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OWNERSHIP IN THE DEEP SEAS

THE PARTICIPATORY SCOPE OF THE COMMON HERITAGE PRINCIPLE

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I have been asked by the symposium editors to write about the participatory scope of the concept of common heritage of humankind for Indigenous peoples, local communities, and future generations. Leaning into the possibilities of the *Unbound* format, I approach the topic in an athwart way. With a focus on seabed mining, I begin with describing a recent occasion on which Indigenous leaders joined a meeting of the International Seabed Authority (ISA) to discuss the mining regime that is in progress. I tease out the meanings that may be drawn from this instance of participation, including the claims that it made to the ocean as common heritage. Next, I turn to the limits of such participation, given the set parameters of the regime. My overall argument, discussed in the final section, is that the real issue at stake is not the possible conceptual scope of the common heritage principle. Rather, its actualization has been such that the burden is effectively shifted to marginalized voices to seek goals that do not disturb the overarching seabed mining regime.

Jamaican Rhapsody

On March 20, 2023, an unusual sound washed over the Kingston Conference Centre, Jamaica, where the ISA's annual meetings are held. These meetings have been taking place on an intensified schedule: March was the fourth time that delegates traveled to Jamaica in a twelve-month period, to discuss draft regulations concerning the commercial exploitation of seabed minerals.

The ISA has been at work for nearly three decades to transform seabed mining from a much-deferred possibility to an operational industry. With dogged perseverance (especially in its initial years, when seabed mining had retreated from general interest) it enacted regulations on the exploration of seabed minerals. It also took other measures, including controversial ones, to promote exploration activity.[1] The exploitation regulations too have been in development for a while, but matters have become urgent since June 2021, when Nauru triggered the "two-year rule" at the behest of its contractor, The Metals Company.[2] This rule requires the ISA to finalize the exploitation regulations within two years, failing which it must consider applications for commercial exploitation in the absence of agreed regulations.

But to demand is not to receive necessarily. As the ISA's work has picked up pace, so have challenges to the very case for seabed mining. The common sense about seabed minerals has altered from the time when they seemed to offer an almost fairytale solution to many concerns: supply security, raw material for limitless growth, strings-free development capital for the Third World, even a New International Economic Order. Such expectations had

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[1] Eric Lipton, *Secret Data, Tiny Islands and a Quest for Treasure on the Ocean Floor*, N.Y. TIMES (Aug. 29, 2022).

[2] Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea, Annex S.1, para. 15, Aug. 17, 1994.

underpinned the linkage of seabed mining with realizing the common heritage principle. But now, with increased clarity about the ecological harms of such mining and startlingly low prospects of revenue redistribution, come fears that seabed minerals comprise more the raw material of moral hazard than sustainable development or human security. This point has been made both inside and outside ISA meetings. The proceedings of March 20 were one such attempt to reiterate the changed significance and apparent dangers of seabed mining.

So, what was the unusual sound? The first to speak at the meeting was the Pacific Indigenous Islander, Solomon Pili Kahoʻohalahala. Kahoʻohalahala, a Native Hawaiian and former member of the Hawaii House of Representatives, attended as part of the Greenpeace observer delegation. Days before the session, he had arrived in Jamaica together with Indigenous activists from the Cook Islands, Papua New Guinea, and Aotearoa New Zealand, traveling on the storied Greenpeace ship *Arctic Sunrise*. On reaching harbor, in a gesture of recognition that spoke to the enduring and layered bonds of Fourth World anti-colonial solidarity, Kahoʻohalahala "removed his shoes and asked for permission to land on Jamaican soil from the head of the Charlestown Maroons, Colonel Marcia Douglas. The Maroon drumming group provided a rousing welcome…."[3] On March 20, Kahoʻohalahala opened proceedings at the ISA by performing a Hawaiian *oli*.

