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AUKUS, the regulation of the ocean and the legal dangers of working together

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In September 2021, Australia, the United Kingdom (UK), and the United States (US) announced 'an enhanced trilateral security partnership' called AUKUS.[1] The AUKUS arrangement envisages 'deeper information and technology sharing' and 'deeper integration of security and defence related science, technology, industrial basis and supply chains'.[2] The technologies under discussion include, most prominently, nuclear-submarine propulsion, but also cyber and electronic warfare capabilities, artificial intelligence, quantum technologies, and hypersonics.[3] The technology-sharing comtemplated by AUKUS will make integration between allies easier.[4] But it can also raise questions under international law. How might international law constrain States in this context or result in States being responsible for the actions of others?

Sharing technology for nuclear-powered submarines may undermine the international law on nuclear weapons

At least two legal instruments might constrain the sharing of nuclear technology with Australia: the 1985 South Pacific Nuclear Free Zone Treaty (the Treaty of Rarotonga) and the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT).

Australia (as a non-nuclear weapon state) has promised under Article 2 of the NPT 'not to receive the transfer … directly, or indirectly [and] not to manufacture or otherwise acquire … and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.' Australia must also 'ensure that any transfer or nuclear technology or material conforms to strict non-proliferation measures in order to provide assurance of exclusively peaceful use'.[5] Australia has been clear that it does not have plans for nuclear weapons and that these submarines will be powered by nuclear reactors, and not armed with nuclear weapons.[6]

There is clearly some ambiguity about what entails 'peaceful purposes' for the purposes of these treaties. Nevertheless, acquiring nuclear submarine reactors that use weapons grade uranium raises the question as to whether AUKUS, at the very least, undermines the objectives of the NPT. This is even if nuclear propulsion for naval vessels is, itself, not in violation of the AUKUS members' obligations under the NPT.

International law has little to say on sharing non-nuclear military technology

The international legal regulation on the sharing of non-nuclear technologies is minimal. While some States have agreed to international guidelines that identify technology that should be controlled (for example the 1995 Wassenaar Arrangement), the implementation is left to the discretion of States. The decisions that are ultimately made about if and how to control technology often reflect an attempt to leverage export controls to 'win the geopolitical, economic, and technology race' rather than a principled attempt to stop proliferation.[7] The close and longstanding alliance between the AUKUS States suggests that these informal, non-binding instruments will not be any impediment to sharing of non-nuclear maritime technology.

There is a risk of complicity for international wrongs

Sharing intelligence increases the risk that States will be complicit in the wrongdoings of their allies. Under international law, a State that 'aids or assists another State in the commission of an internationally wrongful act' is also internationally responsible as long as two criteria are met: first, that it does so 'with knowledge of the circumstances of the internationally wrongful act' and second, that it 'would be internationally wrongful if committed by that State.'[8] But there is a lack of consensus about aspects of the interpretation of this rule such that '[t]he complicity rules of international law may be underdetermined'.[9] The planned increase of joint activities means it is something that the AUKUS partners should consider.

While the list of potential international wrongs is long, there are few specifically related to ocean use that are particularly relevant to autonomous maritime technology. First, these technologies are currently being used, and are very likely to continue to be used, for collecting information about the ocean. Where presence of the device, or the collection of intelligence, occurs in breach of the United Nations Convention on the Law of the Sea (UNCLOS) and customary international law it could amount to an international wrong. Further, international laws on state responsibility are not the only potential legal complication for joint military operations as the nature of joint military operations mean that domestic tort laws from multiple jurisdictions may apply. Environmental law, marine pollution obligations and Antarctic Treaty provisions could all also be relevant. Given the extensive intelligence sharing that is already occurring, this risk has probably already been factored in by all the parties, but the legal consequences of working more closely together should continue to be carefully considered by the AUKUS partners.

There are legal risks that come with legal interoperability

The interoperability challenges caused by different understandings of international humanitarian law are well known. However, this is not the only legal framework where military interoperability can be an issue. When operating in maritime environments, customary law and UNCLOS provides the crucial framework for lawful operations. When and how the navigational rights enshrined in UNCLOS apply to ocean spaces, and two related issues, the lawfulness of military surveillance in the Exclusive Economic Zone (EEZ) of other States and the status of maritime borders in the South China Sea are of note. Differences could also emerge in relation to how human rights obligations apply at sea, the appropriate way to treat uncrewed maritime vessels and when the use of force is permissible to interdict or destroy a hostile vessel.

Conclusion

The developing nature of AUKUS, and the ambiguities it entails, makes any attempt to analyse the challenges it poses to the operation of international law somewhat speculative. The AUKUS partners are no strangers to working together in training, on operations, and in sharing resources and information. There is clearly great military and strategic value in them doing so. Nevertheless, it is clear that some legal issues might arise in relation to the sharing of maritime technology and collaborating on maritime operations. Ideally, the arrangement will allow space for the three States to hold different legal perspectives on some issues, and all should avoid using new challenges to justify deviations from well-developed and effective legal regimes. ●

1 'Joint Leaders Statement on AUKUS' (The White House, 15 September 2021).

2 Ibid.

3 Agreement for the Exchange of Naval Nuclear Propulsion Information, UK–Australia–US (22 November 2021) [2022] ATS 4; 'AUKUS Leaders' Level Statement' (The White House, 5 April 2022).

4 'Australia, UK, and US sign nuclear propulsion info sharing agreement' (Naval Technology, 23 November 2021).

5 Ramesh Thakur, 'The South Pacific Nuclear Free Zone' (1989) 44(3) *India Quarterly* 254–269, 257.

6 'Nuclear Powered Submarine Taskforce' (Australian Government, Department of Defence).

7 Heejin Kim, 'Global Export Controls of Cyber Surveillance Technology and the Disrupted Triangular Dialogue' (2021) 70(2) International & Comparative Law Quarterly 379–415, 398–400.

8 Articles on Responsibility of States for Internationally Wrongful Acts article 16; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, [420].

9 Marko Milanovic, 'Intelligence Sharing in Multinational Military Operations and Complicity under International Law' (2021) 97 *International Law Studies* 1269–1403, 1400.

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