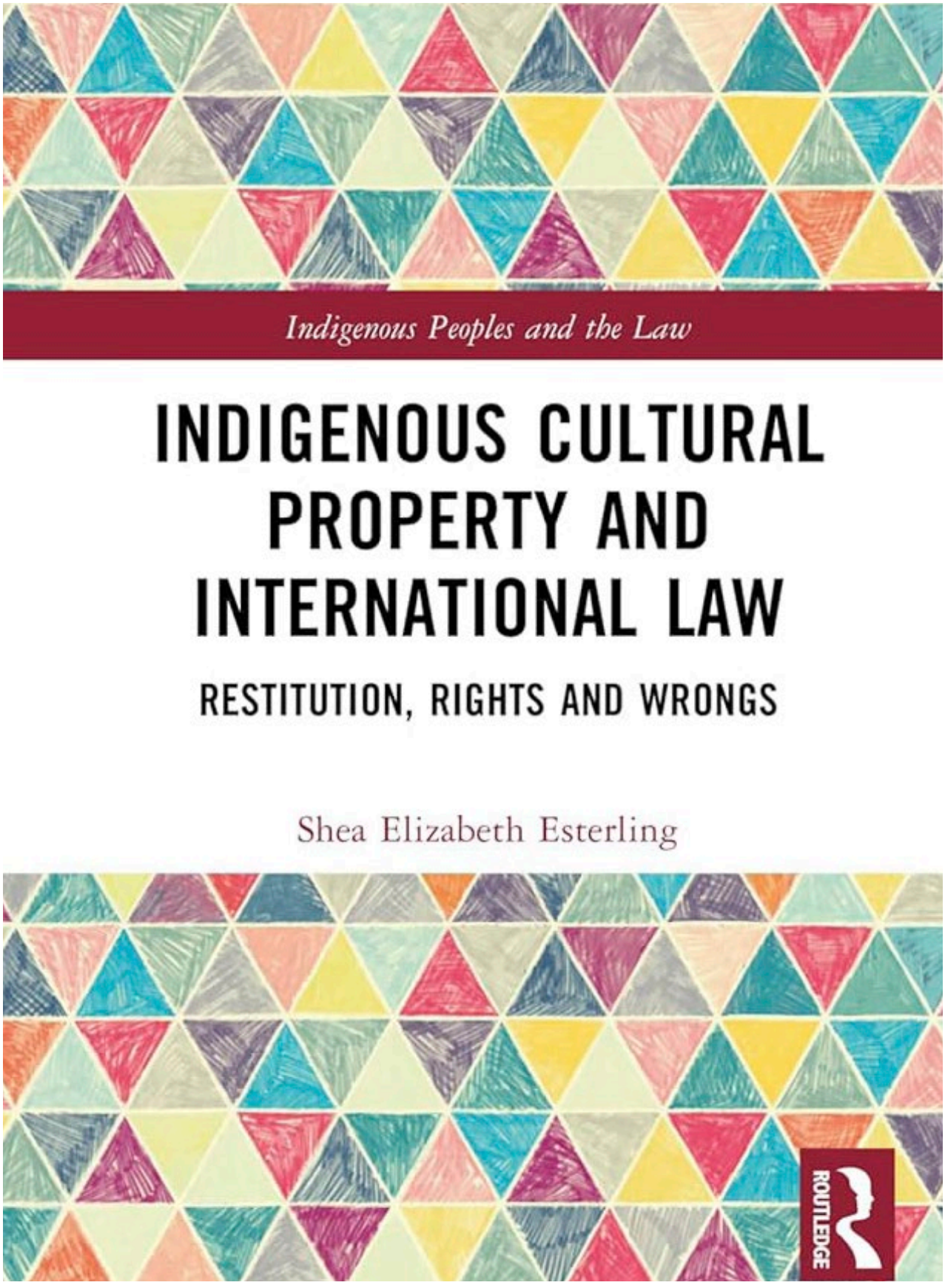
Indigenous Peoples and the Law
INDIGENOUS CULTURAL PROPERTY AND INTERNATIONAL LAW
RESTITUTION, RIGHTS AND WRONGS
Shea Elizabeth Esterling
ROUTLEDGE

