

# **IDEAS FOR MODERNIZING THE RULES-BASED INTERNATIONAL ORDER**

**CHATHAM  
HOUSE  
EXPERT  
PERSPECTIVES  
2019**

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# PREFACE

**WHAT ARE THE** limits to international order, and how can global rules and institutions adapt to today's proliferating challenges to peaceful cooperation between states? These are the principal questions explored, from a variety of angles, in this year's edition of *Chatham House Expert Perspectives*, our annual survey of risks and opportunities in international affairs.

We launched this series in 2018 with a collection of essays identifying trends and inflection points – for better or worse – across a range of thematic areas from geopolitics to climate change. In this 2019 edition, our researchers expand on the 'opportunity' side of that ledger by proposing, or at least examining the potential to develop, solutions to some of the most pressing issues for global governance.

Framing this assessment is the concept of the 'rules-based international order'. We have chosen this theme in part because of its currency in the contemporary policy discourse, but also to stimulate debate around highly contested views on the effectiveness and desirability of different models of international governance. The definition of the rules-based order is not agreed.

Some doubt whether any such order exists, or consider it to consist of multiple overlapping orders. There is also sometimes the assertion that it is an invention of liberal democracies, designed to impose a system for the benefit of Western diplomatic, military and economic agendas.

The contributors to this volume were given the latitude to interpret the rules-based system broadly, allowing the essays here to tackle a wide range of subjects and to accommodate a variety of perspectives on the international order and its modernization. The ideas advocated thus encompass everything from treaty negotiation and the development of other legal instruments to the less formalized corralling of voluntary compliance with agreed goals. The authors have sought to keep the debate pragmatic and to avoid wishful thinking – instead proposing approaches that at a minimum can credibly be advocated by policymakers, while identifying where the chief obstacles to progress on a given issue lie. Rules, of course, are made to be broken, so a number of the essays explore what can be achieved when the rules don't work, or when particular actors ignore them.

A final dilemma we have kept in mind concerns clarifying *who* these solutions are for. Like defining the rules-based international order, this is more complicated than it might seem, and goes to the centre of difficult questions about who should be setting and enforcing global rules and whose interests they serve. The common thread, if there is one, is that while one can certainly disagree about which rules to follow or who should be in charge, a world entirely without rules is not desirable. ■

# ADAPT OR DIE

*by Adam Ward*

**Historically, efforts to build rules-based international orders have emerged out of conflict, only for each system to falter when a new crisis emerges. At issue today, with the post-1945 multilateral system under strain, is how to modernize the making and application of rules to break that cycle.**

**THE MOST VEXING**, complicated and elusive question in international relations is how to achieve an order, based on rules, that enjoys legitimacy, rewards investments in cooperation, reconciles clashing interests and deters conflict. It is not a problem over which a magic wand can be waved. But in our own time, immense and patient efforts have been made towards that general goal, however imperfect the result.

The concept of the ‘rules-based international order’ refers today in its most general sense to arrangements put into place to allow for cooperative efforts in addressing geopolitical, economic and other global challenges, and to arbitrate disputes. It is embodied in a variety of multilateral institutions, starting with the United Nations and running through various functional architectures such as the Bretton Woods system, the corpus of international law and other regimes and treaties, down to various regional instances where sovereignty is pooled or where powers have been delegated consensually by states on a particular issue.

Some aspects of the rules-based order are heavily informed by distinct values, such as those contained in the Universal Declaration of Human Rights. But, more often than not, they simply prescribe a set of basic principles for how the business of international political and economic relations is to be transacted. The parameters of legitimate and illegitimate behaviour are specified. Compliance is incentivized, and some scope to sanction transgressors is provided for.

For some, the rules-based international order is a politically highly charged concept. Indeed, the absence of a common standardized definition of it is perhaps a by-product of the controversy which the mere notion of a rules-based order often attracts – among those who had no or little part in its shaping; those who regard multilateralism as an infringement of sovereignty and a straitjacket on

national ambitions; and those who sense in it a presumption of universal values and shared interests that jars with their own particular historical experience and political preferences. And in a world in which each country occupies its own place on the spectrum of attraction to, tolerance of and resistance to multilateralism, it is inevitable that the present system should be a patchy and incomplete one.

## **The policy challenges may be new, but the pattern of behaviour currently surrounding them presents some dangerous echoes from the past.**

If that patchiness seems increasingly apparent today, then this reflects the proliferation of problems on a truly global scale that multilateral initiatives have as yet failed to keep up with. This is partly because of the sheer pace of change and the deep complexity of problems, and partly because any significant programme of coordinated action requires a focus and consensus that today is in shrinking supply.

More than that, some of the sharpest challenges – climate change; the lack or weakness of rules in the sea, space and cyber domains; the dilemmas thrown up by technological change – are problematic precisely because they are areas in and through which geopolitical competitions are being contested. The policy challenges may be new, but the

pattern of behaviour currently surrounding them presents some dangerous echoes from the past.

Throughout history, most attempts to form international orders have been conceived in a coercive way. From classical antiquity to the 20th century, the dominant form of order has been that imposed or attempted by successive territorial empires, or by predominant powers who made the rules by fiat and were deferred to by their neighbours and satellites. Significant attempts at more collaborative conceptions of order, aimed at coexistence and minimizing risk through rules and accepted conventions, have been far rarer. And the key point about them is that they have been attempted only after competition has spilled over in an uncontrolled, exhausting and ruinous conflict that has called for mechanisms and understandings to prevent a recurrence of disaster. That, in any case, has been the European experience, and subsequently the result of the engulfing crises that radiated out globally from Europe in the 20th century.

Early efforts at order-building focused on mutual recognition and the management of what were felt to be inevitable rivalries. The Westphalian Peace of 1648 emerged from a 30-year period of religious war in Europe. It emphasized the sanctity of sovereignty and non-interference in the internal affairs of other states as a precondition for order, but relied on a jostling balance-of-power approach to the preservation of a basic stability.

A tolerance of conflicts to correct imbalances was implicit to the scheme. But its acute sensitivity to shifts in alignments of power contributed to the later conflicts – from the wars of the Spanish Succession and Austrian Succession to the Seven Years’ War – that ravaged Europe in the 18th century and occurred in an increasingly global theatre of military operations, tracing the development of European imperial projects.

Despite these shortcomings, the balance-of-power model was produced again as a remedy to uncontrolled conflict, at the Congress of Vienna in 1814–15, following more than 20 years of French Revolutionary and Napoleonic wars. A Concert of Europe, accommodating a rehabilitated France, was instituted to regulate the system and periodically decide major geopolitical issues. But it fell into disuse. And although Europe did not suffer a general war for the rest of the 19th century, the salient geopolitical facts were ones not of power balances but of the sharp relative decline of France and the vertiginous rise of Prussia, which defeated Austria and France on the path to German unification.

These dynamics produced convoluted and ever-widening balancing manoeuvres that by the eve of the First World War in 1914 had congealed and hardened into the opposing Triple Alliance and Triple Entente systems, which trapped their respective members into tangled commitments to fight at the trigger of a crisis.

The peacemaking efforts, in Paris in 1919, that followed the war entailed conscious efforts to overturn the balance-of-power model. The tone was set by US President Woodrow Wilson's Fourteen Points, with their emphasis on transparency and openness, while the concepts of egalitarianism among states, the drive towards disarmament and the practice of collective security were central to the revolutionary creation of a League of Nations in 1920.

But the peacemaking also included a punitive dimension – the designation of German culpability, the demand of economic reparations and territorial adjustments – imposed by victor on vanquished. To its critics, the international order being evolved, and the rules drafted to underpin it, had the attributes of an involuntary settlement more than those of a construct built by equals. Lacking a comprehensive membership – crucially, the US had

demurred, while other major powers progressively withdrew or were thrown out – and the military means to impose itself, a divided and often circumspect League faltered in meeting a succession of international crises. It then collided fatally with the revanchism of Germany, Italy and Japan that produced the Second World War.

The ambitiousness and eventual institutional intricacy of the UN system founded in 1945 marked a response to the scale of the ordeal through which the world had passed, and sought to correct the deficits of the League. The UN's membership and the activity of its main organs and specialized agencies all grew prodigiously in succeeding decades, as did its efforts to advance the spirit and culture of multilateralism.

But by giving special privileges to the victors, principally through veto rights held among a small group of permanent Security Council members, the UN reflected and perpetuated a certain historical circumstance: there was no formal institutional adaptation in its highest structures to account for a progressive redistribution of international power, the rehabilitation of defeated countries, the rise of the decolonized world or the desire of emerging powers to assume international responsibilities commensurate with their heft. Rather than a mechanism for international governance, it remained an intergovernmental body through which states pursued their specific or collective priorities.

Indeed, the dominant questions around order in the first five decades of the UN's existence were those posed by the Cold War conducted by the US and the Soviet Union and their respective allies and satellites, while the UN in effect was a prominent arena in which this global antagonism was carried out. The world order was bipolar in concentrating power in two camps, with a swath of neutrals, non-aligned and swing players in between; and

bi-systemic in the complete contrast in the ideological affinities and economic models that were promoted. Nuclear weapons raised the stakes associated with direct conflict to an existential level, and so pushed armed contests to peripheral theatres or on to skirmishing proxies.

The collapse of communism in the early 1990s ushered in a new dispensation. Those who divined the arrival of a 'unipolar moment' for the US were perhaps more accurate in their choice of epithet than they knew. At least on the surface, the US became by far the preponderant power. The decline and 1991 dissolution of the Soviet Union, in consequence of its economic decrepitude and strategic overstretch, not only removed the US's peer competitor, but also opened up avenues for promoting economic liberalization and democratic government. This shift was manifest in particular in changing dynamics in Europe. The US had sponsored the reunification of Germany and was a patron of its subsequent embedding in an integrating, democratic and liberal region. Over time, this drew the former Warsaw Pact members into EU and NATO structures (albeit at a pace and with a completeness that Russia's strategic calculations could not be accommodated to).

And yet, despite these advances, in retrospect the chief development of the 20 years after the Cold War was a different one: globalization had at a gathering pace prompted a redistribution of political power, while its interlocking economic structures created a dense web of interests and dependencies that moved in all directions. It was likely in these circumstances that the appearance of any major emergency would produce insistent voices demanding what they saw as a more inclusive, legitimate and effective form of international order.

Crises duly arrived, first in the shape of the 2003 US-led invasion of Iraq, which strained alliances

and stirred controversial debates about the justice and permissibility of military interventions and the need for constraints on US power; and then in the form of the financial meltdown of 2008, seen by many as a principally Western debacle calling for new global economic governance structures as instanced in the improvised G20. Neither set of debates was conclusively resolved, but each persisted against the backdrop of quickening systemic change.

## The 'America First' posture of the Trump administration has upturned the central feature of the system.

The dilemmas about the shape and maintenance of a rules-based order with multilateralism at its core have since only deepened. The world is pulling in different directions. The 'America First' posture of the Trump administration has upturned the central feature of the system. It entails a distaste for multilateral agreements, a disavowal of traditional notions of US leadership, and an insistence on the unimpeded exercise of American power in pursuit of defined national interests. China asserts the centrality of multilateralism, and practises it selectively, but on the whole favours binary diplomatic transactions where it holds asymmetric advantages; it has used this approach in the construction of its Belt and Road Initiative, as well as on other fronts. Europe has created in its continent a rules-based order par excellence in the shape of the EU, but its energy has been sapped

and its introversion fed by a succession of crises, of which the amputation of the Brexit-bound UK is simply one. The EU has yet to chart its future course or define a global strategy to uphold and advance the multilateralism which has been at its core. Russia unabashedly is subverting the rules-based order as part of a programme of aggrieved self-aggrandizement. Japan champions the principle of a rules-based system, but the country has been disoriented by its abrupt detachment on this issue from its traditional US partner; while Japan has sought to engage like-minded countries in the West, they have not forged a concerted practical plan of action together.

Among other regional powers, Brazil has a populist government that echoes many of the Trump administration's instincts, and India, whatever its preferences, has yet to acquire a foreign policy or presence on the global stage equal to its demographic weight and economic potential.

Prominent points of risk in this fragmenting picture are the multilateral trade system, efforts to address climate change, and collective measures to deal with entrenched conflicts.

One obvious consequence of the attrition of the rules-based system through the indifference or ambitions of the great powers is that it will leave smaller states much more exposed and hostage to the vagaries of geopolitical competition. A key question therefore is whether such states will choose and be able to defend a system which gives them a measure of protection. Over recent decades, a variety of regional groupings – ASEAN, the African Union, the Gulf Cooperation Council, the Organization of American States – have evolved as species of rules-based mechanisms and in order to gather their collective weight. They make a ready constituency for those who would build a coalition for multilateralism. But it is also clear that the support of smaller regional players for such

an approach depends on a revision of the rule-making system towards greater inclusivity and a broader say as to the issues it should address.

It is in the context of these trends and structural shifts that *Chatham House Expert Perspectives 2019* offers ideas for how to modernize and adapt elements of the rules-based international order. As the title of this opening essay indicates, the imperative to 'adapt' reflects the gravity of contemporary challenges, and the inability of many existing structures to underpin ever-more-essential cooperation. Chatham House experts do not offer a master plan, but they attack the problem from a variety of indicative angles. Suggestions are offered as to where gaps in international rules – regarding economic governance, the global health architecture and in respect of under-regulated domains such as space, for example – need to be filled to address immediate problems and advertise the relevance of multilateralism.

Other ideas demonstrate how logjams affecting some aspects of the system can be worked around; how key powers with scope to shape the system should be engaged; how a broader variety of actors beyond national governments need to be drawn into the effort; how rule-breakers might be tackled; and how imposing order on some chaotic situations requires the fundamental premises of existing policies to be rethought.

Chatham House, which celebrates its centenary in 2020, is a child of efforts after the Great War to reconceive the conduct of international relations and fulfil a mission that is today defined as the creation of a 'sustainably secure, prosperous and just world'. The historical record shows that international orders not built on these attributes will fail. ■

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**ADAM WARD is the deputy director of Chatham House.**

# TO IMPROVE GLOBAL GOVERNANCE, EMPOWER SOCIETY

*by Robin Niblett*

As necessary as it remains to improve rules-based systems, the future of international order will also rely on states engaging more creatively with a wider range of constituencies – from citizens and civil society to the private sector and local political actors.

**THE IDEA BEHIND** the post-war international order established since 1945 has been to preserve peace between the major states. The UN and its Security Council set rules under which conflict is permitted or forbidden. An infrastructure of supporting institutions and accompanying rules seeks to buttress this central objective. In the security realm, these include the nuclear Non-Proliferation Treaty (NPT), the Chemical Weapons Convention and the Geneva Conventions. Rules for trade and financial crisis management are embodied principally in the World Trade Organization (WTO) and the International Monetary Fund (IMF), which seek to ensure that economic interaction does not return to the reductive competition of the interwar years.

Although international in scope, the order of the 20th century has principally been led by the West, meaning the United States and its allies. The pre-eminence of their views has been sustained by a set of formal plurilateral and bilateral alliances and intergovernmental coordinating mechanisms – including NATO, the Organisation for Economic Co-operation and Development (OECD) and the G7 – which have persisted into the 21st century.

This entire construct is now being called into question, principally because of the changing balance of global political and economic power since the 1990s. This has resulted in China becoming the second-most powerful state in the world and has seen the US, since the election of Donald Trump, retreat from its leadership role in the current international system and advance its national interests on a more unilateral basis.

Much of the debate about the future revolves around the question of whether the US under a different president will return to its leadership role in a ‘rules-based’ international order. However, this idea runs up

against demands to modernize the current rules, which would in turn reduce US influence – for example, by changing the voting arrangements in the UN Security Council or on the executive board of the IMF.

## **The world needs a new concept of international cooperation that is better suited to the changing ways in which people’s hopes, expectations and capacities can be marshalled to deliver desired outcomes.**

At the same time, many states across the world are hedging against the emergence of a more self-interested US and powerful China by strengthening regional institutions such as the African Union, the European Union and the Association of Southeast Asian Nations (ASEAN). Some also put their hope in more ad hoc, voluntary arrangements to confront the global challenges of this century – through the Paris Agreement to address climate change, the Financial Action Task Force to combat money-laundering and terrorist financing, and the Proliferation Security Initiative, for example. Other states are accepting or even embracing the return to zero-sum international relations,

as evidenced by the re-emergence of authoritarian ‘strongmen’ leaders and the erosion of recent gains in democratic governance.

Each of these efforts ignores the fact that a solely state-centric international order is itself becoming an anachronism. Society’s evolution over the past 40 or so years has encompassed dramatic demographic change and ageing; huge technological progress and diffusion; deepening economic globalization and human and environmental interconnectedness; and the intensification of personal expectations and anxieties alongside the growth of a global middle class. Together, these trends have created an inescapably interdependent world, in which states cannot by themselves manage the challenges to their future prosperity and security, *even* when living in peace.

The future of international order, therefore, does not lie simply in reforming today’s institutions for international cooperation, as important and necessary as this is to manage the rebalancing of economic, political and military power and the challenges of interdependence. The world also needs a new concept of international cooperation that is better suited to the changing ways in which people’s hopes, expectations and capacities can be marshalled to deliver desired outcomes.

In the future, the capacity to resolve shared challenges will rely also on the contributions of citizens, civil society, the private sector and political actors below the level of the state. Cities, regions and local communities, multinational companies and civil society organizations will not just be ‘consumers’ or recipients of government policies, but active partners in promoting solutions. (Indeed, the late Kofi Annan had championed a similar sort of inclusive approach to complex problem-solving, for example through the UN Global Compact.) Better

informed, more politically aware and digitally connected, citizens and civil society can mobilize individually and collectively towards common policy goals, potentially playing a critical role in addressing complex issues such as climate change, resource overconsumption and rising health costs.

This more distributed approach to international relations will put a premium on building bridges between local and sectoral best practices, in addition to treaties and other agreements between states. But for society to play this role, it is all the more important that national governments deliver a high quality of governance at home, so as to empower private actors, civil society and citizens. This demands, among other things, the expansion of effective and accountable systems of governance that will allow citizens to be agents of positive change to the best of their desire and ability, both in domestic affairs and alongside others internationally.

Unfortunately, differences in interpretation of the correct balance between the respective rights and responsibilities of citizens and civil society, on the one hand, and, on the other, of the state constitute one of the central fault lines in international affairs today. As the Chinese system of single-party rule and Russia's evolution into an authoritarian proto-democracy illustrate, illiberal models of political and social control are proving increasingly attractive at a time of international turmoil.

