

SMALL STATES CONFERENCE 2019

Small States, International Law and the Realisation of Rights

Space – the final frontier. These are the voyages of the Small States Conference. It's a 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

DAY ONE

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

Chair: Dr Jean-Pierre Gauci

Speaker: Dr Anne Gallagher

Dr Anne 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 protect small states and their interests. Drawing on the examples of the Universal Declaration of Human Rights and other major human rights treaties, and most recently 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. Dr Gallagher also highlighted the importance of states working together to achieve a goal, and 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) and away from human rights and humanitarian concerns. Dr Gallagher agreed with this.

Dr Gallagher also flagged the nostalgic trap into which humanity often falls: 'is it really so terrible now'? It is easy to idealise the past, but this may have adverse effects and can be weaponised. Indeed, 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 downplayed. As Dr Gallagher noted, Eleanor Roosevelt is often credited with gender equality in the language of the Universal Declaration of Human Rights, whereas the vital role small states played in conceptualising 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 can be traced to their size-related vulnerability, which limits their capacity to make contributions and thus drive change. However, in some instances, small states may have an impact which is disproportionate to their size, addressing the imbalances of power by directing attention and resources where they are needed the most. Dr Gallagher noted the existence of mechanisms to support small states and how these mechanisms 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 the engagement of small states 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 more rules-based order, that is carefully calibrated to take into account small states and their interests.

II. 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 David 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 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 twenty years, as small states have shaped the agenda of the fight against weapons of mass destruction, contributing to the development of the ideas of (human) security and humanitarian disarmament. The challenges faced by small states contribute to their vulnerability at a global level. Due to limited human resources, small states tend to have little presence in foreign ministries and at United Nations (UN) missions. Different priorities in domestic agendas, a lack of resources and a lack of military force may impede small states' engagement with and contribution to important decision-making. Finally, even if an agreement has been made, it may 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.

In his presentation, **Milton Paiva** focused on the small island state of Cape Verde, and its influence on international law. With a population of 600,000, Cape Verde has come a long way since its independence, from not even being included on the world map to becoming a model country in Africa. Mr Paiva endorsed Tom Long's approach which conceptualises three ways in which small states exercise power, namely 'particular-intrinsic power', 'derivative power', and 'collective power'. In Cape Verde's case, it attracts much private investment and satisfies the intrinsic power element. Further, its strategic security alliance with the United States frames the derivative power element. Cape Verde also demonstrates collective power through the Free Mobility Agreement signed by member states of the Community of Portuguese Language Countries (CPLP). Mr Paiva concluded that Cape Verde has advanced significantly, not only within its borders by flourishing in tourism and other sectors, but also in advancing its influence in West Africa, as well on the international scene.

III. 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*

Drawing on various examples, this panel provided a comparative assessment of small states' approaches to international law.

The first speaker, **Daniel Stewart**, gave a chronological overview of the contribution (or lack thereof) of small states to the development of international law. He began by giving examples from past practices. Given their lack of resources, there has been an absence of the voices of small states in the formation of international law. In the past, on numerous occasions, the international community has failed to acknowledge and respond to the concerns of small and developing states. However, this lack of engagement can only be a detriment to the development of international law. Mr Stewart then focused on the present, noting that small and developing states are now more actively engaged with international law. He argued that in a highly complicated scene of international obligations, small states' obligations are in competition with their 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 small states comprising the majority of member states of the UN (where small states are defined in accordance with their membership in the Forum of Small States (FOSS) and its population criterion), she remarked: 'nothing for us without us.' In spite of the vulnerability of small states, through their active participation in the UN and representation in other instruments, small states have proven that they can have influence at an international level that is disproportionate to their size. For instance, the Caribbean Community (CARICOM) was instrumental in bringing attention to the issue of non-communicable diseases in the UN General Assembly, as it was an issue that was at the centre of discussions on a domestic and regional level in the Caribbean. Even though the issue was disregarded at first instance, it was later brought before the UN as an agenda issue. However, Ms Nortjé drew attention to the fact that domestic priorities and a 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 unable to meet their international obligations, no matter how good their intentions to uphold these obligations may be.

