

SMALL STATES CONFERENCE 2021

Issues of Culture, Art and Cultural Identity Faced by Small States

From 17 to 19 November 2021, in conjunction with the Institute of Small and Micro States (ISMS) and the British Institute of International and Comparative Law (BIICL), Wilmer Cutler Pickering Hale and Dorr LLP (Wilmer Hale) hosted an online conference on *Culture, Art, Cultural Identity and Small States*.

The conference featured a keynote panel and six other panels over three days, with speakers of diverse backgrounds from around the world, including representatives of government, academia, international organizations, NGOs and legal practice.

I. Welcome and Keynote Panel

The keynote panel, hosted by Wilmer Hale partner **Steven Finizio**, introduced many of the issues that were explored in depth throughout the conference. The speakers addressed the vulnerability of small states, which are affected by environmental issues as well as economic and political ones, and the need for better and more participative governmental and international representation.

Karima Bennoune, professor at UC Davis School of Law, former UN Special Rapporteur in the field of cultural rights, focused on the climate emergency, cultural rights and small states. According to Bennoune, climate emergency is one of the greatest threats humanity has ever faced, and the leading global threat to cultural rights, especially concerning small island developing states. Bennoune stressed that urgent action on climate change is needed to protect the culture and cultural rights of billions of people around the world and to avoid their cultural extinction.

Dr Andrzej Jakubowski, chair of the Cultural Heritage Governance Committee of the International Law Association, emphasized that global governance should also encompass cultural heritage. Jakubowski explained that the importance of participatory governance for small states in relation to culture, art and cultural identity lies in the fact that small states are particularly vulnerable to economic crises, pandemics, natural disasters and climate change. The complex social and cultural structure of many small states also requires appropriate procedural solutions. Accordingly, small states should have adequate representation in global governance. Jakubowski pointed out that participatory governance of heritage should not be limited to a mere consultation, but should rather involve decision-making procedures. He explained that there is no participatory governance of heritage model that provides uniform solutions for each case and situation. Therefore, the choice of model should also be subject to participatory ways of decision making. Jakubowski highlighted the 2020 Rome Charter, which provides that the right to participate fully and freely in cultural life is vital to cities and communities.

Dr Winani Thebele, chief curator and head of ethnology at the Botswana National Museum, talked about culture during the COVID-19 pandemic and noted that the pandemic made people more closely connected to each other. Thebele noted that culture should be seen not only as a human right, but also as an irreplaceable component of human life. In a context where globalization is a threat to cultural identity, there must be a worldwide effort to protect and promote culture. She also stressed the importance of tolerance and respect for different cultures. She explained that culture transmits a

sense of hope and it keeps people going, even under adverse circumstances. Culture, therefore, is a strong instrument of political resistance.

Lisa Shoman, judge of the Supreme Court of Belize, talked about the search for efficient solutions to cultural problems in small states. She also highlighted the reality of cultural appropriation, from traditional fabric, music and art to cultural traditions. For Shoman, the challenges are: “How to safeguard? How to conserve? And yet, how to promote the culture and creative sectors?” The answers to these questions must absolutely comply with intellectual property rights. Shoman said that it was important that governments established and maintained communication and evaluation processes that promote democratic ideals and create conditions that allow small states to maintain their national identity while simultaneously achieving social and economic benefits. This, however, cannot happen without the cooperation of international partners acting within a framework of good faith and respect. Shoman also stressed the importance of protecting the environment and warned about the immediate impacts of climate change.

During an entertaining and insightful question and answer session, the panelists discussed whether cultural identity was at risk as a result of social media. Shoman noted that it is difficult to ensure the protection of cultural rights when everything has become easily available in the digital sphere, pointing out that the matter must be dealt with urgently so that cultural identity is not taken away from people without proper protection. At the same time, Shoman and Thebele noted that social media also can help to promote and grow cultural identity and awareness.

II. Panel 1: Small States — Crossing Cultures

The first panel explored how people from small states maintain their culture in the host state and what mechanisms they use to keep their culture alive. The panel also discussed how to adapt to other cultures while preserving one’s own culture.