The *oli*, a sonorous chant form, is a mode of storytelling, making contact, and transmitting familial genealogies and origin stories across generations.[4] Sung unaccompanied, and expressed through the voice alone, Kahoʻohalahala's *oli* sent a frisson round the room. Through it, and their words thereafter, Kahoʻohalahala and other Indigenous leaders reminded the assembled delegates of some incontrovertible facts of life and circumstance:

> The ocean is our country. We have only one place that we can call home and that's our home on our Island Earth….[5]

And,

> We come from the deepest depths of the sea. The ocean is our life. We want to ensure that you are not leaving out a conversation we would have with you if our history was different…. We refuse to destroy the depths of the ocean, sacrificing the future of our children for the benefit of a few individuals.[6]

The Poetics of Inclusion

The Indigenous leaders' presence and statements at the ISA were warmly celebrated, especially by the observer groups that had brought them to the meeting.[7] Greenpeace campaigners described their participation as "a game changer," initiating "a new dialogue in the ISA that's never existed before."[8]

At one level this celebration is understandable, as there was much of value in the presence and contributions of the Indigenous leaders. In their addresses, Kahoʻohalahala and others not only conveyed the richness of their traditional worldings, they also evoked long-standing efforts by Indigenous voices to make these worldings

[3] Emma Lewis, *As Deep-Sea Mining Decision Still Hangs in The Balance, Young Jamaican Activists Continue to Campaign*, Glob. Voices (Apr. 11, 2023).

[4] Wailana Kalama, *This Hawaiian Storytelling Chant Is Great Literature Without the Written Word*, Electric Lit. (Nov. 16, 2018).

[5] Quoted by: DSCC, @DeepSeaConserve, X (Mar. 29, 2023, 12:23 p.m.).

[6] International Institute for Sustainable Development, *Summary Report 16-31 March 2023*, Earth Negotiations Bulletin, No. 25(251), at 9 (Apr. 4, 2023).

[7] *See, e.g.*, Jessica Battle, @Jessica_WWF, X (Mar. 20, 2023, 12:32 p.m.); An Lambrechts, @lambrechtsan, X (Mar. 20, 2023, 12:44 p.m.).

[8] Olivia Rosane, *"Ocean Is at Stake" at International Seabed Authority Negotiations Over Deep-Sea Mining*, EcoWatch (Mar. 29, 2023).

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comprehensible to general audiences and empowering to the self-imagination of Pacific peoples.[9] Their presence was also an important geographical assertion: much mining exploration activity has been in the Clarion Clipperton Zone of the Pacific Ocean, proximate to them. Kahoʻohalahala suggested that this matters for two reasons: an environmental concern about mining-induced pollution and biodiversity loss, *and* a concern to protect the deep sea as Indigenous cultural heritage. Against a reduced legal understanding of "underwater cultural heritage" that references objects found under the sea, he pressed the understanding that for Hawaiian Indigenous peoples, "the deep sea [was] their home, their place and their beginning," "the source of creation, thanks to the energy stored in the seabed."[10] In other words, what is at stake for the Indigenous peoples is not a distant ocean, but rather their *mare nostrum*. And yet, they were excluded from the conversation owing to a history of colonization.

It is worth briefly recalling Hawaii's complex positionality in relation to seabed mining even back in the 1970s, the period of much excitement about this activity. At the time, just over a decade after its entry into formal (U.S.) American statehood, Hawaii responded to the prospect of seabed mining in polyphonic and even paradoxical ways. Local newspaper archives reveal the gamut of engagements, excitements, speculations, and initiatives relating to seabed mining—from assertions of special Hawaiian proximity, to prospects of profiting from the processing and refining action on the back of U.S. corporate mining initiatives, to hopes for a regime that would satisfy post-colonial aspirations, to gossip about mining ships docking at Hawaiian harbors.[11] Yet, at the ISA, Hawaiian positionalities and interests have been subsumed within the overarching account of *U.S.* positions and interests. Kahoʻohalahala's speeches are a gentle reminder of the stories that we *might* tell about seabed mining, such as a Hawaiian story that does justice to its Pacific, Indigenous, and anti-colonial ontology, and puts into context seabed mining's political economies, cultural histories, and normative association with the common heritage principle.

Even setting aside the meanings we might make of the words, presence, and arrival rituals of the Indigenous leaders, there is the important document they delivered to the ISA: a petition from fifty-six Indigenous groups in thirty-four countries, calling for an immediate ban on seabed mining.[12] This petition is significant because even within the growing movement opposing seabed mining, stances range from seeking a delay to an outright ban. There are more voices in the former category. While the literature does not offer much analysis of the difference between the calls for a ban and for a pause or moratorium, the difference *is* important, for reasons I discuss later in the essay. For the moment, the point is that Kahoʻohalahala and others brought, as well as their chants, resonances, and solidarities, a clear demand for a particular action that not only joined the oppositional chorus, but also amplified the more radical position within it.

