

# “National Human Rights Institutions as Arenas of Transboundary Water Justice: Evaluating case studies from the Mekong River”

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## Abstract

In Southeast Asia, major transboundary rivers such as the Mekong River are central to the food security, livelihoods and culture of millions of people. An increasingly extensive program of large hydropower dam construction is underway in Laos and Cambodia to meet domestic electricity demand and for power export to neighboring Thailand, Vietnam and China. How the concept of justice in water governance should be understood and applied to transboundary rivers is increasingly the subject of critical analysis, including with regard to human rights-based approaches.

This paper examines how claims for justice on the Mekong Rivers around large hydropower dams have been made and framed within “arenas of water justice” in Southeast Asia, with a particular focus on mechanisms for extra-territorial obligations (ETOs) and the role of national human rights institutions (NHRIs) in Thailand. The research draws upon in-depth interviews and participatory observation with community representatives, civil society groups, NHRIs, government agencies and the ASEAN Intergovernmental Commission on Human Rights (AICHR) conducted during 2015 and 2016.

This paper discusses the roles, opportunities and challenges for public interest law and national/regional human rights institutions to protect and promote human rights on transboundary rivers. It also discusses the strategies communities and civil society undertake in seeking to ensure their human rights are respected, including through national and regional human rights institutions. Overall, the paper argues that in recent years NHRIs have become important arenas of water justice in Southeast Asia for transboundary rivers, although also face limitations in particular regarding their authority to investigate cross-border cases and ultimately to hold domestic actors to account.

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## **Introduction**

In Southeast Asia, major transboundary rivers such as the Mekong River are central to the food security, livelihoods and culture of millions of people. Over 70 million people live within the Lancang-Mekong basin. An increasingly extensive program of large hydropower dam construction is underway in Laos, Vietnam, Cambodia and Myanmar to meet domestic electricity demand and for power export to neighboring Thailand, Vietnam and China. These hydropower dams, and their cross-border power trade, are part of a broader program for regional economic integration (Middleton and Allouche, 2016; Boer et al, 2016). Many recent studies have assessed the costs and benefits of hydropower projects in the region, and the politics enshrouding them that determines who benefits and who pays the costs (e.g. Middleton et al 2016, Öjendal et al, 2012; Molle et al, 2009).

This paper discusses the roles, opportunities and challenges for public interest law and national and regional human rights institutions to protect and promote human rights on transboundary rivers. It also addresses the strategies communities and civil society undertake in seeking to ensure their human rights are respected, including through national and regional human rights institutions. In the context of transnational projects on transboundary rivers, this paper is also an exploration of the emergence of extra territorial obligations as a norm within Southeast Asia. The paper is based upon interviews conducted over 2015 and 2016 with with community representatives, civil society groups, national human rights institutions (NHRIs), government agencies and the ASEAN Intergovernmental Commission on Human Rights (AICHR), and participatory observation.<sup>2</sup>

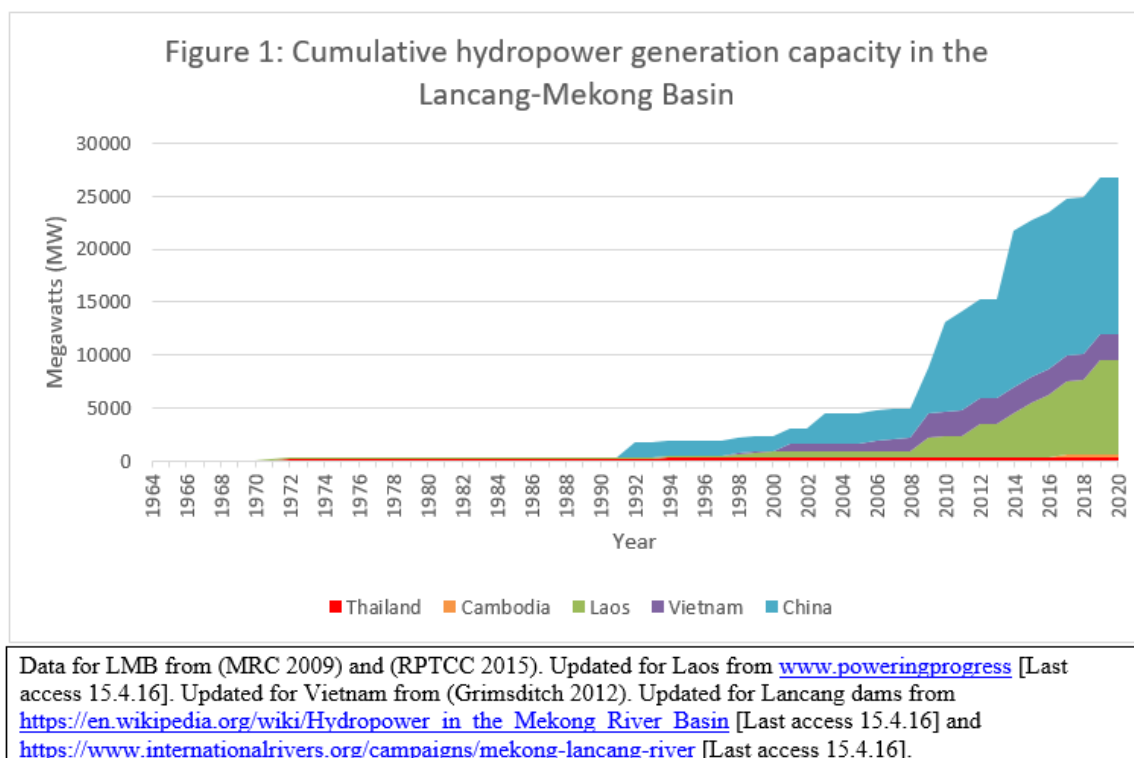
## **Rapid hydropower dam construction in the Mekong Basin**

