Chapter 3

Elements of a human rights-based approach to freshwater access

3.1. Introduction

While international law in general, and international water law in particular, can provide the principles, the institutional frame, and the procedure of water management, a human rights-based approach empowers the individual to take part in these processes. Human rights are the key instrument for individuals to enforce their interests against the state and, indirectly, also against other individuals or groups. Correspondingly, human rights restrict the state authority in water management. The concrete interests of water users may differ considerably. People may simply demand that the state refrains from interfering with their existing access to freshwater or may claim equal access to management institutions. The interests may, however, also aim at positive obligations such as providing protective measures or public facilities. Having said that, not every interest of water users will be met by a human rights claim. The concept of human rights has certain characteristics that determine its content, addressee and procedure. The following chapter will elaborate on the appropriateness of a human rights-based approach as an instrument for individuals seeking basic water access. The analysis will also turn to a human rights-based approach as a political concept of allocation in general water management schemes. In addition, the chapter shall determine the specifics of a human rights-based approach to freshwater access.

The discussion will begin with giving a survey of the basic functions of a human rights-based approach. Subsequently, the distinctiveness of the concept shall be developed by comparing it to policy concepts and by discussing the concepts of the right to environment and the right to development. Specific attention will be paid to the basis of positive obligations in human rights theory and their embodiment in international human rights law. This shall establish the basis for the interpretation of those human rights applicable
to freshwater access in Chapter 4. Eventually, this chapter will briefly turn to the debate on the universal applicability of human rights.

3.2. Characteristics of a human rights-based approach to freshwater access

A human rights-based approach operates in two different manners: result-orientated as well as procedure-orientated. The guarantee of a sphere of freedom, which the state may not interfere with, and positive state obligations granting protection, or certain benefits to individuals, describe the result-orientation of a human rights-based approach because they deal with the establishment of a certain legal interest. This purpose is deemed to oblige the state to achieve – or in certain cases at least to strive towards1 – this result and to entitle the single individual to claim the relevant state action. Thus, with regard to the issue of freshwater access the result-orientation of a human rights-based approach is the guarantee that people have sufficient, safe, acceptable and affordable water access for their basic needs. The state has to comply with this result on all levels of state organisation and during all of its actions, whether legislative, executive or judicial. Thus, the legislature is bound to the result when adopting water management strategies, and the administration and the judiciary when applying the respective rules.

The procedure-orientation of a human rights-based approach determines a frame and certain conditions under which water management has to take place. Thus, human rights demand state action to be consistent with the principles of democracy and the rule of law.2 That makes state action accountable and contributes to transparency of water management. Compliance with the rule of law includes the existence of government’s monopoly on the use of force, the separation of powers, the principle of legality of the executive,

1 See on this point the discussion in 3.5.2.
2 Individual rights to democracy and to the application of the rule of law do not exist in current international law. Nevertheless, today, it is well accepted that human rights contain a procedural dimension in this respect. Paragraph 55 Limburg Principles states in respect to Article 4 ICESCR: “While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition.” (The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, Annex).