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# Rights of Nature and the Antarctic: philosophical considerations, possible modalities, and relations with the Antarctic Treaty System

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## ABSTRACT

This article identifies and further discusses key themes and insights from *The Polar Journal Special Issue on Rights of Nature and the Antarctic*. First, philosophical considerations in relation to RoN are examined, with a specific focus on Antarctica's intrinsic value and the question of whether RoN can be seen as an ecocentric or anthropocentric concept. Next, the possible modalities of an Antarctic RoN approach are examined, including questions on *who* should be rights holders and *what* rights are involved, distinguishing between substantive and procedural rights. The analysis then turns to the question of how an Antarctic RoN approach would relate to the Antarctic Treaty System, with special attention to the draft Antarctica Declaration and the relationship between a RoN approach and the values and principles of the Antarctic Treaty and the Environmental Protocol. It is hoped that the discussions in this Special Issue will be a valuable addition to the ongoing debate regarding RoN worldwide and will contribute to the policy discussions on how to strengthen the protection of the Antarctic environment.

## KEYWORDS

Rights of Nature; Antarctica; human-nature-relationship; intrinsic values; values and principles; Antarctic Treaty System

## 1. Introduction

Although the rights of ecosystems, rivers, mountains, species, or individual animals or plants have been recognised in the legislation or case law of an increasing number of countries,<sup>1</sup> it still is a relatively new phenomenon in modern legal systems. This means there are still many questions about the precise meaning and consequences of acknowledging rights to nature and how it can be guaranteed that nature itself actually has its say. The discussion on Rights of Nature ('RoN') in relation to the Antarctic is even more recent. This concluding article outlines key themes and insights from the *Special Issue on Rights of Nature and the Antarctic*,<sup>2</sup> highlighting connections and recurring ideas. Rather than separating sections into arguments in favour or against Antarctic RoN, this article is

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<sup>1</sup>See Putzer et al., "Putting the rights of nature on the map."

<sup>2</sup>*The Polar Journal* Special Issue, Volume 14, Issue 2 (2024).

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organised around thematic discussions that emerged as important topics for the authors of this Special Issue. These include philosophical considerations, particularly with regard to Antarctica's intrinsic value, the possible modalities of an Antarctic RoN framework and its integration within the current Antarctic governance system. Each section summarises some of the Special Issue authors' perspectives<sup>3</sup> while integrating further reflections to enrich the examination of RoN and the Antarctic.

This final article of the Special Issue is not intended to provide definitive answers or reach firm conclusions. Nonetheless, the contributions to this Special Issue constitute a valuable academic contribution to the broader debate on the topic of RoN and the role of RoN in relation to the Antarctic, more specifically. It is hoped that the discussions may inspire policymakers involved in the Antarctic Treaty System ('ATS') to give the RoN concept and the fundamental thoughts behind it serious attention in order to strengthen environmental protection in the Antarctic.

## 2. Antarctic Rights of Nature: Some Philosophical Considerations

### 2.1. Intrinsic value and Antarctic RoN

As noted by Neumann and Rubenstein, academic literature, as well as existing law and policy, show connections between the (recognition of) intrinsic value of nature and the discussions about RoN. This is relevant for this Special Issue on RoN and the Antarctic because the Protocol on Environmental Protection to the Antarctic Treaty ('Environmental Protocol')<sup>4</sup> explicitly recognises the intrinsic value of Antarctica in Article 3(1) and in some of its Annexes. From a Western philosophical perspective, this recognition of intrinsic value means an acknowledgement that Antarctica possesses not only 'extrinsic' values (those attributed or experienced by others) but also value in itself. It could be argued that this implies Antarctica is not merely an object of the law (including in the Environmental Protocol) but can also be regarded as an entity or a subject with its own value. This brings the step towards the recognition of rights closer, as indeed, the main feature of RoN is the recognition of nature, or a component of nature, as a 'subject' of the law.

Strengthening the protection of intrinsic value through RoN is the central topic of Neumann and Rubenstein's article. Based on an analysis of various international initiatives, including the draft Antarctica Declaration, the Universal Declaration of the Rights of Mother Earth and the Universal Declaration of Oceans Rights, the authors argue that RoN approaches, despite acknowledged limitations, could provide 'a theoretical background from which the recognition and the legal protection of Antarctica's intrinsic value can similarly be enhanced'.<sup>5</sup>

The connection between the recognition of intrinsic value and the recognition of RoN can also be found in Donoso's argument that 'the concept of intrinsic value has prescriptive force – it imposes obligations on us about how we should act'.<sup>6</sup> This obligation to respect the intrinsic value has explicitly been included in the draft Antarctica

<sup>3</sup>Since this concluding chapter extensively builds on the Special Issue contributions, footnote references are not provided every time an author's position is discussed. Footnotes will only be used to reference direct quotations from their contributions.

<sup>4</sup>Protocol on Environmental Protection to the Antarctic Treaty, signed on 4 October 1991 (in force on 14 January 1998) <https://www.ats.aq/e/protocol.html>.

<sup>5</sup>Neumann and Rubenstein, "Rights of Nature and the protection of Antarctica's," 427.

<sup>6</sup>Donoso, "Intrinsic value, sovereignty rights, and sentient animals," 379.

Declaration presented in 2023:<sup>7</sup> ‘Every human being, state, and public or private entity recognised by law, must: (a) respect and protect the presence, dignity, beauty and intrinsic value, of Antarctica and Antarctic beings, and including their different modes of self-expression and wildness’.<sup>8</sup> Suppose one would argue that an obligation of, for example, the Parties to the Environmental Protocol towards Antarctica creates or implies a corresponding right of Antarctica to require Parties to comply with that obligation, then the step towards Antarctica as a rights holder has been made.

However, the above steps may not be apparent or convincing to everyone. For instance, Baard and Mancilla challenge the idea that intrinsic value alone justifies the acknowledgement of rights. They argue that ‘[w]hile rights are taken to express such intrinsic value, there is, to reiterate, no *necessary* link between having intrinsic value and being a rights-holder’.<sup>9</sup> However, the authors state that the fact ‘that something has intrinsic value carries substantial weight from an ethical perspective, entailing that the entity that has intrinsic value is morally considerable’, which constitutes the foundation for considering rights as ‘the best legal way to protect intrinsic value in some cases’.<sup>10</sup> In respect of Antarctica, Baard and Mancilla conclude that its intrinsic value, in combination with specific forms of human attachments, its substantial role as a global systemic resource, and the fact that it is under recurrent and substantial threats, ‘suggest that it is the whole of Antarctica that is to be considered as a rights-holder, towards which all agents have duties’.<sup>11</sup>

## 2.2. The role of RoN in establishing more equal relationships between humans and nature

The RoN debate fits well with the ‘greening’ of human-nature relationships, as reflected in nature conservation law over the last 150 years.<sup>12</sup> As briefly described in the introduction to this Special Issue, Western legal systems are still strongly anthropocentric, as is illustrated by Huijbens’ discussion on the central role of property rights in our relationship to the natural world.<sup>13</sup> However, the development of nature conservation law reflects a broadening of basic environmental philosophical human-nature relationships from mastery (rulership) and stewardship to more ecocentric attitudes, such as partnership and participation. This development is also noticeable for the ATS.<sup>14</sup> The RoN concept represents a significant step in a long journey towards recognising the importance of greater equality between animals, plants, and other components of nature on the one hand, and humans and their interests on the other. Nevertheless, there is an ongoing debate on how truly ecocentric the RoN concept is, a question also raised by several contributions to this Special Issue.

