

Public participation at the International Seabed Authority: An international human rights law analysis

Elisa Morgera¹ | Hannah Lily² 

¹School of Law, University of Strathclyde, Glasgow, UK

²Canterbury, UK

Correspondence

Elisa Morgera, School of Law, University of Strathclyde, Glasgow, UK.

Email: elisa.morgera@strath.ac.uk

Funding information

One Ocean Hub; Global Challenges Research, Grant/Award Number: NE/S008950/1

Abstract

In light of the interlinkages between marine biodiversity and the protection of human rights, this article explores the relevance of international human rights law to the decision-making processes at the International Seabed Authority (ISA). It illuminates the relevance of the ISA decisions for the protection of everyone's right to a healthy environment, as well as for the human rights of indigenous peoples and other communities that have cultural connections to the seabed, children and environmental human rights defenders. On these bases, the article assesses current practices in relation to public participation at the ISA, revealing that human rights obligations of procedure and substance appear overlooked in that context. The article concludes by outlining the steps the ISA member States should take to enhance public participation in decision-making on deep-seabed mining. In addition, it identifies an immediate opportunity for independent international review that could help clarify how human rights can support the ISA in delivering on its complex mandate to regulate deep-seabed mining activities beyond national jurisdiction and protect the marine environment for the benefit of humankind.

1 | INTRODUCTION

The extraction of minerals from the deep seabed is an industry not yet begun, though foreseen in the law of the sea since the 1980s. Proponents pitch it as an answer to metal demand increases,¹ including as part of climate change responses.² But its commencement has been delayed due to technical, environmental, political

and social challenges.³ Scientific findings that deep-sea mining could lead to an irreversible loss of marine ecosystem functions⁴ and species extinction⁵ have raised 'very significant questions' about 'long-lasting and possibly unforeseen consequences' from seafloor destruction, light, noise and sediment plumes. High-level political assessments have recently underscored that deep-seabed mining 'is

¹For an example of a private sector company that manages three International Seabed Authority (ISA) exploration contract sites, see 'The Metals Company' <<https://metals.co/>>.

²Notably batteries for electric cars: K Paulikas, Katona and A Ilves, 'Life Cycle Climate Change Impacts of Producing Battery Metals from Land Ores Versus Deep-Sea Polymetallic Nodules' (2020) 275 *Journal of Cleaner Production* 123822; and B Sovacool et al, 'Sustainable Minerals and Metals for a Low-carbon Future' (2020) 367 *Science* 30.

³L Levin, D Amon and H Lily, 'Challenges to the Sustainability of Deep-seabed Mining' (2020) 3 *Nature Sustainability* 784.

⁴E Simon-Lledó et al, 'Biological Effects 26 Years after Simulated Deep-Sea Mining' (2019) 9 *Scientific Reports* 8040; K Miller et al, 'An Overview of Seabed Mining Including the Current State of Development, Environmental Impacts, and Knowledge Gaps' (2018) 4 *Frontiers in Marine Science* 418.

⁵E Thomas et al, 'A Global Red List for Hydrothermal Vent Molluscs' (2021) 8 *Frontiers in Marine Science* 713022.

This is an open access article under the terms of the [Creative Commons Attribution-NonCommercial-NoDerivs](https://creativecommons.org/licenses/by-nc-nd/4.0/) License, which permits use and distribution in any medium, provided the original work is properly cited, the use is non-commercial and no modifications or adaptations are made.

© 2022 The Authors. *Review of European, Comparative & International Environmental Law* published by Wiley Periodicals LLC.

conceptually difficult to align with the definition of a sustainable ocean economy' and presents 'possible conflicts' with the United Nations (UN) Sustainable Development Goals (SDGs).⁶ During the UN Ocean Conference in June 2022, a growing number of countries and diverse civil society representatives called for a moratorium on deep-seabed mining.⁷ This comes as ongoing international negotiations about minerals beyond national jurisdiction have been subject to significant time pressure, since the State of Nauru triggered a 'hurry-up' clause⁸ requesting that mining regulations be completed in 2 years by the International Seabed Authority (ISA).⁹ Taken together, these developments indicate the urgent need for 'public, transparent, and well-informed consideration, as well as wide agreement'¹⁰ as to the acceptability of the industry proceeding.

This article assesses the current practices¹¹ of decision-making at the ISA from the perspective of international human rights law, with a view to clarifying the content and extent of binding international obligations for member States of the ISA to ensure public participation in ISA decision-making. In light of the interlinkages between marine biodiversity and the protection of human rights, this article first discusses the relevance of the ISA decisions for the protection of everyone's right to a healthy environment, as well as for the human rights of specific protected groups—indigenous peoples and other communities that have cultural connections to the seabed, children and environmental human rights defenders. To that end, this article considers the applicability of global international human rights treaties, such as the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights,¹² the UN Convention on the Elimination of All Forms of Racial Discrimination,¹³ as well as the UN Convention on the Rights of the Child (UNCRC).¹⁴ The article also considers regional conventions on procedural environmental rights, noting that the ISA has referenced in its own policy¹⁵ the Aarhus Convention on public

participation in environmental decision-making,¹⁶ despite its limited membership.¹⁷ The article concludes that currently human rights obligations of procedure and substance appear overlooked at the ISA, which prevents ISA member States from hearing and reflecting the views of 'humankind'—whom the ISA is mandated to represent. The article finally outlines the steps the ISA member States should take to enhance public participation in decision-making on deep-seabed mining. It also identifies an immediate opportunity for independent international review that could help clarify how human rights can support the ISA in delivering on its complex mandate to regulate deep-seabed mining activities and protect the marine environment beyond national jurisdiction for the benefit of humankind.

2 | INTRODUCTION TO THE ISA

The legal framework for deep-sea mining under the UN Convention on the Law of the Sea (UNCLOS)¹⁸ included an innovative regulatory, contracting and monitoring mandate for a new intergovernmental body, the ISA. The Authority will manage those activities, while protecting the marine environment, as a self-standing organization that is accountable to '(hu)mankind'.¹⁹ The ISA is in its third decade of operation now, and currently functions as something akin to a UN-style meeting body—albeit outside of the UN accountability systems, as discussed below. The ISA is poised to transition into an entity that functions more like a mining regulator and environmental authority, combined.

The ISA is required, acting in the interests of and on behalf of all of humankind,²⁰ to set the rules to decide when, to whom, on what terms to issue contracts for the exploration and exploitation of deep-seabed minerals.²¹ The ISA is also expected to promote the active participation of developing States in such activities,²² including through the operationalization of an in-house mining operator called 'the Enterprise',²³ and to secure optimum benefits (economic and otherwise) for the overall development of States, and especially developing States.²⁴ Benefits should be equitably shared according to a mechanism (also to be designed and operated by the ISA).²⁵

environmental decision-making procedures in accordance with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998, and its own rules and procedures'. ISA 'Environmental Management Plan for the Clarion-Clipperton Zone' UN Doc ISBA/17/LTC/7 (13 July 2011) para 13(f).

¹⁶Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 445 (Aarhus Convention).

¹⁷Forty-four ISA member States (plus the European Union) are party to the Aarhus Convention. Of the Aarhus Convention's total 49 ratifications, four are States who are not also ISA members: Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan. For a list of treaty parties, see <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XXVII-13&chapter=27>.

¹⁸United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) Part XI.

¹⁹A Jaeckel, 'Benefitting from the Common Heritage of Humankind: From Expectation to Reality' (2020) 35 International Journal of Marine and Coastal Law 660.

²⁰UNCLOS (n 18) arts 140 and 153(1).

²¹ibid arts 153, 162(2)(o)(ii), Annex III; Implementation of Part XI Agreement (n 8) Annex, section 1(15). See <<https://www.isa.org/jm/mining-code>>.

²²UNCLOS (n 18) arts 144, 148, 150.

²³ibid art 170.

²⁴ibid art 140, Annex III, art 13.

²⁵ibid art 140(2).

⁶M Stuchtey et al, 'Ocean Solutions That Benefit People, Nature and the Economy' (World Resources Institute, 2020). See also World Economic Forum, 'Decision-Making on Deep-Sea Mineral Stewardship: A Supply Chain Perspective: White Paper' (April 2022); United Nations Environment Programme Finance Initiative, 'Harmful Marine Extractives: Deep-Sea Mining' (June 2022).

⁷T Kantai et al, 'Summary of the Second UN Ocean Conference; 27 June–1 July 2022' (2022) 32 Earth Negotiations Bulletin 1, 2, 4 and 10–11.

⁸Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3 (Implementation of Part XI Agreement) Annex, Section 1(15).

⁹K Willaert, 'Under Pressure: The Impact of Invoking the Two-year rule within the Context of Deep sea Mining in the Area' (2021) 36 International Journal of Marine and Coastal Law 505; P Singh, 'What are the Next Steps for the International Seabed Authority after the Invocation of the 'Two-Yea' Rule'? (2022) 37 International Journal of Marine and Coastal Law 152.

¹⁰HJ Niner et al, 'Deep-Sea Mining with No Net Loss of Biodiversity—An Impossible Aim' (2018) 5 Frontiers in Marine Science 53.

¹¹Due to the serious lack of, and limitations in public access to, official ISA records and documents, the authors have, to the best of their abilities, provided alternative sources of specific instances of practices at the ISA, while respecting confidentiality of sources to protect the identities of environmental human rights defenders.

¹²International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS.

¹³International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195.

¹⁴Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

¹⁵For example, a specific policy document for regional environmental management adopted by the ISA Council in 2012, states that the ISA 'shall enable public participation in

Concurrently to these duties focused on mineral development, the ISA is also required to ensure the effective protection of the environment from harmful effects, which may arise from deep-seabed mining activities,²⁶ and to ensure protection of human life.²⁷

While the ISA has a relationship of consultation and cooperation with the UN, it is a standalone, independent entity. This means that it operates outside the wider accountability framework that applies to other UN agencies.²⁸ Currently, the ISA does not have its own oversight office, complaints mechanism, whistle-blowing procedure or ombudsman.²⁹

The ISA has an unprecedented, vast and complex mandate, which potentially affects many (if not) all of the global population.³⁰ Academic literature has long underlined that while the ISA has been given 'unparalleled' competence in international law³¹ and is expected to implement 'the highest possible environmental standards and to allow for informed decision-making on deep seabed-mining projects by the ISA and human society through its numerous stakeholders',³² it is in fact 'dominated by a handful of states'.³³

To date, the ISA has agreed Regulations for Exploration³⁴ (the phase of scientific and feasibility work undertaken as a precursor to future exploitation), and under those rules has issued more than 30 contracts for exploration across six different ocean regions.³⁵ Work has been underway at the ISA for the past few years to develop the next set of Regulations for Exploitation (mining).³⁶ This includes settling on the rules for the protection of the marine environment, the institutional set-up for the ISA, including new inspection and enforcement capabilities,³⁷ the financial regime (including a royalty system)³⁸ and how those payments from contractors will be equitably shared with all.³⁹ The ISA is also midway through developing regional management plans, mapping out existing marine uses and looking at

baseline ocean conditions, for spatial management across wider scale ocean basins.⁴⁰

3 | RELEVANT INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS AND THEIR IMPLICATIONS FOR PUBLIC PARTICIPATION

Deep-seabed minerals in the Area are located hundreds of kilometres from shore, and at depths of hundreds of metres below sea level. Human rights are not explicitly addressed in UNCLOS Part XI on the Area, or in UNCLOS Part XII on the protection of the marine environment, because at the time of UNCLOS adoption the links between the marine environment and human rights were not well understood. Perhaps for these reasons, the relevance of the ISA's mandate for international human rights law is rarely discussed.⁴¹ In this section, in as far as its activities may negatively impact on biodiversity or on a safe climate on which certain human rights depend, we argue that the mandate of the ISA does engage internationally protected human rights law. These include everyone's human right to a healthy environment, indigenous peoples' and local communities' cultural rights, children's human rights and the human rights of environmental activists.⁴² On that basis, we argue that the way in which the ISA delivers on its mandate also triggers human rights obligations of its member States around their collective decision-making.

