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2019

RAISINA FILES

Debating Future Frameworks
in a Disrupted World

EDITED BY **RITIKA PASSI**

Raisina Files is an annual ORF publication that brings together emerging and established voices in a collection of essays. These essays strive to engage readers on key, contemporary questions that are implicating the world and India. Arguments presented in this collection will be useful in taking conversations forward and enunciating policy suggestions for an evolving Asian and world order.

The views expressed in this publication are those of the individual authors.

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IN THIS VOLUME

In 2019, US-China trading blows will become a full-blown trade war. The two will also clash, military and politically, in the Indo-Pacific as competition, containment, and counter-containment come to a head. Conflict across the middle spaces of the Eurasian landmass will not be far behind, thanks to the US withdrawal from the Iran nuclear deal, potential resurgence of Shia-Sunni violence, and flaring up of tensions in eastern Ukraine, between Armenia and Azerbaijan, and in Afghanistan. Cyber attacks on critical information infrastructures will populate the year, and a renewed arms race will complicate regional and global power dispensations.

Such is the risk analysis — all for this coming year — advanced by a collection of global experts, former heads of states, and Nobel Laureates.¹ Great power competition, a returned feature of international politics, remains a defining threat, with “uncertainty” and “insecurity” leading the fray for many observers. Stratfor’s 2019 annual forecast sees it centred around the United States, China, and Russia across multiple fields and regions.

Year in, year out, the well of predications for chaos and crisis refuses to run dry, and risks remain high: rising tensions not only between countries but also within are anticipated for the foreseeable future.² Weak growth and rising protectionism, governance gaps and populist pressures, demographic time bombs and dividends, and misinformation and echo chambers are among trends and

implications bearing heavily on how states are engaging with one another.

Governance and cooperation is becoming harder, claims the US National Intelligence Council’s latest Global Trends, and the conclusion passes muster particularly in the face of flailing existing and legacy systems and mechanisms. It can be argued, however, that in crisis and chaos — in the very recognition of fault-lines and fractures — lie the opportunity to re-evaluate status quo or shift; to brainstorm how best to address and accommodate, correct and improve; and to institute policy steps, which at the very least, even if reactive and piecemeal, keep prospects for escalation at bay. (Or in other words, what other choice do we have?)

It follows then that in an effort to manage attendant risks that a disrupted world will engender new and improved organising rules, principles, and arrangements; a re-affirmation of existing institutions and partnerships will not cut it.

This year’s edition of the Raisina Files asks just that: what are the solutions to guide the way forward into the 21st century? What normative contributions and institution-building processes are being put forward by states and stakeholders to manage power relationships, accelerate or temper trends, and shape geographies?

The first set of essays inside unpacks new and emerging institutions.

¹ These are some of the scenarios and likelihoods explored in the study “Global Risks for Eurasia in 2019,” presented at the fourth annual meeting of the Astana Club. Martin Banks, “World faces economic slowdown, spiralling conflicts in 2019,” *European Business Review* 4 (2018): 30-31.

² See, for instance, Office of the Director of National Intelligence, “Global Trends: Paradox of Progress, <https://www.dni.gov/index.php/global-trends-home>

Jason A. Kirk scrutinises the Asian Infrastructure Investment Bank as both a development finance institution and a Chinese proposition. The role of the AIIB among established financial institutions, as well as among other Chinese foreign policy engagements, is rightly important to monitor — an exercise that is only beginning, given AIIB’s infancy, and which will help gauge to what extent China is both shaping and being shaped by the international system.

Hugo Seymour and Jeffrey Wilson advance the proposed Regional Comprehensive Economic Partnership as an institution that affirms the Indo-Pacific construct, alleviates the noodle bowl problem, and acts as an effective model that suits the needs of Asian developing economies. The conversation on RCEP goes to the heart of how other actors are shouldering greater burdens of sustaining economic globalisation as the traditional bulwark recedes behind tariff walls.

Caitlin Byrne offers a cautionary look at the “Quad”: its current members hold slightly different expectations from such a mechanism, and casting a wider and inclusive net may be a better bet to achieving substantive returns. This intervention introduces the need to perhaps shift away from “balance of power” towards “power of balance” in this transition period defined by multipolarity.

Paula Kift deep dives into the setting up of EU’s law on data protection, the General Data Protection Regulation, before summarising the key questions that will face the implementation of the legislation and implications for EU and beyond. The essays opens the door to positioning such legislation in the emerging debate around who owns data, “the most important element of tomorrow’s power.”³

The second set of essays explores responses and institutionalisation processes in re-invigorated and emerging thematic spaces.

Stephen Tankel’s essay highlights two inter-related contemporary trends when it comes to jihad — rebel governance and propaganda — through a portrayal of the actions of the Islamic State and al-Qaeda. Debating state response leads the way to further reflect on whether there is a “battle for mindscape” underway — and

whether there is need to re-visit social contracts in the 21st century.⁴

Rajeswari Pillai Rajagopalan takes to task the power politics that have been undermining the nuclear non-proliferation regime. Questions of responsibility and leadership will prove increasingly important in the age of multipolarity manifested across domains — does the onus rest on the most powerful? What critical momentum can “middle” powers or regional leaders add to institution-building and norm-making?

Kara Frederick reviews the ongoing state-led process to govern lethal autonomous weapons systems and posits that the civilian private sector, as prominent creators of rapidly advancing technologies, can participate in norm-building. The social contract we sign with emerging technologies is an urgent area of investigation.

This year, we backstop this collection with a “big idea.” Arun Mohan Sukumar investigates the potential and emerging consequences of proliferating digital ID platforms in the space beyond states, i.e., global governance, particularly in the field of international development. Even as debate is rife about the legitimacy and continuation of a liberal international order, it is time to explore how technology can make or break efficient governance.

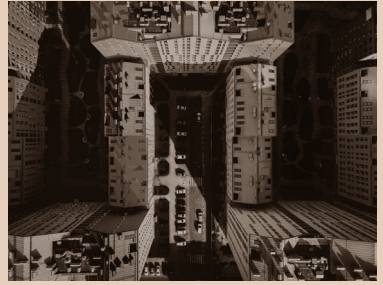
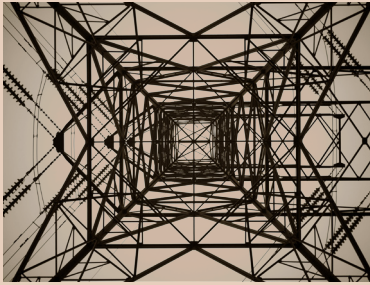
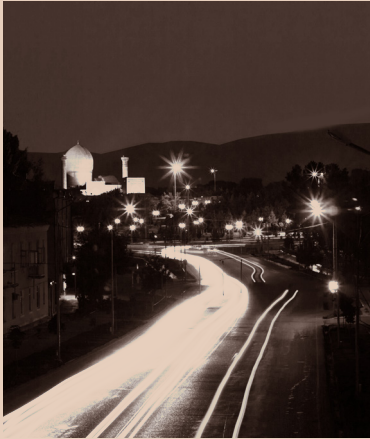
As risks proliferate, so does the need to manage them and the opportunities, should traditional, new, and potential solution-providers take it up, to deliver imaginative, responsive, and flexible frameworks. Indeed, far from a case of “solutions looking for a problem,” to borrow a quote cited in an essay in this compilation, it is very much, today, a case of many more pressing problems and far fewer functional solutions.

It is hoped this fourth edition of the *Raisina Files* offers interpretations that contribute to the thought pool moving forward in correcting this imbalance.

■
Ritika Passi, Associate Fellow and Project Editor, ORF

³In the words of Hans-Christian Hagman, Senior Advisor to the Swedish State Secretary for Foreign Affairs, during Raisina Dialogue 2018.

⁴See, for instance Jamie Gaskarth, “The emerging social contract in Asia,” *Raisina Files 2017: Debating the World in an Asian Century*, ed. Ritika Passi and Harsh V. Pant (New Delhi: ORF, January 2017): 34-41.



INSTITUTIONS

CHINA AND THE ASIAN INFRASTRUCTURE
INVESTMENT BANK: IF YOU BUILD IT, THEY WILL COME (OR, A
RIVER RUNS THROUGH IT) **10**

CAN THE QUAD NAVIGATE
THE COMPLEXITIES OF A DYNAMIC INDO-PACIFIC? **18**

RCEP: AN ECONOMIC ARCHITECTURE FOR THE INDO-PACIFIC? **26**

POWER TO WHOM? PRIVACY IN A POST-GDPR WORLD **34**

SPACES

HOW JIHADISTS WENT GLOCAL AND WHAT TO DO ABOUT IT **44**

THE RETURN OF POWER POLITICS
AND NUCLEAR NON-PROLIFERATION **52**

THE CIVILIAN PRIVATE SECTOR:
PART OF A NEW ARMS CONTROL REGIME? **60**

BIG IDEA

GOVERNANCE BY TECHNICAL STANDARDS:
DO DIGITAL ID PLATFORMS RE-ORDER OR REINFORCE
INTERNATIONAL RELATIONS? **68**

r 2019

INSTITUTIONS

CHINA AND THE ASIAN INFRASTRUCTURE INVESTMENT BANK: IF YOU BUILD IT, THEY WILL COME (OR, A RIVER RUNS THROUGH IT)

Jason A. Kirk

Associate Professor, Political Science and Policy Studies,
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It began with a vision by China's President Xi Jinping. In October 2013, Xi made his first trip to Southeast Asia since assuming office in March. In speeches to Indonesia's Parliament and at the Asia-Pacific Economic Cooperation (APEC) CEO Summit in Bali, Xi proposed to establish "an Asian infrastructure investment bank to promote interconnectivity and economic integration in the region."¹

President Xi was careful to emphasise the complementary, noncompetitive nature of the financial institution China envisioned, so as not to incur friction with existing multilateral development banks (MDBs)² — namely the 67-member Asian Development Bank (ADB), headquartered in the Philippines and led by Japan as plurality shareholder, and the World Bank Group's three lending arms, all headquartered in Washington, D.C. and led by the United States.

The new Chinese proposal came amid cooperation among Brazil, Russia, India, China, and South Africa (the BRICS countries) to establish a new MDB, following a 2012 proposal by India and an agreement among the five countries in March 2013. The BRICS' New Development Bank (NDB) was widely understood as a collective expression of shared frustration at stalled reforms over "voice

and voting" power in the World Bank and International Monetary Fund (IMF) in the wake of the 2007-09 global financial crisis. But now China sought to go further, with a separate initiative that it would lead. (The NDB's initial capital of US\$100 billion is divided equally among the five countries, and although headquartered in Shanghai, an Indian serves as its first president).

China's new proposal also came alongside the announcement of its stunningly ambitious Belt and Road Initiative, with linkages from Pacific Asia to Europe and the Persian Gulf. In scope and timing, President Xi's proposal for a new Asian infrastructure investment bank seemed clearly linked to this overland Belt network and 21st Century Maritime Silk Road concept. The latter did not mollify some concerned analysts who already perceived a Chinese "String of Pearls" strategy to encircle India and make China the dominant geopolitical power in the Indo-Pacific region³ — though China maintained that its "connectivity" vision was commercial and cultural in nature.

Beginning in January 2014, China convened other interested parties for a series of five Multilateral Consultation Meetings, culminating in a Memorandum of Understanding on Establishing the Asian Infrastructure

Investment Bank (AIIB) in October 2014, signed by 22 countries designated as Prospective Founding Members (PFMs).⁴ Despite some reservations, India signed on at the outset, in the view that it stood to benefit materially from such an institution and in order to shape its design. Chief Negotiators for each of the countries set to work on creating the charter. A mechanism and timetable were established for bringing in additional countries during the negotiations. In all, 50 founding members signed the AIIB Charter at a ceremony in Beijing on June 29, 2015, with additional countries signing on as the AIIB readied to open by the year's end. The US and Japan did not participate, although allies in Asia and across Europe and the Middle East did, such that the founding membership extended well beyond its original Asian roster.⁵ Startup capital would be US\$100 billion, around two-thirds of the ADB's capital base and somewhat less than half that of the World Bank.

China's ability to draw so much support so swiftly for its initiative revealed America's diminished influence.⁶ The Obama administration lobbied allies not to join, only to see friendly countries such as Australia, South Korea, and the United Kingdom accept the invitations of Jin Liqun, China's official who would head the bank. ADB and World Bank officials expressed cautious optimism about potential collaboration with the new bank. Liqun recruited former staff from the institutions to participate in the AIIB's creation, which substantially (though not entirely) mitigated concerns over "a lack of clarity about AIIB's governance," including environmental, social impact, and procurement standards.⁷ China insisted that the AIIB would adopt rigorous standards reflecting best practices of the experienced MDBs. But the exclusive focus of the AIIB on infrastructure — and not anti-poverty and social sector lending — implied a narrower range of criteria in assessing whether to lend for projects.

AIIB's first half-decade has inspired a burgeoning scholarly literature addressing its membership, its material and normative impact, and its implications for the balance of power in development finance and attendant influence in Asia and beyond. The consensus is clear: the AIIB is a major development in the global political economy. One study calls it the "most prominent Chinese-led global governance initiative"⁸; another "a landmark development in Asian regionalism" and marker of "a new phase in China's economic diplomacy."⁹ Still another

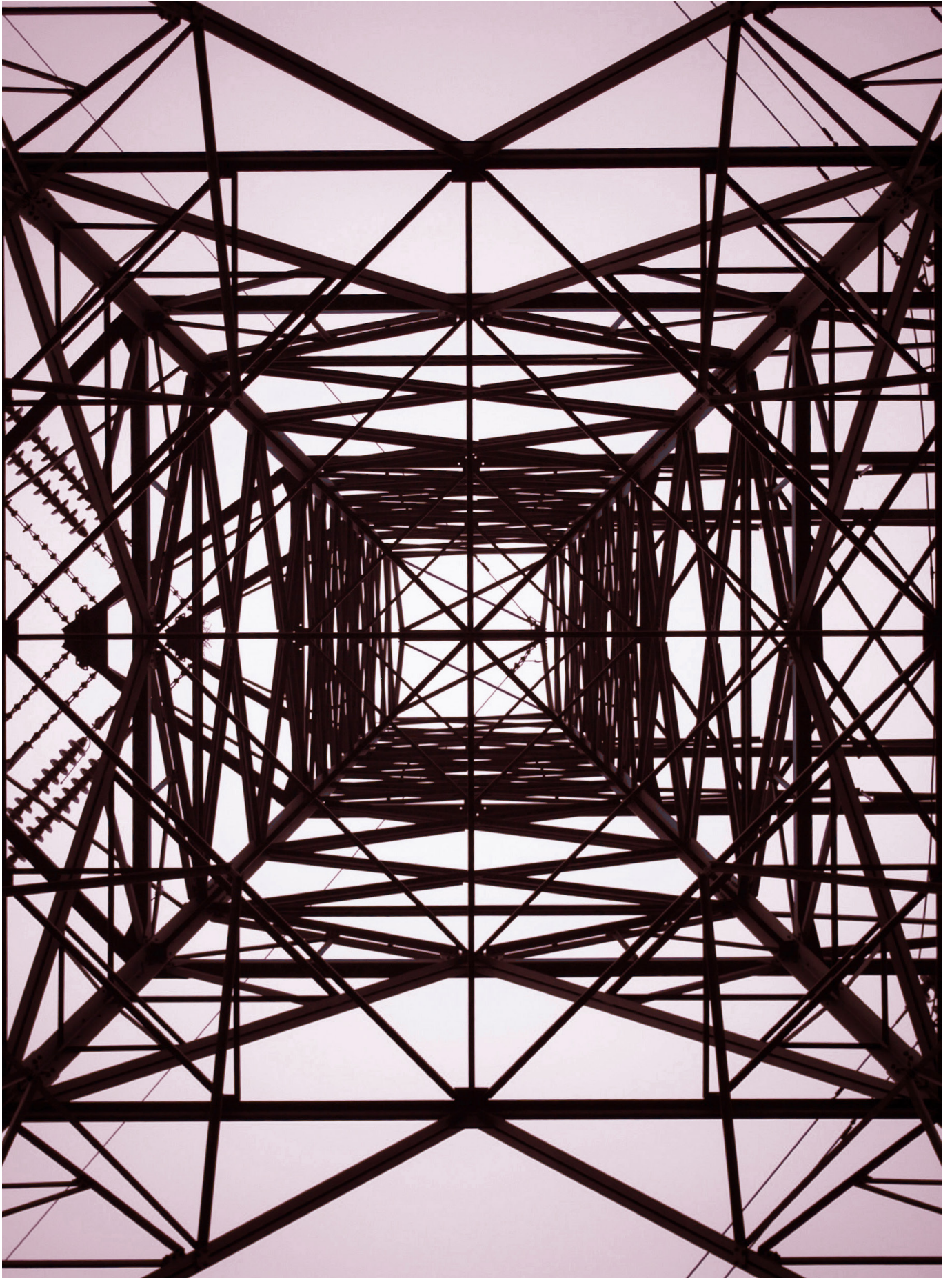
assumes that "the AIIB represents a paradigm-shift vis-à-vis global economic governance as a consequence of China's growing dissatisfaction towards the existing architecture of international financial institutions."¹⁰ A Latin America specialist called the AIIB "the 'talk of the town' in international relations circles" in the region.¹¹

And yet most scholars also find that in its design and lending operations to date, the AIIB is hardly the disruptive development that early reports and US diplomacy warned about. In most ways, its design mirrors that of established MDBs, although there are some important differences. Most AIIB projects so far have been in partnership with the ADB and the World Bank, with the latter lenders in the lead on criteria and safeguards.

Even so, there is no denying China's preponderant position as the AIIB's dominant shareholder and leading member-state, with the power to set the bank's agenda and course. A key question remains: "What does China want from the AIIB?"¹² But divining Chinese intentions alone will not be sufficient to understand what the AIIB may yet become. For one thing, the history of the Western-led international financial institutions is one of significant organizational evolution and innovation, such that today's World Bank institutions (and the IMF) are significantly different creatures than their American and European-led founders envisioned at their creation.¹³ And even if China were to impose a heavier hand in leading the AIIB in years to come, it is already clear that the bank is but one important element in China's rapidly expanding foreign economic policy: the right hand and the left do not always work in coordination.

Actors

While centred in Asia, the AIIB has quickly shaped into a global institution, both in its membership — the Non-Regional Members category spans Africa, the Americas, and Europe — and in the scope of its lending operations. As of late 2018, membership in the bank is 87 states and counting, 20 more countries than the ADB and almost half the membership of the World Bank. This global scope is significant both in expanding borrowing opportunities for states whose infrastructure needs cannot be met by existing multilateral and commercial lenders and in providing a forum for other leading states to both





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In its dealings with established MDBs, it comes to praise,
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promotion of Chinese soft power.*

learn from and impart some influence on the emerging pattern of Chinese-led infrastructure investment in Asia and around the world. As has been observed, “its largest shareholders are the most important states in both Asia and Europe: China, India, Russia, the UK, Germany, France, Switzerland, Italy.”¹⁴

In Africa, Egypt, Ethiopia, Madagascar, and Sudan are members, South Africa remains a PFM, and Kenya is a Prospective Member following approval of its application in May 2018.

In the Americas, the US remains a key holdout on joining or supporting the AIIB. The Obama administration left office as the bank was rapidly taking shape, but had been generally committed to “not allow China to write rules in the Asia-Pacific region.”¹⁵ Specifically, and substantially but not entirely self-servingly, the US position reflected a concern that in lending with fewer strings attached, a Chinese-led bank would “undercut standards” in development finance and set up a “race to the bottom” in quick funding for environmentally and socially disruptive infrastructure projects.¹⁶ The Trump administration has been “openly disdainful of multilateralism and many of the international organisations the United States helped create,” giving China an opening “to step into the leadership void,” according to American political scientist Tamar Gutner. She calls the AIIB “the best showcase of China’s leadership aspiration.”¹⁷

So far, US concerns about a “race to the bottom” appear to have been overstated. The US eventually may come to support the AIIB, just as it dropped its initial opposition to the ADB and the World Bank’s International Development Association facility for low-income countries in the 1960s. But if and when it does, it will be in the context of waning and not ascending US influence, even in its own hemisphere.

Canada joined the AIIB in March 2018, with a one percent vote share. In Latin America, Chile was the first state to pursue membership, and is joined by Prospective Members Argentina, Bolivia, Brazil, Ecuador, Peru, and Venezuela. It is telling that of these states, Venezuela — economically distressed and diplomatically estranged from the US — has committed the highest subscription to the AIIB, at US\$209 million for a 0.2 percent vote share. The region’s collective vote share amounts to less than half of one percent, or less than half of Canada’s share.¹⁸ Brazil, drawn inward by political crisis and its own economic troubles, has seen its participation lag, and it is yet unclear how President Jair Bolsonaro, from the far right, will position the country in the multilateral domain.

Latin American engagement with the AIIB looks set to deepen. The Inter-American Development Bank (IDB) and AIIB have signed a strategic partnership agreement, and AIIB was a guest at IDB’s annual meeting in Argentina in 2018. In 2019, the IDB will meet in China — a first for the bank, and only the third time it has met in Asia.

As for Asia, Japan is the region’s only major economy to stand outside the AIIB as it continues to lead the ADB, even as the latter frequently engages the AIIB as a partner. The ten Association for Southeast Asian Nations (ASEAN) states and South Korea were all founding members of the new bank. Bangladesh and Sri Lanka were among the inaugural borrowers. One scholar observed that in Asia, “[m]ost of AIIB’s inaugural ventures [were] directed to countries that remain close to China geopolitically,” including Pakistan, Tajikistan, and Uzbekistan in South and Central Asia.¹⁹

But by the second half of 2017, seven of the AIIB’s 13 proposed projects were in India, which has emerged as the

bank's largest borrower — echoing its cumulative position in the World Bank — even as security ties between China and India have grown tenuous during Xi's demonstrative presidency and under the assertive Modi government. India joined the AIIB in January 2016 and is the second-largest shareholder after China with US\$8.4 billion in total subscriptions. In the AIIB's first two years, India alone accounted for US\$1 billion of its US\$4.3 billion in Asian lending; as of late 2018, total AIIB commitments in India approach US\$2 billion. This arrangement seems to serve both India's expansive infrastructure needs and the desire of AIIB leadership to emphasise the bank's multilateralism. As stated AIIB Vice-President Danny Alexander, a former UK Cabinet Minister, "One of the questions I have to deal with a lot is, 'Is this a Chinese bank?' And it's not — it's a multilateral bank... India is the largest borrower, we've invested more in India than anywhere else... it shows that any country in Asia, no matter what their diplomatic relations are, is able to engage with and benefit from the work of the AIIB."²⁰

Finally, as a region, Europe has seen significant engagement with the AIIB. Half of the European Union (EU) member countries have joined the bank, along with Iceland, Norway, and Switzerland. A detailed scholarly analysis found that "both strategic and economic factors are important in explaining the various European countries' [separate] policies on joining the AIIB," and further that the European states who joined also did so with the goal of shaping AIIB governance and lending operations "from within"²¹ — and by extension, influencing Chinese infrastructure lending more generally. Whether they might do so depends both on the AIIB's decision-making rules and norms *and* on the degree to which China follows a coordinated approach in managing its various and burgeoning lending streams.

Principles, rules, and norms

Jin Liqun wrote recently to reflect on the process of setting up the bank:

"AIIB's reason for being "is reflected in its special governance structure and operating style... Together, we agreed on its signature combination of a non-resident Board, the Board's delegation of project approval authority to Management and an organizational structure for cost-effectiveness and efficiency, with commitments to

transparency and Asian development thinking embedded in the bank's philosophy... "We were not aiming for a bank to be dominated by one or a few members."²²

China is, by some distance, the bank's largest capital subscriber and shareholder, accounting for 31 percent of total subscriptions and with 26.6 percent of voting shares. (India, as the next biggest shareholder, accounts for 7.6 percent voting power.) At more than one-quarter voting share, China has veto power over key questions of overall governance and strategy, but not over "most operational matters, including project approvals."²³ This is not unusual in MDBs, as the World Bank set the "first among equals" tradition by giving the US veto power in supermajority matters. In practice, the norm has been for decision-making by consensus, but the workings of "consensual" decision-making can be subtle. Veto power is existential: when one state has the ability to oppose, this entails an agenda-setting and discourse-shaping power, well before and beyond formal vote casting.

