

# LAW AND THE MEKONG RIVER BASIN: A SOCIO-LEGAL RESEARCH AGENDA ON THE ROLE OF HARD AND SOFT LAW IN REGULATING TRANSBOUNDARY WATER RESOURCES

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*This commentary sketches a research agenda for mapping the normative networks through which debates concerning transboundary water resources in the Mekong River Basin are being conducted, particularly those networks' transnational legal dimensions. It argues that traditional 'hard versus soft law' analyses of the Mekong River Basin have to date paid too little attention to the role that legal vocabularies, institutions and actors are in fact playing on this highly contested terrain. Such analyses have, moreover, been insufficiently attentive to the particular, plural understandings, expectations and makings of law traceable to parties living and operating in the Mekong River Basin. The commentary outlines a research agenda informed broadly by Michel Foucault's writing on governmentality and Pierre Bourdieu's reflexive sociology and presents some preliminary intuitions animating that agenda. It advocates, in brief, Mekong-specific inquiries into hybrid and variegated forms of legal knowledge and their uneven distribution, beyond any single hard-soft law continuum.*

## CONTENTS

I	Introduction.....	1
II	Transnational Law and Scholarship in the Mekong River Context.....	3
III	International Socio-Legal Scholarship on Hard and Soft Law.....	8
IV	An Agenda for Socio-Legal Research in the Mekong.....	11
V	Research Methodology.....	17
VI	Some Preliminary Hypotheses.....	19
VII	Conclusion.....	20

## I INTRODUCTION

The management and governance of transboundary water resources has long been of interest to international law scholars, and has given rise to interstate disputes reaching back at least as far as the 1870s in the *Helmand River Cases*.<sup>1</sup> Throughout the 20<sup>th</sup> century, scholarly interest was stimulated by the adoption of numerous bilateral or multilateral agreements on the use of particular river

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<sup>1</sup> (*Afghanistan v Persia*) (1872) 5 Moore's International Arbitrations 4706. For discussion of transboundary watercourse disputes see Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press, 2009) 163–95.

basins,<sup>2</sup> and later by the United Nations General Assembly's direction in 1970 to the International Law Commission ('ILC') to study and develop the law of the non-navigational uses of international watercourses.<sup>3</sup>

The resulting framework *Watercourses Convention*,<sup>4</sup> and its 'soft' near relation, the ILC's *Draft Articles on the Law of Transboundary Aquifers*,<sup>5</sup> have provided a new focus for scholarly attention, as have general principles of international environmental law and human rights law that bear upon river management. Those developments have been overlaid by a proliferation of what are generically called 'soft law' standards, emanating from the numerous international and regional stakeholders involved in water management.

On one hand, the progressive development of global norms has encouraged a sense amongst many international lawyers that there is, or invariably should be, a teleological '*hardening*' and *universalising* of the law on shared water resources, and an accompanying move away from the traditional ad hoc approach that dominated the governance of particular rivers. The development of soft law is typically regarded as a normative 'bridge' between an absence of international law — that is, a realm dominated by sovereign discretion, political choices, and unstructured negotiation — and the normative certainty supplied by conventional hard law such as treaties or the binding decisions of courts or arbitrators.<sup>6</sup> Soft law is seen as a way of transitioning towards hard law, impelling behavioural change over time, even if there is flux and variation in the interim.

On the other hand, a neat teleological account of the development of a coherent and singular 'international water law' immediately strikes difficulties when applied to the management of particular river systems. Different river basins are governed in a range of quite different ways, some utilising 'harder' norms and institutions, others falling back on 'softer' regulation, and many mixing elements of both. There is, indeed, great variation not only in the regulatory mix of legal and quasi-legal norms *between* rivers, but also in the social understandings and expectations of law by different stakeholders — local, national, regional, international — with interests *within* a particular river basin.

Moreover, the idea that trajectories of 'softness' and 'hardness' in law have readily predictable outcomes has been shown to be problematic. To the extent

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<sup>2</sup> See generally Shlomi Dinar, *International Water Treaties: Negotiation and Cooperation along Transboundary Rivers* (Routledge, 2008).

<sup>3</sup> *Progressive Development and Codification of the Rules of International Law relating to International Watercourses*, GA Res 2669 (XXV), UN GAOR, 6<sup>th</sup> Comm, 25<sup>th</sup> sess, 1920<sup>th</sup> plen mtg, UN Doc A/RES/2669 (XXV) (8 December 1970).

<sup>4</sup> *Convention on the Law of the Non-Navigational Uses of International Watercourses*, opened for signature 21 May 1997, 36 ILM 700 (not yet in force) ('*Watercourses Convention*'); see generally Stephen C McCaffrey, *The Law of International Watercourses* (Oxford University Press, 2<sup>nd</sup> ed, 2007).

<sup>5</sup> As contained in ILC, *Report of the International Law Commission Sixtieth Session*, UN GAOR, 63<sup>rd</sup> sess, Supp No 10, Doc A/63/10 (8 August 2008) 249. See Gabriel Eckstein, 'Commentary on the UN International Law Commission's Draft Articles on the Law of Transboundary Aquifers' (2007) 18 *Colorado Journal of International Environmental Law and Policy* 537.

<sup>6</sup> See, eg, Sylvia I Karlsson-Vinkhuyzen and Antto Vihma, 'Comparing the Legitimacy and Effectiveness of Global Hard and Soft Law: An Analytical Framework' (2009) 3 *Regulation and Governance* 400, 400–2, discussing a 'legalization continuum' from treaty provisions 'devoid of legal content' to 'precise and legally binding treaties with delegated enforcement bodies'.

that they exist, ‘soft law camp[s]’ among legal scholars and policymakers are, as di Robilant has highlighted, ‘politically kaleidoscopic’.<sup>7</sup> In some instances, soft law promotes what might be termed a pro-market agenda, such as one directed towards the elimination of obstacles to trade.<sup>8</sup> Elsewhere, soft law operates to advance socially progressive causes.<sup>9</sup> The same can be said of legal norms at the ‘harder’ end of the spectrum. Far from championing hard or soft law per se, what seems most pressing in relation to the Mekong River Basin (the ‘Mekong’) is to grasp and evaluate with greater precision the disparate legal strategies embraced by this terminology.

The modest purpose of this commentary is to begin to address a key problem in global water management, which stems from this normative ‘noise’ surrounding river governance: the sense that legal norms and institutions governing particular river basins often do not always work in ways that lawyers, policymakers and stakeholders expect. By spotlighting the Mekong in South-East Asia, this commentary charts an agenda for future research that would allow deeper thinking about how norms that we term ‘hard’ and ‘soft’ law influence decision-making concerning transboundary river systems, for better or worse.

The commentary will first set out the context of existing legal scholarship on the Mekong, before raising some salient theoretical and empirical questions surrounding the role of legal norms in the transboundary governance of the Mekong. A better understanding of the role of law and legal institutions is necessary if the practice and reform of water governance in the Mekong is to yield positive results for the region and its people. Such understanding may also help to improve transboundary river basin governance globally by enhancing understanding of the limits and potential of law and legal institutions, particularly those formulated or operating at a transnational scale. This commentary sketches a socio-legal research agenda that offers one way of generating such understanding. This agenda has been formulated on the basis of preliminary, collaborative research conducted by the authors — a group of scholars bringing to this endeavour a wide range of research strengths and interests in law and the social sciences. As such, this commentary also argues for international lawyers to work closely and collaboratively with Mekong area specialists from other disciplines to address issues of immediate concern in the Mekong.

## II TRANSNATIONAL LAW AND SCHOLARSHIP IN THE MEKONG RIVER CONTEXT

Cradling South-East Asia’s longest river, the Mekong spans the territories of Cambodia, China, Laos, Myanmar (Burma), Thailand and Vietnam. More than 60 million people live in the Mekong,<sup>10</sup> many of whom are dependent on the

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<sup>7</sup> Anna di Robilant, ‘Genealogies of Soft Law’ (2006) 54 *American Journal of Comparative Law* 499, 502.

<sup>8</sup> Ibid 533: ‘[S]oft commercial law is the product of the efforts of the unification movement advanced by social forces committed to the facilitation of transnational capital expansion.’