BOOK REVIEW

Indigenous Cultural Property and International Law

Restitution, Rights and Wrongs

By Shea Elizabeth Esterling

Routledge 2024
ISBN-13 978-0-367-18200-7

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ABSTRACT

This review of Elizabeth Esterling's monograph *Indigenous Cultural Property and International Law: Restitution, Rights and Wrongs*, emphasizes the complexities of cultural property restitution rights under International Law. The article examines the language of customary international law, expanding on Esterling's analysis of UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples) with a comparative analysis of ICRIN (International Covenant on the Rights of the United Nations. Following Esterling's use of textual, purposive, and contextual lenses, particular attention is given to Article 11 of UNDRIP in relation to paragraph 11 of ICRIN. The legal language surrounding culture and its relationship to territory is significant in these texts. Even under these frameworks, the self-determination of Indigenous peoples has been historically minimized and complicated by the formation of international legal codes. Human rights discourse too often becomes an obstacle to indigenous rights, given the pitfalls of essentialism as a political strategy.

***Keywords**:* Indigenous cultural property, international law, restitution rights, UNDRIP, ICRIN, self-determination, human rights, legal language, territory, essentialism

How can international law, as it has evolved since the United Nations General Assembly adopted the UNDRIP in 2007, be used to resist human rights violations and achieve social transformation? Professor Esterling poses this general question and asks more specifically what benefits Indigenous Peoples have achieved from participating in international law-making to regain restitution of their cultural property.

The author, who is on the faculty of law at the University of Canterbury (Aoteroa/

New Zealand), has also served as chairperson of the interest groups Rights of Indigenous Peoples and Cultural Heritage and the Arts of the American Society of International Law (ASIL, an organization associated with US foreign and military policy elites).

The monograph results from Professor Esterling's interest in cultural rights and restitution of cultural property, as well as her personal journey of grappling with her heritage as both an immigrant and an indigenous person. She describes herself as an outsider in the struggle for indigenous justice.

The book is an important first in the international law of cultural rights and realistic academic writing, informed by practice, in its assessment of international human rights law to address the impact of colonialism. Using a comprehensive critical commentary on Article 11 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the author focuses on how that provision has affected the restitution of cultural property.

Esterling divides her analysis of Article 11 using three lenses: textual, purposive, and contextual. The textual part looks at the history of indigenous rights as human rights, distinctions between cultural heritage and cultural property, the development of the right to cultural integrity, and the evolution of human rights law within different parts of the UN system. Through her purposive lens, she looks at the drafting history of UNDRIP, the current absence of a right to restitution, and the impact of Indigenous participation. Focusing on context, she analyzes the international human rights system, which is driven by state concerns about maintaining existing property rights, problems with acceptance of collective rights, and fears of erosion of state sovereignty.

Professor Esterling characterizes UNDRIP as a non-binding "soft" law, which has been a success. ("Soft" means influencing practice and obligation, with normative content). She mentions that the International Law Association, despite the non-binding status of UNDRIP, concluded in 2008 that some provisions have become customary international law but not restitution of cultural property (p. 196)

Customary international law, like treaty law, is based on the consent of states. This is in addition to a non-consensual alternative kind of customary law, *jus cogens*, or a peremptory norm which binds all states. Customary international law evolves and is recognized by international and domestic courts when states create binding legal duties for all by accepting a legal obligation (*opinio juris*) and showing evidence of general practice. The process of customary law-making exists and continues despite the inability to transform UNDRIP into a legally binding treaty. However, the evolution of customary law is not stopped by a single state's refusal to accept its legal obligation or by the "persistent objector" practice of a hegemonic state like the United States.

Despite the difference in political identity between Peoples and Nations, much of the language of Article 11 of UNDRIP is similar to Para. 11 of the International Covenant on the

Rights of Indigenous Nations (ICRIN), adopted in 1994. Both provisions are part of a section devoted to cultural rights, including Arts. 12 and 13/Paras. 12 and 13. Significant legal differences exist between the two instruments of international law, and the differences reflect the conflicts between states and nations in the drafting and final text of UNDRIP. Esterling does not address ICRIN in her book.

