

WilmerHale Conference Highlights Human Rights Issues Facing Small States

On 12 and 13 November 2020, Wilmer Cutler Pickering Hale and Dorr LLP hosted an online conference, in conjunction with the Institute of Small and Micro States (ISMS) and the British Institute of International and Comparative Law, on *Human Rights and Small States: Challenges, Resilience, and Advocacy*.

The conference featured a keynote fireside chat, four panels, a keynote panel, and a “Kaffehaus” debate, in which a range of experts explored a variety of contemporary issues that small states face. Topics included austerity and human rights, migration, recent cases, freedom of expression, and access to justice. The conference benefited greatly from the expertise of the speakers, who came from a variety of backgrounds, including Government, academia, international organizations, NGOs, journalism and legal practices.

Keynote Fireside Chat on Poverty/Austerity and Human Rights, featuring Imrana Jalal and Margarete Macaulay.

The keynote fireside chat explored a number of issues arising from the impact of austerity measures and poverty on small states. The speakers noted that, since the financial crisis of 2008, small states have become more financially dependent on larger economies. For many small island states tourism has been the economic sector that has made them less dependent. As a result of the pandemic, many small island states have experienced a major and sudden drop in revenue from tourism. Small states are, unlike larger economies, unable to absorb these losses.

Imrana Jalal, the Chair of the World Bank Inspection Panel, emphasized the serious consequences that the pandemic has had for island states in the Pacific, particularly in the tourism sector. She noted, for example, that tourism constituted 40% of GDP in Fiji.

When dealing with the economic effects of the pandemic, Jalal explained, organizations such as the World Bank and the UN should provide financial support in order to help small states restart their economies with a focus on green measures. The emphasis should be on self-sufficiency, especially in the fishing and agricultural industries, so that products can be consumed locally rather than being exported.

Margarete Macaulay, a Commissioner of the Inter-American Human Rights Commission and a former Justice of the Inter-American Court of Human Rights, noted that tourism is the largest source of income in the Caribbean and Latin America Region. Natural disasters in this region, such as earthquakes and storms, have already caused substantial damage. Taking measures to respond to the pandemic was even more difficult in the Caribbean and Latin America Region in such circumstances.

Jalal also explained that, while Pacific island states had been responsive during the pandemic, there had also been evidence of misuses of power and increased surveillance, including questionable laws and arrests. In contrast, Macaulay stated that the Caribbean states did not share that experience. Civil society had responded strongly in the face of inequalities caused by the pandemic, she noted, adding that it was easier for police to be held to account in a small state than in large metropolitan areas.

Macaulay also emphasized the importance of fiscal support to put social, civil and community policies into place, to ensure housing, and to provide access to the health system.

She explained that small states should collect taxes more effectively, given that insufficient tax revenue creates a greater risk of poverty. Jalal agreed and stressed that economic recovery was a pivotal building block and requirement for the enjoyment of human rights by citizen of small (island) states.

Finally, Macaulay explained that the Caribbean and Latin America Region should take measures to deal more effectively with migration. Human rights abuses arise both during the journey taken by migrants and after they reach their country of destination.

Panel 1: Austerity and Human Rights, featuring Susie Alegre, Malene Alleyne and Bugalo Maripe, chaired by Santiago Bejarano

During this panel discussion, the speakers explored various issues associated with austerity and human rights in relation to small states. They discussed how Governments frequently take austerity measures in times of crises. The speakers noted that these measures often affect small states more severely, and that they could have a particularly devastating effects on human rights. As a result, strong human rights institutions are needed to mitigate short-term politics and to ensure the overall benefit for society.

Susie Alegre of Island Rights and Doughty Street Chambers focused on semi-autonomous entities, the British Overseas Territories and Crown Dependencies, and in particular the question whether being a British Overseas Territory had any advantages over being an independent small island state. While living standards and self-sufficiency vary greatly between British Overseas Territories, the UK has an obligation towards all of them to care for the well-being of their citizens, subject to Article 73 of the UN Charter. However, at the same time, the UK could also impose obligations on those small island communities. For example, after Hurricane Maria, disaster relief from the UK was made dependent on regulation of the financial services industry in the British Virgin Islands.

