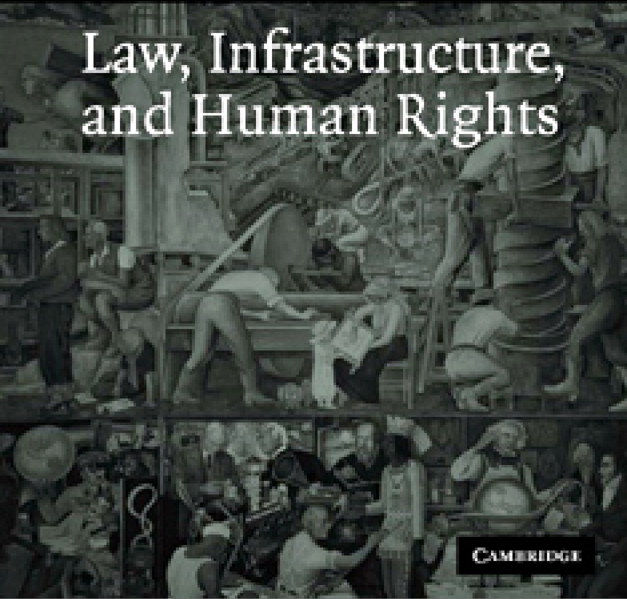
§Law in Context

MICHAEL B. LIKOSKY

Law, Infrastructure, and Human Rights



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Antipoverty

I Introduction

Should the urban poor be asked to pay their way out of poverty? Should transnational corporations (TNCs) be invited to profit from the deprivation of the urban poor? If we use privatization to solve urban poverty, then are we answering "yes" to these questions? In an impassioned and challenging contribution to *Divided Cities: The Oxford Amnesty Lectures 2003*, former President of the World Bank James Wolfensohn describes the United Nations' "Cities Without Slums" action plan.[1] It is in the process of upgrading infrastructures and services in urban slums globally. This plan, and others like it, in part seeks to solve urban poverty through a specific privatization technique, the public-private partnership (PPP). By harnessing the power of TNCs to solve urban poverty, such partnerships demand that the poor pay private companies for what should be their birthright, a basic social and economic infrastructure.

For some time, the World Bank has viewed infrastructure projects as a precondition to economic development and an essential step in ameliorating poverty. Increasingly, the Bank advocates using private companies to deliver these infrastructure services to the urban poor.[2] This move toward using private infrastructure companies is one part of the trend discussed in Chapter 2. Traditionally states and intergovernmental organizations had invested directly in infrastructure projects that were carried out by public corporations. However, in the late 1970s, all of this started to change as private companies began to play a leading role in delivering infrastructures globally. So, when it comes to economic development today, private companies are seen as key to meeting vital infrastructure needs.

Although privatization has spread to almost every country and to most sectors of the economy, the use of private infrastructure companies to deliver services to the urban poor has lagged. At the same time, governments and intergovernmental organizations are increasingly advocating the use of private companies in this

1 J Wolfensohn "The Undivided City" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* (Oxford University Press Oxford 2006) mss 84.

2 P J Brook and T C Irwin, *Infrastructure for Poor People* (The International Bank for Reconstruction and Development Washington, DC 2003).

context. Foreign and international aid packages targeting urban poverty are conditioned upon the introduction of privatization. The "Cities Without Slums" action plan is an important development along these lines. It is in effect a human rights risk mitigation strategy, an attempt to lessen the possibility that a social problem will disrupt the plans of the governments and companies in control of infrastructure projects. Cities in which the poor do not have basic infrastructure services have become untenable.

This PPP-based infrastructure policy targeting urban slums is also part of a larger international effort aiming to reduce poverty globally. The origins of this campaign lie in the adoption in 2000 of the Millennium Development Goals (MDG) by the United Nations.[3] Among other things, through the MDGs the UN seeks to lessen urban poverty.[4] The MDGs are divided into a number of targets and Target 11 addresses urban poverty specifically: "By 2020, to have achieved a significant improvement in the lives of at least 100 million slum dwellers." The United Nations launched a number of new initiatives to accomplish Target 11. Also, existing bilateral programs like the United States Agency for International Development's (USAID's) *Urban Strategy* have moved into the constellation of the Goals.[5] For both Target 11 and the *Urban Strategy*, the use of privatization to construct infrastructures for the urban poor plays a prominent role.

The move to privatize infrastructures targeting urban poverty is recent. Nonetheless, because policies are primed to be more broadly applied, an early evaluation of efforts may contribute to ensuring that the underlying goal of ameliorating urban poverty of the policies is best served. Ironically, infrastructure companies are being encouraged to take advantage of the purchasing power of the urban poor.[6] At the

3 The MDGs are also part of a broader move to incorporate social concerns into international economic decision-making. *See* K Rittich "The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social" (Fall 2004) 26 Michigan Journal of International Law 199, 201.

4 According to Shashi Tharoor the MDGs underscore the need to involve the UN in solving international problems that would otherwise be the sole responsibility of the U.S. S Tharoor "Why America Still Needs the United Nations" (2003) 82 Foreign Affairs 67.

