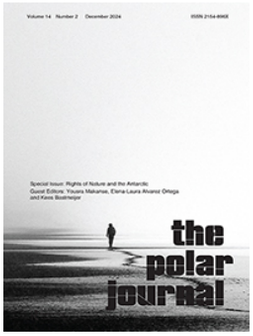

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Outlining three arguments for Rights of Antarctica

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ABSTRACT

In this article, we investigate three arguments for Rights of Antarctica (RoA), understood as recognising the whole continent as a rights-holder with legal standing. For this, we draw inspiration from the Antarctica Declaration, a text developed by an interdisciplinary and international group of scholars and activists. We scrutinise three justifications that could potentially be used in support of RoA. First, we investigate whether arguments for Rights of Nature (RoN) elsewhere can support RoA. RoN has been accepted in several domestic legislations. Unfortunately, we discover important disanalogies between RoA and RoN, defeating the purpose of justifying RoA with reference to RoN. Second, we scrutinise potential arguments that focus on giving rights to specific Antarctic ecoregions or places. However, such arguments would only cover parts of the continent, thus going against the holistic approach of RoA, and they would require using a broader understanding of 'attachments' as grounds for justifying rights for parts of Antarctica. In contrast, we construct an argument for accepting RoA based on four components: (1) Antarctica's intrinsic value, (2) wider forms of human attachments, (3) Antarctica's substantial role as a global systemic resource, and (4) the fact that Antarctica is under recurrent and substantial threats. While none of these are individually sufficient for recognising RoA, they can jointly make RoA appropriate. We conclude that it remains an open question whether international law or, more specifically, the Antarctic Treaty, would be open to such conceptual and normative innovation, adopting a new paradigm in our treatment of the nonhuman natural world. At the same time, we hope to kickstart a discussion of what RoA would require and how it should relate more generally to RoN discourses.

KEYWORDS

Antarctica Declaration; Rights of Antarctica (RoA); Rights of Nature (RoN); ecoregions; Antarctic Treaty; Protocol on Environmental Protection to the Antarctic Treaty

1. Introduction

In a draft document entitled 'Antarctica Declaration', an international group of scholars from various disciplines, environmental activists, environmental NGOs, and other interested persons advocate for giving rights to Antarctica, recognising its legal standing in

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international law.[1] According to the declaration, these rights include *inter alia* 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, enacted via human representatives.[2] The declaration is currently (September 2024) open for review (www.antarcticarights.org.), but its main aim will probably remain the same: acknowledging for the first time that a whole ecosystem, including its living and nonliving entities and spanning beyond any individual national jurisdiction, merits independent representation among international bodies.[3]

Such a goal might seem strange, considering that Antarctica is already supposed to be one of the most protected places on the Earth, thanks to the Antarctic Treaty (1959) and the Protocol on Environmental Protection to the Antarctic Treaty (1991, hereafter Environmental Protocol), the first of its kind limiting human activity in order to protect the environment of a whole continent. In Antarctica, human activities (mostly science and tourism) are subject to restrictions.[4] Those in favour of the Declaration, however, point out that this is not enough at a time when what most affects Antarctica is what happens beyond it – most importantly, global warming.[5] This point has also been raised by other critical voices who have underscored the insufficiency of the business-as-usual scenario to tackle urgent challenges.[6]

The Declaration's preamble states from the very beginning that there is an 'understanding that we are all part of the Earth Community, an indivisible, living community of interrelated and interdependent beings'.[7] Rights of Antarctica (hereafter RoA) provides an opportunity for such a change by giving Antarctica *per se* independent standing in international law, potentially as an equal vis-à-vis other states. This would constitute a double breakthrough in international law, which has so far considered nation states to be the exclusive bearers of political power in the international system and human beings as their exclusive subjects. Moreover, one should not neglect the potential indirect impacts of recognising RoA on other natural places and on the concepts of rights and Rights of Nature (hereafter RoN) as used in international law.

Last but not least, a substantial reason for recognising RoA lies in its expressive power. Recognising RoN 'constitutes a powerful transformation of Nature from object to subject in the eyes of law'.[8] By recognising RoA, it is legally expressed that Antarctica *as such* is

[1]Antarctic Rights, 'Antarctic Declaration', https://antarcticrights.org/resources/antarctica-declaration/. (accessed February 27, 2024). By way of disclosure, one of the authors of this paper is an active participant in the Antarctic Rights group. However, the views presented here do not necessarily represent the views of the group.

[2]Antarctic Rights, 'Antarctica Declaration – Draft of 30 November 2023: Articles IV and XV', https://antarcticrights.org/wp-content/uploads/2023/11/Antarctica-Declaration_draft_2023.11.30c-1.pdf. (accessed March 18, 2024). While the Antarctica Declaration refers to rights and freedoms of both Antarctica and Antarctic beings, we keep these separate and focus solely on the former. The reason is that Antarctic beings refer to animals which fulfil other and more conventional conditions for holding rights, most predominantly sentience, which leads to interests and well-being. Short of substantial metaphysical arguments which we do not provide, Antarctica *per se* does not fulfil conditions such as sentience justifying rights-holding.