These models may serve their governments' immediate objectives for economic development and protection of sovereignty. But the obsession with preserving domestic stability limits the ability of citizens to engage effectively with others in initiatives aimed at international cooperation. At the same time, what the governments of these countries believe are defensive

actions to sustain domestic stability are interpreted by other states as potentially offensive, contributing to a cycle of geopolitical mistrust.

Whatever the short- or even medium-term benefits, history has shown that governance systems in which citizens are kept subservient to the state risk becoming unsustainable politically over time. In contrast, systems in which governments are truly accountable to their citizens – through a separation of powers, the rule of law and a strong civil society – offer greater opportunities for domestic progress over the long term, as well as for constructive international cooperation in an interdependent world.

States will struggle in the coming years to address shared challenges in a world of weak international institutions and geopolitical competition. The goal, therefore, should be a more inclusive approach to international governance, rather than a return to a brittle international order of states. ■

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**ROBIN NIBLETT** is the director of Chatham House.

## WHAT NEEDS TO HAPPEN

— **With the post-1945 settlement under strain, the world needs a new concept of international cooperation better suited to mobilizing citizens and societies in pursuit of common objectives.**

— **Reform to international institutions should reflect changes in the balance of power, but should also be accompanied by a fundamental reassessment of the nature of global governance.**

— **Rather than rely solely on state leadership, a more distributed approach to international relations should incorporate more input from citizens, civil society, the private sector and sub-state political actors.**

— **An effective international order will also rely on the expansion of accountable domestic systems of governance at the national level.**

# STRENGTHEN THE INTERNATIONAL CRIMINAL COURT

*by Elizabeth Wilmshurst*

The ICC has been criticized for slow proceedings, weak management and ineffective prosecutions. The good news is that pragmatic reform need not entail fundamental treaty amendment; a culture change and more realistic expectations would go a long way.

**THE 1998 TREATY** which established the International Criminal Court (ICC) was adopted at a time when the world (or most of it) was willing to reach multilateral agreements on a variety of topics and was encouraging the development of international criminal justice. The two tribunals, set up by the UN Security Council, for the former Yugoslavia and for Rwanda had been relatively successful. The time was ripe for states to agree together to set up a permanent international court with wider scope than the two tribunals.

## The court's proceedings are cumbersome and lengthy. Many of the accused are still at large.

So the ICC was created, with jurisdiction over the international crimes of genocide, crimes against humanity and war crimes; its jurisdiction for the crime of aggression developed later. The court was given the power to prosecute nationals of states that were parties to the ICC Statute, and also to prosecute where the crime was committed in the territory of a state party, whatever the nationality of the alleged criminals. The court had further jurisdiction when the Security Council referred a situation to it.

That was some 20 years ago. There is now a perception in many quarters that the ICC has not fulfilled the expectations of its founders. The court's proceedings are cumbersome and lengthy. Many of the accused are still at large, including Omar al-Bashir, the former president of Sudan. Some €1.5 billion has been spent, and there have been

only three convictions for the core international crimes. There have been criticisms of the judges, the former Prosecutor and other officials, as well as concern over particular decisions of the court. The allegation that the court is only interested in crimes in Africa<sup>[1]</sup> is perhaps heard less frequently now than it once was (most of the African governments concerned referred the situations in their countries to the ICC themselves), and there has not been the mass walk-out of African states that was once predicted. But in other quarters there is serious unease about the situation in the court. As the UK representative said at a meeting last year, 'We cannot bury our heads in the sand and pretend everything is fine when it isn't.'<sup>[2]</sup>

The negative assessment of the ICC's work may be countered by the fact that it is the failure of states to cooperate with the court that causes many of the problems. Further, the expectations of states and civil society about the possibilities of international criminal justice have been so high that no court would be able to meet them. It is not possible for one court actually to 'end impunity' for international crimes,<sup>[3]</sup> nor to prevent war-related violence and mass atrocities, nor to satisfy all victims.

Moreover, the criticisms of the ICC come against the background of the global crisis for multilateralism more generally. The present US administration is notoriously hostile towards this international institution.<sup>[4]</sup>

On the plus side, the establishment of the court has encouraged states to revise their own laws on international crimes and to institute their own prosecutions where it is possible to do so. It is also claimed that the very existence of the court can be a deterrent to potential perpetrators of international crimes. The court has begun to add to the body of international criminal law and has increased the possibility that mass atrocities will be investigated.

But there is indeed some truth in the criticisms made of the internal workings of the court. One problem is that the particular combination of the civil and common law systems that has developed has produced cumbersome procedures regarding the representation of victims at most stages of the proceedings. It has also resulted in endless appeals from huge numbers of small decisions made by one chamber or another. Then there are the management failures which have led to officials of the court being awarded compensation by the administrative tribunal of the International Labour Organization (ILO) because of the way they were treated by the court, and finally the decision of a few of the judges to take proceedings themselves at the ILO to have their salaries increased.

Some ICC decisions have been met with surprise. For example, a former vice-president of the Democratic Republic of the Congo, Jean-Pierre Bemba, who was in the custody of the ICC for 10 years, was convicted by a unanimous trial chamber of various crimes and then succeeded on his appeal. Following this and the acquittal of former Côte d'Ivoire president Laurent Gbagbo,<sup>[5]</sup> there are concerns about the ability of the prosecution to succeed in cases against high-level alleged perpetrators. Most recently, there has been criticism of the reasoning behind the appeal court decision regarding the immunity – or, rather, lack of immunity – of former president Bashir. And a decision of a chamber of the ICC not to authorize the opening of an investigation in Afghanistan has been seen as shielding the US from possible proceedings (though it has been welcomed by others as a pragmatic approach).

The message that certain problems with the ICC need fixing is coming not just from the writings of academics and the legal blogs,<sup>[6]</sup> but from governments too, including

those, like the UK, which are among the foremost supporters of the court. The former presidents of the ICC's Assembly of States Parties (which comprises the representatives of all states parties) say that they 'are disappointed by the quality of some of [the court's] judicial proceedings, frustrated by some of the results, and exasperated by the management deficiencies that prevent the Court from living up to its full potential'.<sup>[7]</sup>

Changes to remove the worst excesses of the procedures that have evolved could be effected without amendments to the treaty incorporating the ICC Statute. It may be that a change in culture is also needed. More modesty by the court, along with more realism from governments and civil society, is needed. And, attractive as it might seem to push at the boundaries of the law, the court should be realistic in what it can achieve. It is next to impossible to prosecute a case effectively where there is no cooperation from the state on whose territory the crimes were committed. What is needed is a court that can undertake efficient and effective criminal proceedings, delivering fair and impartial justice in the small number of cases which it is reasonable to expect it to address, in the light of the evidential challenges, limited resources and limited state cooperation.

Governments should decide together at the Assembly of States Parties to set in hand a review of the ICC's operations. It has been suggested that a group of experts might be mandated to assess the management of the court;<sup>[8]</sup> on the basis of their report, governments could agree on the necessary improvements. Not everything, however, can come within the remit of such a group. Governments should adopt new rules and practices to address matters such as the election process for judges and their training; governments might consider reaching their own understandings on how some provisions of the

ICC Statute should be interpreted in practice. Governments should reach out to the many civil society organizations which have supported the court over the years, to ensure that they are involved in the process.

## **Governments should decide together at the Assembly of States Parties to set in hand a review of the ICC's operations.**

Measures of this kind cannot detract from the fact that the ICC is fundamentally sound and that its role is as necessary as when it was first established. As Richard Goldstone, former chief prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda, has said, 'If there were no ICC in existence today, many people in many countries would be agitating for and demanding one. That we have one is a singular achievement. It behoves us to make it the best possible and to assist it, as States, civil society, and individuals, in the best and most productive way possible.'<sup>[9]</sup> ■

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## WHAT NEEDS TO HAPPEN

- **Cumbersome procedures, ineffective prosecutions against high-level alleged perpetrators, and weak internal management are among current criticisms of the ICC.**
- **Improvements to the court's effectiveness and credibility may be possible without amending the treaty incorporating the ICC Statute.**
- **The Assembly of States Parties should review the ICC's operations, whether or not with a group of experts, and governments should agree on improvements.**
- **New rules and practices should address matters such as the election process for judges and their training.**
- **Better management of expectations of the ICC among governments, civil society and the court itself is needed.**
- **Governments might consider reaching their own understandings on how some provisions of the ICC Statute should be interpreted in practice.**
- **Civil society organizations should be involved in any procedures for reform.**

# CREATE A GLOBAL CODE OF CONDUCT FOR OUTER SPACE

*by Patricia Lewis*

The rules governing human activity in space have been in place for only a few decades, and yet they are already out of date. They need to be built on and extended to reflect the dramatic and rapid changes in the use of space.

**THE 1967 OUTER SPACE TREATY (OST)** is the mainframe for space law. It recognizes the importance of the use and scientific exploration of outer space for the benefit and in the interests of all countries. It also prohibits national sovereignty in space, including of the Moon and other celestial bodies. The OST prohibits all weapons of mass destruction in space – in orbit or on other planets and moons – and does not allow the establishment of military infrastructure, manoeuvres or the testing of any type of weapon on planets or moons. As the treaty makes clear, outer space is for peaceful purposes only. Except of course, it is not – nor has it ever been so.

The very first satellite, Sputnik, was a military satellite which kicked off the Cold War space race between the US and the USSR. The militaries of many countries followed suit, and space is now used for military communication, signals intelligence, imaging, targeting, arms control verification and so on. However, in keeping with international aspirations, space is also being used for all kinds of peaceful purposes such as environmental monitoring, broadcast communications, delivering the internet, weather prediction, navigation, scientific exploration and – very importantly – monitoring the ‘space weather’ (including the activity from the Sun).

There are several other international agreements on space, such as on the rescue of astronauts, the registration of satellites and liability for damage caused by space objects. There is also the Moon Treaty, which governs activities on the Moon and other moons, asteroids and planets.<sup>[1]</sup> More recently, states at the UN Committee on the Peaceful Uses of Outer Space (COPUOS) in Vienna have agreed on guidelines to deal with the worrying situation of space debris which is cluttering up orbits and posing a danger to satellites, the space station and astronauts.

The problem the international community now faces is that the use of space is changing dramatically and rapidly. There are more satellites than ever – well over 1,000 – and more owners of satellites – almost every country uses information generated from space. Increasingly, however, those owners are not countries, militaries or international organizations but the commercial sector. Very soon, the owners will even include individuals. Small ‘mini-satellites’ or ‘cube-sats’ are poised to be deployed in space. These can act independently or in ‘swarms’, and are so small that they piggy-back on the launching of other satellites and so are very cheap to launch. This is changing the cost–benefit equation of satellite ownership and use. Developing countries are increasingly dependent on space for communications, the internet and information on, for example, weather systems, coastal activities and agriculture.

**As humanity becomes more dependent on information that is generated in or transmitted through space, the vulnerability to the manipulation of space data is increasing.**

Another major development is the advent of asteroid mining. Asteroids contain a wide range of metals and minerals – some

asteroids are more promising than others, and some are closer to Earth than others. Several companies have been set up and registered around the world to begin the exploitation of asteroids for precious metals (such as platinum) and compounds (such as rare-earth minerals). Legally, however, this will be a murky venture. The current international treaty regime prohibits the ownership of a celestial body by a country – space is for all. But does international law prohibit the ownership or exploitation of a celestial body by a private company? The law has yet to be tested, but there are space lawyers who think that companies are exempt. Luxembourg and Australia are two countries that have already begun the registration of interest for space-mining companies.

As humanity becomes more dependent on information that is generated in or transmitted through space, the vulnerability to the manipulation of space data is increasing. The demands on the use of communications frequencies (the issue of spectrum availability and rights), managed by the International Telecommunication Union (ITU),<sup>[2]</sup> need to be urgently addressed. There are now constant cyberattacks in space and on the digital information on which our systems rely. For example, position, navigation and timing information such as from GPS or Galileo is not only vital for getting us safely from A to B, but also for fast-moving financial transactions that require accurate timing signals. Almost all of our electronic systems depend on those timing signals for synchronization and basic functioning. Cyber hacks, digital spoofing and ‘fake’ information are now a real possibility. There is no rules-based order in place that is fit to deal with these types of attacks.

Cyberweapons are only part of the problem. It is assumed that states, if they haven’t already done so, will be positioning ‘defensive’ space weaponry

to protect their satellites. The protection may be intended to be against space debris – nets, grabber bars and harpoons, for example, are all being investigated. All of these ideas, however, could be used as offensive weapons. Once one satellite operator decides to equip its assets with such devices, many others will follow. The weaponization of space is in the horizon.

There are no international rules or agreements to manage these developments. Attempts in Geneva to address the arms race in space have floundered alongside the inability of the Conference on Disarmament to negotiate any instrument since 1996. Attempts to develop rules of the road and codes of conduct, or even to begin negotiations to prohibit weapons in space, have failed again and again. There are no agreed rules to govern cyber activity. The Tallinn Manuals<sup>[3]</sup> that address how international law is applicable to cyberwarfare also address the laws of armed conflict in space, but data spoofing and cyber hacking in space exist in far murkier legal frameworks.

The current system of international space law – which does not even allow for a regular review and consideration of the OST – is struggling to keep up. Space is the inheritance of humankind, yet the current generation of elders – as they have done with so many other parts of our global environment – have let things go and failed to shepherd in the much-needed system of rules to protect space for future generations. It is not too late, but it will require international cooperation among the major space players: Russia, the US, China, India and Europe – hardly a promising line-up of collaborators in the current political climate.

### **Filling the governance gaps**

Norms of behaviour and rules of the road need to be established for space before it becomes a 21st-century ‘wild west’ of technology and activity. Issues

such as cleaning up space debris, the principle of non-interference, and how close satellites can manoeuvre to each other (proximity rules) need to be agreed as a set of international norms for space behaviour.

A cross-regional group of like-minded countries (for example Algeria, Canada, Chile, France, India, Kazakhstan, Malaysia, Nigeria, Sweden, the UAE and the UK) should link up with UN bodies, including the Office for Outer Space Affairs (UNOOSA), COPUOS and ITU, and key private-sector companies to kick-start a new process for a global code of conduct to establish norms and regulate behaviour in space. The UN could be the host entity for this new approach – or it could be established in the way the Ottawa process for landmines was established, by a group of like-minded states with collective responsibility for, and collective hosting and funding of, the negotiations.

A new approach should also cover cybersecurity in space. The UN processes on space and cyber should intersect more to find ways to create synergies in their endeavours. And the problems ahead as regards spectrum management – particularly given the large number of small satellites and constellations that are to be launched in the near future – need urgent attention in ITU. ■

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#### **WHAT NEEDS TO HAPPEN**

**— The international rules-based order for space – enshrined in particular in the 1967 Outer Space Treaty – has not kept pace with the rapid and dramatic changes in the use of space. New norms of behaviour and rules of the road are needed.**

**— These norms and rules need to address a host of contemporary or prospective developments, including asteroid mining, increased numbers of satellite owners, the emergence of ‘mini-satellites’, cyberwarfare, and the potential deployment of ‘defensive’ space weaponry to protect satellites.**

**— A cross-regional group of like-minded countries should link up with UN bodies – including UNOOSA, COPUOS and ITU – and key private-sector companies to kick-start a new process for developing a global code of conduct.**

**— Problems related to radio spectrum management – given the large number of small satellites and constellations to be launched in the near future – need urgent attention in ITU.**

# RECALIBRATE THE RESPONSIBILITY TO PROTECT

*by Calum Inverarity  
and James Kearney*

The effectiveness of the ‘responsibility to protect’ principle risks being undermined by apathy on the one hand and by the perception of it as enabling ‘intervention by the back door’ on the other. Could an alternative approach, focused on conflict prevention and wider stakeholder engagement, garner international support and re-energize a failing norm?

**THIS YEAR, 2019**, marks both the 70th anniversary of the Geneva Conventions and the 20th anniversary of UN Security Council resolution 1265, the first to address the protection of civilians in armed conflict. Upon these foundations, and in response to the mass atrocities witnessed at the close of the 20th century, in 2005 the ‘responsibility to protect’ (R2P)<sup>[1]</sup> was codified by all UN member states to prevent such horrors from occurring in the future. R2P is defined by three pillars which emphasize, first, the primary responsibility of the state to ensure the safety and security of its civilians. The second pillar stresses the responsibility of the international community to support states in this aim. The third iterates that the international community has the obligation to ensure the protection of civilians when a state has manifestly failed to do so; or when a state has targeted and attacked its own citizens.

Since its adoption, R2P has been criticized both for failing to mobilize interventions when necessary, and at other times for providing a smokescreen for possible violations of state sovereignty.<sup>[2]</sup> In large part, this can be attributed to the interpretation of R2P’s third and most contentious pillar. From interventionism during the 2000s<sup>[3]</sup> to more recent international responses to situations in Georgia and Ukraine,<sup>[4]</sup> this pillar has been subject to misappropriation by a variety of actors – which in turn has harmed the R2P principle more broadly.

This has led to the present situation in which questions loom over R2P’s relevance and legitimacy, compounded by ever-growing challenges to the international rules-based system. It should not, however, take another mass atrocity on the scale seen in Rwanda or Srebrenica to encourage the international community to acknowledge the present failings of R2P. An examination of the challenges

associated with R2P’s interpretation and implementation is imperative if workable solutions are to be found to ensure the most important of human rights: the right to live securely.

### **To prevent is to protect**

Recent discussion has shifted towards the provision of preventative action, as articulated in R2P’s second pillar.<sup>[5]</sup> This seems logical given that the act of protection is, by definition, preventative, and given that a broad consensus already exists as to the legitimacy of such approaches.<sup>[6]</sup> It is therefore worth considering strategies that emphasize this particular element of R2P as an entry point for efforts to improve protection: in other words leveraging interest in, and tolerance of, pillar two to facilitate development of a more sustainable and robust framework. Such an initiative would, however, have to be approached in a pragmatic manner, given the reduced appetite for international norms.<sup>[7]</sup> As such, it should take the form of a recalibration of R2P, with the second pillar explicated and developed to reflect the increasingly multifaceted nature of governance.