5 Many overseas development assistance efforts have converged in their justification. H V Morais "Proceedings of the Ninety-Eighth Annual Meeting of the American Society of International Law: Testing The Frontiers of Their Mandates: The Experience of the Multilateral Development Banks" (3/31–4/3/04) 98 American Society of International Law Proceedings 64, 68. Existing programs are being rearticulated to make them in line with the MDGs. T W Klein "NOTE: Type Ii Partnerships in the Transport Context: Fulfilling Our Promises, Making the Dream a Reality?" (2003) 15 Georgetown International Environmental Law Review 531, 552. Helen Watchirs argues that existing efforts should be brought more in line with the MDGs. H Watchirs "A Human Rights Approach to HIV/AIDS: Transforming International Obligations into National Laws" (2002) 22 Australian Yearbook of International Law 92. Some have argued that the realization must involve a larger outlay of capital. Klein 552.

Areas such as energy have interestingly not come under the umbrella of the MDGs. D Lallement "TRANSCRIPTS: Sustainable Development Energy Development in Emerging Markets, Presenters Dee Spagnuolo, Michael Fitts, Daniel Kammen, Nancy Floyd, Steven Richards, Dominique Lallement, Roger Raufer, Steve Tessem, Barton Marcois" (Fall 2003) 24 University of Pennsylvania Journal of International Economic Law 759, 797.

6 Private companies play a role in many facets of the MDGs. F Franciosa "International Capital Mobility: Examining the Case for Liberalized Investment as a Mechanism for Improving

same time, privatization is itself a cause of poverty.[7] Thus, the poor are asked to fuel further privatization, the process through which they already bear the costs and risks disproportionately. If private infrastructure companies are to deliver basic infrastructures, then the poor should not have to pay.[8]

Drawing out the argument that the poor should not pay their way out of poverty, this chapter first looks at the underlying question of whether globalization and privatization are themselves causes of urban poverty. To do so, the view of James Wolfensohn is contrasted with the views of Stuart Hall[9] and David Harvey[10] also put forth in each of their contributions to the Oxford Amnesty book. Afterward, the next section turns to an evaluation of PPP-based efforts to target urban poverty under the auspices of the UN MDGs and USAID's *Urban Strategy*.

II Should the poor foot the bill?

The strength of the proposition that the poor should pay TNCs to build urban infrastructures largely depends on the nature of the relationship among globalization, privatization, and urban poverty. On the one hand, one might argue that globalization and privatization have improved the lot of many. Thus, the opportunity to extend further their benefits to the urban poor should be seized. On the other hand, one might argue that globalization and privatization are themselves responsible for the structural inequalities within and among societies. They have in effect produced poverty.[11] Thus, the urban poor should not be asked to fuel further the cause of their predicament. This section explores these contrasting positions. The former position is associated with Wolfensohn and the latter with Hall and Harvey.

Rather than seeing globalization as a cause of poverty, Wolfensohn views it as essential to the eradication of poverty. Globalization creates interconnectivity that in turn means an increased recognition that "in a globalized world, what happens in one place inevitably affects people in another."[12] The message is that poverty is

Developing Countries" (2004) 17 Windsor Review of Legal and Social Issues 83, 86.

7 M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005).

8 This argument aims to build on earlier arguments that attempt to encourage the MDGs to incorporate a human rights approach. *See* S Marks "U.S. Foreign Policy and Human Rights: Article: The Human Rights to Development: Between Rhetoric and Reality" (Spring 2004) 17 Harvard Human Rights Journal 137, 154; M Robinson "Symposium on The United Nations High Commissioner for Human Rights: The First Ten Years of the Office, and the Next: February 17–18, 2003, Remarks" (Summer 2004) 35 Columbia Human Rights Law Review 505.

9 S Hall "Cosmopolitan Promises, Multi-Cultural Realities" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* (Oxford University Press Oxford 2006) mss 6.

10 D Harvey "The Right to the City" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* mss 61.

11 A version of this type of argument made in a different context is seen in Manning Marable's work, which applies the framework to race in the U.S. M Marable, *How Capitalism Underdeveloped Black America* (South End Press Boston 1983).

12 J Wolfensohn "The Undivided City" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* mss 84, 85.

not only a threat to the urban poor. It also blocks inward investment into cities. Globalization encourages policy makers to eradicate this common threat.[13]

For Wolfensohn, the cause of poverty is local rather than global. It is the result of "bad policies and social exclusion."[14] What globalization has done is to make local politicians come to terms with the problems of poverty. This drive to address poverty is motivated by self-interest rather than altruism. According to Wolfensohn, a prime driver of change has come from foreign investors who have found urban poverty in developing countries uncongenial to their commercial enterprise. To encourage investment, local governments are pressed by TNCs to eradicate poverty. Wolfensohn explains:

> It was much harder for them to attract investment to the city they had been elected to govern when potential investors looked out the window of their fancy hotel and saw slums stretching away for miles on end. Nothing is more likely to make an investor go elsewhere.[15]

So, investors expressed their antipathy to urban poverty with their feet. With time, city mayors have gotten the picture, taking the hint that "walls" separating wealth and poverty "block incoming investment as well as greater social cohesion."[16]

Although, for Wolfensohn, globalization holds the key to solving urban poverty, for Hall and Harvey it impoverishes further those persons least able to shoulder the costs and risks of building and maintaining large-scale infrastructure projects essential to expanding globalization. Harvey identifies what he sees as an underlying contradiction in the World Bank's stance on globalization and poverty:

> Even the World Bank admits that poverty, both absolute and relative, has grown rather than diminished during the halcyon days of neoliberalism on the world stage. But it then insists that it is only through the propagation of neoliberal rights of private property and the profit rate in the market place that poverty can be eliminated![17]

Here Harvey argues not only that a correlation exists between globalization and poverty. He goes further, making the point that globalization itself is a major cause of poverty: entrenching economic and social inequalities and further polarizing society. Thus, to make the cause into the solution is for Harvey ironic and also wholly inappropriate.