Across mainland Southeast Asia and southern China, electricity demand is rising. Total power production increased from 26,126 megawatts (MW) in 2000 to 116,070 MW in 2015 (RPTCC, 2015). By far, the region's three largest power markets are Thailand, Vietnam and southern China. Aside from meeting their demand through domestic sources, electricity planners are looking towards electricity imports from neighbouring Laos, Cambodia and Myanmar, primarily from large hydropower dams.

In 1992, China commissioned the Manwan Dam, the first of six large hydropower dams built unilaterally on the Lancang (upper-Mekong) River mainstream in Yunnan province. Meanwhile, in the Lower Mekong basin, almost sixty medium or large hydropower dams are in operation, with over twenty more under construction, including the Xayaburi Dam and Don Sahong Dam on the Mekong River's mainstream in Laos. Whilst early project developers involved Western developers and International Financial Institutions, most projects nowadays are by developers from Southeast Asia and China.

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### **A Human Rights Based Approach to Large Hydropower Dams**

The planning, construction, operation and decommissioning of large hydropower dams have implications for a wide range of human rights as recognized in international law, as mapped out by Hurwitz (2014) (Table 1). Assessing large dams through the lens of a Human Rights Based Approach (HRBA) provides a normative framework by which the actions of government and private sector actors can be evaluated even where gaps or deficits in national law and transboundary regimes may exist.

<b>Table 1: Substantive and Procedural Human Rights Obligations Relevant to Large Hydropower Dams</b>	
<i>Substantive obligations</i>	<i>Procedural obligations</i>
<ul style="list-style-type: none"> <li>• The Right to life</li> <li>• The Right to water and sanitation</li> <li>• The Right to freedom from torture and degrading treatment</li> <li>• The Right to health</li> <li>• The Right to housing</li> <li>• The Right to food</li> <li>• The Right to culture</li> <li>• Rights of disabled people</li> <li>• Rights of the child</li> <li>• Gender and women’s Rights</li> <li>• The Right to self-determination</li> <li>• Indigenous peoples’ land Rights and permanent sovereignty over natural resources</li> </ul>	<ul style="list-style-type: none"> <li>• The Right to equality before the law and equal protection of the law</li> <li>• Rights of non-discrimination</li> <li>• The Right of freedom of movement</li> <li>• Rights to freedom of opinion and expression</li> <li>• The Right to freedom of speech</li> <li>• The Right to freedom of assembly</li> <li>• The Right to transparency and access to information</li> <li>• The Right to participation in decision-making</li> <li>• Right to access to justice</li> <li>• Free Prior and Informed Consent</li> </ul>

In formal international law, the Right to Water has emerged in the context of demand for safe drinking water and sanitation. International conventions that have referenced the Right to Water include the Convention on the Rights of the Child (1989) and the Convention on the Elimination of Discrimination Against Women (1979). Meanwhile, the Right to Water is implicit throughout the International Covenant on Economic Social and Cultural Rights. In July 2010, 122 countries formally acknowledged the Right to Water in the General Assembly resolution (A/64/292).