Alegre also discussed the adherence of the European Convention on Human Rights in and by the British Overseas Territories. She drew comparisons to how other European countries treat their overseas territories. Both France and the Netherlands conduct a systematic review of the human rights standards in their respective overseas territories, she explained, and had taken action to improve the situation. Based on the expected economic effects of the pandemic and pressing issues such as the distribution of a potential vaccine, she proposed a realistic view of the relationship between measures affecting economic activity and their impact on human rights.

Malene Alleyne, a Jamaican human rights lawyer, pointed out that Caribbean states had already suffered high unemployment and natural disasters before the pandemic. Alleyne explained that “austerity is a human rights issue, a racial and economic issue, gender issue, and intersectional issue.” She said that austerity was not an option for small island developing states. She argued that states must invest their maximum available resources into securing social, economic, and cultural rights. She suggested a human rights framework for economic recovery as an alternative to austerity, built on the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

Alleyne explained that the human rights duties embodied in the ICESCR already provide a body of standards and concrete obligations for states when implementing austerity measures. To comply with those standards and obligations, a state must demonstrate that its austerity

measures protect the social, economic, and cultural rights set out in the ICESCR, and are necessary, proportionate, and non-discriminatory. Hence the Caribbean islands' call for fairness in austerity was based on international law, the ICESCR.

Alleyne pointed out that small island states are already disproportionately hit by the climate crisis and are still dealing with colonial legacy which contributes to their underdevelopment. The pandemic will impact on any existing aid program, she predicted. However, development aid in particular should be seen as a moral obligation and therefore any effort should be undertaken by the international community to continue to provide the necessary funding for development programs.

Alleyne also proposed to address the question of taxation as a human rights concern. Tax evasion and business that are not paying a fair share in terms of taxes limit the resources of small island states. An answer how to address tax evasion needs to be found and developed using and interdisciplinary dialogue and addressing in particular the capacity issues small states face to combat tax evasion.

Professor **Bugalo Maripe** of the University of Botswana explained that while the pandemic was draining resources from states in southern African, some of the current issues had already been simmering for the past decade and, as their development status had been upgraded, it had a devastating effect on funding. In countries like Botswana, most of the exploitation of natural resources was by international corporations, while its wildlife had become an opportunity for tourism. However, tourism would not be an option for the near future. He predicted that, as governments need to prioritize their socio-economic agendas, issues of human rights would be pushed to the side, leaving it to individuals to invoke their rights in court.

Maripe further explored the struggle to implement austerity measures. While according to the IMF many developing countries have public sectors that are too large for their respective budgets, reforms in the short-term increased unemployment, making more people reliant on state benefits.

Panel 2: Migration and Discussion, featuring Dr. Jean-Pierre Gauci, François Crépeau, Ms. Nisha, Alberto Costi , chaired by Dr. Daniel Costelloe.

During this panel discussion, the speakers argued that it was incumbent on all states to do their part in protecting the human rights of migrants by creating policies that protect them, by facilitating mobility, and by assisting with the protection of their cultural heritage, among other things.

Dr. **Jean-Pierre Gauci**, the Arthur Watts Senior Research Fellow at the British Institute of International and Comparative Law, discussed Malta's current and historical policies on migration. One of the key issues in Malta concerns the country's relationship with Libya and the question whether the Libyan Coast Guard should stop migrants at sea. These questions raised human rights issues, he observed, including considerations of non-refoulement and the question to what extent states must provide migrants access to protection. Recently, the pandemic has been used as a pretext to impose stricter migration measures.

Professor François Crépeau of McGill University and formerly the UN Special Rapporteur on the Rights of Migrants explored the factors that cause migrants to move and the

circumstances that put them at risk of exploitation. According to Crépeau, current policies create, entrench, and subsidize the criminal rings that operate underground labor markets.

Migrants generally have no right to vote, and migrants usually have virtually no political power. However, there has been some progress internationally in recognizing the importance of protecting migrants, such as the 2030 Sustainable Development Goals and 2018 Global Compact. Unfortunately, however, despite agreeing to these instruments, most states had not started to implement them. It is important in the future to facilitate legal mobility, he said, since doing so will help to secure borders and meet labor needs, while eliminating the underground labor markets that allows abuse and exploitation. States' failure to create long-term policies on migration issues severely hampers their ability to address these issues.