Both Hall and Harvey view globalization as a new form of imperialism. It is rooted in the global expansion of TNCs that started in the mid-1970s. Hall associates this expansion with "the renewed power of financial capital, the pace of global investment flows, currency switching, and the spread of a global consumer culture

13 *Id.* 92.
14 *Id.* 99.
15 *Id.* 92.
16 *Id.*
17 D Harvey "The Right to the City" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* mss 61, 76.

and media disseminating, largely from the 'West,' images of 'the Good Life.'"[18] He characterizes these forces as "the engines of the new hegemonic deregulating, free-market, privatising neo-liberal economic regime."[19] They are allied with legal reform resulting in the dismantling of healthcare systems and welfare programs and also the privatization of public goods.[20]

Globalization has a spatial dimension. Here fully industrialized and developing countries are connected through a transnational economic order. Decision-making power resides in the command and control centers of the fully industrialized world. Orders from these centers are filled in the cities of production wherein reside "global sweatshops and degrading factory systems."[21] The pecking order is such that New York financiers exercise control over producers in Bangalore, Bombay, Ciudad Juarez, Dacca, Ho-Chi-Minh City, Hong Kong, Jakarta, Manila, Shanghai, Seoul, and Taipei.[22]

Harvey argues that globalization is held in place through a distinct system of legal rights. These rights promote the endless accumulation of capital.[23] No regard is paid to "the social, ecological or political consequences" of this accumulation.[24] The cradle of this system has been in the "West" as have, accordingly, the regime of rights that underpins it. As the economy spreads globally, so does the rights regime. International organizations like the International Monetary Fund, the World Bank, and the World Trade Organization promote the legal package associated with the global expansion of the market.[25]

The right to private property is the main component of this legal package. For globalization to function, the commons must be enclosed, parceled out, and made scarce. Along these lines, for example, public services like education, health care, sanitation, and water are privatized. Harvey calls this "accumulation by dispossession."[26] It is through this process that globalization reproduces and creates poverty in cities globally.[27]

Both Hall and Harvey agree that globalization itself produces inequality. Hall tells us: "One of the principle unintended consequences of this 'new world order' . . . has been to secure the conditions for the 'free' reproduction of global inequalities."[28]

18 S Hall "Cosmopolitan Promises, Multi-Cultural Realities" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* mss 6, 11.
19 *Id.*
20 *Id.* 12.
21 D Harvey "The Right to the City" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* mss 61, 63.
22 *Id.* 63.
23 *See also* I Wallerstein "Opening Remarks: Legal Constraints in the Capitalist World-Economy" in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 61.
24 D Harvey "The Right to the City" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* mss 73.
25 *Id.* 73.
26 *Id.* 75.
27 *Id.* 75–76.
28 S Hall "Cosmopolitan Promises, Multi-Cultural Realities" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* mss 6, 13.

Similarly, Harvey explains: "The liberalization not only of trade but of financial markets across the globe has unleashed a storm of speculative powers in which predatory capital has plundered the world to the detriment of all else." "Massive wealth" is being accumulated "at the expense of millions of people." This leads Harvey to conclude: "Unregulated free market capitalism widens class divisions, exacerbates social inequality, and ensures that rich regions grow richer while the rest plunge deeper into the mire of poverty."[29] In this context, the forces of globalization reinforce and exacerbate poverty, particularly urban poverty where "divisions and differences" are "exploite[d] and reproduce[d]."[30]

In sum, this connection between globalization and poverty stands in contrast to the promises of the engineers of globalization. Rather than uplifting the poor, according to Hall, globalization has made "the poor complicit with their global fate." He goes on to tell us how "rising living standards, a more equal distribution of goods and life chances, an opportunity to compete on equal terms with the developed world, a fairer share of the world's wealth – have comprehensively failed to deliver." In sum, "the trickle-down theory of wealth redistribution and the manifestly utopian nonsense about a 'new win-win global economy'" have, according to Hall, "proved themselves the waste-material of yesterday's common sense."[31]

How though do the poor figure into this broader shift toward globalization, specifically with the privatization infrastructure services? What happens when privatization sets its sights on urban poverty and does so through specific legal techniques? Broadly speaking, when a transnational water company lays pipes, it recoups its sunk costs and garners a profit by charging users. It may take decades for sunk costs to be recouped and for a profit to be captured. The cost incurred by the water company in laying its infrastructure is captured by charging water users each time they turn on their taps. The meter starts running. This is fine when the drinkers and bathers earn a decent income for a hard days work. But what is to be done when a hard day's work produces an income already stretched thin in covering food, shelter, clothing, and so on – the basics of living? Wolfensohn, Hall, and Harvey, as well as the policies put forth under the umbrella of the MDGs, provide differing answers to this question.

III The initiatives

A number of multilateral and bilateral efforts are underway targeting urban poverty in developing countries through the introduction of PPP-based infrastructures. The position one takes on the relationship among globalization, privatization, and urban poverty has implications for how one understands these policy-based efforts.

29 D Harvey "The Right to the City" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* mss 61, 75.

30 S Hall "Cosmopolitan Promises, Multi-Cultural Realities" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* mss 6, 34.

31 *Id.* 16.