<sup>9</sup> Ibid: ‘[I]n the hands of marginalized groups seeking social change, soft law becomes a tool for empowerment and emancipation.’

<sup>10</sup> Milton Osborne, ‘The Mekong: River under Threat’ (Paper No 27, Lowy Institute, 2009) 6 <<http://www.lowyinstitute.org/publication.asp?pid=1188>>.

river system for their livelihoods. Many countries have interests in the Mekong continued vitality and development. Yet, today the Mekong's water resources are threatened by extensive and largely uncoordinated development.

In particular, development of hydro-electric power has accelerated markedly and controversially, under the dominant belief that a region with significant numbers living in poverty must develop its water resources to create wealth.<sup>11</sup> With eight dams planned for the Upper Mekong in China's Yunnan Province (three completed and three underway), major hydropower projects proposed or underway in Thailand, Laos, Cambodia and Vietnam,<sup>12</sup> and a further 11 sites under consideration for dam construction,<sup>13</sup> the Mekong ecosystem is under threat, as are the livelihoods of some of the poorest people who depend on fish and other riverine resources. Lowered water levels and declining fish catches have been reported in recent years,<sup>14</sup> which can significantly impact on living standards and public health. In Cambodia, for instance, fish from the Mekong supply 70 per cent of animal protein consumed by people each year,<sup>15</sup> yet dams interrupt seasonal fish migration which is essential in maintaining fish stocks.<sup>16</sup>

Prospects for conflict, environmental insecurity, and human displacement loom large.<sup>17</sup> Poor water management can contribute to social and interstate conflict and human insecurity.<sup>18</sup> As others note, 'the struggle for access to natural resources, market competition, territorial exploitation and unresolved damages by upstream-downstream development to the environment and livelihood of downstream inhabitants could, if not properly addressed, increase the level of interstate conflict.'<sup>19</sup> Risks of conflict are exacerbated as surplus extraction for energy development creates wealth for some at the expense of others.<sup>20</sup> There are transnational problems of equitable distribution of both water

<sup>11</sup> François Molle, Tira Foran and Mira Käkönen (eds), *Contested Waterscapes in the Mekong Region: Hydropower, Livelihoods and Governance* (Earthscan, 2009).

<sup>12</sup> Nantana Gajasen, Oliver William Heal and Gareth Edwards-Jones, 'The Mekong River Basin: Comprehensive Water Governance' in Matthias Finger, Ludivine Tamiotti and Jeremy Allouche (eds), *The Multi-Governance of Water: Four Case Studies* (SUNY Press, 2006) 43, 54-5.

<sup>13</sup> Osborne, above n 10, 18.

<sup>14</sup> Ibid 10; Aviva Imhof, 'The Mekong: Diverse, Magnificent, Threatened' (2007) 22(2) *World Rivers Review* 1.

<sup>15</sup> Milton Osborne, *The Mekong River under Threat*, (11 January 2010) The Asia Pacific Journal: Japan Focus <<http://japanfocus.org>>.

<sup>16</sup> T J Warren, G C Chapman, and D Singhanouvong, 'The Upstream Dry-Season Migrations of Some Important Fish Species in the Lower Mekong River of Laos' (1998) 11 *Asian Fisheries Science* 239; World Commission on Dams, *Dams and Development: A New Framework for Decision-Making* (Earthscan, 2000) 82-3.

<sup>17</sup> Osborne, above n 10.

<sup>18</sup> Ban Ki-moon, 'Secretary-General's Video Message for the First Asia-Pacific Water Summit' (Speech delivered at Asia-Pacific Water Forum, Beppu, Japan, 3 December 2007) <<http://www.un.org/apps/sg/sgstats.asp?nid=2888>>.

<sup>19</sup> Doung Chanto Sisowath, 'Region within a Region: the Mekong and ASEAN' in Maria Serena I Diokno and Nguyen Van Chinh (eds), *The Mekong Arranged and Rearranged* (Mekong Press, 2006) 121, 124.

<sup>20</sup> See, eg, Philip Hirsch, 'Development Assistance in a Transboundary River Basin Setting: The Role of Institutional Mechanisms in Safeguarding Poor People's Livelihoods and Rights to Land and Water in the Mekong Region' in Jannik Boesen and Helle Munk Ravnborg (eds), *From Water 'Wars' to Water 'Riots' — Lessons from Transboundary Water Management* (Working Paper No 2004/6, Danish Institute for International Studies, 2004) 98.

and beneficial uses of it. These are just some of the risks with which the many stakeholders active in the region have been attempting to grapple.

International and regional laws and institutions have sought to address the risks associated with these developments. The key regional legal instrument is the *Mekong Agreement*,<sup>21</sup> which established a transboundary institution, the Mekong River Commission ('MRC'), to promote cooperation in the sustainable development, utilisation, management and conservation of the Mekong. The *Mekong Agreement* has conventionally faced criticism for being too 'soft': it is mostly drafted in 'hortatory'<sup>22</sup> language and its few 'harder' provisions have not been utilised.<sup>23</sup> Instead, the *Mekong Agreement* largely relies upon informal 'Procedures' approved by member states,<sup>24</sup> which are unlikely to be enforceable.<sup>25</sup> Nor has the *Mekong Agreement* been consistently implemented in national legislation of member states.<sup>26</sup>

The relative 'softness' of regional law has not been supplemented by 'harder' international treaty law: the *Watercourses Convention* has not yet achieved sufficient ratifications to enter into force and no Mekong country has signed it. Nor has any Mekong country signed the *Espoo Convention*,<sup>27</sup> which requires member states to take measures to prevent, reduce and control certain adverse transboundary environmental impacts.<sup>28</sup> Mekong governance is, however, set against the wider background of international environmental norms concerning sustainable development, including specific programs concerning freshwater in *Agenda 21*<sup>29</sup> and the 2002 World Summit on Sustainable Development *Plan of Implementation*.<sup>30</sup>

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<sup>21</sup> *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin*, opened for signature 5 April 1995, 2069 UNTS 3 (entered into force 5 April 1995) ('*Mekong Agreement*'). Article 1 provides for cooperation in 'all fields of sustainable development, utilization, management and conservation of the water and related resources of the Mekong River Basin including, but not limited to irrigation, hydropower, navigation, flood control, fisheries, timber floating, recreation and tourism'. Articles 2–10 outline the objectives and principles of cooperation.

<sup>22</sup> Phillip Hirsch et al, University of Sydney, *National Interests and Transboundary Water Governance in the Mekong* (2006) 26–7 <[http://www.mekong.es.usyd.edu.au/projects/mekwatgov\\_mainreport.pdf](http://www.mekong.es.usyd.edu.au/projects/mekwatgov_mainreport.pdf)> ('2006 Study').

<sup>23</sup> The MRC Joint Committee has the authority to prepare legally binding Rules for Water Utilization and Inter-Basin Diversions, pursuant to arts 5 and 26 of the *Mekong Agreement*. However, no such rules have been presented by the MRC. For indicative criticism of the softness of the *Mekong Agreement*, see Bennett L Bearden, 'The Legal Regime of the Mekong River: A Look Back and Some Proposals for the Way Ahead' (2010) 12 *Water Policy* (forthcoming) <<http://www.iwaponline.com/wp/toc.htm>>.

<sup>24</sup> Including Procedures for Notification, Prior Consultation and Agreement, Procedures for Water Use Monitoring and Procedures for the Maintenance of Flow on the Mainstream. See Mekong River Commission, *MRC Agreement, Procedures and Technical Guidelines* (2009) <<http://www.mrcmekong.org>>.

<sup>25</sup> Hirsch et al, above n 22, 30–1.

<sup>26</sup> *Ibid* 33–42.

<sup>27</sup> *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, 1989 UNTS 309 (entered into force 10 September 1997) ('*Espoo Convention*').

<sup>28</sup> *Ibid* arts 1, 2.

<sup>29</sup> *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol 1) (1993) annex II ('*Agenda 21*') [18.1]–[18.90].

<sup>30</sup> *Report of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (2002) annex II ('*Plan of Implementation of the World Summit on Sustainable Development*'), [26].