The Prose of Inclusion

Despite the apparent and immanent meanings to be attached to the Indigenous leaders' presence at the ISA, it is important to recognize the limits of such participation. Most obviously, it has come late—not until the 28th ISA session—and at the behest of observer delegations rather than via a formal mechanism to include them in the decision making. Consequential then are the limitations flowing from the format of participation, and from the settled framework of seabed mining with which such participation must contend. Indeed, this settled framework has already previously erased more ambitious conceptions of the common heritage principle.

The concerns with the format of participation are obvious. ISA processes offer limited opportunities to observers, with power concentrated within closed-door bodies like the Legal and Technical Commission. On most

[9] For instance, Epeli Hauʻofa, *Our Sea of Islands*, 6 Contemp. Pacific 148 (1994).

[10] Maud Oyonarte, *Deep-Sea Mining: Concerns from the Pacific Need to Be Heard*, Greenpeace (Aug. 3, 2023).

[11] Available at newspapers.com.

[12] Blue Climate Initiative, *Indigenous Voices for a Ban on Deep Sea Mining*.

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matters, the Commission determines, *de facto* at least, the direction of decision making by the ISA Council and Assembly. These organs come with their own problems. The Council is a body of thirty-six states, but membership and voting rules allow a few to lead decisions. The Assembly, notionally supreme, and allowing a vote to each ISA member state, is in practice heavily steered by the Council and Secretariat. While observers can speak at Council and Assembly meetings, their participation is marginal: seated outside the semi-circle of state delegations, their opportunity to comment arrives in the end minutes of meetings (or, as on March 20, as a prelude), at times subject to restrictive time-limits, and on top of the prohibitive travel costs, escalating requirements for observer status, and non-robust consultation procedures.[13]

Such limitations *have* generated proposals for improvement of ISA processes, but other limitations are more difficult to address via processual reforms. These other limitations arise from the fact that the ISA appears to regard much of the framework for seabed mining as already settled via treaties (the UN Convention on the Law of the Sea and 1994 Agreement) and its own work. This *acquis* supposedly includes the ISA's pro-seabed-mining orientation and fidelity to a market model. With competition and attractive returns to the mining companies taken as essential assumptions, the corollary—suggested by the ISA's expert consultants—is that only a small proportion of revenue may be available for redistribution, and might be reduced even further depending on cost outlays for environmental risk assessment and management. Even though benefit sharing "is at the core of operationalising the common heritage principle," the amounts anticipated are so limited, and their inadequacy made so apparent by proposed cash distribution schemes, that the ISA has even proposed that the funds might be used in some different way altogether.[14] For example, one suggestion has been to establish a fund to remediate harms caused by mining. This not only highlights ironies but also moves very far away from the goal of redistribution.

These reduced prospects of benefit sharing must be understood in the context of the already significant retreat over time of the common heritage principle. Initially, proposals in the 1970s had considered how seabed mining might realize a genuine partnership between developed and developing states, as well as genuine inclusion of the Global South. Envisaged were mining schemes on a public footing, by way of an internationally governed "Enterprise," that would make developing states equal partners in the activity and regulation of seabed mining. Without assumptions of competition and profit, it was anticipated that the bulk of the revenue would be available for redistribution to states and non-self-governing peoples. Such schemes were a conscious departure from a colonial mode of production, in which the South was a passive site of exploitation, recipient of aid, and market for Northern products. Proposals for organizing the governance of the activity included models allocating decision-making power to multiple stakeholders.[15] In attritive fashion, such proposals gave way to regimes favoring mining corporations and concentrated decision-making power, sweetened by promises of material benefit sharing. What we see now are efforts to transform the idea of benefit sharing to exclude all prospects of redistribution.[16]

It is within such limits that Indigenous and other marginalized voices are expected to frame their participation. This does not mean that there is nothing for them to articulate, but it places them under a dual burden: first, of making their histories and epistemologies comprehensible, thus a burden of translation; second, of formulating demands that can be comprehended within pre-defined parameters, thus a burden of accommodation. In addition, of course, is the burden of finding paths to present their demands to the ISA, absent formal participatory

[13] Elisa Morgera and Hannah Lily, *Public Participation at the International Seabed Authority*, 31 Rev. Eur. Comp. Int'l Envtl. L. 374, 383–84 (2022).