More broadly, there has been growing momentum around the right to a safe, clean and healthy environment. In his statement to the Human Rights Council in March 2014, the current UN Special Rapporteur on Human Rights and the Environment, Professor John Knox, concluded that: “*I believe that it is now beyond argument that human rights law includes obligations relating to the environment*” (Knox 2014).<sup>3</sup>

Meanwhile, in ASEAN, in November 2012, ASEAN Human Rights Declaration issued. Article 28 states “*Every person has the right to an adequate standard of living... including: ...*

- a) *The right to adequate and affordable food, freedom from hunger, and access to safe and nutritious food*
- e) *The right to safe drinking water and sanitation*
- f) *The right to a safe, clean and sustainable environment*

Relatedly, AICHR has hosted workshops on the human right to the environment in Sept 2014, and did so again in September 2015.

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<sup>3</sup> Professor Knox notes that not all States have accepted the norms that could govern the relationship between human rights and environmental protection.

The Right to Water and related resources should not be simply understood as defining the access to water of an individual. Implicitly, it also relates to *decision-making* over who can access resource, and is thus also fundamentally a social relationship and therefore necessarily also an expression of power (Boelens 2008).

### **Extra Territorial Obligations (ETOs) in Southeast Asia**

Given the transnational nature of some human rights cases in Southeast Asia, including in the case of large hydropower dams on transboundary rivers, and the uneven access to justice across the region, the role of extraterritorial obligations (ETOs) could be a significant transboundary justice mechanism. ETOs can be defined by the: “*Obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory*” (ETO Consortium 2013) and are a recent evolution in international human rights law.

Whilst until now most governments in Southeast Asia have interpreted their human rights obligations as applicable only within their own borders, the concept of ETOs is of growing interest. For example, in September 2014, Chulalongkorn University, Thailand hosted a regional conference titled “*Rights-based governance beyond borders: The role of extraterritorial obligations (ETOs)*”, whilst in April 2015 at the ASEAN Peoples Forum in Kuala Lumpur, Malaysia a session was organized titled “*ETOs in cross-border investment : the role of human rights institutions.*” In October 2014, five NHRIs in Southeast Asia together with eleven civil society groups signed the “Bangkok Declaration on Extraterritorial Human Rights Obligations”, stating:

*“We recognise the urgency of advancing the implementation of extraterritorial obligations (ETOs) given the accelerating pace of trade, investment, and broader economic integration between States in south-east Asia; the impending creation of the ASEAN Economic Community; increasing levels of migration and human trafficking in the region; and an increasing amount of cross-border economic, political, social, and military activity in the region and globally”* (APWLD 2014)

### **Arenas of Water Justice: Rights on paper versus in practice**

In this paper, a heuristic framework is proposed centered around the concept of “arenas of water justice” (see Middleton and Pritchard, 2016). These arenas of justice are conceptualized as: “*politicized spaces of governance in which a process for claiming and/ or defending rights or seeking redress for rights violations take place.*” Such arenas exist at the local, national and transnational scale, and can be understood as “arenas of struggle” rather than strictly as arenas in the sense of institutions.

Within more formal arenas, a range of hard and soft law may apply. Hard Law, understood as actual binding legal instruments and laws, include: national constitutions, legislation and regulations; international treaties, including international human rights treaties; and customary international law. Meanwhile, soft law, understood as quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat “weaker” than the binding force of traditional (hard) law, includes: the ASEAN Human Rights Declaration; international Environmental Norms, such as the Rio Declaration; financial institution safeguard policies; the OECD Guidelines on Multi-National Corporations (MNCs); and Corporate Social Responsibility policies.

<i>Scale</i>	<i>Arena</i>
National	<ul style="list-style-type: none"> <li>• National justice system</li> <li>• National Human Rights Institutions (NHRIs)</li> </ul>
Regional inter-governmental	<ul style="list-style-type: none"> <li>• ASEAN Intergovernmental Committee on Human Rights</li> <li>• ASEAN Children and Women Commission</li> </ul>
International inter-governmental	<ul style="list-style-type: none"> <li>• UN - Human Rights Council</li> <li>• UN - Special Rapporteurs</li> <li>• Universal Periodic Review</li> <li>• Core treaties (Optional Protocol mechanisms - CEDAW, CRC etc).</li> </ul>
International voluntary/ non-binding mechanisms	<ul style="list-style-type: none"> <li>• Corporate policies of project developers / financiers</li> <li>• Multi-lateral guidelines (e.g. OECD Standards on Multi-National Corporations)</li> <li>• Multi-stakeholder voluntary processes (e.g. Hydropower Sustainability Assessment Protocol)</li> </ul>

Reproduced from Middleton and Pritchard (2016).