If globalization is, as Wolfensohn asserts, not the cause but instead the solution to poverty, then policies that introduce privatized infrastructures to the urban poor are progressive. If, by contrast, globalization is a cause of urban poverty, then such policies must be viewed with suspicion. Specifically, policies that ask the poor to pay for their own infrastructure are problematic. In practice, policies express contradictory stances toward the cause of poverty. At the same time, policies tend to require the poor to pay for their infrastructures. However, often these payments are supplemented by governments. This section will look at two programs, the UN "Cities Without Slums" action plan under the auspices of the MDGs and the U.S. government's *Urban Strategy*.

A "Cities Without Slums" action plan

The "Cities Without Slums" action plan is a part of the UN's MDGs, signed by member states in 2000. The Millennium Declaration that sets out the signatories commitment to the principles underlying the MDGs views globalization as at once contributing to poverty and at the same time representing a solution to the world's problems. The Declaration states:

> We believe that the central challenge we face today is to ensure that globalization becomes a positive force for all the world's people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable.[32]

The MDGs were reinforced in two subsequent meetings, the 2001 Summit on Financing For Development in Monterrey, Mexico and the 2003 World Summit on Sustainable Development in Johannesburg. They have also formed the foundations of the Declaration on the Trade-Related Aspects of Intellectual Property Rights Agreement and Public Health adopted by World Trade Organization members in Doha.[33] They have influenced the United Nations Development Assistance Framework, the common country assessment,[34] the World Bank, the International Monetary Fund,[35] the European Union,[36] and others.

32 United Nations Millennium Declaration, General Assembly Resolution 55/2 (9/8/00) I(5).
33 E McGill "Poverty and Social Analysis of Trade Agreements: A More Coherent Approach" (Spring 2004) 27 Boston College International and Comparative Law Review 371, 379.
34 E Baimu "U.S. Foreign Policy and Human Right: Between Light and Shadow. By Mac Darrow, Portland, Ore.: Hart Publishing, 2003. pp. 353. $55.00, CLOTH" (Spring 2004) 17 Harvard Human Rights Journal 324, 325.
35 S Fukuda-Parr "GLOBAL INSIGHTS: Millennium Development Goals: Why They Matter" (10/1/04) 10 Global Governance 395, 398.
36 M M Brown "After Iraq: U.S.-UN Relations" (2004) 28(2) Fletcher Forum of World Affairs 127, 131.

The MDGs are made up of eight goals, eighteen targets, and over forty indicators. The goals are to eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria, and other diseases; ensure environmental sustainability; and develop a global partnership for development. Signatory countries have committed themselves to achieving most of the goals by the year 2015. Should institutions such as the World Bank be involved in promoting economic rights as human rights?[37] What is the relationship between the right to development and the MDGs?[38] What are the reporting requirements for the MDGs?[39] How does one measure poverty for the purposes of the Goals?[40] Are the Goals enforceable? Do they need to be justiciable in order to be realized?[41] Is it enough that they set specific targets and aim to achieve the Goals themselves by the year 2015?[42] Or do the MDGs have "limited operational significance"?[43] Will UN institutions be able to coordinate themselves effectively to achieve the goals?[44] What will happen when the cooperation of large numbers of nation-states is also required? Are certain countries closer than others to achieving the MDGs?[45]

37 K-Y Tung "CONFERENCE: Shaping Globalization: The Role of Human Rights – Comment on the Grotius Lecture by Mary Robinson" (2003) 19 American University International Law Review 27, 40. At the same time, Michael S. Barr argues that the MDGs must compete with a diversity of international aid programs with different directives and which are supported for variable reasons. M S Barr "Globalization, Law & Development Conference: Microfinance and Financial Development" (Fall 2004) 26 Michigan Journal of International Law 271, 271–274.

38 D P Fidler "Fighting the Axis of Illness: HIV/AIDS, Human Rights, and U.S. Foreign Policy" (2004) 17 Harvard Human Rights Journal 99, 154.

39 M M Brown "The Future of International Regimes: Organization and Practice After Iraq: U.S.-UN Relations" (Summer 2004) 28 Fletcher Forum of World Affairs 127, 131; S Fukuda-Parr "GLOBAL INSIGHTS: Millennium Development Goals: Why They Matter" (2004) 10 Global Governance 395, 397–398; M Woodhouse "International Perspective: Threshold, Reporting, and Accountability for a Right to Water Under International Law" (Fall 2004) 8 University of Denver Water Law Review 171, 187–191.

40 A Deaton "How to Monitor Poverty for the Millennium Development Goals" (November 2003) 4(3) Journal of Human Development 353.

41 On issues around whether the MDGs are judiciable *see* M J Dennis and D P Stewart "Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?" (July 2004) 98 American Journal of International Law 462. On the economic, social, and cultural rights more broadly *see* M C R Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Oxford University Press Oxford 1995).

42 C E Di Leva "Achieving the Millennium Development Goals: World Bank Projects, Partnerships, and Policies for Sustainable Development" (May 5–6 2005) American Law Institute – American Bar Association Continuing Legal Education, ALI-ABA Course of Study, May 5–6, 2005, International Environmental Law, Cosponsored by the Environmental Law Institute with the cooperation of the ABA Standing Committee on Environmental Law.

43 T N Srinivasan "Globalization, Law & Development Conference: Development: Domestic Constraints and External Opportunities from Globalization" (Fall 2004) 26 Michigan Journal of International Law 63, 64.

44 J G Ruggie "The United Nations and Globalization: Patterns and Limits of Institutional Adaptation" (2003) 9 Global Governance 301, 315–316.

45 J D Sachs and J W McArthur "The Millennium Project: a Plan for Meeting the Millennium Development Goals" (1/22/05) 365(9456) Lancet 347.

