234, at 649.

237. *Id.*

to the governed), we may need to re-invigorate the state. The choice need not be between decentralized, autonomous cities and a powerful state that excludes city power and self-determination. Rather than imagine the state as necessarily unwieldy, closed off, inflexible, and unresponsive, we should emphasize the role of the state in providing a generous space for the exercise of local autonomy. As with any claim to self-determination and arguments equating legitimacy with subsidiarity, the notion that a community should be free to govern itself and forge its own destiny, ignores the fact that community and community interest are always in the process of construction.