The primary obstacle to revitalizing R2P in this way is the likelihood that such action may be interpreted as ‘upstreaming’ interventionism, which would equate to little less than the transposition of pillar three at an earlier stage. To address this, policy development would benefit from increased cooperation between the UN, regional groupings and civil society organizations (CSOs). There is an opportunity for the UN to rediscover its role as the coordinator of such action, given that regional leadership on R2P has been lacking in the EU<sup>[8]</sup> and has gone unsupported in, for example, West Africa.<sup>[9]</sup> Key aspects of this role could involve the UN promoting capacity-building efforts and developing joint-response mechanisms with regional organizations.<sup>[10]</sup>

## **R2P has been criticized both for failing to mobilize interventions when necessary, and at other times for providing a smokescreen for possible violations of state sovereignty.**

When undertaken in a preventative capacity, these efforts would benefit from the legitimacy afforded by the UN, while utilizing the local knowledge and resources available within each region to prepare responses to future crises. The resulting structures and mechanisms might then serve as ‘tripwire’ warning mechanisms and deterrents respectively which, if compromised, would bolster any subsequent case for action under pillar three.

### **Actualizing pillar two**

Complementing this work, the role of CSOs should be clarified to diversify the pool of those responsible within the international community for ensuring the protection of civilians. Meaningful cooperation between the UN and civil society has thus far been undermined by ambiguity over what the protection of civilians means and uncertainty as to the optimum role of CSOs within R2P.<sup>[11]</sup>

However, some operational CSOs are already widely perceived as key

players in the early-warning process,<sup>[12]</sup> and at a minimum should therefore have this important function more formalized. Capacity-building and response mechanisms involving in-country CSOs would benefit from such groups' ability to sound the alarm on nascent threats to security. This approach would also bolster the transparency of preventative actions by diversifying the range of stakeholders involved. It would provide a legitimized, independent source of reporting and verification on instances of instability. This could provide the UN with the evidence required to recognize threats to civilian lives and increase political will among UN Security Council members to discharge their responsibilities – in line with the UN Charter, and as validated in the Sustainable Development Goals. Through broadening the base of authorized actors, the responsibility can be shared, acknowledged and acted upon.

Although R2P is frequently viewed as peripheral to many national interests, it should be considered crucial to the security of all states. The conflict in Syria, which has forced millions of people mostly westwards, continues to challenge the capacity of neighbouring states to absorb and care for the displaced. Ongoing threats to human security in North Africa and sub-Saharan Africa have forced other people to flee to countries including Cyprus, Greece, Italy and Spain.<sup>[13]</sup> Reactive response has become the norm, at the expense of effective prevention measures.

Efforts such as the Focal Points Initiative, which has encouraged each state to appoint a senior civil servant to lead national efforts to galvanize R2P, have had limited impact.<sup>[14]</sup> Countries such as the UK have come under criticism for failing to appoint an official who is sufficiently senior, or wholly dedicated to mainstreaming R2P across relevant government departments.<sup>[15]</sup>

More encouraging have been initiatives born out of work by the High-Level Advisory Panel on the Responsibility to Protect in Southeast Asia.<sup>[16]</sup> Many members of the Association of Southeast Asian Nations (ASEAN) are beginning to develop and integrate R2P-pertinent curriculums into training courses conducted in, for example, police and justice agencies.<sup>[17]</sup> Other states have improved early-warning systems.

Similarly, states facilitating development aid projects in fragile contexts would do well to countenance the security needs of the beneficiaries of such work. For example, if key community facilities are being constructed by donor agencies or NGOs in established towns, can these facilities be safely accessed along main routes from nearby villages or rural communities? Small changes could provide significant security benefits in areas where instability persists.

## Conclusion

R2P is presently vulnerable to the dual forces of disinterest within an international community that is increasingly at odds with itself and the presence of actors who may look to exploit this lack of coherence. As the foundations of the rules-based system are placed under greater strain, R2P runs the risk of sliding further into irrelevance. While a lack of consensus prevails at the state level, this safeguard of human security must instead be reinforced through alternative structures which are more agile and capable of responding within present geopolitical confines. Indecision and infighting cannot be permitted to trump the protection of civilians. R2P must be reinvigorated, not abandoned, by the international community. ■

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## WHAT NEEDS TO HAPPEN

— **Revitalizing R2P has to be done in a pragmatic manner, building on existing structures.**

— **Efforts should focus on the preventative aspects of R2P's second pillar.**

— **R2P approaches must engage a wider stakeholder base. Responsibilities should be distributed more evenly throughout the international community, in collaboration with civil society actors.**

— **R2P considerations must be mainstreamed within development practice, particularly at the state and regional levels.**

# **PRESERVE THE EFFECTIVENESS OF ANTIBIOTICS WITH A GLOBAL TREATY**

*by David L. Heymann  
and Emma Ross*

**The way the world uses antibiotics has to change. A treaty to curtail unnecessary antibiotic use would bring much-needed global governance to the effort to combat antibiotic resistance, and would offer a clear way forward for all countries.**

**THERE IS AN** urgent need to bring global governance to the effort to preserve the effectiveness of antibiotics. The issue of increasing antibiotic resistance, and the need to use antibiotics more wisely, has gained recognition at the highest political echelons, and there is evidence for antibiotic-conserving interventions that all countries could adopt to reverse the global threat. This confluence of factors makes the possibility of negotiating a global treaty aiming to reduce misuse and overuse of antibiotics in humans and animals more viable than ever before. It is an opportunity that should be seized.

Antibiotics are a core tool of modern medicine, but are increasingly being rendered ineffective by the ability of bacteria to develop resistance. Drug-resistant infections are already estimated to kill at least 700,000 people a year, and could kill 10 million people a year by 2050 if left unchecked.<sup>[1]</sup> The potential impact of antibiotic resistance also threatens development and the global economy: recent estimates warn that the economic damage from uncontrolled antimicrobial resistance could be comparable to that of the 2008 financial crisis.<sup>[2]</sup>

While bacteria have a natural ability to develop resistance, making some level of antibiotic resistance inevitable, persistent misuse and overuse of antibiotics in humans and animals have encouraged the pace at which resistance develops to accelerate. We now urgently need to reverse course. In the last few years, international agencies have developed strategies and guidance that identify and recommend evidence-based interventions. However, a critical missing piece to the response is a global governance mechanism.

Antibiotics are used to treat infections not only in humans, but also in animals and plants. Resistance is therefore a complex problem that also affects food and the environment,

and it transcends borders. It cannot be tackled successfully by a single country or international agency. It needs a coordinated, multisectoral response.

## **Drug-resistant infections are already estimated to kill at least 700,000 people a year, and could kill 10 million people a year by 2050 if left unchecked.**

Current multilateral approaches, though extensive, are insufficient in key respects. The strategies, global action plans and recommendations developed recently by the ‘Tripartite’ of UN agencies leading the response at the global level<sup>[3]</sup> – the World Health Organization (WHO), the Food and Agriculture Organization (FAO) and the World Organisation for Animal Health (OIE) – set out a comprehensive range of sound interventions for countries to write into their national action plans on antimicrobial resistance.

However, not all countries have the capacity to adopt all of the recommended interventions. To generate the scale of focused response needed and bring effective global governance and accountability to the effort, there is now a need to agree on a handful of priority measures that all countries can commit to and implement in unison.

A legally binding global treaty to curb the misuse and overuse of antibiotics is an attractive and viable option to consider in this respect. Given the

magnitude and urgency of the threat, it may be the best instrument for maintaining and increasing political will, for helping countries zero in on the most feasible interventions and develop the legislation necessary to implement them, and for filling the global governance gap in antibiotic stewardship.

Such a treaty should specify a prioritized set of interventions, with target timelines and phased implementation. It should be flexible enough so that it can be amended to include more interventions and future innovations, as political will increases and as new, globally feasible tools become available. Such a treaty should also include a robust accountability mechanism, requiring regular tracking of progress in implementing the treaty’s provisions.

One of the first steps should be to embark on a process to identify which of the interventions proposed in the global action plans, strategies and guidance of WHO, FAO and the OIE would be priorities and feasible for all countries to implement. The Tripartite is the natural choice for this exercise, particularly given that these agencies have called for strengthened accountability and global governance.<sup>[4]</sup>

A determination would need to be made as to under which institution’s authority such a treaty should be negotiated. If the proposed provisions fall under the mandates of more than one international agency, it might make sense for the treaty to be negotiated under the UN.

The findings of the prioritization and feasibility exercise should then feed into the negotiation of the treaty, which should contain the interventions that all parties can agree to include and be bound to deliver. Some measures that could be given serious consideration include prohibiting doctors and veterinarians from selling antibiotics, banning the advertising of antibiotics, increasing the use of vaccines that prevent bacterial infections in animals and humans, phasing

out the use of antibiotics for livestock growth promotion, and improving hygiene in the management of human and animal waste.

Negotiation and acceptance of a treaty to curb improper use of antibiotics would not be without significant challenges. There are a huge range of social, economic and cultural factors contributing to the misuse and overuse of antibiotics. Political commitment will be necessary for success, and a handful of countries would need to step up as champions of the idea. Countries that have thus far championed the issue include the UK and many other industrialized nations. The more countries back the idea, the faster the process would move.

The role of civil society advocacy also cannot be underestimated. One of the keys to success of the first global health treaty negotiated under the auspices of WHO – the Framework Convention on Tobacco Control (FCTC) – was the push from non-governmental organizations and other civil society groups. WHO estimates that the prevalence of smoking has decreased globally from 24 per cent of the population aged 15 or older in 2005, when the treaty was signed, to 19 per cent in 2017.<sup>[5]</sup>

The FCTC, ratified by 181 of the 194 WHO member states, is a useful model in many ways. For instance, it is a flexible treaty that provides carefully selected evidence-based options that are feasible for all countries and obligates countries to regularly report progress in implementing its provisions. However, a treaty to curtail antibiotic misuse and overuse would face an important challenge that did not apply to the FCTC: while the solution for tobacco control is to get as many people as possible to stop using tobacco, the solution for the control of antibiotic resistance is to stop the *misuse or overuse* of antibiotics, not all use. It would be critical to ensure that interventions avoid impeding access

to antibiotics for those who need it. While curtailing misuse and overuse is central to addressing the problem of antibiotic resistance, it is estimated that more people die from no access or delayed access to antibiotics than from antibiotic resistance.<sup>[6]</sup> The balance between increasing appropriate access and reducing inappropriate use must be struck, which means that some of the interventions that would help reduce misuse and overuse – such as requiring a diagnostic confirmation before antibiotics are prescribed, or that access to antibiotics be allowed only with a doctor's prescription – would not be feasible in some countries, so other provisions would need to be considered.

## The balance between increasing appropriate access and reducing inappropriate use must be struck.

Despite the challenges, there is now enough political traction around the issue of antibiotic resistance to warrant serious consideration of the negotiation of a legally binding international instrument. The idea is garnering support from experts and advocates for the responsible use of antimicrobials.<sup>[7]</sup> Governments are also paying more attention to the issue. At a UN General Assembly high-level meeting devoted to antimicrobial resistance in 2016, heads of state confirmed their commitment to taking a coordinated approach and pledged

to develop national plans based on the WHO Global Action Plan on Antimicrobial Resistance, endorsed by health ministers at the World Health Assembly in 2015. The UN secretary-general subsequently convened the Tripartite of WHO, FAO and the OIE in the form of an Ad-hoc Interagency Coordination Group (IACG) on Antimicrobial Resistance,<sup>[8]</sup> to provide guidance on what global actions were needed, and called on the agencies to finalize a proposed Global Framework for Development and Stewardship to Combat Antimicrobial Resistance.<sup>[9]</sup> The final recommendation of the IACG's report to the UN secretary-general, published in April 2019, opens up the possibility of using the ongoing process of developing the Framework as a starting point for discussion of 'new binding or non-binding international instruments'.

As the negotiation of a global treaty is a lengthy process, and the threat of antibiotic resistance is urgent and growing every day, current efforts to coordinate the response at the global level must not stall. The need for a global governance and accountability mechanism and the potential for a treaty to deliver that, meanwhile, deserve serious consideration. ■

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## WHAT NEEDS TO HAPPEN

**— Antibiotic resistance is a complex problem that transcends borders and cannot be tackled by a single country or international agency.**

**— A coordinated, multisectoral response is needed, with global-level governance.**

**— Current multilateral guidance identifies many evidence-based interventions, but not all countries have the capacity to adopt them all.**

**— A legally binding global treaty may help countries prioritize the most feasible interventions, while increasing political will and providing an accountability mechanism.**

**— If its proposed provisions fall under the mandates of more than one agency, the treaty might best be negotiated under the UN.**

# RENEW THE BRETTON WOODS SYSTEM

*by Stephen Pickford*

The gradual disintegration of the global rules-based economic order requires a new 'Bretton Woods' conference to reaffirm the benefit for all countries of internationally accepted, treaty-based economic relationships – and to reinvent the institutions to manage those rules.

**TOWARDS THE END** of the Second World War, the Allied powers came together in 1944 to plan a new economic order for the post-war world which would avoid a repeat of the disastrous policy mistakes of the 1920s and 1930s.

At the conference<sup>[1]</sup> in Bretton Woods, New Hampshire, 44 Allied countries met under the intellectual leadership of Harry Dexter White (a senior US Treasury official) and John Maynard Keynes. The conference envisaged new rules of the game to prevent countries following the ‘beggar-thy-neighbour’ policies that had led to the Great Depression. It also established the International Monetary Fund (IMF) and World Bank<sup>[2]</sup> as the key institutions to manage this new world order.

This new structure was initially successful<sup>[3]</sup> in allowing the world to recover after the war. The IMF put in place fixed exchange rates based around the dollar, and provided finance to allow countries to make necessary adjustments to their balance of payments provided that they followed sound domestic economic policies. The World Bank provided long-term loans to allow post-war reconstruction, including in support of the Marshall Plan.

Over the subsequent 50 years the structure of the global economy changed rapidly. The IMF and World Bank reinvented themselves over that period to adapt to these changes. The IMF responded to the move to a largely floating exchange rate system (precipitated by the US decision in 1971 to end convertibility of the dollar to gold) by extending its surveillance, and its conditions for loans, to all major aspects of economic and financial policy. It also played a major role in developing and implementing the ‘Washington consensus’.<sup>[4]</sup>

The World Bank shifted its focus from post-war reconstruction in Europe (financed by borrowing from capital markets) to playing a key role in development. With the creation of its International

Development Association (IDA) arm in 1960, the bank became a major channel for development grants and concessional loans from rich countries to the new emerging economies and the developing world, and it played a large role in setting the agenda for development policies.

But these institutions, and the rules that they manage, have not adapted quickly enough over the last decade to the changing world order, and to the growth of popular discontent with globalization and internationalism.

Emerging markets and developing countries have been the major engine for global growth for many years. Over the past decade they have grown as a group by around 5 per cent a year on average,<sup>[5]</sup> compared with growth of less than 2 per cent a year for advanced economies. And China has now overtaken the US as the world’s largest economy.<sup>[6]</sup>

However, governance changes at the IMF and World Bank have not kept pace with economic reality. At the IMF, the US has over 16 per cent of the voting power while China has only 6 per cent; and the G7 group of advanced economies, accounting for 30 per cent of world output, have over 40 per cent of the voting power. The World Bank has similar disparities, and within IDA the donor countries (the ‘Part I’ countries) control 55 per cent of the voting power. Moreover, since the creation of the two institutions, the convention has been maintained that the US appoints the head of the World Bank,<sup>[7]</sup> and that the head of the IMF is a European.

While small steps have been taken to reduce the degree of control that the advanced economies exercise, emerging markets and developing countries have been increasingly frustrated at the lack of progress. This has had two consequences. First, the larger emerging markets feel less constrained by the rules and norms of the institutions.

For example, China has in place significant capital controls; and emerging markets have challenged the IMF’s policies on international capital movements. Second, emerging markets have responded by setting up institutions to rival the IMF and World Bank. Examples include the so-called ‘BRICS Bank’,<sup>[8]</sup> the Chiang Mai Initiative (CMI)<sup>[9]</sup> and, most recently, the Asian Infrastructure Investment Bank (AIIB).<sup>[10]</sup>

At the same time, many advanced countries have seen the rise of populism, and dissatisfaction with what many consider the damaging effects of globalization. This is most marked in the area of trade, where many countries (led by the US) are reintroducing trade controls. But it has also had an impact on monetary cooperation and development. Countries are accused of starting ‘currency wars’.<sup>[11]</sup> And governments have become more reluctant to commit funds for aid.

As organizations set up by international treaty, the Bretton Woods institutions are reliant on international economic cooperation, support for which is the bedrock of the system. To tackle this erosion of support, a new ‘Bretton Woods’ conference is needed. As with its predecessor in 1944, its aim would be to reaffirm the benefits for all countries of international cooperation rather than unilateralism. Specifically, its tasks would be the following:

## **1. Renew the intellectual basis for the institutions**

For the IMF, the challenge would be to review and amend Article 1 of its founding Articles. This sets out the purpose of the IMF: to promote international monetary cooperation; to facilitate international trade and contribute to economic growth and employment; to avoid competitive exchange rate depreciation; and to provide loans to countries to allow them to adjust their economic policies.

Article 1 embodies assumptions about good economic management.

But the erosion of the ‘Washington consensus’, the support for the ‘Occupy’ movement, questioning of the capitalist system, and the challenge from climate change to the primacy of economic growth as an objective all point to the need for a broad debate on different economic models.

For the World Bank, the challenge is for donor countries to put IDA on to a permanent statutory basis, instead of the current three-year replenishment cycle. But also the ‘division of labour’ between the World Bank and the regional development banks is unclear. The lack of precision is inefficient and a waste of aid resources. The conference would be a valuable opportunity to redesign the overall aid architecture.

## 2. Achieve fundamental reform of institutional governance

For both the IMF and World Bank, three fundamental aspects of governance should be reviewed. First, the financial basis of each institution needs to be addressed, as this determines voting power. A sustainable financial system needs to adapt to changes in economic circumstances, in particular to recognize the growing economic weight of the emerging markets. Second, the composition and structure of the institutions’ executive boards also need to adapt. Third, the current informal arrangements, based on nationality, for appointing the heads of the IMF and World Bank do not necessarily result in the best person for the job.

### Risk vs reward

There are clear blocks to such fundamental change. The US would see a challenge to its ‘supermajority’,<sup>[12]</sup> and most other advanced economies would also lose influence at the two institutions. Emerging markets would be challenged to take more responsibility, in economic management and aid policy for example, in exchange for more power at the IMF and World Bank.

And there are risks to reopening the underlying basis for the institutional structure. Without a clear path forward, the existing structure could be weakened and the institutions’ ability to continue operating could be compromised.