How will the MDGs be financed?[46] Will foreign aid increase beyond its current levels, which are below projected needs?[47] What sort of legal reform do the MDGs require?[48] The "Cities Without Slums" action plan is Target 11 of Goal 7, which is "Ensure Environmental Sustainability." Target 11 mandates: "By the year 2020, to have achieved a significant improvement in the lives of at least 100 million slum dwellers."

To help make the MDGs a reality, Kofi Annan, the Secretary General of the United Nations, commissioned the UN Millennium Development Project. It is an independent advisory group that submitted recommendations to the Secretary General in 2005. Jeffrey D. Sachs, a Professor at Columbia University where he heads its Earth Institute, directs the Project. Sachs acts as a consultant to governments regularly and has published widely on topics with a bearing on the MDGs including his recent book, *The End of Poverty: Economic Possibilities for Our Time*.[49] In his capacity as director of the Project, Sachs has overseen the production of a Report, treating the multiple facets of the MDGs.[50]

The Project Report is far reaching and pays attention at several points to the provision of infrastructures. The Project is made up of:

> Ten thematic task forces comprising more than 250 experts from around the world, including scientists, development practitioners, parliamentarians, policymakers, and representatives from civil society, UN agencies, the World Bank, the International Monetary Fund, and the private sector.[51]

The Project sees infrastructure projects as an essential precondition for moving developing countries from being net recipients of foreign investment into outward investors. It urges:

46 A Clunies-Ross "Globalization, Law & Development Conference: Development Finance: Beyond Budgetary 'Official Development Assistance'" (Fall 2004) 26 Michigan Journal of International Law 389; C M Flood and A Williams "SYMPOSIUM: A Tale of Toronto: National and International Lessons In Public Health Governance From the Sars Crisis" (2004) 12 Michigan State Journal of International Law 229, 245; I Haque and R Burdescu "Interrelationships: International Economic Law and Developing Country: Monterey Consensus on Financing for Development: Response Sought from International Economic Law" (Spring 2004) 27 Boston College International and Comparative Law Review 219, 242–244; A Nov "Essay: Tax Incentives to Entice Foreign Direct Investment: Should There be a Distinction Between Developed Countries and Developing Countries?" (Spring 2004) 23 Virginia Tax Review 685; R S Avi-Yonah "Globalization, Law & Development Conference: Bridging The North/South Divide: International Redistribution and Tax Competition" (Fall 2004) Michigan Journal of International Law 371.

47 "Challenging Goals" [May 2005] (249) OECD Observer 7; J D Sachs "The Development Challenge" [March/April 2005] 84(2) Foreign Affairs 78.

48 OECD, "Part I: Mobilising Private Investment for Development: Policy Lessons on the Role of ODA" 6(2) The Dac Journal 7, 15.

49 J D Sachs, *The End of Poverty: Economic Possibilities for Our Time* (Penguin New York 2005).

50 UN Millennium Project, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (Earthscan London 2005).

51 *Id.* inside cover.

> If every city has a reliable electricity grid, competitive telecommunications, access to transport, accessible and affordable housing for the poor, a water and sanitation system, and access to global markets through modern ports or roads, jobs and foreign investment will flow in – rather than educated workers flowing out.[52]

With regard to the poor, "making core investments in infrastructure" will ensure that poor people can "join the global economy, while empowering poor people with economic, political, and social rights that will enable them to make full use of infrastructure."[53] To carry-forth the MDGs, the Project has created eight Task Forces.

Important for our purposes, Pietro Garau and Elliott D. Sclar coordinate the UN Millennium Project's Task Force on Improving the Lives of Slum Dwellers. Together with Gabriella Y. Carolini, they have produced *A Home in the City*.[54] It aims to translate MDG Target 11 into practice.

A Home in the City addresses a number of issues revolving around the reduction of poverty. Our primary concern is with urban infrastructure. The document places infrastructure into its broader context. Throughout, the authors emphasize that "scaling up investments in infrastructure" is essential for reducing poverty.[55] Thus, a case is made for delivering adequate infrastructure to the poor. To do so, the authors advocate privatization:

> Cities have to develop the urban infrastructure (roads, communications, power, transport services, water and sanitation, serviced areas) that can attract and sustain productive investment. For this to happen, cities need to offer a regulatory and policy environment that encourages private sector endeavors (from small through large scale) and public-private partnerships.[56]

At the same time, a case is made for incorporating subsidies and advantageous tariff structures conducive to making privatized infrastructures affordable to the urban poor into projects.[57]

The authors advocate the use of PPPs to solve urban poverty. In the context of cities with governments of limited capacity, it is not altogether clear how these partnerships will function in practice. Can a weak government properly advance the interests of the most disenfranchised group within its jurisdiction? Can it do so when it involves negotiating with a private infrastructure company? Will the government subsidize infrastructure services for the poor through taxation or other redistribution devices? Should the poor contribute toward the cost of their infrastructures? If so how much?

52 *Id.* 7.
53 *Id.* 7–8.
54 P Garau, E D Sclar and G Y Carolini, *A Home in the City* (Earthscan London 2005).
55 J D Sachs "Foreword" in *Id.*
56 *A Home in the City* 6.
57 *Id.* 5.