3.1 | Everyone's human rights dependent on marine biodiversity (and a safe climate)

The UN General Assembly's recognition of everyone's human right to a healthy environment in 2022⁴³ represents the culmination of the increasing international acknowledgement in the context of international human rights law that biodiversity loss has an impact on a variety of basic human rights.⁴⁴ The full enjoyment of everyone's human rights to life, health, food and water depend on healthy ecosystems and their benefits to people.⁴⁵ Therefore, the protection and realization of basic human rights depend on successful efforts to prevent biodiversity loss.⁴⁶ Also relevant is the understanding

²⁶ibid art 145, Annex III, art 17(2)(f).

²⁷ibid art 146.

²⁸Agreement Concerning the relationship between the United Nations and the International Seabed Authority (adopted 14 March 1997) <<https://isa.org.jm/files/documents/EN/Regs/UN-ISA-Agrmnt.pdf>>.

²⁹K Murphy, 'Assuring Environmental Compliance in Deep-Sea Mining: Lessons from Industry and Regulators' (Pew Charitable Trusts 2020) <https://www.pewtrusts.org/-/media/assets/2020/06/seabed_mining_white_paper.pdf>.

³⁰J Ardron, H Lily and A Jaeckel, 'Public Participation in the Governance of Deep-Sea Mining in the Area' in R Rayfuse, N Klein and A Jaeckel (eds), *Research Handbook on International Marine Environmental Law* (2nd edn, Edward Elgar 2023) fc.

³¹R Collins and D French, 'A Guardian of Universal Interest or Increasingly out of its Depths? The International Seabed Authority Turns 25' (2019) 17 *International Organizations Law Review* 1, 2; T Davenport, 'Formal and Informal Law Making by the International Seabed Authority: An Artificial Distinction?' in N Klein (ed), *Unconventional Lawmaking in the Law of the Sea* (Oxford University Press 2022) 183, 184.

³²M Haeckel et al, 'Environmental Impacts of Deep Seabed Mining' in T Heider (ed), *New Knowledge and Changing Circumstances in the Law of the Sea* (Brill 2020) 327.

³³Collins and French (n 31).

³⁴ISA, 'The Mining Code: Exploration Regulations' <<https://www.isa.org.jm/index.php/mining-code/exploration-regulations>>.

³⁵ISA, 'Exploration Contracts' <<https://www.isa.org.jm/index.php/exploration-contracts>>.

³⁶ISA, 'The Mining Code: Draft Exploitation Regulations' <<https://www.isa.org.jm/index.php/mining-code/draft-exploitation-regulations>>.

³⁷ISA 'Statement by the President of the Council on the Work of the Council During its Resumed Twenty-sixth Session' UN Doc ISBA/26/C/13/Add.1 (14 December 2021).

³⁸ISA, 'Open-ended Working Group on the Financial Terms of Contracts' <<https://www.isa.org.jm/index.php/mining-code/working-groups#fin>>.

³⁹ISA 'Report of the Finance Committee' UN Doc ISBA/26/A/24-ISBA/26/C/39 (6 July 2021).

⁴⁰See, ISA, 'Environmental Management Plans' <<https://www.isa.org.jm/minerals/environmental-management-plan-clarion-clipperton-zone>>.

⁴¹A few contributions are emerging, however: see GJ Hamley, 'The Implications of Seabed Mining in the Area for the Human Right to Health' (2022) 31 *Review of European, Comparative and International Environmental Law*; and J Aguon and J Hunter, 'Second Wave Due Diligence: The Case for Incorporating Free, Prior, and Informed Consent into the Deep Sea Mining Regulatory Regime' (2019) 38 *Stanford Environmental Law Journal* 3.

⁴²This is not intended to be an exhaustive list of rights and rightsholders to which the ISA's work is relevant. There are other categories that are not covered in this article, for example workers involved in deep-seabed mining operations.

⁴³UNGA 'The Human Right to a Clean, Healthy and Sustainable Environment' UN Doc A/RES/76/300 (1 August 2022), which was preceded by HRC 'The Human Right to a Clean, Healthy and Sustainable Environment' UN Doc A/HRC/RES/48/13 (18 October 2021).

⁴⁴J Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' UN Doc A/HRC/34/49 (19 January 2017).

⁴⁵ibid para 5.

⁴⁶ibid.

that biodiversity acts as a reservoir of infinite potential for the development of new medicinal and food products.⁴⁷ For instance, the COVID-19 test relies on an enzyme derived from an organism found at hydrothermal vents and freshwater hot springs.⁴⁸ In addition, there are other connections between biodiversity and human health.⁴⁹ While most attention so far has focused on better understood interdependencies between terrestrial biodiversity and human well-being, such as the relationship between healthy pollinators and global food security,⁵⁰ the same reasoning can be applied to the role of deep-sea biodiversity in contributing to the production of oxygen and to other ecosystem services.⁵¹

Marine biodiversity also contributes to the absorption of carbon dioxide. Reference has been made to the potential of deep-seabed mining to contribute to humanity's climate change mitigation efforts by contributing minerals that are needed for electric car batteries.⁵² But damage to deep-sea biodiversity that could arise from deep-seabed mining could also negatively impact on the ocean's natural contributions to climate change mitigation.⁵³ In 2022, the UN Special Rapporteur on Climate and Human Rights reported that 'serious concerns have been brought to [his] attention ... about the potential environmental and human rights impacts from deep seabed exploration and mining for minerals that could be used in battery production for electric vehicles and other forms of electrical storage'.⁵⁴

For all these reasons, protection of marine biodiversity from the negative impacts of deep-seabed mining should be seen as an integral component of States' international obligations to protect a healthy biosphere and a safe climate as substantive elements of everyone's human right to a healthy environment and the other basic human rights dependent on a healthy environment.⁵⁵ These considerations are based on a combined reading of States' obligations under the core international human rights treaties (such as the two Covenants)⁵⁶ to

which they are party, and their environmental protection obligations under the UN Convention on the Law of the Sea and the Convention on Biological Diversity.

The first implication arising from the human right to a healthy environment is that States, if authorizing an activity that may affect biodiversity, should ensure no unjustified, foreseeable infringements of human rights arise from the decision.⁵⁷ This is based both on potential State action that may directly infringe biodiversity-dependent human rights, and on States' obligation to prevent business entities from violating these rights.⁵⁸ These obligations apply also at the multilateral level.⁵⁹ States collectively need to consider the human rights implications of their international duty to cooperate under multilateral agreements, such as UNCLOS.⁶⁰ The former and current Special Rapporteurs on Human Rights and the Environment have not yet made specific reference to deep-seabed mining. However, current Rapporteur David Boyd in 2020 asserted that the UN negotiations on marine biodiversity of areas beyond national jurisdiction must include appropriate consideration of human rights,⁶¹ which would seem by analogy to apply to the law-making process under the ISA.

ISA member States, therefore, need to consider the human rights implications of their collective decisions that may affect biodiversity, given scientific evidence that biodiversity degradation and loss will derive from deep-seabed mining,⁶² even if—and, in fact, even more so because—we currently lack sufficient scientific knowledge⁶³ on how to avoid negative impacts on humans arising from deep-seabed mining. On the basis of current knowledge, it is not possible to state with confidence, for example, that pollution from deep-seabed mining in areas beyond national jurisdiction will not reach coastal communities, or affect fish stocks that are crucial for human subsistence, livelihoods or culture, due to ecological connectivity between areas beyond and within national jurisdiction.⁶⁴ It is not possible to state with confidence either if negative impacts from deep-seabed mining will not degrade global services provided by deep-sea ecosystems, such as oxygen production or climate regulation. This is because we lack sufficient knowledge of: the relevant ecosystems, how they would be impacted by deep-seabed mining activities, how far impacts could occur (vertically or horizontally) beyond the location of the mining site, what management interventions could prevent or mitigate those impacts, and what indirect or wider repercussions from those impacts may arise, for example, adverse effects to ecosystem services performed by the ocean.⁶⁵

Approach to the Implementation of the 2030 Agenda for Sustainable Development for the Full Realization of Human Rights, Focusing on All Means of Implementation' UN Doc A/HRC/RES/37/25 (19 March 2018).

⁴⁷ibid 12.

⁴⁷ibid 12.

⁴⁸E Hugus, 'Finding Answers in the Ocean' (Woods Hole Oceanographic Institute, 10 November 2020) <<https://www.whoi.edu/oceanus/feature/finding-answers-in-the-ocean/>>.

⁴⁹Knox (n 44) para 12.

⁵⁰ibid paras 11–20.

⁵¹A Thurber et al, 'Ecosystem Function and Services Provided by the Deep Sea' (2014) 11 *Biogeosciences* 3941. See also Deep Ocean Stewardship Initiative (DOSI), 'What Does the Deep Ocean Do for You?' (2022) <<https://www.dosi-project.org/wpcontent/uploads/deep-ocean-ecosystem-servicesbrief.pdf>>; and Hamley (n 41).

⁵²D Paulikas et al, 'Deep-sea Nodules Versus Land Ores: A Comparative Systems Analysis of Mining and Processing Wastes for Battery-Metal Supply Chains' (2022 *fc*) *Journal of Industrial Ecology* <<https://doi.org/10.1111/jiec.13225>>.

⁵³See Human Rights Council (HRC) 'Human Rights and Climate Change' UN Doc A/HRC/RES/44/7 (23 July 2020) and subsequent HRC resolutions; Committee on Economic, Social, and Cultural Rights 'Climate Change and the International Covenant on Economic, Social, and Cultural Rights' UN Doc E/C.12/2018/1 (31 October 2018). The literature is abundant: see, e.g., S Duyck et al (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018).