Ellen Lekka, culture programme specialist at the United Nations Educational Scientific and Cultural Organization (UNESCO) Office for the Pacific States, highlighted the importance of intangible cultural heritage. Lekka explained that culture goes far beyond the tangible: it also includes oral traditions, festivals, dances, knowledge and practices, and often is concerned with the environment. This intangible cultural heritage creates a sense of belonging and identity. It can be traditional, but also contemporary, and is inclusive, representative and community-based. Lekka noted that the COVID-19 pandemic had reinforced how essential cultural participation and inclusion were to wellbeing in Pacific states. With the reduction in tourism, many small states have been hugely affected by the pandemic. The fact that people were exchanging goods instead of using money illustrated the importance of culture.

Calvin Hamilton, arbitrator, shared some of his personal experiences coming from a small state and living in other countries. Hamilton talked about the phases of living in another country. The first, according to him, is the honeymoon phase, when everything seems to work out and only good things stand out. In the second, reality comes to the surface, and with it, some challenges and difficulties that were not perceived before. The third is the negotiation phase, where one tries to find a balance between the bad and good things in the host state. The fourth phase involves settling in the other country. Finally, there is the phase of returning to the country of origin, where the person faces new

difficulties of re-adaptation. Hamilton said that getting help along the way is very important, and also stressed the importance of teaching other people a little bit about who you are and your culture.

Nicole Pierce, deputy director of ISMS, shared her personal experience in adapting to the host country culture but maintaining her identity through cultural activities. According to her, people adapt to the host country, but to some extent they also change the host country by bringing their own culture.

III. Panel 2: Intellectual Property and Culture

The second panel, moderated by **Spyros Maniatis**, director of BIICL, explored the interaction between culture and intellectual property, the protection of culture through intellectual property laws and the tension between protection of culture and the need for commercial exploitation of the heritage to encourage sustainable livelihood.

Charlotte Waelde, professor of intellectual property law, Centre for Dance Research, Coventry University, addressed whether intellectual property and marketing could help modernize communities to enable them to use their intangible heritage for a sustainable livelihood. She discussed a British Academy funded project that took place in India between 2018 and 2020 on Purulia Chhau Dance Community of West Bengal where Waelde worked alongside academic experts in intellectual property and marketing with Banglanatak, an Indian NGO, to develop a strategy to better support the community and prevent over-commercialization, misappropriation, commodification and decontextualization of their intangible heritage. The research team designed Heritage Sensitive Intellectual Property and Marketing Strategies (HIPAMS) to bring together intellectual property, heritage and marketing and worked around the intersection of the three disciplines, keeping the community at the centre of the process. Waelde highlighted suggestions made by the research team. One of the notable tools developed by the research team was a "root and fruit" tool that allowed the community to envisage their heritage roots and manifest themselves as fruits of their endeavours.

Waelde explained the struggles faced by the community and talked about the story of Masoumi Chaudary, a professional Chhau dancer, who, along with her group of dancers, were neither recognized nor credited for their performance in an Indian film which was inspired by her story. In response, the team developed an ethical code for the community rooted in UNESCO's ethical principles, general human rights norms and intellectual property, which required the filmmakers to credit the performers for their work in the film.

Dr Sharon Le Gall, senior lecturer at the University of the West Indies, discussed the intersection of cultural identity and intellectual property and how intellectual property law could be made more accommodating to collectively derive cultural expressions. She provided the historical background on the cultural property regime, which was solely focused on built heritage, and analysed the recent developments of the regime to include protection of intangible cultural expressions, especially from a Caribbean perspective. Although there are multiple conventions that protect tangible cultural properties, the Convention for the Safeguarding of the Intangible Cultural Heritage was only adopted in 2003. This transformation of the cultural property regime to include intangible cultural property protection resulted in an intersection between intellectual rights and the cultural heritage regime.