The first nuance to considering RoN ecocentric relates to the role that humans play in recognising or awarding RoN. Summerson states:

<sup>7</sup>The Antarctica Declaration is an initiative put forward by ‘Antarctic Rights’, a group of environmental advocates and academics. For more information, see <https://antarcticrights.org/resources/antarctica-declaration/>.

<sup>8</sup>Article VIII(1)(a) of the draft Antarctica Declaration, 30 November 2023.

<sup>9</sup>Baard and Mancilla, “Outlining Three arguments for Rights of Antarctica,” 401.

<sup>10</sup>*Ibid.*

<sup>11</sup>*Ibid.*, 404.

<sup>12</sup>See the Introduction to this Special Issue.

<sup>13</sup>See also, de Vries-Stotijn, et al., “Protection through property: from private to nature-held rights.”

<sup>14</sup>Bastmeijer, “Intergenerational Equity and the Antarctic Treaty System.”

There is no evidence that Nature grants or recognizes any rights to anything, as evidenced by the fact that over 99% of all species that have ever lived are now extinct and even whole continents (e.g. Pangea and Gondwana) and oceans (e.g. Tethys and Iapetus) [. . .] have been created and destroyed. The idea of ‘granting’ rights to Nature when Nature doesn’t recognize any rights is therefore contradictory and philosophically unsound. As far as I can see, the only way [a]round this would be to claim that Humans have become so dominant that they now have [the] power to override Nature.<sup>15</sup>

Indeed, if RoN implies that humankind ‘grants’ or ‘attributes’ rights to nature or parts of nature and may freely select the components that deserve such status, RoN would remain an anthropocentric concept. Furthermore, referencing the fact that this granting of rights arises from ‘intrinsic values’ might be unconvincing when considering that these values are also attributed by humans to (parts of) nature. This may lead to attributing intrinsic value or rights based only on attributes considered valuable in relation to human interests. According to Summerson:

The idea of one species granting rights to other species is both highly anthropocentric, hubristic and is probably going to be inconsistently applied in that charismatic megafauna and pretty flowers and birds will be the ones that get the rights while other species who are either unfortunately ugly or with whom we are in conflict, e.g. rats, mosquitoes and dangerous viruses will not.<sup>16</sup>

This practice has been seen before when granting protection to wild plants and animals in species protection law. For example, compared to mammals and birds, insects were only included on protected species lists very late, and a study by Leandro et al. found that in Europe, only 0,12% of the European insects have protected status.<sup>17</sup> This study also revealed a taxonomical, ecological, morphological and ‘well-knownness’ bias in the selection of protected insect species: ‘protected species were significantly larger, better known, more widespread and more multicoloured than a randomly selected set of unprotected species’ and ‘butterflies, dragonflies and grasshoppers were overrepresented’.<sup>18</sup> Another study by Klebl et al. suggests ‘that animals’ beauty leads people to view animals as having moral standing, independent from their perceived mental capacities, disposition to act benevolently, as well as their perceived similarity to humans, familiarity, and edibility’.<sup>19</sup> According to Huijbens, humans are continuously reframing values through changing relationships, and this confirms the central role of humankind in the politicised process of granting rights to nature:

This reframing of the polar regions implies that they *do not* possess some inherent or authentic value, or rights for that matter. The way they are valued is made here and now, there and then, in the moments we make sense of and relate to place on a man-made planet which has, at current, replaced nature.<sup>20</sup>

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<sup>15</sup>Rupert Summerson, personal communication to editors within peer-review process, 2 September 2024.

<sup>16</sup>Ibid.

<sup>17</sup>Leandro et al., “Bias and perspectives in insect conservation: A European scale analysis.” See also White, “British Colonialism, Australian Nationalism and the Law.”

<sup>18</sup>Leandro et al., “Bias and perspectives in insect conservation: A European scale analysis,” 213.

<sup>19</sup>Klebl et al., “Beauty of the Beast: Beauty as an important dimension,” 7.

<sup>20</sup>Huijbens, “Reframing the Antarctic as polar planetary commons,” 508.

Yet, an alternative view extends human-focused ‘natural law’ theory to other parts of nature, arguing that nature and its components possess *inherent rights* rather than having rights attributed by humans through legislation or case law. In this context, RoN serves as a framework to ensure these inherent rights are acknowledged and placed in human-focused legal systems.

This may explain why the draft Antarctica Declaration makes a distinction between inherent rights of nature and ‘rights which are recognised for the purposes of requiring humans to respect and protect the inherent rights’.<sup>21</sup> ‘Inherent and inalienable rights and freedoms’ include, for instance, ‘the right to exist’, ‘the right to be respected as a being’, and ‘the freedom to be wild’,<sup>22</sup> while other rights to support these inherent rights and freedoms include, for instance, ‘the right to be represented in any legal or administrative proceedings that may affect the recognition, exercise or protection of its legal status, powers, rights or freedoms recognised in this Declaration’.<sup>23</sup> This right of representation, however, brings an additional anthropocentric aspect to the RoN discussion. Liebeaux notes that:

[T]he legal personhood model is considered problematic by several scholars, as RoN assumes representation for nature in human political forums with a ‘human protagonist’, even though some scholars have tried to develop new models of representation beyond the human scenario.<sup>24</sup>

The question remains as to whether the discussion about the extent to which RoN can be seen as ecocentric or anthropocentric is very relevant and whether possible anthropocentric aspects of RoN would make the concept less relevant. The fact is that humans have a significant negative impact on nature worldwide and that the many existing nature conservation treaties and laws developed over the past 50 years have been unable to stop the global loss of biodiversity and wilderness areas. Even if RoN has many anthropocentric aspects or would completely be considered a human invention, it still is worth considering whether the concept could lead to more effective protection of nature.

This reasoning on RoN more generally can also be applied to the Antarctic. Although the ATS instruments have played an important role in limiting environmental degradation caused by human activities, the literature shows that the current system has not been capable of ensuring comprehensive protection of Antarctica’s values in accordance with the objectives of the Environmental Protocol and the CAMLR Convention. As Alan Hemmings notes, ‘[n]obody can look at the present state of human engagement with the natural environment in the Antarctic with any sense of confidence that we are on the right pathway’.<sup>25</sup> Human impacts in the Antarctic include pollution (both local and long-range

<sup>21</sup>Footnote 16 of the draft Antarctica Declaration.