But the current challenges require a substantial rethink of the international economic and financial architecture. Incremental changes are unlikely to be able to address these challenges. And without changes, the Bretton Woods institutions – and the international economic system that they support – will continue to erode, until at some point they break. ■

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- [5] IMF (2019), *World Economic Outlook*, April 2019.
- [6] By GDP, measured on a purchasing-power-parity basis.
- [7] David Malpass was appointed in April 2019 for a five-year term as president of the World Bank.

[8] The ‘New Development Bank’ set up by the BRICS countries in 2014.

[9] The CMI was set up in response to the perceived lack of even-handedness in the IMF’s handling of the Asian financial crisis in the 1990s, and in response to pressure for an ‘Asian Monetary Fund’.

[10] The AIIB started operations in 2016; China is the major source of funding for the bank.

[11] A term first coined by Brazil in complaint about dollar weakness.

[12] At present the US, with over 15 per cent of the voting power, has to approve the most fundamental changes to the institutions.

#### WHAT NEEDS TO HAPPEN

— **A new ‘Bretton Woods’ conference should redraft the institutional basis of the IMF and World Bank, and reaffirm support for international economic cooperation.**

— **Article 1 of the IMF’s founding Articles should be amended to incorporate new thinking on different economic models.**

— **World Bank donor countries need to put IDA on to a permanent statutory basis, replacing the current three-year replenishment cycle.**

— **Voting rights need to be further reviewed, to recognize the economic weight of emerging markets.**

— **The executive boards of the IMF and World Bank need reform of both composition and structure. The existing system of appointing the head of each institution based on nationality should also be discarded.**

# RETHINK THE WTO'S ROLE IN A DIGITAL, DIVIDED WORLD

*by Matthew Oxenford*

The strains facing the WTO are not easily resolved. However, as momentum for trade liberalization has historically come from 'coalitions of the willing' – based on sectoral and plurilateral interests – this should be the priority for policy action.

**THE WORLD TRADE ORGANIZATION** (WTO) faces arguably the most acute challenge in its 24-year history. Since the election of Donald Trump in 2016, a US administration hostile to multilateralism and tempted by protectionism has worked to undermine the WTO by leaving the body on the brink of being unable to perform one of its central roles: adjudicating the rules of global trade. If the immediate crisis weren't enough, structural shifts in markets have raised questions about the long-term suitability of the WTO as a rules-based order for international commerce. What, given certain constraints inherent to the WTO system, are the options for reform?

During the 2016 US presidential campaign, trade was a prime target of Trump's populist electioneering. While the president subsequently has not – or, at least, not yet – followed through on a campaign threat to withdraw the US from the WTO altogether, his administration has prevented the Appellate Body of the WTO's Dispute Settlement Body, a central component of the multilateral trading system, from functioning properly. The US has blocked the nomination of new Appellate Body members, whose appointment requires unanimous consent. In December 2019, the four-year terms of two of the body's three current members will expire, leaving it without a quorum to make decisions.

However, the WTO had profound difficulties even prior to this situation, many of which can be traced back to the period around the institution's founding in 1995 and which inform the current crisis. The WTO took shape at a singular historical moment. The 1990s were a period when the consensus on the desirability of trade liberalization was arguably at its strongest since the Second World War; global communism had just collapsed, while developing economies in Asia and Latin America were making significant market reforms. The

economies of the US, the EU, Japan and Canada – termed the 'Quad' by trade negotiators for their pivotal role in driving forward past rounds of trade liberalization – were at the peak of their influence. Their leadership acted as an accelerant to global trade integration, encouraging countries to join the General Agreement on Tariffs and Trade (GATT), the WTO's predecessor. Whereas the initial GATT rounds of trade negotiations had involved fewer than 30 members, by 1994 the total had risen to 123, eventually rising to 164 in the WTO today.<sup>[1]</sup>

## The growing trade in 'intangible goods' is blurring the line between goods and services.

This fleeting moment of political and ideological unity allowed the WTO to be structured to address many of the perceived failings of the GATT. In particular, the GATT system, which had allowed significant exemptions and ambiguous opt-outs for countries, was superseded by the more standardized 'single undertaking' system and binding dispute settlement.<sup>[2]</sup> The WTO also made dispute resolution more efficient by moving from a system requiring unanimous approval to enforce a ruling to one requiring unanimity only when *blocking* a decision.

However, the 'one size fits all' inflexibility of the WTO system created significant strain. Major economies, particularly the US, had reservations about the constraints on sovereignty implied by compliance with binding dispute settlement. The promise of the WTO was that a steady stream

of further negotiations and liberalization would consistently create new agreement and clarity, limiting the need for supranational dispute settlement beyond basic interpretation of continuously updated rules. Instead, the combination of the greater centrality of developing economies, such as China and India, in the trading system and in trade negotiations with the shift towards binding rules – which made the stakes of negotiating the rules themselves higher – rendered consensus in new rounds of trade negotiations impossible to achieve. As a result, trade liberalization and negotiations ground to a halt, and – as can be seen in today's tensions – US concerns over infringement of sovereignty re-emerged in force.

The WTO's effectiveness has further been undermined by developments in technology, which have changed the nature of global trade. Between 2005 and 2015, cross-border digital trade increased 45-fold. E-commerce now accounts for 12 per cent of consumer goods trade.<sup>[3]</sup> The growing trade in 'intangible goods' – including downloadable consumer content, software, data and other digital intellectual property – is blurring the line between goods and services. Physical goods are now also more likely to have services embedded in them, for example through service contracts, software or leasing arrangements. This makes goods trade more dependent than ever before on complicated 'behind the border' regulatory issues more commonly associated with services.

While the WTO's ambitions have always included liberalizing services trade, as an institution it remains ill-suited to responding to this evolution. Services trade liberalization increasingly hinges on regulatory convergence around the services offered, a more difficult area in which to achieve compromise than trade in goods. Whereas tariffs on goods can be adjusted through

one-off changes in government policy, negotiations over services trade involve continuous harmonization of ever-evolving supranational standards. As an international body operating by consensus, the WTO cannot guarantee this convergence will occur. Additionally, the WTO's framework for services trade – enshrined in the General Agreement on Trade in Services (GATS) – divides services trade into four 'modes of supply', yet increasing amounts of digital trade fit neatly into none of these categories.<sup>[4]</sup> As a result, the GATS rules are increasingly unwieldy in the modern economy.

### **Towards coalitions of the willing**

If there is to be any further momentum for trade liberalization, its advocates must first be realistic in their ambitions and recognize that global trade governance has gone beyond what is politically sustainable. The WTO's 'single undertaking' model required an unrealistic level of sustained consensus among its members. Allowing for greater flexibility in member state obligations would acknowledge this, even if the price of reform is less harmonized dispute settlement. Such a move is likely to be inevitable, given evidence that supranational dispute settlement remains controversial beyond the WTO. The problem, however, is that as trade becomes ever more oriented towards services and intangible goods, the need for common rules will only grow. The most likely route to success may lie not with the WTO, but with sector-specific forums and plurilateral agreements involving limited coalitions of states.

One example of qualified success in sector-specific regulatory harmonization can be seen in the development of common banking standards. This process, first through the so-called 'Basel' mechanism

under the Bank for International Settlements (BIS) in 1992, and more recently through the Financial Stability Board (FSB), was primarily designed to ensure a minimum level of regulatory harmonization between jurisdictions.<sup>[5]</sup> Yet one of the additional consequences of this standardization was the reduction of many regulatory barriers, which ultimately allowed finance to become one of the most globalized service sectors. Ironically, this occurred despite the lack of formal trade agreements containing robust financial services chapters.

## **The most likely route to success may lie not with the WTO, but with sector-specific forums and plurilateral agreements involving limited coalitions of states.**

Could variations on the financial industry model be applied more widely? Implementation of Basel and FSB rules depends on global support within the industry and among regulators, yet the same precondition is likely to apply to regulatory convergence in almost any service sector. There is thus no obvious reason why similar harmonization of standards could not be achieved through professional or industry bodies in other regulated service sectors, in order to facilitate and regulate cross-border trade.

By empowering global, sector-specific standard-setting bodies in

this way, industry-driven 'bottom up' approaches could make it easier to overcome political obstacles to reform. With banking, for example, all the players involved are already agreed on the benefits of coordination, and it is in everyone's interests to develop common global regulations. Should stronger or different regulation be needed (as was the case after the 2008 financial crisis), the framework for agreeing adjustments already exists. Similar forums exist in many other professional service sectors, as well as in digital governance. Working with governments, these specialist organizations could help to gain buy-in from their members on the development of new trade policies and rules for their sectors. This in turn could help to ensure the cooperation of governments responsible for regulatory convergence.

Plurilateral agreements, too, provide potential scope for greater ambition. The Trade in Services Agreement (TiSA), in negotiation since 2012, approaches the liberalization of trade in services on a selective basis – starting with a smaller group of negotiating parties (including the Quad) that wish to pursue deeper service-sector liberalization. TiSA is unlikely to progress during the Trump presidency. However, if a less hostile administration arrives in Washington, this sort of agreement has a better chance of success than might another WTO negotiating round. Moreover, it would still cover over 70 per cent of global services trade,<sup>[6]</sup> while creating a set of common standards for other countries to build on. Indeed, even under the Trump administration, the US is one of 76 WTO members beginning to negotiate a plurilateral agreement on e-commerce.

In this future, the WTO will have a diminished but real role to play: acting as a repository and negotiating forum for plurilateral agreements,

performing a monitoring and data collection role, and developing common standards on the goods trade and tariff liberalization still within its remit. Major international organizations have adapted to this sort of reduced remit in the past: after the breakdown of the Bretton Woods system, the International Monetary Fund found its mandate similarly diminished, but was able to reinvent itself as a lender of last resort and as a provider of liquidity in a more flexible, dynamic monetary system. It is not implausible that, after some time in the political wilderness, the WTO could similarly reinvent itself in a newly dynamic global trade system. ■

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#### WHAT NEEDS TO HAPPEN

— **The WTO is unlikely to achieve consensus on a resolution to the dispute-settlement impasse. Securing political support for continued trade liberalization should be prioritized over the preservation of the existing structure.**

— **As trade involves ever more services and intangible goods, progress on governance may be more achievable through sector-specific forums and plurilateral agreements than through full WTO negotiations.**

— **Regulatory harmonization conducted by single sectors such as banking offer a potential template for other services industries to reduce the barriers to trade without a formal trade agreement. This would rely on empowering professional standard-setting bodies and leveraging mutually agreed interests.**

— **Plurilateral processes, selectively involving coalitions of states committed to similar goals, can provide scope for raising policy ambition. A good example is the Trade in Services Agreement (TiSA).**

— **With a diminished role as a rule-setter, the WTO would likely focus on providing a forum for negotiation in more limited sectors and a repository for plurilateral agreements, as well as on monitoring and data collection.**

# DRIVE GLOBAL ACTION ON MONEY- LAUNDERING

*by Nigel Gould-Davies*

**As an inherently transnational activity, global money-laundering is perhaps the definitive problem in need of cross-border, rules-based cooperation. The G7 should lead the way.**

**EVERY YEAR, OWNERS** of illicit wealth send huge sums of money from the countries where they made it to jurisdictions where they can conceal its origins. They can do so because laws, practices and intermediaries in the receiving countries make money-laundering safe and easy. These arrangements abet criminality, corruption and insecurity on a global scale. There is a clear, compelling and urgent case for closing this major governance gap.

Transnational organized crime has long relied on the ability to launder its earnings. But the issue goes much wider. Those who enrich themselves through corrupt relationships and tax evasion routinely send the proceeds to safer jurisdictions.<sup>[1]</sup> The scale of these outflows dwarfs international aid budgets designed to support good governance. The provision by receiving states of what are, in effect, corruption-protection services thus entrenches misgovernance.

Corrupt financial inflows also present a serious security threat by eroding financial integrity and international reputation. But this security dimension has been growing even more severe. Much corrupt money flows from countries that seek to undermine Western interests and values. The ability of elites in those countries to send assets to, and conceal them in, the West sometimes helps sustain authoritarian regimes. Some illegal financial inflows are used to interfere in election campaigns, co-opt local interests or take stakes in strategic companies. Money-laundering is also used to evade sanctions imposed to punish unacceptable behaviour.<sup>[2]</sup>

Three steps are needed to make progress against international money-laundering. First, a universal norm of transparency needs to be established in respect of the beneficial ownership of corporate vehicles. Public registries of beneficial owners, bolstered with reliable data, must ensure that such owners

are declared as natural persons, not legal entities.<sup>[3]</sup> These registries should be standardized and interconnected to facilitate cooperation.

Second, intermediaries need to be regulated effectively. These are the individuals and companies (banks, and trust and company service providers, or ‘obliged entities’ in EU terminology) that conduct the financial, legal, accountancy, property and other administrative operations which enable money to enter a country. Their customer due diligence should include, in particular, establishing the identity of the beneficial owners of the entities that they service. Regulatory authorities should incentivize intermediaries to internalize a culture of compliance. Too often, compliance is formulaic and ‘tick-boxy’. Compare this with best practice in high-physical-risk industries, such as oil and gas. Here, the best companies drive continuous safety improvement in every aspect of their operations. This commitment is part of their corporate culture. Financial, property and legal service providers should adopt a similar mindset in their management of compliance risk.

## **Much corrupt money flows from countries that seek to undermine Western interests and values.**

Third, implementation needs to be properly resourced. Effective and consistent enforcement even of current laws and regulations will yield significant gains. This will require a step

change in budgets, personnel and skills. Unlike other transnational crimes that it facilitates, such as terrorism or human trafficking, money-laundering is rarely an emotive issue for public opinion. Political leaders should therefore provide the drive, direction and resources needed to prioritize enforcement. They should also adequately fund research that supports effective policy with rigorous, evidence-based analysis of the scale of the threat, the forms it takes, and the ways it is evolving.

Over the past decade, a global consensus has emerged that money-laundering should be addressed more effectively. In 2012 the Financial Action Task Force (FATF), the leading international standards-setter in this area, agreed new recommendations endorsed by nearly every country in the world. Following this example, in 2014 the G20 adopted ‘High Level Principles on Beneficial Ownership Transparency’. In 2015 and 2018, the EU agreed its 4th and 5th Money Laundering Directives. The latter requires member states to establish public registries of beneficial ownership for corporate and other legal entities by January 2020.

But recent revelations, from leaks and whistle-blowers, have brought home the continued severity of the problem. The 2016 Panama Papers investigation revealed multi-billion-dollar fraud, tax evasion and sanctions evasion hidden through offshore companies. In 2018 Danske Bank, Denmark’s largest bank, was found to have processed \$230 billion in suspicious transactions.<sup>[4]</sup> Revelations from scandals such as these are likely to continue to emerge. They demonstrate that the rules governing financial inflows, and the resources devoted to their enforcement, remain inadequate in relation to the scale of the challenge.

The priority now is to focus on better outcomes by strengthening global norms, bringing national practices

into line with them and, above all, developing the capacity to implement them. While this is a global challenge, Western countries should take the lead. They, and the jurisdictions they control (like the UK Overseas Territories and Crown Dependencies), are the major service providers for illicit transnational financial flows. They also face the biggest security threats from regimes that transfer assets overseas. And Western progress will have a wider demonstration effect by undercutting excuses made by others for resisting higher standards. Established best practice can also provide the basis for peer assistance and technical support to other states.

## At present, there is far more scrutiny of how money is made than how it is moved.

The most attractive destinations of all for illicit money are the US and the UK, with their highly developed financial and facilitation industries, traditions of light-touch regulation and strong rule of law. Their G7 presidencies in 2020 and 2021 respectively are a natural opportunity to demonstrate sustained global leadership in efforts to counter illegal financial flows. Both countries should make the achievement of further progress in establishing robust global anti-money-laundering rules, and effective implementation, a priority of their presidencies.

At present, there is far more scrutiny of how money is made than how it is moved. And the West demands higher anti-corruption standards of its own companies overseas than it does of foreign money that flows in from

abroad. This is a major gap in global economic governance. On grounds of ethics, policy consistency and security, it is time to close it. ■

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### WHAT NEEDS TO HAPPEN

— **A first priority in strengthening anti-money-laundering efforts is to establish a universal norm of transparent beneficial ownership of corporate vehicles.**

— **Public registries must ensure that beneficial owners are declared as natural persons, not legal entities. These registries should be standardized and interconnected to facilitate cooperation.**

— **Intermediaries need to be regulated effectively. Mandatory due diligence should include establishing the identity of beneficial owners of the entities serviced.**

— **Effective implementation and enforcement will require much greater resourcing. Political leaders should drive this process, including ensuring adequate funding for research.**

— **Western countries should take the lead in strengthening global norms, ensuring national-level compliance and developing capacity. Established best practice can provide the basis for peer assistance and technical support to other states.**

— **The G7 presidencies of the US and the UK, in 2020 and 2021 respectively, offer a natural opportunity to demonstrate global leadership. Both countries should use their terms to strengthen rules and implementation.**

# DEMOCRATIZE TRADE POLICYMAKING TO BETTER PROTECT HUMAN RIGHTS

*by Jennifer Zerk*

There is growing interest in the use of human rights impact assessment to screen proposed trade agreements for human rights risks, and to ensure appropriate risk mitigation steps are taken.

**WITH INTERNATIONAL TRADE** discourse taking an increasingly transactional and sometimes belligerent tone, it would be easy to overlook the quiet revolution currently under way to bring new voices into trade policy development and monitoring. The traditional division of responsibilities between the executive and legislature – whereby treaties are negotiated and signed by the executive, and the legislature does what is necessary to implement them – may be undergoing some change. Growing awareness of the implications of trade and investment treaties for many aspects of day-to-day life – food standards, employment opportunities, environmental quality, availability of medicines and data protection, just to name a few – is fuelling demands by people and businesses for more of a say in the way these rules are formulated and developed.

Various options for enhancing public and parliamentary scrutiny of trading proposals have recently been examined by two UK parliamentary select committees.<sup>[1]</sup> The reason for this interest is obviously Brexit, which has presented UK civil servants and parliamentarians with the unusual (some would say exciting) opportunity to design an approval and scrutiny process for trade agreements from scratch. Doubtless, EU authorization, liaison and approval procedures (which include a scrutinizing role for the European Parliament) will be influential,<sup>[2]</sup> as will the European Commission's experience with stakeholder engagement on trade issues.<sup>[3]</sup> The recommendations of both UK select committees to include human rights impact assessment processes as part of pre-negotiation preparations<sup>[4]</sup> echo calls from UN agencies and NGOs for more rigorous and timely analysis of the human rights risks that may be posed by new trading relationships.<sup>[5]</sup> Again, EU practice with what it terms

'sustainability impact assessment' of future trade agreements provides a potential model to draw from.<sup>[6]</sup>

However, process is no substitute for action. Human rights impact assessment is never an end in itself; rather, it is a *means* to a positive end, in this case a trade agreement which is aligned with the trading partners' respective human rights obligations and aspirations. It bears remembering, though, that the idea of assessing trade proposals for future human rights risks is a relatively recent one. Do we have the tools and resources to make sure that this is a meaningful compliance and risk management exercise?

