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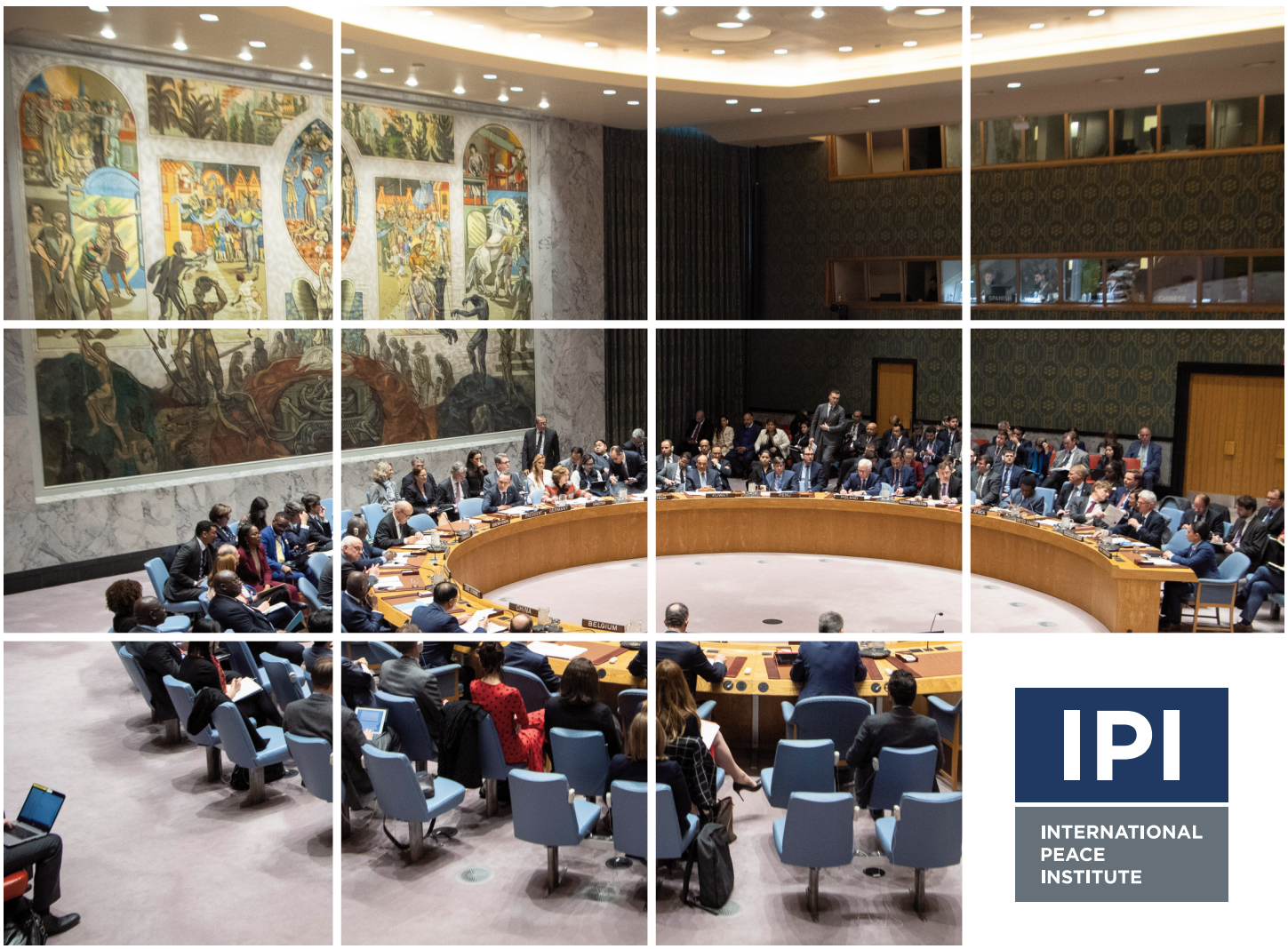
A Necessary Voice: Small States, International Law, and the UN Security Council

ADAM LUPEL AND LAURI MÄLKSOO



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Cover Photo: The Security Council discussing the promotion and strengthening of the rule of law in the maintenance of international peace and security, with a focus on international humanitarian law, New York, April 1, 2019. UN Photo/Eskinder Debebe.

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PERMANENT MISSION
OF ESTONIA TO THE UN

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Executive Summary

The international rule-based order has come under threat on multiple fronts. If this order continues to deteriorate into an older model based on power politics, small states are most at risk. Small states are by definition vulnerable in a world where international law is compromised and only might makes right. This makes them natural defenders of the international order that protects them.

This is not to say that small states constitute a united front in defending international law. They are split by the same geopolitical fault lines as other states and often disagree about the meaning of international law. Moreover, international law is not always a savior from existential threats. Nonetheless, commitment to the international rule of law is a common feature of small states' foreign policies and rhetoric.

This raises the question: Can small states serve as effective champions of the rule-based order and international law in a system dominated by large, powerful states? And how does their participation in this system impact its legitimacy? One place to begin to answer these questions is the UN Security Council. The council, with its five veto-wielding permanent members (P5), is perhaps not an obvious place to look at the role of small states. But notwithstanding the structural advantages of the P5, it presents critical opportunities, as well as difficult challenges, for small states.

Small states' structural disadvantage is an unavoidable challenge. No small states have the P5's veto power or permanent status. This means they lack the same relationships and institutional memory. They tend to have smaller diplomatic corps with fewer resources. There is also a risk that they could be economically or militarily beholden to larger states, which could influence their decisions.