In making the case for private participation in urban infrastructure, the authors are aware of potential pitfalls. Reviewing the checkered history of privatization, they tell us:

> Pushed by international financial agencies and several international donors over the past two decades many developing countries attempted to impose private operation in inappropriate circumstances, often with dire consequences for the poor. The belief was that private operation would ensure efficient services and that users, including the poor, would pay the lowest possible prices while covering costs with little or no subsidy. While there have been successful cases, too often privatizations have had disastrous consequences and have had to be reversed at great cost.[58]

They distinguish between infrastructure sectors more suited to privatization and others. The former are competitive sectors while the latter are natural monopolies. The key to success with privatization lies in the regulatory environment and adaptability to local conditions.

The authors emphasize the need to have a government with the capacity to "regulate effectively in the interests of the poorest citizens."[59] At the same time, they indicate that governments' records have not been reassuring. Here, the authors cite a World Bank study.[60] Overall, in privatization projects, governments must take a more proactive role in ensuring high quality services for the poor than they have in the past.

A Home in the City does not provide an unqualified endorsement of privatization. It makes clear that privatization has failed to deliver on many promises to the poor in the past. How does this position relate to the more optimistic tone of Wolfensohn's piece? Are the MDGs a multiheaded hydra? Is this the academic arm of a directed political movement aimed at privatizing urban infrastructures directed at the poor? Is it no different than any other policy environment in which diverse positions cohabitate? Do policy makers build broad-based policy consensus by putting out messages that everyone wants to hear, even contradictory ones, but in practice continue to pursue an agenda of privatizing the infrastructures of the urban poor?

Wolfensohn ties the "Cities Without Slums" action plan directly to his view on globalization. The World Bank and others, according to Wolfensohn, have recognized that the problem of poverty must be faced because the inexorable march of globalization has made clear to all that "in the areas of health, education, communications, finance, migration, and so many others, we all belong, for better or worse, to one world."[61] For Wolfensohn, globalization is not the cause of poverty but, rather, the route out of it.

58 *Id.* 52.
59 *Id.* 53.
60 *Id.*
61 J Wolfensohn "The Undivided City" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* (Oxford University Press Oxford 2006) mss 85.

To solve the problem of poverty, Wolfensohn argues for a paradigm of development based on partnership. Here, partnerships will be broader than traditional PPPs. Instead of being comprised of just governments and companies, Wolfensohn's partnerships include "a coalition of forces," "institutions such as the Bank and bilateral institutions . . . civil society, the private sector, . . . poor people themselves exercising their rights as full citizens," and faith-based organizations.[62] These partnerships are to come together to solve urban poverty. Mary Robinson, former United Nations High Commissioner of Human Rights, makes the point that PPPs do not always incorporate civil society actors sufficiently:

> Let me emphasize the importance of a multi-stakeholder approach to addressing complex issues: I focus particularly on human rights challenges and a human rights approach to the implementation of the Millennium Development Goals. It's clear that the value of a multi-stakeholder approach is gaining recognition in so many different ways. It was evident at the World Summit on Sustainable Development in South Africa with the development of public-private partnerships, but there was some unease about the composition of those partnerships. I think the civil society dimension of those public-private partnerships was not sufficiently evident. Now that I'm somebody who's rejoined civil society, I think it's interesting to see this issue from the perspective of civil society. Despite the concerns, it is imperative to develop effective multi-stakeholder approaches and also to engage the business sector in a genuine commitment to issues of human rights in order to make progress.[63]

Under the auspices of the MDGs, the World Bank aims to put this approach into practice in urban centers through the UN's "Cities Without Slums" action plan.

In 1999, the World Bank together with the United Nations Centre for Human Settlements (UN-Habitat) created the Cities Alliance, which is an urban development coalition. Since its creation, a number of governmental institutions have joined the Alliance as members of its Consultative Group which is co-chaired by the executive head of UN-Habitat and the Vice President of Private Sector Development and Infrastructure of the World Bank. These include local authorities, state governments, and multilateral organizations. The local authorities are the United Cities and Local Government. The governments include Brazil, Canada, France, Germany, Italy, Japan, the Netherlands, Nigeria, Norway, Sweden, the United Kingdom, and the United States. The Asian Development Bank, the United Nations Environment Programme along with UN-HABITAT, and the World Bank are the multilateral members. This Alliance in turn put together the "Cities Without Slums" action plan.

62 *Id.* 89.

63 M Robinson "Symposium on The United Nations High Commissioner for Human Rights: The First Ten Years of the Office, and the Next: February 17–18, 2003, Remarks" (Summer 2004) 35 Columbia Human Rights Law Review 505, 506–507.

The purpose of the "Cities Without Slums" action plan is "through the citywide and nationwide upgrading of low-income settlements to improve the livelihoods of the urban poor."[64] This focus is in line with the broader objectives of the Cities Alliance which focuses on two areas:

a. making unprecedented improvements in the living conditions of the urban poor by developing citywide and nationwide slum-upgrading programs; and
b. supporting city-based consensus-building processes by which local stakeholders define their vision of their city and establish city development strategies with clear priorities for action and investments.[65]

The action plan aims to deliver basic social and economic infrastructure to urban slums. Infrastructure here includes paved footpaths, roads for emergency use, sanitation, storm drainage, street lighting, waste collection, and water.[66] In this context, the poor are to pay for at least a portion of the infrastructure services that they receive.

B USAID's *Urban Strategy*

The U.S. government, through USAID, its foreign assistance agency, also has devised a strategy aimed at upgrading slums in developing countries. Although the strategy predates the UN MDGs, it has since reenvisioned itself as advancing the MDGs. The Clinton administration developed the strategy, called *Making Cities Work: USAID's Urban Strategy: An Initiative Launched by the Administrator and Prepared by the Urbanization Task Force.* The *Urban Strategy* continues to underpin the Bush administration's approach. Among other things, it aims to lessen urban poverty through privatized infrastructure projects.