<sup>22</sup>Article IV(1) of the draft Antarctica Declaration.

<sup>23</sup>Article V(2)(e) of the draft Antarctica Declaration.

<sup>24</sup>Liebeaux, “Cats in congress or penguins in parliament?,” 476–477; referring to Kauffman, “Rights of Nature,” 506; Celermajer et al., “Multispecies Justice,” 130–31; Reeves and Peters, “Responding to Anthropocentrism”; Bertenthal, “Standing Up for Trees,” 356; and Tanasescu, “Rethinking Representation.” For these references, see the article by Liebeaux in this Special Issue.

<sup>25</sup>Hemmings, “Realising Rights of Nature across and beneath,” 423.

pollution),<sup>26</sup> the increase of human footprint<sup>27</sup> and decrease of wilderness,<sup>28</sup> the introduction of alien species,<sup>29</sup> the disturbance of wildlife,<sup>30</sup> marine noise pollution,<sup>31</sup> and the effects of climate change. As noted by Tejedo et al., the sources of these impacts may be local or long-range, and all these impacts may cumulate:

The negative impacts of human activity and presence in the Antarctic are additive and are likely to be further confounded by some, or all, of the aforementioned global problems, leading to an even more pronounced effect on endemic flora and fauna, perhaps critically in some cases.<sup>32</sup>

Thus, it is worthwhile to examine whether an Antarctic RoN approach could possibly strengthen the protection of Antarctica's environment.

### 3. Modalities of Antarctic RoN

As Hemmings notes, even if the aspirations for implementing an Antarctic RoN were to be considered clear, the question of how these rights might be applied remains uncertain. As Liebeaux points out, RoN implementations 'are always context-specific and should not be decontextualised', which means that 'RoN initiatives are tailored for their region, and the same should be done for the Antarctic'.<sup>33</sup>

Indeed, Antarctica's governance system is distinct from those in any other region, with its complex legal and political system, lack of undisputed territorial sovereignty and lack of a human indigenous population. These aspects give Baard and Mancilla reasons to conclude that *Rights of Antarctica* may not be justified on the basis of RoN. Nonetheless, RoN initiatives may provide inspiration for the development of an Antarctic RoN framework as long as the unique Antarctic context is considered. Moreover, certain motives for RoN initiatives worldwide may also be relevant to the ATS (e.g. the central position of human interest and the lack of effectiveness in achieving environmental protection objectives).

Different options have been put forward in relation to modalities of a potential Antarctic RoN by the authors in this Special Issue. These options vary based on ethical, ecological, legal, and philosophical perspectives, and each has significant implications for the question to whom such rights would be applied, to what extent, and how these rights would be enforced.

<sup>26</sup>Scientific Committee on Antarctic Research. "Persistent Organic Pollutants Database"; Cordero et al. "Black carbon footprint of human presence in Antarctica."

<sup>27</sup>Brooks et al., "Our footprint on Antarctica competes with nature for rare ice-free land." Pertierra et al., "High Resolution Spatial Mapping of Human Footprint across Antarctica."

<sup>28</sup>Leihy et al., "Antarctica's wilderness fails to capture continent's biodiversity."

<sup>29</sup>Leihy et al., "Introduced and invasive alien species of Antarctica."

<sup>30</sup>Tin et al., "Impacts of local human activities on the Antarctic environment."

<sup>31</sup>Erbe et al., "Marine Noise in the Southern Ocean."

<sup>32</sup>Tejedo et al., "What are the real environmental impacts of Antarctic tourism?" 10, With reference to Monz et al, "Understanding and managing the interactions of impacts from nature-based."

<sup>33</sup>Liebeaux, "Cats in congress or penguins in parliament?" 482.

### 3.1. Whose rights?

The first question that arises is, whose rights should an Antarctic RoN framework encompass? While certain RoN initiatives in other parts of the world grant rights to nature as a whole, others define more specific entities as right owners, limiting their scope to particular parts of nature.<sup>34</sup> These may encompass ecosystems, specific geographical features (such as rivers, mountains or forests), animal or plant species (both collectively or individually), or other natural components. In the case of the Antarctic, different options are worth considering.

Donoso, for example, emphasises the rights of sentient species, approaching the topic through an animal ethics lens. The author asserts that sentient animals, ‘who have the capacity for subjective experiences and whose lives can go better or worse from their own point of view’,<sup>35</sup> should be acknowledged for their intrinsic value, which, in turn, gives them certain rights. This perspective prioritises animals capable of experiencing well-being and suffering, and the author advocates for sentient species’ rights as a key component of an Antarctic RoN.

Baard and Mancilla take a similar position and recognise that animals may possess rights based on intrinsic value and certain additional criteria. They also discuss the option of giving rights to specific Antarctic ecoregions or places. However, the authors argue that these options are not sufficient in their view and present four interrelated reasons that, collectively, would make a compelling case for granting rights and legal standing to Antarctica<sup>36</sup> as a whole. In this case, an Antarctic RoN would give ‘Antarctica *per se* independent standing in international law, potentially as an equal vis-à-vis other states’.<sup>37</sup>

Going a step further, Hemmings proposes that a more effective Antarctic RoN should extend beyond the current boundaries of the ATS to include a larger marine region. Specifically, Hemmings advocates for an Antarctic RoN encompassing the ‘Greater Southern Ocean’, an oceanic area extending to about 35° South. As Hemmings states, ‘the case for the larger area rests on its objectively being a better area to both conceptualise and “capture” the space within which Antarctic Nature actually exists and needs to thrive’.<sup>38</sup>

Finally, both Liebeaux and Huijbens suggest adopting a relational perspective, which can help avoid rigid categorisations of natural entities. Liebeaux notes that ‘[s]uch a relational perspective on more-than-humans might be valuable in avoiding lists of included natural entities, which would not withstand the inherent change and variability of ecosystems’.<sup>39</sup> Huijbens argues that such ‘ongoing process of valuing through relating holds unimaginable richness’,<sup>40</sup> and whilst recognising that all relations are politically constituted, suggests cultivating a sense of planetary belonging with the adoption of

<sup>34</sup>Putzer, et al., “Putting the rights of nature on the map.”

<sup>35</sup>Donoso, “Intrinsic value, sovereignty rights, and sentient animals,” 386–387.

<sup>36</sup>In line with the draft Antarctica Declaration, the authors define Antarctica as ‘the community of inter-dependent Antarctic beings that exists South of the Antarctic Convergence, and includes the continent of Antarctica, the ice, sea, seabed, atmosphere, and native species within this area, and the relationships between them’ and also the relationships with Antarctic beings. See Beard and Mancilla, “Outlining three arguments for Rights of Antarctica,” 391.