AIIB's Management holds significant power in project approval, much more than in the World Bank. This, too, is a dimension of potential Chinese influence in the AIIB, given its power in the presidential appointment. Election, suspension, and removal of the president all require a two-thirds supermajority vote by the bank's Board of Governors; China alone does not hold veto power at this threshold, but it comes close, so its preferences will naturally determine who holds the AIIB presidency. While the AIIB Articles of Agreement stipulate that "[i]n appointing officers and staff and recommending Vice-Presidents, the President is obliged to give paramount importance to the highest standards of efficiency and technical competence, while paying due regard to the recruitment of personnel on as wide a geographic basis as possible" — a near-perfect echo of language in the World Bank's International Bank of Reconstruction and Development Articles — no such geographic diversity applies to the AIIB presidency itself. Liqun was a senior Chinese official before he was tapped to lead the bank, and future presidents likely will be Chinese. And why not? Every ADB president has been Japanese. Every World Bank president has been American.

China's initial proposals for AIIB funding and governance would have given it more power within the bank, but, critically, the participation of Australia, South Korea, and key European states moderated its positions in several ways.

As one commentator notes, “China intended to contribute just over 50 percent of the capital stock, which would give it a veto power over all bank decision-making.”²⁴ Further, initial reports had suggested that “only three of 20 directorships would be allocated to non-Asian states,” loans would be in renminbi, and “Chinese companies would be prioritized in the awarding of contracts.”²⁵ Compromises were brokered: nine of just 12 directorships are reserved for Asian members, loans are in US dollars, and construction projects are bid internationally.

The AIIB is distinguished from existing MDBs by “its sole focus on infrastructure development, not poverty reduction” and by the extension of loans at commercial, not concessionary rates. Borrowers must demonstrate repayment capacity.²⁶ But the AIIB’s relative youth, and its co-financing of most projects so far, offer limited scope for comparing its actual operations and impact with those of the established multilateral lenders. Thus, much of the scholarship to date has focused on the bank’s formal design and aspirations.²⁷

The AIIB is an institution of sound design — from a legal and technical standpoint. The AIIB is designed to please and be pleasing. In its dealings with established MDBs, it comes to praise, not to bury. It is in this respect an effective instrument for the promotion of Chinese soft power. A case in point is a “core phrase/narrative developed by China to describe the AIIB”: the bank as an organisation will be “lean, clean and green.”²⁸ Who can oppose such a vision, rendered in English rhyme?

Established MDBs have not always exhibited the highest standards of accountability and transparency. Organised citizens, “transnational advocacy networks,”²⁹ investigative journalists, and representative institutions such as (even) the US Congress all played important parts in pressuring the World Bank, for example, into reforms that made it more responsive and transparent. There remain limits to its accountability even now, but achievements in this direction have been hard-won. Can the results of such a processes — of *politics* — simply be transplanted into a Chinese-led multilateral bank through good intentions, deliberative design, and force of will? If accountability and transparency are affirmed in form, how well will they hold up in the AIIB’s first significant controversies — when there are sharp limits placed on civil society organisation, press freedom, and democratic representation, not only in

many of the bank’s borrowers, but in its largest shareholder?

For this reason, analysing AIIB projects in a country such as India — a very substantial if imperfect democracy, and as noted, the bank’s second-largest shareholder — will be essential to understanding its workings in coming years. Interestingly, the state of Andhra Pradesh (AP) accounts for a significant share of AIIB’s commitments in India, with three major projects in the pipeline, one of which is the Amaravati Sustainable Capital City Development Project that involves US\$200 from AIIB and US\$300 million from the World Bank. In the early 2000s, AP’s Chief Minister Chandrababu Naidu was a star client of the World Bank in its “focus states” lending strategy.³⁰ Now Naidu’s government seeks major investment for the new capital city Amaravati, which may prove controversial. A citizens group representing landowners and farmers told the World Bank’s independent Inspection Panel in May 2017 that they had been subjected to “land grab” tactics by state authorities. After a site visit in September, the Inspection Panel initially recommended that the World Bank’s Executive Board approve a full investigation, but it has since delayed its recommendation as it considers “clarifications” by the World Bank’s management.³¹ This case could prove to be a crucial test of the integrity of the Inspection Panel process in the new context of a World Bank partnership with the AIIB. The Inspection Panel’s very creation owed much to the World Bank’s difficult experience in a controversial infrastructure project on India’s Narmada River, from which the Bank ultimately withdrew. Faced with a similar controversy today, would the World Bank significantly restructure or even withdraw from a project? Would the AIIB?

African democracies will also be key proving grounds for AIIB’s transparency and accountability. The region’s troubled history of indebtedness to the Bretton Woods institutions and Western states has led some analysts to see “debt-trap diplomacy” in the meteoric rise of Chinese lending to African states. From the perspective of a country like Kenya, the interest in joining the AIIB is clear, given ambitious infrastructure plans for developing major internal and regional transport corridors, among other projects. China is already the largest bilateral lender to Kenya, “amassing more than 66 percent of outstanding debt in 2017 ahead of institutions like the IMF.”³² Nairobi-based political economist Anzeste Were cautions that Kenya’s joining the AIIB will “mask

our indebtedness to China,” since the new loans will be listed as multilateral in nature.³³ On the other hand, Chinese investment in Kenya and elsewhere could be improved in quality if subject to the good governance that multilateral administration, at its best, can promote.

Implications

In Chinese development discourse, there is frequent invocation of “crossing the river by feeling the stones” — of moving intentionally, but also incrementally and introspectively. In the basic metaphor, China is the solitary strider. As Chinese leaders have emphasised a collective vision for “harmonious development,” other idyllic images intermingle: Jin Liqun, recalling his assembly of the preparatory team for establishing the bank, writes of envisioning “a caravan along the ancient silk road, its company continuously swelling as it moved forward. China’s leader had planted the seed, yet what made it grow was the shared vision and concerted effort of all shareholders.”³⁴

It is an inspiring image: a fellowship of seekers on a journey, reaching and crossing the river together, feeling the stones and nurturing growth along the riverbank. But what if China is not the pioneering sower and guide, but is the river itself? Its rising resource tide has tremendous potential to nourish, but in a rapid and unmanaged flow, it also carries the potential to overwhelm and erode the landscape. The AIIB is but one stone set amidst the current. Its shape will be inconstant against the force of so much water.

Hameiri and Jones offer one of the most recent assessments of the AIIB, and one of the most thorough so far, in which they offer two simple but essential and related observations. First, China is not a perfectly unitary state, but rather a bureaucratized and fragmented one, and second, the AIIB is but one of several major Chinese initiatives intended to dramatically expand its financial footprint and leadership position in Asia/Eurasia and globally. They argue that “the transformation of the Chinese party-state — its fragmentation, decentralisation, and internationalisation — and the effects of that transformation on China’s external behaviour, pose a more serious challenge to existing development financing norms than the AIIB.”

So far, they argue, there appears to be little coordination between the AIIB and other dimensions of China’s regional investment strategy; they go so far as to say that the bank has been “marginalized” and “is hardly involved” in the Belt and Road Initiative, for example.³⁵ It seems unlikely that this would continue to be the case in coming years, particularly if AIIB begins solely financing a larger number of projects and casts off the training wheels of World Bank, ADB, and other partnerships. But if the AIIB did remain mostly disconnected from the Belt and Road Initiative, that would only mean it stood outside the major stream of Chinese financial activity in Eurasia — either as a strategically positioned but substantively limited multilateral boutique, or as a sign of a much messier and less strategic policy mix than is usually attributed to China.

This compartmentalisation of certain infrastructure projects under the AIIB imprimatur, even as China continues to expand bilateral infrastructure lending across many countries, could enhance China’s international image as a cooperative and responsive “development partner” — even as most Chinese investment remains outside whatever scope of transparency and accountability develop around a more independently active AIIB. It is possible that these norms will even find greater expression in the AIIB than in the legacy multilateral institutions, as the newcomer bank draws on lessons learned by the others, and as China and other leading states such as India seek to position themselves as more responsive leaders than their American, European, and Japanese predecessors in the domain of infrastructure investment. But power and financial self-interest also drive the Chinese-led pattern of infrastructure lending in Asia and across the world, with uncertain social and environmental consequences.

When a rising power creates a new multilateral organisation in the images of those led by established powers, is it revising or merely reforming the existing order? Like much Asian infrastructure it intends to fund, the AIIB was so swiftly proposed and constructed that scholars only recently have begun to present assessments of its design and functioning. Most conclude that so far, the AIIB has been hardly the revisionist disruptor that early media accounts and US positioning suggested.

Yet there can be little doubt that the creation of the AIIB is an important signpost in the broader shift of power away from a US-centred world order, and in the “easternization” of economics, finance, and geopolitics.³⁶ It is a marker of China “changing the world from the second place” and — so far at least — “thus pushing for

responsible but not destabilizing reforms.”³⁷

“It is early days” for the AIIB.³⁸ As the history of the World Bank, IMF, and other international financial institutions suggests, whatever the AIIB may yet become, it may not yet be.

¹⁴ China proposes an Asian infrastructure investment bank,” *China Daily*, October 3, 2013, http://www.chinadaily.com.cn/china/2013-10/03/content_17007977.htm

² Xi Jinping, “Deepen Reform and Opening Up and Work Together for a Better Asia Pacific,” APEC CEO Summit, October 7, 2013, Bali, Indonesia, https://www.fimprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1088517.shtml

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CAN THE QUAD NAVIGATE THE COMPLEXITIES OF A DYNAMIC INDO-PACIFIC?

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The past year has seen the revival of the Quadrilateral Security Dialogue, a mechanism which enables dialogue between four major democracies within the Indo-Pacific region, Australia, Japan, India, and the US, on issues of regional security. Known more colloquially as “the Quad” — language that conjures images of a *Marvel* movie — its revival signals an important development within the Indo-Pacific, and reflects a convergence of strategic interests between four major democracies of the region.

Underscored by principles of openness, freedom of movement, and respect for the rules-based international order, the Quad builds on a complex and overlapping web of bilateral and trilateral alliances and partnerships between the four nations. Its revival, albeit at officials level only, offers a constructive platform for embedding core principles into the narrative of the emerging regional order, while building the trust and confidence needed to support cooperative initiatives between the nations involved, and others.

However, caution is warranted. The re-appearance of the Quad has prompted speculation about its strategic purpose and intent. To suggest that the Quad is an alternative to the China’s Belt and Road Initiative, or a mechanism aimed at containing China, or to conflate it with understandings of the Indo-Pacific construct assigns far too much strategic gravitas to the grouping at this stage. Furthermore, such

notions obscure significant regional mechanisms already in existence, and undermine prospects for cooperation and inclusion across the breadth of the Indo-Pacific region.

The Quad first emerged as a cooperative response to the devastation of the 2004 tsunami, with the navies of India, Australia, Japan, and the US engaged in the coordinated delivery of humanitarian and disaster relief. In 2007, Japan’s Prime Minister Shinzo Abe, an early advocate of the Indo-Pacific, took steps to formalise the grouping through an initial summit and joint naval exercises in the Bay of Bengal. Despite Abe’s efforts, the Quad failed to cohere as a formal group after Australia withdrew in 2008 over concerns that the group might antagonise China. Australia’s withdrawal at that time rankled some in the respective foreign and defence policy communities and raised suspicions, including within India, that Australia might be a weak link in the grouping.¹ Arguably though, formalising the Quad at that stage would have been pre-emptory, as it lacked the agreed strategic framework and purpose. Indeed, aside from Australia, India and Japan harboured their own doubts about taking the initiative forward.² As Indonesia’s former foreign minister, Marty Natalegawa suggests, it was “a solution looking for a problem.”³ Nonetheless, a complex web of interwoven bilateral and trilateral security links sustained a loose coalition between the four nations,⁴ allowing reconstitution some ten years later, at least at the official level, in a format that some have labelled “Quad 2.0.”⁵

As discourse surrounding the Quad has unfolded over the past twelve months, it has brought criticisms, complexities, and challenges to the fore. A vast region, the Indo-Pacific is marked by a precarious geometry of fault-lines and strategic mistrust. While the Quad offers constructive opportunities for improving dialogue and cooperation across the region, it is constrained by internal limitations. Each member of the quartet presents a slightly different view of the Quad's role within the Indo-Pacific, with Australia and India seemingly less attached to the concept than Japan and the US, and the broad objectives of such a grouping remain unclear. While the four largely speak of the same underpinning principles, with commitment to the 'rules-based order' emerging as a common theme, it is not clear just which rules apply and when. Lastly, lingering suspicions between members of the Quad limit the extent of cooperation that might be achieved. India's continued reluctance towards Australia joining the trilateral Malabar exercises offers a clear example, while US concerns over India's relationship with Iran could emerge as another thorny issue for the group. Other challenges, including a wider uneasiness about the role and intent of the Quad, especially amongst the nations of Southeast Asia, and the need to build trust and credibility with smaller nations across the vast region, including in the South Pacific, persist.

Reviving the Quad: An Indo-Pacific focus

US President Donald Trump paved the way for the revival of the Quad against the backdrop of the Indo-Pacific region. In his keynote to the 2017 APEC Leaders' Summit in Vietnam, Trump spoke of US aspirations for a "free and open Indo-Pacific"⁶ (FOIP), a construct now embedded in the US national security strategy. At its core, US positioning towards the Indo-Pacific is a response to the changing geopolitical realities of the region. Some argue that it is simply an extension of longstanding US strategy towards the Asia-Pacific. To some degree this is true, but key differences, not least the recent labelling of China as a strategic competitor, underscore the contemporary significance of America's Indo-Pacific shift.⁷ China's ongoing militarisation and power projections across the region have brought a new sense of urgency to US positioning. While the nature of the Indo-Pacific construct remains ambiguous, it is seen as "a new way of thinking about the region"—one that

engages with major democracies, and more specifically, "dilutes the predominance of China."⁸

The renaming of the US Indo-Pacific Command (from the US Pacific Command) reinforces this message. When announcing the change, US Defence Secretary, Jim Mattis noted its symbolism as the "recognition of the increasing connectivity of the Indian and Pacific Oceans," where "all nations large and small are essential to the region, in order to sustain stability in ocean areas critical to global peace."⁹ Indeed, the language of America's Indo-Pacific has raised the ire of Chinese policymakers on the basis that it smacks of strategic containment. The White House is at pains to dampen such suggestions, preferring instead the narrative of counter-balance to be achieved through deepened security engagement with Japan, India, and Australia.¹⁰ Others provide a more blunt assessment. Outgoing commander of the former US Pacific Command Admiral Harry Harris stated recently, "I believe we are reaching an inflection point in history... A geopolitical competition between free and oppressive visions is taking place in the Indo-Pacific."¹¹ For the US, this Indo-Pacific turn is significant in name and substance. It is "deeply entangled in US-led strategic maneuvering,"¹² which seeks to ensure America's contemporary relevance in the region, provide a strategic framework for responding to China, and by drawing on key partners, offer a platform for sharing the burden of regional leadership.

US emphasis on the Indo-Pacific brought the concept to the fore of analysis and scrutiny across the region, as nations have grappled to define their own Indo-Pacific perspectives. It dominated the agenda and discussion at Delhi's Raisina Dialogue in early 2018, and more recently at Singapore's Shangri La Dialogue. Australia, Japan, and India have welcomed the attention that Trump drew to the concept. Bringing the Indo-Pacific to the fore of regional dialogue validates the strategic outlook that each had been promoting for the previous decade, underscores the importance of their maritime interests, and opens up opportunities to build new partnerships and alignments across the region. But their responses to the Quad are mixed.

Prime Minister Abe, who embedded the FOIP strategy as a framework for Japan's foreign policy in 2016, is unsurprisingly the most receptive to Quad. It is a concept he has previously referred to in an opinion piece as "Asia's





“*Each partner holds a slightly different view of what the Quad might achieve. Though subtle, these differences matter, and reciprocal interests in deeper partnership-building and cooperation cannot be assumed.*”

democratic security diamond” with a clear focus on ensuring freedom of navigation underpinned by values of democracy, the rule of law, and respect for human rights.¹³ For Japan, the Quad is an important step towards a collective regional security arrangement at a time when the nation faces increasing pressure from China, especially in surrounding maritime domains. While Japan’s security relationship with the US endures, Abe is clearly working to keep the Trump-led administration engaged in the region, while shoring up bilateral partnerships with Australia and India. Japan has cultivated trilateral cooperation — Japan-India-US and Japan-Australia-US — to ensure semi-regular diplomatic consultation alongside accelerated military cooperation and defence technology transfer. Abe has taken steps to enhance and extend Japan’s ability to participate in the latter.¹⁴ Questions remain about the extent to which Japan will be able to contribute to the Quad beyond existing activities, given the constitutional limitations on the Japanese Self-Defense Forces. While Abe has signaled his interest in pursuing constitutional change to enable the military to play a more assertive role beyond “self-defence,” such a move carries significant political risk and time may be running out to secure the change.¹⁵

Australia’s recent defence and foreign policy white papers explicitly identify the Indo-Pacific as a more fitting descriptor of the nation’s trans-oceanic strategic outlook.¹⁶ The 2017 Foreign Policy White Paper sets out Australia’s vision for the Indo-Pacific as a neighbourhood “in which adherence to rules delivers lasting peace, where the rights of all states are respected, and where open markets facilitate the free flow of trade, capital and ideas.”¹⁷ Much like Japan, the US Indo-Pacific strategy provides Australia with a critical platform for engaging its strategic ally in the region at a time when the US appears more intent on withdrawal. It also offers important opportunities to consider and develop deeper partnerships across the region, including with India and Japan, as well as with

other regional democracies, like Indonesia. There is much common ground, yet the idea of a US-led strategic design, with an emphasis on the Quad, brings a sense of unease. Indeed, while the Quad offers a useful mechanism for security consultation and cooperation with key partners in support of a free and open Indo-Pacific, it was never intended to define or substantiate Australia’s Indo-Pacific outlook. Former foreign minister Julie Bishop, a strong advocate for the Indo-Pacific, noted that it was “natural” for the four nations, “as like-minded democracies,” to discuss issues of regional stability and security, but made no commitment to a more formal coalition.¹⁸ Neither Australia’s defence nor foreign policy white papers make explicit reference to the Quad, although both reflect on the importance of a range of constructive partnerships that support underpinning principles of a free and open Indo-Pacific.

India’s Prime Minister Narendra Modi has also promoted the Indo-Pacific as a framework that aligns to his Act East and Neighbourhood First policies. India’s own geopolitical positioning is complex. Delivering the keynote at this year’s Shangri-La Dialogue, Modi was careful to avoid discussion of the challenges confronting India in the region, not least arising from a difficult relationship with China. Instead, he focused his speech towards an inclusive Indo-Pacific underpinned by the principle of consent, commitment to the rule of law, and “faith in dialogue” as the operative rules for the region.¹⁹ In a speech that was clearly aimed towards a Southeast Asian audience, “Modi barely mentioned the region’s major powers and other significant players on the periphery, such as Australia or Japan. He stopped well short of criticising China or any other state by name. The ‘Quad’ was not spoken of at all.”²⁰ India is integral to America’s shift towards the Indo-Pacific, but as Modi’s speech indicates, the feelings are not quite so mutual. While “welcoming the Quad overtures,” India is “exercising strategic caution.”²¹ Dual concerns arising

from an unwillingness to aggravate China and growing uncertainty about the US strategic intent in the region are likely to underpin India's cautious engagement with the Quad for now.

Having recently engaged in their third official-level meeting, it is clear that each of the US' key Indo-Pacific partners — Japan, Australia, and India — are generally supportive of an informal coalition of the Quad finding common agreement in the need to promote a rules-based, open, free, and inclusive Indo-Pacific. But closer examination reveals that each has limitations, and each holds a slightly different view of what the Quad might achieve. Though subtle, these differences matter, and reciprocal interests in deeper partnership-building and cooperation cannot be assumed. Continued resistance to engaging in quadrilateral military exercises underscores this challenge. In particular, it seems that Australia still has some ground to overcome deeper suspicions and build relevance and credibility within the group and with others.²²

Similarly, while US engagement in the Indo-Pacific remains a core element of regional security, broadening that engagement beyond security terms towards economic, trade and development initiatives will diffuse significant concerns about the intent of US strategic competition. Additionally, the place of China in the Indo-Pacific is important. India and Japan have made significant moves to build dialogue with China's President Xi. Despite recent hurdles in the relationship, Australia might also play a role in drawing Beijing into sustained and constructive dialogue about the emerging power balance of the region. Indeed, it is worth noting, as Rory Medcalf has argued, that "China is the quintessential Indo-Pacific power."²³

Building an inclusive Indo-Pacific

Although captivated by the Indo-Pacific concept, Southeast Asian nations have taken some time to warm to it. For some, talk of the Indo-Pacific raises uneasiness about their own positioning within the region and appears dismissive of the enduring notion of ASEAN centrality.²⁴ It is an uneasiness that is reinforced by perceptions of the Quad. Graeme Dobell makes the point that "ASEAN mistrusts the Indo-Pacific, and is spooked by the quad."²⁵ While it is worth noting that recent research into ASEAN

perceptions of the Quad suggest this view might be changing,²⁶ officials remain cautious. Singapore's Prime Minister Lee Hsien Loong, in his role as 2018 ASEAN host, reflects this view, affirming ASEAN's acceptance of the Indo-Pacific, provided the end result is "an open and inclusive regional architecture, where ASEAN member states are not forced to take sides."²⁷ China's concerns about the Quad as a form of strategic design have found resonance in Southeast Asia — a clear reflection of China's growing regional and global influence. While most nations across the region have a "shared interest in preventing China's domination...like Australia, they all have complex interdependent relationships with China, which they need to maintain in a reasonable state of equilibrium."²⁸ An Indo-Pacific that seeks to contain China is a difficult pill for Southeast Asia to swallow. More importantly it threatens the traditional consensus and unity found within ASEAN.

Former Australian foreign minister Julie Bishop made the point that "the states of ASEAN are pivotal to any debate about the future of the Indo-Pacific. Geographically, diplomatically and strategically, ASEAN sits at the heart"²⁹ of the Indo-Pacific. Indonesia's former foreign minister Marty Natalegawa concurs, suggesting that under Indonesia's chairmanship in 2002, ASEAN broadened its Indo-Pacific outlook, pushing for stronger engagement with India, Australia, and New Zealand — engagement that ultimately culminated with the establishment of the East Asian Summit (EAS) in 2005.³⁰ Today the EAS, recognised as "the region's premier forum for strategic dialogue,"³¹ draws together member nations of ASEAN, plus China, Japan, Republic of Korea, India, Russia, US, Australia, and New Zealand. Although East Asian in name, it is strikingly Indo-Pacific in its geographic reach and representation. Many commentators, including Natalegawa, argue that the EAS offers the necessary and established architecture to anchor Indo-Pacific strategic dialogue and cooperation. Bringing focus to the EAS as a primary mechanism for Indo-Pacific dialogue would also address ASEAN concerns about sustained "centrality." A more robust and effective EAS could mitigate ASEAN tensions surrounding the Quad.

Importantly, at its 2018 summit, the EAS acknowledged the Indo-Pacific, noting "the broad discussions on the various Indo-Pacific concepts" from the Belt and Road Initiative to the free and open Indo-Pacific. It went further

to affirm the “ongoing discussions within ASEAN to develop collective cooperation in the Indo-Pacific” on the basis of the “principles of ASEAN Centrality, openness, transparency, inclusivity, and a rules based approach.”³² While the statement offers welcome consideration of the Indo-Pacific, it is lacking in clarity and substance. Indeed, it appears that the EAS missed a key opportunity to offer ASEAN strategic or tactical leadership on the Indo-Pacific.