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

IV. Panel 3: The Role of Civil Society

Chair: Irene Antonopoulos

Speakers: Dr Naren Prasad – *International Labour Standards in Small States*
Julian Aguon – *Law as an Activism Tool* (Skype broadcast)

This panel discussed how civil society has assisted smaller states to have a bigger voice. **Dr Naren Prasad** provided an insight as to how small states interact with the International Labor Organization (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 these conventions. This can be traced to two theories. First, 'rational institutionalism', which calls to improve labour standards in a country, reducing the risk of suffering competitive disadvantage in the world markets

and preventing a “race to the bottom” among trade rivals; and second, ‘sociological institutionalism’, which calls for conforming to particular norms of appropriate behaviour and being part of peer groups.

Dr Prasad made some further observations. 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 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 caused by the medical experiments conducted on the Marshallese by American and international pharmaceutical companies.

V. 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 under international law to new models of governance within the new and other states.

Noor Kadhim discussed the concept of microstates that 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 claims to be powered by blockchain and takes territorial form in a strip of land on the Danube. Ms Kadhim suggested that independent from recognition, unrecognised 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. Using these criteria, comparison was made to the paradigms of Somaliland, Kurdistan and Palestine.

Dr Lauren Young, from the United States perspective, concentrated her presentation on 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, technology 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 the need for small states to not only realise their rights under international law but also to 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 TWO

I. Keynote: Strategy of Dispute Resolution of Small States

Chair: Dharshini Prasad

Speaker: Justice Ambeng Kandakasi

Justice Ambeng Kandakasi examined the issue of global warming and proposed a new regional tribunal for Pacific Island countries to address potential disputes arising from climate change. Starting with an overview of issues that arise from climate change, he highlighted that it is a given that global warming is not science fiction and climate change is no longer something that can be dismissed as such. He focused in on small states, and specifically Pacific Island states, which are most affected by the issue in the present moment, as seven out of ten 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 feel the effects of climate change, these adverse effects will be felt in the rest of the world.

Secondly, Justice Kandakasi explored the critical barriers to addressing climate change. Little is being done and efforts are fragmented, which results in them having limited effect. Further, there is weakness and stiffness in coordination from donor institutions, which minimises 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 Kandakasi made several recommendations. He proposed a Pacific Regional Strategic Plan (PRSP), to make a more local and concentrated effort, which should have a system of identifying issues and monitoring and evaluating 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 an 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 proposal for the PREAC, as a judicial body with concentrated power on potential climate change/ environment disputes that could arise in the region.

II. 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?*

Dr Maja Menard started the first panel discussion with an overview of Slovenia’s dispute settlement strategy. Slovenia is a relatively young nation, having gained independence from Yugoslavia in 1991. It was admitted in the UN in 1992, ratified the European Convention of Human Rights (ECHR) in 1994, and became a member of the European Union in 2004. In the 28 years since its independence, Slovenia has engaged 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 of these 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 several 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, with only 54 years passing since its independence from the Federation of Malaya. Singapore has no natural resources; water and 95% of its food are imported. Even though Singapore has other resources, it is vulnerable 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 World Trade Organization (WTO) and other institutions. WTO cases in particular provide good dispute resolution experience, since they often concern systemic issues that need to be resolved but are not high in economic value.

Ms Hong also noted a number of ways in which the Singapore Attorney-General’s office sought to build capacity, including by sending representatives for secondments to law firms working on international law issues and engaging in cases as intervenors to build experience. Some dispute settlements are supported by third parties, and external help is also sought to assure quality control. One impressive feature of Singapore in-house lawyers is that there is centralisation. All international law questions are channelled through the same office. This allows for coherence and makes the best use of the limited expertise and experience. Further, she explained that culturally, 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 in the future they are also interested in exploring mediation and conciliation.

Julian Aguon made a contribution to the discussion by explaining the use of dispute resolution in Guam. Guam is in the midst of a ‘constitutional crisis waiting to be resolved’. The United States federal courts, which have jurisdiction over Guam, have recently struck down numerous cases on self-determination. In the recent case of *Davis v Guam*, the US Court of Appeal for the Ninth Circuit dismissed a claim for self-determination under the 15th Amendment of the US Constitution. However Mr Aguon 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 was only one route that could be utilised for this objective.

