



**British Institute of
International and
Comparative Law**

Small States, International Law and the Realisation of Rights

Summary

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“Space- the final frontier. These are the voyages of the Small State Conference. It’s continuing mission: to explore strange new worlds, to seek out new life and new civilisations to boldly go where no one has gone before” -Katarina Adam-

Keynote: Size Matters: States and International Law in a Fractured and Uncertain World

Speaker: Dr Anne Gallagher

Chair: Dr Jean-Pierre Gauci

Dr Gallagher set the scene for the conference, referring to Small States and International Law and focusing on power, status and influence, in light of what she termed a ‘Crisis of Multilateralism’. She stressed that a rules-based legal order is favourable in that it provides a barricade to naked power. Only such an order would better protect small states and their interests. Drawing on the examples of the Universal Declaration of Human Rights, the UN Human Rights Charters and stemming from those the development of the international bill of rights, and latest the International Criminal Court, she argued that the multilateral successes of the ‘golden era’ of international law, would be most likely impossible to replicate in today’s political climate. She also highlighted the importance of states working together to achieve a goal. She made reference to the Montreal Protocol, which was the first international agreement to achieve universal ratification. This, Dr Gallagher, argued was an important example of states working together to regulate the substances that deplete the ozone layer, a matter of increased relevance today. The discussion that followed questioned whether the world is really facing a crisis of multilateralism or indeed whether there has simply been a shift of focus to other matters (such as investment and trade) away from the international system’s attention to human rights and humanitarian concerns. Dr Gallagher agreed with this.

Dr Gallagher also flagged the nostalgic trap in which humanity often falls. ‘Is it really so terrible now?’ It is easy to idealise the past, but this may have adverse effects and could be weaponised. Indeed the reference to the past is often used in political and public discourse to

justify forms of withdrawal from the international rule based legal order. Moreover, that nostalgia is often of a specific version of history in which the role played by Small States is often underplayed. As Dr Gallagher noted, Eleanor Roosevelt is often credited with gender equality in the language of the Universal Declaration of Human Rights, whereby the vital role Small States played in the conceptualising of the Universal Declaration is less well known . However, on the international plane, there is a mixed record of Small State participation.

The reasons behind Small States having less influence over International Law is traced to their size-related vulnerability, which limits their capacity to make contribution and thus drive change. However, in some instances, Small States may make a difference which is disproportionate to their size, addressing the imbalances of power, by directing attention and resources where needed the most. Dr Gallagher noted the existence of mechanisms to support Small States and how these are now facing their own challenges. In particular, she called on the audience to think of ways of safeguarding and strengthening the Small States office in Geneva and possibly extending that also to New York as a very practical way to support Small States engagement with the international system.

Dr Gallagher concluded that accidents of geography and history determine who is vocal and who is heard at the international level. Thus, she called for a better rules-based order, that is carefully calibrated to take into account Small States and their interests.

Panel 1: How Small States Influence Global Decision-Making

Chair: Dr Radhika Kumar

Speakers:

Dr David Capie *Small States and Disarmament Negotiations*

Milton Paiva *Cape Verde: Small Cape, Great Escape*

The first panel introduced how small states influence decision-making on the international scene. Dr Capie, spoke about how Small States influence negotiations using the example of disarmament. Even though traditionally, ‘great powers’ are thought to be dominant in decision-making, and specifically in the disarmament negotiations, Small States have made significant influential contributions in shaping International Law. ‘Money power’, where the ‘weak suffer what they must’ has changed over the past 20 years, as small states shaped the agenda against weapons of mass destruction, contributing to the development of the ideas of (human) security and humanitarian disarmament. The challenges faced by the small states contribute to their vulnerability in a Global level. Due to limited human resources there is little presence in foreign ministries and at UN missions. Different priorities in domestic agendas, lack of resources, and lack of military forces, may impede their engagement with and contribution to important decision-making. Finally, even if an agreement has been made, it could impose compliance

costs and reporting obligations, which can be a deterrent factor for Small States. Dr Capie concluded that even though it is challenging to initiate and implement new disarmament norms, Small States have been able to shape negotiations.