⁵⁴I Fry, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change: Promotion and Protection of Human Rights in the context of Climate Change Mitigation, Loss and Damage, and Participation' UN Doc A/77/226 (26 July 2022) para 25.

⁵⁵D Boyd, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Human Rights Depend on a Healthy Biosphere' UN Doc A/75/161 (15 July 2021).

⁵⁶The International Covenants are also relevant for States in pursuing the Sustainable Development Goals, as underscored by the HRC: see HRC 'Promotion and Protection of Human Rights and the Implementation of the 2030 Agenda for Sustainable Development' UN Doc A/HRC/RES/37/24 (20 March 2018); and HRC 'The Need for an Integrated

⁵⁷Knox (n 44).

⁵⁸ibid paras 33–34.

⁵⁹ibid paras 36–48.

⁶⁰ibid 36–39.

⁶¹Boyd (n 55) para 90(j).

⁶²Niner et al (n 10); BN Orcutt et al, 'Impacts of Deep-Sea Mining on Microbial Ecosystem Services' (2020) 65 *Limnology and Oceanography* 1489.

⁶³D Amon et al, 'Assessment of Scientific Gaps related to the Effective Environmental Management of Deep-seabed Mining (2022) 138 *Marine Policy* 105006.

⁶⁴E Popova et al, 'Ecological Connectivity between the Areas beyond National Jurisdiction and Coastal Waters: Safeguarding Interests of Coastal Communities in Developing Countries' (2019) 104 *Marine Policy* 90.

⁶⁵Miller et al (n 4).

ISA Member States are therefore to observe the precautionary principle as a critical due diligence standard to take 'effective and proportionate measures' to prevent not only environmental harm but also negative impacts on human rights, 'especially when there are threats of serious or irreversible damage'.⁶⁶ And such precautionary measures should 'result from a procedure that itself complies with human rights obligations, including those relating to the rights of freedom of expression, freedom of association and peaceful assembly, information, participation and remedy'.⁶⁷ In other words, lack of scientific certainty confirms the need for, and arguably calls for heightened obligations of, ensuring public participation with a view to both pooling any possible information and inputs to reduce scientific uncertainty, and to enhancing guarantees of adequate decisions in the face of continued uncertainty.

3.2 | Indigenous peoples' and other communities' cultural rights

It has been discussed in the context of the UN negotiations on marine biodiversity of areas beyond national jurisdiction that indigenous peoples and local communities have knowledge related to these marine areas and marine life.⁶⁸ Academic studies⁶⁹ point to the existence of cultural and spiritual connections to the deep seabed. In addition, increasing attention has been paid to persons whose ancestors' human remains from slave trade ships lie within ISA contract sites: these areas are described as a 'graveyard' as a result of historic 'crimes against humanity'.⁷⁰ It has thus been argued that locations within the ISA's jurisdiction meet the criteria of world natural or cultural heritage sites, deemed as holding outstanding universal value for humankind, and which may be at harm if mining were to occur in those locations.⁷¹

The human right to culture may therefore be relevant in the context of deep-seabed mining—the right of everyone to their belief systems, rites and ceremonies, customs and traditions and

arts,⁷² including those of indigenous peoples,⁷³ that could be negatively impacted by deep-seabed mining directly or because of resulting marine biodiversity loss. ISA member States need to take precautionary measures to prevent possible impacts from deep-seabed mining that may result in the reduced availability, accessibility or acceptability of marine spaces and marine resources (in the Area or in other marine areas that are ecologically connected to the Area⁷⁴) that are essential for intangible cultural heritage, including indigenous peoples' culture on which their identity, well-being and development depend on.

Participation by cultural rightsholders would certainly facilitate increased understanding and better consideration by ISA member States of potential negative impacts on cultural rights that could arise from deep-seabed mining.

3.3 | Children's human rights to a healthy environment and the concept of intergenerational equity

The effects of climate change and biodiversity loss prevent children from enjoying their human rights today and in the future, as their long-term physical and mental health and overall quality of life.⁷⁵ It is now widely understood that climate change will harm the poorest and most vulnerable children first, hardest and longest.⁷⁶ Negative impacts of deep-seabed mining on marine biodiversity, as well as on marine ecosystems' contributions to climate change mitigation, can therefore lead to negative impacts on children's rights. Lack of water, which may potentially be affected by loss of deep-sea ecosystem services that contribute to the global water cycle, will also affect children most and for the longest time.

The interdependence of children's rights and a healthy environment have led the UN Committee on the Rights of the Child to start developing a new general comment on children's human rights and healthy environment, with a special focus on climate change, to clarify relevant State obligations under the UNCRC.⁷⁷ The leaders of UN bodies and organizations already issued a joint commitment on ensuring the promotion and recognition of the right of children, youth and future generations to a healthy environment and their meaningful

⁶⁶J Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles on Human Rights and the Environment' UN Doc A/HRC/37/59 (24 January 2018) Framework Principle 11, para 33(c); see also IACTHR, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017).

⁶⁷Knox (n 66) Framework Principle 11, para 33(a), making reference also to Framework Principles 4–10.

⁶⁸M Vierros et al, 'Considering Indigenous Peoples and Local Communities in Governance of the Global Ocean Commons' (2018) 119 *Marine Policy* 104039; CY Mulalap et al, 'Traditional Knowledge and the BBNJ Instrument' (2020) 122 *Marine Policy* 104103.

⁶⁹P Turner et al, 'Memorializing the Middle Passage on the Atlantic seabed in Areas Beyond National Jurisdiction' (2020) 122 *Marine Policy* 104254.

⁷⁰ISA, 'Council Makes Progress on Draft Sulphides Regulations' (19 July 2007) <<https://isa.org/jm/files/files/documents/sb-13-19.pdf>>.

⁷¹D Johnson, 'Protecting the Lost City Hydrothermal Vent System: All is Not Lost, or Is It?' (2019) 107 *Marine Policy*, 103593. Albeit currently the Convention for the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151, is only applicable to areas within national jurisdiction; see references to 'territory' in *ibid* arts 4–5.

⁷²Committee on Economic, Social and Cultural Rights 'General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)' UN Doc E/C.12/GC/21 (21 December 2009).

⁷³UNGA 'Declaration on the Rights of Indigenous Peoples' UN Doc A/RES/61/295 (2 October 2007) (UNDRIP) arts. 5, 8 and 10–13.

⁷⁴Popova et al (n 64).

⁷⁵World Health Organization (WHO), 'Inheriting a Sustainable World? Atlas on Children's Health and the Environment' (WHO 2017).

⁷⁶UNICEF, 'Unless We Act Now: The Impact of Climate Change on Children' (UNICEF 2015). See also HRC 'Analytical Study on the Relationship between Climate Change and the Full and Effective Enjoyment of the Rights of the Child' UN Doc A/HRC/35/13 (4 May 2017).

⁷⁷UN Office of the High Commissioner for Human Rights (OHCHR), 'Draft General Comment No. 26 on Children's Rights and the Environment with a Special Focus on Climate Change' <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/draft-general-comment-no-26-childrens-rights-and>>.

participation in decision-making at all levels, in relation to climate action and climate justice in June 2021.⁷⁸ Even before these developments, former UN Special Rapporteur on Human Rights and the Environment John Knox had clarified States' obligations vis-à-vis children's human rights in terms of intergenerational equity: the 'discussions of future generations [must] take into account the rights of the children who are constantly arriving, or have already arrived, on this planet'.⁷⁹ Youth representatives at the 2021 Glasgow Climate Summit, for instance, shared their concerns about deep-seabed mining and climate change.⁸⁰

In other words, the 166 ISA member States that are party to the UNCRC should interpret the concept of intergenerational equity as part of the 'common heritage of [hu]mankind'⁸¹ (the designated status of the seafloor and minerals of the Area)⁸² in the light of the internationally protected human rights of children. Substantive standards include preventing environmental harm to fully protect children's rights, including by requiring effective regulation and enforcement mechanisms such as injunctive relief;⁸³ considering the best interests of the child as a matter of primary consideration when designing, implementing and monitoring environmental regulation; and establishing and maintaining substantive non-regressive and precautionary environmental standards that take into account the ideas of children as expressed by children themselves and that contribute to minimize the future negative impacts of climate change on children to the greatest extent possible.⁸⁴

3.4 | Environmental human rights defenders

Environmental nongovernmental organizations (NGOs) and activists that have been active at the ISA or have been addressing the ISA in other international forums are protected by international human rights law as environmental human rights defenders, even if they may not self-identify as such.⁸⁵ Environmental human rights defenders were defined by former UN Special Rapporteur on Human Rights

Defenders Michel Forst, as the individuals and communities that raise awareness about the negative impacts on human rights of unsustainable decisions on the environment.⁸⁶ Environmental human rights defenders are increasingly the object of (often lethal) attacks by governments or private actors, as well as harassment, denigration or side-lining.⁸⁷ They are increasingly recognized and studied as agents of change,⁸⁸ including for their role in preventing unsustainable and unjust uses of the environment that may lead to conflict.⁸⁹

Former UN Special Rapporteur John Knox clarified specifically that activists that 'protect components of ecosystems whose benefits to humans may be less obvious, such as endangered species' should be considered environmental human rights defenders due to the links between biodiversity and human rights.⁹⁰ Environmental human rights defenders are entitled to all the rights and protections set out in the 1998 UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders). To respect defenders' rights, ISA member States must ensure a safe and enabling environment for them to operate free from threats, harassment, intimidation and violence at the ISA, including by providing appropriate training for security officials. Protection further entails publicly recognizing the contributions of defenders to society and ensuring that their work is not stigmatized.⁹¹ Similar protections are included in the recently adopted Escazú Agreement.⁹² And in 2022, parties to the Aarhus Convention appointed a Special Rapporteur on Environmental Defenders as part of a rapid response mechanism to protect any person experiencing or at imminent threat of penalization, persecution or harassment for seeking to exercise their environmental rights.⁹³ Heightened levels of protection are needed for children defenders.⁹⁴

⁷⁸UN, 'Step Up! A Joint Commitment by Heads of UN Entities' <<https://www.sparkblue.org/system/files/2021-06/210615%20STEP%20UP%20-%20Joint%20Commitment%20by%20Heads%20of%20UN%20Entities.pdf>>.

⁷⁹J Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' UN Doc A/HRC/37/58 (24 January 2018).

⁸⁰One Ocean Hub Roundtable on 'Children and Young Peoples' Human Rights to a Healthy Ocean: Their Importance for Climate Change Adaptation and mitigation', Virtual Ocean Pavilion for the Climate Glasgow COP (12 November 2021) <<https://www.youtube.com/watch?v=TVoF8hmSpEE&t=414s>>; and S Álvarez Peña et al, 'Youths Call for a Deep-Sea Mining Moratorium' (Youth Policy Advisory Council of the Sustainable Ocean Alliance, 22 September 2022).

