FRAGILE BARRIERS: INTERNATIONAL HUMANITARIAN LAW IN THE POLAR REGIONS[1]

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Peace is a word often associated with the polar regions. This is on account of their remoteness, climatic extremes and relative lack of human interference. However, humanity has managed to reach these latitudes, and with it has come the potential for armed conflict. Provisions in Polar Law provide fragile barriers to armed conflict, which have already been breached in the past. International Humanitarian Law then takes precedence. This paper argues that the latter is inadequately developed to protect the pristine environments of the poles. A multilateral conference could alter the anthropocentric design of the law of armed conflict to a more ecocentric interpretation for the polar regions and similar environments.

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[1] This paper is a modified version of a paper submitted by the author for the International Humanitarian Law unit in the Juris Doctor program at the Faculty of Law, University of Western Australia.

I INTRODUCTION

> The Arctic is not only the Arctic Ocean, but also the northern tips of three continents: Europe, Asia and America. It is the place where the Euroasian, North American and Asian Pacific regions meet, where the frontiers come close to one another and the interests of states belonging to mutually opposed military blocs and nonaligned ones cross.
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> Mikhail Gorbachev, October 1987 [2]

The words of Mikhail Gorbachev ring true even in the 21st century, with scholars now debating the effects of melting sea ice, fossil fuel discoveries and military expansion at the top of our world.[3] In sharp contrast, the South Pole enjoys immense peace and a focus on scientific cooperation and environmental protection. It is in comparing and debating the laws at the opposite ends of our planet that one discovers the field of polar law. As activity in the polar regions reaches record heights, it is prudent to consider whether polar law can really maintain regional peace and, if not, whether international humanitarian law is sufficiently adapted to protect the fragile environments at the poles.

This paper will explore the defences against armed conflict in polar law and the environmental protections of international humanitarian law which are applicable to the polar regions. For present purposes, the polar regions are defined as everything north and south of the Arctic and Antarctic circles respectively. Polar law can be considered a subset of international environmental law that deals with polar environments, though it is in fact much more than that.[4] International environmental law has a tendency to prevent and prohibit violations, rather than address what happens when a violation is occurring or has occurred.[5] This is the case in polar law, where the Antarctic Treaty prohibits military operations. However, the Arctic lacks such an overall treaty because it is fundamentally different in population, history and geography. Moreover, it is unlikely that any Arctic state would agree to demilitarisation because such states need to defend themselves on their own territory.

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[2] Mikhail Gorbachev, 'Presentation of the Order of Lenin and the Gold Star to the City of Murmansk (1 October 1987)', in Michael Byers, *International law and the Arctic*, Cambridge University Press: Cambridge, 2013, p. 245.

[3] See, generally, Byers, *International law and the Arctic*, pp. 1-9 and 245-79; Marzia Scopelliti and Elena C. Pérez, 'Defining security in a changing Arctic: helping to prevent an Arctic security dilemma', *Polar Record*, Vol. 52, No. 6, 2016, pp. 672-9; David Titley and Courtney St. John, 'Arctic security considerations and the US Navy's roadmap for the Arctic', *Naval War College Review*, Vol. 63, No. 2, 2010, pp. 35-48; and James Kraska (ed.), *Arctic security in an age of climate change*, Cambridge University Press: Cambridge, 2011.

[4] See, generally, Natalia Loukacheva (ed.), *Polar law textbook II*, Nordic Council of Ministers: Copenhagen, 2013.

[5] See, for example, Julian Wyatt, 'Law-making at the intersection of international environmental, humanitarian and criminal law: the issue of damage to the environment in international armed conflict', *International Review of the Red Cross*, Vol. 92, 2010, pp. 602-4.

Even in the face of demilitarisation provisions, it is possible that an armed conflict would automatically trigger and be governed by international humanitarian law rather than polar law.[6] That is why this paper goes further to consider the environmental protections of international humanitarian law. It will reveal that they are lacking because of the primacy they place on anthropocentric (considering human beings as the most significant entity of the universe) views of proportionality. The paper argues that an environmental element of proportionality ought to be introduced, and could be developed under the guise of guidance from the International Committee of the Red Cross (ICRC).