Milton Paiva in his presentation focused on the small island-state of Cape Verde, and its influence on International Law. With a population of 600.000, since its independence, Cape Verde has come a long way: from not even being included in the world map, to becoming a model country in Africa. Milton Paiva endorsed Tom Long's approach, according to which, three ways in which Small States exercise power—namely, 'particular-intrinsic power', 'derivative power', and 'collective power'. In Cape Verde's case, private investment is attracted, and satisfies the intrinsic power element. Further, the strategic Euro-Atlantic Security Alliance with the US, frames the derivative power element. Cape Verde also demonstrates collective power through the Free Mobility agreement in the CPLP. Milton Paiva concluded that Cape Verde has advanced significantly, not only within its borders with flourishing in tourism and other sectors, but also in advancing its influence in West Africa, as well on the international scene.

Panel 2: Not a single basket: Comparative Assessment of small states' approaches to international law.

Chair: Dr Nicole Pierce

Speakers:

Daniel Stewart *The Capacity Game – When to Decide to Carry the Torch*

Alisson Nortjé *Small States and International Law*

This panel discussed, drawing on various examples, a comparative assessment of Small States' approaches to International law.

The first speaker, Daniel Stewart, made a chronological overview of the contribution, or lack of contribution of Small States in the development of International Law. He began by giving examples from past practices. Given the lack of resources, there has been an absence of Small States' voice in International Law formation. In the past, in numerous occasions, the International Community has failed to treat the concerns of Small and Developing States. However, this lack of engagement can only be a detriment to the development of International Law. The speaker then focused on the present, where Small and Developing States are now more actively engaged with International Law. Daniel Stewart argued that in a highly complicated international scene of obligations, Small States' obligations are in competition with the domestic priorities.

The second speaker, Allison Nortjé, shared her experiences as a former Diplomat and Member of the Foreign Service of the Commonwealth of Bahamas. With the number of Small States comprising the majority of Member States of the United Nations (small states defined in accordance to their membership in the Forum of Small States (FOSS) and its population

criterion), she remarked: ‘Nothing for us without us.’ In spite of their vulnerability, through their active participation in the United Nations and representation in other instruments, Small States have proven that they can have influence on an international level, disproportionate to their size. For instance, CARICOM was instrumental in bringing attention to the issue of non-communicable diseases in the United Nations General Assembly, as it was an issue that was at the centre of discussions on a domestic level and regional level in the Caribbean. Even though it was at first instance disregarded, it was later brought as an issue in the agenda before the United Nations. However, she drew attention to the fact that domestic priorities and lack of resources may impede the application and monitoring of treaties on a national level. This shows that due to *force majeure*, some Small States are not able to meet their international obligations, even though they have all good intention to uphold them.

The conversation built on some of the challenges identified in the previous panel in highlighting how shifting domestic priorities, financial limitations, capacity constraints and other challenges, will impact the ability of States to interact with the international system.

Panel 3: The role of civil society

Chair: Irene Antonopoulos

Speakers:

Dr Nared Prasad *International Labour Standards in small states*

Julian Aguon *Law as an Activism Tool* (Skype broadcast)

This panel discussed how the civil society has engaged in smaller states having a bigger voice.

Dr Prasad provided an insight as to how Small States interact with the ILO Conventions and mechanisms. He argued that even though Small States may be vulnerable, they have developed creative strategies to meet their obligations, with an ‘entrepreneurial’ spirit. States ratify ILO Conventions, even though it is a difficult task to implement and monitor. This can be traced to two theories. First, the ‘rational institutionalism’, which calls to improve labour standards in the country, reducing the risk of suffering competitive disadvantage in the world markets and preventing a “race to the bottom” among trade rivals; and second, the ‘sociological institutionalism’ which calls for conforming particular norm of the appropriate behaviour and be part of the peer groups.

Dr Prasad made some observations 2019 Kucera & Sari report. Small States have strong performance in respecting labour rights, which suggests greater concern for adhering to social norms. By typically relying on cooperation and alignment with larger States, to compensate for their smallness, they emphasise the importance of having a place in the international community. Dr Prasad concluded that small island-states tend to perform better, especially in the Pacific/Indian Ocean and in the Caribbean regions.

The second speaker, Julian Aguon showcased his public interest experience and work in Guam. He firmly believes that Small Island-States are punching above their weight in the global advocacy arena. This is demonstrated by their performance in trying to advance their

rights, by having a crucial role in the nuclear disarmament negotiations and treaties, as well as climate change and environmental law, which will have an adverse effect on the Small Island-States of the Pacific. He discussed the case of the Marshall Islands and their fight for their rights regarding the nuclear legacy left on the Islands and the harm the medical experiments conducted on the Marshallese by US and international pharmaceutical companies.