<sup>37</sup>Baard and Mancilla, “Outlining three arguments for Rights of Antarctica,” 390.

<sup>38</sup>Hemmings, “Realising Rights of Nature across and beneath the Southern Ocean,” 422.

<sup>39</sup>Liebeaux, “Cats in congress or penguins in parliament?,” 478.

<sup>40</sup>Huijbens, “Reframing the Antarctic as polar planetary commons,” 508.



a planetary commons perspective that fosters ongoing relationships of radical interdependence.

Approaches suggesting broader or more limited entities to be included in a potential Antarctic RoN framework have advantages and disadvantages. Broader approaches that recognise Antarctica as a singular entity deserving of rights would ensure that all aspects of nature, from its glaciers and ice shelves to its wildlife and ecosystems, are granted protection under an Antarctic RoN framework. These approaches align more closely with the understanding that species and ecosystems are interconnected (e.g. granting rights to penguins without protecting their habitat or other species that serve as their food might not be effective) and support a less anthropocentric view of Antarctica's intrinsic value. However, these broader approaches are also significantly more challenging to implement due to the lack of clearly defined right-holders. In turn, such an encompassing framework may be more difficult to reconcile with the already existing human activities in the region, such as scientific research, fishing and tourism.

Approaches that limit the scope to certain aspects of nature may be more feasible and perhaps facilitate the effective implementation of an Antarctic RoN framework. Giving rights to specific species or entities that are highly visible and whose appeal for conservation resonates globally could generate greater urgency and, therefore, more immediate action. For instance, research by Lee et al. shows that Antarctic science, biodiversity, and tourism stakeholders all 'identified pygoscelid (Adélie, Gentoo, Chinstrap) and emperor penguin colonies, and fur and elephant seals, as important',<sup>41</sup> which could be an argument to select these components of nature for attributing rights. However, focusing on single aspects of nature may not offer sufficient protection to the entire ecosystem of which this species/entity is part, and upon which it is dependent. A more limiting approach also raises important ethical questions about the reasoning and morality of privileging certain species/entities over others.<sup>42</sup> This would, in turn, strengthen the anthropocentric character of the concept as humans would be selecting which natural components have rights.

The decision of whether to focus on a species, certain regions or areas, Antarctica as a whole or the Greater Southern Ocean will ultimately rely on the motivations behind such protection and the underlying values and philosophical considerations supporting such motivations.

### 3.2. Substantive rights

The following fundamental question is, what rights should a potential Antarctic RoN encompass? RoN initiatives worldwide approach this question differently, with some enumerating lists of rights, while others do not specify any rights explicitly.<sup>43</sup> Some of the outlined rights are, to differing degrees, analogous to 'widely recognized human rights, including rights to life, liberty, security of the person, health, a healthy environment, water and clean air; and freedom from discrimination, cruelty, torture, arbitrary detention, slavery, servitude and forced labour'.<sup>44</sup> Other rights typically granted to humans are

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<sup>41</sup>Lee et al., "Conservation features of the terrestrial Antarctic Peninsula," 1045.

<sup>42</sup>See the quotations from Summerson in [Section 2](#).

<sup>43</sup>Wood, "Rights of Nature."

<sup>44</sup>*Ibid.*, 5.

absent,<sup>45</sup> sometimes because they are considered unsuitable for non-human entities. As discussed in subsection 2.2, different views also exist regarding whether rights are inherent or being granted by law. Although substantive rights for any type of Antarctic RoN framework will depend on whose rights they refer to, the authors of this Special Issue have discussed some possible options.

Donoso, utilising animal political theory, builds an argumentation in favour of the inclusion of political rights for animals, particularly in the case of wild animals. Donoso stresses the need to ‘go beyond negative rights (e.g. not to harm, not to kill)’ to the ‘right to be sovereign within their territories (the habitats where they live, feed, procreate, play, etc)’.<sup>46</sup> This perspective encourages a re-evaluation of human interactions with non-human animals and of our ethical obligations to wild animals in Antarctica.

Baard and Mancilla, following the text from the draft Antarctica Declaration, state that Antarctica’s substantive rights should encompass, among other rights, ‘the inherent and inalienable right to exist and to be respected; the freedom to be wild, and the right to self-expression and self-determination’.<sup>47</sup>

While echoing similar ideas, Guggisberg adds that implementing an Antarctic RoN would guarantee substantive rights that possibly include certain notions of functional integrity and the duty of restoration if harm is caused. As such, these rights may encompass ‘the right to exist and to life, the right to function and to continue doing so, and the right to be restored if damaged’.<sup>48</sup> Yet, the author stresses that corresponding substantive human duties would also have to be developed.

Finally, Huijbens proposes, through an earth jurisprudence frame, ‘that humans should recognise the intrinsic value of nature and its right to exist and flourish, yet as part and parcel of a holistic Earth of dynamic inter-relationality’.<sup>49</sup> The author contends that this planetary relational approach advocates for ‘a more holistic approach to law and governance that considers the well-being of the entire Earth community, including the more-than/non-human’.<sup>50</sup>

### 3.3. Procedural rights and representation

How can we ensure that nature is represented in decision-making processes and that its rights can be defended? Who would speak for Antarctic rights holders? And how can these representatives know what is best for Antarctica? In RoN initiatives, Indigenous communities, local populations, and government institutions often serve as the designated representatives to advocate for natural entities. However, as Liebeaux points out, RoN has not yet been applied in a region without undisputed territorial sovereignty, making the designation process of representatives in the Antarctic quite challenging, as clear mechanisms are not readily apparent.

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<sup>45</sup>Ibid.

<sup>46</sup>Donoso, “Intrinsic value, sovereignty rights, and sentient animals in Antarctica,” 387.

<sup>47</sup>The authors reference Articles IV and XV of the draft Antarctica Declaration (Draft 30 November 2023), but they state that they only focus on the rights of Antarctica, while the draft Antarctica Declaration focuses on both “Antarctica and Antarctic beings.”

<sup>48</sup>Guggisberg, “Rights of nature and non-use of nature,” 464.

<sup>49</sup>Huijbens, “Reframing the Antarctic as polar planetary commons,” 499.

<sup>50</sup>Ibid.