To date it has been unclear what impact(s) international and regional laws and transboundary legal institutions have had, and are having, on decision-making and governance in the Mekong. The absence of any rigorous, critical mapping of the normative networks of the Mekong — particularly their transnational dimensions — has permitted widespread reliance upon untested assumptions, with little attention to the legal influences by which those networks and assumptions have, in part, been shaped. In the Mekong, prevailing ideas of ‘best practice’ have often failed to engage the variegated and contested normative landscape within which they seek to gain purchase.<sup>31</sup>

There is, for instance, a common perception that governance of the Mekong is lightly or inadequately regulated by international law. It is often thought that Mekong governance is heavily dependent on informal negotiation, the non-legal expression of sovereign prerogatives, national ‘resource sovereignty’, geopolitical interests, and non-binding, consultative decision-making. Perceptions of an ‘ASEAN<sup>32</sup> way’ along these lines — also influenced by background cultural assumptions about ‘Asian values’ — have driven much analysis of river management.<sup>33</sup>

There is, it must be acknowledged, an extensive body of scholarship examining water management in the Mekong, including its legal aspects. The legal scholarship in this area has focused on the usual incidents of legal regimes: institutions such as the MRC and its predecessors, as well as associated treaty regimes.<sup>34</sup> Some scholars have also analysed — even championed — ‘soft’ transboundary norms in the Mekong,<sup>35</sup> as an alternative frame of reference. However, much of this research has had an applied focus, driven by concerns about options for reform and for remodelling governance structures and processes, or addressing the concerns of national authorities and donors, rather than asking challenging theoretical questions about how norms are generated, understood, deployed, embraced or resisted by different stakeholders in the Mekong.

Much of the recent scholarship has, furthermore, tended to de-emphasise or underestimate the roles played by transnational politico-legal constituencies that

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<sup>31</sup> Hirsch et al, above n 22, 160–1.

<sup>32</sup> Association of Southeast Asian Nations.

<sup>33</sup> See, eg, Koh Kheng-Lian and Nicholas A Robinson, ‘Strengthening Sustainable Development in Regional Intergovernmental Governance: Lessons from the “ASEAN Way”’ (2002) 6 *Singapore Journal of International and Comparative Law* 640; Nathan Badenoch, *Transboundary Environmental Governance: Principles and Practice in Mainland Southeast Asia* (World Resources Institute, 2002); John Dore, ‘The Governance of Increasing Mekong Regionalism’ in Mingsarn Kaosa-ard and John Dore (eds), *Social Challenges for the Mekong Region* (White Lotus, 2003) 405; Lorraine Elliott, ‘ASEAN and Environmental Cooperation: Norms, Interests and Identity’ (2003) 16 *Pacific Review* 29; Roda Mushkat, *International Environmental Law and Asian Values: Legal Norms and Cultural Influences* (UBC Press, 2004).

<sup>34</sup> See, eg, Jeffrey W Jacobs, ‘The Mekong River Commission: Transboundary Water Resources Planning and Regional Security’ (2002) 168 *Geographical Journal* 354; Greg Browder and Leonard Ortolano, ‘The Evolution of an International Water Resources Management Regime in the Mekong River Basin’ (2000) 40 *Natural Resources Journal* 499.

<sup>35</sup> See, eg, George E Radosevich and Douglas C Olson, ‘Existing and Emerging Basin Arrangements in Asia: Mekong River Commission Case Study’ (Paper presented at the Third Workshop on River Basin Institution Development, The World Bank, Washington DC, 24 June 1999).

do not fit neatly into the formal architecture of intergovernmental coordination.<sup>36</sup> Other Mekong scholarship has illuminated intra-regional developments without seeking to connect these with broader tendencies and tensions within the international legal order.<sup>37</sup> Where those connections have been drawn, the research has often been tentative<sup>38</sup> or primarily descriptive.<sup>39</sup> Important work on the politics of dams,<sup>40</sup> water,<sup>41</sup> and transborder issues<sup>42</sup> has paid scant attention to the legal dimensions of those political debates.

Hirsch has written extensively on different stakeholder positions, resource politics and the management of competing interests in the Mekong,<sup>43</sup> including the legal dimensions.<sup>44</sup> The 2006 Study by Hirsch, Boer et al<sup>45</sup> found that what national and regional decision-makers, international experts and aid donors thought about the MRC's future was often structured by understandings about law, without those understandings having been informed by critical inquiry. For instance, the notion that legal rules and practices among ASEAN countries are determined by a non-interventionist and consensual culture peculiar to the region has been extensively critiqued.<sup>46</sup> Yet, in Mekong governance, the 2006 study found that these ideas remained powerful.<sup>47</sup> These ideas also underpin the sometimes unrealistic expectations of civil society groups regarding the power of transnational laws and institutions. As a consequence, different stakeholders

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<sup>36</sup> See, eg, Jörn Dosch and Oliver Hensengerth, 'Sub-Regional Cooperation in Southeast Asia: The Mekong Basin' (2005) 4 *European Journal of East Asian Studies* 263; Khien Theeravit, 'Relationships Within and between the Mekong Region in the Context of Globalisation' in Mingsarn Kaosa-ard and John Dore (eds), *Social Challenges for the Mekong Region* (White Lotus, 2003) 49.

<sup>37</sup> See, eg, John Dore, 'Mekong Region Water-Related MSPs — Unfulfilled Potential' in Jeroen Warner (ed), *Multi-Stakeholder Platforms for Integrated Water Management* (Ashgate, 2007) 205.

<sup>38</sup> See, eg, Chris Sneddon, 'Conservation Initiatives and "Transnationalization" in the Mekong Basin' in Karl S Zimmerer (ed), *Globalization and New Geographies of Conservation* (University of Chicago Press, 2006) 191, 206–8.

<sup>39</sup> See, eg, Gajaseni et al, above n 12.

<sup>40</sup> See, eg, Philip Hirsch, 'Large Dams, Restructuring and Regional Integration in Southeast Asia' (1996) 37 *Asia Pacific Viewpoint* 1; Bruce D Missingham, *The Assembly of the Poor in Thailand: From Local Struggles to National Protest Movement* (University of Washington Press, 2003) 65–96.

<sup>41</sup> See, eg, Andrew Walker, 'Agricultural Transformation and the Politics of Hydrology in Northern Thailand' (2003) 34 *Development and Change* 941.

<sup>42</sup> See, eg, Suchada Thaweessit, Peter Vail and Rosalia Sciortino (eds), *Transborder Issues in the Greater Mekong Sub-Region* (Mekong Sub-Region Social Research Centre, 2008).

<sup>43</sup> See, eg, Mahfuzuddin Ahmed and Philip Hirsch (eds), *Common Property in the Mekong: Issues of Sustainability and Subsistence* (Australian Mekong Resource Centre, 2000); Philip Hirsch, 'Globalisation, Regionalisation and Local Voices: The Asian Development Bank and Re-Scaled Politics of Environment in the Mekong Region' (2001) 22 *Singapore Journal of Tropical Geography* 237; Philip Hirsch, 'Water Governance Reform and Catchment Management in the Mekong Region' (2006) 15 *Journal of Environment and Development* 184; Philip Hirsch, 'Advocacy, Civil Society and the State in the Mekong Region' in Barbara Rugendyke (ed), *NGOs as Advocates for Development in a Globalising World* (Routledge, 2007) 185.

<sup>44</sup> Philip Hirsch, 'Beyond the Nation State: Natural Resource Conflict and "National Interest" in Mekong Hydropower Development' (1999) 29 *Golden Gate Law Review* 399.

<sup>45</sup> Above n 22.

<sup>46</sup> See, eg, Stephen Levine, 'Introduction: Asian Values and Regional Community Building' (2007) 35 *Politics and Policy* 1; Amitav Acharya, 'Ideas, Identity and Institution-Building: From the "ASEAN Way" to the "Asia-Pacific Way"?' (1997) 10 *Pacific Review* 319.

<sup>47</sup> Hirsch et al, above n 22, 75–80; see also Elliott, above n 33.

have conflicting assumptions about the management and governance of the Mekong.