Nonetheless, small states can prove effective in a number of ways. Their small size can allow them to maneuver quickly in policy debates without the constraints of large, impersonal bureaucracies. Those that recognize their limitations can strategically focus on a particular set of policy areas to cultivate recognized expertise. One of these areas is often international law, an issue on which small states have a special interest and can cultivate a reputation for consistency and credibility. By contributing their perspectives on international law and other issues, small states can enhance the institutional legitimacy of the Security Council.

Several recent cases demonstrate how small states have driven debates on the Security Council as defenders of international law and the rule-based order. Small states helped lead the way in passing resolutions on humanitarian access in Syria in 2014, bridging divisions among the P5 on this intractable conflict. They also played a crucial role in passing a resolution on the protection of medical care in situations of armed conflict in 2016, reinforcing a crucial legal norm at a time when some might have questioned the commitment of the international community.

Small states on the Security Council are well-placed to provide an important, credible voice with moral authority to remind all member states of their obligations under international law, reaffirm normative commitments to compliance, and advocate for a recommitment to a multilateral, rule-based international order. Perhaps not since the founding of the United Nations has that voice been more necessary for all to hear.

Introduction

High-risk challenges are undermining the international rule-based order on multiple fronts. This view has been growing in acceptance for several years, and recent developments have reinforced the sense that the UN-based multilateral system is "under siege."[1] The 2014 Russian invasion and annexation of Crimea, condemned by the UN General Assembly, remains a pressing issue. In Afghanistan, Syria, and Yemen, bombings of hospitals and other attacks on healthcare have continued in clear violation of international humanitarian law. A global refugee and migration crisis has inspired old and new political movements to advocate for closed-border policies that challenge the status of the 1951 Refugee Convention as universally applicable international law. Meanwhile, a larger phenomenon continues to unfold, as a resurgent unilateralist nationalism

1 Thomas G. Weiss, "The UN Is under Siege, so Where Is the Secretary-General?" *PassBlue*, September 18, 2018.

upends political discourse around the world and voters turn to populist leaders skeptical of multilateral cooperation and the very idea of a global common good.[2]

What is at stake in the weakening of the international rule-based order, and what are the paths forward? At its most fundamental, the international order seeks to limit the anarchic nature of global affairs. In particular, it establishes a system of norms, agreed-upon rules, and institutions to regulate disputes among states and set limits on the use of force, including when and how it may be used.[3]

Among UN member states, small countries are most at risk if the international system further deteriorates into an older model based on power politics and zero-sum games. Most small states are by definition vulnerable in a world where international law is compromised and only might makes right, because they tend to have limited military capacity compared to great powers with large armies. With small states most at risk, one would expect them to be defenders of the international order that protects them. As one small-state diplomat confided, "If the house of international law crumbles, we will be the last ones out the door."[4] Or, as Jim McLay, former permanent representative of New Zealand said,

> The obvious imbalance between small states and larger powers… means that multilateral systems based on the rule of law are vitally important for those smaller states, as they prevent that imbalance being used to their disadvantage. They reduce opportunities for the strong to impose on the weak… and they allow small states to participate as equal partners in global discussions that directly affect their interest.[5]

In the UN, small states are defined only informally. The working definition of the Forum of Small States (FOSS) is that "small states" are those with a population of 10 million or less.[6] However, the definition is not applied rigidly in policy debates. Thus, a state with a population of more than 10 million can still perceive itself—and be perceived—as a small state in matters of international peace and security. Size is not an absolute form of measure. It is a relational one. Moreover, not all small states are the same or have the same capacities. Sweden, Lebanon, Ireland, and Nauru are all small states, but they play distinct roles in international affairs. Experiences of conflict, levels of regional integration or internal division, and GDP per capita vary considerably among small states. Such factors impact both the capacity of small states to influence multilateral fora and their interest in doing so.[7] To this end, this paper uses the FOSS definition as a guide for defining small states, but it also discusses states with slightly more than 10 million inhabitants (see Annex for a list of small states).

In a system dominated by large, powerful states, can small countries serve as effective champions of the rule-based order and international law? And how does their participation in this system impact its legitimacy? One place to begin to answer these questions is the UN Security Council, the most powerful organ of the United Nations, mandated with the maintenance of international peace and security. This is perhaps not an obvious place to look at the role of small states, as the council is constitutionally structured around the great-power politics of its five veto-wielding permanent members (P5).[8] But notwithstanding the structural advantages of the permanent members, the Security Council presents critical opportunities, as well as difficult challenges, for small states. Given these opportunities and challenges, what role can

2 Jack Snyder, "The Broken Bargain: How Nationalism Came Back," *Foreign Affairs*, February 12, 2019.

3 Henry Kissinger, *World Order: Reflections on the Character of Nations and the Course of History* (New York: Penguin, 2014), p. 7.

4 Interview with small state diplomat, March 28, 2018, New York.

5 Jim McLay, "Making a Difference: The Role of a Small State at the United Nations," speech delivered at Juniata College, Pennsylvania, April 27, 2011.

6 The Forum of Small States is an informal grouping of countries with populations of less than 10 million. The forum was founded in 1992 by Singapore and meets periodically to "discuss and foster common positions of issues of mutual concern." See www1.mfa.gov.sg/SINGAPORES-FOREIGN-POLICY/International-Issues/Small-States .

7 Maria Nilaus Tarp and Jens Ole Bach Hansen, "Size and Influence: How Small States Influence Policy Making in Multilateral Arenas," Danish Institute for International Studies, 2013.