This kind of strategic drift threatens to undermine the Indo-Pacific concept, or at least open the way for alternative frameworks, that may be less suited to the interests of those advocating for a free and open Indo-Pacific — including Quad nations. For example, Malaysian Prime Minister Mahathir’s revived proposal for an East Asian Economic Caucus (EAEC), a grouping based on ASEAN plus China, Korea, and Japan — but excluding India, the US, and Australia — could see ASEAN shrink away from the Indo-Pacific.³³ The proposal, which harks back to Mahathir’s earlier arguments about Asian values and identity, reflects deeper insecurities within the region about managing the China relationship while avoiding any entanglement in great power strategic rivalry. In reality, the EAEC will be unlikely to mitigate against either. From a diplomatic perspective, the four members of the Quad could play a critical role in providing the necessary reassurance to ASEAN, through the EAS, to ensure that it plays a central role in the Indo-Pacific, rather than drift away from it.

Spheres of influence

The broad scope of the Indo-Pacific geopolitical construct brings further operational challenges for Quad partners, this time in terms of how each might engage in and respond to issues within their various spheres of influence across the region. The South Pacific, where strategic Indo-Pacific interests and rivalries are now playing out, provides a useful example.³⁴ China’s heightened engagement, fostered mainly through infrastructure projects and loans across the region, and accompanied by rumours of more strategic military interests, has created significant unease for Australia, and other members of the Quad, notably Japan and the US.³⁵

On this issue, the response has fallen squarely to Australia, with recently appointed Prime Minister Scott Morrison making the point: “This is our patch. This is our part of

the world. This is where we have special responsibilities. We always have, we always will. We have their back, and they have ours. We are more than partners by choice. We are connected as members of a Pacific family.”³⁶ Australia’s subsequent stepped up Pacific Strategy provides for the establishment of five new diplomatic missions; A\$2 (US\$1.4) billion in support of a concessional finance facility to support communications, energy, transport, and water projects; increased military and policy cooperation, annual defence, police, and border security meetings, sporting and cultural links, and the re-establishment of a joint US-Australia military base at Manus Island.³⁷ These initiatives add to earlier announcements by former Foreign Minister Julie Bishop of an A\$18 (US\$12.6) million Australia Pacific Security College, and significant extensions to the Pacific labour mobility scheme.³⁸ The intent is clear: to send a message, particularly to China but also to the US, that when it comes to the vast Indo-Pacific region, the South Pacific sits squarely in Australia’s immediate sphere of influence. It is a message that has the backing and enables, particularly, the involvement of the US and Japan.

The challenge rests in the alignment of interests alongside allocation of responsibility. Although nothing new for Australia’s Pacific relationships, the suggestion of disconnect emerged through Australia’s recent attendance at the September Pacific Islands Forum in Nauru. While Australia’s focus was on the signing of a comprehensive regional security agreement (Biketawa Plus), incorporating contemporary focus on emerging threats including cybersecurity and transnational crime, Pacific Island leaders were keen to address issues of climate change.³⁹ Australia’s own poor track record on climate change action has been an ongoing cause for concern amongst Pacific neighbours, with Fiji’s Prime Minister Frank Bainimarama previously suggesting that Australia’s “selfish” stance on climate change undermined its credibility in the region.⁴⁰ The very nature of the Indo-Pacific outlook, centred on maritime issues and interests, offers a useful framework through which Australia might respond to non-traditional threat issues, most especially climate change. It may even provide the necessary lift to Australia’s lagging policy on the issue, not just in the region but also at home.

In a contested Indo-Pacific, the micro-states of the South Pacific have come to wield significant influence, which could prove useful to them in shaping a regional

agenda that better addresses their own needs. Australia's existing dialogue with South Pacific partners suggests that each of the Quad members must consult carefully to align Indo-Pacific interests with the needs and expectation of the nations that fall within its scope. It is a significant challenge, but one that must be addressed through carefully calibrated diplomacy if the shared ambition of a free and open Indo-Pacific is to be realised.

Focusing on cooperation in the face of challenge

The future of the Quad beyond its current consultative format is not certain. Any ambition to formalise the Quad as a substantive manifestation of a free and open Indo-Pacific is likely to encounter difficulties. Given the complex array of interests at play across the dynamic region, key partners are more likely to preference loose coalitions based on dialogue and cooperation over more fixed, institutionalised formats. The opportunity to discuss emerging regional issues, from piracy to maritime pollution and disaster management, through such a

platform should be seen as a positive. At the same time, assuring ASEAN of its role and relevance to Indo-Pacific, including through established dialogue mechanisms like the EAS, could reinforce notions of inclusivity, build support for the key rules shaping behaviour, and mitigate against the threat of strategic drift within the region. Engaging others, including China, in dialogue about the Indo-Pacific project through such mechanisms will be integral to realising the long-term vision for a stable and inclusive region. However, there is no reason that the Quad might not continue to meet informally on the sidelines of the EAS. Each of the Quad partners has much to learn from the others, and drawing other regional democracies, like Indonesia, into the dialogue might also prove useful. Finally, learning from the recent developments in the Pacific, refocusing the diplomatic efforts of the Quad towards other smaller partners across the region, including the island nations of the South Pacific, is critical. Not only does it reinforce a sense of strategic clarity for members of the Quad outlook, it also offers an important opportunity to bring the concerns of small and micro maritime states to the fore of the Indo-Pacific diplomatic agenda.

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¹³ Shinzo Abe, "Asia's Democratic Security Diamond," Project Syndicate, December 27, 2012.

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RCEP: AN ECONOMIC ARCHITECTURE FOR THE INDO-PACIFIC?

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The Indo-Pacific is an idea whose time has come. Recognising that the centre of gravity in Asia is shifting south and west, many governments have adopted the Indo-Pacific as a spatially-expanded conceptualisation of who and what constitutes the Asian region. The concept has a clear security logic: reflecting the strategic importance of sea lines of communication linking the Indian and Pacific oceans, and India's demonstrable importance as a regional security actor.

However, the economic case for the Indo-Pacific is less developed. There is yet to emerge a critical mass of trade or investment ties linking South Asia to economies on the Pacific Rim, nor significant intergovernmental initiatives to build these ties. Tellingly, the most visible institutional manifestation of the Indo-Pacific — the “Quad” grouping of Australia, India, Japan, and the United States — is a maritime security-focused dialogue. Nor is India well-integrated into economic institutions. While it is a member of the East Asia Summit, the premier regional forum for strategic dialogue, it is not involved in the economically-focused Asia-Pacific Economic Cooperation (APEC).

The Regional Comprehensive Economic Partnership (RCEP) promises to change this. RCEP is one of several “mega-regional” free-trade agreements (FTAs) launched in recent years.¹ It seeks to create a sixteen-member trade

architecture, comprising the Association of Southeast Asian Nations (ASEAN) and the six countries with which it has a plus-one FTA: Australia, China, India, Japan, Korea, and New Zealand. RCEP is systemically significant for the global trading system, accounting for almost half of the world's population, over 30 percent of global GDP, and over a quarter of global exports.² In GDP and population terms, a concluded RCEP will constitute the world's largest trading bloc (Table 1). Significantly, by including India, it is the first regional economic institution to have an Indo-Pacific geographic scope.

As per the “Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership” of 2013, its principal purpose is to “achieve a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement among the ASEAN Member States and ASEAN's FTA Partners.”³ Given the diversity of development levels within its membership, RCEP has focused on traditional trade reforms, such as tariff reduction and at-the-border measures. This is in contrast with the other mega-regional FTA in Asia — the recently-revived Trans-Pacific Partnership (TPP) — which includes a range of advanced trade-related regulatory measures across the investment and services domains. RCEP's more modest ambitions in comparison to the TPP reflect its status as a multilateral



At the regional level, RCEP's developing country-focused model will likely become the template for the next phase of trade and investment liberalisation.

FTA designed by, and to suit the needs of, developing economies in Asia.

Notwithstanding its regulatory ambition, the successful conclusion of RCEP will establish the first genuinely Asian regional trade agreement since the ASEAN FTA of 1992, and the first Indo-Pacific economic institution of any kind. Amidst the turbulence confronting global trade politics and trading institutions, this will send a strong message that the region remains committed to a rules-based approach to trade and investment liberalisation. It will help knit India into the regional trading system, which was a critical foundation for the Asian economic miracle that began in the mid-1980s. It will also help ensure that the Indo-Pacific is a “complete” regional concept, containing both security and economic architectures. RCEP will thus be a landmark achievement in the maturation of the Indo-Pacific regional concept.

An Asian mega-regional trade agreement

RCEP was launched on the margins of the 2012 East Asia Summit. It emerged from a series of earlier proposals for a region-wide FTA and, along with the TPP, was positioned as a “pathway” to APEC’s longer-term goal of creating the Free Trade Area of the Asia-Pacific (FTAAP).⁴ But, unlike the TPP, RCEP offered a far more regionally-focused approach to membership. It did not include the extra-regional APEC members of North and South America, but compensated with the inclusion of all Asian economies, including China, Korea, India, Japan, and the full ASEAN bloc. This Asia-focused approach to membership is reflected in its goals. RCEP embodies a

desire to achieve a regional trade architecture that would ensure all members are “provided with the opportunities to fully participate in and benefit from deeper economic integration and cooperation.”⁵

RCEP is frequently compared with the TPP, the other mega-regional trade agreement in Asia. Both share the common goal of offering a multilateral approach to trade liberalisation. Since the turn of the century, the number of bilateral FTAs within the Asia-Pacific has increased from four to fifty-two.⁶ However, there are major differences across these bilateral agreements in terms of their tariff reduction commitments, investment protections, and other regulatory provisions. This has led to the so-called “noodle bowl” problem, where the regional trade system has fragmented into multiple, overlapping, and inconsistent bilateral FTAs. Bilateral FTAs also tend to favour the interests of larger developed economies, who have the heft to extract better deals in bilateral negotiations than smaller developing counterparts. In architectural terms, both the TPP and RCEP promise a return to trade multilateralism — albeit at the regional rather than global level.

Institutionally, RCEP offers an ASEAN-focused rather than APEC-based approach to trade multilateralism. RCEP formally endorses the principal of “ASEAN Centrality,”⁷ and uses a closed membership model limited only to ASEAN and its current FTA partners. However, in economic terms ASEAN is a comparatively small party, accounting for only 11 percent of RCEP’s combined GDP. China (47 percent) and Japan (21 percent) are the economic heavyweights of the bloc. While India currently holds a modest share (9 percent), its high-speed growth trajectory promises to make it a core player in future

years. One of the key challenges for RCEP negotiators is therefore to strike a balance between its ASEAN-centred institutional form and its China/Japan/India-dominated economic geography.

Indeed, this has proven to be a major challenge during negotiations over the last five years. As of December 2018, twenty-four rounds of negotiations have been conducted, supported by six intersessional Ministerial meetings, with Leaders' discussions held on the margins of ASEAN summits. Only seven regulatory chapters have been concluded, and there remains several gaps to be closed in market access negotiations.⁸ Aspirational deadlines for RCEP's conclusion have consistently been missed. In its "Guiding Principles" statement, the end of 2015 was benchmarked as the deadline for negotiations. In November 2015, the deadline was moved to 2016, and in late 2016 Leaders called for a "swift conclusion" to RCEP.⁹ At the second RCEP Summit in November 2018, the target was again moved to 2019.

These delays are in part explained by the considerable diversity within the RCEP bloc. Its members include some of the most advanced members of the Organisation for Economic Co-operation and Development, alongside several lesser-developed economies, who naturally have major differences between their economic interests and capacity for trade reform. RCEP negotiations have also given prominence to China and India, two countries which have historically not performed leadership functions within regional economic organisations. They also have divergent views on which elements should be prioritised, with China favouring a strong outcome for trade in goods while India pushes for increased services liberalisation.¹⁰ The scope and implementation timetable for bilateral market access exchanges between China and India has turned out to be one of the most challenging elements of the negotiations.¹¹

The travails affecting the TPP have further increased RCEP's importance for the regional trade architecture. When TPP negotiations completed first in 2015, many analysts expected it to become the principal vehicle for multilateralising the regional trade architecture. These expectations were decidedly quashed with the election of Donald Trump in late 2016, who campaigned extensively against the TPP. President Trump withdrew the US from

the agreement with his first executive order in January 2017.¹² In the following months, the eleven remaining TPP members scrambled to find a way to salvage the agreement. Led by Japan, these efforts bore fruit in March 2018 with the signing of the Comprehensive and Progressive Agreement for TPP (CPTPP).¹³ While the CPTPP retains most of the original agreement's advanced rule-making provisions (suspending only a range of intellectual property measures), the absence of the US has reduced the TPP bloc to less than half its original size (Table 1).

As a consequence, RCEP remains a leading prospect for driving a new phase of economic liberalisation in Asia. Its membership is genuinely inclusive of all Asian countries, and is of a sufficient size to claim systemic importance in the global trade system. A concluded RCEP will turn a page on two decades of bilateral trade deals in the region, returning the Asian region to an inclusive and member-driven multilateral architecture. The unresolved challenge for RCEP negotiators is being able to conclude an agreement that not only strategically integrates the economic forces of the region, but also drives economic development.

A developing-country calibrated trade model

RCEP offers a more "traditional" model for trade liberalisation than the TPP. Its objectives are principally focused on liberalising barriers to goods and services trade at the border, involving the elimination of tariff and non-tariff barriers (Table 2). The broader range of regulatory provisions in the TPP — across issues as diverse as e-commerce, intellectual property, environment, labour, and financial services — are not core elements of the RCEP negotiating agenda. While RCEP will include an investment framework, this is intended primarily to facilitate cross-border capital flows, not harmonise national investment regimes. While the TPP is considered a "WTO-Plus" type of agreement, RCEP instead aims for a "WTO-consistent" approach.

RCEP's WTO-consistent approach reflects the need to find a common ground that meet the needs of its diverse membership. This is particularly true for India and the Cambodia-Myanmar-Laos-Vietnam, or CMLV group, which have approached negotiations at an earlier

Table 1: Comparison of major regional trade agreements, 2016

Regional trade bloc	Year established	Member states	Population (million)	Share world GDP	Share world trade
EEC/EU Customs Union	1958/1994	28	507	21.8%	33.0%
Common Market of the South (Mercosur/Mercosul)	1991	5	293	3.6%	1.6%
Association of Southeast Asian Nations FTA	1992	10	640	3.4%	6.9%
North American FTA	1994	3	486	28.2%	16.4%
Commonwealth of Independent States FTA	2011	8	267	2.2%	2.3%
Trans-Pacific Partnership	Suspended	12	696	38.4%	26.5%
Comprehensive and Progressive Agreement for the TPP	2018	11	374	13.6%	14.9%
Regional Comprehensive Economic Partnership	Under negotiation	16	3576	31.6%	17.0%

Source: Authors' calculations from WTO Regional Trade Agreements Database, UNCTAD Stat Database and United Nations Population Division Standard Projections

stage of development than either other ASEAN or the more developed country members. Trade liberalisation is especially challenging for these economies. Tariffs often constitute a significant component of state budgets, requiring complex taxation reforms to compensate for lost revenues. Agricultural liberalisation also constrains several of the policy tools — including price controls and import quotas — which have historically been used to stabilise highly-volatile agricultural markets and ensure food security. Competition from manufacturing imports will also impose structural adjustment costs for certain sectors, even if the aggregate gains for the economy as a whole will be positive.

RCEP's modest ambitions are an explicit attempt to address these challenges for developing economies. By avoiding the more complex and costly WTO-Plus provisions in favour of a focus on conventional liberalisation measures, it poses lower reform costs for developing country members. While reform costs will certainly have to be carefully managed, their quantum is far easier to achieve than for a WTO-Plus agreement like the TPP. Another part of RCEP's equitable development objectives are the special and differential treatment provisions for less-developed members, and the inclusion of economic and technical cooperation partnerships. The latter is especially important, and will offer assistance to improve the technical and bureaucratic capacity of smaller parties.

Even a modest RCEP agreement will be a landmark achievement. It will help alleviate the noodle bowl of bilateral trade deals, which, as Figure 2 illustrates, has become a challenge in organising regional trade arrangements. There are presently twenty-eight bilateral FTAs between the RCEP negotiating parties, in addition to the ASEAN FTA and its six plus-one extensions. Each contains radically different provisions, with varying standards on tariff reduction, rules-of-origin, customs procedures, dispute settlement, and investment and services regulations. Compliance with these complex rules impose significant transaction costs for businesses, which are especially pronounced when regional value chains span several distinct markets. While RCEP will not eliminate existing FTAs, it will provide a single, consistent, and cohesive set of trade rules above them to mitigate the negative effects of the noodle bowl.

Significantly, RCEP will for the first time include India in a major piece of the regional economic architecture. India's economy is not yet substantially connected into East and Southeast Asia: only one quarter of India's two-way trade is with Asia (compared with approximately half of other Asian countries' trade), and there are substantially lower levels of two-way investment between India and the rest of Asia.¹⁴ Part of this lack of economic integration is due to India's ongoing economic liberalisation process, as well as the greater geographical, infrastructural, and socio-

Table 2: Key provisions in RCEP negotiations

Issue	Intended provisions
Trade in Goods	Progressively eliminate tariff and non-tariff barriers to substantially all trade
Trade in Services	A comprehensive, high-quality agreement which substantially eliminates restrictions and discriminatory measures
Investment	Promote, protect, facilitate and liberalise cross-border investment
Economic and technical cooperation	Extend existing initiatives in ASEAN+1 FTAs, with aim of narrowing development gaps in region
Special and differential treatment	Special and differential treatment in agreed commitments, consistent with differing developmental levels of members
Other provisions	Inclusion of intellectual property, competition, e-commerce and dispute settlement provisions

Source: "Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership"

political distance between it and many Asian countries. However, it also reflects India's absence from the regional economic architecture. It is not a member of APEC or the ASEAN+3 (two key dialogue platforms for economic cooperation), and presently only has RCEP country FTAs with Malaysia and Singapore.¹⁵ RCEP will provide an institutional foundation for closing these economic gaps, which major opportunities for both India and its regional partners to develop mutually-beneficial trade and investment ties.

There are also a number of other RCEP economies who do not have bilateral FTAs with one another, including China-Japan, China-India, India-Indonesia, Japan-Korea, and Australia-India. For some, bilateral trade negotiations are ongoing, while others are unlikely to be launched. RCEP offers the clearest path forward to establish a new network of trade arrangements to increase economic connections between these countries. For example, when establishing a Comprehensive Strategy Partnership in May 2018, the leaders of Indonesia and India prioritised RCEP as a key driver in their new economic partnership.¹⁶ For Australia and India, who have long been unable to reach agreement on a bilateral FTA, RCEP offers a more practical avenue to realise stronger trade relations.¹⁷

RCEP and the emerging Indo-Pacific concept

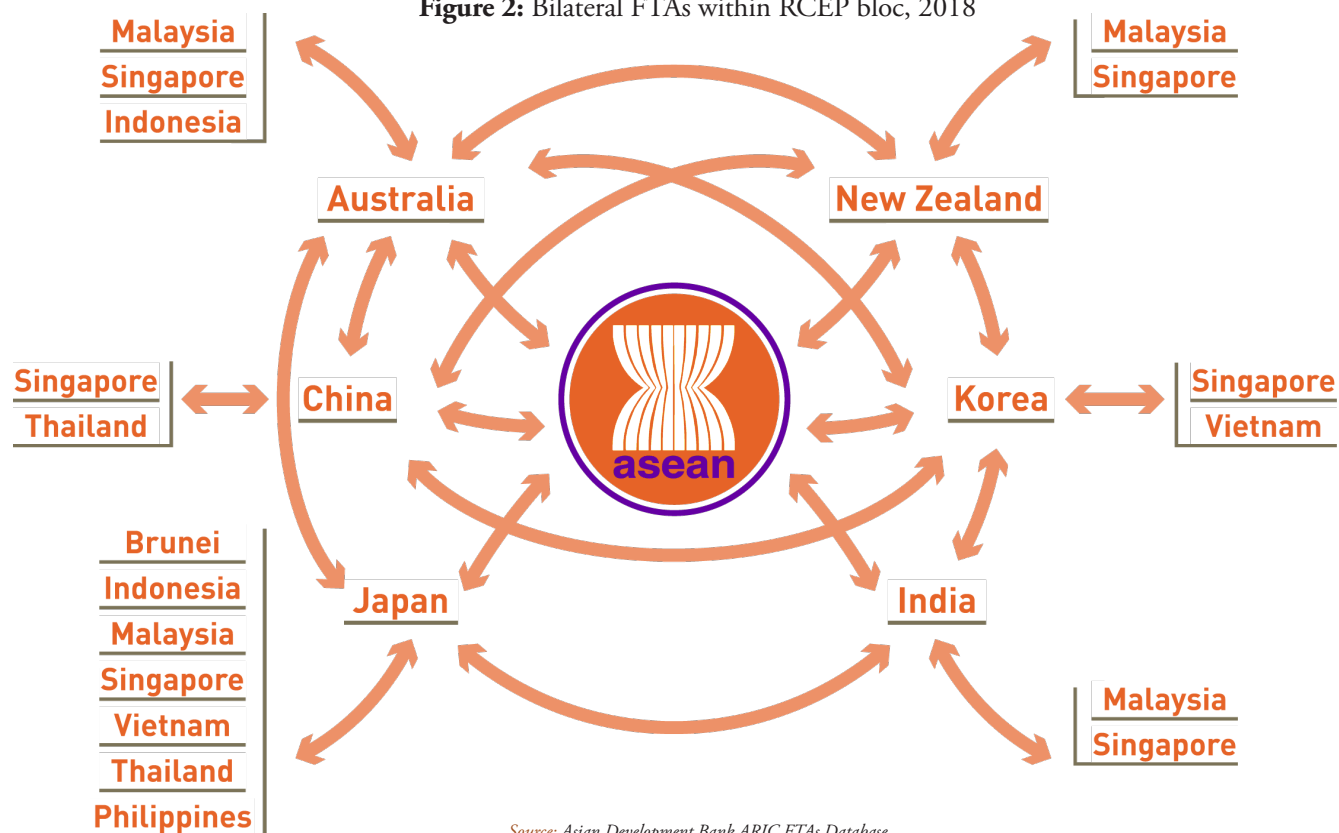
RCEP would be the first regional economic institution with an Indo-Pacific geographic scope. The Indo-Pacific

is a new geographic conceptualisation, extending the prior "Asia-Pacific" concept south and west to include India and countries along the Indian Ocean rim. Since the early 2010s, this concept has been adopted by many governments as a frame of reference for their regional and foreign policies.¹⁸ This has occurred to recognise the rise of India as a major power, and appropriately address the growing economic and strategic linkages spanning the Indian and Pacific oceans. Yet, the Indo-Pacific remains an embryonic concept, and intergovernmental institutions with an Indo-Pacific scope are yet to be formed. India's involvement means the completion of RCEP will advance the realisation of an Indo-Pacific economic framework.

The revival of the CPTPP in early 2018 means that RCEP is not the only mega-regional trade agreement in Asia. Nonetheless, its conclusion will have lasting impacts upon both the regional and global trading architectures. A concluded RCEP will constitute the world's largest trade bloc by both GDP and population, and be the second largest (behind the EU) in terms of share of world trade (Table 1). Moreover, the growth prospects of many RCEP parties — including China, India, Indonesia, and Vietnam — are on a higher trajectory than the global average. Of the twenty economies predicted to be the world's largest in 2050, seven are RCEP countries.¹⁹ This will support the group's growing stature and significance, and over time it is likely to grow faster than any other regional agreement.

The implications of RCEP's current and expected future

Figure 2: Bilateral FTAs within RCEP bloc, 2018



Source: Asian Development Bank ARIC FTAs Database

size for the regional and global trading architectures are significant. At the regional level, its developing country-focused model will likely become the template for the next phase of trade and investment liberalisation. Much larger than the CPTPP, and claiming all regional governments as members, its completion will make a “WTO-consistent” approach the leading model for regional trade law. At the global level, RCEP’s standards will also have a significant impact on ongoing efforts for new WTO agreements, subsequent to the breakdown of the Doha Round negotiations.