Panel 4: The Emergence of a new small state

Chair: Dr-ing. Katarina Adam

Speakers:

Noor Kadhim *Microstates in International Law*

Dr Lauren Young *New Democratic Models and Small States*

This panel discussed the emergence of a new small state, from their recognition in International Law, to new models of governance, within the new and other states.

Noor Kadhim discussed the concept of Microstates. Microstates are currently not recognised by states. Firstly, there was reference to Liberland, which is to date is not a recognised state, and is under the administration of Croatia. Liberland is supposed to be powered by blockchain and takes territorial form in a strip of land in the Danube. Ms Kadhim suggested that independent from recognition, microstates may rely on the declaratory theory to assert their existence. However, she noted that this is not satisfactory as far as the international community is concerned. She referred to the four criteria that define a State, according to the Montevideo Convention: permanent population, defined borders, effective governance, and independence. Regarding these criteria, reference of comparison was made to the paradigms of Somaliland, Kurdistan, as well as Palestine.

Dr Young, from the US perspective, concentrated her presentation on how threats to democracy and democratic erosion in the form of populism and the abuse of power in the electoral system. She suggested that new state models could defend democratic institutions and that technology, including artificial intelligence, could be used to further strengthen nations and democratic processes. This said, it must always be heavily regulated and monitored to ensure that it does not become a tool that exacerbates the problems. These are concerns that apply to Small and Large States in equal measure.

The day was wrapped by Robert Volterra who identified some of the issues noted above and highlighted, amongst others, the need for Small States to not only realise their rights in international law but also fulfil the obligations to which they sign up. He noted that economic and other challenges as well as capacity are critical barriers in this regard.

Day 2

Keynote: Strategy of Dispute Resolution of Small States

Speaker: Justice Ambeng Kandakasi

Chair: Dharshini Prasad

Justice Kandakasi examined the issue of global warming and proposed a new regional tribunal for the Pacific Island countries to address potential disputes arising from climate change. Starting from an overview of issues that arise with climate change he highlighted that it is a given that global warming is not science fiction. Climate change can no longer be something that can be dismissed as such. He focused in on small states, and specifically the Pacific states, which are mostly affected by the issue in the present moment, as 7 out of 10 island states that are anticipated to sink are located in the Pacific. He also stressed that even though Pacific islands will be the first to be hit by the effects of climate change, this will also have adverse effects in the rest of the world.

Secondly, Justice Kadakasi explored the critical barriers in addressing climate change. Little is being done and efforts are fragmented that result in limited effects. Further, there is weak and stiffness in the coordination from donor institutions, which minimise the impact. Finally, due to the lack of strong leadership, monitoring, and plans and budgeting to structurally address the issue, there is an overall absence of meaningful impact.

To address these issues, Justice Kadakasi made several recommendations. He proposed a Pacific Regional Strategic Plan (PRSP), in order to make a more local and concentrated effort. He proposed that the effort should have a system of identifying issues and developing a monitoring and evaluation of the 'strategic plan'. Within the same system, he suggested a dispute identification, management and resolution system (DIMRS), to oversee potential issues that arise. Last, but not least, he submitted that there should be a Pacific Regional Environment Arbitration Court (PREAC) operating within the DIMRS. This would enable states to have a harmonised and centralised system that has expert arbitrators and judges, on environmental issues. This Court would have jurisdiction over regional environmental and climate change issues. Potentially, there could also be mediation for climate change-related disputes. This would prompt creative solutions on common grounds, without the element of adjudication.

The keynote concluded that in the face of the real threat of climate change, all of us must act. Justice Kandakasi called for a system that involves identifying risks and monitoring decisions. He also advanced his idea about a regional Pacific regional arbitration court that has concentrated power on potential climate change/ environment disputes that could arise in the region.

Panel 1: The Strategy of Dispute Resolution for Small States

Chair: Brandon Malone

Speakers:

Dr Maja Menard *Evolution of a Young Small State's Dispute Settlement Strategy: Example of Slovenia*

Daphne Hong *The Strategy of Dispute Resolution for Small States: Singapore*

Julian Aguon *Which is the Best Dispute Resolution Strategy When?*

Slovenia, is a relatively young nation, gaining independence from Yugoslavia in 1991. It was admitted in the UN in 1994 and ratified the ECHR in 2004, with its entry in the European Union. It has been 28 years since its independence, yet Slovenia has been engaging in dispute settlement proceedings before a number of international fora. With a total of 1,400 cases before the European Court of Human Rights, even though most were 'thrown out', the State of Slovenia has been subject to three pilot cases, giving guidance on how to adjudicate on a domestic level a number of cases with similar facts. There have also been interstate cases, mostly against Croatia. Although there is no formal strategy on dispute resolution, Slovenia is progressing in gaining expertise and experience.