⁸¹R Das, 'Compensation as Equity in Context of Common Heritage of Mankind: A Key to Sustainability and Inter-generational & Inter-regional Equity' (2009) 2 NUJS Law Review 267; S Christiansen et al, 'Towards a Contemporary Vision for the Global Seafloor – Implementing the Common Heritage of Mankind' (2019) (Heinrich Böll Foundation 2019).

⁸²UNCLOS (n 18) art 136.

⁸³OHCHR 'Realizing the Rights of the Child through a Healthy Environment' UN Doc A/HRC/43/30 (3 January 2020) para 62.

⁸⁴HRC (n 76).

⁸⁵M Forst, 'Report of the Special Rapporteur on the Situation of Human Rights Defenders' UN Doc A/71/281 (3 August 2016).

⁸⁶ibid.

⁸⁷Global Witness, 'Defending Tomorrow: The Climate Crisis and Threats Against Land and Environmental Defenders' (2020) <<https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow>>.

⁸⁸A Nah et al, 'A Research Agenda for the Protection of Human Rights Defenders' (2013) 5 Journal of Human Rights Practice 522.

⁸⁹A Scheidel et al, 'Environmental Conflicts and Defenders: A Global Overview' (2020) 63 Global Environmental Change 102104.

⁹⁰J Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' UN Doc A/HRC/34/49 (19 January 2017) paras 31–32 and 68; see also Knox (n 66) Framework Principle 4.

⁹¹M Sekaggya, 'Human Rights Defenders' UN Doc A/66/203 (28 July 2011); and M Forst, 'Situation of Human Rights Defenders' UN Doc A/71/281 (3 August 2016).

⁹²Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) <https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf> (Escazú Agreement) art 9.

⁹³UNECE 'Decision VII/9 on a Rapid Response Mechanism to Deal with Cases Related to Article 3 (8) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' UN Doc ECE/MP.PP/2021/CRP.8 (18–20 October 2021). See T Weber, 'Are Climate Activists Protected by the Aarhus Convention? A Note on Article 3(8) Aarhus Convention and the New Rapid Response Mechanism for Environmental Defenders' (2022 fc) Review of European, Comparative and International Environmental Law.

⁹⁴L Lundy, 'The Rights of Child Human Rights Defenders: Implementation Guide' (Child Rights Connect 2020) <<https://wedocs.unep.org/bitstream/handle/20.500.11822/34574/RCHR.pdf?sequence=1&isAllowed=y>>.

3.5 | Resulting procedural obligations

The above sections indicate that there are various ways in which substantive human rights can be engaged by States' decision-making at the ISA. Substantive human rights obligations are inter-twined with procedural obligations.⁹⁵ Securing appropriate standards of public participation at the ISA from an international human rights perspective would thus require the following:

- Ensuring affordable, effective, objective, understandable and timely access to information that should enable people to understand how environmental harm may undermine their rights to life and health and support the exercise of participation rights;
- facilitating participation in decision-making, that should be open to all members of the public who may be affected (which may be seen as the global population for the ISA⁹⁶), ensuring adequate and early opportunities for the public to express views in decision-making process;
- taking the public's views into account, which entails an obligation to explain the justification for decisions to the public;
- taking additional steps to facilitate participation of marginalized communities, women and children⁹⁷ and other categories of persons who may hold specific rights such as potentially affected indigenous peoples and other communities, workers and environmental human rights defenders; and
- including strategies and programmes to identify and protect those vulnerable to the threats addressed in multilateral agreements.⁹⁸

Rights to public participation in environmental decision-making have been drawn, through consolidated interpretation, from the International Covenant on Civil and Political Rights.⁹⁹ These procedural rights are also expressly protected in two regional treaties, with more than 70 parties or signatories between them, namely, the 1998 Aarhus Convention and the 2018 Escazú Agreement. The Aarhus Convention is supported by guidance to parties on 'Promoting the Application of the Principles of the Aarhus Convention in International Forums' (known as the Almaty Guidelines),¹⁰⁰ and has been referenced expressly in policy documents by the ISA.¹⁰¹

These treaties specifically recognize individuals' right to access information, take part in decision-making, and seek independent review of decisions that affect the environment, taken by public

bodies. Given the overlap between those treaties' memberships and the membership of the ISA, States that are party to these treaties should seek to introduce similar standards and procedures within the ISA negotiations and mechanisms. It has also been argued that these two treaties comprise a body of practice and standards that should be emulated at the ISA as a matter of internationally recognized good practice.¹⁰²

There are also specific obligations for States to ensure that indigenous peoples participate in decision-making in matters which could affect their rights, through representatives chosen by themselves, and appropriate procedures in good faith.¹⁰³ These obligations apply to ISA member States that are members of ILO Convention No. 169 on Indigenous and Tribal Peoples, which is admittedly a small number,¹⁰⁴ but also to States members of the virtually global Convention on the Elimination of Racial Discrimination, as well as the Inter-American Convention on Human Rights and the African Convention on Human and Peoples' Rights, which have been interpreted in the light of the UN Declaration on the Rights of Indigenous Peoples.¹⁰⁵ State parties' obligations under the Convention for the Safeguarding of the Intangible Cultural Heritage are also relevant here.¹⁰⁶

With particular regard to children's rights, there is a need for specific modalities to consider children's views on 'long-term environmental challenges that will shape the world in which they will spend their lives'.¹⁰⁷ Considering the wide membership of the UNCRC,¹⁰⁸ the following interconnected obligations are applicable to ISA member States that are party to the UNCRC:

- To collect and make publicly accessible information about the environment (including climate change, biodiversity and pollution) and how it may harm children;
- to ensure the effects of proposed measures on children's rights, specifically those children most at risk, are assessed before the measures are taken or approved; and
- to integrate the rights of children in international discussions on future generations in relation to climate change, biodiversity and other environmental issues.

⁹⁵HRC (n 76) paras 27–32.

⁹⁶Ardron et al (n 30).

⁹⁷Knox (n 66).

⁹⁸ibid para 46.

⁹⁹As summarized in ibid Framework Principles 6, 9 and 14.

¹⁰⁰UNECE 'Decision II/4, Almaty Guidelines: Promoting the Application of the Principles of the Aarhus Convention in International Forums' UN Doc ECE/MPPP/2005/2/Add5 (20 June 2005) (Almaty Guidelines).

¹⁰¹See n 15.

¹⁰²Ardron et al (n 30).

¹⁰³UNDRIIP (n 73) art 18; Indigenous and Tribal Peoples Convention (No. 169) (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 art 6.

¹⁰⁴There are currently just 24 State ratifications of this Convention; see <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314>.

¹⁰⁵As summarized in Knox (n 66) Framework Principles 14–15.

¹⁰⁶Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 art 15: 'Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management' (emphasis added).

¹⁰⁷Knox (n 79).

¹⁰⁸Often identified as 'the most widely-ratified international human rights treaty in history'; see, e.g., <<https://www.unicef.org/child-rights-convention>>.

On the whole, international human rights treaties serve to identify a wide field of human rightsholders to whom the ISA member States are accountable and through that provide both substantive legal standards that clarify the ISA's mandate to operate on behalf of all of humankind. In addition, international human rights treaties provide clear procedural standards for participatory decision-making processes to ensure that the substantive human rights at stake are duly taken into account with a view to preventing foreseeable and unjustifiable negative impacts on human rights arising from environmental harm caused by deep-seabed mining. All these international law provisions, ultimately, set binding legal parameters for the global policy commitment not to leave anyone behind under Agenda 2030,¹⁰⁹ and its SDG 16 on 'responsive, inclusive, participatory and representative decision-making at all levels'¹¹⁰ that are relevant also in the context of deep-seabed mining.¹¹¹

4 | ASSESSING CURRENT PRACTICES AT THE ISA

In 2017, an independent review of the ISA concluded that 'the current governance processes of the Authority are not sufficiently transparent',¹¹² and a growing literature has raised various concerns about transparency, participation and accountability of the ISA.¹¹³ In 2022, the Secretary-General of the ISA wrote: 'As the seabed and its wealth are the common heritage of [hu]mankind, everybody should feel involved or at least have the opportunity to become involved.'¹¹⁴ Against this background, this section will assess the evolving participatory approaches to stakeholder engagement under current ISA practices against the benchmark of the international human rights obligations discussed in the previous section. The first step in assessing public participation at the ISA entails understanding the legal mandate of the ISA organs and their actual contributions to decision-making, which are remarkably different from the

expectations arising from a textual reading of UNCLOS. The second step in assessing public participation in ISA decision-making is looking into who is actually represented or has access to the meetings of ISA organs.

4.1 | ISA organs

The ISA comprises a supreme organ of all member States (the Assembly)¹¹⁵ with responsibility for the final signing off of ISA policies and regulations, and an executive body of 36 member States (the Council).¹¹⁶ The latter is selected and afforded voting rights via a rather complicated system to ensure both geographical representation and representation of various interest groups (net exporters of metals, major consumers of metals, etc.).¹¹⁷ The Council is responsible for the key decisions of the ISA, such as the contents of its regulations, the award of contracts for exploration or exploitation in the Area, and the exercise of control over those contractors.¹¹⁸

These intergovernmental bodies are supplied with technical advice by three subsidiary organs. The most prominent, the Legal and Technical Commission (LTC), made up of State-nominated subject matter experts,¹¹⁹ is responsible for making recommendations to the Council on most of the activities of the ISA, including: contract awards, rules and regulations of the ISA, and oversight of contractors.¹²⁰ The LTC also carries out the functions of another organ foreseen under UNCLOS but not yet established:¹²¹ the Economic Planning Commission, which is mandated to advise upon adverse effects on the economies of developing countries resulting in a reduction of metal prices caused by mining in the Area, and how to protect against or compensate for such effects.¹²² The Finance Committee advises on budgetary matters, and the development of rules for the ISA's future benefit-sharing regime.¹²³ All of these organs are supported by a Secretariat, headed by the Secretary-General.¹²⁴

The reality of how these organs work, however, is quite different, and this is particularly the case of the LTC. The Council is bound by the 1994 Agreement to follow a recommendation by the LTC for approval of a new contract, unless the Council has a 'super-majority' to go against the LTC's recommendation—which requires two-thirds of its members present and voting (entailing a majority of members present and voting in each of the different chambers of the Council, which represent different interest groups).¹²⁵ Most importantly, the

¹⁰⁹The HRC has clarified that Agenda 2030 needs to be interpreted in light of international human rights law; see n 56.

¹¹⁰UNGA 'Transforming Our World: The 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1 (21 October 2015) Goal 16.