However, RCEP’s systemic impacts will depend on the nature of its final membership model. During the negotiating phase, it has used a closed model, including only the ASEAN and the six plus-one FTA partners in talks. While providing a degree of negotiating stability, this prohibits the addition of new members. In the “Guiding Principles,” it is stipulated RCEP will have an “open accession clause” for new partners once the agreement is completed and has entered into force. Whether and

how RCEP includes such an open accession mechanism remains to be determined, and will ultimately bear upon the extent to which it advances regional integration. An accession mechanism which imposes high barriers to new members, and/or sets geographic constraints on the countries which may join would limit RCEP’s capacity to function as a nucleus from which further trade liberalisation can grow.

Geopolitical implications

As per its “Joint Declaration” and “Guiding Principles,” RCEP reaffirms ASEAN centrality in regional processes. While ASEAN lies at the heart of the Indo-Pacific region, and some member states have individually begun using the Indo-Pacific concept, ASEAN as a grouping is yet to formally adopt the construct. A concluded RCEP would likely advance its adoption in Southeast Asia by creating an Indo-Pacific institution in which ASEAN’s central



position is secured. It would also be a victory for ASEAN consensus on trade and investment processes at the same time that the ASEAN Economic Community is seeking to grow in stature and institutional prowess. RCEP will support ASEAN remaining the strategic convener of the broader region's processes, particularly in economic integration matters.

With India becoming a great power both economically and strategically, it is now pursuing closer economic relations with its neighbours.²⁰ As detailed above, India is less economically integrated with the region than most other Asian economies. RCEP thus provides India with an eastern economic bridge into such arrangements, and will advance India's economic integration in the Indo-Pacific region. The momentum from a concluded RCEP could also support India's accession into APEC. If RCEP becomes the model for the realisation for APEC's aspiration for FTAAP, India would be locked into this core APEC initiative. As India acts east by seeking economic and strategic interconnectedness in Northeast and Southeast Asia, RCEP will provide opportunities to develop the required trade and investment linkages.

With the US not a party to RCEP, its conclusion will enhance China's rise as a multilateral leader. While

an ASEAN-centred initiative, China is the principal economy of RCEP and therefore a lynchpin negotiator. Even though RCEP is not a rule-creating agreement of CPTPP standard, it nonetheless has provided China a platform to burnish its regional leadership credentials.²¹ Occurring at a time when the international rules-based order is under strain, it allows China to position itself as an institution-builder that contributes to the supply of rule-making bodies. Additionally, a concluded RCEP (along with the CPTPP) will create another institution for Indo-Pacific regional integration to which the US is not a party. With President Trump skipping both the APEC and East Asia Summits in 2018,²² this will contribute to a shift towards less US engagement in the multilateral architecture of the Indo-Pacific.

With the revival of the CPTPP, countries in the region will face strategic choices with respect to which agreement(s) they seek membership. RCEP offers a politically-easier prospect for regional trade multilateralism, given its Asian membership model and developing country-friendly standards. It remains to be seen whether and when RCEP can be completed, and if so, how its declared ambitions will be realised. But given its size and geographical scope, a concluded RCEP is the most likely template for creating the first piece of Indo-Pacific economic architecture.

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POWER TO WHOM?

PRIVACY IN A POST-GDPR WORLD

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In May 2018, the EU General Data Protection Regulation (GDPR) came into effect, the biggest reform of EU data protection law in over 20 years. While the GDPR introduced a number of important changes, it embodies the same core principles that have undergirded data protection law from the beginning. At the same time, due to its broad material and territorial scope as well as high potential fines for non-compliance, among others, the GDPR attracted an unprecedented amount of lobbying and media attention, turning a subject matter once considered niche into an unlikely battleground for political and economic influence.

Those battles are far from settled. The lack of clarity surrounding the correct implementation of the law has left a power void that existing and emerging actors in the data protection landscape are eager to fill, and not only in Europe. This essay will outline the key actors involved in making and shaping the GDPR; the principles, rules, and norms they are advancing; and what implications different implementations of the law might have on who sets the standards, both legal and technical, on how personal data is processed in the European Union and beyond.

Background

Originally proposed by the European Commission on

January 25, 2012, the GDPR was intended to allow EU data protection law to meet the challenges of the digital present. While the GDPR introduced a number of important changes, for instance, stronger individual rights and higher compliance obligations, it significantly builds upon the 1995 EU Data Protection Directive (DPD) that preceded it. It embodies the same core principles that have undergirded international data protection law from the beginning, e.g., data minimisation, purpose limitation, transparency, accountability, and a measure of control for individuals over the personal data that is being processed about them.¹ What is new about the law, however, is the context in which it came into being. While concerns about the increase in government power due to computerised record-keeping abilities were already being voiced on both sides of the Atlantic as early as the 1970s, it is the increasing trade in personal data in the private sector that originally spurred the European reforms. In line with the self-conception of the EU as both an economic union and a community of shared values, the GDPR thus pursued the dual goal of strengthening the digital market while enhancing individual rights in an increasingly interconnected world.²

This latter goal was advanced with even greater urgency in the aftermath of the Snowden revelations, which suggested that US intelligence agencies appropriated the personal data amassed by a small number of Silicon Valley

behemoths for their own purposes.³ Of particular concern to EU legislators and the European public alike was the fact that private companies generally did not process this data in the jurisdiction in which it was collected, and could hence potentially circumvent regional data protection frameworks such as that of the DPD, which was then still the main governing instrument for data protection across the EU. One of the central goals of the GDPR was thus to devise a legal mechanism by which jurisdiction would not be defined in terms of the location of the organisation processing personal data, but in terms of the location of the person whose data is being processed.⁴ In addition, it aimed to institutionalise penalties for violations of the law that would be severe enough to be, at the same time, effective and dissuasive.⁵ It ultimately settled on a framework that would allow regulators to impose, in certain cases, fines amounting to up to 20 000 000 euros (almost US\$23 million) or 4% of the global annual turnover, whichever is higher.

Following more than four years of intense negotiations, the GDPR was formally adopted in April 2016, providing those organisations subject to it with a transition period of just over two years to review their processing operations for compliance before the law would apply in practice. However, as demonstrated by the flurry of emails right before the May 25, 2018 deadline⁶ on one hand, and a seemingly never-ending string of GDPR “curiosities”⁷ on the other, there is ongoing confusion about what the law requires in practice.

Key actors

European Commission

The European Commission that proposed the overhaul of the EU data protection framework was operating in the historical context of the coming into effect of the Treaty of Lisbon, which elevated the Charter of Fundamental Rights of the EU (CFREU) to primary law, and thus also formally transformed the economic union into one of shared values and fundamental rights.⁸ The CFREU explicitly recognises a right to the respect of private and family life (Art. 7) and a right to the protection of personal data (Art. 8), and thus provided both the basis and impetus for updating the EU data protection framework.⁹ In recognition of this development, José Manuel Barroso,

second-time President of the European Commission at the time, entrusted Vice President of the Commission Viviane Reding with a separate Directorate-Generate for Justice, responsible, among others, for EU fundamental and consumer rights. Reding quickly distinguished herself as a strong advocate of fundamental rights and made the reform of EU data protection law a flagship project of her portfolio. According to the Commission, the preexisting legal framework, the DPD, was lacking in several regards: it was ill-suited to meaningfully protect the personal data of EU data subjects and also did not sufficiently harmonise data protection across EU Member States such that the compliance burden upon businesses would be meaningfully alleviated.¹⁰ Reding also criticised the lack of uniform enforcement.¹¹ In transforming the EU data protection framework, Reding set herself seven goals: (1) a uniform legal framework through a regulation; (2) clear competence of one’s single data protection authority; (3) uniform high level of data protection; (4) consideration of the particularities of police and justice within the legal framework;¹² (5) special attention to small and mid-sized companies; (6) balanced consideration of all basic rights; and (7) openness of the new legal framework for future technological and economic developments.¹³

Member States

Since, as a regulation, the GDPR superseded much of the preexisting national data protection legislation in Europe, individual EU Member States had an elevated interest in ensuring that the content of the regulation was compatible with their national legal and cultural traditions. In some cases, they had an interest in maintaining what they perceived as stronger overall national law;¹⁴ in other cases, there was a concern about the competitive advantage resulting from a comparatively more lenient approach to data protection law in other EU Member States.¹⁵ To the surprise of many observers, Germany, which likes to describe itself as the “motherland of data protection,”¹⁶ was initially “remarkably ambivalent” about the proposed legislative changes.¹⁷ This reluctance was partly due to the fact that the GDPR did not generally distinguish between the regulation of public sector and private sector organisations, which made sense from a European perspective, since the dividing lines between public and private vary from one Member State to the next. There was also some consternation due to a long tradition of regulating





“ *While no revolution, the GDPR is still unprecedented in its attempt to create a harmonised data protection framework able to meet the technological challenges of the modern age. But the GDPR is only the beginning.* ”

these based on sectoral legal frameworks, which would and were, for the most part, superseded by the GDPR.¹⁸ But resistance also came from individual German states, which equally have their own data protection frameworks and were thus facing the threat of being subsumed under the regulation. The German position ultimately became politically untenable, particularly given the broad public support for a European solution following the Snowden revelations. But the GDPR still left significant room for national solutions to particular data protection questions based on the substantial number of opening clauses that allow individual EU Member States to particularise the law in certain areas.

Private sector

The private sector is far from homogenous, so the GDPR naturally had different implications for different actors in this space. Large multinational companies with customers in multiple jurisdictions in general, and American software companies whose business model depends on the monetisation of personal data in particular, may have felt that the law was directed at them in particular, and hence invested significant amounts of resources in order to comply. They generally had an interest in less onerous legislation, on one hand, but also in greater harmonisation of and legal clarity across the EU data protection landscape on the other. This particular sub-segment of the private sector thus paid close attention to, and also tried to actively influence, the development of the law. Indeed, presumably because of its sweeping scope and potential high fines for non-compliance, the GDPR was subject to an unprecedented amount of lobbying, resulting in no less than 3,999 amendments to the original Commission proposal.¹⁹ But because some of the compliance requirements under the GDPR are so resource-intensive, and because the law, apart from its risk-based approach,

makes no distinction between different controllers based on size, some commentators also argued that the GDPR disproportionately disadvantaged smaller companies that could not afford to spend as much time and manpower on the law as their larger competitors.²⁰ Initial assessments of the implementation of the law demonstrate that these concerns are not entirely unfounded.²¹

Civil society

Civil society, as represented by the European Parliament but also advocacy organisations, generally embraced the reforms, particularly in the aftermath of the Snowden revelations, which catapulted privacy into the spotlight of legislative attention.²² But to some observers the reforms were not far-reaching enough.²³ One area of criticism was the issue of whether consent would need to be “explicit,” as requested by the European Commission and Parliament, or the somewhat less onerous “unambiguous,” as requested by the Council.²⁴ Ultimately, explicit consent was only required for the processing of special categories of data.²⁵

Another area of contention was the separation of the area of law enforcement from the general regulation, as some observers felt the instrument of a directive was not strong enough.²⁶ From a different point of view, the GDPR, however, also harboured certain civil liberties risks, as it was unclear, for instance, how conflicts between data protection and freedom of speech would effectively be resolved, among others.²⁷

European Court of Justice

These conflicts will ultimately need to be resolved in court, and more specifically by the European Court of

Justice (ECJ). The ECJ assumed particular prominence in the field of data privacy through highly mediated cases. The list includes *Google Spain*,²⁸ which established the so-called “right to be forgotten,” on one hand, as well as the *Schrems* case,²⁹ which declared the Safe Harbor Agreement invalid, on the other hand. Both cases have far-reaching implications. In *Google Spain*, the ECJ ruled that data subjects have the right to ask search engines to delist information associated with name searches, if that information appears to be inadequate, irrelevant, no longer relevant, or excessive in relation to the processing purpose.³⁰ However, the *Google Spain* ruling raised several important questions. First, who should get to decide what information gets delisted based on these criteria? Should a private sector company with a market share of over 90% in Europe be forced to assume the position of sole arbitrator of what information is easily accessible online?³¹ Second, how far does the reach of the ECJ’s ruling extend? Should the ruling apply to European domains only or, in order to make the “right to be forgotten” meaningful, do search results need to be delisted worldwide? The French data protection authority argued precisely the latter in a case that is currently still pending.³² Were the ECJ to rule affirmatively, it would pit the European approach, which is focused on dignity, directly against the American approach, focused on liberty, among others. Similarly, the Safe Harbor Agreement had provided the legal basis for data transfers between the European Union and the United States until Maximilian Schrems, an Austrian student at the time, complained that data protection standards in the US could no longer be considered “adequate” in light of the Snowden revelations. The Safe Harbor Agreement has since been replaced by the so-called Privacy Shield, but legal uncertainty as to the long-term viability of the latter remains. The economic impact of a disruption to transatlantic data flows would, of course, be substantial.

Implications

The ripple effects of the GDPR could certainly be felt in all corners of the world, making headlines from New York³³ to New Delhi.³⁴ But did the law achieve the goals it set out for itself? What implications will it have on who sets the standards, both legal and technical, on how personal data is processed going forward?

A harmonised legal framework?

As mentioned above, one of the most important goals of the GDPR was to create a harmonised data protection framework across Europe that would achieve the dual goal of protecting personal data while at the same time enabling the free flow of such data.³⁵ But while the instrument of a regulation might achieve that goal in theory, there are a number of reasons why the GDPR fell short of meeting it in practice. First and foremost, the GDPR was intended to be technologically neutral, which means both that it can easily be adapted to an evolving technological landscape, and that it does not provide concrete guidance for how it should be applied in specific processing contexts. While the GDPR does encourage the development of industry standards, these will likely take several years to develop, thus yet again leaving ample room for interpretation in the meantime. There is already evidence that the GDPR has spurred a dubious market for GDPR “experts” and “solutions,”³⁶ likely leading to further confusion and fragmented approaches to implementation on the ground.³⁷

Beyond the general nature of the law, the about 70 opening clauses mentioned above also undermine the goal of harmonisation and thus in many cases require organisations subject to the GDPR to continue consulting national data protection legislation regardless. Thus, while the Commission emerges as the public watchdog of EU data protection law, individual Member States are at least theoretically able to continue to wield significant influence in practice.³⁸

A boon to competition?

Advocates of the GDPR, at both the level of European institutions and civil liberties communities on the ground, often portrayed the law as a way to reign in large American technology companies. But, as mentioned above, the evidence is mixed at best. Unlike Silicon Valley giants, small and medium-sized companies will hardly be able to dedicate “hundreds of years of human time”³⁹ to GDPR compliance. Furthermore, increasingly insecure consumers may choose to remain with established players, thus further raising the barrier of entry for newcomers on the market.⁴⁰ *Strengthening the right to data protection in the EU?*

The GDPR has certainly elevated the public face of data

protection, making it an issue of concern from compliance to the C-suite. Due to the higher potential fines for non-compliance, data protection in Europe now has teeth and, as initial enforcement actions have demonstrated, data protection authorities (DPAs) are not afraid to bite.⁴¹ That said, many DPAs are chronically underfunded⁴² and ill-equipped to address the overwhelming number⁴³ of complaints, data breach notifications, and requests for information received in the aftermath of the coming into effect of the law. There is also the additional complication that the GDPR now requires DPAs to be consistent. This makes sense, of course, at least in theory, considering that the goal of the GDPR was to harmonise the European data protection landscape. But it leads to complications in practice, particularly in the far from unusual case where a data subject issues a complaint about a controller based in another EU Member State. According to the principle of the “One-Stop-Shop,” the DPA ultimately responsible for processing the complaint (“lead supervisory authority”) would be the one in the country where the controller has its main establishment.⁴⁴ However, any other DPA responsible for a significant number of data subjects affected by the complaint (“supervisory authorities concerned”) has the right to object to any decision taken by the lead DPA, in which case the consistency mechanism⁴⁵ would be triggered and all DPAs would jointly have to come to an agreement. This has the potential to become particularly complicated considering that countries such as Germany not only have one national but also more than a dozen fiercely independent regional and sectoral DPAs.

Impact of the GDPR beyond the EU?

Beyond Europe, numerous jurisdictions are now proposing laws that seem at least partly inspired by the GDPR, such as the California Consumer Privacy Act (CCPA),⁴⁶ but also legislation being passed or at least debated in rising powers such as Brazil,⁴⁷ India,⁴⁸ and China.⁴⁹ It is important to note that these laws, of course, may still significantly differ from the GDPR in both intent and practice, closely reflecting the particular legal traditions and economic priorities in each case. For instance, the applicability of the CCPA is limited to for-profit entities only and its scope excludes certain personally identifiable information, such as medical data and information processed by credit reporting agencies, to align the law with the historically sectoral approach to data protection in the United States.⁵⁰ Similarly, even though

the Chinese Personal Information Security Specification was closely modelled after the GDPR, it is at the same time less stringent in important matters such as consent. Its drafters were keen to balance privacy with innovation, as the development of artificial intelligence technologies in particular is of increasing importance in China not only from an economic but also political perspective.⁵¹

All this goes to show that the GDPR may have provided the impetus to review national data protection laws in some cases, but that the shape and content of those laws will continue to differ greatly from one context to another. And it will be the extent and nature of those variations that will determine how frictionless the free flow of data will become at the international level going forward, and the extent to which both the economic and fundamental rights goals behind overhauling the European data protection framework can be met in practice. One potentially counterintuitive consequence of the GDPR, for instance, is that it arguably paves the way for greater data localisation⁵² or data sovereignty.⁵³ A common response to the Snowden revelations in Europe was that European data should be processed according to European standards. But this effectively enabled other players, such as China, India, and Russia, to equally demand that data emanating from their jurisdictions be processed according to their respective national standards. The risk of an increasingly fragmented Internet looms large.

Looking ahead

While no revolution, the GDPR is still unprecedented in its attempt to create a harmonised data protection framework able to meet the technological challenges of the modern age. But the GDPR is only the beginning. At the European level, it will be important now to see how the law will be implemented in practice and what opinions are issued by data protection authorities and the courts as the first enforcement actions make their way to the ECJ in Luxembourg. Attention-grabbing misinterpretations of the law risk undermining underlying legitimate aims. At the international level, the GDPR is also only one among a number of competing approaches, and it remains to be seen how alternative actors, such as the United States and China, will try to shape the development of international data protection standards in the future. Agreeing on a

reasonably unified data protection framework was not easy in the EU already. But hopefully the GDPR will serve as one of the first stepping stones on the path toward a continuous evolution of international data protection standards that meaningfully protect citizens and

consumers from government and private sector intrusions, while at the same time providing a level of freedom and harmonisation that enable both individuals and businesses to reap the full benefits of the digital future — not only in Europe, but also beyond.

¹ See, e.g., the 1970 Data Protection Law of the German state of Hesse, the first of its kind, <https://bit.ly/2TbnmTc>; the 1973 HEW Report on Records, Computers, and the Rights of Citizens, articulating the Fair Information Practice Principles (FIPPs) in the United States, <https://bit.ly/2QSIL86>; the 1980 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, <https://bit.ly/1IWG9Qk>; and the 1981 Council of Europe Treaty 108, <https://bit.ly/2n6P0rT>, delineating core data protection values for the international community.

² European Commission, "Safeguarding Privacy in a Connected World: A European Data Protection Framework for the 21st Century," January 25, 2012, <https://bit.ly/2rUWEMF>

³ Glenn Greenwald and Ewen MacAskill, "NSA Prism Taps Into User Data of Apple, Google and Others," *Guardian*, June 7, 2013, <https://bit.ly/2axxaR2>

⁴ This is also strongly supported by the European public, see Special Eurobarometer 431, "Data Protection," European Commission, June 2015, at 44, <https://bit.ly/2FJ5o7A>

⁵ Art. 83 GDPR, General Conditions for Imposing Administrative Fines.

⁶ Martin Belam, "Businesses Resort to Desperate Emailing as GDPR Deadline Looms," *Guardian*, May 24, 2018, <https://bit.ly/2EN0eXq>

⁷ See, e.g., #XFilesGDPR hashtag on Twitter, <https://bit.ly/2ENKAM5>, which allows German scholars to comment on and resolve dubious GDPR interpretations.

⁸ Eugen Ehmann and Martin Selmayr, *Datenschutz-Grundverordnung*, Second Edition (Beck, 2018): 107.

⁹ *Ibid.*, 110. See also Viviane Reding, "SiebenBausteine der europäischenDatenschutzreform," *ZD*, 2012.

¹⁰ European Commission, "Impact Assessment," January 25, 2012, <https://bit.ly/2GDz5O>

¹¹ Viviane Reding, "Die neue EU-Datenschutzverordnung – Eine Chance füreffektivenDatenschutz in Europa," European Commission, March 21, 2012, <https://bit.ly/2RdwhXb>

¹² The reference to the particularities in the sector of police and justice refer to the fact that the area of law enforcement traditionally falls within the sovereign jurisdiction of each EU member state and is thus a subject matter arguably ill-suited for the all-encompassing instrument of a regulation. The resulting data protection framework thus also distinguished between the GDPR and the EU Data Protection Directive for Police and Criminal Justice, the applicability of which was limited to organisations processing personal data for law enforcement purposes.

¹³ Seeverbatim Reding, *ZD*, 2012.

¹⁴ See, for instance, the highly critical (and widely criticised) public commentary by Johannes Masing, judge on the German Federal Constitutional Court, in *SüddeutscheZeitung*, "EinAbschied von den Grundrechten," January 9, 2013.

¹⁵ The fact that many major American technology companies decided to establish their headquarters in Dublin is sometimes viewed as a result of the generally more cooperative approach of the Irish DPA. See e.g., Adam Satariano, "New Privacy Rules Could Make This Woman One of Tech's Most Important Regulators," *TheNew York Times*, May 16, 2018, <https://nyti.ms/2L7cTF6>

¹⁶ Not entirely without reason, considering that the German state of Hesse implemented the first data protection law worldwide. See Hans-Jürgen Papier, "Von der VolkszählungzurSpeicherung von Verbindungsdaten – 25 JahreinformationelleSelbstbestimmung," <https://bit.ly/2VdMjJl>

¹⁷ See note 8, 116, as well as Martin Selmayr, "Nach PRISM: Endetjetzt die Ambivalenz der deutschen Position zum EU-Datenschutz?" *ZD*, 2013.

¹⁸ See note 8, 117.

¹⁹ George Christou, "European Privacy and Data Protection Policy," in *The Routledge Handbook of European Public Policy*, edited by Nikolaos Zahariadis and Lauri Buonanno (Routledge, 2017): 185.

²⁰ See Wakabayashi and Satariano, "How Facebook and Google Could Benefit from the G.D.P.R., Europe's New Privacy Law," *New York Times*, April 23, 2018, <https://nyti.ms/2JiN3MT>

²¹ Björn Greif, "Study: Google is the Biggest Beneficiary of the GDPR," *Cliqz*, October 10, 2018, <https://bit.ly/2QGURMa>

²² "Prism: A Wake-up Call for Data Protection," European Parliament, June 20, 2013, <https://bit.ly/2LAHxYq>

²³ See, e.g., the comments by Joe McNamee, Executive Director of the civil liberties group European Digital Rights (EDRI), describing the GDPR as "less clear and less protective of personal data than it could – and should – have been." "Data Protection Package Concluded – 1420 Days After Being Launched," EDRI, December 16, 2015, <https://bit.ly/2EOrrK4>

²⁴ See note 19, 185.

²⁵ Art. 9 GDPR, Processing of special categories of personal data.

²⁶ See note 8, 115-116.

²⁷ See note 19, 185-186.

²⁸ Google Spain v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, Case C-131/12 (2014), <https://bit.ly/2QSZbMI>

²⁹ Schrems v. Data Protection Commissioner, Case C-362/14 (2015), <https://bit.ly/2Q31pDR>

³⁰ Google Spain, Rec. 93-94.

³¹ For an in-depth analysis, see Julia Powles, "The Case That Won't Be Forgotten," *Loyola University Chicago Law Journal* 47 (2015): 583-615.