Sovereignty and the jurisdiction of hard law legal processes make the governance of transboundary rivers – and access to justice – complex. Large dams are the sites of international investment and cross border powertrade, meaning that impacts and benefits accrue in different locations, and often different countries. Therefore, the jurisdiction of various courts, authorities and institutions to operate across borders comes to the fore.

In August 2014, the “Convention on the Law of the Non-navigational Uses of International Watercourses” (the “International Watercourse Law”) entered in to force. Within Southeast Asia only Vietnam has ratified the treaty; however, the inter-governmental Mekong Agreement (MRC, 1995) that binds the four countries of the Lower Mekong River (Cambodia, Laos, Thailand and Vietnam) within the Mekong River Commission is drawn from a draft version of the International Watercourse Law. As the principal customary international law on transboundary rivers, the International Watercourse Law addresses the rights and obligations of States sharing transboundary rivers, in particular between those that have acceded to the convention. It is neither a veto right against other riparian states, nor an entitlement to unilateral use. Based on the principle of limited territorial sovereignty, core to the convention is the concept of “equitable and reasonable utilization”. Other important principles are: the obligation not to cause significant harm (Article 7); and the general obligation to cooperate (Article 8). More recently, in addition to the International Watercourses Law and related international environment laws and norms, a wider array of international legal regimes have shaped transboundary water governance in relation to large dams, including: international human rights law; and international investment law (Rieu-Clarke 2015a, Boer et al. 2016).

Within these inter-governmental frameworks, the issue of asymmetrical power relations needs to be considered at several scales, including between countries sharing a river basin where there

may be “*equality on paper and inequality in practice*” (Zeitoun et al, 2014), and also where the “national interest” as represented in inter-governmental negotiations by the state is not the interest of all, especially marginalized communities (Hirsch and Jensen, 2006).

### **Arenas of Justice: Case study of Xayaburi Dam**

Since 2006, plans for a cascade of up to eleven dams on the lower Mekong River’s mainstream have been revived (Grumbine et al. 2012). Whilst the full proposed Mekong mainstream dam cascade holds the potential to generate up to 14,100 MW of electricity and thus to contribute to economic growth, by changing the river’s hydrology and ecology and blocking major fish migrations and the movement of sediment, the mainstream dams could also put at risk the livelihoods, local economies and food security of millions of people (ICEM 2010; Grumbine et al. 2012).

The 1,285 megawatt Xayaburi Dam in Northern Laos is the project at the most advanced stage of preparation, would export 95% of its electricity to Thailand, and is now under construction by a predominantly Thai private-sector consortium (Matthews 2012). Project proponents, including the Government of Laos (GoL), the project consortium, and some of Thailand’s relevant ministries and Thailand’s electricity utility the Electricity Generating Authority of Thailand (EGAT), argue that the Xayaburi Dam would generate cheap electricity and contribute towards Thailand’s energy security, and that the cross-border foreign direct investment and project revenues would bring “development” to Laos. Those opposing the project, including a number of local NGOs and international NGOs and some riverside communities from Thailand, Cambodia and Vietnam under the banner “Save the Mekong Coalition” , emphasize that the Xayaburi Dam would require the resettlement of approximately 2,100 people from ten villages in Laos and that more than 200,000 people located near the dam would experience impacts to their livelihoods and food security, both within Laos and in neighboring countries due to impacts on migratory capture fisheries, loss of sediment flows and other ecological changes. They also highlight how the project’s original Environmental Impact Assessment (EIA) report, published in August 2010, was of poor quality and did not consider transborder impacts (International Rivers 2011).