Daphne Hong contrasted the Slovenian experience with that of Singapore. Similarly, to Slovenia, Singapore is a young nation, 54 years old, since its independence from the Federation of Malaya. Singapore has no natural resources; even water and 95% of the food are imported. Even though Singapore has resources, there is a vulnerability in International Law. Investing in individuals and their capacity in International Law is critical in order to ensure that Small States have the expertise to handle dispute resolution. Most expertise is built through experience in cases before the WTO and other instruments. WTO cases were in particular good to provide dispute resolution experience in since they often concerned a systemic issues that needs to be resolved but were not high in economic value. Daphne Hong also noted a number of ways in which the legal adviser's office sought to build capacity including by sending representatives for secondments with law firms working on international law issues and engaging in cases as intervenors to build experience.

Some dispute settlements are supported by third parties, while also external help is being sought in order to have quality control. One impressive feature of the Singapore in-house lawyers is that there is centralisation. All international law questions are channelled through the same office. This allows for coherence and to make best used of the limited expertise and experience. Further, she explained that as a matter of culture, it is a matter of honour to uphold international obligations. Singapore also seeks to prevent legal disputes from arising, for instance through drafting clearer treaties; while also, in the future, they are interested in exploring mediation and conciliation.

Julian Aguon made a contribution to the discussion, by explaining the use of dispute resolution in Guam. Among these territories, Guam is in the midst of a 'constitutional crisis waiting to be resolved'. The US Federal Courts, with the jurisdiction over Guam, have recently struck down numerous cases on self-determination. In the recent case of *Davis v Guam*, the US Ninth Circuit Court of Appeals, dismissed the claim of for self-determination under the 15th Amendment of the US Constitution. Julian Aguon however insisted that the use of the law, and legal processes, is a critical way to continue to safeguard Guam's place in the world and work towards greater autonomy and independence. He also emphasised that the law, however was only one route that could be utilised to

Panel 2: Dispute Resolution Funding Models

Chair: Sir Franklin Berman KCMG QC

Speakers:

Martin Polaine *Existing Institutional Funding Models For Small States*

Manuel Gómez *Small but Meaningful: Exploring the Potential of Crowd-Litigation-Funding (CLF) for Disputes Involving Small States*

Francis Greenway *A small States Disputes Resolution Fund?*

Martin Polaine examined the different existing institutional funding models for litigation by Small States, and whether they are adequate. Currently, there are three models of funding. Namely, through institutional trust fund; NGO assistance; and third-party funding. Given that the ICJ costs are high, to ensure there is access to the court, a trust fund was created, which could finance any state that wished to benefit from it, not limited in principle to the LEDCs. This is financed by voluntary contributions from States and others, which are not regular and which has resulted in significant limitations to the potential of that fund. An expert panel evaluates anticipated expenses and budget. The PCA has a similar assistance fund. The ITLOS has a trust fund in the same manner but gives preference to the LEDCs. The WTO dispute settlement scheme differs from the other system as it is funded by the WTO itself. NGO sometimes support States in bringing forward their claims when these share a directly interest with the NGO. Finally, third party funding – which rarely takes place, is problematic, as there are different sets of difficulties. Apart from the inherent fund-raising difficulties, funds are not being used, as States often acknowledge how limited the resources are.

The second speaker, Dr Gómez explored how crowd-funding can be used in a dispute involving states. Because lack of funding is a significant challenge faced by Small States. Small States may face other, more resourceful States or corporations that consult with the best lawyers and experts in the field, in preparation for the case. This puts the Small State in a vulnerable position. However, states may get creative, when they are raising funds. One possible solution proposed by Dr Gómez, is the crowd litigation-funding (CLF), from third-parties. This is a form of third-party finance in which the backer is not a single entity, but rather a large number of people each donating a small amount of money. Similarly to large internet campaigns, through different platforms, society is able to help, by providing funds. Because the people funding this will not have an interest in the case, this method is attractive, compared to traditional third-party funding, as the case may take a turn, if there is an interest in it.