Ms. Nisha, the UNESCO Representative to the Pacific States, discussed the issues arising in regard to the preservation of culture if some Pacific island communities have to migrate due to climate change. Her focus was in particular on the role technology could play in the preservation of culture. She noted that, historically, migration has been a key aspect of Pacific Islanders' culture. Today, there is a risk that their culture will be lost as a result of climate change and rising sea levels. It is important, she explained, for states to work together with the bearers of this traditional knowledge to protect the cultural rights of individuals from Pacific island states.

Professor **Alberto Costi** of Victoria University of Wellington discussed the importance of protecting Pacific island states by ensuring that they remain politically and culturally intact. Pacific island states must adapt to climate change through resilience-building. This includes ensuring that island states' maritime borders do not shrink as a result of climate change, Costi explained. Further, if such adaptation was insufficient, he argued, it would be necessary to ensure that Pacific islanders are relocated to, are not assimilated and their cultures are protected in the places to which they migrate. Costi noted that not all Pacific islands have the same vulnerabilities, and that not all people on the same island share the same vulnerabilities either. It is important to take this account in long-term planning. Finally, Costi argued that there may be a duty to assist under customary international law and that other states may have a legal obligation to assist those states severely affected by climate change.

Keynote Panel: Small States—Big Cases, featuring Dr. Philippe Sands and Simon Mount, chaired by Dr Jean-Pierre Gauci.

The second keynote panel featured Professor Philippe Sands QC of University College London and Matrix Chambers, and Simon Mount, the Attorney-General for the Pitcairn Islands and Bankside Chambers. The panel discussed the Chagos Islands' and the Pitcairn Islands' landmark cases.

Professor **Sands** discussed how small states were able, through well-planned, dedicated and determined action, to win significant victories against much larger and more politically powerful states. Sands explained that to succeed in such a case it is necessary to have a clear strategy, allies, a good local team, and a diverse international team.

Sands discussed the history of the Chagos Islands (part of the British Indian Ocean Territory) and Mauritius, as well as the occupation of the Chagos Islands. He explained the legal strategies and processes that led to an arbitration before a tribunal constituted under the United Nations Convention on the Law of the Sea, an advisory opinion by the International Court of Justice, and a pending case before the International Tribunal for the Law of the Sea.

In particular, Sands noted that working with skilled local politicians, diplomats, and attorneys had allowed Mauritius to achieve significant successes. In the UNCLOS arbitration and the ICJ advisory proceedings, not one judge or arbitrator disagreed with Mauritius on the question whether the Chagos Islands legally belonged to Mauritius. Sands also emphasized the human element of the cases, in giving a voice to the ongoing injustice. Today, he said, the question is when, not if, the United Kingdom would leave the Chagos Islands and allow the Chagossian population to return.

Mount discussed how small, isolated islands with very small communities could provide an opportunity to consider issues of self-determination and the rule of law. He explored the legal system of the isolated Pitcairn Islands, which have only around 50 inhabitants and are far from the United Kingdom, through the 19th and 20th centuries.

Mount's presentation focused on the effects of having such a small community, and in particular on two criminal investigations and trials from the late 1990s to 2018. The first was an investigation into rampant sexual abuse on Pitcairn. After reports of sexual abuse had surfaced in 1996, a stronger police presence was established on Pitcairn, and an investigation led to half of Pitcairn's male population being charged. In the end, six men were imprisoned. During the trial, the question arose of whether the application of British law to Pitcairn violated human rights law. Specifically, the question was whether Pitcairn's residents knew these laws and whether it was clear that they applied to Pitcairn. While the defendants raised these issues, the prosecution was able to provide substantial evidence that the answer to both questions was "yes."

The second criminal case involved the investigation and prosecution of Pitcairn's mayor in 2010 for possession of child pornography. The mayor raised the issue whether the Island Council (Pitcairn's legislature) had the authority to promulgate its own laws. This argument stood in stark contrast to the argument that British law could not apply in Pitcairn (i.e., that Pitcairn had had the power to declare its own laws) that the defendants had raised in the 2004 sexual abuse prosecutions. These trials presented opportunities for the Crown, said Mount, to facilitate the meaningful raising and consideration of human rights issues. Both Pitcairn trials demonstrated how the rule of law worked in practice by facilitating and supporting the defendants in raising legitimate questions about human rights and self-determination.