At the same time, there remain persistent calls for more or 'harder' law in the Mekong, often in response to dissatisfaction with less formal governance arrangements. Such demands are traceable to a variety of actors and to a range of unmet needs, unrealised aspirations and unresolved conflicts. These include conflicts surrounding Mekong water itself: for instance, whether it should be approached as a matter of human rights, cultural heritage, fungible economic commodity, sovereign resource, shared good, trade and transport route, the lifeblood of a fragile ecosystem, or otherwise.<sup>48</sup>

Recent scholarship suggests that, already, a diverse and poorly understood complex of international, regional and national laws (both private and public) and legal actors influence the Mekong's governance.<sup>49</sup> The use of legal concepts and vocabularies is in fact widespread in debates surrounding the Mekong's governance and development,<sup>50</sup> notwithstanding prevailing beliefs about the legal under-development of the field. 'Regulatory conversations' occur at multiple sites.<sup>51</sup> Transnational legal norms and institutions inform distributions of power within these debates and are in turn shaped by them in their region-specific effects.<sup>52</sup> Yet there is relatively little theoretical or empirical work examining how, and to what extent, transnational legal norms and institutions inform water governance in the Mekong.

### III INTERNATIONAL SOCIO-LEGAL SCHOLARSHIP ON HARD AND SOFT LAW

An approach closely examining the tendencies captured in the seemingly simple dialectic of hard and soft law, as applied to the Mekong, may yield new insights into the role of law in transboundary water governance. One of the most important contributions of twentieth century socio-legal scholarship was to explore relationships between the normative force of law and that of other social norms and institutions.<sup>53</sup> In international legal scholarship, as elsewhere, these relations have partially been explored in terms of a well known distinction between hard and soft law.

In this context, hard law refers to international legal norms that are relatively clear and binding — often codified as treaties — particularly those linked to

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<sup>48</sup> Cf Lee Godden, 'Perception of Water in Australian Law: Re-Examining Rights and Responsibilities' (Paper presented at the Australian Academy of Technological Sciences and Engineering, November 2003).

<sup>49</sup> See, eg, José E Alvarez, 'Institutionalised Legalisation and the Asia-Pacific "Region"' (2007) 5 *New Zealand Journal of Public International Law* 9; See Hirsch et al, above n 22, 23–44.

<sup>50</sup> See, eg, Eric Rutkow, Cori Crider and Tyler Giannini, *Down River: The Consequences of Vietnam's Se San River Dams on Life in Cambodia and their Meaning in International Law* (NGO Forum on Cambodia Report, December 2005) <<http://www.ngoforum.org.kh/Environment/Docs/mekong/Down%20River.pdf>>.

<sup>51</sup> John Gillespie, 'Towards a Discursive Analysis of Legal Transfers into Developing East Asia' (2008) 40 *NYU Journal of International Law and Politics* 657, 717.

<sup>52</sup> Cf Yves Dezalay and Bryant G Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press, 2002) 4–6.

<sup>53</sup> See, eg, Christopher Tomlins, 'How Autonomous is Law?' (2007) 3 *Annual Review of Law and Social Science* 45.

enforcement mechanisms that mimic domestic legal orders. In contrast, the term ‘soft law’ often refers to international legal materials that are weak in the obligations imposed and/or which afford a high degree of decision-maker discretion.<sup>54</sup> Elsewhere, soft law designates norms that are not legally binding but nonetheless exert some quasi-legal force,<sup>55</sup> in the sense that they shape behavioural change and induce a ‘compliance pull’. In some cases soft law may constitute a ‘self-contained regime’ that effectively and flexibly embodies the legal intentions of the parties.<sup>56</sup> Soft law sometimes offers a more plural space in which international law can be developed by a variety of non-state actors.

In recent decades, international legal scholars have noted a rapid proliferation of soft law.<sup>57</sup> Some associate this with the spread of neoliberal forms of governance or ‘governmentality’ — particularly through the vehicle of international institutions and international law.<sup>58</sup> In light of this growing awareness of normative pluralism and the ‘quest for softness’ in many legal fields,<sup>59</sup> much literature on international and regional law has exhibited a reflex bias towards hard law, including the scholarship addressing transboundary water resources. It is frequently contended that one should aspire to international governance through legal norms and institutions of the utmost firmness,<sup>60</sup> in contrast to the perceived weakness of soft law. Some have also critiqued soft law as the self-interested stretching of international law by scholars keen to expand the discipline.<sup>61</sup>

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<sup>54</sup> Richard B Bilder, ‘Beyond Compliance: Helping Nations Cooperate’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000) 71; Kenneth W Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 421, 422.

<sup>55</sup> Christine M Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 *International and Comparative Law Quarterly* 850, 851 n 2.

<sup>56</sup> See, eg, Harmut Hillgenberg, ‘A Fresh Look at Soft Law’ (1999) 10 *European Journal of International Law* 499.

<sup>57</sup> Jan Klabbers, ‘Reflections on Soft Law in a Privatized World’ (2006) 104 *Lakimies* 1191; Jan Klabbers, ‘Institutional Ambivalence by Design: Soft Organisations in International Law’ (2001) 70 *Nordic Journal of International Law* 403; John Kirton and Michael J Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate, 2004); Pierre-Marie Dupuy, ‘Soft Law and the International Law of the Environment’ (1991) 12 *Michigan Journal of International Law* 420.

<sup>58</sup> See, eg, Tania Murray Li, *The Will to Improve: Governmentality, Development, and the Practice of Politics* (Duke University Press, 2007), 230–69; Aihwa Ong, ‘Graduated Sovereignty in South-East Asia’ in Jonathan Xavier Inda (ed), *Anthropologies of Modernity: Foucault, Governmentality and Life Politics* (Wiley-Blackwell, 2005) 83; James Ferguson and Akhil Gupta, ‘Spatializing States: Toward an Ethnography of Neoliberal Governmentality’ (2002) 29 *American Ethnologist* 981.

<sup>59</sup> Hillgenberg, above n 56.

<sup>60</sup> Stephen J Toope, ‘Formality and Informality’ in Daniel Bodansky, Jutta Brunnée and Ellen Hay (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 107, 108.

<sup>61</sup> See Jean d’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials’ (2008) 19 *European Journal of International Law* 1075; see also Anthony D’Amato, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials — A Reply to Jean d’Aspremont’ (2009) 20 *European Journal of International Law* 897.

Elsewhere, international lawyers have argued for the distinctive merits of soft law over hard law in given contexts.<sup>62</sup> In the field of transboundary water management specifically, it has been argued that ‘informal, non-binding norms may come to shape practice quite effectively’; more effectively, indeed, than formally entrenched and highly specific ‘hard’ norms.<sup>63</sup> Soft law may be seen as less threatening and more capable of adoption than hard law, but may as effectively shape behaviour in practice as it takes on a life of its own.

Socio-legal scholars Trubek and Trubek have, however, observed that the debate concerning the relative advantages of ‘softer’ and ‘harder’ forms of international law often seems ‘stuck in untenable positions’.<sup>64</sup> They characterise that scholarship as prone to underestimating both the ‘hardness’ of soft law (the impact of pressures to conform and discursive transformations) and the ‘softness’ of hard law (its indeterminacy and the pervasiveness of prerogative power).<sup>65</sup> Even those who defend a positivist critique of soft law have acknowledged that there are different levels of ‘softness’.<sup>66</sup> The vagueness of the terms ‘hard’ and ‘soft’ obscures a wide range of different normative characteristics of particular ‘legal’ instruments, sources or materials.<sup>67</sup> Debate framed at such a level of generality may also distract participants from critical questions, as Trubek and Trubek have underlined.<sup>68</sup> These might include: what is at stake in appealing to ‘softness’ or ‘hardness’ in particular instances, as opposed to framing argument in other ways? What gets elided or enabled by these rhetorical devices?

More or less in parallel to international lawyers’ ‘soft versus hard law’ debates, international relations scholars have, over the past decade, explored the role that ‘legalisation’ plays in international politics; ‘legalisation’ being the tendency of global actors to submit or be subjected to obligatory, relatively precise rules delegating interpretive authority to third parties.<sup>69</sup> Legalisation of international affairs within the Asia-Pacific has been the subject of particular study.<sup>70</sup>

This legalisation literature, however, exhibits shortcomings, particularly in its Asia-Pacific applications. For critics, it pays insufficient regard to actors’ involvement in non-binding interstate institutions, standardisation processes, and public/private consortia structured by law. It tends to approach the Asia-Pacific in the singular, as though regional legalisation were a uniform phenomenon. It is

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<sup>62</sup> Chinkin, above n 55; Bilder, above n 54; Timothy Meyer, ‘Soft Law as Delegation’ (2009) 32 *Fordham International Law Journal* 888.