USAID roots its infrastructure policy in a broader context of increased urbanization and dire social and economic need. In developing countries, USAID points out, a seismic population shift is underway whereby people are moving from rural to urban areas. This trend is particularly pronounced in developing countries. These new urban dwellers will have infrastructure needs.[67] USAID focuses on how to meet infrastructure needs in the areas of access to water and sanitation.[68]

The *Urban Strategy* aims to encourage developing country governments to meet their infrastructure needs through private companies. It tells us that "governments in developing countries . . . can do little to fund urban infrastructure."[69] Also, USAID argues that the private sector "is best suited for such roles as employer, developer,

64 Charter A.3.
65 *Id.* 1.
66 "Cities Alliance for Cities Without Slums: Action Plan for Moving Slum Upgrading to Scale" (World Bank Group Annual Meeting 1999: Special Summary Edition).
67 USAID, *Making Cities Work: USAID's Urban Strategy: An Initiative Launched by the Administrator and Prepared by the Urbanization Task Force* 2–3.
68 *Id.* 3.
69 *Id.* 3–4.

builder, investor, and, at times, operator." Accordingly, USAID argues: "Only the private sector can mobilize the resources on the scale provided." Foreign agencies can "help leverage private investment."[70] They do so in a number of ways including mitigating investment risk, fostering an enabling environment, helping to develop regulatory incentives and safeguards, creating institutions, aiding financing and insurance applications, and encouraging transparency.[71] USAID's role as a facilitator of foreign investment accords with a broader trend in the international aid away from directly financing projects.

Importantly, when USAID advocates the introduction of foreign companies into the urban infrastructure sector, it has greater participation by U.S. companies in mind. The U.S. government generally subscribes to a regime of tied aid. Here, USAID conditions its aid to developing countries on the participation of U.S. firms.

The *Urban Strategy* specifically promotes PPPs. These are, according to USAID, "essential to yield maximum results"[72] in cases in which "needs are great."[73] Just as with the "Cities Without Slums" action plan, the composition of PPPs is broader than governments and private companies. It includes members of the general public who USAID sees as "future customers." Here it advocates "participatory planning."[74] USAID has applied this approach to projects in Indonesia, India, and South Africa. The bulk of aid goes to large scale projects in Egypt, the West Bank/Gaza, and Bosnia.[75]

Privatization takes a number of legal forms. The United States argues that developing countries should adopt legislation. Privatization mechanisms include PPP devices such as concessions, leases, and outright privatization. These may take the form of municipal bonds, partial guarantees, pooled finance, private sector loans, project finance, and special purpose authorities.[76] In contrast to the "Cities Without Slums" action plan, the *Urban Strategy* provides this detailed list of PPP techniques.

IV Companies and PPPs for the urban poor

Both the "Cities Without Slums" action plan and the *Urban Strategy* aim to mobilize the poor to finance their own basic social and economic infrastructure. This should be cause for concern, even though both programs have undeniable successes. Here we return to the debate between Wolfensohn, on the one hand, and Hall and Harvey, on the other.

Wolfensohn talks of mobilizing the economic resources of the poor to finance their economic and social infrastructure. According to Wolfensohn, the poor invest

70 *Id.* 4.
71 *Id.*
72 *Id.* 6.
73 *Id.* 9
74 USAID, *Capital Financing* 2.
75 USAID, *Making Cities Work* 7.
76 *Id.*

seven dollars of their own money for every dollar of investment by the government. This "explodes the myth that people in poverty have no money."[77] Worryingly, this economic power might be an open invitation to private infrastructure companies to exploit the urban poor, making them foot the bill for the problems caused by globalization.

Hall and Harvey persuasively argue that globalization itself has produced poverty. Wolfensohn sees no correlation between the spread of globalization and increased poverty, while Hall and Harvey see causation. If globalization has underdeveloped the urban infrastructure of the poor, should this poor be asked to then feed a hostile globalization in order to escape from urban poverty?

Wolfensohn recounts the story of how the World Bank built basic infrastructure, water and sewage, in a *favela* in Rio de Janeiro. He speaks of the genuine excitement of a woman in Rio who was able to enjoy the benefits of paying for water. It seems that the receipt of payment, which included her name and address, meant that she could secure a bank loan. She finally had a document confirming her residence. So, paying for water meant even more than drinking and bathing, it unlocked the ability to be an economic citizen. Although this is a story of success, one might wonder whether there is not another way of encouraging banks to loan money to the urban poor besides asking the poor to pay for the expansion of globalization to the new frontier of urban slums.

At the same time, the "Cities Without Slums" action plan and the *Urban Strategy* are not reducible to initiatives aimed at paving the way for private capital to exploit the urban poor. Companies are not even involved in all aspects of the initiatives. In addition, the MDGs seek to involve the poor in the social programs meant to help them in ways that do not involve a financial commitment. Kamal Malhotra makes the point:

> As a result, human development, while not a new concept, is an important one that has been placed at the core of ambitious UN development programs such as the Millennium Development Goals. This approach is important in that it places people at the heart of development, allowing expansion of human capabilities and opportunities while emphasizing that people must actively participate in the processes that shape their lives. While important for all people, this is of particular importance for women worldwide, who have traditionally had less access to opportunities and have often been excluded from defining development for themselves and their communities.[78]

Furthermore, both often envisage a public subsidy to make infrastructure services cheaper for the urban poor. The UN Millennium Project's Task Force on Improving the Lives of Slum Dwellers recognizes this and speaks of using "appropriate design

77 J Wolfensohn "The Undivided City" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* mss 98.

78 K Mahotra "Globalization, Law & Development Conference: The Purpose of Development" (Fall 2004) 26 Michigan Journal of International Law 13, 18.

and innovative structures of tariffs and subsidies" in order to make infrastructure "rates affordable to the poor."[79]

It is important to be attuned to how companies are involved in PPPs. When they do participate, what form does it take? Who pays whom for the social and economic infrastructure of our urban slums? Is the infrastructure of the poor subsidized in the same way that we subsidize the infrastructure of our corporations?