8 In a recent article for UN University, Richard Gowan persuasively argues the best we can hope for in the current period is "to identify the minimum level of P5 cooperation necessary for the Security Council to play a significant role in managing major power competition." This is indeed an important role for the council in a perilous time of rising geopolitical tension, and it is a realistic assessment. The risk is that if the interests of two-thirds of council members and of the broader UN membership are absent from the agenda, the legitimacy of the council will be further eroded, especially in the eyes of member states from the Global South. Richard Gowan, "Minimum Order: The Role of the Security Council in an Era of Major Power Competition," United Nations University Centre for Policy Research, December 3, 2018.

small states play in defending international law on the Security Council? While the experiences of some—mostly Western European—elected members of the Security Council have been analyzed in the literature,[9] there is a shortage of studies examining the role, experiences, and potential of small states on the council.[10]

In this paper, we first examine small states' commitment to international law as manifested in their foreign policy and public pronouncements. Following this, we discuss the particular obstacles and opportunities for small states on the Security Council. Finally, we discuss two recent cases in which small states played a key role advancing resolutions that in part served to reinforce normative commitments to the international rule of law.

We argue that defending international law is strongly in the interest of small states. While states of all sizes will strongly defend international law when it is in their interests, small states have fewer economic or military tools to rely on and thus often place greater emphasis on international law in their foreign policy. As a result, small states can cultivate a reputation for consistency and credibility on the issue. This can serve them well on the Security Council. Small states represent the numerical majority of UN member states. Their participation on the Security Council contributes to its legitimacy by adding the perspective of the broader UN membership to discussions on international peace and security, which are often dominated by the P5. Thus, while small states are subject to significant structural limitations, we argue they are well positioned to play a modest though normatively critical role in defending international law from the Security Council.

Small States' Commitment to International Law

A commitment to the international rule of law is a common feature of small states' foreign policies. They tend to highlight this when running for the Security Council, as did Sweden in 2017–2018 and Slovakia in 2006–2007, among others.[11]

The importance of international law is also a widespread theme in the rhetoric of small states. For example, Lennart Meri, president of Estonia from 1992 to 2001, stated in response to nuclear tests in Southeast Asia in 1998, "The nuclear weapon of small states is international law."[12] The comment stemmed from his own nation's experience. The restoration of Estonia's statehood without any bloodshed in 1991 was facilitated by persuasive arguments taken from international law, which allowed the majority of Western states never to recognize the Soviet annexation.[13]

Admittedly, such faith in international law as a savior from existential threats to small states may not always be justified. All too often, international law has been ignored, manipulated, and violated by international actors. In their interactions with each other, states are constantly redefining and renegotiating what international law means—and not always to the benefit of the least powerful.

Moreover, while small states are strategically inclined to be defenders of the principle of international law, they do not constitute a united front in its interpretation and application. In principle, international law is a universally valid benchmark, but policymakers in different national capitals see it from different perspectives.[14] This may have a number of structural reasons: treaties often

9 See, for example, Jan Wouters, Edith Drieskens, Sven Biscop, eds., *Belgium in the UN Security Council: Reflections on the 2007–2008 Membership* (Antwerp: Intersentia, 2009); and Nicoletta Pirozzi, ed. *Strengthening the UN Security System: The Role of Italy and the EU* (Rome: Instituto Affari Internazionali, 2008).

10 Exceptions include "Small States in the UN Security Council: Means of Influence?" by Baldur Thorhallsson (2011) and Colin Keating's 2008 speech on "The United Nations Security Council: Options for Small States."

11 Interviews with member states at the UN missions of Denmark, France, Lebanon, New Zealand, Singapore, Slovakia, Sweden, and Uruguay. New York, March–April 2018. See also, Peter Burian, "The Slovak Republic's Performance in the Security Council (2006-2007)," in *Yearbook of Slovakia's Foreign Policy 2007* (Bratislava: Research Center of the Slovak Foreign Policy Association, 2008) pp. 28-38.

12 Paavo Palk, "Eesti: väikeriigist advokaat" ("Estonia: Small State as Advocate"), *Postimees*, February 12, 1998 available at https://arvamus.postimees.ee/2535661/eesti-vaikeriigist-advokaat .

13 Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Leiden: Brill, 2003).

14 For a recent fundamental discussion on this phenomenon, see Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017).

represent a compromise, resulting in broad and vague provisions; international case law can be scarce; and diverse legal cultures can result in diverse legal views among scholars. Furthermore, customary international law is imprecise by nature. Through their normative positions, actions, and policies, states contribute to the formation of customary international law, but there are broad disagreements on the legal value of custom in the international system and on how to definitively identify new customary rules.[15] While it is comforting to think of law as an objective standard that can be applied evenly across all cases, such a view "omits much of the politics central to international law."[16]

Indeed, geopolitics often influences references to international law. In the Security Council, small states are caught in the middle of an intense global debate about the meaning and direction of international law more than seventy years after the adoption of the UN Charter. This is a debate about the role of state sovereignty, human rights, the responsibility to protect, the legitimacy of regional military alliances such as NATO, and other related matters. However, while the views of small states in this debate depend on their history, geography, and alliances, what they all have in common is that questions about international law and the use of force are potentially existential in a literal sense. Their very existence may depend upon it.

Representatives of small states know well that should commitments to the UN Charter system further erode, including restrictions on the use of force, their countries would be at risk. However, disagreements about what international law *means* in practice today, and whether its core norms have evolved since the adoption of the UN Charter in 1945, remain a challenge. This is a disagreement not just between states like the US and UK on the one hand and Russia and China on the other but also among small states.