## Human rights impact assessment is never an end in itself; rather, it is a *means* to a positive end.

Thus far there is little evidence that human rights impact assessment and stakeholder engagement exercises are having any real impact on the content of trade agreements.<sup>[7]</sup> This is the case even in the EU, where practice in these areas is the most advanced and systematic.<sup>[8]</sup> There are several possible reasons for this. First, the methodological challenges are enormous. Aside from the crystal-ball gazing needed to forecast the social, economic and environmental effects of a trade intervention well into the future, demonstrating causal links between a trade agreement and a predicted adverse impact is often highly problematic given the number of other economic and political factors that may be in play.<sup>[9]</sup> Secondly, there

are many challenges around the need to engage with affected people and listen to their views.<sup>[10]</sup> The sheer number of possible impacts of a trade agreement on different individuals and communities, as well as the range of rights potentially engaged, makes this a difficult (some would say impossible) task. Some prioritization is always necessary.

This makes for difficult decisions about who to engage with and how. Perceived bias or an apparent lack of even-handedness – favouring business compared to civil society, for instance – can sow mistrust about the true aims of such a process, undermining its future effectiveness as participants begin to question whether it is genuine or worthwhile.<sup>[11]</sup> The challenges are even more acute where impact assessment practitioners are tasked with investigating potential human rights impacts in other countries. Even if it is possible to get past the inevitable political sensitivities,<sup>[12]</sup> the sort of in-depth consultations required will be beyond the budget and time constraints of most assignments.<sup>[13]</sup>

There are good reasons why trade policy should be subject to greater public and parliamentary scrutiny, and why there should be more opportunities for public participation in the formation of new trading regimes. By building more opportunities for stakeholder consultation at these stages, we can acquire perspectives on trade that are not available from other forms of assessment and analysis.

However, policymakers should be wary of overstating the benefits of existing procedural models. Human rights impact assessment processes are still struggling to provide compelling analyses of the relationships between trade agreements and the enjoyment of human rights, let alone a roadmap for policymakers and trade negotiators as to what should be done.<sup>[14]</sup> And financial

and practical barriers to participation in stakeholder engagement exercises mean that, at best, these will provide only a partial picture of stakeholder impacts and views.

## For a trade agreement running many years into the future, human rights impacts and implications will take time to emerge, suggesting the need for robust monitoring and mitigation frameworks.

Experiences with human rights impact assessment of trade agreements so far demonstrate the need for realism about two things: first, the extent to which one can sensibly anticipate and analyse human rights-related risks and opportunities in the preparation stages for a new trading agreement; and, second, the extent to which problems identified in this way can be headed off with the right form of words in the treaty itself. Both recent UK select committee reports place considerable faith in the ability of pre-project transparency and scrutiny processes to flush out potential problems and prescribe solutions. Of course, there may be cases where frontloading the analysis in this way could be useful, for instance

where the human rights implications are so clear that they can readily be addressed through upfront commitments by the parties concerned, whether by bespoke or standardized approaches.

More often, though, for a trade agreement running many years into the future, human rights impacts and implications will take time to emerge, suggesting the need for robust monitoring and mitigation frameworks designed with longevity in mind. Ideally, pre-signing approval and assessment processes would lay the groundwork for future action by both trading partners, either jointly or separately (though preferably both). To this end, as well as developing ideas for more robust substantive provisions on human rights, policymakers should consider the institutional arrangements required – whether pursuant to the trade agreement or by complementary processes – to ensure that human rights-related risks identified during the planning stages are properly and proactively followed up, that emerging risks are tackled in a timely fashion, and that there are opportunities for meaningful stakeholder contributions to these processes. ■

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## WHAT NEEDS TO HAPPEN

— **Trade policymakers can use human rights impact assessment to screen proposed trade treaties for human rights-related risks and to identify possible ways of mitigating those risks, whether through the terms of the agreement itself, domestic law reform or flanking measures.**

— **Building more opportunities for stakeholder consultations can enable perspectives on trade to be highlighted that are not available from other forms of assessment.**

— **Assessment is complicated, however, by methodological challenges and the difficulties of forecasting a trade agreement's future impacts. Policymakers need to be realistic about the risks that can be anticipated, and the extent to which many of those identified can be addressed upfront in trade agreements' terms.**

— **These inherent limitations may be overcome to some extent by better ongoing monitoring. Future trade agreements should include more robust human rights risk monitoring and mitigation frameworks, designed with longevity in mind.**

# TACKLE THE 'SPLINTERNET'

*by Marjorie Buchser  
and Joyce Hakmeh*

**Competing governance visions are impairing efforts to regulate the digital space. To limit the spread of repressive models, policymakers in the West and elsewhere need to ensure the benefits of an open and well-run system are more widely communicated.**

**THE DEVELOPMENT OF** governance in a wide range of digital spheres – from cyberspace to internet infrastructure to emerging technologies such as artificial intelligence (AI) – is failing to match rapid advances in technical capabilities or the rise in security threats. This is leaving serious regulatory gaps, which means that instruments and mechanisms essential for protecting privacy and data, tackling cybercrime or establishing common ethical standards for AI, among many other imperatives, remain largely inadequate.

A starting point for effective policy formation is to recognize the essential complexity of the digital landscape, and the consequent importance of creating a ‘common language’ for multiple stakeholders (including under-represented actors such as smaller and/or developing countries, civil society and not-for-profit organizations). The world’s evolving technological infrastructure is not a monolithic creation. In practice, it encompasses a highly diverse mix of elements – so-called ‘high-tech domains’,<sup>[1]</sup> hardware, systems, algorithms, protocols and standards – designed by a plethora of private companies, public bodies and non-profit organizations.<sup>[2]</sup> Varying cultural, economic and political assumptions have shaped where and which technologies have been deployed so far, and how they have been implemented.

Perhaps the most notable trend is the proliferation of techno-national regimes and private-sector policy initiatives, reflecting often-incompatible doctrines in respect of privacy, openness, inclusion and state control. Beyond governments, the interests and ambitions of prominent multinationals (notably the so-called ‘GAFAM’ tech giants in the West, and their ‘BATX’ counterparts in China)<sup>[3]</sup> are significant factors feeding into this debate.

## Cyberspace and AI – two case studies

Two particular case studies highlight the essential challenges that this evolving – and, in some respects, still largely unformed – policy landscape presents. The first relates to cyberspace. Since 1998, Russia has established itself as a strong voice in the cyberspace governance debate – calling for a better understanding, at the UN level, of ICT developments and their impact on international security. The country’s efforts were a precursor to the establishment in 2004 of a series of UN Groups of Governmental Experts (GGEs), aimed at strengthening the security of global information and telecommunications systems. These groups initially succeeded in developing common rules, norms and principles around some key issues. For example, the 2013 GGE meeting recognized that international law applies to the digital space and that its enforcement is essential for a secure, peaceful and accessible ICT environment.

However, the GGE process stalled in 2017, primarily due to fundamental disagreements between countries on the right to self-defence and on the applicability of international humanitarian law to cyber conflicts. The breakdown in talks reflected, in particular, the divide between two principal techno-ideological blocs: one, led by the US, the EU and like-minded states, advocating a global and open approach to the digital space; the other, led mainly by Russia and China, emphasizing a sovereignty-and-control model.

The divide was arguably entrenched in December 2018, with the passage of two resolutions at the UN General Assembly. A resolution sponsored by Russia created a working group to identify *new* norms and look into establishing regular institutional dialogue. At the same time,

a US-sponsored resolution established a GGE tasked, in part, with identifying ways to promote compliance with *existing* cyber norms. Each resolution was in line with its respective promoter’s stance on cyberspace. While some observers considered these resolutions potentially complementary, others saw in them competing campaigns to cement a preferred model as the global norm. Outside the UN, there have also been dozens of multilateral and bilateral accords with similar objectives, led by diverse stakeholders.<sup>[4]</sup>

## China has by far the most ambitious programme. In 2017, its government released a three-step strategy for achieving global dominance in AI by 2030.

The second case study concerns AI. Emerging policy in this sector suffers from an absence of global standards and a proliferation of proposed regulatory models. The potential ability of AI to deliver unprecedented capabilities in so many areas of human activity – from automation and language applications to warfare – means that it has become an area of intense rivalry between governments seeking technical and ideological leadership of this field.

China has by far the most ambitious programme. In 2017, its government released a three-step strategy for achieving global dominance in

AI by 2030. Beijing aims to create an AI industry worth about RMB 1 trillion (\$150 billion)<sup>[5]</sup> and is pushing for greater use of AI in areas ranging from military applications to the development of smart cities. Elsewhere, the US administration has issued an executive order on ‘maintaining American leadership on AI’. On the other side of the Atlantic, at least 15 European countries (including France, Germany and the UK) have set up national AI plans. Although these strategies are essential for the development of policy infrastructure, they are country-specific and offer little in terms of global coordination. Ominously, greater inclusion and cooperation are scarcely mentioned, and remain the least prioritized policy areas.<sup>[6]</sup>

Competing multilateral frameworks on AI have also emerged. In April 2019, the European Commission published its ethics guidelines for trustworthy AI. Ministers from Nordic countries<sup>[7]</sup> recently issued their own declaration on collaboration in ‘AI in the Nordic-Baltic region’. And leaders of the G7 have committed to the ‘Charlevoix Common Vision for the Future of Artificial Intelligence’, which includes 12 guiding principles to ensure ‘human-centric AI’. More recently, OECD member countries adopted a set of joint recommendations on AI. While nations outside the OECD were welcomed into the coalition – with Argentina, Brazil and Colombia adhering to the OECD’s newly established principles – China, India and Russia have yet to join the discussion. Despite their global aspirations, these emerging groups remain largely G7-led or EU-centric, and again highlight the divide between parallel models.

### **The importance of ‘swing states’**

No clear winner has emerged from among the competing visions for cyberspace and AI governance,

nor indeed from the similar contests for doctrinal control in other digital domains. Concerns are rising that a so-called ‘splinternet’ may be inevitable – in which the internet fragments into separate open and closed spheres and cyber governance is similarly divided.

Each ideological camp is trying to build a critical mass of support by recruiting undecided states to its cause. Often referred to as ‘swing states’, the targets of these overtures are still in the process of developing their digital infrastructure and determining which regulatory and ethical frameworks they will apply. Yet the policy choices made by these countries could have a major influence on the direction of international digital governance in the future.

## **The lack of standards and enforcement mechanisms has created instability and increased vulnerabilities in democratic systems.**

India offers a case in point. For now, the country seems to have chosen a versatile approach, engaging with actors on various sides of the policy debate, depending on the technology governance domain. On the one hand, its draft Personal Data Protection Bill mirrors principles in the EU’s General Data Protection Regulation (GDPR), suggesting a potential preference for the Western approach to data security. However,

in 2018, India was the leading country in terms of internet shutdowns, with over 100 reported incidents.<sup>[8]</sup> India has also chosen to collaborate outside the principal ideological blocs, as evidenced by an AI partnership it has entered into with the UAE. At the UN level, India has taken positions that support both blocs, although more often favouring the sovereignty-and-control approach.

### **Principles for rule-making**

Sovereign nations have asserted aspirations for technological dominance with little heed to the cross-border implications of their policies. This drift towards a digital infrastructure fragmented by national regulation has potentially far-reaching societal and political consequences – and implies an urgent need for coordinated rule-making at the international level.

The lack of standards and enforcement mechanisms has created instability and increased vulnerabilities in democratic systems. In recent years, liberal democracies have been targeted by malevolent intrusions in their election systems and media sectors, and their critical infrastructure has come under increased threat. If Western nations cannot align around, and enforce, a normative framework that seeks to preserve individual privacy, openness and accountability through regulation, a growing number of governments may be drawn towards repressive forms of governance.

To mitigate those risks, efforts to negotiate a rules-based international order for the digital space should keep several guiding principles in mind. One is the importance of developing joint standards, as well as the need for consistent messaging towards the emerging cohort of engaged ‘swing states’. Another is the need for persistence in ensuring that the political, civic and economic benefits associated with a more open and well-regulated digital sphere are made

clear to governments and citizens everywhere. Countries advocating an open, free and secure model should take the lead in embracing and promoting a common affirmative model – one that draws on human rights principles (such as the rights to freedom of opinion, freedom of expression and privacy) and expands their applications to the digital space.

Specific rules on cyberspace and technology use need to include pragmatic policy ideas and models of implementation. As this regulatory corpus develops, rules should be adapted to reflect informed consideration of economic and social priorities and attitudes, and to keep pace with what is possible technologically.[9]■

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#### WHAT NEEDS TO HAPPEN

**— Demystifying the salient issues, consistent messaging and the creation of a common discourse are key to advancing a well-informed debate on global digital governance.**

**— The benefits associated with open and well-regulated digital governance should be clearly presented to all stakeholders. For example, the link between sustainable development, respect for human rights and a secure, free and open internet should take priority in the debate with developing countries.**

**— International norms need to be updated and reinterpreted to assert the primacy of non-harmful applications of technologies and digital interactions.**

**— This process should follow a multi-stakeholder approach to include under-represented actors, such as developing countries and civil society, and should adopt a gender-balanced approach.**

**— The design of rules, standards and norms needs to take into account the essentially transnational nature of digital technologies. Rules, standards and norms need to be applicable consistently across jurisdictions.**

**— Developing countries should be supported in building their digital infrastructure, and in increasing the capacity of governments and citizens to make informed policy decisions on technology.**

# INCREASE CLIMATE AMBITION BY MAKING POLICY MORE INCLUSIVE

*by Antony Froggatt  
and Catherine Hampton*

Climate action within the UN framework is inadequate for meeting internationally agreed mitigation targets. Efforts to hold countries to account and boost ambition must mobilize a wider range of actors.

**THE EXISTING RULES** of engagement within the international climate framework – the UN Framework Convention on Climate Change (UNFCCC) – are proving inadequate for delivering the emissions reductions needed, and at the pace necessary, to meet recognized climate objectives. The 2015 Paris Agreement established national adaptation and mitigation plans, or Nationally Determined Contributions (NDCs), in which countries committed to decarbonize their economies over the coming decades. While procedural elements of this framework are legally binding, the crucial NDCs are voluntary. Working within this essentially constrained rules-based order in climate policy, and given countries’ reluctance to date to translate targets into structural reforms, what can be done to uphold NDCs and raise future climate ambition? Part of the answer is to engage more actors and mobilize support more creatively.

Four measures in particular must be taken if the UNFCCC system is to meet the challenge of climate change.

### **1. Persuade countries to adopt more ambitious targets**

The first is for countries to present more ambitious mitigation plans, so that deeper emissions cuts and climate-smart technologies can be initiated within achievable time frames. To increase action, the UN secretary-general has called for a climate summit in September 2019. Capitalizing on this opportunity, a small group of climate-smart developing and developed countries should convene to draft a resolution on increasing NDC ambition to levels consistent with limiting global warming to 1.5°C above pre-industrial levels.

Maintaining NDC ambition will require stronger monitoring of national commitments. The summit could therefore also be used to create an NDC tracking mechanism with an

integrated, closed-door process of peer review between countries – not a rules-based system *per se*, but a step towards greater accountability.

Efforts to make NDCs more ambitious will also require subnational political support and sustained policy momentum from non-state actors. The Talanoa Dialogue, established in 2018, provides a platform for parties to the UNFCCC process (i.e. national governments) and non-parties alike to convene and discuss challenges. Local governments, cities, businesses and NGOs – which often have practical experience of developing and implementing climate mitigation and adaptation measures – can showcase examples of low-carbon innovation and policy change, potentially encouraging national governments to commit to bolder action. There remains, however, a need for subnational governments and non-state actors to go beyond the sharing of experiences and best practice.

### **2. Elevate the role of local governments**

The current arrangements for non-parties in the UNFCCC framework are set to expire in 2020. This provides an opportunity to shape the future framework: strengthening and elevating the positions of sub-state actors in both national and international processes will be key to increasing NDC ambition.<sup>[1]</sup> One way to achieve this could be by defining their roles in the Global Stock Take within the Katowice ‘rulebook’, and by creating ‘national stocktake’ moments that formally include their policy actions in climate accounting.<sup>[2]</sup>

A key rationale for empowering subnational governments is that they are more connected with people on the ground, see the effects of climate change more acutely, and are able to implement change more rapidly. For example, in Shenzhen, concerns over air pollution spurred the Chinese city

to convert its 16,000 buses to electric power; plans are now under way to require the same of its 22,000 taxis.<sup>[3]</sup>

## **Efforts to make NDCs more ambitious will require subnational political support and sustained policy momentum from non-state actors.**

Can such local initiatives be scaled up and coordinated internationally? Climate-focused international networks of sub-state bodies – such as the C40 group of cities and the Global Covenant of Mayors for Climate and Energy – already exist. They now need to be given a more substantial and legitimate role in shaping global targets, via robust consultative processes that feed into national strategy and international ambition.

### **3. Involve business, finance and civil society**

The third tactic will be to make the climate response architecture itself more robust. Non-state actors from business, finance and civil society could use the global climate policy networks that link them – such as the Alliance of CEO Climate Leaders, the Climate Action 100+, the Climate Action Network, etc. – to set up industry-specific charters on climate action, as has occurred within the fashion industry.<sup>[4]</sup> These groups have the collective power to make

a global difference: businesses can promote climate-smart innovations within their supply chains; investors can align their portfolios around climate-related physical, transition and litigation risks; and civil society can help to establish system-wide key performance indicators across multiple sectors and geographies.

Elevating such activities within existing processes will require, in turn, a stronger accountability mechanism for climate commitments.<sup>[5]</sup> Building on the growing capacity to track non-state action, UNFCCC parties and the UNFCCC secretariat should work to ensure that designated High-Level Champions are able to deliver on their mandate to expand climate action. This will likely require increasing the use of formal and informal ‘friends of the Champions’ outside the UN system, and better integrating the work of the secretariat’s support unit with the broader climate action community.

#### 4. Widen societal engagement

The three short-term strategies mentioned above, if successfully implemented, promise to improve the climate governance framework and create new pathways for greater ambition. However, the fact that NDCs are voluntary means that countries face few consequences for non-compliance with targets. In the long term, therefore, adherence to climate ‘rules’ – constrained as these currently are, in a formal sense – must ultimately come via a fourth way: sustained pressure by citizens on national governments.

