6. Hilal Elver: The Emerging Global Freshwater Crisis and the Privatization of Global Leadership

Summary

This chapter deals with a key component of global crisis: the nature of, access to, and the multifaceted laws and policy perspectives governing the use of global freshwater. Its focus is also on the global leadership strategies and struggles concerning access to a vital resource for human survival. This struggle involves global market forces and civil society movements. It concerns issues of environmental justice and human security. On the one hand, neoliberal free market principles and new constitutional forms of international economic and trade law, have led to the treatment of vital resources such as water as saleable ‘commodities’. On the other hand, numerous civil society organizations and human rights lawyers argue that access to drinking water should be a fundamental human right. This paper argues for an approach to water governance that treats water as a fundamental human right rather than simply as a commodity that is best governed by private corporations and market forces.

Introduction: fresh water scarcity

This chapter explores some of the legal, political and economic structures and processes that are shaping leadership strategies for addressing the emerging global freshwater crisis. It discusses international water laws; control over the market for freshwater supply and the various political forces shaping global water policies. It addresses these questions not simply from the viewpoint of the efficient allocation of water as a commodity, but more fundamentally, as a question of access to water from a human rights perspective. This clash of perspectives will shape the future governance of global freshwater supply in coming years.

The World Health Organization and UNICEF estimate that approximately 1 billion people lack access to adequate drinking water while 2.6 billion people lack access to basic sanitation. The majority of these people live in the developing world. Despite some improvements in recent years and the high priority given to improved access to water and sanitation services by various governments, the UN and a range of civil society organizations, it is estimated that if current trends continue, by 2015, 672 million people will still lack access to adequate drinking water and 2.7 billion people to basic sanitation (WHO 2010). Moreover, as many as 5 million people, the majority of whom are children, die annually from preventable water-related diseases. The lack of access to water and sanitation services has particularly negative implications for women and girls who tend to be responsible for travelling long distances in order to bring water to their homes. (WHO 2010: 29).

While the world population quadrupled in the last century, the amount of freshwater consumed has increased many, many times more. This, coupled with the current acceleration of urban growth, is putting massive pressure on our planet’s freshwater resources. It is estimated that by 2030, half the world will be living under severe water stress. This water scarcity affects countries highly unevenly. For instance, according to a report released by the Asia Society Leadership Group on Water Security in 2009, one of the most affected areas globally will be Asia, where the urban population is likely to increase by 60% by 2025. As the water needs of
growing cities worldwide increase, the need to find sustainable urban water solutions has never been more urgent.

Moreover, availability of freshwater resources is part of the problem of the sustainability of the biosphere that has already been significantly affected by early signs of global warming (IPCC 2007). Shifting precipitation patterns and increased melting of mountain glaciers disrupt previous water patterns, upsetting the timing and quantity of flows. Moreover, rising sea levels will exacerbate saltwater intrusion into the lower reaches of many rivers. Stronger storm surges may also inundate low-lying coastal deltas. States may suffer both chronic pressures, such as decreased freshwater availability, and acute crises, such as flooding or drought. Both types of threats can impair food production, endanger public health, stress established settlement patterns, and jeopardize livelihoods and social wellbeing. The risks of global warming on water resources will be particularly damaging to countries in the developing world. Farming, fisheries, forestry, and other environmentally sensitive sectors represent significant portions of most economies of most developing countries, making them particularly vulnerable to climate impacts. As such, without effective leadership, the crisis of water availability looms increasingly large.

The shifting focus of international water law and practice

Water has traditionally been considered a part of the eco-system itself and a public good. Its direct relation with human health is one of the major preoccupations of domestic and international law. Because water is such a versatile resource, several specific areas of law, from environmental to human rights and finally international economic law (or trade law), are regulating or at least claiming to regulate the use and distribution of water.