For example, in April 2018, small states in the Security Council had different opinions about the US, UK, and French airstrike against Syria following the use of chemical weapons there. Bolivia sided with Russia and China in voting for a resolution condemning the strike as a violation of international law.[17] In turn, Sweden's ambassador to the UN said, before the airstrikes, that "whatever happens next has to abide by international law"[18]—and yet Sweden voted with the US, UK, and France against the Russian resolution. In other words, Bolivia and Sweden—both small states that strongly support international law but have distinct geopolitical outlooks—ended up with different interpretations of the law in this particular case.

Small states thus occasionally differ in their analysis of the relatively restrictive rules pertaining to the beginning of wars—what international lawyers call *jus ad bellum*; at the same time, they have solidarity on the point that such rules should matter and be taken seriously as binding international law. Without them, it would mean a return to the period before the Kellogg-Briand Pact of 1928 when starting a war and annexing another country or parts of its territory was in principle legal, subject only to the balance of power.

The meaning of international law is often contentious. Thus, the debates and decisions of the council can be a critical part of determining how international law is applied in concrete cases. In determining what constitutes and what does not constitute a threat to international peace and security and how to respond, the Security Council simultaneously determines the meaning of international law. Some of these decisions and choices can be of near-existential importance for small states.

In 1990, when Iraq occupied and annexed Kuwait—a country nearly a tenth its size—it was through the Security Council that the international community reacted to this grave violation of international law by authorizing the use of military force to compel Iraq's withdrawal.[19] In the war that followed, starting in January 1991, Kuwait was

15 Malcom N. Shaw, *International Law*, fifth ed. (Cambridge: Cambridge University Press, 2003), pp. 68-70. On the role of the Security Council in customary law, see Gregory H. Fox, Kristen E. Boon, and Isaac Jenkins, "The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law," *American University Law Review* 67, no. 3 (2018).

16 Ian Hurd, *How to Do Things with International Law* (Princeton, NJ: Princeton University Press, 2017), p. 47.

17 See Julia Conley, "Global Leaders Condemn Trump's 'Scorn for International Law' As Haley Threatens More Possible Air Strikes," Truthout, April 15, 2018, which cites the Bolivian ambassador to the UN, Sacha Sergio Llorenty Soliz, as saying that the US has "nothing but scorn for international law."

18 See Michelle Nichols, "Bolivia Calls U.N. Meeting over Syria Strike Threat," Reuters, April 11, 2018. This article quotes the Swedish ambassador to the UN, Olaf Skoog.

19 David M. Malone, *The International Struggle over Iraq: Politics in the UN Security Council, 1980–2005* (Oxford: Oxford University Press, 2006), pp. 54-83.

liberated and its sovereignty restored. In situations like this, the UN Security Council can become a lifeline for small nations. We can only guess how many times the mere possibility of Security Council action has prevented aggression against smaller or militarily weaker nations, but interstate military aggression and annexation of territory by force have diminished considerably since the legal prohibition of war in the UN Charter in 1945.[20]

Admittedly, the Security Council's record on the use of force has been inconsistent over time. Not quite a complete system of collective security among all member states, Sir Adam Roberts has called it more properly a system of "selective security."[21] This is particularly true when a member of the P5 is a party to the conflict under consideration. In the case that a permanent member of the Security Council uses military force or even annexes another state's territory, the council is hampered in its ability to condemn the action because of the veto power of the permanent member concerned. This is true even though under the UN Charter a "party to a dispute" under consideration by the council should "abstain from voting" in decisions related to the pacific settlement of disputes by the UN or regional organizations.[22] While this clause is limited, in that it does not apply to resolutions regarding the use of force, if permanent members refuse to abstain from such decisions, they would violate the fundamental principle of justice that no one should be a judge in their own case (*nemo judex in causa sua*).

Regrettably, this is what happened on the question of Crimea. In February 2014, the Russian military seized control of Ukraine's Crimean Peninsula, and in March of the same year, Russia annexed the territory. Because the Security Council was unable to adopt a resolution condemning the action, the task fell to the General Assembly, which adopted a resolution on March 27, 2014, that supported the territorial integrity of Ukraine, including Crimea.[23]

Four years later, in February 2018, the ongoing Russian annexation of Crimea provided a potent background to the ministerial open debate held during Kuwait's council presidency to mark the anniversary of its liberation from Iraqi occupation. Indeed, Poland, the UK, and the US made direct connections to Crimea in their statements during the debate.[24] Meanwhile, the president's introduction explicitly referenced the meaning of the Charter and international law for small states:

> The State of Kuwait did not decide to choose the purposes and principles of the Charter as the topic for today's meeting at random. We are currently the smallest Member State on the Council in terms of our physical size. However, the issue of respecting the provisions of the United Nations Charter and the rules of international law is extremely important for all countries, in particular the small ones. In fact, the principles and purposes of the Charter represent the first line of defense for small countries.[25]

The view that international law provides a first line of defense for small countries is a common view among small-state diplomats.[26] Most small states present themselves as champions of international law. This provides a potentially significant constituency representing the majority of member states at a time when normative commitments to the rule-based order are being undermined. However, given divisions on the meaning and application of international law and the relative power of small, elected members vis-à-vis the P5, can small states on the Security Council do anything in particular to defend the rule-based order?

20 Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017).

21 Adam Roberts, "The Use of Force: A System of Selective Security," in *The UN Security Council in the 21st Century*, Sebastian von Einsiedel, David M. Malone, and Bruno Stagno Ugarte, eds. (Boulder, CO: Lynne Rienner, 2016).

22 This restriction applies to decisions made under Chapter VI and Chapter VIII, Article 52, paragraph 3. Notably, it does not apply to Chapter VII, which encompasses military enforcement actions. UN Charter, Art. 27, para. 3.