In response to growing confidence in climate science, the risks of climate change are increasingly a major concern to the public. Recent analysis by the Pew Research Center shows that climate change is considered the top threat in 50 per cent of surveyed countries.<sup>[6]</sup> Growing segments of society, perceiving inaction or insufficient action on the part of governments,

are turning to awareness-raising and non-violent civil disobedience to raise the profile of climate issues.

Two recent examples in 2019 were the School Climate Strikes, in which more than 1.6 million schoolchildren in over 300 cities participated on a single day;<sup>[7]</sup> and the Extinction Rebellion movement. In the latter case, in the UK the protesters’ demands were not only for the government to commit to extremely rapid emissions reductions (with net zero carbon by 2025), but for the establishment of a new national-level governance mechanism in the form of a people’s assembly.

## Adherence to climate ‘rules’ must ultimately come via a fourth way: sustained pressure by citizens on national governments.

A precedent for this sort of body already exists in Ireland, where a citizens’ assembly was launched in 2017. The assembly’s conclusions, published in 2018,<sup>[8]</sup> showed 97 per cent of its members recommending that climate change be at the centre of policymaking in Ireland.<sup>[9, 10]</sup> Similar mechanisms, if enacted, in other countries could enable public frustration over climate action to be captured across jurisdictions, potentially translating into a stronger evidence base for more ambitious national strategies. ■

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## WHAT NEEDS TO HAPPEN

— **National governments need to commit to more ambitious mitigation and adaptation targets, within shorter time frames.**

— **To help achieve this, the 2019 UN climate summit could establish a tracking mechanism for national climate commitments with a closed-door process of peer review between countries.**

— **Ultimately, countries cannot be forced to cut emissions and raise targets – but increasing pressure could help, meaning the UNFCCC process needs to do more to leverage local government, business, finance and civil society.**

— **Countries could undertake bottom-up assessments to include local authorities in revising climate targets, given such entities' on-the-ground practical knowledge.**

— **Businesses could be encouraged to set up industry-specific charters on climate action (e.g. as seen in the fashion industry). This can help to promote climate-smart innovation.**

— **Government ambition needs to reflect growing public concern over climate change and enable greater citizen engagement.**

# TARGET AGRICULTURAL SUPPLY CHAINS TO TACKLE DEFORESTATION

*by Duncan Brack*

**An international framework on trade in timber would help to reduce illegal logging and combat climate change. It would be even more effective if also adapted to cover trade in agricultural commodities.**

**EVER SINCE THE** collapse of the attempt to negotiate a global agreement on forests at the UN Conference on Environment and Development (the ‘Earth Summit’) in 1992, there has been, in effect, no rules-based international order relating to forests. Recent developments, however, hold out the prospect – faint though it may be – of the emergence of an international framework promoting forest governance and law enforcement by regulating trade in timber and agricultural commodities associated with deforestation.

There is no doubt that this is an urgent challenge. Over the last 60 years, the world has lost almost 10 per cent of its remaining forests.<sup>[1]</sup> Although, overall, deforestation has slowed or reversed in temperate and boreal areas, it remains unsustainably high in tropical forests. Continued deforestation contributes to climate change (accounting for 12–14 per cent of global greenhouse gas emissions), disrupts local temperatures and water cycles, destroys habitats and wildlife (forests provide habitats for two-thirds of land-based plants and animals), and threatens the lives of forest communities and indigenous peoples. More than 1.6 billion people – about a fifth of the global population – depend on forests for food, medicines and fuel, as well as their jobs and livelihoods.<sup>[2]</sup>

Efforts to date to create a legally binding global framework for the protection of forests have foundered mainly on developing countries’ insistence on retaining sovereignty over their ability to exploit their own natural resources; not an unreasonable position, especially given that the arguments for such a treaty were mainly advanced by industrialized nations, which had deforested their own land centuries before.

Instead, a patchwork of multilateral agreements, UN and regional strategies, action plans, declarations and bilateral arrangements have attempted

to address different aspects of forest policy, such as climate change, biodiversity or illegal logging, in most cases without significant impact. Forest targets set recently – such as the aim of ending deforestation by 2020 expressed in the UN Sustainable Development Goals and the UN’s Global Forest Goals – will be missed.

But some progress in addressing deforestation has been made in recent years in one area: improvements in forest governance through tackling international trade in illegally logged timber – a major problem for many forest-rich tropical countries. Over the past 20 years or so, producer and consumer countries have increasingly cooperated to exclude illegal timber from international trade. The US, the EU, Australia, Japan and South Korea have all adopted domestic legislation designed to close their markets to illegal timber products. Under the EU’s Forest Law Enforcement, Governance and Trade (FLEGT) initiative, a series of bilateral Voluntary Partnership Agreements (VPAs) have been negotiated between the EU and timber-exporting countries. These agreements have established legality assurance and licensing systems designed to ensure that only timber products verified as legally produced can be exported to the EU (and, in practice, to other destinations). In turn, FLEGT-licensed products are granted easier access to the EU market than timber from other countries. Australia’s legislation explicitly recognizes FLEGT licences, potentially beginning to lay the foundations for an international regime.

Such initiatives remain at an early stage. Only one producer country – Indonesia – has so far introduced a full export licensing system. Nonetheless, the evidence suggests that it is now becoming easier to sell Indonesian timber products on the EU market as a consequence – indicating that such policies can be effective.<sup>[3]</sup>

More importantly, even in countries yet to introduce a licensing system, such as Ghana, the process of negotiating and implementing the VPAs has itself triggered significant improvements in forest governance: enhancing the transparency and accountability of forestry administration, as well as recognition of community rights, while creating new mechanisms for exposing corruption along the entire supply chain. This has helped to lead to a measurable decline in illegal logging in a number of countries, including Ghana.<sup>[4]</sup>

**Over the last 60 years, the world has lost almost 10 per cent of its remaining forests.**

To have a greater impact on deforestation, however, policy needs to go further than addressing trade in timber alone. This is because the main global driver of deforestation is not logging for timber but clearance of forests for agriculture. The key point here is that trade patterns for agricultural commodities are similar to those for timber: developing countries export commodities such as palm oil, beef, cocoa and rubber to consumer markets such as the EU, the US, Japan and, increasingly, China and India.<sup>[5]</sup> Interest is therefore growing, particularly in the EU, in adapting the experience of the FLEGT initiative for agricultural trade. This could include requiring businesses selling ‘forest risk commodities’ on the EU market to have in place a system of due diligence, designed to minimize the risk of agricultural products associated with

deforestation (and with other undesirable activities such as human rights abuses or the use of child labour) entering the supply chain. The EU Timber Regulation, introduced under the FLEGT initiative, includes this kind of due diligence approach for illegally logged timber. Discussion is also starting about adapting the bilateral partnership agreement model currently used for timber so that it can be applied to commodities such as cocoa, a major driver of deforestation in West Africa.

All these discussions are taking place against the background of a wider debate on the responsibility of business for environmental harm and human rights abuses associated with corporate operations and supply chains. The debate has been stimulated in part by the adoption of the UN Guiding Principles on Business and Human Rights, agreed in 2011, and subsequent instances of national legislation such as the UK Modern Slavery Act of 2015 and the French *Devoir de Vigilance* law of 2017.

Does this route offer the chance of building a global framework that offers effective protection to forests? There are undoubtedly formidable obstacles. All countries tend to resist external efforts to regulate their right to exploit their natural resources – but the FLEGT approach, based around enforcing the laws of the producer country, places them in control of the standards to be regulated. It also focuses on the root cause of much deforestation: weaknesses in governance and law enforcement. Unlike previous attempts at a binding agreement on forests, this approach uses trade as a lever, conditioning access to consumer markets on products meeting specified standards. It places requirements not just on governments but on the businesses buying and selling the products.

The new European Commission, due to take office towards the end

of this year, will have the opportunity to propose a new Action Plan on Deforestation, building on the experience of the FLEGT initiative and dealing with the EU's impact on forests worldwide. This will be a potentially important moment for forest governance: if it is to tackle deforestation effectively, the Action Plan should include both proposals for regulation to deal with agricultural commodities associated with deforestation that are placed on the EU market and a plan to establish dialogue along the supply chain with major consumer and producer countries, with the aim of developing the beginnings of a global framework.

Until agricultural supply chains are tackled effectively – which must involve action by consumer-country governments and businesses – tropical forests will never be effectively protected. An international initiative focusing on trade in forest risk commodities offers a possible route forward. ■

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#### WHAT NEEDS TO HAPPEN

— **Expand timber legality assurance and export licensing schemes to more producer and consumer countries.**

— **Build on the EU's FLEGT initiative to tackle a broader set of drivers of deforestation, rather than focusing only on illegal timber.**

— **Adapt the bilateral partnership agreement and corporate due diligence approach used in the EU for illegal timber to agricultural commodities associated with deforestation, such as palm oil, soy, beef, cocoa and rubber.**

— **Lobby for ambition in the forthcoming EU Action Plan on Deforestation.**

— **Encourage other consumer countries to adopt a similar approach.**

# **ENGAGE CHINA TO UPHOLD MULTILATERALISM – BUT NOT AT ANY COST**

*by Harriet Moynihan*

Where China's interests align with those of the international community, there are opportunities for the country's influence and economic power to strengthen the rules-based international order. Where they do not, states that traditionally support that order should join together to push back.

**CHINA'S ADHERENCE TO** the rules-based international system is selective, prioritizing certain rules in favour of others. States supportive of that 'system' – or, as some argue, systems<sup>[1]</sup> – should identify areas of mutual strategic interest so that they can draw China further into the global rules-based order and leverage China as a constructive player that potentially also contributes to improvements in such areas. This is particularly apposite at a time when the US is in retreat from multilateralism and Russia seems bent on disrupting the rules-based international order.

### Supportive player

There are many reasons for actively engaging with China on mutual areas of interest. China is a committed multilateralist in many areas, recognizing that often international cooperation and frameworks hold the key to its domestic problems, for example in the fields of environmental sustainability and financial regulation. China's economic power is valuable in upholding international institutions: China is the UN's third-largest donor (after the US and Japan) at a time when the UN is facing budgetary shortfalls. China is also the second-highest contributor to the UN peacekeeping budget, and the largest contributor of peacekeeping forces among the five permanent members of the UN Security Council.

China also has a valuable role to play in the settlement of international disputes over trade and investment. China is a big supporter of the World Trade Organization (WTO)'s dispute settlement mechanism, and one of its most active participants;<sup>[2]</sup> China is currently playing an active role in negotiations to save the WTO's appellate mechanism from folding in the wake of the US's refusal to nominate new judges. The last 15 years have also seen a major shift in Chinese attitudes to investment arbitration, from a general suspicion and limitation of arbitration rights to broad acceptance and incorporation of such

rights in China's trade and investment treaties. China is actively engaged in multilateral negotiations through the UN Commission on International Trade Law (UNCITRAL) on reforms to investor–state dispute settlement.

China has shown leadership on global climate change diplomacy, urging nations to remain committed to the Paris Agreement in the wake of the US decision to pull out, and has been an important interlocutor with the UK and the EU on these issues. As a strong supporter of the Paris Agreement, but also as the world's top emitter of carbon dioxide, China has a crucial role to play in pushing forward implementation of the Paris targets. Despite its high emissions, China remains one of the few major economies on track to meet its targets,<sup>[3]</sup> giving it greater leverage to peer review other parties' efforts.

A recent report by the UK parliament's Foreign Affairs Committee (FAC), on China and the rules-based international order, noted that where a body of trust and goodwill is developed with China, there is the possibility of discovering interests that coincide and the ability to work together on issues mutually regarded as of global importance. The report refers to a number of success stories from UK partnership with China in multilateral forums, including in counterproliferation and global health.<sup>[4]</sup>

### Developing areas of global governance

As well as working with the current system, China is increasingly involved in the shaping of newer areas of international law – whether it be submissions to the International Tribunal for the Law of the Sea (ITLOS) on procedural rules for the emerging deep-sea mining regime or pitching for a greater role in Arctic governance.<sup>[5]</sup> This enthusiasm should be harnessed to promote the international rule of law, but at the same time there needs

to be recognition of the strategic goals that drive China's engagement. China's interest in the Arctic, while including the desire to protect its ecology and environment, is also about access to marine resources, as well as about the Arctic's strategic potential for China's military. China's submissions to ITLOS on the rules of procedure for deep-sea mining are constructive, but also reflect an ambition to secure first-mover advantage when commercial mining eventually takes place. Like other major powers working in this policy area, China's actions are guided by self-interest, but that doesn't mean its goals can't be pursued through multilateral rules.

China is also interested in creating new international structures and instruments that further its strategic aims. For example, with Russia (through the Shanghai Cooperation Organisation) it has proposed an International Code of Conduct for Information Security in the UN.<sup>[6]</sup> China is also pondering an array of options for dispute-resolution mechanisms for its Belt and Road projects, including the possibility of an Asian version of the international Convention on the Settlement of Investment Disputes, which might sit under the auspices of the Asian Infrastructure Investment Bank (AIIB).<sup>[7]</sup>

The creation of new instruments and institutions need not be a threat to the rules-based international order in itself. We have already seen a combination of the creation of parallel complementary regimes alongside the reform of existing institutions, for example in development financing through the AIIB or the New Development Bank (often referred to as the 'BRICS Bank'); these two banks are relatively conventionally structured along the lines of Western-dominated institutions, albeit with greater Chinese control. Based on these examples, selective adaptation seems more likely than a hostile 'Eastphalian' takeover.<sup>[8]</sup>

## Risks

There is, however, a real risk that in certain areas China may promote a rival authoritarian model of governance, assisted by an opportunistic convergence with Russia on issues such as human rights, development and internet governance. In areas where China's core interests clash with those of the rules-based international order, China has shown itself to be unbending, as in its refusal to abide by the July 2016 decision of the Permanent Court of Arbitration in its dispute with the Philippines over the South China Sea.<sup>[9]</sup> China is becoming more assertive at the UN, but while it seeks to project itself there as a responsible emerging global leader, it is promoting a vision that weakens international norms of human rights, transparency and accountability,<sup>[10]</sup> while also carrying out practices domestically that raise serious human rights concerns (not least the detention of hundreds of thousands of Uighurs in re-education camps in Xinjiang).<sup>[11]</sup> China's increased dominance geographically and geopolitically through its Belt and Road infrastructure projects carries with it a number of social and economic risks, including smaller states becoming trapped in unsustainable financial debts to China.

But at a recent Chatham House conference on Asia and international law, participants highlighted the limitations on how far China can shape an alternative governance model.<sup>[12]</sup> China currently lacks soft power, cultural power and language power, all of which are needed in order to embed an alternative model abroad. China also currently lacks capacity and confidence to build coalitions with other states in the UN. Where it has tried to get buy-in from the international community for its new institutions, such as the China International Commercial Court (CICC) announced in July 2018, there has been scepticism about the

standards to be applied.<sup>[13]</sup> Unless the court can demonstrate sufficient due process, international parties are likely to prefer other centres with a strong reputation for upholding the rule of law, such as those in London, Dubai and Singapore.

Where China does promote its own governance model at the expense of the rules-based international order, states are starting to push back, often in concert. EU member states so far have adopted a joined-up approach to the Belt and Road Initiative. With the exception of Italy, they have refused to sign a Memorandum of Understanding on participation unless China provides much greater transparency on its compliance with international standards. The EU also recently presented a coordinated response to China on the situation in Xinjiang.<sup>[14]</sup> Similarly, members of the so-called 'Five Eyes' intelligence-sharing alliance (comprising Australia, Canada, New Zealand, the UK and the US) have acted together in relation to certain incidents of cyber interference attributed to China.<sup>[15]</sup>

## Cooperation with China should lead to outcomes that are backed up by international standards and transparency.

There are also signs of pushback from smaller states closer to home in relation to challenges to national sovereignty, debt diplomacy and financial viability arising from Belt and Road projects. The Sri Lankan government recently reversed the award of a \$300 million housing deal to China, instead

opting for a joint venture with an Indian company. China has been downscaling its investments as a way to counter some of the backlash it has received: the most recent Belt and Road summit put forward a more modest set of aspirations. This suggests that there is some scope for states to stand up to China and use leverage to get better deals.

Many international institutions have been Western-dominated for years;<sup>[16]</sup> China, together with many emerging and middle powers, has felt for some time that the international architecture does not reflect the world we live in. Given that context, states that champion the rules-based international order should acknowledge China's desire to update the international order to reflect greater multipolarity, globalization and technological change, while being clear-eyed about their engagement with China. This involves investing in a proper understanding of China and how it works.<sup>[17]</sup> Where possible, cooperation with China should lead to outcomes that are backed up by international standards and transparency. The above-mentioned FAC report cites evidence that the UK's support, and that of other developed countries, had a positive impact in shaping the governance and standards of the AIIB.<sup>[18]</sup> China has brought in international experts to advise on disputes before the CIIC, which may reassure would-be litigants.

China's relationship with the rules-based international order needs to be assessed pragmatically and dynamically. China can be a valuable partner in many areas where its objectives are closely aligned with those of the international community – from trade to climate change to peacekeeping. But where the country's core interests are at odds with those of the wider international community, an increasingly confident China will strongly resist pressure, including on the South China Sea and human rights. In these areas, states supportive of international law can most powerfully

push back through alliances and by ensuring that their own core values are not compromised in the interests of economic benefits. ■

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#### WHAT NEEDS TO HAPPEN

**— China's rising power and selective commitment to multilateralism make it a potentially influential ally in modernizing international governance.**

**— China is increasingly involved in shaping newer areas of international law. This enthusiasm could be harnessed in the service of institutional development and reform.**

**— Other states should identify areas of mutual strategic interest where China may offer a constructive role, including dispute settlement, health and climate change.**

**— However, engagement must not ignore the strategic calculations that drive China's agenda, or its poor record on civil and political rights, transparency and accountability.**

**— Cooperation with China should lead to outcomes that are backed up by international standards and transparency.**

**— Where China's actions undermine the rules-based international order, coordinated action by states supportive of that order is likely to be more effective than acting individually.**

# DON'T OVERSTRETCH

*by Hans Kundnani*

**How the European Union took the idea of a 'rules-based order' too far – and how it can regain legitimacy.**

**THE EUROPEAN UNION** is the ultimate ‘rules-based order’. Since the end of the Cold War, the world has become increasingly integrated, in a process that Dani Rodrik has called ‘hyper-globalization’ to distinguish this from the more moderate form of globalization that occurred during the Cold War period. But Europe, which was already more integrated than the rest of the world, has gone even further in removing barriers to the internal movement of capital, goods and people. The consequence of this has been the need for a more developed system of rules to govern this deep integration.