<sup>63</sup> Toope, above n 60, 119.

<sup>64</sup> David M Trubek and Louise G Trubek, ‘Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination’ (2005) 11 *European Law Journal* 343, 355.

<sup>65</sup> *Ibid* 355–61.

<sup>66</sup> See d’Aspremont, above n 61.

<sup>67</sup> See also Arnold N Pronto, ‘Some Thoughts on the Making of International Law’ (2008) 19 *European Journal of International Law* 601, 613–4.

<sup>68</sup> Trubek and Trubek, above n 64, 344.

<sup>69</sup> Kenneth W Abbott et al, ‘The Concept of Legalization’ (2000) 54 *International Organization* 401; Michael Byers (ed) *The Role of Law in International Politics* (Oxford University Press, 2000).

<sup>70</sup> See, eg, Miles Kahler, ‘Legalisation as Strategy: The Asia-Pacific Case’ (2000) 54 *International Organization* 549.

also inadequately attentive to the role of experts acting outside the state<sup>71</sup> — a limitation of considerable importance in a field such as water regulation, where technical expertise keenly shapes regulatory outcomes.

In short, existing scholarship, concerned either with soft law's proliferation or with the legalisation of international politics, has neglected international law's 'interstitial' operation 'in and around explicit normative frameworks'.<sup>72</sup> Moreover, here as elsewhere, comparative studies of the Asia-Pacific region have often served to 'reinforce the internationalist's claim to govern from a space beyond culture' by stabilising the division of 'assimilable' from 'exotic' and taking for granted private law's detachment from politics.<sup>73</sup>

In environmental law, and watercourse law in particular, these problems persist, despite the best efforts of Toope and Brunée.<sup>74</sup> Beyond their work, there have been few studies in this context that have combined theoretical inquiry into the circulation and impact of legal ideas, institutions and vocabularies with ethnographic mapping of particular socio-legal fields, probing both public and private law and hard and soft law dimensions.<sup>75</sup> Yet it is research that 'yokes [hard and soft law] together' that has been shown to be 'most promising',<sup>76</sup> particularly if it pursues comparative inquiry not only at an interstate level, but across and within various fields of expertise and scales of governance. Such inquiry can yield 'richer' views of international law and politics of the sort for which Finnemore and Toope have called.<sup>77</sup>

#### IV AN AGENDA FOR SOCIO-LEGAL RESEARCH IN THE MEKONG

Development of a richer understanding of the role of law in transboundary water governance in the Mekong requires pursuit of two sorts of inquiry. The first is an ethnographic and/or sociological investigation of prevailing notions of 'law' and the relative appeal of different conceptions or modalities of law to different stakeholders in the Mekong. The second avenue of inquiry entails focusing more closely on the mix of transnational legal norms and forms deployed in decision-making and conflict resolution in the Mekong, to determine their significance in shaping governance and distributive outcomes.

The first of these inquiries would initially require identifying how law (including its role, status, authority and legitimacy, as well as notions of its 'hardness' and 'softness') is understood by the many actors in the Mekong (at the local, national, regional and international levels). It would further require identifying from where particular demands emanate for law (especially

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<sup>71</sup> Alvarez, above n 49.

<sup>72</sup> Martha Finnemore and Stephen J Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 *International Organization* 743, 743.

<sup>73</sup> David Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance' (1997) 2 *Utah Law Review* 545, 636.

<sup>74</sup> Jutta Brunée and Stephen J Toope, 'The Changing Nile Basin Regime: Does Law Matter?' (2002) 43 *Harvard International Law Journal* 105; Dezalay and Garth, *The Internationalization of Palace Wars*, above n 52.

<sup>75</sup> For a noted exception, outside the environmental law and watercourse law field, see Dezalay and Garth, *The Internationalization of Palace Wars*, above n 52, 33–58.

<sup>76</sup> Trubek and Trubek, above n 64, 361.

<sup>77</sup> Finnemore and Toope, above n 72.

transnational law)<sup>78</sup> to govern the Mekong, and factors contributing to those demands.

Such an inquiry would also entail identifying *how* different claims, interests, grievances and disputes around the Mekong and its resources are asserted or framed by actors. Such investigation would necessitate considering the extent to which such claims are articulated in legal language, what forms of legal discourse are invoked in particular settings (rights, property, heritage and so on), and what conflicts arise from choices between different legal regimes (local, national, regional and international/transnational) or between different legal vocabularies.

Conversely, the extent to which actors may *avoid* framing their interests in legal terms is also relevant. Certain actors may instead resort to non-legal techniques or discourses of governance, methods of dispute resolution, and social practices.

*Why* protagonists do or do not opt for law would also be a relevant field of inquiry. For example, it may be that law is sometimes seen as ineffective, inefficient, too slow, too blunt, too prescriptive, too susceptible to political capture, unable to deliver the appropriate remedies, and so on. In other instances, legal avenues and discourses may promise ‘effectiveness’ of a sort on which international legal scholarship has to date rarely focused: the prospect of wielding expertise, for instance, to formulate the questions about which negotiations are conducted, or otherwise to gain or shape ground comprising the ‘background’ to conflict. In many cases too, the tendency to articulate particular matters in legal terms may be less a matter of deliberate choice than a matter of habituation or of other options being foreclosed.

Research in this vein would seek to grasp the extent to which, and the particular ways in which, knowledge about the Mekong, its resources and people, is produced and negotiated through legal instruments, institutions, expertise, and vocabularies as opposed to other prevailing disciplinary registers. It would seek also to document *which* forms of law or legal thinking are particularly influential in this setting. To the extent that increasing legalisation of debate surrounding the Mekong is discernible, this research agenda would extend to identifying factors that may be contributing to that phenomenon, as well as those working against it.

Such an inquiry recognises the insights of scholars of legal pluralism. It acknowledges, for instance, that the international legal system now ‘accepts a range of different ... normative choices’ by a diversity of actors as more or less

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<sup>78</sup> Transnational law is used in this article in the sense in which Philip Jessup famously used it in his 1956 Storr Lectures at Yale University, in Philip C Jessup, *Transnational Law* (Yale University Press, 1956) 2:

[T]he term “transnational law” ... include[s] all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.

Our understanding of the term has also been fruitfully informed by Peer Zumbansen’s work. Zumbansen has rethought the term in relation to Gunther Teubner’s theorisation of reflexive law, highlighting its utility as a methodology for engaging the ‘role of law within dispersed and fragmented spaces of norm production’: Peer Zumbansen, ‘Transnational Law’ in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar, 2006) 738, 739.

‘equally legitimate’ or compelling.<sup>79</sup> It endorses, too, the pluralist emphasis on multiple and variable ‘normative communities’, while approaching the ideal of ‘community’ with some circumspection.<sup>80</sup>

Furthermore, such an inquiry seeks to apply these pluralist insights reflexively, acceding that ‘the professionalization of academic knowledge has rendered us blind to what people in other places know’.<sup>81</sup> Throughout the Mekong, it may be that prevailing ‘knowledge about the ways the world is governed’ circulates and is distributed ‘unevenly’, or such knowledge may be ‘hoarded’ in ‘liminal spaces’ without much circulation at all.<sup>82</sup> By seeking to grasp what the many, interlocking normative ‘communities’ of the Mekong make of law in grappling with transboundary water resource issues, researchers might discern strategic possibilities and innovations yet unrecognised in this field.