Historically, water was one of the important areas of international law in relation to oceans, providing ‘freedom of seas’ for the dominant naval powers; governing the navigational use of rivers especially in continental Europe where long rivers are shared and heavily used commercially by two or more countries. After a long period of navigational preoccupation, during the post-industrial revolution concerns about the quality of freshwater resources and pollution problems subsequently emerged. So too did a number of international lawyers with an interest in legislation related to water. The perspective adopted by these lawyers was generally informed by a respect for state sovereignty over natural resources, though they also sought means to protect water and the environment from pollution.

During this period, legal struggles related to the governance of water tended to be based on a conflict between the desire for states to retain control over water resources (largely related to a desire to maintain economic competitiveness in post-colonial settings) and international concerns with water and environmental sustainability. In this context, the management of trans-boundary water resources became one of the most contested issues of international law. This context also set the stage for the emergence of inter-state and intra-state water conflicts in many parts of the world, especially in developing countries situated in arid regions where the quantity of water and the development of water resources was a major preoccupation. During this period, the two areas of international environmental law and laws governing the use of watercourses began to merge. Although this merger has shaped current international legal thinking about water in a more environmentally conscious manner, it has not yet been able to resolve major international river conflicts, nor to establish
international principles regarding the sustainable and equitable use of freshwater resources.

In recent years, there have been significant changes relating to the regulation of water resources. As noted above, in addition to trans-boundary issues, the most serious immediate challenges in the 21st century are the lack of access to safe drinking water and inadequate sanitation. This preoccupation requires solutions that go beyond traditional international water law principles that are grounded in state sovereignty, national self-interest and reciprocity. What is needed is a new global approach based on normative principles that values environmental protection and human security above the interests of states and global market forces.

However, this is not what has emerged. Rather, over the past two decades, water has increasingly been governed according to the neoliberal economic principles outlined in the Washington consensus: the blueprint for global neoliberal economics that tries to resolve all issues through the logic of market efficiency. Beginning with the Rio Environmental Conference of 1992, water has increasingly been defined as a tradable commodity that is best governed by private market forces. The commodification of water has been supported by international business and trade law, with the help of the World Trade Organization, the World Bank and International Monetary Fund, which have effectively created a regulatory framework that legally protects the rights of corporations involved in the water sector over and above those of the majority of the population – indeed the new forms of law and regulation correspond to what Stephen Gill (1992, 1998a, 1998b) refers to as the institutions and neo-liberal practices of the ‘new constitutionalism’. For example:

- International trade bodies such as NAFTA and the WTO have declared water to be a tradable commodity, classifying it as a ‘commercial good’, a ‘service’, or an ‘investment’ (Barlow and Clarke 2003: 97).
- The WTO’s General Agreement on Trade and Services (GATS) has the potential to constrain the ability of governments to prevent private sector involvement in domestic water management (Flecker and Clarke 2005: 76).
- The law plays a key role in privatizing water in the lending conditionality imposed by the IMF, the World Bank and other regional and international lending institutions. Consistent with the principles of the Washington Consensus, these institutions have mandated that governments, particularly those in the developing world, pass legislation enabling privatization of water and sanitation systems in order to receive loans. The World Bank also serves the interests of water companies both through its regular loan programs to governments, and also through its private sector arm, the International Finance Corporation, which invests in privatization projects and makes loans to companies carrying them out.
- Nevertheless, in recent years, the World Bank and other IFIs have taken a step back from their overwhelming and largely uncritical endorsement of the privatization of water services. This shift is largely due to the failure of many private water projects to generate sufficient revenue for investors; the failure of the private sector to deliver much of the new investment and expanded services promised to governments; and not least, the significant grass roots opposition that has emerged in response to water privatization.
However, despite the explicit admission by certain divisions of the World Bank (and others) that privatization of water services may have negative outcomes, particularly for the poorest, a large proportion of new loans continue to promote and/or compel privatization. A year-long study by the International Consortium of Investigative Journalists, a project of the Washington-based Center for Public Integrity, released in February, 2003, found that the majority of World Bank loans for water in the previous five years required the conversion of public systems to private as a condition for the transaction. According to one investigative report, between 2004 and 2008, 52% of World Bank water services and sanitation projects – 78 projects totalling $5.9 billion – promoted some form of privatization and 64% of them promoted some form of cost recovery.\(^1\) In addition, in many instances, public utilities were urged to restructure themselves along commercial lines, ‘turning them into more autonomous bodies governed by a corporation board, with shareholders from both the public and private sectors’, and to award management contracts to the private sector.\(^2\)

Such new ‘public-private partnerships’ continue to be informed by the belief that the allocation and management of water is best and most efficiently done by the private sector and global market forces.

