Factsheet 3

How is AI governed now?
A regulatory wild west?

Current efforts to develop AI specific regulation and governance

AI specific governance challenges

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The short answer is no. While there is no international law specifically regulating AI development, there is no legal vacuum. Protections and regulations exist both at the international level as well as the national level. Central to our concerns here is the legal landscape that regulates international peace and security, by providing protection to States and individuals in peace and wartime. This is an enormous subject, but it is especially useful for those coming from STEM fields to look at a few key aspects:

- When we talk about international law, we are usually talking about the rules generally accepted as binding between States. Together with the wider body of international law, the UN Charter provides a structure for the conduct of international relations. It creates reciprocity between States as sovereign equals, accords predictability and legitimacy to their actions within an agreed multilateral system, and provides a platform for resolving disputes.

- A branch of international law is international humanitarian law. This is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. It is also known as the law of war or the law of armed conflict. The Geneva Conventions are an example of international humanitarian law.

- When we talk about human rights, we are usually, though not always, talking about those rights referenced in the UN Charter, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as other binding treaties like the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Convention on the Elimination of Discrimination Against Women. These include rights like the right to life, as well as freedom from slavery and torture, the right to recognition everywhere as a person before the law, the right to safe and healthy working conditions, the right to nationality, and the right of women to access financial credit. Human rights are generally considered “universal, indivisible, interrelated, interdependent and mutually reinforcing[1].” This means they are automatically held by all people, and should not be separated from each other.

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We can divide these primarily into efforts that focus on the civilian context and the military context. Starting with the civilian context:

- Amongst intergovernmental efforts to regulate or manage AI use, one of the first major sets of principles was adopted by the Organization for Economic Cooperation and Development (OECD) in 2019\(^1\). These principles promote the use of AI that is innovative and trustworthy and that respects human rights and democratic values. They include enabling "those adversely affected by an AI system to challenge its outcome based on plain and easy-to-understand information on the factors, and the logic that served as the basis for the prediction, recommendation or decision"\(^2\).

- In November 2021, the Member States of UNESCO adopted the Recommendation on the Ethics of Artificial Intelligence, the first ever global agreement on the Ethics of AI. The recommendation was developed over the course of two years, and with the assistance of a multidisciplinary expert group, and consultations with a wide range of stakeholders. The recommendation includes emphasis on the relevance of ethical questions to all stages of the AI system lifecycle, and that selected AI methods should be appropriate and proportional to achieve a given legitimate aim and should not violate or abuse human rights.

In the military context: there are a number of ongoing intergovernmental processes that address the peace, security, disarmament, arms control, and nonproliferation consequences of AI and autonomy.

- Perhaps most prominent is the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (also called the LAWS GGE, see also FS2). This group operates in the framework of the United Nations Convention on Certain Conventional Weapons (see also FS2), the convention that prohibits or restricts the use of certain conventional weapons which are considered excessively injurious or whose effects are indiscriminate.
The group has adopted 11 guiding principles, including that international humanitarian law continues to apply fully to LAWS, and that human responsibility for decisions on the use of weapons systems must be retained as accountability cannot be transferred to machines. In relation to these points, the group has also agreed that human involvement in the development and use of LAWS is critical, although the required type and degree of human-machine-interaction is context dependent. Another key principle is that LAWS should not be anthropomorphized.

- There are also discussions on responsible military use of AI between States outside of these frameworks. These include confidential dialogues, as well as public discussion between like-minded States, and are generally aimed at enhancing transparency and building confidence between States. These take a number of forms, from States individually publishing their positions on use of AI, to meetings of like-minded partners to discuss their respective policies, approaches, and challenges in adopting AI-enabled capabilities.

- There are also internal State initiatives, like the US effort to develop norms and best practices around responsible military use of AI (also called the “DoD Principles”). These obviously also occur in the civilian context, like Chinese requirements, launched in March 2022, for companies deploying recommendation algorithms to file details about those algorithms with the Cyberspace Administration of China (CAC) [4].

AI specific governance challenges

- International governance efforts face conceptual, institutional, and challenges when dealing with AI – be it for the purpose of disarmament, arms control, and non-proliferation, safeguarding human rights, or responsible and ethical use of AI.

