

*Book Review*

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## **Book Review of Endalew Lijalem Enyew, *Indigenous Peoples, Marine Space and Resources, and International Law: The Interaction Between International Human Rights Law and the Law of the Sea***

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The book under review is Endalew Lijalem Enyew, *Indigenous Peoples, Marine Space and Resources, and International Law: The Interaction Between International Human Rights Law and the Law of the Sea*, Routledge, 2024, ISBN 9781032151595 [1]. This book explores the rights of Indigenous Peoples (IPs) to marine space and resources under international law through a comprehensive and critical examination of the intersection between international human rights law (IHRL) and the law of the sea. The work identifies gaps in the existing legal framework and suggests possible approaches for future development that would more effectively protect and uphold the rights of IPs. The author notes that while there is a rich body of literature on the general position of IPs in international law, particularly with respect to their rights to lands and terrestrial natural resources [2,3], the scholarly literature on the rights of IPs in marine areas and resources is very limited. This book therefore aims to fill this gap by providing a comprehensive examination of IHRL and the law of

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the sea regimes.

Part I includes an introduction (Chapter 1) and a historical overview (Chapter 2). Chapter 1 furnishes a general background, encompassing the intimate link that coastal IPs have with traditionally used marine space and resources, as well as the multifaceted challenges that such peoples face. The chapter also situates the book from a theoretical and methodological perspective, following two interrelated and complementary critical theoretical and methodological approaches, namely a Third-World Approach to International Law (TWAIL) and a Human Rights-Based Approach (HRBA) to natural resources [4–9]. TWAIL is a critical approach that offers a distinctive perspective on the nature of international law. It is shaped by the experiences of Third World States and peoples, and it centers on addressing the concerns of these states and peoples. TWAIL shifts the international legal paradigm away from dominant Eurocentric narratives (p. 19). HRBA is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights (p. 19). Chapter 2 is organized into three periods to provide a contextual background for assessing the rights of IPs over their lands, marine space, and natural resources. The three periods are the pre-classical international law era, the classical period of international law, and the United Nations (UN) era of international law. This chapter discusses the evolution of related doctrines, beginning with a historical overview. The analysis demonstrates that the recognition of indigenous human rights in international law has undergone a cyclical pattern of decline and resurgence throughout these periods. While pre-classical international law afforded minimal recognition to IPs as holders of rights to their lands and territories, IPs' rights were significantly diminished or even lost during the classical period. It was only in the UN era that IPs began to utilize international law for their own benefit, marking a significant shift in the legal landscape.

Part II consists of Chapters 3 and 4. In order to provide a general basis for assessing the application of IHRL, Chapter 3 discusses the core human rights norms relevant to IPs' rights to lands and natural resources, namely the right to self-determination, the right to culture, the right to property, the right to non-discrimination, and the right to consultation and participation (p. 71). Building on Chapter 3, Chapter 4 examines the extent to which IHRL recognizes the customary rights of IPs to marine space and associated resources, and concludes that: (1) generally, human rights instruments bind contracting States throughout their national territorial limits and within areas under their 'jurisdiction,' including maritime space; (2) specifically, specific human rights norms applicable to traditional lands and natural resources implicitly recognize and protect IPs' rights to traditionally used marine areas and to harvest marine living resources (MLRs) (p.149).

Chapters 5-8 constitute Part III. As a basis for the analysis that follows, Chapter 5 examines the core rights and obligations of coastal States with respect to the MLRs of the different maritime zones under national

jurisdiction (i.e. Internal Waters, Territorial Sea, Archipelagic Waters and Exclusive Economic Zone), as well as the principle of freedom to fish and the related obligations that apply in areas beyond national jurisdiction - the high seas (p. 184). Chapter 6 examines the possible interactions between the law of the sea and the rights of IPs with respect to marine space and resources under IHRL. From the perspective of the general mechanisms for interaction between human rights law and the law of the sea regimes, the various cross-referencing, applicable law, and relationship clauses of the 1982 Law of the Sea Convention (LOSC) [10–15] and Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) [16–18] serve as important legal bases for linking the two bodies. The distinction between non-exclusive rights and exclusive area-based rights is of great importance when considering the above interaction. With respect to non-exclusive indigenous rights, such as the right to harvest resources, which benefit from the ‘open-ended and broadly worded’ (p. 229) nature of the fisheries provisions of the LOSC, a coastal State can exercise its broad authority over MLRs in a manner that also fulfills its obligations to IPs under IHRL. In contrast, when an indigenous community claims an exclusive right for certain purposes, such as the preservation of cultural and spiritual sites, there is a potential for conflict in the interaction between indigenous exclusive rights and the right of navigation (p. 213), especially within the territorial sea, archipelagic waters, and the exclusive economic zone. In sum, the relationship between the law of the sea and human rights law with respect to IPs is largely complementary. Thus, the coastal State should exercise its broad rights and discretionary powers under the law of the sea to draw from the appropriate human rights norms and standards to protect the rights of IPs (p. 230). Chapter 7 focuses on the dual obligations of states: the obligation to conserve marine mammals, on the one hand, and the obligation to recognize the harvesting rights of IPs, on the other (p. 233). Against this backdrop, it examines the marine mammal provision of the LOSC, several general conservation-oriented instruments that cover marine mammals, and instruments that deal specifically with the conservation and management of particular species of marine mammals, such as seals, whales, and polar bears. Chapter 8 discusses the concept of traditional fishing rights (TFRs) in the law of the sea and its relevance (application) to the rights of IPs to harvest MLRs across international maritime boundaries. This chapter not only examines the provisions of the LOSC dealing with TFRs but also reviews the relevant jurisprudence of international courts and tribunals and the bilateral practice of States on the topic.