Adopting the guidance into national rules of engagement would be an appropriate way of developing the environmental element, which could eventually become a rule of customary international law. Given the interest in the polar regions, an international conference among the Antarctic Treaty System, the Arctic Council and the ICRC is a real possibility in the near future and could be a step towards strengthening the fragile barriers against environmental damage by providing guidance which could be implemented into national rules of engagement.

II DEFENCES AGAINST ARMED CONFLICT

The idea of a demilitarised geographical zone is not new. There has long been the concept of the 'neutral state' and a 'law of neutrality' describing the rules associated with states which are not party to, or cannot become party to, an armed conflict.[7] Demilitarised zones are a cousin of neutralised zones and non-defended localities but are critically distinct.[8] Neutrality is generally triggered when an armed conflict begins, terminates when an armed conflict ends, and is declared unilaterally.[9] On the other hand, demilitarised zones are formed by agreement between or among states, whether in peacetime or in war.[10] There are subtle differences between the two but, for present purposes, the focus will be on peacetime agreements.

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[6] See, for example, Michaela Halpern, 'Protecting vulnerable environments in armed conflict: deficiencies in international humanitarian law', *Stanford Journal of International Law*, Vol. 51, No. 2, 2015, pp. 131-4; and Young Kim, 'The real Cold War', *Harvard International Review*, Vol. 16, No. 3, 1994, pp. 56-60.
[7] Michael Bothe, 'The law of neutrality', in Dieter Fleck (ed.), *The handbook of international humanitarian law*, 3rd edition, Oxford University Press: Oxford, 2013, pp. 549-79.
[8] Stefan Oeter, 'Means and methods of combat', in Fleck, *The handbook of international humanitarian law*, pp. 204-11.
[9] Bothe, 'The law of neutrality', pp. 555-9.
[10] Oeter, 'Means and methods of combat', pp. 206-7.

Antarctica and Svalbard (a Norwegian archipelago between the mainland and the North Pole) are the two permanently demilitarised zones of the polar regions.[11] Both derive their authority from peacetime treaties. However, they do it radically differently.

The Antarctic Treaty undoubtedly focuses on demilitarisation, with its first article proclaiming that the continent 'be used for peaceful purposes only' and that any 'measures of a military nature' be prohibited; the only exception is military assets in support of a peaceful purpose (such as scientific or for environmental protection).[12] However, the use of military assets in Antarctica is very common, and there is a strong link between military forces and the frozen continent. This does not bode well for the environment if an armed conflict were to break out in violation of the treaty.

The Svalbard Treaty prevents the archipelago from being used 'for warlike purposes' and obliges Norway not to establish or allow the establishment of fortifications or naval bases.[13] This much weaker provision relies primarily on Norway for enforcement. It is an indication of the importance of sovereignty in the Arctic and the difficulties associated with imposing treaty obligations on individual states, unlike the Antarctic which can be considered a 'global commons.'

Indeed, in the Second World War, the Norwegian attempt at fulfilling its treaty obligations consisted simply of destroying equipment and resources which could be used for warlike purposes, then evacuating all residents to Russia and the UK. Germany, a signatory to the treaty, promptly took over the archipelago and used it specifically for military purposes. Even today, there are tensions with Norway's membership of NATO and its regular patrols around Svalbard with an armed coast guard vessel (which incidentally is the largest ship in its navy by gross tonnage).[14]

Clearly, a treaty providing for demilitarisation will not guarantee peace. Armed conflict can flare up suddenly and thoughts on treaty obligations could instantly evaporate if, for example, there were a need to use military force in self-defence. For that reason, even Antarctica is not immune.[15] Therefore, the idea of polar law providing a barrier against armed conflict using demilitarisation is weak. The only place in the Arctic where such a barrier exists has already had it violated in the Second World War. Developing other demilitarised zones in the Arctic is highly unlikely, given that the Arctic states have to defend themselves against the possibility of an armed attack.