23 See UN General Assembly Resolution 68/262 (March 27, 2014), UN Doc. A/RES/68/262. While the Security Council did not pass a resolution, Lithuania—an elected member at the time—did actively express its views, qualifying Russia's annexation of Crimea as a violation of international law.

24 UN Security Council, 8185th Meeting, UN Doc. S/PV.8185, February 21, 2018.

25 Ibid.

26 This was a consensus view expressed in interviews with member-state representatives at the UN missions of Denmark, France, Lebanon, New Zealand, Singapore, Slovakia, Sweden, and Uruguay, New York, March–April, 2018.

Obstacles and Opportunities for Small States on the Security Council

When asking what small states can do on the Security Council to defend normative commitments to the international order, one must first recognize the limitations of their participation. While in principle the UN system is based on the sovereign equality of all its member states, giving small and large states equal weight, the Security Council was structured to provide a constitutional advantage to the victors of World War II.[27] The founding powers did this to protect the system from a fate similar to that of the defunct League of Nations. The priorities of the founders, who drafted the Charter in the midst of world war, were "performance, unity, and control, not equity."[28] In order for the maintenance of international peace and security to endure, they considered it vital that the US, UK, and Soviet Union, in particular, operate based on consensus.[29]

As a result of this historical decision and a continuing vested interest in the council's role managing great-power competition, there are no small states among the five permanent members of the council, which is where influence predominantly lies.[30] Even the largest, most powerful elected members of the council run up against the uneven nature of member states' influence on the body. Many point to the veto as the critical determinant of power on the Security Council; but at the working level it is often the element of permanence that gives the P5 their heightened influence. A permanent seat on the council allows a member state to build up an institutional memory of relationships, working methods, and precedents that is difficult for an elected member to master in the short span of a two-year term. A mastery of process leads to influence over outcomes, and thus permanence in the council can give the P5 the upper hand over many elected members, even without resorting to the veto.

Permanent members also tend to have much larger, better-resourced staff and diplomatic corps, which are difficult for elected members to match.[31] A large and well-resourced staff in New York means a member state can be in more places at once, cover more meetings or committees, and go into depth on more issues related to the Security Council agenda. A large diplomatic corps around the world means greater access to on-the-ground information, analysis, and relationships. While some wealthy, populous elected members may achieve this, such resources are out of the reach of many small states.[32]

There is also a risk that some small states are limited in their ability to pursue their own independent decision making on the council because they are beholden to other states, whether economically or militarily. Such obligations can be formal; for example, the Marshall Islands and Monaco are required to consult the US and France, respectively, on their foreign policy decisions. This could become an issue if either of these small states were to serve on the council.[33] More commonly, however, these obligations are informal, based on economic dependence on aid or trade that leave a small state vulnerable to pressure to vote one way or the other.

Despite these disadvantages, small states can still prove effective in a number of ways. Numerous observers have noted that one comparative advantage of a small size is the ability to maneuver quickly in policy debates. Every country's foreign service is different, but small states are generally less burdened by large, impersonal bureaucracies that make internal consultations slow and difficult.

27 UN Charter, Art. 2, para. 1.

28 Edward Luck, "A Council for All Seasons: The Creation of the Security Council and its Relevance Today," in *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, Vaugh Lowe, Adam Roberts, Jennifer Welsh, and Dominick Zaum, eds. (Oxford: Oxford University Press 2008) p. 61.

29 Ibid., p. 72.

30 On the council as a mechanism for managing great-power competition, see Gowan, "Minimum Order."

31 Paul Romita, Naureen Chowdhury Fink, and Till Pappenfuss, "What Impact? The E10 and the 2011 Security Council," International Peace Institute, March 2011, p. 2.

32 Vanu Gopala Menon, "Challenges Facing Small States at the UN," Academic Council on the United Nations System, Informational Memorandum no. 79, 2009, p. 2.

33 Thorhallsson, "Small States in the UN Security Council: Means of Influence," *Hague Journal of Diplomacy* 7, no. 2 (2012), p. 145.

Small-state diplomats are often less constrained by domestic policymaking and have a more "direct and trusting" relationship with their political leadership back home.[34]

Small diplomatic corps also tend to result in more focused expertise. Small states that accept the reality that they cannot cover everything and decide to strategically focus on a particular set of policy areas to cultivate recognized expertise have often found more success. This type of "niche diplomacy"—where a member state champions a particular issue to move it forward in the system—has been behind some of the most significant advances in multilateral diplomacy in recent times.

For example, through its active diplomacy on behalf of international criminal justice, Liechtenstein has played a key role both in activating the jurisdiction of the International Criminal Court over the crime of aggression and in advocating for a limitation on the use of the Security Council veto in cases of atrocity crimes.[35] Costa Rica championed the 2013 Arms Trade Treaty adopted by the General Assembly. Additionally, the successful negotiations of the UN Convention on the Law of the Sea, adopted in 1982, were led by small maritime states—in particular Fiji, Malta, New Zealand, and Singapore. More recently, Sweden's focus on taking forward the humanitarian file on the Security Council, in particular as penholder for resolutions on the humanitarian aspects of the conflict in Syria, has been widely praised as effective.[36]

The Cases of Syria and the Protection of Healthcare

Recent years have witnessed several cases where small states have driven debates on the council defending international law and the rule-based order, in particular international humanitarian law. The cases of the humanitarian file on Syria and the resolution to protect healthcare are illustrative.