For proponents of economic globalization, the future of the world is inextricably linked to the future of business. Their conception assumes that private investment should act as the primary engine of growth and that the private sector is best suited to manage the looming water crisis. In other words, public leadership relating to the management of water should be transferred to private leadership.

Private governance of water resources has also been justified as the best and most efficient means promoting conservation and environmental sustainability. For instance, in 2002, during the UN World Summit on Sustainable Development in Johannesburg, privatization was presented to the world community as a magic formula capable of solving water problems around the globe, both in developed and developing countries. One reason offered for this is based on the idea that as countries globalize, their increased wealth will enable them to save more patches of nature from the ravages of exploitation. The argument is that privatization will enable governments to protect water resources from depletion over the long term.

A second line of argument – embraced by the IMF and OECD governments – is based on the idea that the market price of water reflects its ‘true’ value and therefore, pricing water according to the dictates of the market is the best means of assuring that there is equilibrium between supply and demand. The OECD recently released three


\(^2\) Dried Up, Sold Out: 16-17.
reports that argue for the need to increase the price of water in order to promote conservation. According to the OECD Secretary-General, Angel Gurría, ‘putting a price on water will make us aware of the scarcity and make us take better care of it’. Of course, this approach has the potential to increase the cost of water for some of the poorest sectors of the population while doing little to address the highly inequitable distribution of water resources.

Thus a range of powerful social forces have advanced the idea that the best and most efficient means of addressing the global water crisis involves the privatization of the planet’s remaining fresh water, including the sale of exploitation rights to corporations and allowing the global market to decide who gets to drink and use water. Corporations that deliver the services have a strong self-interest in promoting these initiatives as beneficial to the poor.

While rich countries have the flexibility to implement selectively, shop around and find the most effective solutions for water sanitation and distribution, poor countries are often pushed by the IMF and the World Bank to adapt their constitutional principles and domestic legal orders to allow the privatization of public goods and services previously governed by public institutions and to minimize government regulation. Such governments have little freedom to oppose the tide of privatization and new constitutionalism.

But what are the possible impacts for the poorest water users of a free market approach to natural resources management in developing countries? Despite the importance of both ecological and social aspects of natural resource management, proponents of the market model have surprisingly little to say on the possible ecological and social consequences of the to water services (Galaz 2004). Policy makers should be aware that the ‘water market’ would have a negative effect on underprivileged users in particular. Especially in rural areas, weak NGOs; non-existent or marginalized water user associations; and slow governmental agencies will not be able to protect underprivileged water users’ rights in courts against water management companies in case of conflict (Galaz 2004).

Who controls the water market?

The market for water infrastructure, sanitation and pollution prevention in the developing world is potentially vast. Currently, water systems are controlled publicly in 90% of communities across the world. These numbers are however changing rapidly. For instance, in 1990, only 50 million people in 12 countries worldwide got their water services from private companies, but by 2002 it was 300 million and growing. There are ten major corporations – that constitute a global oligopoly of market players – that now deliver fresh water services for profit. Between them, the

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three biggest -- Suez and Vivendi (recently renamed Veolia Environment) of France and RWE-AG of Germany – deliver water and wastewater services to customers in over 100 countries, and are in a race against, or in some instances they cooperate with others such as Bouygues SAUR, Thames Water (owned by RWE) and Bechtel-United Utilities, with goal of expanding to every corner of the globe.