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[11] Jann Kleffner, 'Scope of application of international humanitarian law', in Fleck, *The handbook of international humanitarian law*, p. 58.
[12] Antarctic Treaty, Articles I(1) and I(2).
[13] Svalbard Treaty, Article 9.
[14] Forsvaret, *KV Svalbard* [website], 2016, available at <https://forsvaret.no/fakta/utstyr/Sjoe/KV-Svalbard> accessed 18 December 2016.
[15] Anthony Bergin *et al*., 'Cold calculations: Australia's Antarctic challenges', *Strategic Insights*, Vol. 66, 2013, pp. 1-25.

Thus, this paper proceeds on the assumption that a polar armed conflict, sparked by a simple altercation or an act of self-defence, is a real but unlikely possibility which could not be prevented by polar law.[16]

III PROVISIONS DURING ARMED CONFLICT

Should armed conflict occur, international humanitarian law would take over as the governing framework of international law. It would not completely displace other international laws but would provide content to inform their interpretation.[17]

For example, using the Australian Antarctic Territory as a base for military operations in the event of armed attack on the Australian mainland would likely be permitted under international law because it is probable that a court would consider international humanitarian law to be informing the meaning of the prohibition on military uses in the Antarctic Treaty. Another possibility could be an attack on scientific bases in the Australian Antarctic Territory, where Australia would similarly be justified, under international humanitarian law, in acting in self-defence.

This paper focuses on the environmental protections accorded by international humanitarian law, as these are the most pressing in an armed conflict in the polar regions. In doing so, it notes that there are myriad other issues, such as indigenous communities and scientific assets. However, the fact that environmentally-speaking 'what happens [at the poles] affects us, no matter where we live on this planet' makes environmental protection the most important issue to consider.[18] The destructive nature of armed conflict, particularly with modern weaponry such as explosives, incendiaries and weapons of mass destruction, would wreak havoc on polar environments.[19]

International humanitarian law accords the environment some consideration in the making of military decisions. There are specific treaty provisions, such as article 35 of Additional Protocol I to the Geneva Conventions, which hint at the underlying reasoning for environmental protection, namely that it is an extension of the principles of military necessity, proportionality and distinction.[20] The natural environment is

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[16] See more about the focus on prevention in Wyatt, 'Law-making at the intersection of international environmental, humanitarian and criminal law', pp. 602-4.
[17] See Wyatt, 'Law-making at the intersection of international environmental, humanitarian and criminal law', pp. 608-9.
[18] David Attenborough in BBC program, *Frozen Planet*, 2011.
[19] Wygene Chong, 'In the sledge tracks of Amundsen', *JusT Cogens*, [web blog], 9 October 2016, available at <https://justcogens.org/2016/10/09/in-the-sledge-tracks-of-amundsen> accessed 18 December 2016.
[20] Oeter, 'Means and methods of combat', p. 213.

essentially 'civilian' and can only be targeted where it provides 'cover, conceal[ment] or camouflage [for] military objectives'.[21]

Therefore, the environment cannot itself be a legitimate military objective, a principle reinforced by the Environmental Modification Convention, which prohibits deliberate attacks on the environment to mould the battle space to the advantage of one party.[22] Combatants must also ensure that their use of force is proportionate to the damage it might cause to the environment. More specifically, means and methods of warfare which cause widespread, long-term and severe damage to the environment are prohibited.

However, herein lies the problem, as applying this law to the polar regions will not result in an environmentally-friendly outcome, because such environments are so sensitive to change. As one commentator contended, 'a mine exploding in the desert will not have the same environmental implications as a mine exploding in the Arctic'.[23] On reflection, a combatant may acknowledge that throwing a grenade could cause more severe damage in a polar environment but, in a combat situation, they are likely to err on the side of executing the military objective, especially when the immediate damage is small. Further, interpretation of 'severe' in international humanitarian law has leant towards an anthropocentric view; it requires a link to human disruption rather than pure environmental harm.[24]

Hence, it can be argued that the polar regions require additional protection beyond that which international humanitarian law currently provides. Not only does the aggregate test of widespread, long-term and severe damage raise the bar too high but the test is simply not adapted to polar environmental damage.[25] Melting of polar ice has the potential to change climates around the globe. It is also well known that polar ice can store chemicals for millennia, which could include harmful chemicals from armed conflict.[26] These are unlikely to be issues at the forefront of the mind of combatants and policy makers when conducting warfare in the polar regions. A strengthening of the regime is required.