III. 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 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 funds; non-governmental organization (NGO) assistance; and third-party funding. Given that costs of the International Court of Justice (ICJ) are high, to ensure there is access to the ICJ, a trust fund was created which will finance any state that wished to benefit from it, not limited in principle to less economically developed countries (LEDCs). This fund is financed by voluntary contributions from states and others, but these voluntary contributions are not regular, which has resulted in significant limitations to the potential of that fund. An expert panel evaluates anticipated expenses and budget. The Permanent Court of Arbitration (PCA) has a similar assistance fund. The International Tribunal for the Law of the Sea (ITLOS) has a trust fund in the same manner, but gives preference to LEDCs. The WTO dispute settlement scheme differs from other systems, as it is funded by the WTO itself. NGOs sometimes support states in bringing forward their claims when the claims share a direct interest with the NGO. Finally, third party funding – which rarely takes place – is problematic, as there are different sets of difficulties. Apart from inherent fund-raising difficulties, funds are not being used, as states often acknowledge how limited the resources are.

The second speaker, **Dr Manuel Gómez**, explored how crowdfunding can be used in disputes involving states. A lack of litigation funding is a significant challenge faced by small states. Small states may face more resourceful states or corporations that are capable of consulting with the best lawyers and experts in the field, in preparation for a 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 concept of 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 support litigation by providing funds. Because the people funding it 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 in securing 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 pool all funding in dispute settlement, and thus, no equal opportunities can arise. Presently, there are restraints on the use of funds, as discussed by the previous speakers. Acknowledging some of the practical challenges in the implementation of such schemes, Mr Greenway suggested the establishment of a small states dispute resolution fund, and sought to answer some of the questions as to who would establish such a fund, how it would be funded, and which cases and parties would qualify for funding. Noting the practical challenges of such a proposal, he 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.

IV. 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 Adam and Mathias Goldmann – *Damages Calculation of Environmental Degradation*

Simon Milnes – *Human Rights and Climate Change*

The final panel surrounded its discussion on a current issue in international law, namely climate change issues in a blockchain era.

The first speaker, **Steven Finizio**, discussed the suitable dispute resolution regime for climate change disputes, noting that states often fail to identify the correct forum to raise such claims. Further, issues may arise when states want to advance a domestic case, especially with jurisdiction and consent. 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 are 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 must be a commercial element to it. Finizio recommended that new mechanisms could possibly be created, especially in state cases brought against non-state parties.

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

Mathias Goldmann and **Dr -Ing. Katarina Adam** gave a presentation on blockchains, and the extent to which they are a valuable means of collecting data and evidence on environmental claims efficiently and securely. It has been thirteen years since the introduction of the first blockchain currency, Bitcoin. Goldman and Adam note that gathering evidence of environmental catastrophes or damages through blockchain technology 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. The speakers concluded by emphasising that the process must be transparent. In order to trust a technological feature, a user must be educated on it, and break down its processes to sub-processes. Both panellists support that blockchain fulfils the need for transparency.

Finally, **Simon Milnes** discussed the importance of environmental jurisprudence as part of the bigger picture of the fight against climate change. There has been a plethora of inter-state claims on environmental issues, in multiple jurisdictions, such as under the International Covenant on Civil and Political Rights, the African Convention on the Conservation of Nature and Natural Resources, the ECHR and the Inter-American system. Mr Milnes also discussed 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, and know the value of a fair society, as is evidenced by their compliance with ILO Conventions. Small states have jurisdictional resourcefulness and are using successfully the argument of vulnerability. Small states are resourceful, and from within their communities have come ideas to establish a regional arbitration court for Pacific Island countries concerned with climate change and environmental matters, and to instigate a bespoke small states (investment) disputes fund. Small states are powerful, and have shown their power by securing the Paris Agreement and a guarantee of 1.5 degrees for the global community. However, small states also must be patient, be themselves, invest in their people, look for partners to further their causes, and unite to benefit from an international legal order that supports them.