The Xayaburi Dam has been surrounded by intense local, national, regional and even global politics (Kirby et al. 2010; Matthews 2012). Key moments in decision-making around the project’s construction include (see also, International Rivers 2014 and Rieu-Clarke 2015b):

- The GoL and the project developer signed a Memorandum of Understanding (MoU) of the Xayaburi Dam in May 2007, a Project Development Agreement (PDA) in November 2008, and the concession agreement (CA) in November 2010.
- An MoU for a Power Purchase Agreement (PPA) was signed between EGAT and the GoL in July 2010, and the PPA between EGAT and the project developer was signed in October 2011
- In May 2009, the MRC commissioned a Strategic Environmental Assessment (SEA) report for the Mekong mainstream dam cascade, which was launched in October 2010 (ICEM 2010)

- On 22 September 2010, one month before the launch of the SEA, the GoL initiated a regional decision-making process through the MRC called the Procedures for Notification and Prior Consultation and Agreement (PNPCA). The GoL concluded that the process was complete in April 2011, whilst Cambodia, Thailand and Vietnam requested further studies.
- Subsequently, in December 2011, the MRC Council agreed to conduct a further study on the Mekong mainstream dam cascade, which to date has not been completed.
- The GoL announced in July 2012 that the project had been redesigned to address neighboring countries concerns, and a “ground breaking” ceremony was held in November 2012 attended by the Cambodian and Vietnamese governments
- A court case was submitted in August 2012 by Thai villagers to the Thailand’s Administrative Court challenging the role of the Thai government in the project.

Hence, in the case of the Xayaburi Dam, a range of arenas of water justice have to a greater or lesser extent been pursued (see Middleton and Pritchard, 2016 for detailed analysis). Each arena has its own story of coalition building, and politics of claims, frames, and power (Table 2). Within each arena, actors’ narratives have drawn upon various studies and also made claims about the project’s impacts on substantive and procedural rights, including:

- *Substantive Rights:* The Right to Life; The Right to Food; The Right to Health; and The Right to Housing
- *Procedural Rights:* The Right to Transparency and Access to Information; The Right to Participation in Decision-making; The Right to Access to Justice

Whilst it is arguably the national court case that has had the greatest impact in Thailand in terms of seeking to hold state agencies to account over the project, a complaint was first submitted Thai National Human Rights Commission (TNHRC) that was an important initial attempt by communities and civil society groups to raise questions about the project and its environmental and social impacts.



<b>Table 2: Typology of legal “arenas of water justice” for human rights protection for Xayaburi Dam</b>	
<i>Scale</i>	<i>Arena</i>
National	<ul style="list-style-type: none"> <li>• Thailand’s Power Development Plan (since 2010)</li> <li>• Laos Environmental Impact Assessment (February 2010)</li> <li>• Thailand National Human Rights Commission (February 2012)<sup>4</sup></li> <li>• Thailand Administrative Court (since August 2012) and Thailand Supreme Administrative Court (since June 2014)</li> <li>• Thai Senate Committee on Good Governance Promotion and Corruption Investigation (November 2012)</li> </ul>
Regional inter-governmental	<ul style="list-style-type: none"> <li>• Mekong River Commission <ul style="list-style-type: none"> <li>◦ Strategic Environmental Assessment (May 2009 – Oct 2010)</li> <li>◦ Procedures for Prior Notification and Agreement (PNPCA) (Sept 2010 – April 2011)</li> <li>◦ Basin Development Plan 2 (2011)</li> <li>◦ MRC Council Study (Dec 2011)</li> </ul> </li> <li>• ASEAN Intergovernmental Commission on Human Rights (AICHR) (April 2011)<sup>5</sup></li> </ul>
International inter-governmental	<ul style="list-style-type: none"> <li>• <i>N.A.</i> (Potentially UN Special Rapporteur on Right to Food)</li> </ul>
International voluntary/ non-binding mechanisms	<ul style="list-style-type: none"> <li>• OECD Guidelines for Multinational Enterprises <ul style="list-style-type: none"> <li>◦ Pöyry (August, 2012 – June 2013)</li> <li>◦ Andritz AG (April 2014)</li> </ul> </li> </ul>

Reproduced from Middleton and Pritchard (2016).

### **TNHRC investigation of Xayaburi Dam**

The National Human Rights Commission of Thailand (TNHRC) accepted the case of the Xayaburi Dam after receiving a complaint from Network of Thai People in Eight Mekong Provinces on the Xayaburi Dam submitted in May 2011. The complaint was based “... *on the grounds that the project lacked information disclosure and public participation, including an Environmental Impact Assessment (EIA) and Health Impact Assessment (HLA)*” (TNHRC, 2012). The Sub-Committee on Community Rights and Natural Resources of the TNHRC was assigned to investigate the complaint.