Panel 3: Freedom of Expression, featuring Junkung Jobartah, Alinda Vermeer, Joanna Connolly and Saba Ashraf, chaired by Steven Finizio.

During this panel discussion, the speakers explored the challenges faced by journalists worldwide, including violence and other measures used to intimidate and silence the media, and discussed experiences in small states, particularly during and after political changes.

Alinda Veermer, the Acting CEO of Media Defence, an NGO that provides legal support for journalists, shared her experience providing legal help to journalists, citizen journalists and independent media across the world. She addressed some of the less visible ways challenges journalists face worldwide. She noted that, in addition to defamation suits and prosecutions based on allegations of assisting terrorists, which have long been used to try to silence and punish journalists, states were now charging journalists with other crimes in order to retaliate for investigative reporting, such as tax evasion or she was also seeing even more far-fetched allegations, such as incitement to commit suicide.

Vermeer highlighted the use of “SLAPP” (Strategic Lawsuit Against Public Participation) suits as one increasingly common tool used to intimidate journalists. In some cases, journalists face dozens or hundreds of such suits, which are intended to exhaust their resources. Vermeer also discussed attempts by certain governments to restrict freedom of expression online, through measures to control the use of social media and restrictions on certain platforms.

Addressing the impact of the pandemic, Vermeer noted that there has been significant financial pressure on journalists, as demonstrated by the number of journalists who have lost their jobs, and this financial pressure makes the media less effective. Further, some governments are using the pandemic as an excuse to take further repressive measures against journalists.

Jukung Jorbateh, the Executive Secretary of the Media Council of The Gambia and formerly the Head of the Legal Department of the Public Utilities Regulatory Authority in The Gambia, discussed the obstacles to freedom of expression and information that The Gambia had faced in the last decades. He described the development of the media during the first decades of independence and barriers to expressing opinions.

The Information and Communication Act in 2009 in The Gambia established several restrictions to freedom of expression, including online, empowering governmental organizations to exercise surveillance over the population and to intercept communications in full. Mounting criticism in the following years led the government to amend the Information and Communication Act in 2013. The amended Act provided for even harsher penalties for criticism of the government or public authorities, and it allowed governmental agencies to prosecute journalists and media professionals.

The election of a new government in 2016 significantly changed the political environment in The Gambia, and the new administration revoked the 2013 Amendment to the Information and Communications Act. Jorbateh explained that the new government created a way to review laws that limited the freedom of press or access to information. However, despite these changes, attacks on journalists and media professionals continue to occur.

Caroline Muscat, a journalist from Malta, was unable to participate in the conference. **Joanna Connolly**, a Legal Officer at Media Defence who represents Muscat, discussed developments in Malta, and the increasing use of SLAPP suits more generally. Connolly explained that there are weaknesses in many legal systems that make SLAPP suits easy to use against journalists, including (i) the low cost of filing defamation cases and other forms of civil litigation, (ii) the lack of legal or monetary consequences for those who file unmeritorious claims, and (iii) the ability to “forum shop” to bring claims in jurisdictions where the law is more favorable to plaintiffs and which also adds to the costs of defending against such claims. Connolly noted that Malta is an example of a country where the use of SLAPP suits and similar practices to harass journalists are increasing. To give an example of the seriousness of the issue, she referred to the case of the Maltese journalist Daphne Caruana Galicia, who was facing more than 42 lawsuits in Malta and the UK, when she was assassinated by car bomb.

Connolly described legislative steps that have been taken in some jurisdictions, such as the US, to address SLAPP suits. She noted that countries in the European Union, including Malta, are discussing the possibility of similar legislative reform. Connolly described steps that can be taken to protect freedom of expression, including by protecting journalists against

SLAPP suits, for example through the early dismissal of unmeritorious claims, imposing costs or other sanctions against plaintiffs for filing such claims, educating judges about how such suits are being misused, and helping to provide defense funds for journalists. Connolly also highlighted the urgent need to reform defamation laws to protect public interest journalism within the European Union, as well as the need to reform laws that allow forum shopping to harass journalists. She also noted making media outlets aware of their rights and developing their capacity to assess the level of threats could help protect them.