[14] Daniel Wilde, Hannah Lily, Neil Craik & Anindita Chakraborty, *Equitable Sharing of Deep-sea Mining Benefits: More Questions than Answers*, 151 Marine Pol'y 105572, 8 (2023).

[15] Tirza Meyer, Elisabeth Mann Borgese and the Law of the Sea 111–15 (2022).

[16] Aline Jaeckel, *Benefitting from the Common Heritage of Mankind: From Expectation to Reality*, 35 Int'l J. Marine & Coastal L. 660 (2020).

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mechanisms. What then happens, when they seek to exceed these terms, such as in calling for a ban on seabed mining?

The Participatory Scope of the Common Heritage Principle

In theory, the common heritage principle can and should include Indigenous peoples, local communities, and future generations. Much literature already makes this point, from arguing for an appropriately expansive conception of the principle, to offering reminders of its evolutionary scope.[17] Indeed, the principle's immanent possibilities was why developing states championed it during the recent negotiations on marine biodiversity in areas beyond national jurisdiction.

But, whatever its potential scope, in the seabed mining context the principle has only traveled in a retreating direction. It is used to reiterate set assumptions about competition and profit, and to insist upon these as incontrovertible elements of the seabed mining regime. So congealed are these assumptions that they are presented as entirely apolitical—as given, not chosen. Thus, per the ISA secretary-general, common heritage "denotes only a specific and limited legal status and does not imply any moral or philosophical concept."[18] The only element of progressive evolution has been some centering of environmental concerns, with growing evidence of likely harms. Thus, the regime now integrates the precautionary approach and other key environmental principles. Yet their importance is understood in different ways. The ISA Secretariat, Legal and Technical Commission, contractors, and some states express willingness to embrace enhanced risk assessment and management procedures; but cast environmental obligations as somehow offsetting redistributive ones. Some have also recruited environmental concerns, such as the need for green energy transition and threats from land-based mining into their rhetorical arsenal for arguing *in favor* of seabed mining. At the sharp end is the call for a moratorium. But it is important to recognize that this call too, (promisingly) disruptive as it might appear, does not in fact demand reconsideration of the political economy of the seabed mining regime.[19] It emphasizes further research, better processes, and exploration of alternatives—and thus, rightly, a more responsible approach to mining—but does not question the framing of this activity in terms of competition and profit. Indeed, in citing a market justification for a moratorium, and valorizing commitments by otherwise extractive corporations to exclude seabed minerals from their supply chains, it even reinforces a basic commitment to this given political economy.

This framing of the moratorium call is perhaps a recognition that regardless of its proven limits, and the alternative visions available in its history, a market approach to seabed mining is not up for contestation. It is in this context that Indigenous leaders have come together in a wide global alliance to call for a total ban. They are not trying to fit their aspirations to pre-set parameters, enhanced environmental safeguards, more transparent processes, more opportunities to attend discussion. Rather, exceeding the given terms of their participation, they have renewed—and expanded—the older anti-colonial call to build a new economic order on the sea; to build indeed a new imagination of what this order should entail by taking seriously Indigenous histories, knowledge systems, and cultural and economic associations with the ocean. And thus, meaningfully, to the current regime, merely performative inclusion, and even activism accommodated to the underlying status quo, they are just saying—no.

[17] Dire Tladi, *The Common Heritage of Mankind and the Proposed Treaty on Biodiversity in Areas Beyond National Jurisdiction: The Choice Between Pragmatism and Sustainability*, 25 Y.B. Int'l Envtl. L. 113, 127 (2014); Karin Mickelson, *Common Heritage of Mankind as a Limit to Exploitation of the Global Commons*, 30 Eur. J. Int'l L. 635, 661–63 (2019).

[18] Michael Lodge & Philomene Verlaan, *Deep Sea Mining: International and Regulatory Challenges and Responses*, 14 Elements 331, 333 (2018).

[19] Deep Sea Conservation Coalition, *Position Statement on Deep Seabed Mining* (July 2019).

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