Ethical Dimensions of Ocean Governance

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Some Initial Ideas

Exploring the ethical dimensions of ocean governance represents a challenge that has to be addressed with care, especially for those like us, who are not professional philosophers. When Elisabeth Mann Borgese, Ambassador Arvid Pardo, and others used the concept of 'common heritage of mankind'[1] to advocate for the approval of the United Nations Convention on the Law of the Sea[2] (UNCLOS), the ethical background was not explicitly analyzed in detail although it is evident that the core of the concept is absolutely linked with moral philosophy. We briefly examine the core concept of the common heritage in relation to the general understanding of ethics.

According to UNESCO,

> Governance has been defined to refer to structures and processes that are designed to ensure accountability, transparency, responsiveness, rule of law, stability, equity and inclusiveness, empowerment, and broad-based participation. Governance also represents the norms, values and rules of the game through which public affairs are managed in a manner that is transparent, participatory, inclusive and responsive. Governance therefore can be subtle and may not be easily observable. In a broad sense, governance is about the culture and institutional environment in which citizens and stakeholders interact among themselves and participate in public affairs.[3]

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1   E.M. Borgese, *Pacem in Maribus* (New York: Dodd, Mead & Company, 1973).

2   Montego Bay, 10 December 1982, 1833 *U.N.T.S.* 3.

3   "Concept of Governance," UNESCO, Education, http://www.unesco.org/new/en/education/ themes/strengthening-education-systems/quality-framework/technical-notes/concept -of-governance/, last accessed 19 February 2018.

It is the way the rules, norms and actions are structured, sustained, regulated and held accountable to keep a system going in a good shape and for all. But underlying the concepts of 'good shape and for all' is a notion of what is ethical, for what benefit, and for whom?

Ethics is a branch of philosophy having as many definitions as there are philosophers. It deals with the question of what is good and bad and to define our moral duties and obligations. Subtle differences exist between moral behavior, which is primarily about making the correct choices, and ethical conduct, which is about the proper reasoning for decision-making. The latter is what interests us in regards to the important concept of the 'common heritage of mankind'.

Behind the Common Heritage of Mankind Concept

The ancient approach of 'virtue ethics' focuses on the virtuosity of the acting person. A good action has to be judged by the intention not the consequence, as in the Good Samaritan principle for example.[4] In this way, recognized altruistic people, such as Elisabeth Mann Borgese, Ambassador Arvid Pardo, and many others promoting UNCLOS, acted on the grounds of classical ethical behavior.

Following from Aristotle's thought, Spinoza proposed that human beings are part of nature and thus derive happiness from other living organisms and the systems that support them.[5] Such thoughts strongly relate to the common heritage of mankind that involves the full ocean system, its living and non-living resources. Hume argues that natural benevolence accounts, in great part, for what he calls the origin of morality, in opposition to utilitarianism.[6] He accepts the need for the rules of justice, which are normative human conventions that promote public utility, because humans are motivated by a variety of passions, both generous and ungenerous. But these rules of justice will promote the necessary framework to benefit most of the people and even all of humankind, in opposition to a selfish utilitarianism. Kant indicated that the moral law is a purely formal principle that commands us to act only on maxims

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4 D. Frede, "Plato's Ethics: An Overview," Stanford Encyclopedia of Philosophy Archive (Winter 2016 edition) (last revision 18 July 2013), https://plato.stanford.edu/archives/win2016/entries/plato-ethics/.

5 "Baruch Spinoza," Stanford Encyclopedia of Philosophy (last revision 4 July 2016), https://plato.stanford.edu/entries/spinoza/.

6 David Hume, *An Enquiry Concerning the Principles of Morals* (Stephen Buckle, ed.) (Cambridge: Cambridge University Press, 2007).

that have what he calls lawgiving form.[8] A core concept of Kant's ethics is that a maxim has morally permissible form only if it could be willed as a universal law, i.e. willing to be applicable to all people without contradiction. We can see the common heritage of mankind foreseen in Kant's claim that the expansion of hospitality with regard to "use of the right to the earth's surface which belongs to the human race in common" would "finally bring the human race ever closer to a cosmopolitan constitution."[7] Although he was not the first to propose a global idea of commonality, he was probably one of the most influential philosophers in the pursuit of the greater common good. The Kantian idea is a condition that will be reached by UNCLOS only when it becomes universally accepted.