The TNHRC sent a written request to the project’s main developer, Ch Karnchang, to submit a written testimony in response to the complaint, together with relevant government agencies including the central bank and the Ministry of Energy. They also approached the Thai commercial banks that provided loans to the project (International Rivers, 2012). As the inquiry proceeded, a commissioner also visited impacted areas to talk with the communities. He also

<sup>4</sup> For details on case, in particular regarding the Power Purchase Agreement, see: <http://www.internationalrivers.org/blogs/259-0>

<sup>5</sup> Although AICHR could not formally investigate the case, Thailand’s representative at-the-time suggested it could be considered in AICHR’s CSR study: [http://www.en.mahidol.ac.th/eng/envi\\_news/envi\\_news\\_full\\_e.php?id=1463](http://www.en.mahidol.ac.th/eng/envi_news/envi_news_full_e.php?id=1463)

encouraged them to conduct research that could be an input into the inquiry. These activities were coordinated with civil society.

On 21 February 2012, 5 months after the signing of the project's Power Purchase Agreement, the TNHRC organized a public hearing under the Sub-committee on Community Rights. The four Thai commercial banks confirmed that they had financed the Xayaburi Dam. The banks indicated that they had relied solely on report prepared by the consultancy group Pöyry and commissioned by the GoL as evidence that the project was environmentally and socially responsible (International Rivers, 2014; Pöyry Energy AG 2011). This is particularly significant given that a subsequent investigation under the OECD Guidelines on MNCs completed in 2013, whilst concluding the Pöyry did not violate OECD Corporate Social Responsibility Guidelines, also stated that:

*“Pöyry should have addressed the ambiguities related to environmental issues and human rights more clearly in its report to the government of Laos. However, the company made an effort to mitigate the environmental risks and negative impacts of the project by means of several detailed recommendations, even if the various parties disagree upon whether or not these actions were adequate.” (Ministry of Employment and the Economy, 2013)*

On completion of the inquiry by the TNHRC, a preliminary report was issued by the sub-committee, but a final report to be issued by the Commission has not been completed. According to the commissioner leading the investigation from the second committee, responsibility is now handed over to the third committee (Pers. comm, 2016). However, it is not clear if the work will be completed.

In May 2012, the TNHRC issued publicly an opinion where they recommended that “...*the Prime Minister should review the implementation of the dam construction*” (TNHRC, 2012). Issues of concern that raised questions about the signing of the PPA included the limited Environmental Impact Assessment prepared for the project, which did not include an assessment of transboundary impacts; and little sharing of information with the public about the project before the PPA had been signed.

The complexity of the role of a NHRI in a cross-border investment is apparent from this case. The representative of the TNHRC made clear that it doesn't have any jurisdiction to inquire into agencies in neighboring countries, but only Thai agencies and private sector (Pers. comm., 2016). At the same time, he considered that the TNHRC must ensure that Thailand is in compliance with all of its obligations not only domestic laws, but also international obligations.

Interviews with civil society groups who had worked with the Network of Thai People in Eight Mekong Provinces said that the TNHRC was “*a very useful mechanism for getting copies of documents that were unavailable, getting meeting with companies and government who wasn't available, and having in it an independent body investigate the situation and then file a report that was publicly available.*” (Pers. comm, 2016).

Since the release of the preliminary report, attention of activists shifted from the TNHRC to the submission of a case to Thailand's Administrative Court in August 2012, which had the potential to make more enforceable requirements on the involved state agencies. The case was submitted by 37 Thai community members from eight Thai provinces along the Mekong River who claimed that they would be affected by the project. The villagers were supported by the Thai public interest lawyer NGO Community Resource Center. In February 2013, the court announced that it did not accept jurisdiction on the case. In March 2013, however, the plaintiffs appealed to the Supreme Administrative Court of Thailand, and in June 2014, the Supreme Administrative Court of Thailand reversed the lower court decision. Yet on 25 December 2015, the Supreme Administrative court rejected the case, stating: "*the PPA signing was legal and passed the Mekong River Commission's (MRC) Procedure for Notification Prior Consultation and Agreement (PNPCA). Hosted by the Department of Water Resources (DWS), four public hearings were arranged in Thailand's provinces along the Mekong River in 2011 as part of the PNPCA.*" An appeal has since been filed. However, the court case was unprecedented for Thailand, as it investigates the consequences of Thai investment in a neighboring country. In other words, the case partially represents Thailand's consideration of its extra-territorial obligations, even though it only considers the extent to which the project creates impacts on Thai communities.