For much of this period, many Europeans – and also many outside Europe who had a liberal view of international politics – believed that the EU was a kind of blueprint for global governance. They believed that the rest of the world would simply catch up with the enlightened and apparently successful approach that Europeans had taken. In short, Europeans were showing the way forward for the world.

However, after a decade of crisis, it now seems as if Europe may have overreached. In particular with the creation of the single currency, European rules increasingly extended into areas of life in which member states had previously had relative autonomy. Since the beginning of the euro crisis in 2010, there has been a backlash against EU rules, which has raised the difficult question of whether international rule-making can go too far.

What makes international rules problematic is that they depoliticize – that is, they take the policy areas they cover out of the realm of democratic contestation. This can be a good thing when applied to policy areas that we think should be non-negotiable, like human rights. But since the 1980s, and especially since the end of the Cold War, international rules have increasingly applied to areas of policy

that not only *should* be contested but that should be at the *centre of contestation* – in particular, economic policy areas that have distributional consequences (that is, they create winners and losers).

## With the creation of the single currency, European rules increasingly extended into areas of life in which member states had previously had relative autonomy.

The EU’s rules constrain its member states even more than global rules – for example, those of the World Trade Organization (WTO) – or rules associated with other regional integration projects constrain nation states elsewhere in the world. In particular, the EU’s fiscal rules – created along with the euro – set strict limits on the ability of member states to run budget deficits and accumulate debt. Since the beginning of the euro crisis, these fiscal rules have been further tightened, which in turn has magnified the political backlash against the EU system and fuelled tensions between member states.

In democratic nation states, rules are made through a process that gives them what is sometimes called ‘input legitimacy’. International rule-making, by contrast, is essentially the product of power relations between

states and therefore lacks this specific kind of legitimacy. Supporters of European integration as currently constituted – whom one might term ‘pro-Europeans’ – would argue that EU rules are more like domestic rules than international rules: after all, they are agreed through a process involving democratic institutions such as the European Parliament. But even within the EU, power matters – as notably illustrated by Germany’s prominent (and controversial) role in driving the development of fiscal rules since the beginning of the euro crisis.

In addition, because European integration is meant to be an irreversible process, it is extremely difficult to change or abolish rules that have already been agreed. To do so would be ‘disintegration’ in the sense that powers would be returned to member states. For example, there are good economic and political arguments for abolishing the ‘debt brake’, based on a German model, that EU member states agreed to incorporate into their national constitutions as part of the Fiscal Compact in 2011. But anyone making those arguments is labelled as Eurosceptic or ‘anti-European’.

There is also insufficient differentiation between EU rules. Any decision taken at a European level – even those decisions, such as on the Fiscal Compact, that are outside the EU treaties – becomes part of the EU’s system of rules. To challenge such a decision is therefore to violate the rule of law and therefore the EU’s ‘values’. As Dieter Grimm has shown, legislation that would normally have the status of secondary law in a nation state has constitutional status in EU law and is therefore ‘immunized against political correction’.<sup>[4]</sup>

Though European leaders still often speak of the EU as a model for the rest of the world, the reality is that it now illustrates what other regional integration projects should *avoid* as

much as what they should emulate. Even before the euro crisis, few other regions were thinking of creating a common currency. But they will now think even more carefully about how far to follow Europe down the route of economic integration it has taken – and in particular will be unlikely to introduce EU-style fiscal rules.

The difficult question is where exactly the limits of international rule-making should be set. The European experience in the past decade suggests that rules on economic policy are particularly problematic because of the distributional consequences they have. But European integration focused on economic policy from its beginnings with the European Coal and Steel Community in the 1950s. Moreover, because globalization is to a large extent an economic phenomenon, economic policy is precisely where international rules are needed.

## In order to regain legitimacy, Europe should apply this idea of democracy-enhancing rules to its own approach to integration.

A good place to start in thinking about where to set the limits of international rule-making may be in terms of the objectives of rules. During the early phase of European integration and the more moderate phase of globalization in the 30 years after the end of the Second World War, integration

strengthened nation states – indeed, Alan Milward argued that integration ‘rescued’ the nation state in Europe.<sup>[2]</sup> But since the end of the Cold War, rules at both the global level and a European level have been driven by the maximization of economic efficiency. This has undermined the nation state. As Rodrik has argued, a reprioritization is now needed – rules should be made above all with their impact on democracy in mind.<sup>[3]</sup>

In order to regain legitimacy, Europe should apply this idea of democracy-enhancing rules to its own approach to integration. It should begin by differentiating more clearly between rules that are fundamental to the European project and those about which Europeans can – and should – disagree. The consequence of thinking of rules above all in terms of legitimacy may be that in some policy areas, particularly those with distributive consequences, rules should be abolished and power returned to member states.

‘Pro-Europeans’ should be open to this kind of ‘disintegration’ as a way to help the EU regain legitimacy and thus be sustainable in the medium term. It is also only by successfully recalibrating the balance between rules and democracy that the EU will once again be seen as a model for regional integration projects in the rest of the world, and for global governance more generally. ■

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### WHAT NEEDS TO HAPPEN

— **The EU offers a cautionary tale on the limits of regional integration, with its status as a model for international governance eroded by a decade of crisis.**

— **In certain areas, notably fiscal policy, democratically contested decision-making has been subordinated to ‘depoliticized’ supranational rules. The crisis over the single currency exemplifies the tensions between autonomy and integration.**

— **To restore its legitimacy, the EU needs to recalibrate the balance between rules and democracy. Policymakers should ensure that laws are made with their impact on democracy in mind.**

— **Politicians and policymakers should differentiate more clearly between rules that are fundamental to the European project and those about which Europeans can – and should – disagree.**

— **In some policy areas, this could include returning powers to member states. Though politically challenging, this will require ‘pro-Europeans’ to tolerate some ‘disintegration’ as the price of ensuring the future stability of the EU.**

# RAISE THE BAR

*by Thomas Raines*

**The European Union should focus on using its regulatory power and economic clout to export high standards to the rest of the world.**

**A DECADE OF** crises has generated plenty of pessimism about the European Union. It is certainly true that the EU faces structural challenges and political divisions over reforming the euro and migration policy, as well as disputes over the rule of law in some member states. But these problems should not obscure the union's strengths. The EU is a trade, regulation and standard-setting superpower, and even while international cooperation stalls in some areas, it can help to lead the world in regulating markets on crucial questions of privacy, competition, technology and the environment.

## Brexit has been a powerful demonstration of the EU's trade and regulatory power.

In 2012 Anu Bradford, a professor at Columbia Law School, christened the EU's ability to export its regulations around the world as the 'Brussels effect', borrowing from a term used to describe the phenomenon in the US in which Californian regulations – often more stringent than in the rest of the country – are adopted in other US states due to California's relative economic heft. The EU's size means it can replicate this in some policy domains at a global level: in effect, achieving a form of 'unilateral regulatory globalization' through market mechanisms, and ideally leading to raised and harmonized global standards.

In a number of areas, the EU has shown its international regulatory clout. EU competition policy has constrained the behaviour of multinationals or blocked

corporate mergers, sometimes even when the companies involved are not headquartered in Europe. The EU's chemical regulation, REACH,<sup>[1]</sup> vies with its US equivalent to set the terms of global chemical use. Through its General Data Protection Regulation (GDPR), the EU has taken the lead in trying to protect personal privacy amid the rise of the data-driven economy.

The EU can do this largely because of its size and competence. Non-compliance means losing out on access to Europe's \$20 trillion market. In many cases, it does not make sense for companies to make products to varying standards, rather than ensure all adhere to the highest one. So where EU standards are more stringent than – and not incompatible with – those in other key markets, particularly the US, they can become the de facto rule.

Brexit has been a powerful demonstration of the EU's trade and regulatory power. In many areas, from electrical products to pharmaceuticals, it will make little sense for the UK to try to diverge from rules made in Brussels. Even though it is a major economy, the UK is the considerably smaller side in the negotiations, and the EU is the destination for more than 40 per cent of its exports. The 'common rulebook' that formed part of the UK government's proposed future relationship was an admission of this: rather than being 'common' rules, the commitment was a euphemistic expression of the need for the UK to follow rules set by the EU to ease trade, while losing the ability to directly shape them. The Brexit process has highlighted the EU's position as Europe's regulatory hegemon: the mass of laws, rules and standards around which the rest of non-EU Europe, and much of the world, orbits. Britain has burned a lot of political fuel seeking escape velocity, with little economic opportunity in sight.

The process has also shown the lengths to which the EU will go to defend the integrity of the market it has built. That integrity brings power. The relative importance of this power is increased in an era when multilateralism is under strain. The EU's regulatory power is not dependent upon international consensus-building or functioning multilateral institutions. It is not the result of an international negotiation dependent on reasonable or compliant partners who share a broadly similar world view. It is a unilateral power of the EU, rooted in market size and regulatory competence, and so is less affected by, say, a rogue American president.

As Bradford originally observed, the 'Brussels effect' has not always been an intentional phenomenon. The EU's approach to regulation is largely driven by its own politics and policy preferences, filtered through the complex process of law-making at the European level, rather than generally being a conscious effort to regulate the world. However, in some instances there has been a greater awareness of the EU's capacity to set global standards in areas of emerging law.

The EU's data privacy law, GDPR, is a good example. The regulation governs how the personal data of Europeans are collected, used, moved and stored, but its broad scope gives it extraterritorial effect.<sup>[2]</sup> It puts citizens' privacy at the heart of data use, placing much clearer restrictions on the collection, storage and use of personal data. While GDPR initially attracted criticism for compliance costs and ambiguity in implementation, various revelations about the behaviour of big technology companies<sup>[3]</sup> have served to validate the intention and spirit of the regulation.

The EU could be more active in seeking to export regulation internationally, designing standards with the intention of promoting global goods and using its trading power to supplement such

efforts. In this, the EU is likely to have a greater impact through its regulatory power than through its generally weak foreign and defence policy, which is hampered by substantial differences of attitude, capability and will across the continent, and by the fact that decisions are largely intergovernmental and based on unanimity.

## Overall, the EU has a good record of pioneering pro-consumer regulation and challenging corporate power unilaterally.

For example, the EU could do more to look at supply chain ethics and transparency. Building on member states' efforts, such as the UK's Modern Slavery Act, which obliges larger companies to publish annual statements explaining the efforts they have taken to address risks of slavery and trafficking, the EU could work with the private sector to raise standards of transparency, labour rights and corporate responsibility in global supply chains, as the European Parliament has called for.<sup>[4]</sup> It could take a stronger approach to tax avoidance, adding robustness to the tax haven blacklisting initiative that began in December 2017. On the environment, the EU has already been a leader, for example by pioneering emissions standards and trading, but the scale of the task to combat climate change and biodiversity loss remains vast. The EU could push further on electrical standards, plastics

use and trying to curb the effects of European consumption on the developing world. It could more aggressively use trade policy, and even sanctions, to try to raise climate ambition on the part of major emitter countries. It could also build on efforts to place ethical and legal constraints on the use of data by focusing on the regulation of emerging technologies. The EU has already convened a High-Level Expert Group to establish ethical guidelines on artificial intelligence. The European Commission's focus on ensuring competitive markets while robustly protecting citizens' privacy makes it well placed to lead this agenda. And it should always be willing to challenge domestic attitudes and interest groups within Europe when their positions are not rooted in science or evidence.

There are risks of overreach: stifling nascent industries, overburdening companies, or giving competitive advantages to other states or territories. But overall, the EU has a good record of pioneering pro-consumer regulation and challenging corporate power unilaterally, with knock-on effects globally. That agenda will be all the more important if international cooperation and multilateralism become ever more difficult. ■

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### WHAT NEEDS TO HAPPEN

— **As a trade, regulation and standard-setting superpower, the EU can help to lead the world in regulating markets on crucial questions of privacy, competition, technology and the environment.**

— **In many areas, the EU has been successful in exporting its regulation to the rest of the world through the sheer power of its market. It could be more active in seeking to design rules and standards with the intention of promoting global goods.**

— **An expanded agenda could include: supply chain ethics and transparency, further regulation to tackle tax avoidance, raising ambition on environmental protection and emissions reduction, and developing regulation for emerging technologies.**

# ADDRESS RUSSIAN RULE- BREAKING

*by James Nixey*

**What can the West do to keep Russia in check, when the country's state policy is fundamentally at odds with the rules-based international order and when the Kremlin has every intention of continuing to act as a disruptive force?**

**THE KREMLIN FAMOUSLY** demands ‘respect’ from the world’s leading powers and international organizations.<sup>[1]</sup> But it shows little respect itself for the rules-based international order. Indeed, it rejects the very notion that such an order exists. Where most Western governments see an imperfect liberal capitalist system – even one in retreat – Moscow’s ruling elites see the slow passing of a hegemonic, US-led world order in which the ‘rules’ are slanted in the West’s favour and Russia’s ‘natural rights’ have been ignored. In this context, the Russian leadership does not consider its interests to lie in following others’ rules. This presents a number of practical challenges for those in the West who nonetheless need to deter or respond to Russian aggression.

## Russia’s developmental prospects are so poor that the country cannot rise within the established rules of the international order.

Russia has been perfectly clear that it wants a different international settlement, one in which no major decisions may be taken without its consent. Seeing itself (despite all evidence to the contrary) as an indispensable world power, Russia pursues a goal in the West that consists of re-achieving the uncoupling of western Europe from eastern and central Europe in order to restore a historic sphere of influence.

This inevitably means that the Kremlin’s ambition is a threat to all those European countries that subscribe to the current order, police it, or aspire to be a part of it. The material extent of that threat can be seen in the 13,000 deaths in Ukraine since the start of the conflict in 2014,<sup>[2]</sup> and in the tens of thousands more casualties in Syria, not to mention the unknown number of victims of covert Russian operations in the UK. All can be interpreted as collateral damage from Moscow expressing its dissatisfaction with how the West thinks the world should be organized. A key point here is the importance of taking the consequences of Russia’s foreign policy positioning seriously, rather than reducing it to a simple negotiable difficulty. Failure to respond appropriately to Moscow’s declared ambitions will mean further assaults on Western societies, populations and democratic institutions.

### The cooperation illusion

The seductive myth that there must be common ground for cooperation with Russia must be rebutted. Whereas the West may be able to cooperate artfully with China to strengthen the rules-based international order when mutual interests align, this will not work with Russia. China profited from the end of the Cold War, Russia lost everything. China wants to use the system to rise up within it. Russia’s leadership, as mentioned, wants a different system altogether.<sup>[3]</sup> Facing structural economic decline, Russia cannot fulfil its supposed great power destiny by any means that are acceptable to the West. The Kremlin has correctly deduced that Russia’s developmental prospects are so poor that the country cannot rise within the established rules of the international order.

In this context, the Kremlin understands ‘cooperation’ simply as a means to extract compromise and concession.

In rare instances where Russia’s interests coincide with those of the West, any mutual gains are entirely context-limited: the confluence of factors cannot be leveraged to achieve cooperation elsewhere. In fact, the reverse mechanism applies, with Moscow exploiting any supposed magnanimity on a particular issue to advance its agenda in other areas. There are ample illustrations of how, when the West weakens or concedes, Moscow entrenches, reinforces tactical gains, and pushes further.

Above all, the search for common interests is of no help to those seeking to deter Russia’s worst excesses. This is because those actions – from military interventions in Ukraine and Syria to digital interference in Western democratic processes – are designed to ensure that Russia’s place at the top table is maintained. They are a fundamental element of state policy.

### Dual options for response

Defence of the West, its societies, institutions and populations, relies now as it long has done on strong but calibrated resistance to Moscow through a mixture of *deterrence by denial* and *deterrence by punishment*. Deterrence by denial means closing off the possibility of easy wins for Russia. This entails a number of actions: investment in stronger financial regulation; political funding for transparency initiatives;<sup>[4]</sup> continued vigilance against Russian malign-influence operations; the observation of cyber hygiene; policies to ensure energy security and protect critical infrastructure (which should include legal systems); and a robust military posture. None of these steps definitively eliminate the Russian threat, but they incrementally diminish the country’s ability to do harm.

Deterrence by punishment requires the West to impose costs and consequences where Russia violates

international rules or norms. There is evidence (where information exists in the public domain) that holding at risk what Vladimir Putin cares about has worked on occasions. Economic sanctions are the most obvious example. While there is debate over the precise extent of their effects – largely from people who dispute the justification for such measures in the first place – their symbolic value as an admonishment should not be understated. If in no other way, the effectiveness of sanctions can be measured by the urgency of the Russian elite’s desire to have them removed.

However, sanctions are insufficient on their own, and in any event are not the only option for responding to Russian actions. Western commercial diplomacy could exploit Russia’s friendly, if unequal, relationship with China to drive a wedge between the two countries. Cautious and appropriate Western engagement with China’s Belt and Road Initiative, which bypasses Russia, could provide a clear example to Russia that the latter’s interests lie in genuine cooperation not isolation.

A more forceful option includes proper enforcement of laws and regulations on responsible media behaviour. These laws, which already exist in most European countries, offer the potential to counter Russian propaganda and disinformation more effectively. Outright bans of RT (formerly ‘Russia Today’) and Sputnik, the Kremlin’s chief information outlets in the West, would likely be counterproductive: not only prompting tit-for-tat retaliation against Western broadcasters but also reflecting poorly on free-speech protections. However, appropriate regulatory penalties could still induce both media organizations to substantially adjust their output and behaviour.<sup>[5]</sup> Regulators could bar Western advertisers from buying space on Russian channels. And *temporary* (but repeated)

removal of broadcasts from the airwaves – as and when Russian news reporting breaches official standards of impartiality – would have some impact as a punishment and could boost conformity. This should not be confused with ‘winning’ in the information warfare space, where Russia’s authoritarian machinery gives it the edge. However, the West doesn’t have to let Russia win quite so easily.

### When they go low ...

When resisting Russia, it is critical that the West not depart from its values to do so, since this would be self-defeating. One positive model is the package of legislation recently passed in Australia against subversive Chinese activity. Far from representing a departure from Western norms and values, many of the measures are aimed at increasing transparency.<sup>[6]</sup>

## Dealing with Russia requires persistence, a willingness to play the long game, and an appetite for bearing short-term economic and diplomatic retaliation.