[3]This differs from existing recognitions of RoN, such as the Whanganui River in New Zealand, which has been limited to domestic legislation (see Section 2).

[4]Fishing, arguably the most important economic activity, is not regulated by the Environmental Protocol, but by the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR).

[5]See, for example, Antarctic Rights, 'Antarctica Declaration – Draft of 30 November 2023: Articles VIII.1.e.i and 12.2', https://antarcticrights.org/wp-content/uploads/2023/11/Antarctica-Declaration_draft_2023.11.30c-1.pdf. (accessed July 21, 2024).

[6]As Steven L. Chown claims in presenting the book *Antarctic Futures*, 'The future scenarios raised by the authors are concerning. They suggest that whilst humanity values Antarctica and has a strong desire to protect its environments and biodiversity, without much change, current governance arrangements are unlikely to succeed in doing so' (Chown, 'Foreword', vi).

[7]See, for example, Antarctic Rights, 'Antarctica Declaration – Draft of 30 November 2023', 1, https://antarcticrights.org/wp-content/uploads/2023/11/Antarctica-Declaration_draft_2023.11.30c-1.pdf. (accessed July 21, 2024).

[8]O'Donnell et al., 'Stop Burying the Lede', 409.

a rights-holder and that Antarctica *as such* has legal standing. As a result, Antarctica must then be considered in decision-making processes, but not necessarily by reference to the goods it provides for human agents. As environmental philosopher Næss once conceded, the language of rights may be 'the best expression I have so far found of an intuition which I am unable to reject'; namely, the intuition that natural entities ought to be protected and valued in themselves and not just as instrumental for us.[9] A similar intuition stands behind those advocating for RoA.

In what follows, we understand having a right as having an enforceable claim that creates a correlative duty on others. This could be, for instance, that the rights-holding entity ought to be provided with the goods necessary to be in specific states, or that agents ought to refrain from depriving the entity of goods, damaging it, or harming it. By RoA, we mean that the whole of Antarctica is a rights-holder towards which all of us carrying legal responsibility – including individuals and collective entities like states and corporations – have enforceable duties.[10] Meanwhile, by RoN we mean legally recognised rights at the domestic level for natural entities such as forests, rivers, and natural areas, which also give rise to corresponding duties.[11]

We discuss three arguments for RoA. The first is to think of RoA as an extension of RoN. The second is a 'piecemeal' strategy, which consists of giving rights to certain Antarctic ecoregions and/or places. After discussing the problems with both we propose a third argument for defending RoA as one single entity. We suggest that four reasons taken in conjunction could make a case for giving rights to Antarctica as a whole. These are (1) Antarctica's intrinsic value, (2) specific forms of human attachments to Antarctica, (3) Antarctica's role as a global systemic resource, and (4) the fact that Antarctica is under recurrent and substantial threats.

2. First argument: extending RoN to RoA

Recent years have seen an increased number of recognitions of RoN. Examples include the Whanganui River in New Zealand, which was granted legal personhood in 2017 (Te Awa Tupua Act 2017), the Mar Menor Lagoon in Spain (2022), Bolivia's 'Law of Mother Nature' (2010), and Ecuador, which gave *Pachamama*, or Mother Nature, constitutional standing in 2008.[12] Putzer et al. count over 400 initiatives of RoN all over the world since 2006.[13] RoN has also generated increased scholarly discussion.[14] RoN is a legal novelty whereby the importance of inanimate natural entities – rivers, forests, lagoons – is legally recognised. Such entities are either given 'existence rights' or legal personalities.[15]

[9]Næss, *Ecology, Community, and Lifestyle*, 167.
[10]Here we follow the Declaration's definition of 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 unless the context indicates otherwise, "Antarctica" refers also to Antarctic beings'. See, for example, Antarctic Rights, 'Antarctica Declaration – Draft of 30 November 2023: Article 1.1.a', https://antarcticrights.org/wp-content/uploads/2023/11/Antarctica-Declaration_draft_2023.11.30c-1.pdf. (accessed July 21, 2024). Note that this definition is more inclusive than the one used by the Antarctic Treaty, which is delimited geographically to the area south of 60 degrees South.
[11]Baard, 'Manifesto Rights'; Baard, *Ethics in Biodiversity Conservation*; Baard, 'Fundamental Challenges'.
[12]See Boyd, *Rights of Nature*; Kauffman and Martin, *Politics of Rights of Nature*.
[13]Putzer et al., 'Rights of Nature on the Map'.
[14]Baard, 'Manifesto Rights'; Baard, *Ethics in Biodiversity Conservation;* Baard, 'Fundamental Challenges'; Kurki, 'It's Not that Easy'; Corrigan and Oksanen, *Rights of Nature*; Epstein et al., 'Science and the Legal Rights'.
[15]O'Donnell et al., 'Stop Burying the Lede'.

RoN and RoA have a central feature in common, namely, they both refer to natural entities having intrinsic value. But they also have at least four important differences that we spell out below.