### **NHRIs and Extraterritorial Obligations in Southeast Asia**

The Xayaburi Dam is one of a number of cases that have tested Thailand's ETOs in recent years. Since the mid-2000s, the TNHRC has investigated the Hat Gyi dam located on the Salween River which would have an impact on Thailand and Myanmar. Here, the lead proponent was Thailand's utility, EGAT. The report was finished under the first term of the TNHRC, and was an opportunity to significantly question the project. More recently, the TNHRC has also received a complaint about the Pak Beng Dam in Laos, which at the time of writing is being proposed in Northern Laos, and convened a hearing on it. In this case, the project developer is from China, but Thailand is the anticipated electricity market.

Meanwhile, the Malaysian National Human Commission (SUHAKAM) received a case for the Don Sahong dam in Southern Laos. The project developer is Mega First Corporation Berhad, under construction since January 2016. SUHAKAM received and initially accepted a complaint from Cambodian and Thai communities in October 2014. In their 2015 Annual Report, however, they concluded that they did not have a mandate to investigate the transboundary case. Arguably, one challenge for the commission was the lack of political pressure in Malaysia to pick the case up. SUHAKAM did recommend to the Malaysian government to "*develop policies or guidelines to monitor Malaysian companies operating outside of Malaysia in order to ensure compliance with applicable human rights principles and standards as provided under Principle 3 of the UN Guiding Principles on Business and Human Rights (UNGPs), and that the Government adhere to the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises...*" (SUHAKAM, 2015: 100)

Most recently, in May 2016 a cabinet resolution on Thai outbound investment was issued recommending compliance with *the United Nations Guiding Principles on Business and Human Rights (UNGP)*. It was prompted by a TNHRC investigation of Thai business involvement in the Dawei Special Economic Zone (SEZ) in Myanmar, as well as widening awareness and advocacy

on the impact of Thai investment in neighboring countries. Thai civil society groups have continued to advocate for the implementation of this resolution, which in itself is an important milestone although much remains to be done (Suk, 2017)

### **Conclusion: NHRIs as arenas of Water Justice**

Across rural mainland Southeast Asia, direct access to and sustainable use of natural resources are inextricably tied to people's wellbeing. Loss of access to natural resources – including due to hydropower dam construction – is a threat to livelihoods, and also to human rights. The construction of a large hydropower dam significantly redistributes access to and control over river-related resources from riparian communities to the operator of the dam and to the consumers of electricity.

The Xayaburi Dam case study reveals that there is not a single arena of water justice that exists whose jurisdiction and authority may offer a “silver bullet” for redressing claims of injustices. Instead, impacted communities and civil society allies have pursued multiple arenas of water justice hoping that a critical momentum may be achieved, including the TNHRC.

Transboundary arenas of justice and the associated extra-territorial obligations implicit to them will become increasingly significant as Southeast Asia continues to economically integrate, including under the ASEAN Economic Community. These arenas could be a key avenue offering access to justice when contestation emerges over shared resources within and across borders, which takes place in the context of uneven access to justice across the region. These arenas are created, affirmed and reinforced, however, only through the innovative actions of affected communities, civil society groups, and allied individuals bravely challenging powerful actors often at personal risk.

### **References**

- APWLD (2014). *Bangkok Declaration on Extraterritorial Human Rights Obligations*. Chiang Mai: Asia Pacific Forum on Women, Law and Development (APWLD).
- Boer, B., Hirsch, P., Johns, F., Saul, B. and Scurrah, N. (2016). *The Mekong: A Socio-legal Approach to River Basin Development*. Abingdon and New York: Earthscan.
- Boelens, R. (2008). “Water rights arenas in the Andes: Upscaling the defence networks to localize water control.” *Water Alternatives* 1(1): 48-65.
- ETO Consortium (2013). *Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights*. Heidelberg: FIAN International.
- Grumbine, E., Dore, J. and Xu, J. (2012). “Mekong hydropower: drivers of change and governance challenges.” *Frontiers in Ecology and the Environment*. 91-98
- Hurwitz, Z. (2014). *Dam Standards: A Rights-Based Approach - A Guide Book for Civil Society*. Berkeley, International Rivers.

Hirsch, P. and Jensen, K. M. (2006). *National Interest and Transboundary Water Governance in the Mekong*. Sydney: Australian Mekong Resource Center, University of Sydney.

ICEM (2010). *MRC SEA For Hydropower On The Mekong Mainstream: SEA Main Final Report*. Hanoi: International Center for Environmental Management (ICEM).