Le Gall highlighted measures taken by Caribbean states to expand copyright protection to include protection of traditional cultural expressions, providing more focus on identity and culture. In explaining how this has been incorporated in national legislation, she provided the example of Barbados' Copyrights Act of 1998, which provides protection for folklore. Over the past decade, many Caribbean states have developed more comprehensive regimes and actively participated in efforts by the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore for the development of draft treaty provisions for the protection of traditional cultural expressions. The goal of this committee is to ensure recognition of collective origin of traditional cultural expressions and to develop a structure to facilitate collective enforcement in protection of those rights beyond existing protections rights that focus on individual rights.

Le Gall discussed international measures to protect traditional cultural expressions that are traceable to a particular group, region or country and which are intergenerational, oral in nature and linked to the identity of the source groups or communities. These measures would ensure preservation of cultural diversity and prevent misappropriation of traditional cultural expressions, thereby protecting cultural identity. These measures would also encourage the right to be identified as the source of the traditional cultural expression, which would help communities obtain an equitable share of benefits from use of their traditional cultural expressions.

Purcell Saiki Sali, a legal services advisor at Massey University, discussed the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture and the model law that was adopted for protection of rights of traditional owners over traditional knowledge and expressions of culture. He noted that traditional knowledge is typically unwritten and expressed through stories, legends, folklore, rituals, songs or laws, passed down orally for generations, and requires protection beyond existing intellectual property laws, which afford protection only to known individuals and for a limited duration. He explained that traditional knowledge requires a higher level of protection and its disclosure could result in misappropriation. He provided instances of misappropriation of traditional designs and artforms by international brands, which use them without respecting their cultural values or what they represent.

The model law was adopted in the region to protect the rights of traditional owners over traditional knowledge and expressions of culture. It allows commercialization of knowledge with prior approval of the owners through an application to an identified cultural authority or through direct agreement with the traditional owners. It regulates non-customary use of traditional knowledge and expressions of culture by means of an authorized user agreement with the traditional owners. It also provides a non-exhaustive list of expressions of culture, to be modified by states that adopt it in order to include their indigenous communities.

Although it is a positive step, Sali explained that the model law does not extend to other aspects of traditional knowledge, such as knowledge conveyed due to biological reasons, and that it is challenging to enforce, at least in part because members of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore have struggled to agree on defining offences under the model law.

IV. Panel 3: Flow of Cultural Goods – Past and Present

The third panel, moderated by **Ian Sandford**, explored cultural goods. The discussions ranged from protection of intangible culture to prevention of illegal trafficking of tangible looted and orphan cultural artifacts.

Professor Rostam J Neuwirth of the faculty of law at the University of Macao discussed Macao's trade history century-old trade history and highlighted how Macao exercised a high degree of autonomy and enjoyed independent executive, legislative and judicial power despite being part of the People's Republic of China. Neuwirth noted Macao's participation in international organisations like the World Trade Organization (WTO), General Agreement on Tariffs and Trade (GATT) and UNESCO and its ability to reconcile east-west culture and trade.

Neuwirth described Macao as a creative city of gastronomy, collaborating with diverse associations and institutions to reassert the importance of a sustainable food culture, and thereby promoting the local gastronomic heritage. Macao had recently opened the longest sea bridge between Macao and China to demonstrate its intention to achieve "one country, two systems" by 2035. Neuwirth described Macao as an "oxymoron", having a hybrid legal system and considered a laboratory for a world experiment in terms of the future creative or experience economy. He concluded his discussion by referring to the importance of considering opposites as mutually enriching rather than mutually exclusive.

Michelle Q Zang, senior lecturer at Victoria University of Wellington, discussed indigenous interests under international trade policy, in particular the Māori community and the Treaty of Waitangi, which is considered the founding document of New Zealand. The Treaty of Waitangi, which was signed in 1840 between British officials and Māori chiefs, afforded rights and privileges to both the New Zealand government and the indigenous community of Māori.

The Waitangi Tribunal, established in 1975, had the authority to interpret the three articles in the Treaty of Waitangi in contemporary society and to assess violations of treaty obligations with regard to the interests and development of the indigenous peoples.