As the Syrian civil war raged in 2013, there was a growing sense in the Security Council that something had to be done, but divisions among the P5 blocked forward progress to stem the fighting. Attention thus began to turn to the need to facilitate humanitarian access in order to alleviate suffering. Elected members of the council, including several small states, took the lead in trying to negotiate an outcome. With some starts and stops, Australia and Luxembourg—a country of less than 600,000 people—spearheaded the adoption of a presidential statement on October 2, 2013. This was the council's first formal result on humanitarian issues related to Syria.[37]

Legal experts may debate the binding nature of presidential statements, depending on the particular language used, but their principal significance is that they require consensus among council members. Thus, while the 2013 statement had to be relatively soft to be acceptable to all, it did allow the council to speak with a unified voice in condemning "the widespread violations of human rights and international humanitarian law by the Syrian authorities, as well as any human rights abuses and violations of international humanitarian law by armed groups." It also reminded the authorities that "all obligations under international humanitarian law must be respected under all circumstances" and detailed steps that the government of Syria ought to take to facilitate humanitarian relief.[38]

This effort prepared the ground for further progress on issues related to international humanitarian law the following year. Jordan, another small state, came on to the council in January 2014. As a neighboring state, it quickly became an important partner to Australia and Luxembourg on the humanitarian file for Syria. By leading several weeks of negotiations, Australia, Luxembourg, and Jordan sought to build bridges among the divided P5. It would prove difficult to produce a resolution that criticized the Syrian government with strong

34 Colin Keating, "The United Nations Security Council: Options for Small States," speech in Reykjavik, Iceland, June 16, 2008; Andrea O'Súilleabháin, "Small States at the United Nations: Diverse Perspectives, Shared Opportunities," International Peace Institute, May 2014.

35 See "Security Council Code of Conduct," http://www.globalr2p.org/our_work/un_security_council_code_of_conduct . On Liechtenstein and the crime of aggression, see https://crimeofaggression.info/the-campaign/the-principality-of-liechtenstein/ .

36 This was a common assessment among member-state representatives interviewed in New York, March–April 2018. See also "The Penholder System," Security Council Report, December 21, 2018, p. 4.

37 UN Security Council Presidential Statement 2013/15 (October 2, 2013), UN Doc. S/PRST/2013/15.

38 Ibid.

language on accountability while avoiding another Russian and Chinese veto.[39]

In the end, Resolution 2139 was adopted on February 22, 2014.[40] It demanded that all parties "cease and desist from all violations of international humanitarian law" and "stresse[d] the need to end impunity." However, it did not include a clear threat of sanctions or of indictment by the International Criminal Court, which would have been necessary to give the resolution teeth.[41] Nevertheless, the resolution constituted progress, even though, as Secretary-General Ban Ki-moon noted at the time, it should not have come to this. Humanitarian assistance "is not something to be negotiated; it is something to be allowed by virtue of international law."[42] Critically, the resolution did establish a monthly reporting requirement to track its implementation, and this has helped keep consistent attention on the issue.

Building on this success, a second resolution (2165) was adopted in July 2014 after protracted negotiations, this time focusing on cross-border humanitarian access. Again, Australia, Luxembourg, and Jordan led the way. Notably, council members passed the resolution by a unanimous vote. The ability of the elected members to broker consensus on such a sensitive issue was a genuine achievement. Of course, the humanitarian situation in Syria continued to deteriorate after 2014, so the achievement was a limited one. However, cross-border convoys undoubtedly saved lives, and they would not have been possible without these resolutions.[43] Meanwhile, the monthly reports required by Resolution 2139 have provided a drumbeat reminder that member states have no excuse for violating international humanitarian law.[44]

The Syria file is not the only issue small states have taken on in order to lead a defense of international law on the Security Council. They also played a central role in the passage of Resolution 2286 on the protection of medical care in situations of armed conflict, a landmark thematic resolution adopted on May 3, 2016. This resolution was a response to a shocking increase in the number of attacks on healthcare facilities and health workers during humanitarian emergencies. It had become clear that many such attacks were not simply a matter of collateral damage but the result of specific targeting of healthcare providers. In 2014 and 2015, the World Health Organization recorded 594 incidents of armed attacks on healthcare in nineteen countries and determined that 62 percent were intentional.[45]

The protection of the wounded and the provision of a safe space for medical personnel to deliver care is at the cornerstone of international humanitarian law going back to the first Geneva Convention of 1864. By undermining this long-standing norm against attacks on healthcare, such attacks undermine the very principle of a rule-based order and the purpose of international humanitarian law.[46]

Research has shown that normative commitments incentivize people to obey the law better than threats of punishment do. More often than not, people obey the law because they believe it is the right thing to do or because they have internalized societal norms that are unconsciously reflected in their behavior.[47] This is true for domestic laws as well as international laws. Former State Department Legal Adviser Harold Koh has observed that "most compliance with law—including international law—comes not from coercion but from *patterns of obedience*."[48] The risk is that once those patterns of obedience break

39 Thanks to Paul Romita for his insights on these cases. See Paul M. Romita, "(Dis)unity in the UN Security Council: Voting Patterns in the UN's Peace and Security Organ," PhD dissertation, the Graduate Center, City University of New York, 2018.

40 UN Security Council Resolution 2139 (February 22, 2014), UN Doc. S/RES/2139.

41 Ibid.

42 Security Council, "Security Council Unanimously Adopts Resolution 2139 (2014) to Ease Aid Delivery to Syrians, Provide Relief from 'Chilling Darkness,'" press release, UN Doc. SC/11292, February 22, 2014.

43 For 2018 numbers on people reached via cross-border assistance, see ReliefWeb, "UNHCR Cross-border Humanitarian Response Fact Sheet: Northwest Syria," August 31, 2018, available at https://reliefweb.int/report/syrian-arab-republic/unhcr-cross-border-humanitarian-response-fact-sheet-northwest-syria .