IV STRENGTHENING THE BARRIERS

[21] Oeter, 'Means and methods of combat', p. 213.
[22] Convention for the Prohibition of Military or other Hostile Use of Environmental Modification Techniques, (opened for signature 18 May 1977, entered into force 5 October 1978).
[23] Halpern, 'Protecting vulnerable environments in armed conflict', p. 123.
[24] Wyatt, 'Law-making at the intersection of international environmental, humanitarian and criminal law', pp. 625-6.
[25] Wyatt, 'Law-making at the intersection of international environmental, humanitarian and criminal law', p. 626.
[26] See the use of ice cores in Daniel Sigman, Mathis Hain and Gerald Haug, 'The Polar Ocean and glacial cycles in atmospheric CO2 concentration', *Nature*, Vol. 466, 2010, pp. 47-55.

In light of the above, this paper argues for a multifaceted solution rooted in 'soft law'. A hard law approach in this context would be inappropriate because it would probably not garner the required universal support, and be seen as favouring one side of the debate.

A useful contrast is the issue of an Arctic treaty, which is far more conducive to hard law because the Arctic states share vastly similar interests.[27] On the other hand, a strengthening of hard criminal law in response to violations of international humanitarian law in the environmental space would be exceedingly difficult because of the lack of common interests.[28] Instead, the polar regions would benefit from a cross-institutional conference, drafting a guidance document on polar armed conflicts with an 'ecocentric' rather than anthropocentric view of environmental damage, in a form which could easily be adopted into national rules of engagement.

A cross-institutional conference could consist of the ICRC, the Arctic Council and the Antarctic Treaty System. These are the key organs for international humanitarian law and polar law, which include all relevant parties and the permanent members of the UN Security Council. In 2009, the polar law institutions held a major joint conference in the context of the Fourth International Polar Year.[29] With interest in polar issues growing, it is possible the UN could declare a Fifth International Polar Year within the next decade. The ICRC should seize this opportunity to provide clarification on polar armed conflict.

The resulting conference communiqué could provide ministerial impetus towards a more developed guidance document.[30] It is recognised that ICRC guidance has a tendency to invoke controversy. However, if the starting point for a polar document is a ministerial-level conference at which all the major players are present, this would make for a more cohesive document. In other words, it would represent the world view of those most likely to be participating in conflicts, with the added expertise of the ICRC, rather than an instance of the ICRC 'legislating' on its own.[31] The aim would

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[27] See in that context, generally, Anton Vasiliev, 'The agreement on cooperation on aeronautical and maritime search and rescue in the Arctic – a new chapter in polar law', in Loukacheva, *Polar law textbook II*, pp. 55-8; Ingvild Rise, 'The agreement on cooperation on marine oil pollution preparedness and response in the Arctic: the establishment of an Arctic oil spill regime', master's thesis, University of Tromsø, 2014, p. 56; and Natalia Loukacheva, 'Polar law developments and major trends', in Loukacheva, *Polar law textbook II*, pp. 28-30.

[28] Wyatt, 'Law-making at the intersection of international environmental, humanitarian and criminal law', pp. 639-46.

[29] Consultative Parties to the Antarctic Treaty and Member States of the Arctic Council, 'Washington Declaration on the International Polar Year and Polar Science', Ministerial declaration, 6 April 2009.

[30] See, for example, Nils Melzer, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, International Committee of the Red Cross: Geneva, 2009.

[31] Leah Nicholls, 'The humanitarian monarchy legislates: The International Committee of the Red Cross and its 161 rules of customary international law', *Duke Journal of Comparative and International Law*, Vol. 17, No. 1, 2006, pp. 223-52.

be a highly pragmatic document, expressed at a high level of abstraction to allow for national interpretation, but which focused on an ecocentric model. That is, it should not link the 'widespread, long-term and severe damage' definition to human activities but rather focus on potential damage to the environment.