Zang focused on one particular claim before the Waitangi Tribunal, Inquiry WAI 262, which dealt with indigenous animals, plants, cultural and intellectual property. The inquiry was initiated against the backdrop of the WTO and proposed legislation on intellectual property and free trade, and addressed claims that the proposed legislation, and, in particular, provisions relating to natural resources, indigenous animals and plants, had been drafted without adequate consultation with the Māori community, and that the New Zealand government had therefore denied the Māori's "absolute authority" to control and make decisions relating to conservation, use and development of its resources, as provided in the Treaty. The main concern surrounded the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), wherein the minimum standard provided in TRIPS would prevent the New Zealand government from adequately recognising the Māori interests irrespective of tangible and intangible expression of Māori culture and traditions.

Zang discussed the Tribunal's decision, which reiterated the importance of identification and active protection of Māori interests when they are likely to be affected by international instruments. Effectively, the New Zealand government incorporated international practices within its regime with a view to protecting Māori interests.

Mariya Polner of the World Customs Organisation (WCO) addressed trafficking of looted and orphan cultural goods that are obtained illegally and laundered through the supply chain. She identified challenges in determining the origin of looted cultural goods and their authenticity, which require detailed expert inspections. She further explained difficulties in linking identified objects to a specific state because many looted objects originated from former empires, which raises the question of restitution.

Polner discussed issues concerning fake products, noting that the former Director General of Antiquities of Syria noted in 2016 that 70% of the objects seized at the Syria-Lebanon border were fakes. She explained that the lack of proper legislation governing the movement of cultural goods across borders and loopholes within import-export laws are exploited to transport cultural goods through third-party countries.

She explained difficulties faced in terms of inter-agency cooperation in handling of cultural goods and the degree of importance given to related offences in different countries, which significantly affects the resources dedicated to investigate and stop such illicit trafficking. She noted that trafficking had become entrepreneurial and that the offenders used loopholes and unstable situations to transport cultural goods outside the origin country.

Polner highlighted certain steps taken by WCO in response, including the development of a secure communication platform that enables communication between customs authorities and police across the world to flag suspicious shipments, helping to verify and ensure the authenticity of goods. The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 and bilateral treaties between countries also provide clarity on classifying looted objects and determine how such goods should be treated. Polner also noted that one of the three priorities identified by the G20 ministers of culture in Rome in 2021 is illicit trafficking and trade of cultural goods.

Michalis Gavrielides, head of the Office for Combating Illegal Possession and Trafficking of Antiquities in Cyprus, discussed the dangers surrounding trafficking offences on an international scale. Gavrielides explained that the international community became more sensitive after the Palmyra destruction, connecting it to terrorism, money laundering and organized crime, which led to efforts from international organisations to combat this crime.

Gavrielides noted that large-scale illegal trafficking in cultural goods is often linked to instability caused by war and conflicts. He explained the measures taken by Cyprus after a large part of its cultural heritage was destroyed in an invasion by Turkey. In response, Cyprus's Office for Combating Illegal Possession and Trafficking of Antiquities was established with the aim of protecting and preserving its cultural heritage, fighting against illicit trafficking of art and seeking the return and repatriation of antiquities taken from Cyprus. Cyprus has also implemented strict laws and undertaken measures at both the local and international level to combat trafficking. Cyprus established the National Commission of Combating Illicit Trafficking of Cultural Goods to enable the exchange of information about trafficking with intergovernmental organizations. He discussed international measures taken by Cyprus in response to illicit trafficking, which includes active membership in EU Carnet and initiatives to enter into bilateral treaties with other countries. He also commended the platform developed by the WCO to enable secure communication among customs authorities and police across the world.

V. Panel 4: Culture and the Environment

The fourth panel, moderated by **Dr Elke Selter**, Cultural Heritage Research Fellow at BIICL, discussed the intersection between environment and culture, in particular how cultural rights can be protected in the face of environmental changes.

Ron Vave, a native of Fiji and a PhD candidate in marine biology at the University of Hawaii, addressed the cultural practices of indigenous Fijians, and their social and ecological resilience. Vave discussed his research into the tradition of culturally protected water bodies in Fiji, specifically those formed after funerals take place. Under this tradition, an area of the reef is protected following the burial of a loved one to ensure that there is a higher catch of fish on the day of gathering, which generally takes place a hundred nights after the burial.