UNDRIP Article 11 provides:

1. *Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies, and visual and performing arts and literature.*

2. *States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.*

Compare this with ICRIN Para. 11:

Indigenous Nations have the right to practice their cultural traditions and ***evolve*** *culture* ***in relation to lands and territory without interference****. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites and structures, artifacts, designs, ceremonies, technologies and visual and performing arts and literature,* ***as well as the right of restitution*** *of cultural, religious and spiritual property taken without their free and informed consent or in violation of their laws (emphasis added).*

Viewing the texts side by side, one can see that the forceful taking of land and territory is absent from UNDRIP's Article 11, sidelining the issues of ownership and control of land. Culture also, is rendered static and can only be revitalized. This is a problem of essentialism, which Professor Esterling explores in detail in her chapter on the discursive limits of the human rights approach. The right of restitution in 11(2) has ended up as one optional mechanism for states to select to redress their violations of law. Yet restitution is an old remedy of the colonial system. In thirteenth-century English law, the writ of restitution was issued by the King's Bench where there was no remedy in law or equity or where the remedies available didn't allow full recovery.

In her purposive analysis, the author examines how a sui generis right, a new right to the restitution of cultural property, was reversed during negotiations. The retrogression occurred after a draft, which had been developed between human rights expert staff, NGOs from civil society, and especially the representatives of Indigenous Peoples, was submitted to the states' delegates. State delegates, those with the voting

power, reduced the right to a discretionary measure. The states' positions on the right to restitution of cultural property not unsurprisingly conformed to their positions on the right of self-determination under international law. These positions were and are "maximalist" and "minimalist." The UNDRIP minimalists insisted on preventing the full autonomy of Indigenous Nations, supposedly because it would destroy existing sovereign states and demanded changes that resulted in acceptance of an internal self-determination modality within the human rights framework.

Even in the late twentieth and early twenty-first centuries, some states have continued to argue for the language of "Indigenous Populations" rather than "Indigenous Peoples," and commentators on treaties have substituted "populations" for "peoples." ILO Convention 169 on Indigenous and Tribal Peoples has long settled this error. The right to self-determination in individual rights treaties is often muddled. An example is the 1989 Convention on the Rights of the Child (CRC), the most ratified human rights treaty by all UN members (except the US). In CRC Article 30, which protects a child's right to culture "in community with other members of his or her group," indicating recognition of the collective right to culture, that article links Indigenous Peoples with ethnic minorities within a state who lack the right to self-determination.

Esterling notes that protection of the right to culture under Article 27 of the International Covenant on Civil and Political Rights (ICCPR) has been strategically deployed by advocates of Indigenous Peoples to claim a collective right to culture and to link land to culture and that some claims have resulted in recognition of fluidity of culture. But she concludes that the ICCPR as a basis for advancing a right to restitution of cultural property, as with other human rights treaties, is not going to be workable as an approach for Indigenous Nations, given the conceptualization and treatment of Indigenous culture and identity as static and one-dimensional rather than dynamic and multidimensional.

The author sees a tension between Indigenous participation in international law-making and an ability to realize the claims made as human rights: a "dissonance flows from discursive limitations in human rights; limitations which manifest themselves in essentialism" (pp. 180-181) While strategic use of essentialism has benefited some Indigenous Peoples it has also sidelined others. Categorization opens the door to gate-keeping, what Indigenous Peoples have been resisting, and interferes with a Nation's right to self-identification. "Colonial structures and neocolonial discourse," Esterling points out, "employ essentialism to establish and maintain hegemonic control," which places "Indigenous Peoples in contrast to Western culture with the effect that they are homogenized into an undifferentiated other" (p. 185).

This monograph was of particular interest to me as a person educated in anthropological and international law methodologies. I am attempting to understand how international human rights law can advance the rights of Indigenous Nations and what the limitations of this approach may be.

This article may be cited as:
Schmidt, M. L. (2025). [Review of the book Indigenous Cultural Property and International Law: Restitution, Rights and Wrongs, by S. E. Esterling]. *Fourth World Journal 24*(2), 203-208.

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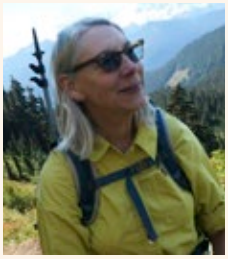

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Martha L. Schmidt holds law degrees from the University of Washington (LL.M., Law and Marine Affairs) and University of Wisconsin (J.D.) and a Master's degree in International Administration from the School for International Training. She is currently a Board director of the Center for World Indigenous Studies, a member of the Task Force of the Monique and Roland Weyl People's Academy of International Law, and a co-chair of the Human Rights Framework Project of the National Lawyers Guild (NLG). For more than a decade, she has been involved with groups in the US working on the human right to health, particularly as an educator and strategist.