2.1. A common core: the intrinsic value of natural entities

Intrinsic value is a central concept for justifying obligations that agents have towards the entity that possesses that value. While there are different understandings of what intrinsic value is,[16] the concept can be used to identify and justify moral status and is central to moral reasoning. When something has intrinsic value, it is valued independently of any instrumental uses it may have, or due to extrinsic factors. That is, an entity having intrinsic value is either valued regardless of what further states or goods it can enable (its instrumental value) or due to its connection to, for instance, historical events or cultural meaning (its extrinsic value).

In environmental ethics, intrinsic value is usually used in connection with the value of entities such as ecosystems, species, individual living beings, or animals. Commonly, justifying the intrinsic value of such entities expresses *non-anthropocentrism*. This means that the value of, for instance, an ecosystem or species is not exhausted by how useful it is for humans. While intrinsic value is often contrasted with instrumental or extrinsic values, it has also recently been discussed in relation to 'relational values', whereby something is valuable intrinsically but justified through the meaningfulness of the relations moral agents have to that entity. While 'relational value' is intended to go beyond intrinsic and instrumental value, most of the time, it boils down to the former: though noninstrumentally valuable, justifications of relational value still rely extensively on anthropocentric interests and values.[17]

Intrinsic value has also played a role in justifying RoN. Highlighting the ethical foundation of RoN, Chapron, Epstein, and López-Bao suggest that RoN advocates 'make a moral assertion that nature does have this intrinsic value'.[18] Putzer et al. write that RoN 'promote[s] a new understanding of the human environment, where natural entities are conceived as subjects with intrinsic value independent of human interests'.[19] Epstein and Schoukens propose that 'when people talk about obligations to natural entities as being derived from rights held by those entities, they implicitly acknowledge the intrinsic value of those entities, and when they talk about rights of natural entities in litigation, they give courts the opportunity to do the same'.[20]

What Epstein and Schoukens point towards here is an expressive function of legislation. Here, it is of importance that the 42 states that have signed the Environmental Protocol to date have already agreed that Antarctica has intrinsic value. As this document states, the intrinsic value of Antarctica shall be among the 'fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty Area'.[21]

[16]O'Neill, 'Varieties of Intrinsic Value'; Baard, 'Goodness of Means'; Baard, *Ethics in Biodiversity Conservation*.
[17]Baard, 'Relational Values'.
[18]Chapron, Epstein, and López-Bao, 'Rights Revolution', 1392.
[19]Putzer et al., 'Rights of Nature on the Map', 89.
[20]Epstein and Schoukens, 'Positivist Approach', 208.
[21]Secretariat of the Antarctic Treaty, 'Protocol on Environmental Protection to the Antarctic Treaty, 1991: Article 3', https://www.ats.aq/e/protocol.html.

To be sure, natural places may be valuable in ways that exceed their instrumental value. But, even if they have intrinsic value, there is no necessary conceptual connection between having intrinsic value and having *rights*. Things can be intrinsically valuable without evoking the thought that they should be rights-holders. Works of art, cultural heritage, or species may be important *to* rights-holders for noninstrumental reasons, and they may be necessary conditions for protecting the rights of groups of people, but such factors do not make them, the things themselves, *necessarily* rights-holders. Legal philosopher Feinberg, for instance, argues that a cultural heritage site such as the Taj Mahal, or a species, while being noninstrumentally valuable, cannot be considered a rights-holder in the sense of having valid claims that give rise to corresponding duties. Such entities do not have 'beliefs, expectations, wants, or desires' and, more generally, lack a conative life.[22] To allow all entities having intrinsic value to also be considered rights-holders would generate a significant number of rights-holders, and be a substantial conceptual departure from conventional conditions for rights-holding.

But although there is no necessary link between intrinsic value and rights, it is possible that one way of affirming and protecting the intrinsic value of some entities is by giving them rights that recognise some stringent duties towards them. Just like human rights protect human persons and ensure that they are treated as ends and not merely as means, the same could be said for RoN: it protects certain natural entities for their own sake, giving them a higher degree of protection. Suffice here to state that intrinsic value, while perhaps giving rise to duties, is not a sufficient condition for holding rights. More conditions conventionally need to be fulfilled, such as sentience, conative life, or rational will.

The existing cases of RoN show that there is a certain flexibility regarding what entities to regard as right-holders and legal persons. While that flexibility is certainly constrained by domestic legislation, there are instances under which natural entities such as rivers and forests can be considered legal persons and as having rights in some domestic legislations, thereby removing them from the sphere of 'mere things' to the sphere of entities having legal status. This flexibility also sits at the centre of RoA.

2.2. The differences between RoA and RoN

Despite the above commonality between RoN and RoA, here we discuss four central differences that make RoN unsuitable for justifying RoA.