International Rivers (2011). *Summary of Technical Reviews of the Xayaburi Environmental Impact Assessment*. Berkeley: International Rivers.

International Rivers (2012). Press release: Thailand defies neighbors on contentious Xayaburi Dam. 29 February 2012. <https://www.internationalrivers.org/resources/thailand-defies-neighbors-on-contentious-xayaburi-dam-3686> [Last accessed 16.8.17]

International Rivers (2014). *Xayaburi Dam: Timeline of Events (Last updated: April 2014)*. Berkeley: International Rivers.

Kirby, M., Krittasudthacheewa, C., Mainuddin, M., Kemp-Benedict, E., Swartz, C., and Elnora de la, R. (2010). “The Mekong: a diverse basin facing the tensions of development.” *Water International* **35**(5): 573-593.

KNOX, J. H. (2014). *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Mapping report. Human Rights Council: Twenty-fifth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*. New York: United Nations Human Rights Council.

Matthews, N. (2012). “Water grabbing in the Mekong basin – An analysis of the winners and losers of Thailand’s hydropower development in Lao PDR.” *Water Alternatives* **5**(2): 392-411.

Middleton, C. and Allouche, J. (2016). “Watershed or Powershed?: A critical hydro-politics of the Lancang-Mekong Cooperation Framework” *The International Spectator* **51**:3: 100-117.

Middleton, C., and Dore, J. (2015) “Transboundary Water and Electricity Governance in mainland Southeast Asia: Linkages, Disjunctures and Implications” *International Journal of Water Governance (Special Issue)* **3**(1): 93-120.

Middleton, C, Matthews, N., and Mirumachi, N. (2015) “Whose Risky Business?: Public–Private Partnerships (PPP), Build-Operate-Transfer (BOT) and Large Hydropower Dams in the Mekong Region” (pp 127-152) in Matthews, N. and Geheb, K. (eds) *Hydropower Development in the Mekong Region: Political, Socio-economic and Environmental Perspectives*. London: Earthscan.

Middleton, C. and Pritchard, A. (2016) “Chapter 3: Arenas of Water Justice on Transboundary Rivers: A Case Study of the Xayaburi Dam, Laos” (pp 57-88) in Blake, D. and Robins, L. (eds.) *Water Governance Dynamics in the Mekong Region Strategic Information & Research* Development Centre: Petaling Jaya

Ministry of Employment and the Economy, (2013) “Statement of the Ministry of Employment and the Economy: Pöyry Oyj complied with OECD guidelines in Laos dam project [Finland]”

Molle, F., Foran, T. and Kakonen, M. (Eds.) (2009). Contested Waterscapes in the Mekong Region: Hydropower, Livelihoods and Governance. London and Sterling, VA: Earthscan.

MRC. (1995). *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, 5 April 1995*. Vientiane: Mekong River Commission (MRC).

Öjendal, J., Hansson, S. and Hellberg, S. (Eds.) (2012). *Politics and Development in a Transboundary Watershed: The Case of the Lower Mekong Basin*. Dordrecht, Heidelberg, London, New York: Springer.

Pöyry Energy AG (2011). *Compliance Report: Government of Lao PDR, Main Report, Xayaburi Hydroelectric Power Project, Run-of-River Plant*.

Rieu-Clarke, A. (2015a). “Transboundary Hydropower Projects Seen Through the Lens of Three International Legal Regimes—Foreign Investment, Environmental Protection and Human Rights.” *International Journal of Water Governance* (Special Issue) 1: 27–48

Rieu-Clarke, A. (2015b). “Notification and Consultation Procedures Under the Mekong Agreement: Insights from the Xayaburi Controversy.” *Asian Journal of International Law* 5(1): 143-175.

RPTCC. (2015) “Country presentations from 19th Meeting of the GMS Regional Power Trade Coordination Committee (RPTCC-19) meeting, 16-17 November 2015”. Bangkok, Manila: Asian Development Bank.

SUHAKAM (2015) *Subakam Annual Report 2015*. Human Rights Commission of Malaysia (SUHAKAM): Kuala Lumpur.

Suk, W. (2017). “Writing the Rulebook: Will Thailand Force Its Businesses to Respect Human Rights?” <https://www.earthrights.org/blog/writing-rulebook-will-thailand-force-its-businesses-respect-human-rights>

TNHRC (2011) “National Human Rights Commission of Thailand’s Press Release on Xayaburi” (unofficial translation). 4 May 2011.