³² See David Meyer, "The 'Right to Be Forgotten,' Globally? How Google Is Fighting to Limit the Scope of Europe's Privacy Law," *Fortune*, September 10, 2018, <https://bit.ly/2RXXDgm>

³³ See, e.g., Adam Satariano, "G.D.P.R., a New Privacy Law, Makes Europe World's Leading Tech Watchdog," *New York Times*, May 24, 2018, <https://nyti.ms/2sd5Y4H>

³⁴ See, e.g., Amba Kak, "As Europe's Data Protection Law Kicks In, Where Does India Stand," *TheTimes of India*, May 25, 2018, <https://bit.ly/2kSmV10>

³⁵ As noted in the title of the law itself, though the second half is commonly neglected.

³⁶ "Business Booms for Privacy Experts as Landmark Data Law Looms," *Reuters*, January 22, 2018, <https://reut.rs/2Dq9UDr>

³⁷ See, e.g., Peter Münch, "Wien wirdochnichtzurHauptstadt der Namenlosen," *SüddeutscheZeitung*, November 28, 2018, <https://bit.ly/2EOshGI> on the confusion about whether landlords would still be able to put nameplates on doorbells in Vienna, as well as dpa, "Mit DSGVO überfordert: RadiosenderretterWunschzettel-Aktion in Bayern," *Heise*, November 22, 2018, <https://bit.ly/2VbujW9> on concerns about whether a town in Bavaria could still allow children to hang wish lists on public Christmas trees under the GDPR.

³⁸ Note that Member States do not have to make use of opening clauses.

³⁹ Ashley Rodriguez, "Google Says it Spent 'Hundreds of Years of Human Time' Complying with Europe's Privacy Rules," *Quartz*, September 26, 2018, <https://bit.ly/2BKd4CK>

⁴⁰ See note 20.

⁴¹ See Wiebke Kummer, "Portuguese Data Protection Authority Imposes 400,000 EUR Fine on Hospital," *DatenschutzNotizen*, October 24, 2018 <https://bit.ly/2QufSd1>

⁴² Douglas Busvine, Julia Fioretti, and Mathieu Rosemain, "European Regulators: We're Not Ready for New Privacy Law," *Reuters*, May 8, 2018, <https://reut.rs/2rGasS0>

⁴³ William RM Long and Jasmine Agyekum, "EU DPAs Receive Thousands of Complaints Under the GDPR," *Lexology*, November 13, 2018, <https://bit.ly/2RjffHoC>

⁴⁴ See Art. 56 GDPR, Competence of the lead supervisory authority.

⁴⁵ See Art. 63 GDPR, Consistency mechanism.

⁴⁶ "CCPA, Face to Face with the GDPR: An In-Depth Comparative Analysis," Future of Privacy Forum, November 28, 2018, <https://bit.ly/2CADGJY>

⁴⁷ Melanie Ramey, "Brazil's New General Data Privacy Law Follows GDPR Provisions," *Inside Privacy*, August 20, 2018, <https://bit.ly/2EjpyUm>

⁴⁸ Niles Christopher, "The India Draft Bill on Data Protection Draws Inspiration from GDPR, But Has Its Limits," *Economic Times*, July 28, 2018, <https://bit.ly/2BIQU3F>

⁴⁹ Samm Sacks, "China's Emerging Data Privacy System and GDPR," *CSIS*, March 9, 2018, <https://bit.ly/2Dm8CbT> For an expansive comparison of how different privacy laws around the world compare to the GDPR, see the International Association of Privacy Professionals (IAPP)'s "General Data Protection Regulation Matchup Series," <https://bit.ly/2CyNQsp>

⁵⁰ See note 46.

⁵¹ See note 49.

⁵² See Sam Pfeifle, "Is the GDPR a Data Localization Law?" *IAPP*, September 29, 2017, <https://bit.ly/2RaCaF5>

⁵³ See Danny Crichton, "GDPR, China and Data Sovereignty are Ultimately Wins for Amazon and Google," *Tech Crunch*, May 29, 2018, <https://tcrn.ch/2H16zfa>

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HOW JIHADISTS WENT ‘GLOCAL’ AND WHAT TO DO ABOUT IT

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At its apotheosis, the Islamic State bridged the local and global divide more effectively than most violent extremist organisations — jihadist or otherwise — have ever done. Rather than mobilising “lone wolves,” it made individuals believe that they were not alone. They were actually part of a global community that was centered on, but not reducible to, the Islamic State’s physical caliphate, where the group engaged in rebel governance.¹ Although the Islamic State combined the physical control of territory where it provided goods and services with social media in ways no jihadist group had done before, its efforts in these areas were not sui generis.

Insurgent movements and violent extremist organisations have historically used propaganda, and many of them have engaged in rebel governance where possible. There is no reason to suspect that other non-state actors could not replicate the Islamic State’s success, or at least that they will not try to do so. This essay explores two inter-related areas: jihadist groups’ efforts to advance alternate governance mechanisms; and the ways in which new technologies have evolved to enable these organisations to pursue supporters both locally and globally.

Jihadist governance

The year 2011 looked to be particularly bad for the jihadist movement. Drone strikes were degrading al-

Qaeda in Pakistan. Operatives who were not killed had to prioritise their survival over the ability to move around, communicate, or execute transnational attacks.² As a result, core al-Qaeda was on the ropes by the time US intelligence officers identified a compound in the upscale city of Abbottabad, Pakistan, as the place where Osama bin Laden might be hiding. Obama approved a high-risk raid by US Navy SEALs, and they killed the al-Qaeda leader on May 2, 2011, shortly after 1:00 a.m. local time. Information gathered during the raid enabled the United States to target additional high-ranking leaders with subsequent drone strikes.³ Meanwhile, successful transitions in Tunisia, Egypt, and Yemen seemingly undermined the jihadist narrative that violence was a necessary handmaiden for revolution or that the United States would always prop up autocratic regimes. The NATO-led intervention in Libya showed that the West would intervene to protect Muslim civilians.

Yet, far from being a death knell, revolutions across the Arab world reinvigorated jihadists and enabled a level of activity unforeseen hitherto.⁴ The weakening or outright removal of police states created space for mobilisation in places where jihadists had previously had little room for maneuver. While many experts initially focused on how the Arab uprisings affected the jihadist narrative, jihadist leaders recognised the opportunities the revolutions presented. A week before his death, bin Laden referred to the uprisings as “a great and glorious event” and stressed the importance of winning new supporters through missionary

outreach.⁵ The deputy emir of al-Qaeda in the Arabian Peninsula (AQAP) encouraged jihadists to take advantage of the newly open environments to spread their ideas.⁶

This is precisely what they did. Jihadists in Egypt and Tunisia seized on their newfound operational freedom to organise and enlist supporters. The environment was even more open in Yemen, which was not a police state in the first place. Autocratic regimes in Libya and Syria deliberately facilitated jihadist mobilisation immediately after protests began in order to promote the narrative that they were fighting terrorism and to create conflict among various opposition groups.⁷ This helped jihadists emerge as some of the most organised forces in post-Gaddafi Libya and in the escalating conflict in Syria.

Lasting democratic transitions and improved governance did not accompany the deterioration of police states. Tunisia was the only Sunni-majority Arab state where a democratic transition held.⁸ And even there, the security situation deteriorated, contributing to a flow of foreign fighters to other conflict zones.⁹ Egypt slipped back into autocracy when the military overthrew the democratically elected prime minister. The new military-backed regime soon faced an escalating jihadist insurgency. Libya, Mali, Syria, and Yemen descended into civil war.¹⁰ In June 2014, the Islamic State, which had split from al-Qaeda earlier in the year, launched a major military offensive in Iraq that captured the country's second largest city, Mosul. Afterwards, Abu Bakr al-Baghdadi, the Islamic State's leader, announced the reestablishment of the caliphate, and declared himself the caliph.¹¹ Numerous jihadist groups — some of them previously loyal to al-Qaeda — offered their allegiance.

Jihadists had limited experience engaging in governance before the Arab uprisings. For example, the Egyptian Islamic Group controlled “liberated zones” in parts of Upper Egypt and Greater Cairo during the 1980s and into the early 1990, when it was at war with the state. The group simultaneously provided social services the government could not or would not provide, and engaged moral policing intended to purify the population.¹² In the decade after 9/11, the Tehrik-e-Taliban Pakistan ran sharia courts in parts of the Federally Administered Tribal Areas and Northwest Frontier Province that were under its control.¹³ After al-Shabaab in Somalia broke away from the Islamic Courts Union and grew into a full-fledged jihadist

organisation that seized control of large swaths of territory, it dispensed justice in accordance with its interpretation of sharia and also provided limited social services.¹⁴ Al-Qaeda in Iraq also enforced its harsh interpretation of Islamic law on territory it controlled before losing ground as a result of the Sunni Awakening and US military surge.

These limited experiences yielded valuable lessons, but jihadists also relied on the writings of the theoretician Abu Bakr Naji (the nom de guerre for Muhammad Khalil al-Hakaymah) when it came to seizing and governing territory after 2011. In *The Management of Savagery*, published almost a decade before the Arab uprisings, Naji laid out a three-step process for creating the caliphate.¹⁵ First, Naji argued that “vexation strikes” were needed to draw the security forces away from certain areas in Muslim countries, and thus create the vacuums for jihadists to fill. Second, once jihadists had created chaos in these areas, they could fill the void by re-establishing order and imposing their version of Islamic law.¹⁶ In practice, this meant providing internal security and social services, establishing sharia justice (including forcing lax Muslims to comply with authority), and spreading understanding of Islamic law.¹⁶ The idea was to create a network of like-minded Islamic emirates, or mini-states, which could be as small as a city or as large as a country. These emirates would communicate with one another, and coordinate to the degree possible on political, financial, and military matters. Finally, once an acceptable caliph arrived, these emirates would transition from a network of mini-states into a caliphate.

The collapse of police states and advent of civil wars after the Arab uprisings fast-tracked the process Naji had envisioned, and ushered in two important trends within the jihadist movement. The first was a return of locally focused jihadist violence in the heart of the Arab world. The most robust revolutionary jihads since 9/11 had been waged against countries like Pakistan, Yemen, and Saudi Arabia that previously supported or enabled jihadist groups. After the Arab uprisings, Arab states that had avoided or put down revolutionary challenges before 9/11 were forced to reckon with them. This renewed local emphasis was accented by the growing influence of sectarianism on jihadist agendas. The Islamic State inflamed and benefited from an increasingly bloody Sunni-Shi'a competition that infused other conflicts across the region. Second, jihadist organisations transformed into war-fighting militias that pursued state-building enterprises with greater





“*Ansar Al-Sharia branches signified both the local nature of jihadist activism after the Arab uprisings, and the fact that terrorism increasingly occupied just one part of a much larger jihadist portfolio.*”

sophistication. The Islamic State was the most successful group in terms of holding and administering territory. Its territory in Iraq and Syria formed the heart of the caliphate, but Baghdadi proclaimed he was the leader of all Muslims and his group soon began adding governorates in other countries. Some al-Qaeda affiliates simultaneously were declaring their own mini-emirates during this time in Mali and Yemen.

New movements, which called themselves Ansar al-Sharia, also emerged in multiple places as vehicles for popular mobilisation. Ansar al-Sharia means “Partisans of Islamic law,” a name that emphasised the intention to establish Islamic states. Ansar al-Sharia branches effectively served as popular fronts that prioritised local agendas, used violence, preaching, and social services to achieve these goals, and attempted to engage in rudimentary state-building. AQAP created the first Ansar al-Sharia chapter in Yemen in 2009 as an insurgent force to capture territory and administer social services to the population.¹⁷ Additional branches formed in Libya, Tunisia, and Egypt during the Arab uprisings.¹⁸ These were independent entities with loose ties, if any, to one another. They signified both the local nature of jihadist activism after the Arab uprisings, and the fact that terrorism increasingly occupied just one part of a much larger jihadist portfolio.

The Islamic State and al-Qaeda became competing lodestars in the jihadist movement. There were notable differences between the two groups, including in how they interpreted Naji’s theory of victory. First, Naji had envisioned the formation of the caliphate as a gradual process in which various emirates came together over time. Al-Qaeda leaders adhered to this vision, and believed it was necessary to build public support and make sure that suitable conditions existed before an Islamic state could be created.¹⁹ Islamic State leaders did not. They wasted little time declaring a caliphate after seizing large swaths of territory in Iraq.

Second, having suffered serious damage to its brand because of the large number of Muslims killed in Iraq and subsequent Sunni Awakening, al-Qaeda leaders advocated a population-centric approach designed to win over locals.²⁰ Thus, AQ affiliates attempted to avoid killing innocent Muslims, and theoretically eschewed harsh treatment of the population on seized territory in favor of *dawa* and the provision of social services.²¹ The Islamic State took a different tact. The group inflamed sectarian tensions to create chaos, and then governed through fear. It provided social services, but also practiced shocking brutality as a way to cow the local population and foster a perception of strength. And it was uncompromising when it came to implementing harsh interpretations of sharia.²²

Because Naji recognised the need for manpower, he encouraged Muslims who lived in non-Muslims countries to immigrate, rather than remaining at home and conducting attacks. The Islamic State’s mastery of social media and declaration of a caliphate helped it to inspire thousands of foreign fighters, who flocked to its banner in Iraq and Syria.²³ This development was part of a larger trend: jihadists’ use of technology to reach global audiences to a greater degree than ever before.

Terrorists’ use of technology

In the *Call for Global Islamic Resistance*, Abu Musab al-Suri (born Mustafa bin Abd al-Qadir Setmariam Nasar) argued that his fellow jihadists should limit large-scale insurgencies to a small number of Muslim countries, and otherwise focus on fomenting a leaderless jihad in non-Muslim states.²⁴ He believed that most jihadist organisations were not robust enough to withstand a serious counter-offensive. Inspiring attacks in non-Muslims countries was a way of rebuilding momentum. Because jihadist leaders could not provide direct guidance for specific operations, al-Suri also

emphasised the importance of ideological indoctrination as a way to ensure at least some level of influence. New communications technologies have not only enabled jihadists to inspire individuals in non-Muslim countries, but also to provide them direct guidance in some instances. This has collapsed the space between the global and the local, helping to make al-Suri's strategic theory a reality.

The process of online radicalisation is similar to radicalisation in any closed environment, but new technologies have made it faster and more far-reaching. Social-media platforms like Twitter, Instagram, Facebook, and YouTube offer anyone — including jihadists — the opportunity to convey messages to would-be supporters around the world. These platforms are also easier to use, and to use pseudonymously, than password protect jihadist websites and chat rooms. This enables reaching a much larger pool of people. The algorithms on which social media platforms function also connect users to content that resonates with them, meaning that these platforms help do the work of finding potential recruits and supporters. Moreover, it is possible for these individuals to connect directly with credible figures, be they clerics or fighters in a conflict zone.²⁵

Historically, popular support for a terrorist or insurgent group has been characterised as active or passive. Active supporters are willing to risk personal harm or make other types of sacrifices either by joining an insurgent group or movement, or providing material assistance such as money, shelter, weapons or other supplies, intelligence, and medical aid. Passive supporters sympathise with a group's cause and probably will not betray its members or active supporters, but they stop short of joining up, providing material assistance, or otherwise acting on behalf of the group or movement in question.²⁶

This dichotomy remains valid for assessing and describing supporters on the ground where a violent extremist organisation operates. However, the rise of social media has created new ways for people to support an extremist cause without executing or supporting attacks, donating money, or otherwise engaging in traditional supportive activities. Instead, social media users can amplify a group's message or behaviour, helping with fundraising, radicalisation, and recruitment by uploading content on the Internet or even just clicking the retweet button.²⁷ Moreover, online radicalisation may occur thousands of miles away from where a conflict is taking place, or right in the heart of it.

The growing number of individuals becoming radicalised online in the West understandably receives a lot of attention. Another growing phenomenon is the increase in Internet-based radicalisation in places — such as Afghanistan, India, and Kenya — where jihadist groups traditionally recruited through more traditional means.

As social media companies have cracked down, jihadists increased their use of encrypted messaging platforms. Talent-spotters operating on publicly visible social-media sites connect with potential recruits, and then steer them toward end-to-end encryption, which is often inaccessible to governments. According to FBI Director Christopher Wray, the FBI was unable to access the content of 7,775 devices in fiscal year 2017: that is more than half of those it attempted to access in that year.²⁸ As the Bipartisan Policy Center assessed in a report on digital counterterrorism, “[b]y toggling between publicly visible social media and encrypted messaging applications, terrorist recruiters can share their message with a vast global audience and then communicate securely with individuals lured in by that public outreach.”²⁹

In addition to facilitating the radicalisation and mobilisation of new supporters, end-to-end encryption also enables jihadists to engage in operational plotting. The Islamic State also used end-to-end encryption to pioneer a “virtual-planner model,” in which its operatives provided guidance to inspired individuals, like Mohammed Yazdani, on how to conduct attacks halfway across the world. This guidance has been relevant for everything from conceiving plots to selecting targets to building bombs. In some cases, virtual planners helped operatives to troubleshoot during an attack, or overcoming last-minute nerves before executing one.³⁰

Not all terrorist groups use social media equally. The core al-Qaeda organisation was eclipsed by its own affiliates. Al-Shabaab was an early adopter, especially of Twitter, which it used for everything from recruitment to fact-checking media when the group believed a story was misreported.³¹ AQAP was also more active on social media specifically, and the Internet in general than al-Qaeda core. The Islamic State has been the most prolific jihadist organisation, combining social media savvy with video production techniques to produce propaganda that helped attract record number of foreign fighters.³² At the same time, the group also adopted elements of al-Suri's strategy, and called on its sympathisers who could not emigrate to undertake attacks in their home countries:

“If the infidels have shut the door of hijrah [travel to Syria and Iraq] in your faces, then open the door of jihad in theirs. Make your deed a source of their regret. Truly, the smallest act you do in their lands is more beloved to us than the biggest act done here [in Syria]; it is more effective for us and more harmful to them. If one of you wishes and strives to reach the lands of the Islamic State, then each of us wishes to be in your place to make examples of the crusaders, day and night, scaring them and terrorizing them until every neighbor fears his neighbor.”³³

This strategy contributed to the high number of Islamic State attacks in the West after June 2014. The group was not the first jihadist organisation to adopt al-Suri’s method of inspiring attacks abroad, while simultaneously pursuing Naji’s strategy of seizing territory at home. AQAP had pursued a similar course of action, with Anwar al-Awlaki and the *Inspire* magazine he produced, rousing adherents to action. However, once again, the Islamic State was considerably more prolific. As Kim Cragin pointed out in the *Texas National Security Review* earlier this year, the group conducted more external operations — attacks conducted outside Syria, Iraq, or its 25 so-called provinces — from 2015 to 2017 than the al-Qaeda network did during a similar period from 2008 to 2010. She further highlighted that the Islamic State’s “inspired” operations made up a considerable proportion of the total number of the total.³⁴

The way forward

No one could have predicted that a Tunisian street vendor setting himself on fire would spark a conflagration that consumed much of the Arab world.³⁵ Nor could anyone have foreseen that a former soccer enthusiast in Iraq, who had done time in a US-administered prison camp, would command the most powerful jihadist group the world had ever seen and declare himself the leader of the Caliphate.³⁶ What analysts can do is to identify trends. Insurgents have long sought to influence adherents and potential supporters, including through governance and the use of propaganda. The ways in which jihadist groups have adopted and adapted these practices, especially in terms of their ability to use new technologies, are trends we cannot ignore. So what can we do?

The international community has scored significant victories

against the Islamic State, severely degraded core al-Qaeda, kept AQAP contained, and disrupted other terrorist groups across the world. And yet, despite nearly two decades of US-led counterterrorism operations, the Center for Strategic and International Studies recently found that there are almost four times as many Sunni Islamist militants operating in 2018 as there were on 9/11.³⁷

One way of making sense of this is to posit that terrorist organisations have been weakened in the past several years, but that the wider jihadist movement remains strong. If one accepts this proposition, then it is impossible to ignore the fact that the movement’s ongoing strength stems in large part from the fragile nature of the states in which the majority of its adherents operate. State fragility is rampant across parts of South and Central Asia, the Middle East, Horn of Africa, and Sahel, where governments lack legitimacy and fail to provide their citizens with adequate security or basic social services. Many of these governments are poorly run and corrupt, led by elites who are predatory and sometimes inclined toward authoritarian tendencies. Rule of law is often absent.

For years, the international community has sought to reduce these risk factors through various policies and programmes, but too often it has done so through a counterterrorism lens. Put another way, the aim has been to address these deficiencies in large part to reduce terrorism. Because terrorism prevention was the objective, this may have helped to engender tradeoffs that favored short-term solutions that relied more on the use of force. This has certainly been the case for the United States. There is another way of approaching the problem, however, and one that European countries advocate: viewing terrorism as just one negative outgrowth from fragile states (immigration flows is another), and focusing primarily on addressing the state fragility that is at the heart of these problems. This view merits consideration, and it is worth noting that the US Institute of Peace Task Force on Extremism in Fragile States has adopted elements of it.³⁸

The use of force still has a place in this approach. After all, security is critical for development and reform. And no country should be expected to allow looming threats to fester without addressing them. However, the international community, and especially the United States, which has been in the lead when it comes to building the security capacity of partner nations, can and should do more to ensure that force is used judiciously.

External actors also must develop greater commonality in terms of envisioning terrorist threats and how to combat them, objectively assessing the potential for burden sharing, and making realistic approaches to improving efforts to shore up fragile states and combat terrorism in the Middle East, Africa, and South and Central Asia. Part of this effort includes identifying structural or political impediments to burden sharing that cannot be overcome and therefore must be mitigated, as well as barriers that are worth attempting to surmount. It also requires building a community of interest among government officials and outside experts on how to improve state-to-state burden sharing and incorporate it within the European Union, NATO, and the World Bank.

A similar cooperative effort is needed to combat online radicalisation and the misuse of encrypted communications channels. There is no single policy fix when it comes to terrorists' use of technology. We need to think in terms of layered security, similar to the ways in which countries approach airport or homeland security. In this case, the need for public-private partnerships and international collaboration is even greater. Governments, multinational organisations and alliances, and the private sector must come together to create rules of the road. This means promoting national and global norms that balance security needs with individual privacy and freedom of expression. Put simply: better governance, on the ground and online, is critical to combatting jihadists locally and globally.

¹ Jen Easterly and Joshua A. Geltzer, "The Islamic State and the End of Lone-Wolf Terrorism," *Foreign Policy*, May 23, 2017, <http://foreignpolicy.com/2017/05/23/the-islamic-state-and-the-end-of-lone-wolf-terrorism/>

² For example see: Letter from 'Atiyya (akak Mahmud) to Bin Laden, June 19, 2010, Government Exhibit 421-10-CR-019-S-4-RJD (Abbottabad document released at trial of Abid Naseer).

³ Mark Mazzetti, "CIA Drone Is Said to Kill Al Qaeda's No. 2," *New York Times*, August 27, 2011.

⁴ Seth Jones, *A Persistent Threat: The Evolution of al-Qa'ida and Other Salafi Jihadists* (Arlington, VA: RAND, 2014), x.

⁵ Letter to Atiyya (Sheikh Mahmud) from Osama bin Laden (Abu Abdullah), April 26, 2011, SOCOM-2012-0000010.

⁶ Daveed Gartenstein-Ross, "The Cuban in the Desert," *Foreign Policy*, August 13, 2013.

⁷ On Libya see, Mohammed Abbas, "Libya Prisoner Release Stokes Fears of Tribal Strife," *Reuters*, March 3, 2011. On Syria see, Michael Weiss and Hassan Hassan, *ISIS: Inside the Army of Terror* (New York: Simon and Schuster, 2015), 139

⁸ Michael Totten, "Year Four: The Arab Spring Proved Everyone Wrong," *World Affairs Journal* 177, no. 2 (July/August 2014): 43–49.

⁹ Aaron Zelin, *Tunisian Foreign Fighters in Iraq and Syria* (Washington, DC: Washington Institute for Near East Policy, Nov. 2018).

¹⁰ The Arab uprisings catalyzed civil wars directly in Libya and Syria, and indirectly contributed to or facilitated the outbreak of conflict in Yemen and Mali.

¹¹ "Sunni Rebels Declare New Islamic Caliphate," *Al Jazeera*, June 30, 2014.