2.2.1. The delimitation of the rights-holder and the role of human attachments

The first difference concerns the delimitation of the rights-holder. This sets RoN apart from other rights-holders and distinguishes RoN from RoA. While conventional rights-holders, such as individual humans or animals, are clearly delimited entities, this is not the case for ecosystems. The dynamic characteristics of ecosystems, ecoregions, and, in general, the natural environment, make it difficult to establish *what*, exactly, the rights-holder is. What is at stake here and relevant to both RoN and RoA is whether there are ways of reasonably and meaningfully delimiting the potential rights-holder. While there are some appeals of rights being ascribed to Nature as a whole (discussed in Section 2.2.3

[22]Feinberg, 'Rights of Animals', 52.

below), most recognitions of RoN have taken place in domestic legislation and concern clearly delimited places.[23]

In many cases, RoN relies on relations both for delimiting the rights-holder in question and for emphasising the meaning of those places. A decisive factor in RoN is that the places in question often play some central role for a local community or groups such as Indigenous peoples, and that RoN is an appropriate legal tool for expressing that role. Parallels can be drawn to arguments making certain places normatively relevant in political and moral philosophy. Some delimited places have special characteristics and cultural meanings for individuals and groups.[24] James calls the value that derives from places that are meaningful to agents *constitutive*, and stresses its importance to the agents as places that are meaningful to identity and culture in ways that cannot be reduced to their instrumental value. In some cases, such as for cultural groups, access to places plays a pivotal role in cultural practices, and should such a group have cultural rights, it could justify the protection of that place.[25] In a similar vein, political philosopher Armstrong discusses human 'attachments' referring to claims to access to and control of certain natural resources, and the right to exclude others from them.[26] Such attachment-based claims are justified by how access to a natural resource is central to the life plans of individuals or groups. Depriving them of access to the area or intervening in the area in a way that relevantly affects those life plans may thus be considered violating an attachment-based claim.

Though neither constitutive value nor attachments have been related explicitly to RoN, it is sometimes the case that assigning a natural entity with rights goes hand in hand with recognising the value that the entity has for a human group. People relate to specific 'places' in normatively relevant manners, and such relations are central in delimiting such places.

In contrast, in the Antarctica Declaration, Antarctica is defined as 'the community of inter-dependent Antarctic beings that exist 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'.[27] That is, RoA means rights for 10% of the Earth's landmass and the Southern Ocean ecosystem, together with every natural entity within them. RoN has never come close to anything of that scale thus far, though there have been calls for universal and global recognition of RoN (see Section 2.2.3 below).

In addition to scale, it is difficult to argue that Antarctica is a constitutive part of some people's identity and culture in the way that other places are. Although studies show that people around the world *value* Antarctica for different reasons (e.g. as a wilderness reserve or an open-air laboratory),[28] this is a far cry from saying that people have attachments to the continent in the sense discussed above. As we show in Section 4.2, however, a wider understanding of attachments to place may accommodate these relations between humans and a certain environment.

[23]Putzer et al., 'Rights of Nature on the Map'.
[24]James, *How Nature Matters*.
[25]Ibid.; James, 'Legal Rights'.
[26]Armstrong, *Justice and Natural Resources*, 119.
[27]Antarctic Rights, 'Antarctica Declaration – Draft of 30 November 2023: Article I(1)', https://antarcticrights.org/wp-content/uploads/2023/11/Antarctica-Declaration_draft_2023.11.30c-1.pdf. (accessed July 21, 2024).
[28]See Neufeld et al., 'Valuing Antarctica', 241ff.

Thus, one way of delimiting rights-holders in RoN is by drawing on the cultural services and historical attachments that specific places – rivers, mountains, forests – provide for human collectives. But this approach is unlikely to be relevant to Antarctica, where attachments tend to be individual and personal rather than constitutive of the culture of larger human groups with a permanence in time.[29] In the case of RoA, furthermore, it would require people having such normatively recognised relations to the whole of Antarctica, that is, to the whole continent. But Antarctica is the only continent without Indigenous people, where scientists and some logistics personnel come the closest to forming a permanent human group. Antarctica is an example of 'epistemic technocracy': 'the expertise-driven form of governance that brings technology, bureaucracy and science together'.[30] While the recognition of RoN may be intertwined with other claims (which influence the motivation of law, see below), all cases of RoN usually have a group claiming special relations to a specific place. O'Donnell et al. claim that 'the most transformative case of rights of Nature have been consistently influenced and often actually led by Indigenous peoples'.[31] Here, we could think of the work of some Māori scholars, who have suggested that their ancestors might have reached Antarctica earlier than any other human group and have underlined the place of Antarctica in the Māori imaginary.[32] However, it is important to distinguish between the existence of Indigenous Antarcticans and the existence of Indigenous perspectives on Antarctica. What these scholars argue for is the latter, not the former.[33]

Attachments, as commonly understood, are therefore difficult to apply in the case of RoA, as there are arguably no permanent human groups who 'come to develop expectations of continued access, and to begin to orient [their] life-plans around those' places in Antarctica.[34]

2.2.2. The motivation of the law

Claims for RoN are often advocated for by agents such as activist groups, local inhabitants, or Indigenous peoples. To Tănăsescu, RoN is not even primarily about nature but rather about 'creating new relations through which environmental concerns may be differently expressed'.[35] This is connected to the attachments mentioned above, where a group needs access to and usage of a natural resource for cultural expression and historical reasons and has a right to such