¹¹¹The relevance of the SDGs in the context of the ISA has been underscored by the ISA Secretariat at the first and second UN Ocean Conferences: ISA, 'The Contribution of the International Seabed Authority to the Achievement of the 2030 Agenda for Sustainable Development' (22 November 2021) <<https://isa.org/jm/node/20612>>.

¹¹²D Johnson et al, 'Periodic Review of the International Seabed Authority pursuant to UNCLOS Article 154: Final Report' (Seascope Consultants 2016) 22.

¹¹³J Ardron, H Ruhl and D Jones, 'Incorporating Transparency into the Governance of Deep-seabed Mining in the Area beyond National Jurisdiction' (2018) 89 *Marine Policy* 58; M Guilhon, F Montserrat and A Turra, 'Recognition of Ecosystem-based management Principles in Key Documents of the Seabed Mining Regime: Implications and Further Recommendations' (2020) 78 *ICES Journal of Marine Science* 884; A Jaeckel et al, 'Seabed Mining: Negotiating the Fate of the Common Heritage of Humankind' (Institute for Advanced Sustainability Studies, 21 March 2022) <<https://www.iass-potsdam.de/en/blog/2022/03/seabed-mining-negotiating-fate-common-heritage-humankind>>; M Conde et al, 'Mining Questions of 'What' and 'Who': Deepening Discussions of the Seabed for Future Policy and Governance' (2022) 21 *Maritime Studies* 327.

¹¹⁴M Lodge and M Bourrel-McKinnon, 'Sharing Financial Benefits from Deep Seabed Mining: The Case for a Seabed Sustainability Fund' in R. Sharma (eds), *Perspectives on Deep-Sea Mining* (Springer, 2022).

¹¹⁵UNCLOS (n 18) arts 159–160.

¹¹⁶*ibid* art 161.

¹¹⁷Implementation of Part XI Agreement (n 8) Annex, section 3(9), (10) and (15).

¹¹⁸UNCLOS (n 18) art 162.

¹¹⁹*ibid* arts 163, 165.

¹²⁰*ibid* art 165.

¹²¹Until such time as the Council decides otherwise or the first mining contract is awarded by the ISA: Implementation of Part XI Agreement (n 8) Annex, section 1(4).

¹²²UNCLOS (n 18) arts 163–164.

¹²³Implementation of Part XI Agreement (n 8) Annex, section 9.

¹²⁴UNCLOS (n 18) art 166.

¹²⁵Implementation of Part XI Agreement (n 8) Annex, section 3(11).

LTC has a crucial role to play in the development of the Exploitation Regulations, as these are essentially drafted by the LTC for subsequent adoption by the 36 members of the Council.¹²⁶ It has been noted that UNCLOS did not clarify whether LTC members serve in a personal capacity or represent their governments,¹²⁷ which adds to the lack of clarity and accountability of this body. There have been instances where 'a person affiliated with a government institution or an entity that has an exploration contract with the ISA' were LTC members.¹²⁸ The reporting practice of the LTC is also problematic from a transparency perspective: reports to the Council are redacted in an extremely summarized form to the point that Council members have complained about the inability of the Council to exercise its function in relation to assessing compliance by contractors, because of the incomplete information provided by the LTC on contractors' reports.¹²⁹

A recent decision taken by the LTC demonstrates how this organ is currently making decisions that can have impacts on marine biodiversity and human rights without sufficient consideration for international law points discussed above and without sufficient State scrutiny—let alone public participation. Under the current exploration phase of deep seabed mineral activities, contractors may test new mining technology. As this will cause some degree of environmental harm, a prior environmental impact assessment must be conducted.¹³⁰ The LTC is responsible to review the relevant information submitted by the contractor, and to decide whether or not to 'recommend incorporation of the environmental impact statement into the programme of activities under the contract'.¹³¹ The ISA's guidelines encourage the contractor's sponsoring State to conduct a stakeholder consultation before the environmental impact statement is submitted to the ISA, otherwise the ISA Secretariat will itself publish the environmental impact statement and invite comments. But as seen in this case, such guidelines are not sufficient to assure appropriate levels of public participation in current environmental decision-making at the ISA.

The Government of Nauru, as sponsoring State to ISA contractor Nauru Ocean Resources Inc., recently held a stakeholder consultation on a draft environmental impact statement to test a polymetallic nodule collector system in the Clarion Clipperton Zone of the Pacific Ocean.¹³² This technology, which will bring nodules in quantity to surface, is a significant new development in the deep seabed minerals sector.¹³³ Stakeholder responses to Nauru's consultation noted

significant gaps in the environmental impact statement, including a lack of biological baseline data, and scant detail as to a planned environmental monitoring programme during and after the test.¹³⁴ The contractor significantly amended the environmental impact statement and submitted this new version to the LTC, also subsequently submitting a new environmental management and monitoring plan.¹³⁵ No further opportunity was provided by Nauru or the contractor for public comment on these revisions. The LTC reviewed the documents and requested further information from the contractor.¹³⁶ The LTC then gave its approval to the environmental impact statement.¹³⁷ The amendments made to the environmental impact statement since Nauru's stakeholder consultation appear extremely significant—at least a hundred new pages of information. Expert scientists in the field proactively raised concerns over substantive deficiencies in the revised environmental impact statement that was submitted to the LTC.¹³⁸ Others raised concern over the lack of opportunity for stakeholder consultation on this new information.¹³⁹ Given this, the unprecedented nature of the proposed trial, and the LTC's own guidelines, it is hard to see why the LTC did not provide a further opportunity for stakeholders to review and comment upon the revised environmental impact statement. Furthermore, it seems that the LTC's review and decision on the environmental impact statement was taken by a small sub-committee of members, with the wider LTC membership only being given notice by email, with 72 h to object to the decision, before it would be passed under the 'silence procedure'.¹⁴⁰ Use of email, short time limits and the silence procedure for decision-making by the LTC are not processes conducive to open debate nor are they mechanisms permitted in the LTC's Rules of Procedure.¹⁴¹ No rationale for the LTC's decision has been published.

¹³⁴Copies of which were published by the Government of Nauru online: <https://static1.squarespace.com/static/611bf5e1fae42046801656c0/t/6220ff81b1b3701e8f8068ea/1646329743006/NORI%2BCollector%2BTest%2BEIS%2BPublic%2BComments_Final_Reduced%2BFile%2BSize.pdf>.

¹³⁵ISA 'Report of the Chair of the Legal and Technical Commission on the Work of the Commission at the Second Part of Its Twenty-seventh Session' UN Doc ISBA/27/C/16/Add.1 (15 July 2022) para 42.

¹³⁶*ibid* paras 45–47.

¹³⁷ISA, 'ISA Legal and Technical Commission Concludes Its Review of the Environmental Impact Statement Submitted by NORI for the Testing of a Polymetallic Nodule Collector under Its Contract for Exploration in the Area' (15 September 2022) <<https://www.isa.org.jm/news/isa-legal-and-technical-commission-concludes-its-review-environmental-impact-statement>>. This press release was issued by the ISA several days after the public was first informed of the approval by the contractor (n 133), and indeed a day after the contractor's test-mining vessel had left port.

¹³⁸DOSI, 'The Purpose and Requirements of Environmental Impact Statements: A Case Study of the NORI Prototype Collector Test' (July 2022) <https://www.dosi-project.org/wp-content/uploads/NORI_EIS_Case_Study.pdf>.

¹³⁹Authors' own files: Germany made a statement during the ISA's Council session on 26 July 2022, describing the process around the environmental impact statement as 'deficient', noting the way the environmental impact statement was submitted in three parts, with inadequate early drafts. ISA observer the Pew Charitable Trusts also wrote to the LTC to express its concern about lack of stakeholder consultation on the significantly revised environmental impact statement submitted by the contractor.

¹⁴⁰A copy of the relevant LTC correspondence is on file with the authors, available upon request. See also Deepsea Conservation Coalition, 'DSSC Letter to ISA on NORI Test Approval' <<https://www.savethehighseas.org/resources/publications/dssc-letter-to-isa-on-nori-test-approval>>.

¹⁴¹LTC, 'Rules of Procedure of the Legal and Technical Commission' <https://isa.org.jm/files/files/documents/rop_ltc.pdf>.

¹²⁶J Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press 2011) 151–156; A Jaeckel, *The International Seabed Authority and the Precautionary Principle: Balancing Deep Seabed Mineral Mining and Marine Environmental Protection* (Brill 2017), 147; Davenport (n 31) 194.

¹²⁷Davenport (n 31) 189.

¹²⁸*ibid* 189.

¹²⁹E Morgera et al, 'Summary of the Twenty-Third Annual Session of the International Seabed Authority: 8–18 August 2017' (2017) 25 Earth Negotiations Bulletin 1, 6 and 9.

¹³⁰ISA LTC 'Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Marine Minerals in the Area' UN Doc ISBA/25/LTC/6/Rev.1 (30 March 2020).

¹³¹*ibid*.

¹³²<<https://www.eisconsultationnauru.org/>>.

¹³³The Metals Company, 'The Metals Company Subsidiary, NORI, Receives ISA Recommendation to Commence Pilot Nodule Collection Trials in the Clarion Clipperton Zone of the Pacific Ocean' (7 September 2022) <<https://investors.metals.co/news-releases/news-release-details/metals-company-subsidiary-nori-receives-isa-recommendation>>.

4.2 | Representation and transparency in ISA meetings

With regard to actual representation and access to ISA meetings, formal meetings currently held twice a year at the ISA's headquarters in Kingston, Jamaica, are limited to States and accredited observer organizations. Papers for the ISA organs to consider during these formal sessions are usually posted on the website in the ISA's six official languages in advance of the meetings,¹⁴² and simultaneous translation is provided throughout the meeting for all participants—including those attending remotely for COVID-19-related reasons.¹⁴³ Some, but not all, interventions made by delegates during proceedings are submitted by those delegates in writing to the ISA Secretariat, and some, but not all, of these are then published to the ISA's website.¹⁴⁴ In recent years, the ISA's annual sessions have been livestreamed on the web. Though this excludes informal meetings conducted in side-rooms during breaks, which is where some of the more tense political negotiations can take place. During COVID-19-restricted travel periods, opportunity was also provided for remote participation in ISA sessions for both State and observer delegations. For 4 years the ISA's annual sessions also benefited from informal daily summary bulletins by an external provider.¹⁴⁵ The recent cancellation of these services for Council sessions is unfortunate,¹⁴⁶ as there is otherwise little or no formal record of the meeting.