The guidance would also need to elaborate on the kind of damage which could be expected in a polar environment, allowing easier application of this definition in the field. It is likely that there would be broad consensus on the increased severity of military damage in polar regions, and that this damage would have broader implications for the rest of the planet. In noting that, this paper recognises that most, if not all, of the parties to such a conference would be attending in multiple capacities. For instance, Australia would likely be represented not only by the Departments of Defence and Foreign Affairs, but also by the Australian Antarctic Division and Department of the Environment. Such a whole-of-government effort would ensure that any guidance is not purely military or diplomatic but strongly influenced by concerns for the environment. As a result, there is no need for the actual definition to be changed, contrary to calls from some authors.[32] Rather, it would be a tweaking of the application of the international humanitarian law principle of proportionality.

ICRC guidance could then be drafted into a model rules of engagement. Organisations such as the International Institute of Humanitarian Law in San Remo would be well placed to do this.[33] The aim would be to provide a more 'down-to-earth' application of ecocentric guidance, which would specify exactly when a use of force would be appropriate in given circumstances. This would be an exercise of proportionality but with far greater emphasis on 'civilian' casualty (that is, damage to the polar environment) than in more conventional rules of engagement. Definitive interpretations would be an expansion of Additional Protocol I without the need for any difficult treaty modifications.[34]

This multifaceted solution to the specific issue of polar armed conflicts has the potential to spark wider changes within international humanitarian law. Calls for a fifth Geneva Convention on the environment have been met with stiff opposition in the past but could become a reality after the full implementation of this expansion of Additional Protocol I. This paper does not argue for a fifth convention; it merely indicates that this could be a future pathway for consideration. The crucial point is that bigger change

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[32] See, for example, Glen Plant, 'Elements of a "Fifth Geneva" Convention on the Protection of the Environment in Time of Armed Conflict', in Glen Plant (ed.), *Environmental protection and the law of war: a 'Fifth Geneva' Convention on the Protection of the Environment in Time of Armed Conflict*, Belhaven Press: New York, 1992, pp. 37-8, cited in Halpern, 'Protecting vulnerable environments in armed conflict', p. 142.

[33] Dennis Mandsager (ed.), *San Remo handbook on rules of engagement*, Istituto Internazionale di Diritto Umanitario: San Remo, 2009.

[34] Halpern, 'Protecting vulnerable environments in armed conflict', p. 143.

must begin at a smaller level. Environmental damage in the polar regions is an area where there is relatively widespread consensus, because all major states on the world stage have significant and growing interest in the poles. Using a more clear-cut instance of the intersection between international humanitarian law and the environment would create a catalyst for a more sophisticated debate on harder issues in the same space.

VI CONCLUSION

The barriers against armed conflict in the polar regions are illusory. Demilitarisation as the only protection against environmental harm is insufficient, because armed conflicts can flare up at any time from as simple an incident as the legitimate exercise of self-defence. Once active, an armed conflict will largely be governed by international humanitarian law, not polar law, and the international humanitarian law regime to protect the polar environment is seriously lacking in clarity. As a result, commanders would be more likely to err on the side of military necessity, especially in the heat of an operation.

Therefore, this paper has promoted an inter-organisational conference that brings together international humanitarian law and polar law organs to discuss the issue. Such a conference could produce high-level guidance on the conduct of polar armed conflicts under international humanitarian law, clarifying the interpretation of environmental protection measures. This guidance would manifest in national rules of engagement through raised awareness. On the whole, it could prompt a wider debate on the protection of environments outside the polar regions, and perhaps signal a modification or addition to the Geneva Conventions.

Ironically, this serious contemplation of a polar armed conflict could even strengthen pan-polar cooperation. By bringing all relevant parties to the table to consider how international humanitarian law should respond to an armed conflict at the poles, the polar law provisions against armed conflict would appear even more important. In other words, the clarification of international humanitarian law rules could reinforce the barriers against conflict in polar law by highlighting the need for, and triumph of, polar cooperation. Indeed, the Arctic Council has already been focusing more clearly on such cooperation. Mikhail Gorbachev's words, at least for the polar regions, will probably ring less true in the years to come.