If privatization continues at the same speed, the top three alone will control over 70% of the water systems in Europe and North America by 2020. Vivendi (Veolia) earned $5 billion in 1992 from water-related revenues; by 2002, its earnings had increased to over $12 billion. RWE, which moved into the world market with its acquisition of Britain’s Thames Water, increased its water revenue by a staggering 9,786 percent between 1992-2002. All three firms are among the top 100 corporations in the world and together, their annual revenues in 2002 were almost $200 billion and were growing at ten per cent a year – thus far outpacing the economies of many of the countries in which they operate. The performance of these companies in Europe and the developing world has thus been well documented: they have earned huge profits, charged higher prices for water, they have also cut-off to customers who cannot pay, reduced water quality, bribery, and corruption. (Snitow, Kaifman and Fox, 2007: 114)

There are numerous accounts of the negative impacts of the privatization of water worldwide. Though these cannot be fully detailed here, a few examples should suffice to demonstrate the point. One well-known example is the case of Bolivia, where the famed ‘water war’ of 2001 emerged as a direct result of a World Bank initiative involving a Bechtel subsidiary Abengoa Spain. When the price of water tripled after privatization was introduced, thousands took to the streets of Cochabamba. This led to a violent conflict between the people, who were later termed ‘water warriors’ and the local government, which eventually ended with the termination of the private contract. Bechtel later sued the government of Bolivia for millions of dollars under a bilateral investment treaty for losses in future profits (Olivera and Lewis 2004).

The Bechtel versus Bolivia case went before the International Center for the Settlement of Investment Disputes (ICSID) the World Bank’s little known international arbitration tribunal that holds all its sessions in secret without any public scrutiny or participation. Bechtel demanded $50 million as compensation for loss of profits, from a country with some of the poorest people in the western hemisphere. A wide range of groups joined to demand that the World Bank open up the arbitration process to public scrutiny. Trade union organizations, environmental groups, grassroots movements, and many others joined forces to demand that the World Bank open up the arbitration process to public scrutiny.

4 For the most recent figures about the global water market, see Global Water Market 2011 by Global Water Intelligence: Market Leading Analysis: www.globalwaterintel.com

consumer organizations, research groups and numerous religious organizations all over the world all joined in presenting a petition to participate in the ICSID tribunal hearing the case. For four years after 2000 Bechtel and the subsidiary Aguas de Tunari found their companies and corporate leaders dogged by protest, damaging press coverage and public demands from five continents that they drop the case. The result was the first time that a major corporation of has ever dropped a major international trade case as a direct result of global public pressure, and it sets an important precedent for the politics of future trade cases like this.6

A similar situation has occurred in other South American countries. For instance, in July 2002, Suez terminated its World Bank-backed 30-year contract to provide water and sewerage services to the city of Buenos Aires when the financial meltdown of Argentina's economy meant that the company would not be able to maintain its profit margins. During the first eight years of the contract, weak regulatory practices and contract re-negotiations that eliminated corporate risk enabled the Suez subsidiary, Aguas Argentinas S.A to earn a 19% profit rate. Water rates, which the company said would be reduced by 27% actually rose 20% while 50% of its employees were laid off. Aguas Argentinas also reneged on its contractual obligations to build a new sewage treatment plant. As a result, over 95% of the city's sewage is now dumped directly into the River Plate.

In South Africa water supplies were cut off to over 10 million people between 2002-04, largely due to their inability to pay for the newly privatized service (Bond 2004). This occurred despite a constitutional guarantee of access to water for all, pointing to the prioritization of economic commitments and international legal and trade agreements – the new constitutionalism – over and above domestic legal and constitutional guarantees. Similar problems have been reported in many parts of the world where private water companies have increased water rates and cut off services to those who cannot pay the bills, while reducing water quality and refusing to make investments for the improvement of infrastructure such as leaky pipes.

More recently, in the context of the global financial crisis, with the tightening of international and domestic credit markets, many private companies have failed to meet their obligations to invest in water projects. This has shed serious doubt on the future of numerous public-private partnerships, including those related to water and sanitation. Several countries, including South Africa, Australia, the USA, Mexico and several countries in the Middle East have already cancelled a range of such partnerships (Dwivedi 2010).