The third speaker, Francis Greenway, argued whether a bespoke Small States dispute resolution fund would be feasible. He remarked that dispute settlement is a key building block in the maintenance of global peace, security and prosperity, yet many States that are less economically developed are challenged having equal access to justice. Given that dispute resolution is timely and costly, while experts are needed to make a concrete case, it is almost impossible for LEDCs to pull all funding in a dispute settlement, and thus, no equal opportunities will arise. Presently, there are restraints in the use of funds, as discussed by the previous speakers. Acknowledging some of the practical challenges in the implementation of such schemes, the speaker suggested the setting up of a Small States Dispute Resolution fund sought to answer some of the questions as to who establishes it? How it is funded? Which cases and parties qualify for funding? Noting the practical challenges of such a proposal, Francis

Greenway noted that given the problems with existing sources of funding, something must be done in order to ensure fair access to justice for Small States.

Panel 3: Climate Change Economics

Chair: Amanda Lee

Speakers:

Steven Finizio *The Problem of Choice – Which Dispute Resolution Regime for Climate Change Issues?*

Andre Maclay *Damages Calculation of Environmental Degradation*

Dr-ing. Katarina Goldman

Mathias Goldmann *Damages Calculation of Environmental Degradation*

Simon Milnes *Human Rights and Climate Change*

The final panel surrounded its discussion on an up-to-date issue in International law, Climate Change issues in a blockchain era.

The first speaker, Steven Finizio, discussed which is the suitable dispute resolution regime for climate change disputes. Finizio noted that that states often fail to identify the correct forum to raise such claim. Further, issues, especially with the jurisdiction and consent may arise when states want to advance a domestic case. Different instruments have dealt with environmental issues in the international, regional and domestic scene. Such issues may also appear in litigation of investment treaties, but generally raised as a defence. Two cases were given as an example – *Burlington v Ecuador* and *Perenco v Ecuador*. The challenge with dispute resolution is to have an enforceable award. When the environment is involved, there has to be a commercial element to it. Finizio recommended that new mechanisms could possibly be created, especially in State cases are brought against non-state parties.

Andrew Maclay focused on the quantification of damages in investment or commercial cases. He started by presenting what is the general principle of quantifying damages; ‘the value of what would have happened ‘but for’ the intervening event, minus the value of what has actually happened’. The claimant has to bring evidence to prove the causation. Maclay then focused on how this can apply to environmental issues. In quantifying the claim Maclay identified five key issues. Firstly, the causation, and the standard of certainty, attribution may be very hard to achieve, as there might be many parties at fault or little evidence. Secondly, there are appointment of damages to different causes. Thirdly, there is the valuing of the loss of human life/ or life-threatening disease, which are difficult to express in numbers. Fourthly, stigma claims are also difficult to value. Finally, liability attaching to issues before they were known about is another issue. Some cases were brought up in order to illustrate the arguments on environmental damage and climate change.

Mattias Goldman and Katarina Adam, made a presentation on what blockchains are, and to what extent they are a valuable means of collecting data and evidence on the environmental claims, efficiently and securely. It has been 13 years since the introduction of the first blockchain currency – Bitcoin. Through blockchain technology, Goldman and Adam note that gathering evidence of environmental catastrophes or damages, may be less costly, safer and more secure than traditional methods, which can be tampered with. Given that blockchains are difficult (impossible) to hack, they provide a sense of security in that manner. The conclusions of the speakers stress that the process must be transparent. In order to trust a technological feature, the user has to be educated on it, and break down its processes to sub-processes. Both panellists support that blockchain is the need for transparency.

Finally, Simon Milnes discussed the importance of environmental jurisprudence, as part of the bigger picture, the fight against climate change. There has been a plethora of inter-state claims on environmental issues, in multiple jurisdictions, such as the ICCPR, the African Convention, the ECHR and the Inter-American system. Milnes discussed about the ecosystem integrity as a ‘Grundnorm’ in international law, and as a human right to a clean environment.

Petra Butler concluded the conference by summarising that Small States are smart. They know the value of a fair society as evidenced by complying with ILO Conventions. Small States have jurisdictional resourcefulness and are using successfully the argument of vulnerability.

Small States are resourceful. From within their communities come the ideas to have a Pacific Island countries regional arbitration court concerned with regional climate change and environmental matters or to instigate a bespoke Small States (investment) disputes fund.

Small States are powerful. They have shown their power by giving the global community Paris 1,5 degrees .

However, Small States also have to be patient, have to be themselves, invest in their people, look for partners to further their cause, and unite to benefit from an international legal order that supports them- but Small States are smart...