Vave noted that, because of limited knowledge available about culturally protected water bodies, there is a disharmony in the way international organizations such as the World Wide Fund for Nature (WWF) are calling for conservation in Fijian waters. Because such organizations are labeling large parts of the Fijian waters as conservation areas, the practice of culturally protected water bodies is being disrupted. As a result, when there is a memorial feast, the locals harvest fish from the conservation area, thus defeating its purpose. He noted that only the Wildlife Conservation Society has incorporated funeral-related culturally protected water bodies into their conservation plan.

Vave stressed the importance of conservation organizations and local governments incorporating knowledge of local communities into contemporary conservation approaches. He also stressed that locals should value their traditional knowledge and use it alongside modern approaches.

Muhammad Juma, a native of Zanzibar, and head of the Africa Unit at the World Heritage Centre, UNESCO, discussed natural heritage protection in Zanzibar. He explained that the key challenge faced when linking culture and nature together is the bias against traditional management systems. He noted that Africa was trying to correct this bias, having realized that culture and nature are two sides of the same coin.

He spoke about the different perspectives in Zanzibar towards culture and nature. He noted that Swahili culture is a fusion and cannot be defined as one person's identity but is instead made up of various cultural identities (e.g., Indian food, Arab clothing, African languages) brought to the forefront a long time ago and has been widely accepted. However, the same has not happened with traditional knowledge concerning the preservation of nature, which has created a divide between protecting culture and protecting nature.

Juma focused on challenges regarding organization, deforestation, and climate change. He proposed documenting the knowledge of indigenous communities about how to mitigate environmental problems on small islands. He emphasized the need to overcome a bias of seeing nature and culture as separate, but caveated his proposal by stating that in some areas of the world, traditional management systems are ideal as there are uninhabited areas that can easily be cordoned off for protection. The same not being true for small island states, it is all the more important to take the views and knowledge of locals into account.

Looking to the future, Juma urged better recognition of the value of the knowledge that local communities have, and better understanding of how that knowledge could be incorporated into future conservation policies.

Caroline Mair-Toby, native of Trinidad and Tobago and partner at Mair, addressed the topic of climate change and cultural resilience and spoke about her experience at COP26. Mair-Toby explained the importance of paying attention to the knowledge of local communities, describing how the Merikins community used natural resources to build homes, make food, and provide medicine. The Garifuna community likewise enjoyed the same harmony with coral reefs, only taking what was needed from the waters. Their knowledge was so vast that they knew which fish were available in which seasons, and which direction the wind would blow based on the presence of dolphins.

Mair-Toby discussed legal developments with regard to indigenous peoples, including the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP). She stressed that climate change was causing extreme injuries to and tragedies for local communities, as clean water, food and shelter were becoming increasingly difficult to source, while waterborne diseases and fires were becoming more common. Mair-Toby said that COP26 had not been a success for small island states and indigenous people, as none of these issues were given the necessary attention. She emphasized the need to confront the silencing of indigenous identity and history, as well as the need to pay heed to local attributes and tradition.

VI. Panel 5: Dispute Resolution – Art and Artefacts

The fifth panel, moderated by **Dr Petra Butler**, director of ISMS and acting dean of the faculty of law at Victoria University of Wellington, discussed how art and cultural heritage disputes not only involve complex legal issues, but also sensitive elements of an emotional, ethical, historical, moral, or political nature.

Dr Anne-Marie Carstens, assistant professor of law and director of lawyering at the University of Maryland Francis King Carey School of Law, discussed the Pandora Papers and illicit looting of antiquities. She gave the example of the 2010 dispute concerning the Koh Ker statues, which raised the issue of whether the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property had been triggered. The issue under the Convention was whether artefacts had been taken prior to 1970 when the Convention was implemented, or after. It was proven that the Koh Ker statues were wrongfully taken, and they were returned to Cambodia.

Carstens also discussed the case of Douglas Latchford, who was revealed in the Pandora Papers to have been involved with the Koh Ker statues and other Cambodian artefacts. After he died, his daughter returned all of the artefacts that came into her possession. Carstens asked whether museums that were in possession of artefacts would react similarly. Although some museums have argued that the artefacts in their collections are from before 1970, and therefore outside the scope of the Convention, many have started to return them. Carstens stressed that these are not to be understood as isolated events, but instead as a changing approach to the illicit trafficking of artefacts.