When examining whether the existing non-use measures<sup>51</sup> within the ATS contribute to achieving procedural RoN, Guggisberg asserts that, although some procedures allow for the representation of diverse interests, key decision-making remains under state control. As such, only entities invited by decision-making states have a seat at the table. Liebeaux also contends that, while some elements of the ATS could be seen in a more ecocentric way, its strong anthropocentric foundation restricts the inclusion of more-than-humans in decision-making processes: ‘For instance, ATCPs need to act in the common interest of humankind: the interests of Antarctic more-than-humans are not within that scope’.<sup>52</sup> The author discusses the possibility of Antarctic Treaty Consultative Parties (‘ATCPs’) becoming the guardians of an Antarctic RoN. However, building upon an argument for separating RoN guardianship from the state, the author concludes that ‘RoN often emerges after the failure of governments to protect the environment. The representative of the Antarctic should, therefore, be separate from ATCPs’.<sup>53</sup>

Baard and Mancilla explain that ‘[i]n the literature about representing nature in domestic constituencies, the usual candidates are “those who know” and “those who care”’,<sup>54</sup> which would mean that the selection of Antarctic representatives could be based on ‘their knowledge and attachments to the place’.<sup>55</sup> This connects well with the draft Antarctica Declaration assertion that the implementation of the Declaration should ensure that ‘Antarctica and Antarctic beings are represented by people with the necessary understanding, personal qualities, expertise and commitment to the best interests of Antarctica, do so with integrity and wisdom’.<sup>56</sup> Inspired by the New Zealand Te Awa Tupua Act, Liebeaux states that:

[I]t might be best to prefer New Zealand’s model of RoN for the Antarctic, integrating more-than-human considerations directly into decision-making arenas to institutionalise their presence with an ‘independent environmental defenders office, staffed by a multidisciplinary team and charged with the responsibility of environmental monitoring, political advocacy, and legal representation’.<sup>57</sup>

According to Liebeaux, ‘[s]uch an Antarctic office could for instance support the implementation of *in dubio pro natura* and represent the Antarctic more-than-humans at ATCMs’ and other ATS organs.<sup>58</sup>

#### 4. Antarctic RoN and the Antarctic Treaty System

Apart from examining the modalities of a potential Antarctic RoN framework, it is also important to consider how it would interact with the existing Antarctic governance system. This includes discussions on whether Antarctic RoN would be integrated into

<sup>51</sup>In the author’s analysis, ‘non-use’ is defined as ‘the absence of use of nature or elements thereof, [...] implemented through non-use measures [...] such as moratorium, closed area, closed season, or non-entry/no-take zone’. See Guggisberg, “Rights of nature and non-use of nature” 449.

<sup>52</sup>Liebeaux, “Cats in congress or penguins in parliament?,” 488 (internal footnote omitted).

<sup>53</sup>Ibid., 483. (internal footnote omitted).

<sup>54</sup>Baard and Mancilla, “Outlining Three arguments for Rights of Antarctica,” 400.

<sup>55</sup>Ibid.

<sup>56</sup>Article XV of the draft Antarctica Declaration.

<sup>57</sup>Liebeaux, “Cats in congress or penguins in parliament?,” 487 (internal footnote omitted).

<sup>58</sup>Ibid.

the ATS or constitute an alternative approach and how it would relate to some of its features, such as values (other than intrinsic value) and principles agreed in legal instruments of the ATS. As with previous considerations, these factors would significantly impact the viability and extent of an Antarctic RoN framework.

#### 4.1. Compatibility of RoN initiatives and the ATS

A relevant question is how the potential recognition of Antarctic RoN might relate to and interact with the current international legal regimes applicable in the Antarctic and, in particular, the ATS. Different options can be envisaged in this regard: Antarctic RoN could be an independent development that originates and develops outside the ATS or a framework that (while possibly originating outside the ATS) finds its way into the ATS.

Several contributions to the Special Issue discuss different aspects concerning how Antarctic RoN could be developed or implemented *within* the ATS. Liebeaux raises some interesting questions in this regard, including important aspects such as the possibilities for the designation of representatives for the Antarctic within the ATS and how their participation could be embedded within the existing system's structures. More fundamentally, the author reflects on how such a development would 'challeng[e] mainstream values and principles', including '[t]he strong anthropocentric roots of the ATS'.<sup>59</sup> On the other hand, Liebeaux notes that such development might be in line with more ecocentric aspects of the system and suggests that '[t]he ATS could potentially become a trailblazer in ecocentric law by including the just representation of Antarctic more-than-humans within its institutions'.<sup>60</sup>

Other contributors also reflect on the possibility of Antarctic RoN becoming a feature within the ATS and express less optimistic views concerning its likelihood. In this sense, Hemmings recalls the challenges faced within the ATS in relation to the adoption of new binding instruments since the adoption of the Environmental Protocol in 1991. Similar concerns have been repeatedly discussed in the academic literature. This apparent difficulty in reaching consensus with regard to the substantive regulation of human activities in the Antarctic within the ATCM and CCAMLR does not foreshadow any significant likelihood for the incorporation of RoN within the ATS. Nonetheless, Hemmings also considers that:

[t]his apparently dismal prognosis for the prospects of take-up within the existing Antarctic forum (the ATS) need not be seen as fatal to Antarctic RON, although of course it may be. The nature of RON represents such a departure from all previous and current approaches to protecting Antarctic environments that a considerable period of education and empathy-building is inevitably necessary before any sort of discussion around codification within existing or potentially new institutions and architectures could realistically begin.<sup>61</sup>

Moreover, in line with the proposal to recognise RoN within a greater area, the author notes that such an initiative 'likely entails a fragmented engagement with discrete jurisdictional and institutional entities' and suggests that development might start at the Antarctic

<sup>59</sup> *Ibid.*, 487–488.

<sup>60</sup> *Ibid.*, 488.

<sup>61</sup> Hemmings, "Realising Rights of Nature across and beneath the Southern Ocean," 422–423.

continent and expand ‘through successive functional layers’.<sup>62</sup> Albeit reluctant to assume that Antarctic RoN will be codified within the next decades, Hemmings suggests that we may see ‘an emerging practice of attending to RON under *existing* legal instruments to the extent that this is feasible, i.e. the establishment of new norms of interpretation and the recognition of the need for further institutional development’.<sup>63</sup>

A similar idea is discussed by Guggisberg, who analyses ‘whether - and to what extent - non-use measures [existing within the ATS] can step in for the not-yet-internationally-recognised RoN’.<sup>64</sup> After a thorough discussion of the different non-use measures adopted within the ATS, Guggisberg concludes that they pursue some ecocentric aims but are subject to many and broad exceptions. Furthermore, a ‘holistic approach’ is found to be absent due to ‘the limited scope of these non-use measures’ and ‘the fundamental threat posed by climate change is ignored by the ATS, decreasing the potential positive effects of all existing non-use measures’.<sup>65</sup> Acknowledging that ‘non-use measures cannot replace the RoN’, Guggisberg argues that ‘there are synergies that can be further built upon’.<sup>66</sup> In particular, the author proposes that ‘in the international law field, it might be more realistic to examine how some RoN concepts can serve to reinterpret or modify existing rules, and look at how the RoN can inform norms and processes’.<sup>67</sup> Nonetheless, the author warns that even ‘such an incremental evolution’ may be difficult at the moment due to consensus decision-making within the ATCM, coupled with the current geopolitical situation.<sup>68</sup> Despite the challenging prospects, Guggisberg recalls that ‘the ATS has long served as a model in terms of environmental protection – its patchwork of best practices identified here might once more inspire other existing frameworks that use majority decision-making procedures or even future regimes’.<sup>69</sup>