The entire book is structured around three central questions and their corresponding answers, which form the backbone of the text. The first question is about the extent to which international law recognizes and protects indigenous rights specifically in relation to marine subject at both the actual and theoretical levels (p. 341). Parts I and II offer the answer by demonstrating that IPs have acquired a unique status in contemporary international law and IHRL applies equally to both terrestrial and marine

areas. The second question focuses on the relationship between the law of the sea and IHRL with respect to the rights of IPs. Based on the second question, the third question inquires the limitation that the law of the sea brings to the capacity of coastal States to recognize and implement the rights of IPs relating to marine space and resources (p. 341). Part III provides answers to both the second and third questions. Part III shows that the evolution of human rights law recognizing IPs is pushing the law of the sea to indigenize itself and achieve 'decolonization' (p. 344) by interacting with IHRL relating to IPs. Part III further illustrates that the relative silence of the law of the sea instruments does not restrict coastal states from recognizing and protecting indigenous rights related to marine space and resources, as the existing framework provides sufficient space to do so.

More generally, this book has several significant advantages and innovations that contribute to its scholarly value. First, as the author himself notes, the book fills a gap in the academic literature on the rights of IPs in marine spaces and resources, which is significant for the development of both the law of the sea and IHRL. Second, it identifies and emphasizes the need for equitable relations by critiquing the often State-centric and paternalistic perspectives (p.349) prevalent in international law when dealing with the rights of IPs [19]. Third, based on a sound understanding of the nature of LOSC as a 'living instrument,' the author proposes a comprehensive legal framework that both offers strategic recommendations for advancing these rights through the evolutionary interpretation of existing legal rules and promotes a more respectful and pluralistic understanding of indigenous rights for integrating maritime law with IHRL [20,21]. Finally, its methodological strengths lie in its application of the TWAIL and HRBA to natural resources. By integrating critical jurisprudence with historical context, these approaches not only enhance understanding of current law, but also provide a robust framework for envisioning what the law should aspire to be.

However, the book also has some shortcomings. First, there is insufficient and explicit reference to the rights of IPs over marine space and resources. Such rights are of paramount importance in this book, but they are not sufficiently and clearly enumerated by the author. An attempt is made in Chapter 4, but it is based on Chapter 3, which is limited to the core norms of IHRL. As a result, the discussion in chapter 4 is not sufficiently detailed and comprehensive. The discussion of only a few core rights is not sufficient to understand exactly what rights IPs have in relation to marine spaces and resources. For example, in discussing the right to marine space and resources as a property right, the conclusions stop at the fact that indigenous communities' property rights over marine space and resources are protected, with the qualification 'as established by law' (p. 140). The scope and extent of such property rights remain unclear [22,23]. This omission limits the depth of the analysis and may leave critical aspects of indigenous rights unexamined. Second, the inadequacy of the case law of human rights courts and treaty monitoring bodies recognizing these rights further limits the effectiveness of the book, as it relies on a limited legal framework to support its arguments. In

particular, in the context of specific rights of IPs, both legal instruments and cases are important to test the validity of conclusions. For example, when examining indigenous rights to harvest marine mammals, the book is sadly lacking in the presentation of cases. Third, despite the author's claim that this book applies the TWAIL and HRBA methodologies, such methodologies seem to be reflected only to a limited extent in the book's abstract conceptual orientation. From a theoretical perspective, the introduction of these two methodologies is very systematic and forward-looking, which is a highlight. However, from a practical perspective, the book doesn't seem to have combined the methodologies and empirical analyses very well. The author neglects to explain how these methodologies have been applied, both in the selection of sources and in the interpretation of the various instruments of international law. Moreover, the author focuses on the merits of the approaches without noticing their limitations. For example, the diversity of actors and contexts may influence the way in which a HRBA is implemented [24], and there is also the current lack of practicality and pragmatic solutions offered by TWAIL [24,25]. Taken together, these factors hinder the book's potential to fully address the complexities surrounding indigenous rights in marine contexts.

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