These processes have generated numerous resistance movements, which, in turn, have led to the termination of some contracts. In other instances, governments have begun to think about how to withdraw from sophisticated agreements that have been signed with corporate giants, usually prepared by international corporate lawyers. However, in spite of growing public opposition, as noted above, the World Bank and various private interests continue to support privatization projects.

Nonetheless, advocates of privatization have become more sophisticated. For instance, water companies now package their business in human rights and

6 Ibid.
environmentally oriented language and they have become involved with various UN agencies and water-related projects. They argue that many governments in developing countries have failed to recognize their citizens’ supposed rights to water and that water privatization can therefore go a long way toward ‘quenching the thirst of the poor’ (Segerfelt, 2005: 13). They claim that public water systems in the developing world generally supply politically connected wealthy and middle class people, whereas the poor are not hooked up to municipal water. They further note that the poor pay more for their water as they are often forced to purchase water from contractors who drive tankers to poor districts and sell water by the can for highly inflated prices. On average, this water is 12 times more expensive than water from regular water mains. These are of course important problems but the question is whether the private sector actors are the best suited to deal with them.

Who sets global water policy?

The United Nations and its specialized bodies are generally considered to be the major policy making institutions in relation to social and environmental issues. The 1977 Mar del Plata meeting was the first water policy meeting under the UN flag and it focused primarily on drinking water and human use. After that, for almost 20 years, there was no serious interest in water issues in the UN. Part of the reason for this was related to the competition and rivalries that existed between the more than 20 UN agencies that claimed water as part of their agenda. However, by the early 1990s, this gap was filled by private ‘epistemic communities’ that gradually became the home of the water companies.

In 1992, two important conferences took place: The International Conference on Water and the Environment (ICEW) in Dublin and the UN Conference on Environment and Development (UNCED) in Rio de Janeiro. These conferences set the stage for a dramatic shift in the global water agenda as it was here that the UN first defined water as an ‘economic good’ thus planting the institutional roots for privatization. These conferences also supported a shift in water governance away from state oriented, fragmented principles and toward more holistic, stakeholder-oriented participatory principles that introduced a new role for the private sector, NGOs and international organizations in the global governance of water. Instead of a long-standing international diplomatic norm-making process, a top down process was quietly begun, as a means to shift the governance of water from the global environmental agenda to economic platforms. Despite calling for a more participatory approach, the core message that emerged from these two conferences was that water has an economic value and that it needs to be managed according to economic principles in order to promote sustainable development (Finger and Allouche, 2002: 21). Concerns about equity and poverty were completely ignored.

The idea of leadership by private institutions, regional and non-governmental organizations along with all interested governments was articulated in a more sophisticated manner with the establishment of the World Water Council (WWC) in

7 Segerfelt (2005) cites one study that 15 countries that found that in the poorest quarters of their populations, 80% of the people were not hooked up to water mains.
2000. This organization is financed and supported by the giant water companies, with participation from the World Bank, United Nations Development Programme, water policy experts, eminent individuals, and mainstream environmental NGOs. Every three years, the WWC organizes World Water Forums in different parts of the world to discuss upcoming issues, establish networks among companies, and offer various services to governments for effective water management. Ultimately, this forum takes on the appearance of a UN agency, and seeks to set the future agenda for global water resource management. It supports the view of water as a commodity and advocates a central role for the private sector in the provisioning of water.

What is emerging in global water policy therefore is a new trend: The leadership role played in 1990s by the UN system has started to decline, and is now being taken over by new institutions like the World Water Council, the Global Water Partnership, and the Stockholm Water Symposium, all of which continue to advocate governing water through the market mechanism as a means of addressing the water crisis. This privatized global water leadership network is interested in norm-making processes that have traditionally belonged to states, interstate relations and diplomacy. Sometimes however, their norm-making process is completely outside of the state-oriented processes still largely governed by international law. When necessary, they act together with local or regional bodies rather than federal governments. Their institution building, style and norm making efforts could be defined ‘as fluid as water’. They are interested in the management of water resources and water services in a vertically integrated manner so they can control water as a profitable commodity.