The second avenue of inquiry emphasises less the conscious understandings that relevant actors bring to bear than the role that legal norms may play in distributions of social, cultural and economic capital. This course of inquiry entails considering the implications (for the actors concerned and others with material or non-material investments in the Mekong) of adopting a particular legal register in relation to transboundary water resource issues and surrounding conflicts. If there are indeed more legal norms and influences at work in the Mekong than commonly acknowledged, then it remains to be seen what effects these norms may be having upon the dynamics and outcomes of negotiations concerning the Mekong’s resources. Research in this second mode would address the question of these effects. Such an inquiry would proceed, moreover, on the basis that the ‘distribution of knowledge about strategic action in a fluid world’ — including strategic action of a legal tenor — ‘is ... a political, economic and social issue of the first order’.<sup>83</sup>

One area for investigation in this respect is the influence in the Mekong of transboundary water governance models drawn from outside the region and the possible routes of these models’ passage.<sup>84</sup> Tracking norms’ provenance in this way may shed light on how transnational legal norms circulate and gain purchase in particular riverine settings. What, for instance, may be the impact of the organisation International Rivers pursuing advocacy and protest campaigns with respect to dams on the Mekong River and its tributaries, while running parallel campaigns concerning the Belo Monte Dam on the Amazon's Xingu River in

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<sup>79</sup> William W Burke-White, ‘International Legal Pluralism’ (2004) 25 *Michigan Journal of International Law* 963, 977. See generally Ralf Michaels, ‘Global Legal Pluralism’ (2009) 5 *Annual Review of Law and Social Science* 243.

<sup>80</sup> Paul Schiff Berman, ‘Global Legal Pluralism’ (2007) 80 *Southern California Law Review* 1155, 1229–30. On some perils and critiques of ‘community’, see Gerald E Frug, *City Making: Building Communities without Building Walls* (Princeton University Press, 1999) 64–9, 89–91.

<sup>81</sup> David Kennedy, ‘The Mystery of Global Governance’ (Speech delivered at the Kormendy Lecture Series, Pettit College of Law, Ohio Northern University, 25 January 2008) <<http://www.watsoninstitute.org/blss/media/docs/kennedy.pdf>>.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> See, eg, Jonathan L Chenoweth, Sarah A Ewing and Juliet F Bird, ‘Procedures for Ensuring Community Involvement in Multijurisdictional River Basins: the Murray-Darling and Mekong River Basins’ (2002) 29 *Environmental Management* 497.

Brazil and the Gibe 3 Dam on the Omo River in Ethiopia?<sup>85</sup> What legal norms and governance ideas are being deployed across these various settings and how are these transferred, assimilated, transformed or cast into question in the process?

Also demanded along this second research route would be examination of the ways in which different legal regimes and institutions help to shape actors' identities, status and influence. Scholarship on the Mekong has rarely touched, for example, upon the role played by private legal advisers in structuring relationships and allocating authority in large-scale dam projects. Yet in other contexts Dezalay and Garth's work has shown how significant an impact lawyers (and the 'palace wars' in which they and their clients have stakes) may have in this regard.<sup>86</sup> It seems timely to consider, for instance, how the legal and governance aspects of 'best practice' models relating to the Mekong and its development have been shaped and negotiated over time. What has been the role, in this regard, of the United Kingdom and Australian law firms which have advised on projects such as the Nam Theun 2 hydropower project?

Also worthy of attention are the legal and governance dimensions of generalised management and advocacy practices being entrenched in the Mekong through various channels. What, for example, has been the impact of the MRC's program of regional training in integrated water resources management and development in generating and circulating particular ideas about governance?<sup>87</sup> Similarly, what ideas about law, legal institutions and legal expertise feature in EarthRights International's Mekong Legal Advocacy Institute and EarthRights School Mekong, run for civil society advocates?<sup>88</sup> How is the advocacy of 'grassroots' organisations, such as the Assembly of the Poor in relation to Pak Mun Dam in Ubon, Thailand, shaped by interactions with domestic, regional and international legal experts? These are the sorts of questions that inquiries in this second vein would address by way of gauging the role of legal ideas in shaping human and institutional relations throughout the Mekong.

Such inquiries would yield a clearer picture of the actual mix of hard and soft legal norms at work in the Mekong, as well as hybrid variations along the soft-to-hard spectrum. Such 'hybrids' may include coercive aspects of 'non-mandatory' regimes, and voluntarist deferrals or zones of discretion within hard law. Indeed, such a nuanced normative map may suggest that a 'soft versus hard' rubric be abandoned altogether. The prospects for movement from 'softer' to 'harder' law in water governance, or from one form of hybrid to another, and the strategic and policy implications (costs and benefits) of such shifts, may then be evaluated.

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<sup>85</sup> See *International Rivers* <<http://www.internationalrivers.org>>.

<sup>86</sup> Dezalay and Garth, *The Internationalization of Palace Wars*, above n 52, 47–51.

<sup>87</sup> See Olivier Cogels, 'Integrated Water Resources Management' in *Regional Cooperation Programme for Sustainable Development of Water and Related Resources in the Mekong Basin* (October 2005) Mekong River Commission <[http://www.mrcmekong.org/mekong\\_program\\_ceo.htm#integrated\\_water](http://www.mrcmekong.org/mekong_program_ceo.htm#integrated_water)>.

<sup>88</sup> See EarthRights International, *Mekong Legal Advocacy Institute* (2010) <<http://www.earthrights.org/training/earthrights-school-mekong>>; *EarthRights School Mekong* (2010) <<http://www.earthrights.org/training/earthrights-school-mekong>>.

The research agenda that we have sketched above would draw upon a wide range of theoretical resources. Scholarly thinking in reflexive sociology, governmentality analysis, geography, development studies, as well as contemporary international legal theory have all informed its development and would need to remain operative throughout its realisation. This research agenda figures international watercourse law and associated practices and institutions as part of a complex matrix of 'arts and regimes of government'.<sup>89</sup> As such, it enlarges upon standard law reform agendas. It seeks to reveal the influence that international laws and institutions may (or may not) have beyond questions of enforceability and effectiveness. In relation to water governance in particular, this research looks to the ways in which law helps to shape understandings of the social, political and physical geography of riverine basins.

The research agenda that we propose for the Mekong would be informed primarily by two bodies of scholarly work: writings on governmentality and reflexive sociology.

Governmentality studies have alerted us to the importance of examining 'particular mentalities, arts and regimes of government and administration' as much as the 'calculated direction of human conduct' through legal or other means.<sup>90</sup> Work on governmentality takes as a starting point the insights of Michel Foucault concerning the emergence, in the 18<sup>th</sup> century, of a practice or 'art' of regulation associated with 'transition ... from a regime dominated by structures of sovereignty to one ruled by techniques of government'.<sup>91</sup> Despite the 'from' and 'to' of the immediately preceding sentence, that work has always been called upon to probe 'a plurality of forms of government',<sup>92</sup> recognising the continuities and interdependence of these structures and techniques to which Foucault continually drew attention.<sup>93</sup>

For socio-legal studies, a focus on governmentality may be problematic in view of the position taken by some legal scholarly readers of Foucault that his

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<sup>89</sup> Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (Sage, 1999) 2.

<sup>90</sup> Ibid. Rather than offering here some potted introduction to 'governmentality' and the diverse and extensive literature that takes up the term, we refer readers to Nikolas Rose, Pat O'Malley and Mariana Valverde, 'Governmentality' (2006) 2 *Annual Review of Law and Social Science* 83.

<sup>91</sup> Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, 1991) 87, 101.

<sup>92</sup> Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978* (Graham Burchell trans, Palgrave MacMillan, 2007) 93 [trans of: *Sécurité, territoire, population* (first published 2004)].