The phrase 'common heritage of mankind' was first mentioned in an international law-giving form in the preamble of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[8] Then, it followed a path to UNCLOS, and into other conventions and rules. The concept follows the mandatory awareness of the results of any actions. It is consistent therefore with consequentialism, which holds that whether an act is morally right depends only on the consequences of the act or of something related to that act.[9] In addition, the explicit words 'for the benefit of future generations', refer us to the Golden Rule: "One should not treat others in ways that one would not like to be treated."[10]

Following Bunge:

> Far from preaching the joyless life, we repeat the slogan *Enjoy life and help live*, and add the following unavoidable platitudes: (*a*) at present most people do not have the means to enjoy life, and many of those who do have them mistake the good life for the ability to buy whatever they fancy; (*b*) unless we alter some of our values and learn to administer wisely our resources, we shall rob our offspring of their inheritance.[11]

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7   Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* (Ted Humphrey, trans.) (Indianapolis: Hackett Publishing, 2003), 16.

8   The Hague, 14 May 1954, 3511 *U.N.T.S.* 216.

9   N. Heinzelmann, G. Ugazio and P.N. Tobler, "Practical Implications of Empirically Studying Moral Decision-making," Frontiers in Neurosciences 6 (2012): 94, doi.org/10.3389/fnins.2012.00094.

10 J. Finnis, "Natural Law Theories," Stanford Encyclopedia of Philosophy (Winter 2016 edition) (last revision 4 November 2015), https://plato.stanford.edu/archives/win2016/entries/natural-law-theories/.

11 M. Bunge, *Treatise on Basic Philosophy. Ethics: The Good and The Right*, Vol. 8 (Dordrecht: Reidel Publishing, Dordrecht, 1989), 361.

Recognizing that individual consciousness does not have the same altruistic or egoistic levels for all personalities, Kohlberg,[12] inspired by Piaget,[13] proposed that moral development has different levels, and postulated six stages of human moral development (Table 1). Kohlberg's theory holds that moral reasoning, the basis for ethical behavior, has six identifiable developmental stages, each of them more able to respond to ethical dilemmas than its predecessors.

Before UNCLOS, governance rules on oceans mostly fitted stages 1 to 3. At the pre-Convention levels, the main social drivers were the silent acceptance of the rules imposed by the dominant powers. Stage 3 was mostly the case of conformity with the governing *status quo*, maintaining some relationships convenient to both, the ones holding the power and those conforming to that power. The mere proposal of UNCLOS in support of ocean governance cannot be just classified as a Conventional level 4 but, as established as a social contract, it matches the Post-Conventional level 5.

At stage 6, action is an aim in itself; the individual acts because it is right and not to avoid punishment or to comply with social laws. He/she acts in the right way because it is mainly in his/her own interest. Although it is not easy to find individuals always acting according to the highest ethical stage, which may be considered somewhat utopian, we can consider this highest stage as a spur to push ourselves in that direction.

Ideally, any individual, organization, or nation must climb the six stages to the top, in order to elevate the ethical quality of their behavior. Most people rely on stage 5, assuming that following a given social contract, for example, a professional code of ethics/conduct, would be enough; others remain at stage 4, following the rules because they are in force, not by any deep conviction. The ultimate Stage 6 fits individuals with impeccable ethical credentials, because of their deep conviction and consciousness that their ethical values are the right ones.

Contemporarily to the quixotic fight of Borgese, Pardo and others advocating the need for UNCLOS in the mid-1960s, an article of great impact was published in the journal *Science* in 1968 by the ecologist Hardin, entitled "The Tragedy of the Commons."[14] He was inspired by the 1833 work of Lloyd, which mentioned a hypothetical dilemma of over-use of a common resource.[15] Hardin

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12   L. Kohlberg, *Essays in Moral Development, Volumes 1: The Philosophy of Moral Development* (San Francisco: Harper and Row, 1981).