Different infrastructure sectors will assumedly receive different forms of subsidy.[80] For example, access to telecommunications means something different than access to water or sanitation. Furthermore, depending on the infrastructure sector at issue, the urban poor will need different levels and quality of services. The UN Millennium Project recognizes this: "Even when roads can be financed through tolls, it is often highly advantageous to foster free access rather than toll-based access."[81] Perhaps all infrastructure services targeting the urban poor should be based on the "free access" model.

The poor should have free access to basic infrastructure services. It is for this reason that, despite important successes of the "Cities Without Slums" plan and the USAID efforts, some distance must be taken from them. My earlier research uncovered how companies and foreign governments work closely with the Malaysian government to reproduce inequalities locally.[82] Similarly, Boaventura de Sousa Santos argues:

> One of the major causes of human rights violations in the world . . . is the unequal exchanges that constitute the capitalist world economy and world system. People are not poor, they are impoverished; they do not starve, they are starved; they are not marginal, they are marginalized; they are not victims, they are victimized. With its exclusive reliance on capitalist accumulation, market relations and property rights, the world capitalist economy is structurally unjust, in the sense that its normal operation breeds social injustice both internally and internationally.[83]

Thus, the argument put forth here concurs with the positions taken by Hall and Harvey. Globalization and its agent privatization are in certain respects part of the problem. Should we roll back privatization as Harvey suggests?[84] Perhaps. Should the right to basic social and economic infrastructure derive, as Harvey suggests,

79 P Garau, E D Sclar and G Y Carolini, *A Home in the City* (Earthscan London 2005) 5.

80 For an evaluation of the various forms of subsidies targeting the provision of infrastructures to the poor *see* P J Brook and T C Irwin, eds, *Infrastructure for Poor People: Public Policy for Private Provision* (The International Bank for Reconstruction and Development/The World Bank Washington, DC 2003).

81 UN Millennium Project 49.

82 M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005).

83 B d S Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edition Butterworths London 2002) 289.

84 D Harvey "The Right to the City" in R Scholar, ed, *Divided Cities: Oxford Amnesty Lectures 2003* (Oxford University Press Oxford 2005) mss 78.

from a “right to adequate life chances for all, to elementary material supports”?[85] It seems so.

V Conclusion

To put these rights into practice, urban social movements must have concrete targets and tangible ideas for how society will be remodeled if they are successful. This will ensure that Harvey’s challenge that “positive outcomes rather than a descent into endless violence”[86] will ensue. Here the “Cities Without Slums” action plan and the USAID effort are not beyond repair. For them to be genuinely equitable efforts, however, they must be refashioned. And it is doubtful that this will happen without social movements targeting them.

One way that they could be reworked would be to harness the power of private capital differently. Joseph J. Norton rightly tells us:

> Although public-private partnerships have been known for well over a decade, the surge of international developmental efforts, such as the Millennium Development Goals and the Monterrey Consensus, underscore the importance of the involvement of the private sector in alleviating poverty. Nonetheless, there are several factors that should encourage public-private partnerships to better serve developmental objectives. Primarily, the public sector alone has proved incapable of providing a sustained development level to poor countries. The private sector is more able to channel capital flows and to help achieve tangible results in the short run. In light of the economic interdependence between nations, and the economic downturn after “September 11th,” the private sector should not be excluded from the arduous task of financing development.[87]

Private companies are without a doubt the primary repositories of the expertise for building infrastructures. They must thus be at the table. However, it must be a table and not a trough. And, the working poor should not pay their way out of poverty to members of the very corporate class that is in part responsible for their poverty in the first place. Profit margins must be conservatively determined. And, rather than charge user fees to pay for infrastructures, the state should pay for the infrastructures of the urban poor.

Under privatization, states do not have to pay out of their budgets for infrastructures to be built. Instead, the cost of infrastructure is put on the shoulders of its users. The person who turns on the faucet pays the water company. This is appealing to governments that are no longer responsible for providing basic infrastructure to their citizenry. However, it is not great for the working poor.

85 *Id.*
86 *Id.* 65.
87 J J Norton “Encouraging Capital Flows and Viable Dispute Settlement Frameworks Under the Monterrey Consensus” (Winter 2004) 10 Law and Business Review of the Americas 65, 81–82.

Governments have a responsibility to ensure that their citizens can realize their basic human rights. Powerful foreign governments have a responsibility overseas as well as at home. A properly functioning urban infrastructure for the poor is essential here. To fulfill their responsibilities, governments should pay the infrastructure charges of the urban poor. This payment would not be an immediate strain on government budgets. Instead, incremental payments would be stretched over decades. The cost would be covered through progressive taxation by governments. As taxpayers, many of the working poor will pay some of this cost. Perhaps if basic infrastructure is guaranteed by the state, then we will be one step closer to allowing the working poor to exercise the "right to the city" for which Harvey makes such an eloquent case.