<sup>93</sup> Ibid 8-10:

Mechanisms of security do not replace disciplinary mechanisms, which would have replaced juridico-legal mechanisms. In reality you have a series of complex edifices in which, of course, the techniques themselves change and are perfected, or anyway become more complicated, but in which what above all changes is the dominant characteristic, or more exactly, the system of correlation between juridico-legal mechanisms, disciplinary mechanisms, and mechanisms of security ... we need only look at the body of laws and the disciplinary obligations of modern mechanisms of security to see that there is not a succession of law, then discipline, then security ...

work asserts that law has been expelled from modernity.<sup>94</sup> Our readings of Foucault's work have, however, not aligned us with that view. Rather, those readings have suggested the persistence of law in a variety of modes in Foucault's work and its complex (and at times confounding) interface with sovereign, disciplinary, biopolitical, regulatory and governmental power.<sup>95</sup>

This is not, however, the place to track that interface through Foucault's extensive body of work. Suffice to say that this project draws from that work the imperative of attending to the role that law, lawyers and legal institutions play in cultivating the living of life according to particular norms. It also acknowledges the extent to which law operates within specific programs and technologies of government, such that it is 'incorporated into a continuum of apparatuses (medical, administrative and so on) whose functions are for the most part regulatory'.<sup>96</sup> As Stephen Collier has argued:

[G]overnmentality designates the genus — diagrams of political rationality, 'govern-mentalities' — of which specific political rationalities, such as advanced liberalism, are species. The concept is most valuable in understanding the conditions of possibility of certain ways of understanding and acting; for drawing insightful distinctions among diagrams of power; for understanding what is general to diverse governmental forms in disparate sites.<sup>97</sup>

In drawing from governmentality studies, the research agenda laid out here would build also upon recent development studies of Southeast Asia. In this context, a governmentality analytic has fostered examination of practices of rule and regularisation that 'educat[e] desires and configur[e] habits, aspirations and beliefs' as well as 'set[ting] conditions'.<sup>98</sup>

The research for which we argue would also be informed by reflexive sociology, as developed by Pierre Bourdieu.<sup>99</sup> 'Field analysis', in Bourdieu's formulation, directs one to map intellectual and professional field(s) in which work is being done as part of the process of studying the 'objects' that its

<sup>94</sup> Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press, 1994) 56. Cf Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15 *Legal Studies Forum* 327 in which Kennedy accuses Foucault, among other things, of 'present[ing] laws and legal institutions as elements in power situations without sharply distinguishing them from other elements, such as professional knowledge and disciplinary authority' (at 354).

<sup>95</sup> See generally, Ben Golder, 'Foucault and the Incompletion of Law' (2008) 21 *Leiden Journal of International Law* 747.

<sup>96</sup> Michel Foucault, *The History of Sexuality, Volume I: An Introduction* (Robert Hurley trans, 1979) 144 [trans of: *La Volonté de savoir* (first published 1976)].

<sup>97</sup> Stephen J Collier, 'Topologies of Power: Foucault's Analysis of Political Government beyond "Governmentality"' (2009) 26(6) *Theory Culture Society* 78, 99. In relation to the final point, however, we are mindful of, and concur with, Andrew Neal's cautionary remark that 'Foucault does not offer a generalisable theory or system of thought': Andrew W Neal, 'Rethinking Foucault in International Relations: Promiscuity and Unfaithfulness' (2009) 23 *Global Society* 539, 543.

<sup>98</sup> Tania Murray Li, above n 58, 5, 258.

<sup>99</sup> Again, rather than offering any more by way of a potted account, we would refer readers to Pierre Bourdieu and Loïc J D Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press, 1992), especially Part III and the first appendix.

field-workers set out to study.<sup>100</sup> For our purposes, this implies that we must explore what academic and practising lawyers and others have made of ‘the Mekong’ in the process of studying and developing policy for the region, as part and parcel of our examination of particular socio-legal phenomena associated with the Mekong.<sup>101</sup> Reflexive sociology suggests also that researchers approach the intellectual, activist and professional domains surrounding the Mekong as a field or ‘habitus’, or a set of interlocking fields: each such habitus a ‘system of dispositions’ generating particular practices.<sup>102</sup> Each is to be taken, moreover, as ‘a force-field as well as a field of struggles which aim at transforming or maintaining the established relation of forces’.<sup>103</sup>

As Dezalay and Garth have done in respect of Latin America,<sup>104</sup> the research being proposed here would use Bourdieu’s work to analyse defining dispositions and ‘concrete strategies by which particular [transnational] agents ... construct an international legal field while at the same time transforming their national legal fields’.<sup>105</sup> Rather than study international legal institutions in isolation, the research would strive to grasp ‘objective relations that obtain among ... different institutions’ and the struggles by which they are shaped.<sup>106</sup>

## V RESEARCH METHODOLOGY

A three-pronged research methodology would be suitable for socio-legal research into the role of law in the Mekong along these lines: field analysis; qualitative interviewing; and case studies. First, field analysis could produce an epistemological history of the ‘Mekong River Basin’ as a zone of regulatory output, an object of regulatory focus, a terrain for the cultivation and accumulation of capital, and a site at which particular types of legal subjectivity have been elicited and enacted. As discussed above, this is the mode of analysis fostered by the work of Bourdieu by which this project is informed.

At a minimum, this would entail mapping and analysis of historical developments in three fields: (a) national regulations and institutions concerning water and environmental protection; (b) regional rule-making and governance practices concerning transboundary rivers and riverine resources; and (c) forms of legal and non-legal expertise concerning transboundary water governance and development, stakes at play in these fields, and regional distributions of that knowledge and influence and associated capital. There are already many surveys of the international and regional law applicable to transboundary watercourses in

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<sup>100</sup> Ibid 69–72.

<sup>101</sup> Ibid.

<sup>102</sup> Pierre Bourdieu, *In Other Words: Essays towards a Reflexive Sociology* (Matthew Adamson trans, Polity Press, 1990) 77 [trans of: *Choses dites* (first published 1987)].

<sup>103</sup> Ibid 143.

<sup>104</sup> Dezalay and Garth, *The Internationalization of Palace Wars*, above n 52.

<sup>105</sup> Ibid viii.

<sup>106</sup> Pierre Bourdieu, *The State Nobility: Elite Schools in the Field of Power* (Lauretta C Clough trans, Polity Press, 1996) 198 [trans of: *La noblesse d’État: Grandes écoles et esprit* (first published 1989)].

general and/or to the Mekong.<sup>107</sup> Rather than produce another such ‘what is the law’ survey, emphasis needs to be placed instead on ‘how is’ questions. How, for instance, have transboundary legal institutions directly and indirectly informed thinking and action in these fields?

Secondly, the conduct, transcription and analysis of qualitative interviews could be used to identify the transnational normative codes and ‘webs of influence’<sup>108</sup> in water governance in the Mekong and to situate key legal and policy decision-makers in relation to those codes and to each other. Such method has already been used successfully by some researchers in the Mekong.<sup>109</sup> It is, moreover, a methodology that has been employed to great effect in prior studies of socio-legal fields that have drawn from reflexive sociology.<sup>110</sup>

Thirdly, case studies of particular developmental uses of the Mekong (or ‘hybrid constellations’)<sup>111</sup> would be a crucial feature of this research. Case study analysis is the most appropriate methodology when ‘how’ and ‘why’ questions are being posed, and when the goal is to try to ‘illuminate a decision or set of decisions’ about law and policy.<sup>112</sup> The case study method also permits the type of detailed, cross-cutting or topological analysis that the conceptual frameworks of governmentality and reflexive sociology both favour.<sup>113</sup> The case study ‘frame’ can be varied to enable different points of entry to the research questions. Carefully selected case studies can present distinct hybridisations of ‘hard’ and ‘soft’, public and private, national, regional and international law and legal influence. In our research, we propose to study those hybridisations discernible in three development projects: the Nam Theun 2 hydropower project in Laos,<sup>114</sup>

<sup>107</sup> See, eg, Owen McIntyre, *Environmental Protection of International Watercourses under International Law* (Ashgate, 2007); Stephen C McCaffrey, *The Law of International Watercourses* (Oxford University Press, 2<sup>nd</sup> ed, 2007); Van Duyen Nguyen, ‘The Mekong Agreement and the Watercourses Convention: A Comparison’ (2001) 6 *Asia Pacific Journal of Environmental Law* 349.

<sup>108</sup> John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 12.

<sup>109</sup> See, eg, Hirsch et al, above n 22. Simon R Bush, ‘Scales and Sales: Changing Social and Spatial Fish Trading Networks in the Siphandone Fishery, Lao PDR’ (2004) 25 *Singapore Journal of Tropical Geography* 32; T Q Bao et al, *Local Knowledge in the Study of River Fish Biology: Experiences from the Mekong* (Development Series No 1, Mekong River Commission, July 2001) <[http://www.mrcmekong.org/free\\_download/research.htm](http://www.mrcmekong.org/free_download/research.htm)>; Chris Sneddon, ‘Water Conflicts and River Basins: The Contradictions of Comanagement and Scale in Northeast Thailand’ (2002) 15 *Society and Natural Resources* 725.