[29]For one exception, see Alice Oates' argument that the British scientific station Halley is 'a *settled* colonial space, regardless of the presence or absence of colonial intentions among winterers' (Oates, 'Settler Colonial Mindsets', 248).
[30]O'Reilly, *Technocratic Antarctic*, 172
[31]O'Donnell et al., 'Stop Burying the Lede', 403.
[32]Wehi et al., 'Māori Journeys to Antarctica'.
[33]Similar concerns about attachments are also relevant in other RoN-based suggestions. One prominent example is the rights of the moon, where it is argued that some peoples can have relevant attachments to the moon from afar. See Center for Democratic and Environmental Rights, 'Declaration of the Rights of the Moon', https://www.centerforenvironmentalrights.org/declaration-of-the-rights-of-the-moon (accessed August 7, 2024).
[34]Armstrong, *Justice and Natural Resources*, 115. Recently, some scholars have argued that what have been traditionally known as 'gateway cities' should become 'custodians' instead, given the sense of environmental and cultural connection between their inhabitants and Antarctica. Still, even if one accepted this as a relevant attachment, it would be considerably different from the standard ones used to justify special claims to the place. See Leane et al., 'Gateway to Custodian City'.
[35]Tănăsescu, *Understanding the Rights of Nature*, 17.

cultural expression. RoN has the potential of emphasising relational approaches to nature.[36]

That Antarctica is the only continent without Indigenous peoples has a bearing on the motivation of the law. The Te Urewera Act 2014 and Te Awa Tupua Act 2017 are recognitions of Māori worldviews and relations to the environment and the importance of Te Urewera and the Whanganui River, respectively, to that worldview and identity.[37] In fact, for some scholars, these acts represented primarily a way through which New Zealand attempted to repair historical injustices towards the Māori and were only incidentally or secondarily a recognition that nature as such had rights.[38] In the cases where RoN has been recognised in Latin America, it has been argued that giving nature legal titularity is a strategy being used to protect the human rights of particular communities, especially the right to a healthy environment.[39] Tănăsescu observes that RoN seems to appear at the intersection of, on the one hand, intensified human pressure on the environment and, on the other, 'expansion of liberalism in the guise of increasing numbers, and kinds, of rights'.[40] Regarding the latter, Tănăsescu writes that the 'expansion is largely inseparable from the concomitant history of colonialism and Indigenous subjugation'.[41]

These are proper reasons for recognising RoN, but they do not apply for RoA. They show that RoN may often be intertwined with other claims for justice and recognition that are justified and reasonable for reasons *other* than a specific environmental place *per se* having a specific value. RoA, instead, would be based on a non-anthropocentric or ecocentric justification, meaning that it would not rely on human interests, values, or attachments as they are understood above.

2.2.3. Domestic legislation versus international law

While RoN is recognised in some domestic legislation,[42] RoA concerns a whole continent which is beyond the jurisdiction of any individual state. While there have been calls for the recognition of RoN at the international level, such as the establishment of the International Rights of Nature Tribunal,[43] so far, all RoN legislation has taken place at the domestic level. This stands in contrast to RoA, which would concern international law. In international law, the environment is still primarily regarded as a resource for sovereign states to own, exploit, or protect, a conceptualisation that RoN has the potential to change in favour of more relational approaches.[44]

[36]Gilbert, 'Creating Synergies'; Gilbert et al., 'Rights of Nature'.
[37]Boyd, *Rights of Nature*; Kauffman and Martin, *Politics of Rights of Nature*.
[38]Magallanes, 'Nature as an Ancestor'.
[39]Beckhauser, 'Synergies'.
[40]Tănăsescu, *Understanding the Rights of Nature*, 10.
[41]Ibid.
[42]For example, New Zealand adopted the Te Urewera Act in 2014 and the Te Awa Tupua Act in 2017; Ecuador adopted RoN in its constitution in 2008; Bolivia adopted the Rights of Mother Earth in 2010; Tamaqua Borough (Pennsylvania, USA) adopted rights of natural communities and ecosystems in 2006; and Spain adopted the rights of the Mar Menor Lagoon 2022. Putzer et al. lists over four hundred legal initiatives internationally; see Putzer et al., 'Rights of Nature on the Map'.
[43]See Tănăsescu, *Understanding the Rights of Nature*, 150; see also calls for a Universal Declaration of the Rights of Mother Earth in Cullinan, *Wild Law*, 189.
[44]Gilbert, 'Creating Synergies'; Gilbert et al., 'Rights of Nature'.

This matters for several reasons. First, while there are constraints to domestic legislation, there is a certain amount of liberty in domestic law regarding what it is reasonable or justified to ascribe rights or legal personhood to. There are also differences between specific RoN. O'Donnell et al. point out differences between RoN that focus on nature and rights to life, on the one hand, and RoN that justify the legal standing of certain places, on the other.[45] While the first category regards 'existence rights' (to exist, to function), in the second category, there are usually more specific rights, such as legal standing.[46] Thus, for instance, the Mar Menor Lagoon in Spain has a right to exist and evolve naturally, whereas the Whanganui River in New Zealand has all the rights of a legal person exercised through a custodian council. Although there are differences between the background and forms of RoN in different countries, what they have in common is that they are recognised by specific domestic legislation. This is consistent with the conventional understanding of sovereignty, where a state and its people are self-determining so long as they do not negatively impact others.[47] They are thus at liberty to recognise RoN within the constraints of their legislation – but also at liberty to refrain from doing so.[48]