In the online context, Connolly noted, data protection legislation has created a way to protect reputation and personal data.] However, these protections can also be manipulated and misused against journalists. She highlighted the importance of data protection legislation but also of making governments aware of how data protection legislation can be misused to the detriment of journalists and the public interest.

Saba Ashraf, a Senior Legal Officer at Media Defence, stood in for Montenegrin journalist Jovo Martinovic, who was unable to participate. Ashraf described Martinovic's case, and note that it reflected the persecution that journalists often suffer in response to investigative work relating to corruption, drug trafficking and similar subjects. Martinovic spent 14 months in pre-trial detention without receiving information about the charges against him. He was then charged for allegedly facilitating a meeting between drug dealers and buyers. Ashraf explained that such accusations were often used to punish journalists for not writing stories critical of or not cooperating with the government. Apart from the impact on the journalist who has been targeted by the government, prosecutions like that in the Martinovic case are used to intimidate others in the media.

“Kaffeehaus” Debate, featuring Stanley Simpson in an interview with Ana Tuiketei (recorded) and Junkung Jobarthe, Alinda Vermeer, Joanna Connolly and Saba Ashraf, chaired by Steven Finizio.

The “Kaffeehaus” debate explored the difficult balance that sometimes must be found between protecting and fostering freedom of expression and other important concerns, including privacy and culture, and how balancing these rights can be particularly complex in small states.

The debate began with a video interview between **Ana Tuiketei**, the deputy director of the Institute for Small and Micro States and a barrister in Fiji and Tonga, and award winning Fijian journalist **Stanley Simpson**, who is currently the director of Mai TV, director of media production house Business Media, and the editor of monthly magazine Fiji Plus. Simpson provided insight into the life of a journalist in a small state. He discussed the challenges of being a journalist under a military Government, and the complicated issues arising from balancing personal relationships, financial dependence on government advertisement, and media regulation, while maintaining journalistic integrity.

Simpson and other speakers discussed the interplay between freedom of expression and cultural issues, particularly in the context of small state. He noted that a journalist has to balance when the public interest overrides cultural considerations, and when cultural considerations need to be respected.

The speakers also discussed the tensions arising from data regulation and the challenge of protecting privacy while also protecting the right to freedom of expression. Simpson noted that, for better or worse, in a small state a journalist often is forced to take responsibility for finding the right balance between privacy and freedom of expression. Simpson also noted that it can be difficult for international organizations and foreign governments to provide support for journalists and to help fight against restrictions on freedom of expression because such efforts can be perceived as interference in local issues, although there are times when outside pressure can be effective.

Panel 4: Access to Justice, featuring Dr. Maxi Scherer, Dr. Julinda Beqiraj, Chiann Bao and Dr. Janine Ubink, chaired by Dr. Sara Migliorini.

This panel explored issues relating to access to justice. The panel first addressed the interplay between technology and access to justice, followed by a discussion of how the UN Sustainable Development Goals could facilitate this major goal of access to justice. Further, the panel discussed the availability of an adjudicatory forum for violations of human rights in a commercial context.

Professor **Maxi Scherer** of Wilmer Cutler Pickering Hale and Dorr LLP and Queen Mary University focused on the interplay between technology and access to justice. She noted that technology has transformed the legal landscape both internationally and domestically as a result of the pandemic, raising the question whether this “new normal” or “paradigm shift” actually increased access to justice.

Scherer pointed out that videoconferences had been used for a long time and have been especially utilized during the pandemic. In international arbitration, remote hearings have become the new normal. She shared statistics on remote hearings indicating that 60% of all cases, where remote hearings were used, were said to be either better or at least as good as in person hearings. Scherer believed that technology clearly increases access to justice. Her view is supported by a decision of the Supreme Court of Austria which had recently recognized that videoconferences could be used as a tool to ensure effective access to justice and the right to be heard.