<sup>110</sup> Dezalay and Garth, *The Internationalization of Palace Wars*, above n 52. See also Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996).

<sup>111</sup> Trubek and Trubek, above n 64, 361.

<sup>112</sup> Robert K Yin, *Case Study Research: Design and Methods* (Sage, 3<sup>rd</sup> ed, 2003) 1, 9.

<sup>113</sup> The notion of topological analysis, as a deployment or elaboration of Foucault’s work, is drawn from Collier, above n 97.

<sup>114</sup> See Nam Theun 2 Power Company, *Nam Theun 2 Power Company* (2010) <<http://namtheun2.com>>. See also World Bank, *The Nam Theun 2 Hydroelectric Project* (2010) <<http://www.worldbank.org/laont2>>; The Asian Development Bank, *Nam Theun 2 Hydroelectric Project* (3 August 2008) <<http://www.adb.org/Projects/Namtheun2/default.asp>>; Australian Mekong Resource Centre, The University of Sydney, *Contested Landscapes of the Nam Theun* (13 August 2005) <[http://www.mekong.es.usyd.edu.au/case\\_studies/case\\_index.htm](http://www.mekong.es.usyd.edu.au/case_studies/case_index.htm)>.

the Pak Mun Dam in Thailand<sup>115</sup> and the Se San River Basin development in Cambodia.<sup>116</sup>

## VI SOME PRELIMINARY HYPOTHESES

As indicated earlier, one of the aims of the research agenda outlined here is to critically evaluate prevailing assumptions about the role of transnational law and legal institutions in Mekong governance, and in the governance of river basins generally. In this vein, it is possible to chart six preliminary hypotheses underpinning this research agenda, which the research proposed would test and vary or confirm. As we have made clear, these remain no more than informed hunches or speculations at this stage. Nonetheless, we submit that it is useful to state explicitly the intuitions by which the design of the foregoing research agenda has been driven, so that these might be scrutinised (and, if necessary, debunked) from the outset.

*First, it is likely that there is more law — hard, soft and hybrid — regulating the Mekong than most commentaries and strategic assessments suggest.* Scholarly and expert evaluations of the regulatory terrain of the Mekong have tended to underestimate the density, range and impact of legal norms — especially private law norms — affecting water governance outcomes. For example, relatively little consideration has been given, in regulatory planning or scholarly criticism, to the cumulative impact of stabilisation clauses in investment contracts for hydro-electric development in and around the Mekong.

*Second, it is probable that law is understood, perceived and constituted in a variety of different and often competing ways by the different actors who have interests in the Mekong, even if shared vocabularies are sometimes at work.* Despite the universalist aspirations of international law, ideas about ‘law’ and its role, status, authority and legitimacy are not uniformly understood, but vary according to contextual factors such as geography, social practice, politics, culture, gender, class and so on. At the same time, caution must be exercised in viewing law through the prism of ‘culture’.<sup>117</sup> For example, it is questionable whether the ‘soft’ transboundary water governance in the Mekong is traceable to an ASEAN/Asian ‘way’ capable of cogent formulation in the singular.

*Third, the sources of legal/policy norms and proposals are likely to impact upon their legitimacy and credibility in the eyes of key actors in the Mekong.* For instance, pressures for greater ‘legalisation’ in the management of the Mekong emanating from external actors (such as development agencies) might have had

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<sup>115</sup> World Commission on Dams, *Case Study: Pak Mun Dam — Mekong River Basin, Thailand: Final Report* (November 2000) <[http://www.centre-cired.fr/IMG/pdf/F8\\_PakMunDam.pdf](http://www.centre-cired.fr/IMG/pdf/F8_PakMunDam.pdf)>; Tira Foran and Kanokwan Manorom ‘Pak Mun Dam: Perpetually Contested?’ in François Molle, Tira Foran and Mira Käkönen (eds), above n 11.

<sup>116</sup> Rutkow, Crider and Giannini, above n 50; Halcrow and Partners, *Se Kong-Se San and Nam Theun River Basins Hydropower Development Study: Final Report* (Asian Development Bank, July 1999) <<http://www.adb.org/Documents/Reports/Consultant/30003-REG/default.asp>>; Philip Hirsch and Andrew Wyatt, ‘Negotiating Local Livelihoods: Scales of Conflict in the Se San River Basin’ (2004) 45 *Asia Pacific Viewpoint* 51; Australian Mekong Resource Centre, The University of Sydney, *Hydropower Development in the Se San Watershed* (2005) <[http://www.mekong.es.usyd.edu.au/case\\_studies/case\\_index.htm](http://www.mekong.es.usyd.edu.au/case_studies/case_index.htm)>.

<sup>117</sup> Annelise Riles, ‘Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture’ (1993) 106 *Harvard Law Review* 723.

less concrete impact in river management than pressure from local actors (such as riverine states) for ‘softer’ norms of cooperative management of the basin.

*Fourth, transboundary law plays a significant role in shaping perceptions of agents’ roles and capacities in relation to the Mekong.* Aside from the obvious sense in which this occurs — through laws formally creating and authorising particular institutions — legal norms also generate narratives and shape prevailing beliefs about the relationships between different agents and their respective styles, priorities, authority and capacities. The *Mekong Agreement*, for example, conveys powerful impressions about what ‘cooperation’ is possible in the Mekong, and what sort of questions and concerns may be aired.<sup>118</sup> The actual and potential impact of transboundary law (whether hard or soft) on water governance in the Mekong may be more significant than previously assumed and merits further study.

*Fifth, persistent demands for law and/or legal change in relation to the Mekong comprise part of a para-institutional process of norm-making worthy of study.* Alongside the processes of national and regional legal change, a complex array of actors is engaged in an ongoing negotiation around the Mekong. This negotiation often takes the form of proposals for law reform, or for legal norms and institutions to play new roles. By this means, grievances, concerns and visions of the future, which find no other ready outlet, are articulated. A range of non-governmental organisations and communities have put forward ideas and concerns about the Mekong’s future,<sup>119</sup> some of which are expressed in legal language — as in terms of ‘rights’ or ‘obligations’. This transboundary exchange of claims, expectations, and aspirations amounts to a process of innovation and political feedback for water governance, and greater account might be taken of the dynamics and content of this para-institutional discourse.<sup>120</sup>

*Sixth, peaceful, sustainable, equitable development goals in the Mekong are not necessarily best served at the regional or international levels by either strengthening hard law or providing ‘soft’ regulatory accommodations to the ‘ASEAN way’.* Rather, a more nuanced understanding of the variable normativity of laws, as opposed to a simple binary conception of them, can assist in constructing more calibrated regulatory responses to river management or in ensuring more effective strategic engagement with struggles on this terrain.

## VII CONCLUSION

Improved regional coordination of sustainable water management among Mekong countries and stakeholders is crucial to fostering equitable development and economic cooperation and ensuring the peaceful coexistence of Mekong communities in the long term. The research agenda mapped out by this commentary has the potential to enhance understanding of how this might be

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<sup>118</sup> See, eg, *Mekong Agreement*, arts 1, 2–10, 26 (providing that the Joint Committee should prepare specific Rules for Water Utilization and Inter-Basin Diversions).

<sup>119</sup> See, eg, Hirsch and Wyatt, above n 116, 51.

<sup>120</sup> George Marcus and Douglas Holmes offer ‘para-ethnography’ as a strategy for engaging such ‘alternative form[s] of knowledge creation’ acknowledging that ethnographic subjects ‘have developed something like an ethnography of ... their own predicaments’: Douglas R Holmes and George E Marcus, ‘Fast Capitalism: Para-Ethnography and the Rise of the Symbolic Analyst’ in Melissa S Fisher and Greg Downey (eds), *Frontiers of Capital: Ethnographic Reflections on the New Economy* (Duke University Press, 2006) 33, 34–5.

achieved, by illuminating the complexity of transnational norms influencing the region; identifying how law, legal institutions and discourses are produced, negotiated, perceived, understood, and contested; and exposing the advantages and disadvantages, for interested parties and relevant constituencies, of different regulatory approaches, theories of governance, and institutional designs in water management.