44 See Romita, "(Dis)Unity in the UN Security Council."

45 WHO, "Report on Attacks on Health Care in Emergencies," 2016, p. 7.

46 Els Debuf, "Evaluating Mechanisms for Investigating Attacks on Healthcare," International Peace Institute, December 2017.

47 Tom R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990).

48 Harold Hongju Koh, *The Trump Administration and International Law* (Oxford: Oxford University Press, 2019), p. 7.

down, noncompliance will become pervasive. The attacks on healthcare represented a potential shift in normative commitments to uphold international humanitarian law. Like in the above case of Syria, there was a widespread feeling that the Security Council had to respond.

In early 2016, New Zealand initiated discussion on a possible resolution by convening a multi-stakeholder round table at its UN mission. The discussion included not only member states but also actors from the UN Secretariat and NGOs.[49] Soon, a draft resolution was being negotiated by five penholders from a diverse range of countries: Egypt, Japan, New Zealand, Spain, and Uruguay. As with Syria, accountability language was a sticking point. After extensive negotiations, the final resolution used language from the Rome Statute of the International Criminal Court to reinforce commitments to international humanitarian law and clearly remind member states that "intentionally directed attacks" on health facilities and medical workers during armed conflict are war crimes.

From a negotiation standpoint, the resolution was a tremendous success. It was adopted unanimously, with eighty-five member states as co-sponsors. With five penholders from five continents, the co-sponsors could rightly claim that the resolution had a high level of legitimacy. It represented the will of the broader UN membership, not simply the Security Council.

Unfortunately, this success has not translated into major progress on the ground, and attacks on healthcare continue. However, the resolution—spearheaded by two small states in partnership with others—is a landmark Security Council decision. It has helped keep the focus on an issue and, even more importantly, has reinforced the legal norm prohibiting attacks on healthcare at a time when some might have questioned the international community's commitment. As such, it continues to provide both political and legal leverage for advocacy and accountability on this issue.

Conclusion

Cynics may dismiss debates about the importance of international law in the UN as meaningless ritual or empty talk.[50] No country argues it is wholly *against* international law or completely indifferent to it, no matter its behavior. Rather, they interpret international law differently. However, it is notable that small countries especially tend to emphasize the role of international law and their support for it at the UN.

As a matter of law, the UN system is based on the sovereign equality of member states. While the inequality of the Security Council introduces a fundamental tension in the UN system, its legitimacy depends on the principle that it is not a state's military power or population size that gives it the right to participate in decision making; rather, it is each state's status as a legally equal member of the international community.[51] Thus, while small states, by definition, do not have the power that often comes with a large population—and they are structurally disadvantaged as elected, rather than permanent, members of the Security Council—they are principal UN stakeholders. In fact, the Forum of Small States makes up the numerical majority of UN member states.

When discussing the relationship between small states and the Security Council, it is important to think not only of how small states act on the Council but also of how the council's actions affect all small states in the international community. Having small states participating in decisions concerning international peace and security that are simultaneously decisions about international law makes international legal processes more legitimate. Having a certain rotation of states represented in the UN Security Council as non-permanent members ensures that all states potentially affected by the decisions made there can

49 Paul Romita, "(Dis)unity in the UN Security Council."

50 For example, the renowned international law professor and former Finnish diplomat Martti Koskenniemi recently asked, rhetorically, "Was there not something comical about the Decade of International Law (1989–1999) that produced nothing of normative substance?" See Martti Koskenniemi, "Between Commitment and Cynicism: Outline for a Theory of International Law as Practice," in *International Law as a Profession*, Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper, and Wouter Werner, eds. (Cambridge: Cambridge University Press, 2017), p. 47.

51 This tension has been apparent from the earliest days of the UN. Indeed, when the UN was founded, some colonial-power representatives even assumed the new organization would be compatible with a continuation of empire. See Mark Mazower, *No Enchanted Palace. The End of Empire and the Ideological Origins of the United Nations* (Princeton, NJ: Princeton University Press, 2009).

at least occasionally take part in discussions and decisions that may affect them directly or indirectly.

While disagreements abide, most small states share a primary concern for the importance of international law because they know that their statehood could never be based on hard power alone. Instead, they can best secure their sovereignty through a commitment to the international rule-based order. In this sense, small states' rhetorical emphasis on international law highlights their commitment to a multilateral global system in which decisions are not made solely according to the right of the stronger, but are justified with reference to a legal order under which they are sovereign equals. When normative commitments to international law are undermined, this system is endangered. It follows that, in spite of the challenges and limitations, small states have a vested interest in council membership to take an active role in supporting the development of international law as embodied in the principles of the UN Charter.

However, if small states use the rhetoric of international law and emphasize its importance in their campaigns for council seats, they must make use of the applicable rules and precedents of international law while on the council as well. Otherwise, they risk confirming the beliefs of the cynics and revealing their stated commitment to international law as empty talk. There is always a risk that rhetorical commitments to international law are unmatched by practice.[52] All states dedicated to an international rule-based order should start with themselves by demonstrating their commitments with deeds, not just words. In order to defend normative commitments to international law effectively, small states also must be consistent in their own practice.

Clearly, the Security Council's power rests predominantly with the P5. Quoting George Orwell, Uruguay's permanent representative to the UN, Elbio Rosselli, quipped at a 2017 meeting that, indeed, "some animals are more equal than others" on the council.[53] But the UN system as a whole represents an order founded upon the sovereign equality of all states, whether big or small. Small states must actively defend this order.