Yet another proposal, this time in more philosophical terms, is put forward by Donoso. Donoso’s contribution examines how the recognition of the intrinsic value of Antarctica within the Environmental Protocol can be seen to impose limitations on sovereignty claims over Antarctica. According to the author’s argument, ‘State sovereignty in Antarctica becomes conditional to acting in Antarctica in ways that are consistent with the respect owed to wild sentient animals’.<sup>70</sup> This ‘also require[s] revisiting and amending domestic policies that generate direct harm or unreasonable risk to wild animals in Antarctica despite being performed perhaps thousands of miles away from the white continent’.<sup>71</sup> Moreover, it is also noted that ‘[t]he same conditions of respect for what is intrinsically valuable in Antarctica apply to [other Parties]’.<sup>72</sup>

In sum, various contributions within this Special Issue discuss the compatibility of RoN with the ATS and/or how different obligations within the ATS, including the commitment to protect the intrinsic value of Antarctica and specific non-use measures, could be used to define a level of protection that can materialise, at least, some elements

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<sup>62</sup>Ibid., 423.

<sup>63</sup>Ibid., 424.

<sup>64</sup>Guggisberg, “Rights of nature and non-use of nature,” 448.

<sup>65</sup>Ibid., 465, 468

<sup>66</sup>Ibid., 469.

<sup>67</sup>Ibid.

<sup>68</sup>Ibid.

<sup>69</sup>Ibid.

<sup>70</sup>Donoso, “Intrinsic value, sovereignty rights, and sentient animals in Antarctica,” 387.

<sup>71</sup>Ibid.

<sup>72</sup>Ibid.

of Antarctic RoN. This approach would ensure an equivalent level of protection for these elements, even if the formal recognition of Antarctic RoN were not to become accepted as law in this region.

Since the draft Antarctica Declaration is an existing initiative that aims to connect RoN with the Antarctic, it is also interesting to discuss its potential interaction with the current legal regime. As Liebeaux argues, the legal personality that the draft Antarctica Declaration presents is similar to ‘environmental statehood’ as it purports to recognise Antarctica as having rights under international law which can be seen as equivalent to states.<sup>73</sup> The draft Antarctica Declaration includes both general duties of humans (in Article VIII) and specific duties of states (in Article IX). Moreover, it also provides that ‘[e]ach State must take legislative and other measures to enable Antarctica to be effectively represented in sub-national, national, transnational or international [...] decision-making that may have a significant impact on Antarctica [...]’.<sup>74</sup>

However, the draft Antarctica Declaration does not provide specific guidance on how this representation should be operationalised or implemented. The provisions on implementation are also very open-ended, stating that ‘[t]he peoples of Earth who proclaim and support this Declaration must collaborate to ensure its effective implementation, including by establishing institutions and processes’ aimed at the identification and conveyance of ‘the best interests of Antarctica’.<sup>75</sup> In light of the draft Antarctica Declaration’s indeterminacy with regard to the representation of Antarctica within relevant decision-making processes, there would be room for different levels of interaction with existing legal regimes.

In terms of its relationship to other legal instruments, the draft Antarctica Declaration affirms not to deny ‘the existence or validity of any right, freedom, duty or power that is recognised or conferred by international customary law, treaty, transnational, national or subnational law, common law, or customary law, *to the extent that it is consistent with this Declaration*’.<sup>76</sup> On the other hand, it declares ‘invalid and of no force or effect’ ‘[a]ny provision of international customary law, a treaty, transnational, national or subnational law, common law or customary law, that is inconsistent with [...] an inherent right or freedom [of Antarctica] recognised in Article IV [...]’.<sup>77</sup> This provision, if the draft Antarctica Declaration were to be adopted and were to eventually result in the adoption of legally binding rules,<sup>78</sup> would most likely have far-reaching consequences, including for the interpretation of human rights. Always giving priority to (inherent) RoN over any other international obligations (including human rights), as the draft Antarctica Declaration proposes, could probably result in unexpected and undesirable outcomes.

<sup>73</sup>See Liebeaux, “Cats in Congress or Penguins in Parliament?,” 483. See also, Article III(2) of the draft Antarctica Declaration: “As an entity with legal personality, Antarctica has: (a) the right to independence and to exercise all its legal powers freely and without dictation by States; (b) jurisdiction within its territory, over all Antarctic beings, and over all Humans within its territory; and (c) the right to equality in law with States.”

<sup>74</sup>Article X(2) of the draft Antarctica Declaration.

<sup>75</sup>Article XV of the draft Antarctica Declaration.

<sup>76</sup>Article XIV(1) of the draft Antarctica Declaration (emphasis added).

<sup>77</sup>Article XIV(2) of the draft Antarctica Declaration.

<sup>78</sup>The explanatory memorandum explains that, while the specific duties of states under the Declaration would be non-binding, they are intended as “a step towards the adoption by the United Nations (or a group of States) of a similar declaration and eventually the incorporation of these duties in a legally binding international treaty” (see Antarctica Declaration, draft of 30 November 2023, Explanatory memorandum, p 19, available at: <https://antarcticrights.org/resources/antarctica-declaration/>.)

This is compounded by the difficulties in ascertaining nature's (or parts thereof) interests in a particular case and being able to channel them accurately into the relevant decision through human representatives.

Yet, the RoN concept is not necessarily intended to prioritise nature in every situation where there is tension between RoN and the rights of humans; rather, it is intended to achieve a more equal position for nature in legal systems. In this sense, when implementing a RoN approach, it is indeed important to set very clear limits on exceptions and on discretionary space for governments to weigh up interests and come to a decision. After all, such exceptions and room for balancing interests already exist in most of the existing nature conservation law systems, and practice shows that humankind often let its own interests prevail in their implementation.