Set against the powerful private global water network, more radical NGOs have established their own networks to create alternative water policies based on human rights and human security. The more recent campaigns on water issues have a different target. They have mobilized the citizens against the privatization of water, bulk water sales and to remove water from the global trade list of the World Trade Organization. For instance, the World Coalition Against Water Privatization is a global umbrella organization that developed a campaign to keep water out of the WTO at its Johannesburg Summit. The ‘water warriors’, go wherever the ‘water barons’ go, organize alternative forums and wage street demonstrations in cities where the WWF hold their meetings. Basically they are trying to inform citizens

8 The second WWF was in The Hague in 2000, the third was in Japan.


10 I borrowed this language from a project of the Center for Public Integrity, the International Consortium of Investigative Journalists: The Water Barons: How a Few Powerful Companies are Privatizing Your Water (Washington DC: Public Integrity Books, 2003).
that their valuable public good is about to be sold by the governments or local
authorities to the ‘water barons’, who in turn take some of the warriors’ leaders very
seriously. And the barons are aware that the privatization of water systems under the
banner of ‘public-private partnerships’ do not always work without major problems,
and political will is required in order to protect their profits. For instance in Mexico at
the third World Water Forum, the protests were so successful that the organizers of
the WWC had to include the NGOs’ leaders on to their board in order to pacify the
movement.

Access to water? Human rights law and environmental law

A component of the present global conjuncture concerns the conflict between
different social forces regarding the ways in which water should be governed in the
context of the emerging water crisis. The forces of leadership on one side of the
struggle include a number of élites, governments of many of the developed countries,
the IFIs and the private sector who largely support a neoliberal approach to the
governance of water. These social forces promote the privatization of water as the
best and most efficient means of encouraging conservation and view the private sector
as an essential partner in the delivery of water and sanitation services. This view has
been institutionalized and secured through a range of international trade, lending and
other legal agreements that compel governments to privatize services and that seek to
protect private investments from ‘expropriation’ or from future government
interventions. On the other side are a range of NGOs, civil society organizations
and popular movements that point to the numerous negative consequences of past
privatization projects in order to argue that water privatization increases human
insecurity and will ultimately do little to address the water crisis. The latter group of
social forces has increasingly begun to frame their position in relation to international
human rights law, a trend that seems to have the greatest potential to address the
water crisis and to remove this essential resource from the hands of the private sector
and the dictates of the capitalist market.

International human rights law is the only area of international law that aims directly
at distributive, corrective and procedural justice principles. In general, international
human rights law promotes and protects the rights of human beings, as well as the
factors that impede enforcement and punishment of human rights violators, or those
factors that increase the likelihood that violations will occur. The essential role of
human rights law is particularly important to protect individuals and groups that are
considered to be the most vulnerable and it enables redress to those who could not
otherwise obtain access to water if market principles were applied.11 This also means
that ‘access to water for all’ implies that the implementation of this right is a
responsibility of states with respect to their own citizens. However, as of yet, there
are no enforceable norms that protect peoples’ access to water as a human right.

Environmental law is also important in the struggle for the human rights to water. For
a long time environmental law and human rights law were regarded as having

11 As ideas about what is ‘vulnerable’ change, understandings of human rights adapt
to meet emerging claims associated with new forms of vulnerability.
different targets and interests, and were treated separately. However, there are many areas of significant overlap. For example, the right to safe food and water, to live a decent and healthy environment, and to participate in environmental decision-making, all bear upon both human rights law and environmental law. With the growing importance of environmental law, the international community has taken an interest in investigating and anchoring the relationship between the two fields. The integration of these two fields has been evolving since the 1970s through national constitutions, regional agreements and international treaties. Some countries have already enacted the ‘right to access to drinking water’ as a constitutional right. The South African Constitution is one example.