In operational terms, what small states can do for international law and for Security Council decision making is to build bridges among the often antagonistic P5 at a time of rising geopolitical tension, as they did with the Syrian humanitarian initiatives. Small states can also prove to be better "listeners," especially when facing multiple perspectives on international law. They can demonstrate that, powerful though the P5 members may be, they are not the only effective actors in the international community. Indeed, in certain instances, small states can use skillful diplomacy, particularly in niche areas developed over time, to achieve results, thereby bolstering the legitimacy of the UN system and strengthening commitments to the principle of a rule-based international order.

Provided they do this, small states on the Security Council are well-placed to provide an important, credible voice with moral authority to remind all member states of their obligations under international law, reaffirm normative commitments to compliance, and advocate for a recommitment to a multilateral, rule-based order that is of collective benefit to the entire world. Perhaps not since the founding of the United Nations has that voice been more necessary for all to hear.

52 This is a phenomenon most evident in compliance with human rights law. See Ryan Goodman and Derek Jinks, "Incomplete Internalization and Compliance with Human Rights Law," *The European Journal of International Law* 19, no. 4 (2008), pp. 725-748.

53 UN Security Council, 7922nd Meeting, UN Doc, S/PV.7922, April 12, 2017, p. 10.

Annex: Small States on the Security Council

Table 1. States with a population close to 10 million or below that have served as elected members of the UN Security Council

Country	Population (in millions; 2017 estimate)	Terms
Austria	8.8	1973-1974; 1991-1992; 2009-2010
Azerbaijan	9.9	2012-2013
Bahrain	1.5	1998-1999
Belarus	9.5	1974-1975
Bosnia and Herzegovina	3.5	2010-2011
Botswana	2.3	1995-1996
Bulgaria	7.1	1966-1967; 1986-1987; 2002-2003
Cabo Verde	0.5	1992-1993
Costa Rica	4.9	1974-1975; 1997-1998; 2008-2009
Croatia	4.1	2008-2009
Denmark	5.8	1953-1954; 1967-1968; 1985-1986; 2005-2006
Djibouti	1.0	1993-1994
Equatorial Guinea	1.3	2018-2019
Finland	5.5	1969-1970; 1989-1990
Gabon	2.0	1978-1979; 1998-1999; 2010-2011
Gambia	2.1	1998-1999
Guinea-Bissau	1.9	1996-1997
Guyana	0.8	1975-1976; 1982-1983
Honduras	9.3	1995-1996
Hungary	9.8	1968-1969; 1992-1993
Ireland	4.8	1962; 1981-1982; 2001-2002
Jamaica	2.9	1979-1980; 2000-2001
Jordan	9.7	1965-1966; 1982-1983; 2014-2015
Kuwait	4.1	1978-1979; 2018-2019
Lebanon	6.1	1953-1954; 2010-2011

Country	Population (in millions; 2017 estimate)	Terms
Liberia	4.7	1961
Libya	6.4	1976-1977; 2008-2009
Lithuania	2.8	2014-2015
Luxembourg	0.6	2013-2014
Malta	0.5	1983-1984
Mauritania	4.4	1974-1975
Mauritius	1.3	1977-1978; 2001-2002
Namibia	2.5	1999-2000
New Zealand	4.8	1954-1955; 1966; 1993-1994; 2015-2016
Nicaragua	6.2	1970-1971; 1983-1984
Norway	5.3	1949-1950; 1963-1964; 1979-1980; 2001-2002
Oman	4.6	1994-1995
Panama	4.1	1958-1959; 1972-1973; 1976-1977; 1981-1982; 2007-2008
Paraguay	6.8	1968-1969
Qatar	2.6	2006-2007
Sierra Leone	7.6	1970-1971
Singapore	5.6	2001-2002
Slovakia	5.4	2006-2007
Slovenia	2.1	1998-1999
Sweden	10.1	2017-2018
Togo	7.8	1982-1983; 2012-2013
Trinidad and Tobago	1.4	1985-1986
United Arab Emirates	9.4	1986-1987
Uruguay	3.5	1965-1966; 2016-2017

Table 2. States with a population of less than 10 million that have never been members of the UN Security Council

Country	Population (in millions; 2017 estimate)
Albania	2.9
Andorra	0.08
Antigua and Barbuda	0.1
Armenia	2.9
Bahamas	0.4
Barbados	0.3
Belize	0.4
Bhutan	0.8
Brunei Darussalam	0.4
Central African Republic	4.7
Comoros	0.8
Cyprus	0.9
Dominica	0.07
El Salvador	6.4
Eritrea	5.1
Estonia	1.3
Eswatini	1.4
Fiji	0.9
Georgia	3.7
Grenada	0.1
Iceland	0.3
Israel	8.7
Kiribati	0.1
Kyrgyz Republic	6.2
Laos	6.9
Latvia	1.9
Lesotho	2.2

Country	Population (in millions; 2017 estimate)
Liechtenstein	0.04
Maldives	0.4
Marshall Islands	0.05
Micronesia	0.1
Moldova	3.6
Monaco	0.04
Mongolia	3.0
Montenegro	0.6
Nauru	0.01
North Macedonia	2.1
Palau	0.02
Papua New Guinea	8.3
Saint Kitts and Nevis	0.06
Saint Lucia	1.8
Saint Vincent and the Grenadines	1.1
Samoa	2.0
San Marino	0.03
São Tomé and Principe	0.2
Serbia	7.0
Seychelles	0.1
Solomon Islands	0.6
Suriname	0.6
Switzerland	8.5
Tajikistan	8.9
Timor-Leste	1.3
Tonga	0.1
Turkmenistan	5.8
Tuvalu	0.01
Vanuatu	0.2

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