¹² Social welfare included medical clinics for people in need of health services, affordable housing, schools to provide free education, and militias to act as intermediaries in neighborhood conflicts. At the same time, EIg engaged in violent acts of vigilantism against individuals who did not conform to its interpretation of sharia, as well as against "unIslamic" targets such as liquor stores and video shops. James Toth, "Islamism in Southern Egypt: A Case Study of a Radical Religious Movement," *International Journal of Middle East Studies* 35, no. 4 (2003): 557. Meijer, "Commanding Right and Forbidding Wrong As a Principle of Social Action," 194-200.

¹³ The Northwest Frontier Province has since been renamed Khyber Pakhtunkhwa, which in turn has incorporated the Federally Administered Tribal Areas. For more on the TTP see for example, Mona Kanwal Sheikh, *Guardians of God: Inside the Religious Mind of the Pakistani Taliban* (New York, NY: Oxford University Press, 2017)

¹⁴ Stig Jarle Hansen, *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group, 2005-2012* (New York: Oxford University Press, 2013).

¹⁵ Najj Abu Bakr, *Management of Savagery: The Most Critical State Through Which the Ummah will Pass*, trans. William McCants, unpublished manuscript, 2004.

¹⁶ Najj also argued it would be necessary to secure the region from external attack, provide military training to young men in the population, form an intelligence apparatus, attack enemies, and establish coalitions with allies.

¹⁷ Abu Zubayr Adel al-Abab, a senior AQAP official, admitted that, "the name Ansar al-Sharia is what we use to introduce ourselves in areas where we work, to tell people about our work and goals, and that we are on the path of Allah." "Online Question and Answer Session with Abu Zubayr Adel al-Abab, Sharia Official for al-Qa'ida in the Arabian Peninsula, April 18, 2012," translation by Aman Soliman from the International Center for the Study of Radicalization and Political Violence. See also, Christopher Swift, "Arc of Convergence: AQAP, Ansar al-Shari'a and the Struggle for Yemen," *CTC Sentinel* Vol. 5, no. 6 (June 2012).

¹⁸ For a brief primer on the different Ansar al-Sharia branches that emerged see, Aaron Zelin, "Know Your Ansar al-Sharia," *Foreign Policy*, Sept. 21, 2012 (<https://foreignpolicy.com/2012/09/21/know-your-ansar-al-sharia/>).

¹⁹ Anonymous letter (assessed to be either Osama bin Laden and/or Atiyya) to Abu Basir (Nasir al-Wuhayshi), written after October 2010, SOCOM-2012-0000016. Anonymous letter (assessed to be Osama bin Ladin) to unknown, date unknown, SOCOM-2012-0000017.

²⁰ Daveed Gartenstein-Ross et al., *Islamic State vs. Al-Qaeda: Strategic Dimensions of a Patricidal Conflict* (Washington, DC: New America Foundation, 2016).

²¹ These efforts at restraint often were not as effective in practice as envisioned.

²² The Islamic State leadership also directed its so-called provinces in Libya, Egypt, Yemen, and elsewhere to adhere to this same approach.

²³ For more on this dynamic and on Najj's influence on the Islamic State see for example, R. Kim Cragin, "The Riptide: How Foreign Fighter Returnees Could Shape the Jihadist Movement," *Texas National Security Review*, Mar. 20, 2018.

²⁴ Brynjar Lia, *Architect of Global Jihad: The Life of al-Qa'ida Strategist Abu Mus'ab al-Suri* (New York: Columbia University Press, 2008).

²⁵ This paragraph draws from a report on Bipartisan Policy Center report on terrorism and counterterrorism in the digital age, which evaluates these developments in considerable depth. See, Blaise Misztal et al, *Digital Counterterrorism: Fighting Jihadists Online*, (Washington, DC: Bipartisan Policy Center, Mar. 2018), <https://bipartisanpolicy.org/library/digital-counterterrorism-fighting-jihadists-online/>

²⁶ See for Example, Bard E. O'Neill, *Insurgency and Terrorism: From Revolution to Apocalypse* (Washington, DC: Potomac Books, 2005), ch. 5.

²⁷ Misztalop, cit.

²⁸ Christopher Wray, Federal Bureau of Investigation, Remarks before the International Conference on Cyber Security, January 9, 2018.

²⁹ Misztalop, cit.

³⁰ On the virtual planner model see, the Daveed Gartenstein-Ross and Madeleine Blackman, "ISIL's Virtual Planners: A Critical Terrorist Innovation," *War on the Rocks*, Jan. 4, 2017; Daveed Gartenstein-Ross, "We Squeezed the Balloon: As ISIL Collapses, Jihadism Remains in a Growth Phase," *TNSR*, March 20, 2018, <https://tnsr.org/roundtable/policy-roundtable-future-jihadist-movement/>

³¹ Clint Watts, *Messing with the Enemy: Surviving in a Social Media World of Hackers, Terrorists, Russians, and Fake News* (New York, NY: Harper Collins, 2018).

³² J.M. Berger and Jonathon Morgan, *The ISIS Twitter Census: Defining and Describing the Population of ISIS Supporters on Twitter* (Washington, DC: The Brookings Institution, 2015), https://www.brookings.edu/wp-content/uploads/2016/06/isis_twitter_census_berger_morgan.pdf.

³³ Abu Muhammad al-Adnani, "That they Live by Proof," Statement by ISIL Spokesman, translated and released by al-Hayat Media Center, May 22, 2016.

³⁴ R. Kim Cragin, "The Riptide: How Foreign Fighter Returnees Could Shape the Jihadist Movement," *Texas National Security Review*, Mar. 20, 2018.

³⁵ Tarek al-Tayeb Mohamed Bouazizi, a Tunisian vegetable vendor, provided the spark for the Arab uprisings in December 2010 when he set himself on fire outside a municipal building to protest corruption. The uprisings that followed gained steam in 2011.

³⁶ William McCants, *The Believer: How an Introvert with a Passion for Religion and Soccer Became Abu Bakr al-Baghdadi Leader of the Islamic State* (Washington, DC: Brookings Institution, 2015).

³⁷ Seth Jones et al., *The Evolution of the Salafi-Jihadist Threat: Current and Future Challenges from the Islamic State, Al-Qaeda, and Other Groups* (Washington, DC: CSIS, 2018).

³⁸ Thomas Kean and Lee Hamilton, *Beyond the Homeland: Protecting America from Extremism in Fragile States* (Washington, DC: USIP, 2018).

THE RETURN OF POWER POLITICS AND NUCLEAR NON-PROLIFERATION

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Nuclear non-proliferation has remained a major global challenge for more than six decades but the nature of the problem has undergone many changes, especially since the end of the Cold War. The threat environment and the emerging balance of power dynamics have greatly changed since the global nuclear order was established and they both contribute to making the non-proliferation order much more at risk today than it has ever been. The international order looks much more conflict-prone today than it was even a decade ago, and regional conflicts have further increased insecurity. This essay will briefly look at the effects of both global and regional conflicts on nuclear non-proliferation and the international normative consensus on which it has been based.

It is necessary to acknowledge that for most states, nuclear weapons are ultimately about security, and the bargain offered by the non-proliferation order was accepted despite its inequities because it offered greater security. The number of countries engaged in the pursuit of nuclear weapons has also gone up as the non-proliferation order bargain frays. In addition, from being concerned mostly with the singular threat of the US-Soviet rivalry and the consequent threat of global nuclear war, the threat now has grown to include the proliferation of weapons of mass destruction (WMD), along with their delivery mechanisms and nuclear terrorism. Some specific challenges in this regard include the China-Pakistan nuclear and missile

cooperation, and nuclear and missile activities relating to both North Korea and Iran. Each of these challenges have further had the impact of altering the military balance in Asia.

Nuclear non-proliferation is one area where further institutionalisation appears to have ground to a halt.¹ Though it remains at the core of the global security architecture, major progress in institutionalisation can all be traced to the first three decades of the non-proliferation order, with little further progress being made in the last two decades. The establishment of the Nuclear Suppliers Group (NSG) and other technology control regimes, as well as tightening of the rules of International Atomic Energy Agency monitoring through the Additional Protocol and changes to the NSG rules themselves to require full-scope safeguards for nuclear transfers, were all innovations and institutional measures introduced from the 1970s through the 1990s.² Subsequently, the United States under the second Bush administration mistakenly decided that unilateral measures were far more effective. This proved to be the undoing of the order because the United States did find it difficult to put the genie back in the bottle after it went to war against Iraq on the pretext of nuclear and WMD non-proliferation. Iraq weakened both American ideological and material power, and the consequences are still being felt.

The nuclear non-proliferation order is also one in which

the main actors have not changed much, these being the great powers, specifically the P-5, who also are the N-5, the only five countries that can legitimately maintain nuclear arsenals. Despite the growing prominence of the developing world and groups such as BRICS (Brazil, Russia, India, China, and South Africa) and IBSA (India, Brazil, and South Africa), the non-proliferation order has remained firmly under the control of the P-5.³ Though other actors are sometimes included, such as during negotiations of the Iran nuclear issue, they are essentially window-dressing rather than serious players. This could potentially change in the coming decades, as power shifts occur and the current non-proliferation order decays further. Whether a new non-proliferation order can be fashioned remains to be seen, but it is doubtful.

In the meantime, the global nuclear non-proliferation order remains in serious difficulty, as revealed by the state of the Nuclear Non-Proliferation Treaty (NPT), the centrepiece of the state-led non-proliferation regime, discussed below.

The NPT: Evolution and challenges

The effectiveness of the NPT that was negotiated in 1968 is questionable, but those who have remained optimistic about the treaty still see it as playing a useful role. The optimists argue that the treaty has managed to stay the course with its objectives, given that there are only a handful of countries who have developed nuclear weapons.⁴ It is also often argued that NPT is the only treaty that has seen large-scale participation, including the five Nuclear Weapon States (NWS),⁵ thus alluding to the fact that nuclear disarmament is very much on the agenda through commitment contained in Article VI of the NPT. Yet, this was a serious point of contention between the non-nuclear weapon states (NNWS), particularly a handful of countries like Egypt, and the NWS at every five-year Review Conference (RevCon), including the 2015 NPT RevCon.⁶ The prevailing sense among the nuclear weapon countries is to continue with the status quo and they are not willing to do anything significant to make any progress towards nuclear disarmament, even in a long-term framework. This suggests that many of these states see nuclear weapons as “necessary,” “legitimate,” or “justifiable.”⁷ As long as nuclear weapons are seen as legitimate by these few states, it will be justified by other states as well. In some cases, there are legitimate security

interests and vulnerabilities that have pushed these other non-NWS states to pursue nuclear weapons.

Acknowledging that NPT may have its pitfalls may be the necessary first step to reviving and strengthening the instrument.⁸ For instance, the question of Iran and North Korea clearly demonstrates the weakness of the regime in general and the NPT in particular. True, a group of major powers was able to stitch together the Joint Comprehensive Plan of Action (JCPOA), but the fact that the deal was negotiated and concluded outside the NPT framework is a clear illustration of the flawed regime. Dealing with North Korea has met with the same fate. A unilateral US deal in the 1990s was considered as a permanent solution to the Korean nuclear imbroglio but a decade later, Pyongyang decided to pull out of the NPT to go nuclear.

The difficulties faced by the NPT is evident, but it is not to suggest that efforts should not be made to strengthen the mechanism.⁹ Furthermore, the global non-proliferation architecture needs to have a broader perspective and innovative means to integrate countries such as India. India has extended strong ideational support for non-proliferation, and is increasingly becoming integrated with the international nuclear order and export control regimes. Such steps must be pursued with greater vigour to reinforce the value of the global nuclear non-proliferation instruments.¹⁰

Iran and North Korea are not first instances of the global nuclear non-proliferation order facing a crisis, and they certainly will not be the last. In the past, different crises have brought together all major players with an imperative to review, revise, and strengthen the regime. The manner in which the NSG took shape in a case in point. India's first nuclear test in 1974 led to a concerted effort on the part of the global nuclear community to further tighten the rules. Similarly, the discovery that Iraq was pursuing a concealed nuclear weapon programme led to streamlining of the rules and the introduction of the Additional Protocol in the early 1990s. Likewise, there have been debates about removing the right to withdrawal from the NPT following North Korea's decision to do so, but this idea has not gotten very far.

However, greater disagreement among major players today poses a far more serious danger to the regime, which

is preventing them from cooperating effectively against proliferation threats. The source of such disagreement stems from power competition.

The return of power politics

Increasingly power-centric competition has begun to cast a long shadow in the way the existing international order is governed. The central challenge, thus, is the increasing great power competition fuelled, in the first instance, by the emergence of new rising powers that has begun to make the debates around nuclear non-proliferation a lot more challenging. The emerging world order appears to be moving closer to greater sense of competition, rivalry, chaos, and conflict. The global political and security order as we know it, defined by alliances, rules of engagement, and respect for international law, is coming under increasing strains. Much of the world took the international liberal order to be some sort of entitlement, but it is no more a given, and unless conscious efforts are made to strengthen and uphold the existing principles and regimes, it could easily wither away. This calls for a clearly calculated strategy.

For many countries, it is not in their interests to see a weakened United States being replaced by China that challenges accepted norms. However, China cannot be held responsible for all the problems and difficulties that ail the global non-proliferation order. Beijing does not comprehend or is unwilling to accept the dangerous consequences of a weakening non-proliferation order. This is driven by the fact that China views the world from a power-centric perspective. Its approach to India's NSG membership is a good example: China became the single biggest hurdle in taking forward India's objectives to join the NSG. Even as China's opposition to India's NSG membership was couched in technical language, it was clearly driven by its political calculations.¹¹ It certainly was not driven by a desire to support and sustain the non-proliferation principles of the regime. Rather, Beijing saw that India gaining a seat at the NSG could possibly put New Delhi on an equal footing with China, and it delinked India from Pakistan.

Clearly, all big powers have an interest in ensuring that their interests find acceptance, especially on global governance platforms. But even as they pursue their

national interests, their perception of self-interest can be tweaked in a way that serves the larger interests of the global community. Therefore, despite the high-pitched competition and rivalry between the United States and the USSR, Washington and Moscow were able to find common cause with regard to nuclear non-proliferation issues and supported the establishment of the global nuclear non-proliferation regime. The utility of converting narrow national interests to global public good has apparently not yet been recognised by the Chinese leadership.

A second factor, also linked to a changing international order, is the relative decline of US power, even as it continues to be the most dominant power, which has consequences for how willing it is to lead governance in this area. Though these are multilateral arms control measures, it still requires at least one great power to take the lead in promoting and sustaining the regime. The lack of a credible US leadership in this regard has had a negative impact on how the non-proliferation norms are sustained into the future.¹²

Many find it fashionable to conclude that the lack of credible US leadership is a direct result of the Trump administration coming into office, but in reality, the phenomenon has been in the making for a while. This trend was quite evident under Obama, who brought with him the rhetoric of multilateralism as he came into office.¹³ The rhetoric was useful to an extent to address the over-stretch of US military power following two simultaneous military operations in Iraq and Afghanistan. However, the problem with the Obama administration was that it started taking the notion too seriously and thus ended up ceding a lot of strategic space to other powers, such as China.

The Trump Administration has further contributed to this perception about the US decline. With President Trump in office, apprehension about US leadership has increased, especially among American allies — many of whom have the technical and industrial capacity to build nuclear weapons, but had deliberately decided that US extended deterrence commitments were a cheaper and safer security bet.

Many regional powers therefore feel that they have been left to fend on their own and take care of their own security



We are not on the cusp of a major growth in the number of nuclear-armed powers, but the security provided by the non-proliferation regime and US guarantees backing up the regime are increasingly suspect in the eyes of many capitals.

needs. If the US' extended deterrence strategy were to be further called into question, there could be other US allies as well who will be compelled to develop and strengthen their own security measures, which could also include nuclear options. This would lead to further erosion of the nuclear non-proliferation instruments.

On the other hand, nuclear security is one area that has seen quite a bit of accommodation among the great powers and some amount of US leadership under Obama. US leadership was a determining factor in holding four successful rounds of nuclear security summits. Even though the summit process has ended now, cooperation on nuclear security could be continued and further expanded to include counter-proliferation measures that could augment the overall effectiveness of global nuclear non-proliferation measures.¹⁴

The impact on the nuclear non-proliferation regime due to changes in power balances and ensuing competition is strengthened by a third challenge — the growing salience of nuclear weapons. This is becoming more marked in the nuclear plans and strategies of the NWS. Though nuclear arsenals themselves are not growing dramatically, there is little effort on the part of the NWS to move away from nuclear weapons. Every NWS appears intent on maintaining its arsenals for the foreseeable future. In addition, some, such as China, Russia, and the United States,¹⁵ are continuing to modernise and improve their nuclear forces. New missiles and warheads are being designed and incorporated into their arsenals. Nuclear strategies themselves are becoming somewhat more adventurous. For instance, though China has formally adopted a no first use doctrine, the continuing growth in the numbers and sophistication of the Chinese nuclear arsenal and its supporting infrastructure, and hints of an

internal debate in China about its no first use doctrine, cannot but add to the growing anxieties about Beijing's nuclear plans.¹⁶

Russia, similarly, appears to be emphasising its nuclear weapons more.¹⁷ Moscow's unnecessary effort to cheat on the Intermediate-range Nuclear Forces (INF) treaty has now forced the United States to respond, threatening one of the more successful nuclear arms control treaties, one that eliminated a whole class of nuclear weapons. There are definitely problems with the INF — it was set up at a time when China and China's nuclear arsenal was not seen as a major threat, and so the INF treaty does not cover its nuclear arsenal (nor those of any others, as it was a bilateral US/Soviet treaty). With the post-Cold War downsizing of US and Russian nuclear arsenals, and the growth in China's nuclear capabilities and its general power position, the fact that China is able to deploy intermediate range missiles without any constraint has been a concern for both the United States and Russia. But sacrificing the INF treaty may do more harm than good, especially in demonstrating further to the NNWS that nuclear powers have no interest in eliminating their arsenals. And if an INF arms race should begin, especially involving China, it could further spur the interest of others in looking at nuclear weapons.

A fourth challenge has arisen due to shifting power balances among major powers: there is now a growing salience of nuclear weapons in the national security strategies of many countries, though as yet this salience is marked more by greater interest in acquiring nuclear arms than actual nuclear arsenals. This is partly aided by the continued emphasis on nuclear weapons in the security strategies of the NWS's and the four nuclear-armed states. This increasing interest in nuclear weapons is also driven



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by regional conflict, aggravated by the reality of growing conventional military imbalances in different regions of the world, particularly, for one, in the Middle East. If Iran goes nuclear, there is likely to be further proliferation in the Middle East, as states such as Saudi Arabia pursue their own deterrent forces.

The growing intensity of regional competition in the form of arms race is playing out in East Asia as well. In 2006, North Korea detonated its first nuclear weapon. North Korea is the only state to withdraw from the NPT to acquire its own nuclear weapons. North Korean missile and nuclear-related activities along with the China threat are developments that have important strategic consequences for the region. On-and-off negotiations with North Korea could possibly lead to a denuclearisation of the Korean peninsula at some point but current trends are not particularly positive. If North Korea continues to maintain its nuclear arsenal, it will put additional pressure on countries, such as Japan, to reconsider their own non-nuclear weapon stance. If Japan decides to build nuclear weapons, South Korea will not be far behind.¹⁸ Thus, regional conflicts, especially one in which some have nuclear arms, are increasingly spurring further interest in nuclear arms even among countries that have hitherto been stalwart anti-nuclear powers.

Many of these powers are allied with the US, but as noted above, they worry that Washington will be increasingly unable or unwilling to defend their allies in distant parts as threats rise within their regions. A debate about nuclear weapons is growing even in countries such as Germany, which would have been unimaginable just a few years back. None of this is to suggest that we are on the cusp of a major growth in the number of nuclear-armed powers, but that the security provided by the non-proliferation regime and US guarantees that backed up the regime are increasingly suspect in the eyes of many capitals. There is still time to head off further growth in the numbers of nuclear powers, but the danger of further proliferation needs to be taken seriously by the major powers.

Conclusion

The lack of consensus among the great powers means greater disputes about promoting and sustaining non-proliferation norms. The lack of agreement among

major powers is almost a direct function of the changing balance of power equations.¹⁹ The changing global as well as regional balance of power dynamics means less consensus, which suggests that a rule-maintaining exercise is potentially in danger.

This is a larger malady that has conditioned the nuclear non-proliferation regime for a couple of decades now. The lack of consensus among the major powers has essentially hampered the process of strengthening the regime. During several crises in the early days of the non-proliferation order, the major powers were willing to put aside their political differences in developing congruent positions to tighten the regime further. However, this is missing in today's political environment to the extent where even when all the major powers acknowledge many of the challenges in their official rhetoric, they have failed to address them through a more concrete policy approach that would help present a united front in dealing with nuclear proliferation threats and crises.

While this is not a problem unique to nuclear non-proliferation, that is no solace. The two major camps, the US-led West and the Russia-China one, have failed to build consensus on any major nuclear non-proliferation policy measure, thus leading to indecisiveness and crisis in decision-making. For instance, one area of disagreement among great powers is the status of India within the nuclear order. In the mid-2000s, the United States changed its view on India's status as it concluded the US-India nuclear deal, a change that was accepted by all other powers, except China, an issue that has continued to rankle relations not only between China and India but also between China and the United States.

The nuclear non-proliferation regime is still dominated by the great powers, and to them must fall the greater responsibility of managing current stresses. But they themselves are victims of the shifting balance of power and their own efforts to maintain their self-interest in this midst. This suggests the need to expand the circle of stakeholders beyond the N-5. At the same time, there are difficulties facing the existing the review mechanisms — the five-year NPT RevCons also suggest that little progress is likely to be made if two hundred countries attempt to negotiate progress of the non-proliferation order.²⁰ One solution might be to bring together the N-5 alongside the four non-NPT nuclear-armed states and a few key

powers from different regions of the world, including countries such as Japan, Germany, South Africa, Brazil, Argentina, and Mexico. These powers should attempt to come up with a new consensus on where to take the non-proliferation order, the common risks they all face, and potential solutions that will be acceptable to all of them. Such an effort, while not very democratic, probably has a better chance of generating a fresh perspective on non-proliferation away from the high-pressure grandstanding at RevCons.

The BRICS countries in fact could potentially take the lead, as the grouping includes two N-5 powers, Russia and China, two key non-nuclear powers, Brazil and South

Africa, and one of the non-NPT nuclear-armed states, India. Similar ideas were taken up earlier although they are yet to gain any serious traction.²¹

Renewed discussion could include dealing with some of the more difficult issues in the NPT, such as the Article VI commitment to nuclear disarmament. But it is also important to examine nuclear technology transfer commitments under Article IV. In addition, the anomalous state of the four non-NPT nuclear-armed states could also be considered.

These are likely to be difficult discussions, but they are a necessary step in preserving the non-proliferation order.

¹ By institutionalisation, I refer here to the formal and informal arrangements that form part of the non-proliferation order. This includes NPT itself, the Safeguards Arrangement under the IAEA, and technology control regimes, such as the Nuclear Suppliers Group (NSG), Missile Technology Control Regime (MTCR), Australia Group (AG), and Wassenaar Arrangement (WA).

² James A. Glasgow, Elina Teplinsky, and Stephen L. Markus, "Nuclear Export Controls: A Comparative Analysis of National Regimes for the Control of Nuclear Materials, Components and Technology," Pillsbury Winthrop Shaw Pittman LLP, Washington DC, October 2012, <https://www.pillsburylaw.com/images/content/3/3/v2/332/NuclearExportControls.pdf>

³ Even though the BRICS grouping has two of the N-5 powers, it has made very little progress in real. The challenge could continue in the future due to some of the inherent problems—whether and how China would respond to India's quest for instance to become part of the global nuclear architecture including membership into export control regimes such as the NSG. So far, BRICS has tried to focus more on the civil nuclear energy aspects for cooperation. See Sergei Uyanayev, "The Nuclear Agenda and BRICS," Russia International Affairs Council, November 14, 2012, <https://bit.ly/2RcJnK> and Sverre Lodgaard, *Nuclear Disarmament and Non-Proliferation: Towards A Nuclear Weapons-free World?* (London and New York: Routledge, 2011).