A general lack of engagement by member States in formal ISA processes has been observed. An independent review in 2016–2017 noted a persistent lack of quorum at ISA Assembly meetings.¹⁴⁷ There is no record of the extent to which member States who do attend have consulted with their populations on key deep-sea mining policy issues beforehand.¹⁴⁸ The weight of responsibility afforded by UNCLOS to the Council, with its limited membership, and representation of particular interest groups, may also contribute to the perception that decision-making at the ISA is dominated by a small number of States with vested interests.¹⁴⁹ At the time of writing, the Council

seemed to be exploring different ways of working, including more intersessional events,¹⁵⁰ working groups¹⁵¹ and informal Council meetings,¹⁵² which may enhance the range and number of participating States.

Civil society may also consider engagement directly in ISA decision-making via observer organizations. The ISA Rules of Procedure permit observer participation in ISA sessions by NGOs that demonstrate an interest in matters under consideration by the ISA.¹⁵³ However, in recent years, the Secretariat has proposed various schemes that could seem likely to restrict the number of such observers, and particularly those who may represent voices opposed to deep-sea mining. For example, new guidelines were proposed by the Secretary-General in 2019¹⁵⁴ that would have required all observer NGOs to demonstrate adherence to numerous restrictive criteria that demonstrate specific contribution (including financial) to the purposes and the work of the ISA and would have required all recognized observers to be subjected to new periodic monitoring and review mechanisms looking to establish a 'substantial' contribution to the ISA's work and that 'no conflict of interest' exists with the ISA's activities. These proposals were rejected by the Assembly, who went on to prescribe their own less restrictive guidelines for NGO observers instead.¹⁵⁵

Nonetheless, the pool of NGO observers engaged with ISA activities remains extremely limited. Out of the 32 NGOs currently registered as ISA observers,¹⁵⁶ none represent indigenous communities, youth, women or any identified marginalized group.¹⁵⁷ A recent report from the ISA Secretariat noted that 'many of these observers do not actually attend the sessions of the ISA' in any event, showing an average of just 13 NGO observer organizations participating in ISA annual sessions between 2015 and 2019.¹⁵⁸

Such failures to attend may reflect challenges that arise in an NGO observer's actual ability to engage in ISA proceedings, even if present. For the July 2022 session, a logistical note issued by the ISA Secretariat detailed that, due to repairs being made to the usual conference facilities, observer organizations would be required to sit in a different meeting room to States, where there would be space for only one delegate per observer organization.¹⁵⁹ Also in that session, during the Assembly meeting, observers were, without notice,

¹⁴²For example, see the papers for the 27th session of the ISA in 2022: <<https://isa.org/jm/sessions/27th-session-2022>>.

¹⁴³ISA, 'Decision of the Assembly of the International Seabed Authority Relating to the Budget of the Authority for the Financial Period 2021–2022' UN Doc ISBA/26/A/19 (31 December 2020).

¹⁴⁴The practice of publishing online written copies of statements made by delegates during ISA sessions appears to have commenced during the 22nd session of the ISA (in 2016) as statements are not shown prior to this (e.g. see the 'statements' page for the 21st session in 2015: ISA, 'The 21st Session of the International Seabed Authority' <<https://isa.org/jm/node/1715/session/statements#block-media-2>>.

¹⁴⁵The Earth Negotiations Bulletin of the International Institute for Sustainable Development provided summaries and photographs of proceedings between 2017 (<<https://enb.iisd.org/events/23rd-annual-session-international-seabed-authority>>) and February 2020 (<<https://enb.iisd.org/events/1st-part-26th-annual-session-international-seabed-authority-isa>>).

¹⁴⁶The ISA Secretariat has indicated that the cancellation of Earth Negotiations Bulletin reporting services at Council meetings is due to budgetary constraints; see ISA 'Proposed Budget for the International Seabed Authority for the Financial Period 2023–2024' UN Doc ISBA/27/A/3–ISBA/27/C/22 (14 April 2022) para 17; and K McVeigh, 'Seabed Regulator Accused of Deciding Deep Sea's Future "Behind Closed Doors"' (The Guardian, 1 April 2022).

¹⁴⁷D Johnson et al, 'Periodic Review of the International Seabed Authority Pursuant to UNCLOS Article 154, Interim Report' (15 May 2016) <https://www.isa.org/jm/files/documents/EN/22Sess/Art154/Art154_InterimRep.pdf>.

¹⁴⁸Ardron et al (n 30).

¹⁴⁹Collins and French (n 31).

¹⁵⁰ISA, 'Workshops and Webinars' <<https://www.isa.org/jm/events/workshops>>.

¹⁵¹ISA 'Decision of the Council Concerning Working Methods to Advance Discussions on the Draft Regulations for Exploitation of Mineral Resources in the Area' UN Doc ISBA/26/C/11 (21 February 2020).

¹⁵²Statement by the President of the Council (n 37).

¹⁵³ISA 'Rules of Procedure of the Assembly of the International Seabed Authority' UN Doc ISBA/A/6 (7 July 1994) Rule 82.

¹⁵⁴ISA 'Guidelines for Observer Status of Non-governmental Organizations with the International Seabed Authority' UN Doc ISBA/25/A/7 (4 June 2019).

¹⁵⁵ISA 'Decision of the Assembly on the Guidelines for Observer Status of Non-governmental Organizations with the International Seabed Authority' UN Doc ISBA/25/A/16 (26 July 2019).

¹⁵⁶ISA, 'Observers' <<https://www.isa.org/jm/observers>>.

¹⁵⁷ibid.

¹⁵⁸ISA 'Possible Financial Contributions from Observers of the International Seabed Authority to Cover the Costs of their Participation in Meetings' UN Doc ISBA/26/FC/6 (7 October 2020).

¹⁵⁹'Information on Logistical and Procedural Aspects for the Twenty-seventh Session of the Council (Part II) and the Assembly (18 July–5 August 2022)' <<https://acrobat.adobe.com/link/review?uri=urn:aaid:scds:US:0e2a9380-da1e-3698-954b-83ff1537247a>>.

requested by the Assembly President to limit the length of their interventions, so as to enable the meeting to finish on time.¹⁶⁰ In fact, the Assembly meeting closed after just three and a half days; a day and a half in advance of the scheduled closure date.

The LTC and the Finance Committee, where much of the ISA's technical and substantive discussions occur, generally hold entirely closed meetings, with very limited reporting of discussions and outcomes in the Council. The closed nature of the LTC meetings should be contrasted with the significant influence that its recommendations have at the ISA, as discussed above. For this reason, the perceived secrecy of LTC discussions has received significant criticism from various stakeholders, with one recent commentator noting a 'lack of transparency in the functioning of the Legal and Technical Commission, ... increased politicization of this expert committee [... and] lack of record of diverging views, technical detail and nuance in the reports to the Council'.¹⁶¹ Yet the closed meetings continue despite urging towards improved transparency even by the ISA's supreme body, the Assembly.¹⁶² While the LTC can invite State contractors and non-State contractors (State-owned enterprises and private entities) to its meetings 'for purposes of consultation and collaboration', NGOs have no right to be invited.¹⁶³

4.3 | Other avenues for public participation

The ISA's annual sessions are supplemented by intersessional webinars and expert workshops, organized by the ISA Secretariat. This mode of operation by the ISA noticeably increased during 2020–2021 when the global pandemic prevented in-person sessions, with virtual working arguably increasing accessibility.

These types of events include expert workshops which can involve independent academics and scientists, as well as State representatives. The results are reflected in reports that are published on the ISA website. These may then be considered by the LTC in its development of rules, regulations and procedures of the ISA. While the initial workshops were 'relatively ad hoc', their procedures have been increasingly formalized with the Secretariat developing terms of

reference and processes for selecting participants.¹⁶⁴ These events can feature rather narrow and controlled invitee lists, such as events aimed at people who hold specific data¹⁶⁵, which may include only the contractors and scientists already working in the field—and excludes others who may have legitimate interests or perspectives.

The ISA Secretariat has been quite proactive with regard to outreach to deep-sea scientists for specific science-related projects and events.¹⁶⁶ However, it is not clear how those contacted are selected—seldom via open procurement or public calls for engagement—and it appears that developing country scientists or resource managers are rarely hired or invited as 'experts' to ISA processes. It also remains unclear to what extent these scientific inputs are shaping the negotiations of key ISA instruments, such as the Draft Exploitation Regulations.

The ISA also has a capacity-building mandate, which has progressed quite significantly in recent times with outreach events targeting geographic regions (the Pacific islands and Africa, in particular), usually aimed specifically at encouraging engagement with deep-sea mineral activities.¹⁶⁷ It is not clear to what extent these are two-way information exchanges that can contribute to public participation in ISA work, though this element does seem to underpin a new deployment scheme for expert government officials within the ISA Secretariat.¹⁶⁸

Online consultations are also now used periodically by the ISA. At the Council's suggestion,¹⁶⁹ a series of stakeholder surveys and online public consultations have been held since 2014, in relation to the development of the Draft Exploitation Regulations (and underpinning instruments). While initially targeting 'contractors, international organizations, NGOs, scientific institutions and universities, private entities and individuals',¹⁷⁰ they since expanded to any person or association with 'an interest of any kind in, or who may be affected by, the proposed or existing exploitation activities under a plan of work in the Area, or who has relevant information or expertise'.¹⁷¹ The responses received have usually also been made publicly available.

¹⁶⁰The verbatim note taken by one of the authors during the session are as follows:

Assembly President: 'This concludes the list of speakers amongst member States. I would now recall we are under agenda item 17—other matters—we are about 30 minutes before the lunch break. My hope would be we can conclude the business of the Assembly before lunch for costs and other reasons. ... Under rule 82 paragraph 5 observers may sit at the public meeting of the Assembly and upon invitation of the president and subject to the approval of the Assembly may make statements of questions with the scope of their activities. I will invite the six observers that have requested the floor to make statements under agenda item 17, but [suggest] that we limit the speaking time to three minutes per observer so that we can conclude before 1 pm. I see no objections. It is so decided. Observers take the floor.'

¹⁶¹K Willaert, 'Public Participation in the Context of Deep-Sea Mining: Luxury or Legal Obligation?' (2020) 198 *Ocean and Coastal Management* 105368.

¹⁶²ISA 'Decision of the Assembly of the International Seabed Authority Relating to the Final Report on the First Periodic Review of the International Regime of the Area Pursuant to Article 154 of the United Nations Convention on the Law of the Sea' UN Doc ISBA/23/A/13 (18 August 2017), in which the Assembly '[e]ncourages the Legal and Technical Commission to hold more open meetings in order to allow for greater transparency in its work'; *ibid.* 4.

¹⁶³Davenport (n 31) 191, commenting on the LTC Rules of Procedure (n 141) rule 53(1).

¹⁶⁴*ibid.* 192.

¹⁶⁵One such example can be seen in the call for nominations for a 2020 Workshop for the Development of a Regional Environmental Management Plan for the Area of the Northwest Pacific: <<https://isa.org/jm/files/files/documents/Call%20for%20NomandInfo.pdf>>.