Second, there are substantial differences between domestic and international law in general. As suggested by legal philosopher Hart,[49] many of the necessary components of legal systems are missing when it comes to international law. Hart argues that there is a 'radical inconsistency' between a state that is 'at once sovereign and subject to law',[50] as one aspect of sovereignty is the right to set laws. It is, for example, voluntary for a state to enter into agreements with other states that dictate conduct, but these are voluntary self-imposed constraints of sovereign entities by way of treaties, conventions, or precedents. Moreover, any legal system requires rules of recognition dictating what counts as law and

[45]O'Donnell et al., 'Stop Burying the Lede'; Tănăsescu, *Understanding the Rights of Nature*, 147.
[46]O'Donnell et al., 'Stop Burying the Lede', 409.
[47]Miller, 'Territorial Rights'.
[48]Not all states agree on the idea of RoN, and some actively disagree. The United Kingdom, for instance, has claimed that recognising RoN would be inconsistent with domestic legislation. See Jonathan Watts, 'UK Government Can Never Accept Idea Nature has Rights, Delegate Tells UN', *The Guardian*, February 22, 2024 https://www.theguardian.com/environment/2024/feb/22/uk-government-can-never-accept-idea-nature-has-rights-delegate-tells-un (accessed March 4, 2024). In the US, the state of Utah has recently taken steps that have been described as 'advancing legislation aimed at stopping a growing "rights of nature" movement' when passing Bill H. B. 249 ('Utah Legal Personhood Amendments'), which explicitly states that a governmental entity may *not grant nor recognise* legal personhood to *inter alia* inanimate objects, bodies of water, land, plants, or nonhuman animals. See Joshua C. Gellers, 'Blog Post: The Tortured Politics of Nonhuman Personhood: AI, Animals, Embryos, and Nature', Environmental Rights Review, March 12, 2024, https://environmentalrightsreview.com/2024/03/12/blog-post-the-tortured-politics-of-nonhuman-personhood-ai-animals-embryos-and-nature/.; Katie Surma, 'Utah Legislature Takes Aim at Rights of Nature Movement', Inside Climate News, February 1, 2024, https://insideclimatenews.org/news/01022024/utah-legislature-stopping-rights-of-nature/. For the bill, see State of Utah, 2024 General Session, 'Utah Legal Personhood Amendments', https://le.utah.gov/~2024/bills/static/HB0249.html#63G-31-102. (accessed March 4, 2024). The bill is instructive in the sense that not all are aboard in recognising RoN (Utah is also joined by Florida, Ohio, and Idaho, which have all passed similar bills). See Madeleine Debele and the ELC Team, 'Utah Advances Anti-Rights of Nature Bill with Implications for Artificial Intelligence', Earth Law Center, https://www.earthlawcenter.org/blog-entries/2024/2/utah-advances-anti-rights-of-nature-bill-with-implications-for-ai. (accessed August 22, 2024). In Europe, in 2019 a proposition by a member of the Swedish Parliament to include RoN in the Swedish constitution was rejected. See Rebecka Le Moine et al. (MP), Motion 2019/20:3306, 'Naturens rättigheter', [The rights of nature] https://www.riksdagen.se/sv/dokument-och-lagar/dokument/motion/naturens-rattigheter_h7023306/. (accessed March 4, 2024).
[49]Hart, *Concept of Law*.
[50]Ibid., 220.

provides norms with legal authority, which are lacking in international law.[51] Finally, there is a lack of coordinated sanctions if the rules are violated at the international level. This has led some scholars to argue that international law historically has primarily expressive functions, to express disdain for specific conduct that ought to be refrained from.[52] Factors such as rules of recognition and sanctions distinguish domestic legislation from international law. The differences between Roa and Ron are provided in Table 1.

Table 1. Differences between RoN and RoA.

	RoN	RoA	Challenge for RoA
Delimitation of the place and human attachments	Natural places with distinct, stable human groups attached to the place, and where that attachment plays a central role for justifying RoN.	No human groups permanently living there and/or having the standard kind of attachments to Antarctica as a whole.	Rights never before applied at such a scale, and where (at best) standard human attachments are to specific places within Antarctica rather than to the continent as a whole (e.g. scientists' knowledge and activity-based attachments).
The law's motivation	At least partly to recognise rights of human groups that have suffered historic injustices (colonialism, racism, etc.).	Ecocentric	Motivating rights for Antarctica without the cultural and historical background that is relevant in cases of RoN.
Legal framework	Domestic legislation	International law	Representation of a nonhuman entity in international law