Education is also a fundamental part of the long-term answer. Threat perception is critical: populations need to understand that their countries have a Russia problem – or, more accurately, a problem with Russia’s leadership. As ever, we can learn

from the front-line states. Poland has ensured that its domestic Russia expertise has not faded away, unlike in so many other Western countries where capacity and language skills have been eroded. In the Nordic states, children are schooled to identify disinformation (fake news) from an early age.<sup>[7]</sup>

Above all, Western policymakers must be clear-sighted in recognizing that dealing with Russia requires persistence, a willingness to play the long game, and an appetite for bearing short-term economic and diplomatic retaliation and the domestic political fallout from it. It also requires recognition that a firm response cannot and should not be reliant on full Western unity, which is unrealistic. This, too, underlines the need for sturdier EU diplomacy, not always a strong point under the current High Representative. While the immediate impacts of resisting Russia’s ambition are likely to be uncomfortable, the long-term consequences – both for Europe and for the rules-based international order as a whole – of *not* doing so would be devastating. ■

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[1] In Russian geopolitical thinking, ‘respect’ is code for a demand that the West continue to respect the borders and rules that defined the USSR until 1991. This covers a further 2 million square miles of land, and an additional 140 million people, compared to modern Russia.

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[3] It should also be remembered that Russia possesses networks and local knowledge in central and eastern Europe that China does not.

[4] ‘Sunlight is the best disinfectant,’ said Louis Brandeis. Brandeis, L. (1914), *Other People’s Money and How the Bankers Use It*.

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## WHAT NEEDS TO HAPPEN

— **The West must recognize that Russia rejects the rules-based international order, and that any apparent ‘cooperation’ is a temporary tactical expedient in the service of the Kremlin’s revisionist agenda.**

— **Defence of Western societies, institutions and populations will continue to rely on strong but calibrated resistance to Moscow, through a mixture of deterrence by denial and deterrence by punishment.**

— **Denial strategies should include financial regulation, funding for transparency initiatives, vigilant cyber hygiene, protection of energy security and critical infrastructure, and a robust military posture.**

— **Punitive deterrence will continue to involve economic sanctions, which have a marked effect on the Russian elite.**

— **Other measures must include enforcement of laws and regulations on responsible media behaviour, in order to limit Russian outlets’ ability to disseminate disinformation.**

# EMBRACE SOFT POWER (BUT RECOGNIZE ITS LIMITS)

*by Champa Patel*

ASEAN's consensus-driven system has enabled diverse states to coexist within a supranational order. But without harder rule-making, the Southeast Asian grouping may struggle to address emerging regional security challenges.

**JOSEPH NYE**, when writing his seminal work on soft power, defined it as the ability of a country to persuade others to do what it wants without force or coercion. The three pillars of his conception of soft power were political values, culture and foreign policy.<sup>[1]</sup> The Association of Southeast Asian Nations (ASEAN), an intergovernmental body comprising 10 countries from the region, is an embodiment of soft power in practice. ASEAN's consensus-oriented model offers a constructive, if limited, means of managing a membership that shares few obvious commonalities. But despite decent prospects for economic integration, how will this model cope with emerging regional challenges where more binding rules may be demanded?

The core principles and norms underpinning ASEAN are enshrined in the Treaty of Amity and Cooperation, signed at the first ASEAN Summit in 1976. Broadly speaking, these are a) respect for the sovereignty and territorial integrity of member nations; b) non-interference in the internal affairs of one another; c) peaceful dialogue, non-confrontation and consensus; and d) non-use of force in dispute settlement.<sup>[2]</sup> Collectively often referred to as the 'ASEAN way', these principles and norms were later incorporated into the ASEAN Charter, which came into force in 2008, signalling the shift from a loose alliance of countries to a more formal organization.

ASEAN member states encompass a hugely diverse region. A wide range of governance models (democracies, authoritarian regimes, military governments) coexist with countries encompassing some of the world's major faiths (Islam, Buddhism and Christianity). ASEAN members also range from wealthy states (Singapore) to some of the poorest (Myanmar). In addition to contending with this internal heterogeneity, ASEAN has multiple

challenges to balance: the impacts of natural disasters and cross-border crises; territorial tensions such as those in the South China Sea; and the increasing great power competition between China and the US. With all these considerations in play, the impact of ASEAN's soft power approach is uneven, more effective in some contexts than in others.

The most promising area is economic relations. Unlike the EU, ASEAN began life as a political initiative. The original five members – Indonesia, Malaysia, the Philippines, Singapore and Thailand – first came together to reduce regional tensions but also to work as a bloc against communist-led insurgencies. It was not until 1993 that economic integration became a strong plank of the body, culminating in the establishment of the ASEAN Economic Community in 2015. One key part of this agenda is the Regional Comprehensive Economic Partnership (RCEP), launched in 2012, which seeks to bring together ASEAN members' existing free-trade agreements with six other Asia-Pacific countries into one accord.<sup>[3]</sup> Once implemented, RCEP could cover an aggregate population of 3.6 billion spread across economies with a combined GDP of \$25 trillion.<sup>[4]</sup> As Peter Petri and Michael Plummer note, in the contemporary context of protectionism and populism, RCEP is both a 'developing country-centric [and] pro-integration alternative on an unprecedented scale'.<sup>[5]</sup> It could be a game-changer for ASEAN, not only establishing a shared market of monumental size but also illustrating the organization's ability to bring together a wide range of stakeholders to achieve a common goal.

In contrast, ASEAN's approach to peace and security illustrates some of the limits of soft power. Although there has been a high degree of institutional development of peace and security norms – as embodied in the 2012 ASEAN Concord II – the

region faces several challenges in making these principles a reality. The main tension is how the primacy of non-interference, consensus decision-making and the non-use of force undermines attempts at a coherent approach to crises within the region.

## **The principle of non-interference could provide cover for governments, as they know any use of violent means – despite any criticisms made – would not lead to an active intervention.**

Non-interference in the affairs of another country is hard-wired into the ASEAN system. It must be acknowledged that the primacy of this norm is what has enabled such a wide range of member countries to coexist within the same body. However, the rise of transnational peace and security issues – including cross-border terrorism, refugee and migrant flows, trafficking and illicit financial flows – puts into question whether this approach can be effective in response to complex problems that affect multiple countries.

For example, there is no mechanism to invoke a response, without a nation state's consent, to actions that represent a regional threat to peace and security. As such, any ASEAN member that poses a threat of this kind can be confident that no

real action is possible against it. The risk, therefore, is that the principle of non-interference could provide cover for governments, as they know that any use of violent means – despite any criticisms made – would not lead to an active intervention.<sup>[6]</sup> ASEAN's peace and security norms lack the type of enforcement powers that would be needed to tackle such issues.

The Rohingya crisis in Myanmar is illustrative of this problem. ASEAN's non-confrontational response has had no impact in preventing the forced displacement of Rohingya people into neighbouring Bangladesh, nor has it provided any means to agree constructive ways forward.<sup>[7]</sup> Some member states, such as Indonesia, tried to use bilateral diplomacy to ameliorate the situation. Others, such as Malaysia, took on a more outspoken stance and were openly critical. As a collective, however, ASEAN has been ineffective at pressuring Myanmar to improve its treatment of the Rohingya people. Beyond the difficulties associated with the norm of non-intervention, the need for collective agreement makes it difficult for ASEAN to achieve cohesive positions on contentious issues.

Increasing pressures resulting from the formidable rise of China add further complexities. For example, on the South China Sea issue, China and several ASEAN states share overlapping claims. ASEAN first committed to finding a peaceful resolution in 1992 but has struggled to form a legally binding position on maritime disputes in the South China Sea. It was not until 2002 that a Declaration on the Conduct of Parties in the South China Sea was agreed, and even this agreement is non-binding.

There is an argument that with greater political and economic engagement with China, the 'internal relations of ASEAN itself' are being transformed.<sup>[8]</sup> Put simply, China also has deep bilateral relationships with ASEAN countries, which may factor into any decision-making. For

example, in 2012 and again in 2016, Cambodia blocked a joint ASEAN statement on the South China Sea issue, a move perceived by some as reflecting Chinese influence on the country's position.<sup>[9]</sup> Without consensus, the bloc had nothing meaningful to say on one of the major issues in the region.

## For ASEAN to be an effective peace and security actor, it needs to marry non-intervention with a greater investment in preventive diplomacy.

However, progress is possible. When Cyclone Nargis hit Myanmar in 2008, the country struggled to respond to the devastation. The government compounded the crisis by blocking aid and support from some international agencies. ASEAN took on a brokering role, acting as a bridge between Myanmar and the international community, and helped ensure the delivery of aid. Another illustration of how ASEAN can play a more constructive role on contentious issues was the establishment, in 2009, of the ASEAN Intergovernmental Commission on Human Rights (AICHR). Though sensitivities about criticism of human rights abuses remain an obstacle to more robust rule-making, and the commission lacks enforcement mechanisms,

this is an important development in shaping and building norms.

For ASEAN to be an effective peace and security actor, it needs to marry non-intervention with a greater investment in preventive diplomacy. It also needs to recognize when the limits of this type of diplomacy have been reached and stronger recourse is needed. Preventive diplomacy is an important part of the toolkit for ASEAN, as it chimes with its doctrine of non-interference in the internal affairs of member countries. However, this should not be to the detriment of also working more through multilateral institutions, such as the UN, and potentially through non-governmental organizations, to find solutions to challenging situations. ASEAN could also undertake peer-to-peer learning, for example through formal dialogues with the African Union, to better understand how other regional bodies have balanced respect for state sovereignty with a more active role on peace and security issues.

There is a risk that norms may become redundant if their development goes beyond what states are prepared to accept. The ASEAN way, while it may seem ponderous, has avoided major conflict in the region since the organization's inception. Furthermore, issues that were once considered too sensitive, such as human rights, have become part of the ASEAN architecture. However, without greater institutionalization or means to enforce accountability, any progress will always be at risk. Moving forward, the greatest challenge for ASEAN as a peace and security actor is whether it can go beyond its established norms to promote greater stability in the region, or whether its commitments will remain unfulfilled promises. ■

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## WHAT NEEDS TO HAPPEN

— **A consensus-driven model has enabled the coexistence of diverse member states within the ASEAN system, but the resulting constraints on governance need to be overcome if the grouping is to remain relevant.**

— **The doctrine of non-intervention can impede meaningful action on peace and security challenges. To be effective, non-intervention needs to be married with investment in preventive diplomacy.**

— **ASEAN also needs to recognize when the limits of this type of diplomacy have been reached and stronger recourse is needed.**

— **ASEAN could work more through multilateral institutions such as the UN, and potentially also through non-governmental organizations, to address regional problems.**

— **It could also undertake peer-to-peer learning, for example through dialogues with the African Union, to better understand how other regional bodies have balanced recognition of state sovereignty with a more active conflict-prevention or mediation role.**

# RETHINK STATE-BUILDING IN THE MIDDLE EAST AND NORTH AFRICA

*by Renad Mansour  
and Tim Eaton*

**To have any chance of success, post-conflict governance models for Iraq and Libya must acknowledge ‘hybrid’ armed groups and incorporate them in rebuilding the state, but focus on improving their accountability.**

**STATE WEAKNESS AND** protracted conflict continue to plague Iraq and Libya. A breakdown of the unitary state, competition for power and influence, and the absence of a social contract all continue to drive conflict, while allowing a proliferation of local armed groups to flourish. Yet while such groups in both countries are often viewed solely as security actors, many of them are better considered as 'hybrid' networks that also span the political, economic and social spheres. Western policies to mitigate the threats presented by these groups must therefore extend beyond security-based interventions to necessarily inclusive and political approaches focusing on accountability as a route to peace. For the beginnings of a durable rules-based order to emerge, assumptions about the dynamics of state power in the Middle East and North Africa (MENA) must be reconsidered.

The encroachment of armed groups into civilian life in these countries is all too evident. In the absence of effective governance or public services, militias and paramilitaries in both Iraq and Libya are carving out niches and establishing their own social contracts with local populations. Not only are they generating revenues from state and non-state sources in exchange for the promise of protection and, in some cases, services; they are also positioning themselves to be part of any political settlement, with the intention of cementing their presence in post-conflict governance structures via cadres in political and economic fields.

In response to this phenomenon, many Western peacekeeping and state-building initiatives continue to focus on either the demobilization of armed groups or their integration into official 'state' forces, in order to establish a monopoly over legitimate violence. However, such approaches have never worked in the region. From Iran to Saudi Arabia, political settlements have incorporated armed groups

into state structures but have never integrated them into unitary chains of command, or held them accountable to civilian governance structures.<sup>[1]</sup>

## The primary miscalculation in the Western approach is to overemphasize the military dimension, defining groups by their armed status.

Why, then, is current Western policy on armed groups in Iraq and Libya still guided by this failed framework? The problem stems in part from the West's normative stance on the Westphalian state system, wherein the existence of non-state or hybrid armed actors is seen as undesirable in and of itself. Policymakers therefore focus on the crimes committed by these groups, without applying the same standards to *de jure* state armed groups. We contend that militias should not be considered a problem merely because they lack *de jure* recognition, but only where their actions result in negative outcomes for local populations, such as rights abuses, service delivery failures, and monopolistic economic and political approaches.

The primary miscalculation in the Western approach is to overemphasize the military dimension, defining groups by their armed status. In reality, many militias are hybrid actors that also serve state functions. Their membership includes politicians, businesspeople, engineers, doctors and other professionals.

One example is Iraq's Popular Mobilization Units (PMU), or *al-hashd al-shaabi*. The PMU emerged as a collection of defence forces in response to the rapid rise of Islamic State of Iraq and Syria (ISIS) in 2014. In today's post-ISIS context, the PMU forces have not gone home. Instead, they have expanded their roles as political and economic actors. In national elections in mid-2018, the PMU electoral coalition, the Fateh Alliance, placed second. Beyond the PMU, and throughout Iraq, groups ranging from Kurdish Peshmerga paramilitaries to Sunni tribal and non-dominant ethnic community fighters compete (and at times cooperate) with the state for power, capability and legitimacy.<sup>[2]</sup>

In Libya, a large number of armed groups of different social and political complexions have developed since 2011. Most notably, the Libyan Arab Armed Forces (still widely known as the LNA)<sup>[3]</sup> have grown from a limited set of actors in 2014 into a broad alliance that now generates revenue through parallel civilian institutions in the east of the country. LNA forces have established a military investment authority, and have deposed elected civilian officials in order to wield political power directly. In April, the LNA launched a military offensive on the Libyan capital, Tripoli.

The essence of the situations described above is that no military solution awaits that will bring lasting stability to Iraq or Libya or remove these groups. Integration, demobilization and kinetic military action appear unfeasible. So what should the goal of Western efforts be?

Here, we contend that greater emphasis should be placed on political approaches that demand accountability at multiple levels. The focus should not be on all armed groups, but specifically on those that are becoming hybrid actors yet negatively affecting local residents and the state in their countries.

The first layer of accountability should come from the people living under such groups. Many hybrid actors depend on an element of legitimacy and popularity to maintain a social contract with local residents: displaying images of martyrs, providing social services, and mimicking state functions.<sup>[4]</sup> In Libya, the LNA has leveraged its nationalist credentials, purporting to base its military expansion upon the guarantee of stability, state function and a crackdown on ‘criminals’ and ‘terrorists’. Restoring stability and functioning governance is a popular and effective means of generating local support.

However, over time these groups typically fall victim to failed governance and begin to lose popularity. Corruption and an inability to deliver services are already clear shortcomings of the PMU, and in 2018 protests in the southern Iraqi province of Basra began targeting PMU offices. Meanwhile, the LNA’s expanding role in civilian governance has come under question as military operations in areas under its control have largely been concluded. Civilian authorities question why the LNA should take a role in services such as rubbish collection and the granting of visas to migrant workers.<sup>[5]</sup>

Politically targeting the groups that negatively affect local welfare and undermine the state means picking away at their legitimacy and weakening their links to the civilian population. This process requires supporting local initiatives that can be relied upon when incumbent armed groups prove unable or unwilling to uphold the social contract. For now, however, independent civil society organizations and protests remain two of the only channels through which citizens can voice concerns about the dominance of such groups.

Another layer of accountability is to state institutions and the rule

of law. Many armed groups claim to be officially recognized actors seeking to build the state.<sup>[6]</sup> The LNA presents itself as *the* legitimate army of the state, although this is contested by elements not aligned with its leader, Field Marshal Khalifa Haftar. The replacement of elected mayors with military governors in eastern Libya has also illustrated the LNA’s expansion into politics and civilian life. While such approaches may be acceptable to local populations during conflict, the role of the LNA’s interventions in governance in places such as Benghazi, where wide-scale violence has come to an end, is more controversial.

## A big role for Western interlocutors is to support independent legal institutions in becoming more effective.

Armed groups’ ability to sustain their legitimacy is likely to be further undermined over time by human rights abuses – an accusation constantly levelled, for example, against the PMU.<sup>[7]</sup> Many locals across southern Iraq allege that PMU forces act with impunity, beyond the control of the police and courts. In Libya, meanwhile, civilian leaders claim that whatever the LNA cannot obtain through legal means it will obtain through others. The group is similarly accused of widespread human rights violations. Mahmoud al-Warfalli, an LNA officer, has been indicted for war crimes by the International Criminal Court.

Given the above, Western efforts to challenge armed groups’ state-building narratives need to include several elements. One is to call groups out on violations of the rule of law and human rights. A bigger role for Western interlocutors, however, is to support independent legal institutions – local and federal – in becoming more effective. The laws in Iraq and Libya exist, and the armed groups claim to be interested in upholding them. The gap, then, is the absence of a body in either country that can hold the groups to account. Such a body could take the form of an empowered integrity commission or audit bureau, which would monitor and investigate abuses of power and rights violations.

In sum, we propose to shift the conversation on state-building and armed actors in MENA away from the failed Westphalian notion of integration towards accountability. A new approach should reflect the reality that armed groups in the region operate in a zone where the distinctions between political, economic, societal and military networks are blurred, and that focusing solely on the latter will not end conflict. ■

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## WHAT NEEDS TO HAPPEN

— **Western policymakers must abandon narrowly securitized approaches to tackling conflict-related instability in Iraq and Libya.**

— **New approaches must acknowledge the de facto legitimacy of non-state and hybrid armed groups, give them a qualified role in state-building, but emphasize accountability.**

— **Support should prioritize helping independent legal institutions – local and federal – to become more effective.**

— **Where militias continue to create instability, policy must weaken their legitimacy by challenging their narrative of state-building and essential service provision.**

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