¹⁶⁶For example, the United Kingdom Natural History Museum and the ISA Secretariat are working on a taxonomy project; Duke University in the United States and the ISA Secretariat are working on spatial planning tools for regional environmental planning; Korean governmental and science institutions are working with the ISA Secretariat on enhancing image-based biodiversity assessments.

¹⁶⁷For example, the Abyssal Initiative for Blue Growth, focused on Pacific island nations (<<https://isa.org/jm/vc/abyssal-initiative-blue-growth>>) and the African Deep-Sea Resources Project (<<https://isa.org/jm/vc/supporting-africas-blue-economy>>).

¹⁶⁸ISA, 'ADSR Experts' <<https://www.isa.org/jm/training/adsr-experts>>.

¹⁶⁹ISA, 'Statement of the President of the Council on the Work of the Council During the Nineteenth Session' UN Doc ISBA/19/C/18 (24 July 2013) para 19; Davenport (n 31) 192.

¹⁷⁰Davenport (n 31) 192, commenting on ISA, 'Developing a Regulatory Framework for Mineral Exploitation in the Area: Report to the Members of the Authority and all Stakeholders' (March 2015).

¹⁷¹Davenport (n 31) 192, commenting on ISA 'Draft regulations on exploitation of mineral resources in the Area' UN Doc ISBA/25/C/WP.1 (22 March 2019).

5 | IDENTIFIED SHORTCOMINGS IN PUBLIC PARTICIPATION AT THE ISA

Compared to the first 20 years, and particularly over the past 5 years, the ISA has made some progress towards wider stakeholder participation. In particular, the consultations around the Draft Exploitation Regulations have arguably 'affirmed and formalized participation'.¹⁷² That said, it is notable that, the concept of 'public participation' is less well-profiled in ISA documentation.¹⁷³ This could suggest some limiting of the categories of persons eligible to engage. Similarly, the use of 'engagement' as opposed to 'participation' has been noted in the draft Exploitation Regulations, with one member State highlighting that this choice of wording is limiting in terms of the nature of engagement anticipated.¹⁷⁴

On the whole, ISA practices appear to operate below expected UN standards, and there remains a need for clearer, more predictable and more advanced procedures for open and inclusive public participation, in line with human rights norms. In effect, the ISA should arguably set higher public participation standards than other international organizations because of its unique powers (regulatory and monitoring), its mandate to benefit humankind, and its lack of accountability within the UN system. This is even more urgent in the face of the growing scientific understanding of the risks of deep-seabed mining, the likely significant and possibly irreversible impact of the ISA decisions on biodiversity and the climate, and the importance of healthy marine ecosystems for all SDGs. In this article, we therefore point to the role of ISA member States in better holding the ISA accountable to humankind by enhancing public participation that effectively allows relevant human rightsholders to have a voice in decisions on deep-seabed mining.

Member State intervention is needed as instruments setting guidelines for ISA consultations or stakeholder engagement seem continually de-prioritized. A draft Stakeholder Engagement and Communications Strategy published for consultation in December 2020, which received significant criticism from stakeholders,¹⁷⁵ appeared subsequently to fall off the radar. A regional stakeholder

analysis commissioned by the European Commission and delivered to 'the ISA' (Secretariat, presumably) in 2019–2020 has never been published, nor shared with the ISA's membership.¹⁷⁶

Similarly, an expert workshop tasked in 2019 to consider subsidiary instruments required under the ISA's Mining Code, recommended the ISA with 'phase 1; priority 1' urgency to develop guidelines for procedures for stakeholder participation.¹⁷⁷ The subsequent work plan by the LTC omitted this item on the basis that it 'felt that these guidelines could be incorporated into the communication strategy of the Authority',¹⁷⁸ which does not seem to exist. Meanwhile, all the continuing challenges in participating in ISA meetings have been compounded by difficulties progressing matters during the global COVID-19 pandemic.¹⁷⁹

More fundamentally, it is increasingly difficult to reconcile the ISA's original mandate to regulate deep-seabed mining and protect the marine environment as it was designated by UNCLOS decades ago,¹⁸⁰ with today's understanding of the fragility of deep-sea ecosystems, the ecological connectivity of the ocean,¹⁸¹ and the role of a healthy ocean in the fight against climate change¹⁸² and the protection of basic human rights.¹⁸³ Against this backdrop, it is noteworthy that climate change issues have featured very little in discussions at the ISA.¹⁸⁴ While biodiversity has been raised as an important issue by a few, and notably by environmental NGOs who are ISA observers, these interventions tend to focus on the need to minimize biodiversity loss, and to assess negative impacts on ecosystem services and their relevance in terms of benefit-sharing, rather than rights-based arguments.

A lack of specific engagement by the ISA with indigenous peoples' rights issues has been noted by commentators,¹⁸⁵ despite strong

Trusts: (<https://www.pewtrusts.org/-/media/assets/2021/01/isa-stakeholder-strategy-comments-pew_jan-2021.pdf>).

¹⁷⁶P Weaver, 'The Atlantic Regional Environmental Management Plan (REMP) Project: Final Report' (Publications Office of the European Union 2022) <<https://data.europa.eu/doi/10.2926/384506>>.

¹⁷⁷'Workshop Report: Development of Standards and Guidelines for Activities in the Area', Pretoria, South Africa (13–15 May 2019) <https://www.isa.org.jm/files/files/documents/pretoria_workshop_report-final.pdf>.

¹⁷⁸ISA 'Report of the Chair of the Legal and Technical Commission on the Work of the Commission at the Second Part of Its Twenty-fifth Session' UN Doc ISBA/25/C/19/Add.1 (11 July 2019).

¹⁷⁹See further PA Singh, 'The Two-year Deadline to Complete the International Seabed Authority's Mining Code: Key Outstanding Matters that Still Need to Be Resolved' (2021) 134 *Marine Policy* 104804.

¹⁸⁰The matter is apparently viewed thus by the current ISA Secretary-General, MW Lodge: 'It must be stressed however, that it is useless and counter-productive to argue that an a priori condition for deep-sea mining is an existential debate about whether it should be permitted to go ahead or not. The international community passed that point already many years ago.' See P Verlaan, 'Deep-Sea Mining: International Regulatory Challenges and Responses' (2018) 14 *Elements* 331.

¹⁸¹E Popova et al, 'So Far, Yet so Close: Ecological Connectivity between ABNJ and Territorial Waters' (International Institute for Environment and Development 2019).

¹⁸²See M Lennan and E Morgera, 'The Glasgow Climate Conference (COP26)' (2022) 37 *International Journal of Marine and Coastal Law* 137.

¹⁸³Knox (n 66).

¹⁸⁴LA Levin et al 'Climate Change Considerations are Fundamental to Management of Deep-sea Resource Extraction', (2020) 26 *Global Change Biology* 4664.

¹⁸⁵See, e.g., UN Economic and Social Council 'Study on the Relationship between Indigenous Peoples and the Pacific Ocean' UN Doc E/C.19/2016/3 (19 February 2016); Aguon and Hunter (n 41); and A Pouponneau and P Singh, 'Comments to the Draft Regulations on Exploitation of Mineral Resources in the Area: Transboundary Harm and the Rights of Coastal States Adjacent to the Area' (2018) <<https://www.isa.org.jm/files/documents/EN/Regs/2018/Comments/PS-AP.pdf>>.

¹⁷²Davenport (n 31) 207.

¹⁷³For example, the ISA's Strategic Plan 2019–2023, adopted by ISA Assembly, references the importance of transparent practices 14 times. But the term 'public participation' is not used once. Where brief reference is made to participatory decision-making, this is expressed in restrictive terms, for instance as applicable to member States and 'stakeholders' (only), or relevant only 'as applicable'; ISA 'Decision of the Assembly of the International Seabed Authority Relating to the Strategic Plan of the Authority for the Period 2019–2023' UN Doc ISBA/24/A/10 (27 July 2018). Similarly, the ISA Secretariat's 'zero draft' Communications and Stakeholder Engagement Strategy, as released for public consultation in December 2020, includes a definition of stakeholders that focuses only on those entities who are [already] 'interacting with the ISA', and not the public population as a whole' ISA, 'Communications and Stakeholder Engagement Strategy (Zero Draft)' (December 2020) <https://isa.org.jm/files/files/documents/Draft_Comms_and_Stakeholder_Engagement_Strategy.pdf>.

¹⁷⁴See <<https://isa.org.jm/files/2022-03/DR44-micronesia.pdf>>.

¹⁷⁵ISA, 'Communications and Stakeholder Engagement Strategy (Zero Draft)' (n 173). In terms of critical responses, see for example submissions made (but not published by the ISA), by the One Ocean Hub (<<https://oneoceanhub.org/the-one-ocean-hub-submits-inputs-into-the-international-seabed-authoritys-stakeholder-engagement-strategy/>>); DOSI (<https://www.dosi-project.org/wp-content/uploads/DOSI_CommsStakeholderEngagementStrategy.pdf>); the Deep Sea Conservation Coalition (<<http://www.savethehighseas.org/wp-content/uploads/2021/01/DSSC-Submission-on-ISA-Draft-Stakeholder-Engagement-Strategy.pdf>>); OceanCare (<<https://www.oceancare.org/en/deep-sea-mining-increase-transparency-and-stakeholder-engagement-at-the-international-seabed-authority/>>) and the Pew Charitable

arguments for the relevance, in particular, of inclusion of indigenous and local knowledge in ISA decision-making processes.¹⁸⁶ The lack of reference in the existing and draft ISA regulations to socio-cultural rights and customary marine uses such as traditional navigation routes, migratory paths of culturally significant marine species, sacred sites and waters associated with ritual or ceremonial activities of indigenous peoples and local communities, has also been underscored.¹⁸⁷

In the sphere of children's rights, no international obligations have been expressly cited at the ISA, nor have children's interests featured in the ISA's decision-making to date, even if growing scientific evidence points to intergenerational impacts of seabed-mining and 'humankind' and the 'equitable' underpinning to Part XI of UNCLOS are generally understood in inter-generational terms.¹⁸⁸ In other words, there has been no consideration—let alone primary consideration—of the best interests of the child in designing, implementing and monitoring environmental regulation at the ISA.¹⁸⁹ Furthermore, there has been no mechanism or opportunity to take into account the ideas of children as expressed by them in establishing and maintaining substantive non-regressive and precautionary environmental standards that contribute to minimize the future negative impacts of climate change on children to the greatest extent possible.¹⁹⁰

The tension between the ISA's mineral development and environmental protection duties may be a reason why the ISA Secretariat appears to have exhibited some degree of hostility towards civil society campaigning against seabed mining. Groups and individuals who argue for precautionary environmental protection standards at the ISA have not previously been described as environmental human rights defenders,¹⁹¹ and the ISA has taken no steps to afford them specific protections, nor have wider freedom of expression and association rights been expressly invoked at the ISA. Indeed, it has been reported in the press that the ISA Secretary-General 'mocked' and 'lashed out' at environmental campaigners, referring to them as 'propogandists'.¹⁹² There was reportedly suppression of peaceful protest by youth campaigners at an official event including the ISA Secretary-General at the UN Ocean Conference in June 2022.¹⁹³

Calls by the ISA Secretariat for NGOs to demonstrate their alignment with ISA interests¹⁹⁴ and pay fees as a precondition to observer status,¹⁹⁵ to 'respect the legitimacy of internationally-agreed processes'¹⁹⁶ and recent warnings against 'overshadow[ing]' or 'hinder[ing] progress'¹⁹⁷ towards mining, raise further concerns about squeezing civic space and stigmatizing environmental human rights defenders.