It is important to note that there are versions of RoN that intend to regard all of nature as a rights-holder and there have been calls for recognition of a Universal Declaration of the Rights of Mother Earth.[53] Some have argued that, for instance, 'Gaia' – the combined ecosystem of all ecosystems – is a rights-holder,[54] or that the separation between humans and nature ought to be overcome to form some type of 'inclusive holism' expressed through RoN.[55] However, these approaches require committing oneself to metaphysical assumptions that are difficult to justify. This is evident in how Stone-one of the first scholars to discuss the theoretical justification of RoN[56]—describes the notion of 'inclusive holism' as an expansion of the individual moral self.[57] While not impossible to justify, this would require a significant reconceptualisation of individual identity. Second, as noted by O'Donnell et al., justifications for these broader RoN are difficult to align with legal personality, which would then also require a major reconceptualisation.[58]

[51]Ibid.
[52]Stahn, *Justice as Message*, 45ff.
[53]Cullinan, *Wild Law*, 189.
[54]Ibid.
[55]Stone, *Earth and Other Ethics*, 101.
[56]Stone, 'Should Trees Have Standing?'.
[57]Stone, *Earth and Other Ethics*, 100ff.
[58]O'Donnell et al., 'Stop Burying the Lede'.

In summary, despite there being a central commonality between RoN and RoA, there are key differences between them. Due to these differences, a defence of RoA that relies substantially on drawing parallels to RoN is on shaky ground.

3. Second argument: giving rights to specific Antarctic ecoregions and/or places

In light of the above challenges, a possible path to recognise RoA is to rely on the concept of ecoregions or places as rights-holders. Such regions and places have unique features that could be expressed through the concept of rights. An upshot of this approach is the clear delimitation of the rights-holders by agent-independent features – that is, the delimitation of an ecological region or place is not as dependent on human observers doing the delimitation and having attachments as in the above cases.

'Ecoregions' provide a way to delimit ecosystems that can have political relevance under certain conditions.[59] The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) defines an ecoregion as:

> A large area of land or water that contains a geographically distinct assemblage of natural communities that: (a) Share a large majority of their species and ecological dynamics; (b) Share similar environmental conditions and; (c) Interact ecologically in ways that are critical for their long-term persistence.[60]

The concept of 'ecoregion' can be used to delimit an area in an intersubjectively meaningful way. The concept also makes it possible to determine what condition the delimited area is to be in. This could be done by assessing the character of the natural communities, which could be supplemented with longitudinal data of their past conditions. Alternatively, ecoregions could help define the specific type of an area, in order to both delimit it and assess its condition.

Antarctica has 16 biologically distinct biogeographic regions, 'defined by their biological communities and underlying physical, climatic and environmental characteristics'.[61] Antarctic Conservation Biogeographic Regions have been endorsed by the Antarctic Treaty Consultative Meeting and are 'considered an integral part of international Antarctic science, policy and management'.[62] The Antarctic Treaty Parties could possibly grant rights to some or all of these biogeographic regions, or to specific places that have unique features and are in need of protection. One such place could be the McMurdo Dry Valleys, which have been compared to the surface of Mars in terms of their geology, ecology, and environment, while at the same time having a long history of human presence.[63]

One obvious shortcoming of this way of justifying RoA is that not *all* of Antarctica would gain rights. While ecoregions have clear potential to respond to the challenge of delimiting the rights-holder and avoid some of the problems discussed in Section 2, giving them rights requires substantial conceptual and legal work that would entail

[59]Baard, 'Sovereignty, Ecology, and Regional Imperatives'.
[60]Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), 'Ecoregion', https://www.ipbes.net/glossary-tag/ecoregion (accessed March 11, 2024).
[61]Wauchope, Shaw, and Terauds, 'Snapshot of Biodiversity Protection', 2.
[62]Terauds and Lee, 'Antarctica Biogeography Revisited', 836.
[63]Salvatore and Levy, 'McMurdo Dry Valleys'. On human presence in the Dry Valleys, see Howkins, 'Placing the Past'.

similar flexibility as that which is presumed in recognitions of RoN, and a fair amount of political will and imagination from the Antarctic Treaty Parties. It would be the first recognition ever in international law of natural places having rights, as previous recognitions of RoN are limited to domestic law. Though arguments can be made for giving ecoregions such relevance, they are not without challenges.[64] For instance, in discussions about the normative relevance of 'region', it has been noted that there is a reliance on human interests both in the justification of RoN and its implementation. While the former includes issues such as the difficulties of distinguishing RoN from rights of places justified by human attachments to them, implementation challenges include *inter alia* the need to appoint a representative or representatives.[65] Such appointment evokes issues such as by what procedures a rightful representative or representatives ought to be selected based on their knowledge and attachments to the place.[66]

Furthermore, and more importantly, basing RoA on ecoregions fits uneasily with domestic legislation and authority. Should an ecoregion within some claimed Antarctic territory be given rights, careful consideration must be given to how to weigh these rights vis-à-vis the territorial aspirations of the claimant state. To ascribe normative meaning to ecoregions would no doubt be a significant change in the way in which we understand political authority, as such authority would be restricted.[67]

Another challenge of basing RoA on ecoregions concerns its feasibility. Considering that some of the parties are reluctant to recognise RoN, it seems unlikely that they would recognise any form of RoA, even in the form of ecoregions.

More importantly, reducing RoA to the rights of some of its ecoregions is also not aligned with the ambition of the Antarctic Declaration. Even if successful, justifying RoA with ecoregions would only cover parts of Antarctica, and the result would be patchy and piecemeal. This stands in stark contrast to Article IV of the Antarctica Declaration, which states that Antarctica as a whole has rights, with corresponding duties for all agents.