The conceptual challenges of AI – what should be regulated? What shouldn’t?
- A first conceptual challenge stems from the dual/general purpose of AI technology. Dual or general use technologies are those that have legitimate civilian use, as well as offensive or military uses that may need to be restricted. Dual/general purpose technologies are difficult to regulate because they require the balancing or competing needs: ensuring access for legitimate use, while restricting illegitimate use. This balancing act has been a challenge for instruments that control nuclear, chemical and biological materials for a long time. It is also challenging with AI as many, if not most, developments in AI have dual-use potential.
- A second conceptual challenge is definitional. Capturing what should be regulated in the language of a regulation is no easy task given that AI is a fuzzy technological area, and AI experts themselves still disagree about how AI can be appropriately defined.
- A third conceptual challenge is the complexity and speed of AI development. The fact AI technology moves quickly pose two practical problems to regulators. They need to understand and keep up with technological advances on the one hand and, on the other hand, ensure that regulatory language can be future-proof and adjust to future technological changes. Otherwise, regulation risks ending up quickly becoming irrelevant or obsolete, especially if it is based on technical characteristics. In the worst case, the regulation could already be obsolete by the time it comes into effect.
- A final related conceptual challenge involves breadth of coverage. Regulation that is too broad in its restrictions risks inhibiting valuable innovation. On the other hand, regulation that is too narrow runs the risk of missing key elements and undermining the use of the regulation entirely. It also runs the risk of being easy to circumvent, or not usefully future proof.

The institutional challenges of AI – how can control be exerted?
- There are a few institutional issues that make the regulation of AI at the national or international level particularly challenging.
  - Speed of action. Regulatory processes usually move slowly. It can take years, if not decades for arms control processes to agree on a treaty. The two processes that have been touching on AI in the arms control context have been going on for a long time. The UN process on cyber started 1998 while the debate on LAWS started in 2013. Given the speed at which AI innovations take place, some are concerned technological advances might outpace governance structures.
AI specific governance challenges

- **Centre of action.** The fact that the private sector is leading AI innovation is also a challenge, as governance processes are usually State-centric. In order to regulate, States need to have full understanding of the technological development in question, which can be difficult as private companies might have clashing interests. In some countries governmental officials might lack the expertise to detect and monitor technological developments of concern on time.

- **Geographical distribution.** The global nature of the AI industry also presents a challenge for States which would like to regulate AI. This problem is compounded by the fact that the development and operation of AI systems can be distributed across States and involve many different legal entities. For example, a parent company, individual developers, hardware and datasets may all operate from different States, crossing a number of legal jurisdictions.

- **Diffusion of knowledge and data resources.** Limiting or controlling the development of AI technology is a very difficult. This is because the skills and resources to take advantage of AI are already widely available: many of the critical components of an AI systems are available through open-source access. Monitoring and exerting control over the assets, individuals and entities involved in the development and use of an AI system is practically difficult, and potentially ineffective, as no State or entity can exert control over the entire industry.

- **Intangibility.** AI technology is to a large extent intangible. Monitoring and exercising control over the transfers of intangible technology is generally difficult for States.[5] Transfers of intangible technology are hard to detect, and it is methodologically difficult to design and apply effective control in the first place.

The (Geo)political challenges of AI

- Politics also play a role, and the current geopolitical climate has direct implications for the prospect of regulatory development in AI.

- Political will. States are the only entities that have the power to determine where and when legally binding regulations are needed; what rules should apply, to whom and how. The development of legally binding regulations on AI are therefore contingent on the political will of governments.

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- **Big power competition.** The current geopolitical context, characterized by a return of big power competition, can make international legally binding regulations on AI harder to achieve. Many States consider AI a key technology for power competition. Several States have expressed the view that they would be disinclined to support regulatory developments that could cause them to lose a perceived advantage or become somehow disadvantaged, whether economically or militarily. This stems both from the fear that new regulation could limit options for growth, as well as “tie their hands” in the event of a conflict, and disadvantage them vis-à-vis other powers which may for instance be willing to breach such regulations. This is not to mention the challenge of inclusivity, and ensuring that States outside of those where AI development tends to be centred have a voice, particularly those in Global South.
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