Summerson has expressed the view that the draft Antarctica Declaration 'seems to promote the overthrow of the Antarctic Treaty System which I would consider extremely dangerous'.<sup>79</sup> This appears to be a reasonable assumption in light of the above-mentioned provisions and the draft Antarctica Declaration's explanatory memorandum indicating that, while the duties of states in Article IX of the draft Antarctica Declaration would be non-binding, the ultimate aim is 'the incorporation of these duties in a legally binding international treaty'.<sup>80</sup> Interestingly, this is not aligned with the information published at the Antarctic Rights website in answering the question whether the Declaration is compatible with the ATS, which affirms that:

[t]he Declaration is not intended to replace the ATS, nor could it. The adoption of the Declaration would be analogous to the adoption of the (non-binding) Universal Declaration of Human Rights by the United Nations on 10 December 1948. [...] We hope that the adoption of an Antarctic Declaration will have a similar positive impact on how people perceive and relate to Antarctica and guide the progressive reform of the ATS and laws, policies and institutions at the international, transnational, national and sub-national levels to afford higher levels of protection for Antarctica and Antarctic beings.<sup>81</sup>

#### **4.2. Antarctic RoN and Values and Principles in the Antarctic Treaty and the Environmental Protocol**

In order to address the question of the compatibility of Antarctic RoN with the ATS at a deeper level, the fundamental values and principles of the system provide a further relevant and enriching perspective. While much attention in this Special Issue has been devoted to the intrinsic value of Antarctica and its potential relationship with RoN, it is also relevant to explore how an Antarctic RoN framework could relate to other values and principles outlined in ATS instruments. Some preliminary ideas on how Antarctic RoN might relate to values and principles recognised in the Antarctic Treaty and the Environmental Protocol will be presented here.<sup>82</sup> Since an in-depth examination of this

<sup>79</sup>Rupert Summerson, personal communication to editors within peer-review process, 2 September 2024.

<sup>80</sup>See draft Antarctica Declaration, draft of 30 November 2023, Explanatory memorandum, 19, available at: <https://antarcticrights.org/resources/antarctica-declaration/>. See also *Ibid*, 25.

<sup>81</sup>See <https://antarcticrights.org/resources/faq/>.

<sup>82</sup>For a complete overview of the values and principles recognised in the Antarctic Treaty and the Environmental Protocol, see Makanse et al. 'Values and Principles'. It is important to acknowledge that only the values and principles in the Antarctic Treaty and the Environmental Protocol are considered in the discussion here. An analysis on further values and principles recognised in other ATS instruments is a relevant question as well, and it would deserve further research.

question is beyond the scope of this article, we do not exhaustively engage with all the values and principles in these instruments. Rather, we present some preliminary ideas and highlight some values and principles that we consider illustrative in this context. This interaction, of course, would take different shapes depending on further considerations of a potential Antarctic RoN framework, including its specific characterisation and how such a framework would interact with the ATS. Therefore, this examination reflects a rather broad engagement with the idea of an Antarctic RoN.

#### **4.2.1. Values and Principles that could potentially be strengthened by Antarctic RoN**

Recognising RoN in the Antarctic could support and even strengthen many of the values and principles already established in the Antarctic Treaty and the Environmental Protocol. The authors of this Special Issue have highlighted the designation of Antarctica as a natural reserve, devoted to peace and science, Antarctica's environmental values, as well as the substantive principle of comprehensive protection, although they have not always addressed these values and principles directly. Instead, they are often embedded in the discussions of Antarctica's intrinsic value.

In relation to the emphasis on environmental protection, Antarctic RoN could contribute in various ways to ensure the 'comprehensive protection of the Antarctic environment and dependent and associated ecosystems' as agreed in the Environmental Protocol.<sup>83</sup> Currently, the assessment of human activities under the Environmental Protocol mainly focuses on individual activities, not the sum of the effects (cumulative impacts) of all human activities and additional stressors such as pollution and climate change. If rights were granted at the level of ecosystems, Antarctic regions, Antarctica and/or the Greater Southern Ocean, a RoN approach could potentially ensure a more holistic protection. Furthermore, RoN may encourage more consistent and comprehensive monitoring, which is still lacking.

Moreover, the application of the precautionary approach and the prevention principle would potentially be strengthened. Within the ATS, there are examples from the past where environmental protection measures have been based on the precautionary approach (e.g. the removal of dogs from Antarctica). However, in recent years, some Consultative Parties appear to be increasingly distancing the CEP and ATCM practice from applying the precautionary approach by requiring scientific evidence for the necessity or proper functioning of protective measures. The current draft of the Antarctica Declaration also explicitly mentions the precautionary approach, stating that:

If there is doubt as to whether a proposed activity will limit or violate a right or freedom recognised in this Declaration or be contrary to the best interests of Antarctica, a precautionary and preventive approach that prioritises the protection of Antarctica must be applied.<sup>84</sup>

In any event, it is relevant to mention that human activities in Antarctica need not be completely outlawed within an Antarctic RoN framework. For instance, in relation to tourism activities in particular, the draft Antarctica Declaration lists 'low impact tourism' within the activities that may be acceptable in Antarctica, provided that they meet certain

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<sup>83</sup>Article 2 of the Environmental Protocol.

<sup>84</sup>See Article VII(5) of the draft Antarctica Declaration (internal footnotes omitted).



criteria.<sup>85</sup> The focus on the low impact of tourism activities appears to align with Resolution 7 (2009) adopted by the ATCM. Resolution 7 (2009) enumerates the *General Principles of Antarctic Tourism*, amongst which is that '[t]ourism should not be allowed to contribute to the long-term degradation of the Antarctic environment and its dependent and associated ecosystems, or the intrinsic natural wilderness and historical values of Antarctica'. Furthermore, the Resolution also states that a pragmatic and precautionary approach should be adopted in the absence of adequate information about the potential impacts of tourism activities.

An Antarctic RoN approach could also potentially better ensure the protection of Antarctic wilderness values. The Environmental Protocol is one of the few international treaties that explicitly protects wilderness values, but not much of that protection is achieved in practice. Environmental impact assessments generally pay little attention to impacts on wilderness values, and the surface of inviolate wilderness has decreased substantially.<sup>86</sup> Wilderness values are also seriously underrepresented in the Antarctic Specially Protected Areas network. In theory, an Antarctic RoN approach could strengthen wilderness protection, as both concepts fit well together. Wilderness protection involves providing space for natural processes and keeping wilderness qualities intact, such as a relatively large size, a high degree of naturalness, and a lack of permanent infrastructure and other permanent proof of modern human society.<sup>87</sup> This concept essentially recognises that nature (or an ecosystem) is an entity to which humans must exercise restraint in active management and physical interventions. This is also reflected in the draft Antarctica Declaration, which describes one of Antarctica's inherent rights and freedoms as 'the freedom to be wild and the right to continue their regenerative cycles and processes free of human disruption'.<sup>88</sup>

Recognising Antarctic RoN can also indirectly support human safety by controlling activity and limiting harmful undertakings. Strict regulations on human activities, like tourism, can minimise human presence in sensitive areas, lowering the chances of incidents in remote locations where rescues are challenging. These limitations can also strengthen the aesthetic value of Antarctica, which is acknowledged in the Environmental Protocol. By acknowledging rights for the environment, including protections against pollution, excessive human activity, and disruptive infrastructure, RoN can help protect Antarctic landscapes.