International environmental law is primarily preoccupied with the protection of natural resources and avoids environmental harms particularly in the context of transboundary resources. Therefore in relation to water, international environmental law first and foremost deals with how to protect transboundary water resources from environmental damage and how to provide principles of equitable sharing among the riparian countries. The most important customary law principle of international environmental law, embodied in Principle 21 of the 1972 Stockholm Declaration, stipulates that states have ‘the sovereign rights to exploit their own resources pursuant to their own environmental policies,’ as long as they do not thereby ‘cause damage to the environment of other states or areas beyond the limits of national jurisdiction.’ International environmental law respects state sovereignty and does not purport to regulate a country’s internal environmental problems. Therefore, in many developing countries national law may allow an activity even if it is contrary to international law (Elver 2008: 395). In recent years, however, human rights scholars and environmental NGOs have introduced human rights principles to establish remedies to environmentally harmful activities associated with transboundary water conflicts. These mechanisms are virtually unique in offering venues of redress for individuals or groups who need to appeal beyond their own governmental institutions if harm is done to them from neighbouring countries. Yet, in the transboundary water context, implementing human rights principles is still highly controversial idea since it clashes with the principle of state sovereignty.

Nonetheless, there are numerous ways in which a human rights approach to water can be advanced. For instance, even though the 1948 Universal Declaration of Human Rights does not specifically spell out a right to water, Article 3 provides the right to life and Article 25 recognizes the right to health and grants it a human rights quality. Both of these objectives clearly require the availability of a minimum amount of clean water. The Declaration is not binding per se as a General Assembly resolution, yet it is considered as jus cogens in international law (McCaffrey, 1992: 6). Furthermore, implementing such international human rights principles of access to water at the domestic level also gives citizens additional access to the judicial system – if need be against their own government.

Similar principles are also included by way of article 6 in the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. In addition, the rights enshrined in Articles 11 (which recognizes the right of everyone to an adequate

\[12\text{ A Jus cogens is a peremptory norm, or a fundamental principle of international law.} \]
standard of living, including sufficient food and shelter) and 12 (which contains the right to physical and mental health) of the ICESCR also presuppose access to drinkable water. Furthermore, the 1966 International Covenant on Civil and Political Rights includes the ‘right to life’ in Article 6. The recent trend among human rights scholars is to expand the right to life under the Article 6 as much as possible and to argue that states have a duty to actively pursue politics that are designed to ensure the means of survival for every individual and for all people. Although these rights are somewhat abstract and do not precisely guarantee water rights, they offer the space for judges or administrators to interpret them as such.

Other international human rights treaties include explicit references to the right to water. For instance, Article 14 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women (1979) stipulates that state parties shall ensure women the right to ‘enjoy adequate living conditions, particularly in relation to … water supply’. Similarly, Article 24 (2) of the Convention on the Rights of the Child (1989) requires state parties to combat disease and malnutrition ‘through the provision of adequate nutritious foods and clean drinking water.’

As a social and economic right, the right to water does not encompass a right to access water, directly enforceable by each person against the state. However, the right to water requires governments to progressively increase the number of people with safe, affordable and convenient access to drinkable water. Governments must also ensure non-discriminatory and affordable access to water (Turk and Krajewski 2003). This then offers a legal basis from which to critique the privatization of water given the general failure of private water companies to adequately expand infrastructure and their tendency to raise water prices in ways that increase the burdens felt by the poorest users and in particular, women.

In sum, despite the fact that the right of access to water is recognized in environmental law documents, that right has been circumscribed and transformed under conditions of neo-liberal economic globalization. The 1972 Stockholm Declaration Principle 1 established the link between human rights and the environment, despite the fact that it is a declaratory document. However, much later, the 1992 Rio Declaration on Environment and Development failed to declare a concrete, operative individual right to a decent environment. Instead, Principle 1 of the Declaration used the word ‘entitlement’, and it proclaimed in Principle 3 the ‘right to development’. This formulation may be viewed as a regressive step if compared to the clear language of the Stockholm Declaration adopted 20 years before. Furthermore, the United Nations Convention on Watercourses of 1997 did not refer directly to the right to access to freshwater in a human rights context. Rather Article 10 contains an indirect reference through the concept of ‘vital human needs’, without defining what it is.