Scherer also explored the possibility that remote hearings may increase existing discrimination in the access to justice, in the sense that remote hearings are only available for people who actually have the available technology. She noted that technology was not a given worldwide. She pointed to statistics showing that only 35% of the population in Africa has access to basic online technology, while in certain parts of the UK one in four adults does not to have access to the internet.

Dr. **Julinda Beqiraj**, the Maurice Wohl Senior Research Fellow in European Law at the British Institute of International and Comparative Law, discussed the potential of Goal 16 (“Peace, Justice and Strong Institutions”) of the Sustainable Development Goals.

Beqiraj observed that Goal 16 provided for three components, peace, justice and strong institutions, noting that one of the three elements was access to justice *for all*. Further, Beqiraj noted that the Goals, although not binding, reflected the general objective of the Sustainable Development agenda. That agenda has specific targets, and the measurability of progress provided by such targets is critical to the success of instruments like the Sustainable Development Goals.

Beqiraj also referred to the various funds established to support developing states in accessing justice at the international level, such as the International Court of Justice's legal aid scheme and the International Tribunal for the Law of the Sea's trust fund.

Finally, she explored the importance of data in monitoring progress in achieving the Goals, but also the need to think about data around vulnerability of states in determining eligibility for particular measures and assistance including legal aid before international courts and tribunals.

Chiann Bao, an independent arbitrator and Senior Honorary Fellow at the British Institute of International and Comparative Law, focused on the availability of an adjudicatory forum for human rights violations and how human rights issues can be addressed in the commercial context. Bao emphasized the movement towards ensuring that businesses respected human rights and addressed the human rights consequences of their activities. She noted that small states with manufacturing or labor-intensive industries can in particular face with human rights issues resulting from commercial activities.

Bao explained that there were obstacles that prevented the use of international arbitration to resolve human rights issues. She noted that international arbitration requires consent from the parties, and she noted that human rights abusers rarely bind themselves to arbitration agreements. Arbitration also is not necessarily an effective mechanism for those with limited financial resources. However, arbitration still offers some advantages, such as the enforceability of awards, the independence of arbitrators, confidentiality, expertise, etc.

According to Bao, recent initiatives have shown that arbitration can be used to address human rights issues, especially in small states. The Bangladesh Accord, concluded after the Rana Plaza garment factory collapse in 2013, by unions and labor rights groups, and garment manufacturers, is the first global framework agreement for the resolution of business and human rights disputes to include a binding arbitration mechanism. Similarly, the Hague Rules on Human Rights are aimed at creating a private international dispute resolution mechanism for parties involved in business and human rights issues. However, in contrast to the Bangladesh Accord, the Hague Rules do not incorporate substantive human rights standards.

Bao explained that companies' consent to arbitrate business and human rights disputes could be achieved through peer pressure on the basis of corporate social responsibility and publicity, or on the basis of the advantages of arbitration, such as confidentiality. However, Bao noted that those seeking to address human rights abuses may want publicity and transparency, rather than confidentiality.

Bao mentioned that legal aid has been used to help fund some cases. In the context of investment arbitration, she noted that there are specialized funds dealing with human rights arbitration claims that are modelled on the financial assistance fund of the Permanent Court of Arbitration and aim at assisting developing countries to meet their arbitration costs. Ms. Bao also mentioned that pro bono services and third-party funding may help to deal with costs.

Dr. Janine Ubink of the University of Leiden addressed lessons from Namibia (and beyond), focusing on customary dispute resolution and traditional leadership in times of global

capitalism. She discussed the problems of co-existence in some African States of customary judicial cultures and Western-inspired judicial systems. Ubink pointed out that one cannot understand customary justice without understanding the role of community leadership and traditional leaders.

She further noted that, since the 1990s, there has been a resurgence of tradition and of customary courts and law – which has been a surprising development, given previous attempts to curtail such processes. Research has shown that this resurgence has occurred to a greater extent in strong states, which allows the state to make itself more relevant, legitimate and effective. Other political goals that Ubink mentioned included bringing in rural votes and creating access to natural resources. Aiding factors including democratization, decentralization and liberalization, which opened up doors for the involvement of traditional leaders.

Finally, Ubinke noted various other challenges to a continued role for traditional authorities, including the erosion of checks and balances, capitalism and the challenges that arise from governing valuable resources (land grabbing), as well as gender equity.