#### 4.2.2. *Values and Principles that could experience a mixed effect by Antarctic RoN*

Recognising RoN in the Antarctic could also have a mixed effect on certain values and principles, potentially strengthening and challenging them simultaneously. One important value to consider in this context is peace. By limiting the range of activities allowed in the Antarctic, RoN can contribute to peace, which is one of the primary objectives – and, arguably, originally the main aim of the Antarctic Treaty.<sup>89</sup> Indeed, the prohibition and strict regulation of a wide range of human

<sup>85</sup>See Article XI(2)(c) of the draft Antarctica Declaration.

<sup>86</sup>Leihy et al., "Antarctica's wilderness fails to capture continent's biodiversity."

<sup>87</sup>Bastmeijer, "Wilderness Protection in Europe. The Role of International," For a problematisation of the wilderness concept, see Huijbens, "Reframing the Antarctic as Polar Planetary Commons."

<sup>88</sup>See Article IV(1)(c) of the draft Antarctica Declaration.

<sup>89</sup>See Article I of the Antarctic Treaty.

conduct in the Antarctic to respect RoN can help limit the potential of tensions or conflicts which could arise, for instance, from attempts to use parts of the Antarctic environment as natural resources for human use and benefit. However, such prohibitions and/or strict limitations on human use of resources (e.g. ice/water, fish, krill, etc.) could also increase tensions in future scenarios where global scarcity of such resources becomes an issue. In such cases, certain states might be inclined to seek access to these resources from the Antarctic, regardless of the existing agreements, which could lead to potential conflicts.

In relation to science, a fundamental activity accorded priority within the ATS,<sup>90</sup> an Antarctic RoN framework might contribute to redirecting the focus of scientific research towards understanding and protecting nature rather than prioritising research driven by human needs or technological innovations. This prioritisation would be in line with the explicit mention of 'research essential to understanding the global environment' when referring to the value of Antarctica 'as an area for the conduct of scientific research' in the Environmental Protocol.<sup>91</sup> Ultimately, this shift in focus could guarantee that research contributes to the long-term protection of the region, reinforcing the commitment to comprehensive environmental protection. However, an Antarctic RoN would further emphasise the need to critically discuss the current and increasing human footprint of science and science infrastructure in Antarctica, an issue seldom discussed by the ATCM.

This mixed effect of Antarctic RoN may also occur in relation to historical values. Recognising RoN could help preserve existing historic sites in the Antarctic, indirectly protecting them from further pollution, human activity, or environmental degradation. However, accessibility to these sites may be impacted, as strict protections could restrict access to certain locations, reducing opportunities for historical research and educational tourism. Furthermore, the materials and substances present in some of these sites might be potentially dangerous or detrimental to the natural environment, which could put their preservation *in situ* in tension with the protection of RoN.

The principle of 'governance in the interest of all humankind' within the ATS might be deemed, at first sight, an anthropocentric principle that would be difficult to reconcile with Antarctic RoN. Indeed, if the principle is explained from a position of human rulership over nature, then large-scale exploitation of natural resources could be in line with this principle, which would certainly create tensions with the RoN concept. However, if the 'interest of all humankind' is to be understood as also comprising the 'interest of future generations', the protection of RoN can be viewed as beneficial to humanity, as it helps protect nature for the future. In this context, a reference to the work of Edith Brown Weiss is worthwhile. Weiss explains that '[t]he theory of intergenerational equity states that all generations have an equal place in relation to the natural system, and that there is no basis for preferring past, present or future generations in relation to the system'.<sup>92</sup> According to the author, '[t]his requires that each generation leave the planet in no worse condition than it received it, and to provide succeeding generations equitable access to its resources and benefits'.<sup>93</sup> Consequently, fairness to future generations implies fairness to the natural world (e.g. the Antarctic). Given the lack

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<sup>90</sup>See Article 3(3) of the Protocol.

<sup>91</sup>See Article 3(1) of the Protocol.

<sup>92</sup>Weiss, "In Fairness to Future Generations and Sustainable Development", 20. See also Bastmeijer, "Intergenerational equity and the Antarctic treaty system: Continued efforts to prevent "mastery"".

<sup>93</sup>Weiss, "In Fairness to Future Generations and Sustainable Development," 21.

of effectiveness of current legal systems in ensuring this fairness towards the natural world, adopting a RoN approach could be considered in accordance with the principle of governance for the benefit of all humanity if this approach would be better suited to guarantee this fairness.

#### **4.2.3. Values and Principles that could potentially be challenged by Antarctic RoN**

Finally, some values and principles may be challenged and harder to reconcile with a potential Antarctic RoN. Closely related to peace, cooperation, and the avoidance of conflicts is the ‘agreement to disagree on the legitimacy and legality of territorial claims’ over parts of Antarctica. It is to be expected that the recognition of an Antarctic RoN framework will put pressure on this principle. Claimant states may have different views on the appropriateness and acceptability of RoN in relation to Antarctica, and some might strongly oppose its adoption.

## **5. Conclusions**

A RoN approach for the Antarctic raises many philosophical, legal and other questions, especially due to the specificities of the region and its unique governance framework, as well as the fact that the RoN concept is still in development. The contributions in this Special Issue discuss many relevant points in this regard, such as which entity or entities would or should be the right-holders, the ecological or philosophical arguments for the different positions and the implications in terms of environmental protection. Relatedly, they also address which substantive and procedural rights an Antarctic RoN framework would or should encompass. In dealing with these questions, the contributors analyse how proposals interact with the existing legal regimes and, in particular, with the ATS. There seems not to be any advocacy among the scholars for replacing the ATS with a RoN approach. Most authors express a nuanced standpoint regarding the possibility of RoN being recognised within the ATS and the possible consequences of such recognition.

It is hoped that the discussions in this Special Issue will be a valuable addition to the ongoing debate regarding RoN worldwide and will contribute to the discussion on how to strengthen the protection of the Antarctic environment. The contributions may also constitute a foundation for further research on questions that must be considered when designing a potential Antarctic RoN framework. While intrinsic value has received relatively more attention within this Special Issue, it would be essential for future research to consider and analyse how RoN could interact with (and even promote) other ATS values and principles.

This Special Issue primarily aims to make an academic contribution to the discussion about RoN in relation to the Antarctic. Yet, there is good reason to also promote such a discussion at the policy level. The academic literature makes it clear that human impacts on the Antarctic are multifaceted and increasing over time. Currently, there is insufficient control over the cumulative effects gradually altering the Antarctic environment. The consensus-based decision-making process has not been able to prevent adverse environmental impact, and additional threats do not receive a proactive governance response. Particularly in light of the designation of Antarctica as a natural reserve, devoted to peace and science, and the agreement to provide comprehensive protection to

the Antarctic environment, there is a pressing need for the Consultative Parties to engage in fundamental debates on the position of the Antarctic itself in the ATS and the ATS decision-making processes. The RoN discussions can be a good starting point thereof.

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