6 | CONCLUSION: ENHANCING ISA PRACTICES FROM THE PERSPECTIVE OF HUMAN RIGHTS

Various improvements to ISA practices are necessary from the perspective of international human rights law, to ensure appropriate levels of public participation to inform its decision-making. This concluding section thus identifies the steps that ISA Member States should take to enhance public participation in decision-making on deep-seabed mining. In addition, it suggests involving international human rights mandates in assessing and enhancing public participation practices at the ISA, which may be urgent if improvements are not forthcoming from within the ISA.

First, to allow humankind, including children and indigenous peoples, to assess any risks for their human rights arising from deep-seabed mining, it seems the ISA needs to ensure timely sharing of comprehensive and accessible information to enable people to understand how environmental harm may undermine their human rights and support the exercise of participation rights. There have been few moves by the ISA to date to engage proactively in public outreach and debate, beyond communications to its member States and registered observers. A set of new and more specific activities aimed at informing the general public about deep-seabed mining, including potential risks to their human rights is a necessary first step in this regard.

Second, public participation in ISA decision-making should be improved. This is the case in particular for the LTC deliberations. Not even the other ISA organs (Council, Assembly), let alone broader civil society and relevant human rightsholders, are able to fully appreciate how recommendations are made in that influential organ, nor what information these recommendations are based on. Specific measures should be put in place to facilitate participation in ISA proceedings, workshops and consultations of broader sections of humankind, with particular attention to indigenous peoples and children. Across all these avenues, civic space should be preserved and protected for environmental human rights defenders.

¹⁸⁶V Tilot et al (2021) 'The Concept of Oceanian Sovereignty in the Context of Deep Sea Mining in the Pacific Region' (2021) 8 *Frontiers in Marine Science*. See also submissions to the ISA made by the Federated States of Micronesia, e.g. <https://isa.org/jm/files/files/documents/FSM%20Comments%20on%20draft%20Regulations%20on%20the%20Exploitation%20of%20Mineral%20Resources%20in%20the%20Area_FINAL%20282019-10-15%29.pdf>.

¹⁸⁷See <<https://isa.org/jm/files/2022-03/Micronesia-AnnexIV-merged.pdf>>.

¹⁸⁸Jaeckel (n 126); M Nyka, 'International Seabed Authority and Environmental Deep-Sea Stewardship – Principles Governing the Protection and Use of Seabed Resources' (2020) 39 *Maritime Law Yearbook* 9.

¹⁸⁹OHCHR (n 83) para 62.

¹⁹⁰HRC (n 76).

¹⁹¹Knox (n 66) Framework Principle 4.

¹⁹²E Lipton, 'Secret Data, Tiny Islands and a Quest for Treasure on the Ocean Floor' (New York Times, 29 August 2022).

¹⁹³Sic Notícias, 'Conferência dos Oceanos: ONG falam em separação entre civis e decisores políticos' (5 July 2022) <<https://sicnoticias.pt/mundo/conferencia-dos-oceanos-ong-falam-em-separacao-entre-civis-e-decisores-politicos/>>; <https://twitter.com/im_ahilario/status/1542124141674889216>. An internal report (unpublished), seen by one of the authors, prepared by one of the young people involved stated: 'Ironically, despite being an "interactive dialogue", there were no questions ... While the panellists were talking about

stakeholder engagement, the only engagement with stakeholders was the threatening of youth stakeholders.'

¹⁹⁴ISA, 'Guidelines for Observer Status of Non-governmental Organizations' (n 154).

¹⁹⁵ISA 'Possible Financial Contributions from Observers' (n 158).

¹⁹⁶ISA, 'Contribution of the International Seabed Authority to the achievement of the 2030 Agenda for Sustainable Development' (2021) <https://isa.org/jm/files/files/documents/ISA_Contribution_to_the_SDGs_2021.pdf>.

¹⁹⁷*ibid*.

Particularly with regard to the LTC, there is an urgent need to identify ways in which ISA member States have a genuine opportunity to ensure compliance with their international human rights obligations. With respect to indigenous peoples' rights, decisions on deep-seabed mining should prevent impacts that may result in the reduced availability, accessibility or acceptability of marine spaces and marine resources that are essential for culture, including indigenous peoples' intangible cultural heritage on which their identity, well-being and development depend. With respect to children's rights, decisions on deep-seabed mining should give primary consideration to the best interests of the child with a view to preventing or minimizing future negative impacts of environmental harm on children to the greatest extent possible. With respect to everyone's right to a healthy environment, decisions on deep-seabed mining should seek to prevent foreseeable and unjustified negative impacts on biodiversity and the climate on which human rights depend, taking into account ecological connectivity between areas beyond and within national jurisdiction and the importance of global ecosystem services provided by deep-sea biodiversity, such as oxygen production. These factors should be expressly written into ISA Regulations that set the criteria for decision-making.

Third, new practices need to be developed at the ISA to demonstrate how the public's views are taken into account, and to provide justifications for decisions to the public, with clear references to the extent and range of expertise underpinning the decision and the range and extent of public inputs. These justifications should enable people, including children, to understand how potential environmental harm and negative impacts on human rights have been taken into consideration.

Compliance with these obligations would require a host of adjustments in current ISA practices. This should not be considered surprising or in itself an insurmountable obstacle: such a need for adjustments is clearly anticipated, for instance, in the Almaty Guidelines adopted under the Aarhus Convention. These Guidelines point to the need for adapting the structure of international processes 'in order to ensure meaningful and equitable interactional access', in principle to the benefit of the 'public at large'.¹⁹⁸ In addition, the Guidelines note the need for facilitating 'the participation of those constituencies that are most directly affected and might not have the means for participation without encouragement and support',¹⁹⁹ including through capacity-building and the allocation of appropriate resources.²⁰⁰

If change is not forthcoming from within the ISA, compliance with international human rights obligations could become a matter of external international scrutiny as part of States' reporting on human rights and the environment, including indigenous peoples' and children's rights, to relevant human rights mechanisms.²⁰¹ In addition,

the UN Special Rapporteur on Human Rights and the Environment, and/or the UN Special Rapporteur on Civic Space could request to carry out an independent assessment of the participation practices at the ISA, similarly to the review process currently underway by the UN Special Rapporteur on Toxics and Human Rights at the International Maritime Organization.²⁰² The UN Special Rapporteur on Climate Change and Human Rights could also request such an assessment, considering that he has recently cautioned against the loss of marine ecosystems from a climate change and human rights perspective, and has criticized the international climate change process for its poor public participation practices,²⁰³ which are much more advanced than those at the ISA. An independent assessment of ISA practices could also be carried out by the recently appointed Special Rapporteur on Environmental Human Rights Defenders under the Aarhus Convention. Any of these options would allow for an independent international expert to 'identify good practices, as well as areas that need improvement'.²⁰⁴ These would be coupled with 'constructive and concrete recommendations' based on visits at the ISA, interviews with relevant personnel, as well as a call for States, civil society organizations, academics, UN agencies, business enterprises, consumers' organizations and all other interested parties to submit information.²⁰⁵ It is certainly urgent to identify to what extent the existing international human rights law obligations of the ISA member States can and must support the ISA in carrying out its mandate in the interest of humankind.

ACKNOWLEDGEMENTS

This article draws from research undertaken by Elisa Morgera under the One Ocean Hub, which is a collaborative research programme for sustainable development funded by UK Research and Innovation (UKRI) through the Global Challenges Research Fund (GCRF) (Grant Ref: NE/S008950/1). Hannah Lily thanks for their discussion and support the Seabed Mining team at The Pew Charitable Trusts: Andrew Friedman, Anindita Chakraborty and Chris Pickens. The authors are thankful to Prof Patrick Vrancken, Dr Tajudeen Sanni and the two anonymous reviewers for their valuable and insightful comments on earlier drafts of this article.

DATA AVAILABILITY STATEMENT

Data are derived from public domain resources.

ORCID

Hannah Lily  <https://orcid.org/0000-0002-5888-7412>

²⁰²International Maritime Organization, 'UN Special Rapporteur on Toxics and Human Rights visits IMO' (27 January 2021) <<https://www.imo.org/en/MediaCentre/PressBriefings/pages/01-special-rapporteur.aspx>>.

²⁰³Fry (n 54).

²⁰⁴Following the example of the UN Special Rapporteur on Toxics: OHCHR, 'Call for Submission, SR Toxics and Human Rights "Impact Analysis of the International Maritime Organization (IMO)"' <<https://www.ohchr.org/en/special-procedures/sr-toxics-and-human-rights/call-submission-sr-toxics-and-human-rights-impact-analysis-international-maritime-organization-imo>>.

²⁰⁵ibid.

¹⁹⁸Almaty Guidelines (n 100) paras 13–14.

¹⁹⁹ibid para 15.

²⁰⁰ibid paras 17–18.

²⁰¹HRC (n 76).

AUTHOR BIOGRAPHIES

Elisa Morgera is Professor of Global Environmental Law at the University of Strathclyde Law School, UK. She is the director of the One Ocean Hub, a global interdisciplinary research collaboration of institutions in the United Kingdom, Africa, South Pacific and the Caribbean, as well as UN agencies and other international partners. The One Ocean Hub is pioneering research on human rights and the marine environment with a view to better connecting marine and social sciences, and the arts, to support fair and inclusive decision-making for a healthy ocean whereby people and planet flourish.

Hannah Lily is a British lawyer with more than 20 years' professional experience, starting out in human rights law, before moving into the field of oceans and natural resources. Hannah has

particular expertise in relation to seabed mining, over the past decade advising various governments in the Pacific Islands, Caribbean and African regions on national laws and international negotiations, as well as working with intergovernmental agencies and environmental NGOs who engage with deep-sea mining issues.

How to cite this article: Morgera E, Lily H. Public participation at the International Seabed Authority: An international human rights law analysis. *RECIEL*. 2022;1-15. doi:[10.1111/reel.12472](https://doi.org/10.1111/reel.12472)