She also discussed the 'line in the sand' argument with regard to artefacts looted during armed conflicts, as the principle against looting during such times was codified in 1899-1900. However, she

explained that the argument was more nuanced because there was ambiguity as to what constitutes art, and what constitutes an armed conflict. Carstens illustrated this point with the example of the Benin bronzes, which were collected by British soldiers and auctioned off in Benin. The question remains as to whether they were wrongfully taken and whether they should be returned.

Dr Evelien Campfens, a researcher at Leiden University and a lawyer specializing in international cultural heritage law, the illicit trade in cultural objects and issues concerning looted art, discussed the legal texts that exist with regard to colonial era disputes, e.g., the Benin bronzes, El Bosco paintings, the Parthenon Marbles, and the Bangwa Queen.

Campfens started with Hugo Grotius' declaration in 1625 that monuments and artefacts should not be looted. Thereafter, in the early 19th century, the Congress of Vienna stated that restitution of dispersed cultural heritage was a principle of justice, and the 1907 Hague Regulations stated that the seizure or destruction of works of art was forbidden and should be made the subject of legal proceedings. More recently, in 1973, the UN General Assembly's resolution on return or restitution of cultural property to its country of origin urged the return of cultural property that is of fundamental spiritual, historical, and cultural value.

Campfens explained that UNDRIP is an important instrument for colonial takings as it sets out specific obligations with regard to lost cultural objects. Illustrating this, she mentioned how UNDRIP was used in the "Quimbaya Treasure" case to establish that indigenous people are entitled to their lost cultural objects under customary international law. She noted that instruments such as UNDRIP focus on heritage interests and identity values, and define rights in terms of access, control and return. She posited that a human rights approach to historical claims could help inform cultural heritage, as injustice of the past calls for justice today.

David Bowker, chair of Wilmer Hale's international litigation practice, spoke about how disputes involving arts and antiquities can be productively, fairly and justly resolved. He iterated how the most difficult cases to handle are those that arise in and around armed conflict, e.g., disputes arising out of World War I, World War II, and the Russian Revolution. In resolving these disputes, he emphasized the need for a consistent framework to be applied, and for everyone involved to be as transparent as possible in order to bring stakeholders together to have a common understanding of the facts.

He clearly stated that a strict application of the rule of law is insufficient to adequately address what is fundamentally a much more complex set of problems involving historical and cultural issues. Bowker stated that where the facts are undisputed, the case is generally straightforward to resolve, but where the facts are disputed, it becomes exponentially more challenging. As a corollary to this, Bowker mentioned that a full and fair investigation can really help put a case on the path to resolution, and that it is important to consider the circumstances in which art is created as that may have an impact on who has the right to a certain piece. Illustrating this, he referenced the extremely complicated history of the Benin bronzes, involving child labor and slaves being traded for raw material.

Bowker further agreed with the other panelists that cultural heritage is an important part of humanity, is tied up in our identities, and has timeless importance. He stated that as art disputes are here to stay, it is important to realize the most efficient and effective ways to address them.

After all of the presentations had concluded, several questions were raised by the panelists themselves: to whom should an object be returned if ownership was disputed before an armed conflict? Which state should make the decision as to whom the property belongs to? Which state should make the decision of whether the property should be returned at all? Views were espoused but the panelists generally agreed that there were no black-and-white answers. Following that, there was a brief discussion on which dispute resolution method was the most effective for such cases. Bowker stated that arbitration had become the norm for many large institutions attempting to deal with the Nazi era and armed conflict situations, and Carstens noted that arbitration was preferred because of its speed, which prevented disputes from becoming too emotionally draining. On the other hand, Campfens stated that alternative dispute resolution had proved to be relatively unsuccessful in colonial cases, due to the lack of equal bargaining power between small colonial governments and big states. As an overarching comment to conclude the panel discussion, the point was raised that art disputes not only seek restitution, but also recognition of the stories and history of the artefacts.