13   H.E. Gruber and J.J. Vonèche, eds., *The Essential Piaget* (New York: Basic Books, 1964).

14   G. Hardin, "The Tragedy of the Commons," *Science* 162, no. 3859 (1968): 1243–1248, doi. org/10.1126/science.162.3859.1243.

15   W.F. Lloyd, *Two Lectures on the Checks to Population* (Oxford: Oxford University Press, 1833), http://philosophy.lander.edu/intro/articles/lloyd_commons.pdf.

TABLE 1   Kohlberg's levels and stages of moral adequacy (adapted from Kohlberg[a])

Level	Stage	Social driver
Pre-Conventional (actions are judged by their direct consequences)	1	Obedience and punishment Blind egoism
	2	Self-interest orientation Individualism, Instrumental egoism
Conventional (actions are judged by comparing them to society's views and expectations)	3	Interpersonal accord and conformity Others approval, Social relationships
	4	Law and order Blind compliance, Social systems
Post-Conventional (individuals' taking precedence over society's principles; inclusion of basic human rights such as life, liberty, and justice)	5	Social contract orientation Agrees on common regulations Universal ethical principles
	6	Principled self-conscience and mutual respect

[a] Kohlberg, *supra* note 12.

extended the concept and pointed out the problem of individuals acting rationally in self-interest; if all people in a group used common resources for their own benefit and with no concern for others, all resources would still, sooner or later, be depleted. Hardin argued against relying on people's conscience or the potential benevolence of people as a means of governing the commons. He suggested that this favors selfish individuals (egoistic utilitarianism), over those who are more altruistic, thus promoting—explicitly or implicitly—the development of some kind of social contract or rules of justice. UNCLOS follows Hardin's warning.

The Application of Scientific Knowledge Assumes Ethical Correctness

Kant proposed that the human understanding is the source of the general laws of nature and that human reason gives itself the moral law.[16] This point of view is controversial.

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16   Kant, *supra* note 7, 64.

Scientific knowledge, although not perfect, portrays how nature works, and it builds and organizes our rational understanding in the form of testable explanations, giving us logical tools to make predictions. Thus, if we have to reap benefits from nature in the form of environmental products and services, it is imperative to know how the system works. As a natural complex system, the ocean challenges society from the scientific point of view, not just in order to understand its functioning, but also to set the proper rules to benefit from its many services. Thus, proper governance has to be based on the best scientific available knowledge. However, scientific knowledge is equally necessary for an egoistic exploitation of the oceans as well as for an altruistic one and, if we agree that the tragedy of the commons has to be avoided, the altruistic approach has to be the rule. Thus, science is necessary, but not sufficient. Ethics is the essential tool for the conduct of decision-making, targeting the greater good, supported by the highest standards of moral behavior, rational thinking, and the best scientific knowledge. Proper moral behavior is necessary to make the correct choices, while ethical conduct helps the proper reasoning for decision-making, differentiating between what we have the right to do and what is the right thing to do. This is the key question for responsible ocean governance.

Both, science and ethics are therefore necessary conditions for good ocean governance. As asserted by Simeroth: "Science brings society to the next level, while ethics keeps us there."[17] Nothing expresses it better than the concepts presented by Pardo in his speech before the United Nations in 1967, as quoted by Elisabeth: "the world's oceans and seabeds should become the common heritage of mankind, and, in the interest of present and future generations, should be fostered and administered exclusively to peaceful ends."[18] To do so, not just the well-being of humankind has to be pursued, but also the wealth of all life forms and the systems that sustain them in good shape, in order to give future generations, and us, the opportunity to "enjoy life and help live."[19]

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17 P. Mayer, *Bankbook Bodies: The Billion Dollar Business with Organ Trade—The Development of International Legal Measures and the Effectiveness in Curtailing the Black Market, Saar Blueprints*, Saar Blueprints, 12/2016 EN, http://jean-monnet-saar.eu/wp-content/uploads/2013/12/Bankbook-Bodies_FINAL.pdf, 44.

18 Borgese, *supra* note 1.

19 Bunge, *supra* note 11.