⁴ For the strengths and weaknesses of the NPT, see "The Global Nuclear Nonproliferation Regime," Council on Foreign Relations, May 21, 2012, <https://www.cfr.org/report/global-nuclear-nonproliferation-regime>

⁵ Nuclear Weapon States (NWS) are the five nuclear weapons states recognised under the Nuclear Non-Proliferation Treaty (NPT).

⁶ Henrik Salander, "Reviewing a Review Conference: Can There Ever be a Successful NPT RevCon?," European Leadership Network, June 8, 2015, <https://bit.ly/2Rag8CG>

⁷ "Nuclear Non-Proliferation Treaty, Unimplemented, Becomes 'Place-Holder' for States to 'Insert Disarmament Measures Here', First Committee Told," GA/DIS/3507, General Assembly First Committee, Sixty-Ninth Session, 13TH Meeting, October 21, 2014,

⁸ Rajeswari Pillai Rajagopalan and Arka Biswas, "India and the NPT Need Each Other," *The Diplomat*, August 18, 2015, <https://thediplomat.com/2015/08/india-and-the-npt-need-each-other/>

⁹ "Question #1: Why is the Non-Proliferation Treaty important? —John P. Holdren," Press Release, Belfer Center for Science and International Affairs, Harvard University, April 26, 2005, <https://www.belfercenter.org/publication/question-1-why-non-proliferation-treaty-important-john-p-holdren>

¹⁰ On India's efforts and the merits and demerits of New Delhi's integration with the international nuclear order, see Rajeswari Pillai Rajagopalan and Arka Biswas, "Locating India within the Global Non-Proliferation Architecture: Prospects, Challenges and Opportunities," ORF Monograph, 2016, <https://bit.ly/2QoEraD>

¹¹ Rajeswari Pillai Rajagopalan, "India's NSG Quest: A Reality Check," *Science, Technology & Security Forum*, November 30, 2016, <http://stsf.org/content/indias-nsg-quest-reality-check>; Rajeswari Pillai Rajagopalan and Arka Biswas, "India's Membership to the Nuclear Suppliers Group," ORF Issue Brief No. 141, May 2016, https://www.orfonline.org/wp-content/uploads/2016/05/ORF_Issue_Brief_141.pdf

¹² Rebecca Davis Gibbons, "Nuclear Nonproliferation is Under Threat, and So is American National Security," *Washington Post*, February 14, 2015, <https://wapo.st/2Vvcamm>

¹³ Alexandra Homolar, "Multilateralism in Crisis? The Character of US International Engagement under Obama," *Global Society* 26, no. 1, (2012): 103-122.

¹⁴ Sarah Shirazyan, "Counterproliferation: 'Synergies of Strengths': A Framework to Enhance the Role of Regional Organizations in Preventing WMD Proliferation," *Arms Control Today*, September 2018, <https://www.armscontrol.org/taxonomy/term/20>

¹⁵ See Scot Paltrow, "Special Report: In modernizing nuclear arsenal, U.S. stokes new arms race," Reuters, November 21, 2017, <https://reut.rs/2TuvfmS>; Peter Huessy, "As Russia looms, modernizing US nuclear arsenal is non-negotiable," *The Hill*, January 1, 2018, <https://bit.ly/2REB3NH>; Nick Whigham and AFP, "Trump goes nuclear: US pentagon plans to upgrade nuclear weapons program to counter adversaries' mistaken confidence," *news.com.au*, January 19, 2018, <https://bit.ly/2QmA53T>

¹⁶ On China's evolving nuclear strategies and modernisation of its nuclear capabilities, see Nan Li, "China's Evolving Nuclear Strategy: Will China Drop 'No First Use?'," *China Brief*, 18, no. 1, January 12, 2018, <https://bit.ly/2AvzcfG>; Ben Lowson, "Is China Abandoning Its 'No First Use' Nuclear Policy?," *The Diplomat*, March 21, 2018, <https://bit.ly/2CSFR9N>; James Samuel Johnson, "Chinese Evolving Approaches to Nuclear 'War-Fighting': An Emerging Intense US-China Security Dilemma and Threats to Crisis Stability in the Asia Pacific," *Asian Security*, 2018, 1-18; and Gregory Kulacki, "China's Nuclear Force: Modernizing from Behind," *Union of Concerned Scientists*, January 2018, <https://bit.ly/2AxpEp7>

¹⁷ See Pavel Podvig, "Russia's Current Nuclear Modernization and Arms Control," *Journal of Peace and Nuclear Disarmament* 1, no. 2(2018): 256-267, <https://www.tandfonline.com/doi/full/10.1080/25751654.2018.1526629>; Hans M. Kristensen and Robert S. Norris, Russian nuclear forces, 2018, *Bulletin of the Atomic Scientists* 74, no. 3 (2018): 185-195, <https://www.tandfonline.com/doi/full/10.1080/00963402.2018.1462912>

¹⁸ Lami Kim, "South Korea's Nuclear Hedging?," *Washington Quarterly*, vol. 41, no. 1. (Spring 2018): 115-133; Sayuri Romei, "Japan's Shift in the Nuclear Debate: A Changing Identity?," *Working Paper*, The Center for International Security and Cooperation, Stanford University, <https://bit.ly/2seh2Pj>; Masaru Tamamoto, "The Emperor's New Clothes: Can Japan Live without the Bomb?," *World Policy Journal* 26, no. 3 (2009): 63-70. <http://www.jstor.org/stable/40468657>

¹⁹ Differing perspectives and differing priorities among great powers make the decision-making process extremely challenging in nuclear non-proliferation. For these and other challenges facing enforcement of norms in this area, see Jeffrey W. Knopf, "After diffusion: Challenges to Enforcing Nonproliferation and Disarmament Norms," *Contemporary Security Policy* 39, no. 3 (2018): 367-398.

²⁰ The last RevCons have had very poor results. See Henrik Salander, "Reviewing a Review Conference: Can There Ever be a Successful NPT RevCon?," European Leadership Network, June 8, 2015, <https://bit.ly/2Rag8CG>; Robert Einhorn, "The NPT Review Process: Time to Try Something New," Issue Brief, Center for Nonproliferation Studies, Middlebury Institute for International Studies, Monterey, April 2016, <https://bit.ly/2LQdj3w>

²¹ Groups such as BRICS have tried to pursue the nuclear agenda but it is yet to make any meaningful influence. See Richard Weitz, "How BRICS can Advance Global Non-Proliferation Agenda," April 13, 2014, <https://russia-direct.org/opinion/how-brics-can-advance-global-non-proliferation-agenda>

THE CIVILIAN PRIVATE SECTOR: PART OF A NEW ARMS CONTROL REGIME?

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Four years ago, I stood in the darkened operations center in front of a wall of blinking screens, arms crossed and squinting at video footage on one of them.

“Is this the guy?” The commander asked me for the second time, signaling toward the figure on the screen. “Kara, is it him?” I looked over and reviewed a mental checklist of the individual’s pattern of life over more than a decade. I weighed this against his latest movements, reflected on the screen in real time. The commander took a step toward me and started again, “Kara. We are running out of time. *Is this our guy?*”

I had a decision to make.

Using a machine to determine the validity of the target and take action is a nonstarter. But not everyone agrees on the details. Though the machines I dealt with that day were only semi-autonomous, it is not difficult to imagine a world where fully autonomous weapons are programmed to make a lethal decision. Institutions, countries, industry, and society must choose when and how to govern this technology in today’s world, where semi-autonomous weapons systems are no longer cutting-edge instruments of violence. Central to this is the reality that lethal autonomous weapons systems (LAWS)-related

technologies are outpacing a cumbersome, incremental diplomatic process. This is causing non-traditional actors, such as the private sector, to play an increasingly significant role in norms building. Against the backdrop of an era of strategic competition, the international community must account for these new stakeholders and their potential impact on international peace and security.

United Nations GGE: Current state of play, key actors, and objectives

The constantly evolving nature of foundational LAWS technology will inform attempts to govern its use. Technologies that underpin these systems — like artificial intelligence (AI) and robotics — are advancing rapidly. From automatic parallel parking to the US Navy’s Aegis combat weapons system, uses of autonomy span the breadth of civilian and military life. This reality shows no signs of slowing down. Corporations and governments alike are dumping more and more resources into these technologies for a variety of uses. For instance, Russia’s private sector AI investments will likely hit US\$500 million by 2020, and just last year corporations like Google snapped up AI start-ups for hundreds of millions of US dollars, with a total of US\$21.3 billion spent in AI-related mergers and acquisitions in the United States.¹ Similarly, China is

aiming for its AI industry to be worth US\$150 billion by 2030.² In explicit defence-related investments, the US Defense Advanced Research Projects Agency announced a US\$2 billion effort to develop the “next wave” of AI technologies in 2018.³

While this technology is diffuse across a range of industries, it can also be purposed for war. In April of last year, former Alphabet Executive Chairman Eric Schmidt testified to US Congress that AI will “profoundly affect military strategy.”⁴ Furthermore, as former US Vice Chairman of the Joint Chiefs of Staff General Paul Selva told a DC-based think tank in August 2016, the “notion of a completely robotic system that can make a decision about whether or not to inflict harm on an adversary is here. It’s not terribly refined. It’s not terribly good. But it’s here...”⁵ The superhuman reaction time of such decision-making machines could also increase the risk of accidents and prove deadly on a catastrophic scale, especially if the pace of future battle exceeds human decision-making capability.⁶

In light of such a future, attempts at governance under the framework of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively Injurious or to have indiscriminate effects (CCW) are underway. At the United Nations Office in Geneva in November 2013, states parties anticipated a need to examine the potentially destructive effects of this technology during a meeting of the High Contracting Parties to the CCW.⁷ A few years later, the CCW instituted a series of Group of Governmental Experts (GGE) meetings for further substantive discussions, beginning in 2017.⁸ This “expert subsidiary body of the CCW” signaled a rise in priority of the “questions related to emerging technologies in the area of LAWS.”⁹ The latest CCW meeting of High Contracting Parties convened again in Geneva in November this year, when they decided to hold seven more days of meetings in 2019.¹⁰

Diplomatic progress is duly open-ended, with a plurality of actors taking up various mantles on LAWS governance. Key among these are states, non-governmental organisations, international organisations and consortiums, industry, and academics. As a general overview meant only to demonstrate potential mechanisms of governance as they exist today, these players can be broadly categorised into states and other actors:

States: States include all permanent members of the UN Security Council and additional countries, for a total of 125 member states (High Contracting Parties to the CCW), with each country typically acting in its own security interests. States, and groupings of states like the Non-Aligned Movement (NAM) and the African Group, coalesce around multiple objectives, such as the assertion that no new legally binding measures on LAWS are needed, as current international law suffices. (Notably, Russia, the United States, Israel, France, and the United Kingdom all reject a ban.)¹¹ Other states, like Germany, support a non-legally binding political resolution, exemplified in their joint call with France for a “political declaration” at the April 2018 GGE meetings in Geneva.¹² Then there are those countries that advocate for a legally binding treaty to ban fully autonomous weapons, like Pakistan, Ecuador, Egypt, the Holy See, Cuba, Ghana, Bolivia, Palestine, Zimbabwe, Algeria, Costa Rica, Mexico, Chile, Nicaragua, Panama, Peru, Argentina, Venezuela, Guatemala, Brazil, Iraq, Uganda, Austria, Colombia, and Djibouti.¹³ Still other states require more information to make definitive judgements on LAWS governance.

Other actors: Non-governmental organisations and activists who approach potential LAWS governance from a humanitarian perspective, along with international organisations, entities, and independent actors, with a variety of corresponding and contrasting motives, comprise the other broad set of participants. For example, the NGO Campaign to Stop Killer Robots monitors policy developments on the call for a ban and helms the general movement.¹⁴ Agencies such as the International Committee of the Red Cross, UN Institute for Disarmament Research, UN Office for Disarmament Affairs, entrepreneurs, “industry associations,” academics there to observe, ethicists attending to inform, and roboticists all represent a plurality of agendas and interests.¹⁵

Uniters or dividers: Principles and norms

While certain principles unite actors in attempts to establish norms (or “standards of appropriateness”) — like involving a human in lethal decision-making — key impediments to this cohesion will frustrate any process to codify mutual restraint into law.¹⁶

“ *The independent establishment of a AI principles and ethics by private companies could offer standard-setting measures or lay the groundwork for new principles to work into LAWS governance.* ”

One of these uniting principles is that international humanitarian law (IHL) applies to the use of LAWS. This effectively provides the overarching framework for CCW meetings.

More explicitly, ten possible “guiding principles” were enumerated in the consensus document of recommendations from the August 2018 GGE meetings. Key among these is the affirmation of the importance of human responsibility “on the use of weapons systems,”¹⁷ articulated as follows: “Human responsibility for decisions on the use of weapons systems must be retained since accountability cannot be transferred to machines. This should be considered across the entire life cycle of the weapons system.”¹⁸

This consensus on some form of human involvement in the decision to take a life can encourage countries to collaborate on more specific questions that are engendered. France and Germany, for instance, aim to work together on the imperative to define meaningful levels of human control and “explore” the field of human-machine interaction.¹⁹ Even as dueling ideas of “meaningful level of human control” versus “appropriate human judgement” versus “appropriate human involvement”²⁰ can dictate the agendas of future meetings, given contested degrees of gradation concerning human involvement, but virtually no one in the diplomatic process argues that humans are unnecessary, somewhere “in/on the loop.”

Therefore, the human factor, along with the overarching principles of IHL,²¹ can serve as starting points to refine and unite future collaborative efforts on governing this space.

Conversely, there are areas of contention that divide actors involved in the GGE meetings and thus throw

up formidable obstacles to effective governance. Even commonly recognised objectives can act as divisive forces in attempts to govern, such as the need to establish a common definition of LAWS in order to begin thinking about implementation and restraint. While not prohibitive, this has been a glaring hurdle to the development of the normative process from which legal analysis and procedures can flow. The Center for a New American Security’s Paul Scharre contends that people fall into multiple schools of thought on the technical sophistication of autonomous weapons. Some think of autonomous weapons as agile and adaptive systems that use machine learning, others see them as any weapon that uses any type of autonomy, and yet others think of machines with the same cognitive abilities and intelligence of humans.²² Further, some GGE participants will not even agree on the existence or the utility of a definition. According to Scharre’s account of an interview with Human Rights Watch Arms Division Director Steve Goose, a working definition would actually hinder efforts to restrict autonomous weapons by jumpstarting a “conversation of potential exceptions.”²³ By this logic, creating too limiting a definition may inadvertently exclude possible subjects or components of legitimate regulation.

A second speed bump for CCW is disagreement on the morality of using or *not using* such weapons. For example, a general moral polarity exists more visibly concerning one element of LAWS safety: individuals and groups cannot seem to agree if they will make warfare safer (due to their precision) or more dangerous. For instance, United States Army Training and Doctrine Command’s Tony Cerri asked an audience in 2018: “Is it immoral not to rely on certain robots to execute on their own ... given that a smart weapon can potentially limit collateral damage?”²⁴

A third factor that inhibits the potential for effective

governance through the existing process is the fact that the CCW's hallmark is its status as a consensus-based organisation.²⁵ The High Contracting Parties have to agree to fund the endeavour and to participate in the next meeting itself, which allows any one player to impede the process. While the benefits of a consensus on LAWS governance are legion, this structure also creates a higher bar for agreement and implementation. Something as small as Russia's insistence on reducing the 2019 GGE meetings from ten to seven days at the November 2018 Meeting of the High Contracting Parties to the CCW highlights this hurdle.²⁶

Where do we go from here? New players in the state-led system

Given this backdrop, elements of the private sector can be leveraged strategically in the norms-building conversation — not as new leaders, but as an *option* for maintaining relevant governance frameworks despite a shifting technological landscape.

As with most emerging tech, the technology that underpins LAWS is far outpacing efforts to govern it. In certain instances, uneven rates of progress between new developments and accompanying guidelines can result in an outdated policy apparatus failing to keep up with malicious use. Recent examples include the reported use of facial recognition at music venues without individual consent and commercial drone near-misses with both military and civilian aircraft.²⁷ With LAWS, the uniquely revolutionary nature of AI may alter the institution-building processes brought to bear so far. Its myriad components and applications extend well beyond military applications to social, economic, humanitarian, diplomatic, and medical uses. The potential wide-ranging and salutary societal effects of continued AI development are widely acknowledged beyond national borders, as articulated by the Russia Federation position paper to the CCW in 2017:

“The difficulty of making a clear distinction between civilian and military developments of autonomous systems based on the same technologies is still an essential obstacle in the discussion on LAWS. It is hardly acceptable for the work on LAWS to restrict the freedom to enjoy the benefits of autonomous technologies being the future of humankind.”²⁸

This diffuse nature of AI, the growing concentration of engineering talent in the private sector, and their demonstrated technical breakthroughs and influence changes the impact and nature of stakeholders, placing a greater emphasis on today's purveyors of AI tech development — the civilian private industry.²⁹

For instance, in 2017 AI company DeepMind's Alpha Zero algorithm learned three different strategy games, including chess, without any training data.³⁰ In 2018, Chinese company Tencent made similar progress when its FineArt software defeated the human champion of another strategy game.³¹ Private company SpaceX achieved breakthroughs through its reusable rockets, with implications for blending commercial and defence technologies. Due to its role in developing the world's next transformative technology faster, the civilian private sector has already begun to articulate standards for the use of these technologies, absent any overarching strictures already in place.

Such a change also reflects a deeper trend of private actors gaining more influence in national security discourses, as demonstrated from the United States to South Korea in 2018. Notably, a cadre of Google engineers voicing concerns over the use of object recognition algorithms for the Pentagon's Project Maven, and the subsequent Google decision to discontinue its contract, demonstrates the pull of these non-traditional actors. Korean AI researchers effective boycott of Korean University KAIST, until it pledged not to develop “killer robots,” is a related demonstration of influence.³² The Future of Life Institute's open letters to the CCW, consolidated by University of New South Wales Professor Toby Walsh, also highlight this heightened involvement.³³ Influential AI leaders like DeepMind's Mustafa Suleyman and Tesla CEO Elon Musk's signatures on his 2017 Open Letter to the CCW, imploring the High Contracting Parties to “find a way to protect us all” from the “dangers” of autonomous weapons, portend future private sector engagement.³⁴ As such, the independent establishment of AI principles and ethics by companies like Google and Microsoft could offer standard-setting measures or lay the groundwork for new principles to work into LAWS governance.³⁵ Even if these principles are not directly applicable to the use of weapons, or their sources are dubious (i.e., the poor track record of US tech company self-regulation), giving these companies a seat at the table in the norms-building





processes would leverage the lessons learned from their technological breakthroughs and attendant standard-setting measures.

The combination of the disruptive impact of AI and the rise of private sector engagement can further influence the norms-building process, and even the common framework CCW parties take for granted, through “morally responsible engineering” and non-traditional private partnerships and consortiums.³⁶

In the first case, civilian industry’s human capital standouts can volunteer to contribute to the design stage of normative frameworks. As demonstrated above, civilian industry employees are increasingly seeking involvement in global ethics debates, and using their expertise to form the “technical architecture” of algorithms that underpin autonomous weapons systems is one way to keep up with the accelerating pace of unregulated technological advancement. As Harvard researchers noted in 2016:

“Programmers, engineers, and others involved in the design, development, and use of war algorithms might take diverse measures to embed normative principles into those systems. The background idea is that code and technical architectures can function like a kind of law.”³⁷

Civilian technical talent can help uniformed researchers inject “ethics” early on in the algorithms’ design phase to help preserve norms as the technology develops — like the importance of human control in lethal decision-making. In other words, civilian engineers can work side-by-side with AI scientists and government personnel to promote Georgia Tech roboticist Ronald Arkin’s concept of “embedding ethics” into the design of the system to potentially constrain lethal action.³⁸ To note in this regard is the 2018 EU’s high level expert group on AI, to be released March 2019, that will use this “ethics by design” principle as a test case for the rest of the international community.³⁹ The CCW’s 2018 Guiding Principles already offer a general blueprint for these efforts, which could benefit from private sector engagement: “Risk assessments and mitigation measures should be part of the design, development, testing and deployment cycle of emerging technologies in any weapons systems.”⁴⁰

In short, the engineering cadre responsible for the design can use the CCW’s two key principles of IHL and human responsibility to determine the best “programming policies”

as early as possible in the algorithm’s life cycle, prior to fielding. Speculation that developers can programme certain narrow uses of AI to comply with an agreed-upon code of ethics — whether the IHL, Geneva Convention, or a set of practices or standards agreed upon by a group of states operating under a common normative framework (e.g. NATO) — merit further research in both defense industry and civilian labs.

Secondly, the private sector can also help governance keep up with LAWS-related technology by examining, and perhaps even replicating, the efforts of non-traditional partnerships between private companies, interactions and forums that are on the rise and which have the potential to influence states and their own approaches to developing regulations, if successful. For example, Microsoft’s Brad Smith’s proposal for a Digital Geneva Convention urges governments to create “new international rules to protect the public from nation state threats in cyberspace.”⁴¹ Groups of companies like Siemens, IBM, and T-mobile devised and signed off on a charter to set standards to counter hacking attacks in early 2018, with calls for governments to take responsibility for digital security as well.⁴² The rise of digital terrorist propaganda on different platforms and a consortium designed to prevent the phenomenon between major technology companies gave way to a similar effort to counter computational propaganda in Europe, with companies like Facebook and Twitter signing off on a voluntary code of conduct, drawn up by the European Union.⁴³ In some cases, these companies brought in and trained smaller tech companies, international organisations, and NGOs to disrupt threats with new technology.⁴⁴ Already, different forms of potentially harmful technologies are evolving quicker than agreements on their ethical use, like the gene editing tool CRISPR and facial recognition, spurring similar self-policing efforts to both stem the tide and set new standards of “appropriateness” with government buy-in.⁴⁵

The LAWS norms-building process must make room for the rise of such agile, unconventional policy responses. It should account for increasingly significant players — particularly in a crowded milieu of great power competition and multipolarity as some harness emerging technologies quicker than others and aggravate security calculi.

While the private sector can offer blueprints to help govern global spaces, the current GGE process is working to

acknowledge this impact in constructive ways. According to the Campaign to Stop Killer Robot's Mary Wareham, AI scientists, experts, engineers, roboticists, and computer scientists are already "deeply involved" in the UN GGE meetings.⁴⁶ Outgoing Chair of the GGE meetings, Amandeep Gill, rightly highlighted the necessity of keeping policy "tech-neutral" and in line with technical developments to avoid constant revision, and of opening the conversation to multiple stakeholders, including industry.⁴⁷

LAWS technology is evolving so fast, and with such broad

implications for general society, that a serious recalibration of current institution-building procedures is warranted. The existing state-led system must make allowances for the impact of a formidable engine of these advances — the civilian private sector. Its role in the design and development of technology used in or adapted for armed conflict will matter increasingly in wartime scenarios, such as the one I experienced on deployment four years ago. In fact, the key to a new framework may alone rest on private sector developers who deliver the next steps in AI progress. The earlier we realise this, the better.

¹ Michael Horowitz, Elsa B. Kania, Gregory C. Allen, and Paul Scharre, "Strategic Competition in an Era of Artificial Intelligence," CNAS, <https://bit.ly/2mvRcDU> and "Google Leads in the Race to Dominate Artificial Intelligence," *The Economist*, December 7, 2017, <https://econ.st/2RcCldA>

² Ibid.

³ "DARPA Announces \$2 Billion Campaign to Develop Next Wave of AI Technologies," Defense Advanced Research Projects Agency, <https://www.darpa.mil/news-events/2018-09-07>

⁴ "Statement of Dr. Eric Schmidt to the US House Armed Services Committee on April 17, 2018," US Congress, April 17, 2018, <https://bit.ly/2F6qz3L>

⁵ Aaron Mehta, "No Terminators, but Autonomous Systems Vital to DoD Future," Defense News, August 8, 2017, <https://bit.ly/2AxFLTW>

⁶ Paul Scharre, "A Million Mistakes a Second," *Foreign Policy*, September 12, 2018, <https://bit.ly/2N12vrA>

⁷ Meeting of the High Contracting Parties to the CCW, "Report of the 2014 Informal Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS)," CCW/MSP/2014/3, November 13-14, 2014, <https://bit.ly/2AuFwZu> Organisations interested in the humanitarian impact of these weapons, like the International Committee of the Red Cross (ICRC), attempt to define these systems with an eye toward regulation. The ICRC categorises LAWS as "weapons that can independently select and attack targets, i.e. with autonomy in the 'critical functions' of acquiring, tracking, selecting and attacking targets."