Framing water as a human rights issue directly conflicts with much international economic and trade law, which is shaped by the new constitutionalism. It is argued by neoliberals that human rights and the principles of international economic law are mutually reinforcing. Thus certain proponents of new constitutional economic and trade law have argued that the liberal principle of non-discrimination is functionally equivalent to constitutional guarantees for basic human rights. However, critics have pointed out that this neoliberal approach mainly focuses on traditional market freedoms such as the right to trade or the right to own and sell property and it tends to assume that the right to health, food, shelter and water are best protected and
guaranteed through the free market. Further, the perspective of human rights of the liberal approach only focuses on protections traditional human rights against state intervention (a negative concept of human rights) and does not consider human rights enforced through the state (a positive concept of human rights). In contrast, some critics argue that human rights are more than just narrow legal obligations of governments to adopt or avoid particular policies. Rather, they often require considerable political effort by governments to initiate a variety of policy choices.

Indeed, the United Nations High Commissioner for Human Rights explicitly made this point in a report on the ‘liberalization of trade in services and human rights’. According to the report:

A mere reliance on liberal markets to promote human rights is insufficient from a human rights perspective. The state’s obligation under human rights law includes the obligation to ensure that private entities or individuals, including transnational corporations do not deprive individuals of their economic, social and cultural rights.\(^{13}\)

In other words, in contrast to the liberal constitutional approach, it is argued that market forces cannot be expected to protect human rights and governments have an obligation to actively ensure their provisioning. The report continues: ‘The adoption of any deliberately retrogressive measure in the liberalization process that reduces the extent to which any human right is protected constitutes a violation of human rights.’\(^{14}\)

The conflict highlighted by the UN High Commissioner between human rights and trade regulations is particularly important in relation to water since the reclassification of water as a commodity and an economic good in trade law has had negative impacts on the human rights of much of the world’s population. As such, conflicts may arise between, for instance, a state’s obligations and commitments under the GATS and their commitments to UN human rights agreements. The right to water requires government actions aimed at progressively ensuring universal, equal and reliable access to drinkable water; by contrast the GATS principle of ‘progressive liberalization,’ implies the commercialization or privatization of provision.

**Conclusion**

The potential conflict between trade liberalization and regulation of water services as a means to ensure the progressive realization of the right to water opens an important space to offer more progressive approaches to dealing with the global water crisis. The progressive realization of basic human rights such as the right to water needs effective and prudent – indeed very far-sighted – regulation rather than the forms of


\(^{14}\) Ibid.
deregulation and privatization advocated by neoliberals. If the private sector is to be involved in the provisioning of water, there must be effective social and economic regulation and institutions and these institutions must also be democratically accountable. Neither the GATS nor any other agreements of the WTO or capacity building efforts assist countries with the design of such regulatory regimes, because quite simply, the objective of the World Trade Organization governed trade regime is liberalization of trade and investment.

Sustainable water management must grapple with pervasive mismatches between the national political level at which key decisions are made: the individual, societal, and economic levels where the actions generating environmental change occur and the eco-systemic levels at which the environmental consequences unfold. Effectively addressing these challenges will require effective global leadership that fosters policy making structures and processes that can successfully encompass multiple scales from the local to the global, while also navigating the disparate perspectives of diverse users situated at levels extending from households and communities to the national, regional, and international.

Four major questions remain for future global leadership – questions that require deep introspection and reflection and that might serve as guidelines for debates on how we might govern this vital aspect of global governance: (1) Should water, a substance vital to life itself, be treated as if it can be solely as a commodity that is the object of profit-making? (2) How can we organize a global world order so that basic public services such as clean water, clean air, universal health care can be made available to all people of the planet regardless of their ability to pay? (3) How can we govern that world so that technological innovations become available to truly sustainable use of natural resources? (4) Finally, how can we distribute responsibility to protect our planet among the people, treated as equals, in ways that are equally just?