⁸ Fifth Review Conference of the High Contracting Parties to the CCW, "Report of the 2016 Informal Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS)," CCW/CONF/2, December 12-16, 2016, <https://bit.ly/2C4tZjl>

⁹ Patrick Tucker, "Russia to the United Nations: Don't Try to Stop Us From Building Killer Robots," Defense One, November 22, 2017, <https://bit.ly/2Vz41O6>

¹⁰ Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, "Final Report," CCW/MSP/2018/CRR1, November 21-23, 2018, <https://bit.ly/2Vwi6LZ>

¹¹ Elsa B. Kania, "China's Strategic Ambiguity and Shifting Approach to Lethal Autonomous Weapons Systems," *Lawfare*, April 20, 2018, <https://bit.ly/2F5S7pG>

¹² "Statement of France and Germany to the Meeting of the Group of Governmental Experts on Lethal Autonomous Weapons Systems Geneva, 9 to 13 April 2018," <https://bit.ly/2F9ofbk>

¹³ "Country Views on Killer Robots," Campaign to Stop Killer Robots, April 13, 2018, <https://bit.ly/2KP4pl5>

¹⁴ Ibid.

¹⁵ Sono Motoyama, "Inside the United Nations' Effort to Regulate Autonomous Killer Robots," *The Verge*, August 27, 2018, <https://bit.ly/2oelmMH>. This is a non-exhaustive list meant to illustrate the variety of participants in the CCW framework.

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BIG IDEA

GOVERNANCE BY TECHNICAL STANDARDS: DO DIGITAL ID PLATFORMS RE-ORDER OR REINFORCE INTERNATIONAL RELATIONS?

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If the post-War order was founded on the political identity of nation-states, the proliferation of digital identity platforms challenges this sacred tenet of international relations. The popularity of digital IDs coincides with a curious moment in history. The “liberal, international order” was preoccupied for the most part of the 20th century with the objective of preventing war, but global governance in the 21st century aims largely to serve the individual.

At least 10 of the 17 Sustainable Development Goals (SDG), for example, relate directly to personal well-being. Digital ID platforms position themselves as conduits for fulfilling some of the goals: conferring “legal identity” is itself an SDG. The needs of the individual, broadly identified, are no longer met by states alone: they are often serviced by international organisations, whether in the form of humanitarian aid or access to justice. In fact, the reach of international organisations over the range of human activity has become so expansive that the European legal scholar Jan Klabbers has compared their relationship with states as to that between Frankenstein and his monster: “You are my creator, but I am your master. Now obey!” The Prosecutor of the International Criminal Court, for instance, is empowered to try individuals charged with crimes of grave concern to “the international community,” not nation-states. The hitherto unchallenged

authority of the state in designating an act as criminal, and its suzerainty over the individual’s freedoms, are thus simultaneously called into question. In short, “man” is no longer the third “image” of analysis in the Waltzian sense but an actor whose rights and responsibilities today are addressed directly by the international system.

Digital IDs, this essay argues, catalyse the direct interaction between individuals and the international order, without the tempering influence of state-based institutions. Many digital IDs are themselves created by governments, but they may have the unintended effect of blurring the unique status and political identity enjoyed by states.

Some caveats are in order before this thesis is further explained. Digital ID platforms are not going to replace states as the principals of global governance. Multilateral regimes may indeed have become more sophisticated, invasive, and ambitious, but states have shown extraordinary resilience to retain and reinforce their primacy in the international system. The network of regimes in place today to manage the affairs of states continue to privilege their political identities in three distinct and important ways.

Firstly, states are still the primary sources and subjects of international law, with trans-border migration or

commerce mediated exclusively by them. The World Trade Organisation, for instance, has long discouraged non-tariff barriers with a view to eliminate political interference in inter-state trade.² The provisions of the General Agreement on Tariffs and Trade, however, have not prevented states from imposing protectionist measures that reflect the political, even ideological, preferences of governments of the day.³ The European Union — perhaps the closest the world has come to genuine, “supra-national” governance — too has recently acknowledged the imprimatur of member-states in areas of “high politics” such as foreign affairs and security policy. The formal creation of the European Council — a “politically independent” gathering of European heads of states and government — through the Treaty of Lisbon in 2007, and its heightened prominence since the 2008 global financial crisis⁴ reflects the reality that states and their political interests cannot simply be wished away.

Secondly, the monopoly of states on violence, and protection offered to them — since 1945 — from violent acts by other states represent the ultimate validation of their political autonomy and identity. They are the only units of international relations that can use military force to defend territory. The protections offered to states against aggression is in no way qualified by the type or nature of the government in question. Article 2(4) of the United Nations Charter directs the prohibition against the threat or use of force not only against the territorial integrity of a state, but also its “political independence.” The rule of non-interference contained in Article 2(7) of the Charter similarly requires the UN to stay away from “matters that are essentially within the domestic jurisdiction” of a state. Norms on the use of force, expected to uniformly apply across the board, have responded to political — but state-centric — impulses of the time. In 1973, the UN General Assembly endorsed the use by liberation movements of all necessary means, “including armed struggle”, to overthrow colonial regimes.⁵ But those struggles in many instances had to be aligned with the goals of national unity and territorial integrity to earn UN recognition.⁶ Since 9/11 and the US invasion of Afghanistan, it is generally accepted among states and scholars that the right to self-defence extends not only to actions against states, but also non-state actors.⁷ The balance of power between states and non-state actors — insofar as the use of force is concerned — is still tilted overwhelmingly in favour of the former.

Thirdly, the conspectus of international instruments that codify the civil, political, social, and economic rights of individuals all declare them to be universal, but ultimately leave their implementation to states. Although the intrusive powers of human rights monitoring and reporting agencies have steadily increased over the years, they continue to be subservient to statist, political considerations. Elections to say, the UN Human Rights Council, the Group of Governmental Experts on ICTs, or the Global Climate Fund are even today based on political calculations unrelated, respectively, to the human rights record, size of the digital economies, or emissions reduction efforts of states.

None of these realities will likely be upended by the introduction of digital ID platforms. That said, digital IDs take aim at the rare chink in the armour of state sovereignty: the inability or incapacity to govern. The most prominent challenges to states’ sovereignty in recent years have arisen on this account. The norm of Responsibility to Protect, (R2P), for instance, calls on the UN Security Council to protect populations (even through the use of force) from genocide, war crimes, crimes against humanity, or ethnic cleansing, if a state is unable or unwilling to fulfil this solemn duty. Similarly, the recent surfeit of “global administrative law” (GAL) on counterterrorism suggests international organisations have been emboldened enough to manage the security environment of weak and small states.⁸ GAL is exemplified in the sanctions regime that the UN Security Council has created through Resolutions 1373 and 1267. These regimes have been created for all 193 UN states by 15 members of the UNSC, with limited room for non-participating members to withdraw or express reservations. What is more, the sanctions regimes affect individuals directly through listing and de-listing decisions by a committee of the Council — for all intents and purposes, they constraint the ability of states, especially weak ones, to govern their own citizens according to their laws.⁹ Yet another channel for the dilution of sovereignty has been through “reputational databases” such as the Fragile State Index, Freedom in the World Index, and the Democracy Index, used often as foil for effecting structural changes to the political economies of states.

So far, these encroachments into sovereignty have themselves been politically coloured and inconsistently applied. Moreover, some of them — like the norm of R2P

“*Digital IDs take aim at the rare chink in the armour of state sovereignty: the inability or incapacity to govern. The most prominent challenges to state sovereignty in recent years have effectively arisen on this account.*”

— reflect extraordinary circumstances where the state’s dereliction of duty is so manifest that the international community is left with no choice but to intervene militarily.

Unfortunately, this approach towards the political sanctity of statehood — “sovereign until they are not” — has resulted in a lack of serious introspection as to the eligibility, in the first place, for continued statehood beyond formal requirements (population, territory, government, etc). In particular, there has been a woeful neglect of state capacity as a determining criterion of sovereign autonomy, and thus, worthiness of primary membership in the international system. The capacity of states to serve their territory or population is not eroded overnight save in exceptional circumstances. In most cases, it is the result of incremental failure of governing institutions. There are good reasons why such a debate is yet to materialise: over just the last six decades, three separate waves of self-determination allowed numerous societies to cast off the yoke of colonialism and claim independence through statehood. It would be premature — not to mention historically unjust — to question the hard-earned autonomy of newly formed states because of systemic constraints they face in developing their economies or improving the livelihood of their peoples. The lack of clear, substantive parameters to assess the effectiveness of a state, and the inevitable politics it will invite, have made such a determination difficult. Digital IDs may help move this needle.

Where do digital ID platforms fit in?

On first glance, digital ID platforms, which have cropped up in almost all major geographies, appear to pose no threats to the supremacy of states. If anything, their application, being confined squarely to territorial limits, would seem

to augment the capacity of a state to control the affairs of its people. But the recent embedding of such platforms within the broad rubric of the UN ecosystem and Bretton Woods machinery (note the World Bank’s Identification for Development Initiative) has to be viewed in a political context as well.

Instruments such as the Universal Declaration of Human Rights or the Convention on the Rights of the Child confer individuals, or certain categories of individuals, with inalienable rights. Others such as the UN Refugee Convention confer “status” based on universally accepted parameters. Both the implementation of rights and the conferring of status are often politically coloured exercises — states can well argue, as many have, that a group of individuals have no “well-founded fear of persecution” in their home state and thus do not meet the requirement to be classified as refugees.¹⁰ Digital ID platforms do not confer status but in validating the identity of individuals, they arguably eliminate some of the discretion available to states to renege from their responsibilities under international regimes. They provide an objective and acceptable basis for determining the capacity of a state: the very purpose of giving an individual a digital identity is to confirm her legal existence, and concomitantly, realise those rights or benefits that the state itself has promised to all citizens in her position (these could be universal rights such as the right to vote, or special economic rights accrued to her as a member of a marginalised community).

In conceiving and implementing a digital ID platform, a state has complete autonomy in choosing who to identify, and deciding what entitlements ought to be linked with such identity. But once conferred, the performance of a state in meeting its governance commitments to those identified is held to a technical standard as opposed to politically pliable interpretations or macro-indicators of

development. In other words, state capacity is no longer determined solely by formal parameters that have so far languished in procedural purgatory.¹¹ A digital ID platform would assess it through the prism of technical standards that determine or confirm whether the individual has indeed been the rightful recipient of governance. This is a sea change to extant paradigms of global governance, which has flagged under-performing states for want of capacity, but ultimately left them to be arbiters of their own development. So far, unless such “incapacity” has exceeded an improbably high threshold — as with failure to prevent famine or mass atrocities — political censure, or stronger measures like sanctions, has been few and far in between. Digital IDs ensure that the penetrative gaze of the “liberal, international order” extends to the individual directly than through the collective of race, community, gender, or ethnicity, whose grievances have thus far provided the limited grounds for infringements of sovereignty. In some cases, digital IDs can indeed point to systemic exclusions of civil, social, or economic rights for a community, exposing states to scrutiny. But for the most part, they are likely to invite the international community’s attention to issues that are less politically visible but important nevertheless. Through its absorption into the SDG framework — Goal 16.9 promises “legal identity for all” — for example, the UN has been offered an enabling framework to help pilot digital ID projects in developing countries. But the same framework allows the UN and other international agencies to assess, using digital ID-based statistics, whether said states have made progress in meeting the rest of the SDGs: for example, access to justice, clean water, healthcare, and education can all be enabled and monitored through a digital ID platform.

Can a state’s inability to meet the needs of individuals who have been given a digital identity be grounds for “creeping monism,”¹² i.e., international regulations that directly address those unmet requirements? Arguably not, and were such a norm to be mooted, it would likely take many years, even decades, to gain currency among governments for fear of its implications for their sovereign powers. But digital IDs provide room for a technocratic assessment of governance, and curtails the ability of a state to offer a “justificatory discourse” for compliance with international human rights treaties, SDGs, or other norms.¹³ Most importantly, in focusing on the individual, digital ID-based metrics of global governance will offer rich micro-indicators of development, eschewing broad parameters

that reveal little. For instance, a country’s impressive performance in the World Bank’s Ease of Doing Business Index does not reflect the extent of financial inclusion (in practice) among small and medium-size entrepreneurs, or the qualitative nature of their access to banking institutions. An evaluation of state governance based on digital identity admittedly cannot avoid subjective or politically agitated prescriptions that follow a verdict of poor performance. Current debates around the “right” path of development that a state ought to follow will likely be replicated in such a case.

The exposure of its incapacity is, however, not the only way in which digital ID platforms may catalyse a move away from state-centric global governance. It could also be through the “transfer” of sovereign functions. Take Estonia’s digital ID programme, the e-ID kaart, whose *raison d’être* is the need to meet the requirements of the country’s tiny population spread over a (relatively) large territory. Effecting private or public transactions (transferring money or casting a vote) over secure digital ID infrastructure is therefore more viable than setting up brick-and-mortar institutions (banks, polling booths) across Estonia.¹⁴ But the e-ID kaart is also premised on a model of a country as a “service” and not physical territory as defined by international boundaries.

“Country as a service is the new reality. For example, if the UK says unequivocally that it will not issue a secure, government-backed digital identity to its subjects, or if states fail to greatly simplify the machinery of bureaucracy and make it location-independent, this becomes an opportunity for countries that can offer such services across borders,” Taavi Kotka, formerly Estonia’s Chief Information Officer, has argued.¹⁵

The e-ID kaart effectively allows Estonians anywhere in the world to avail governance benefits, but the functions that it serves could well extend to other countries. Today, a citizen of Myanmar can apply to become an “e-resident” of Estonia, which would grant her access to banking services (making and receiving payments from anywhere in the world), authenticate digital transactions, and register and run businesses remotely. Estonia’s digital infrastructure is leveraged to make available governance benefits that Myanmar or another less developed economy is unable to provide. For example, entrepreneurs from those countries can raise capital in EU markets, which would be otherwise





difficult without physical residency permits. The service would not just be for entrepreneurs, but also local businesses in say, Turkey, using gateways like PayPal that have stopped operations in that jurisdiction, but not in the EU.¹⁶ Estonian e-residency is also based on the e-ID kaart.¹⁷ By offering an identity-based residency as a service, the e-ID kaart (and future ID platforms based on the Estonian model) diminishes the autonomy of states to govern the affairs of its citizens who cannot vote with their feet, but can do so through digital networks.

India's biometrics-driven platform, Aadhaar, offers yet another model of governance based on digital identity. It is not so much the collection of biometric or personally identifiable information that is relevant to this context as the model by which "Aadhaar-enabled" services are offered. Apps using Aadhaar are built on application programming interfaces (APIs) — "stacks" — that help them query its database. The working principle behind this API-based platform is that any institution, regardless of its function (profit / not-for-profit) or legal character (public / private entity), should be able to use the unique, digital ID to authenticate the identity of an individual. UPI, or the Unique Payments Interface, is also built on the same principle, and lets Indians send and receive money to and from banks, online vendors or other commercial establishments. UPI relies on a unique digital ID called the Virtual Payment Address — "johndoe@upi" — that becomes the source and destination address for transactions. The VPA obviates the need for remembering cumbersome bank account numbers or routing codes. To be clear, UPI applications do not need Aadhaar to effect payments, although until recently, they could be made to users through their Aadhaar numbers as well. UPI places a premium on the interoperability of systems: the individual only needs a Virtual Payment Address — a unique identifier — and as long as she relies on a banking or payments app that runs on UPI, she can effect payments between any two entities, no matter how different they are.

The individual therefore becomes the manager of money flows, a scenario that banks and other financial institutions that previously played this role have readily accepted, because it saves them time and resources from trying to verify the bonafide credentials of customers. Were this platform to be transposed onto a regional or even international context, it would deprive states of one of their biggest levers of sovereign autonomy: controlling money within their borders. Since the 9/11 attacks, the international regime on capital controls

has been some of the strongest ever, with a view to target the illicit financing of drugs, arms, and terrorist activities.¹⁸ States have been caught in the cross-hairs of this restrictive regime, and asked to implement tough measures to regulate the flow of money into their economies. Those with the institutions and the political will necessary to perform such oversight have stepped up, while states with poor capacity continue to be safe harbours for money laundering. A UPI-like platform would allow international organisations and law enforcement agencies to track money flows without the aid of states.¹⁹ (Even if unique identifiers were based on a platform developed by one state, it would be relatively easy to set up a coordinating body that keeps track of international transfers, as long as a critical mass of states accept that technical standard). Such a digital ID model too would diminish the autonomous agency of states.

What is more, an individual's digital ID is arguably the nucleus of personal information that she is willing to offer online. States traditionally have borne the responsibility of physically protecting its citizens, but in this case, individuals may migrate to alternative, state-run or private platforms that offer better protection from cyber-intrusions.²⁰

With the advent and scaling up of these platforms, will digital identities of individuals really eclipse, or at the very least, blur the political identity of states? At first blush, it may seem unrealistic to believe the state, among the oldest and most resilient units of international relations, will simply wither away. But digital ID platforms pose a potent threat precisely because they do not challenge the state by offering a grand or comprehensive alternative to Westphalian governance. Instead, digital IDs create micro-regimes around individuals, throwing into relief their socio-economic status and making it possible to draw a straight line from the development goals of global governance to the persons whom it was articulated for. That connection is not mediated by the state, although the digital identity is conferred by it. Is it conceivable that the UN High Commission for Refugees will in the future disburse cash transfers to "stateless" individuals through a digital ID platform built by it? Such a scenario is well within the realm of possibility. Moreover, platforms like the e-ID and UPI dilute the principal-agent relationship between the state and citizen, because many of their features allow individuals to interact with entities and other individuals across borders without needing the government's vouching for their legal existence and "good standing." This takes away from one

of the important features of a state, which is its capacity to enter into relations with other governments.

If digital ID platforms threaten to erode — or in other cases, highlight the lack of — state capacity, it is likely that some governments will use them to concentrate even more power to control its citizens or monitor its critics. The misuse of digital IDs for mass surveillance is an outcome the international community should therefore guard against.

But for now, the onward march of digital ID platforms appears unstoppable. States themselves are queuing up to develop these platforms, without perhaps being fully cognisant of their potential to bite the proverbial hand that feeds them. Digital ID platforms may be put to different uses depending on the socio-economic context in which they operate. But it is likely they will all subscribe to a shared, core set of technical standards to ensure interoperability, robust data protection or ease of adoption within economies. In other words, digital ID platforms are not likely to be drastically different across geographies. If technical standards have had a harmonising effect on the physical features and capabilities of handheld consumer devices all over the world, it is reasonable to believe this will be true of digital ID platforms as well, which in any event are run on economies of scale. It is notable that the first comprehensive, collated set of technical standards

for digital ID platforms was published by the World Bank (the standards were themselves variously developed by other entities such as the ISO and the International Telecommunications Union).²¹ The interoperability of digital ID platforms could facilitate the shift in user bases, further eroding the ability of a state to retain its “client” base.

State-based institutions, norms and regimes of global governance probably will not face an existential challenge from digital identity platforms. But by re-orienting the locus of international relations to the individual — often without mediation by traditional, domestic institutions — digital IDs will trigger reactionary measures from governments. Some of those compensating tendencies may be positive, with states clamouring to offer better services to their citizens for fear of international criticism, or of individuals choosing electronic services in non-native jurisdictions. Some measures will invariably be repressive, and governments could try to exclude some communities from digital ID projects, limit their interoperability or end-uses, or misuse them for surveillance.

One thing is clear: digital ID platforms may currently be conceived as technocratic interventions, but their roll-out and widespread adoption will also have political implications that go well beyond their “stated” uses.

¹The author is a PhD candidate at the Fletcher School, and currently on a sabbatical from ORE. He is grateful to Srinath Raghavan, Urvashi Aneja, and Sanjay Anandaram for inputs and feedback on this article.

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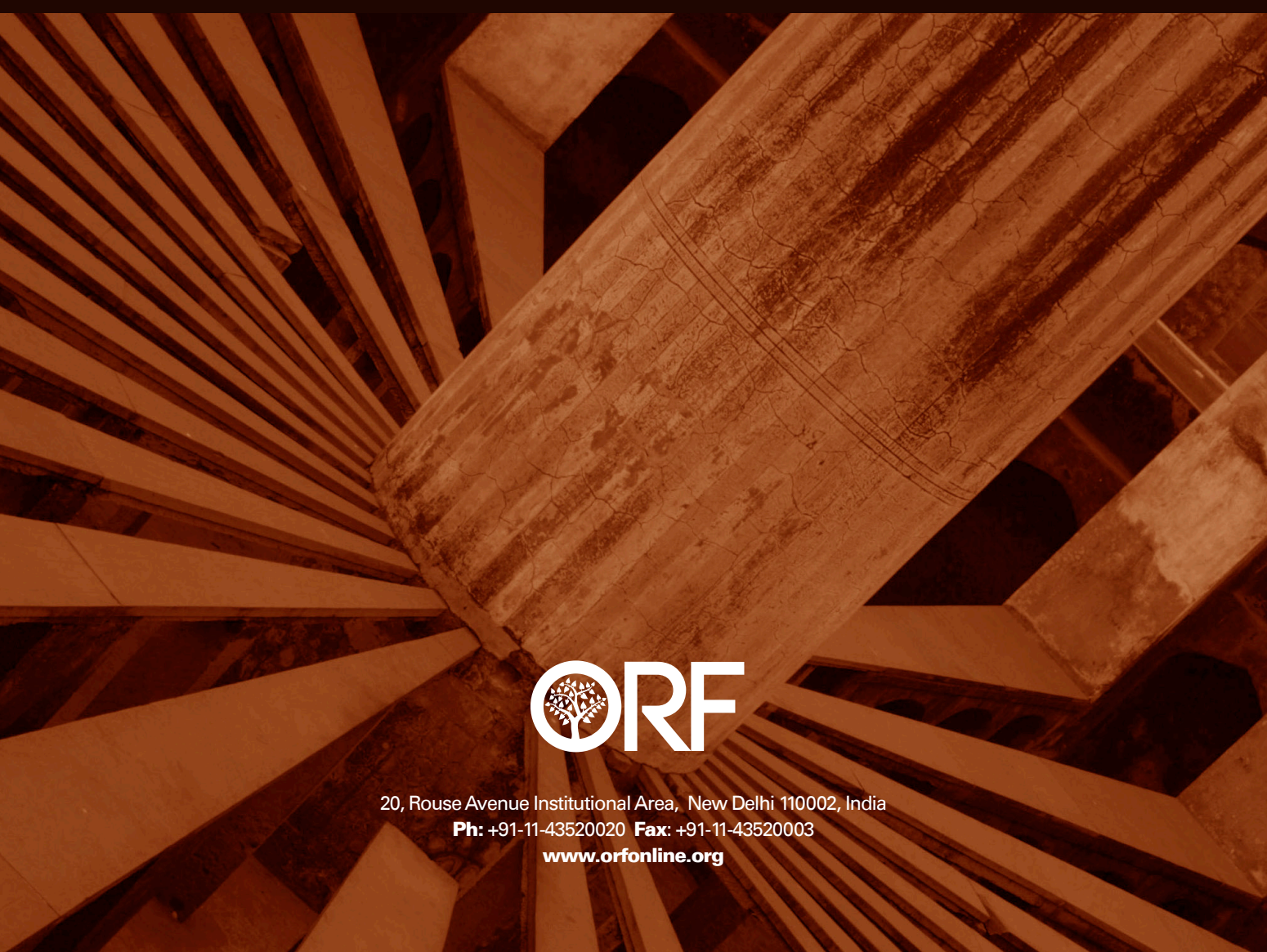
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