Due to the shortcomings identified hitherto, we now turn to a third justification of RoA.

4. Third argument: four reasons for RoA as one single natural entity

So far, we have outlined two approaches to giving rights to Antarctica: one based on extending RoN to RoA, and one that aspires to give rights to some places and/or

[64]Baard, 'Sovereignty, Ecology, and Regional Imperatives'.
[65]Ibid.
[66]In the literature about representing nature in domestic constituencies, the usual candidates are 'those who know' and 'those who care'. See, for example, O'Neill, 'Representing People'; Eckersley, 'Representing Nature'. We acknowledge that the question of how to pick the representatives arises not just here, but also if one wishes to assign rights to Antarctica as a whole. We do not discuss this issue further as it would merit discussion in its own right and it regards more the implementation of RoA than its very justification.
[67]Baard, 'Sovereignty, Ecology, and Regional Imperatives'. There are also challenging implications for accepting this view beyond Antarctica. If not all ecoregions, globally, ought to be considered rights-holders, then it must be specified which ones should be, and on what basis. Should ecoregions as such have rights, the nation states where they lie would not be at liberty to exploit their natural resources. While we see several benefits to some such constraints, this requires close scrutiny and a reconceptualisation of the Doctrine of Permanent Sovereignty over Natural Resources, which provides that 'States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources' (United Nations General Assembly, 'Permanent Sovereignty over Natural Resources (1962), Resolution 1803 (XVII), Adopted at the 1194th plenary meeting, 14 Dec. 1962', https://www.ohchr.org/sites/default/files/resources.pdf.). See also Mancilla, 'From Sovereignty to Guardianship'.

ecoregions in Antarctica rather than to Antarctica as a whole. We have found both wanting. In this section, we offer a justification for RoA as a whole, based on four characteristics. The first two have a common relationship with RoN elsewhere, although the attachments referred to are of a different kind. The last two are specific to Antarctica and possibly also to other global systemic resources under threat. It should be stressed that while none of the following *individually* suffice for ascribing rights, they may jointly do so. RoA would thus be the legal expression of all four in combination.

4.1. Intrinsic value

Antarctica has *intrinsic value* according to Article 3 of the Environmental Protocol, which states that 'the protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica [...] shall be fundamental considerations in the planning and conduct of all activities'.

While rights are taken to express such intrinsic value, there is, to reiterate, no *necessary* link between having intrinsic value and being a rights-holder. However, as stated above that something has intrinsic value carries substantial weight from an ethical perspective, entailing that the entity that has intrinsic value is morally considerable. This means that intrinsic value guides actions regarding what ought to be done and what ought to be prohibited regarding such an entity, and calls for duties such as respect and refraining from harm. This explains why rights may be seen as the best legal way to protect intrinsic value in some cases, even though there is no analytical and necessary conceptual relation between intrinsic value and holding rights. Even if not all intrinsic values merit rights-holding, the case grows stronger for RoA when we supplement intrinsic value with three other factors discussed below.

4.2. Human attachments in Antarctica

Even though Antarctica has neither a permanent human population nor Indigenous peoples, there *are* people in Antarctica. These are mainly scientists and logistics personnel, plus tourists during the summer season. This stands in contrast to RoN, where the usual guardians or representatives have been peoples long settled in the place in question, many times Indigenous groups. For instance, Takacs suggests that RoN initiatives 'empower Indigenous groups, or other communities with long histories as stewards', and that such groups 'will manage nature as if their lives depended on it, because their lives depend on it'.[68] Takacs, however, expands the set of possible custodians to anyone with 'intimate connection and knowledge' of the natural world, including 'sportspersons, hikers, scientists, birders, local nature enthusiasts [which] could – and should – be fiduciaries, empowered to act as trustees for rivers and mountains and ecosystems'.[69] This echoes US Supreme Court Justice Douglas, who, in 1972, voiced dissent to a ruling in *Sierra Club v. Morton*. Ruling against claims raised by the Sierra Club to strengthen the protection of a natural resource, Justice Douglas dissented by recognising the possibility of RoN. He wrote, for instance, regarding representatives of an environmental place, that 'those who hike it, fish

[68]Takacs, 'We Are the River', 603.
[69]Ibid., 604.

it, hunt it, camp in it, or frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be a few or many'.[70] Following this, one could plausibly see visitors to Antarctica as fitting this description.

On most readings of attachments, they are used to 'defend the jurisdictional rights of people over a certain territory'.[71] While such attachment-based claims are standardly justified with reference to the importance that access to and usage of a natural resource has to the life plans of cultural groups, the notion of attachments having normative bearing can be expanded along the lines suggested by Takacs above. Mancilla provides a nonexhaustive list of attachments that are production-based, activity-based, belief-based, knowledge-based, emotion-based, and aesthetics-based.[72] A place may thus come to matter to individuals in a wide variety of ways, forming the basis for normatively relevant attachments. In the case of Antarctica, it may primarily be about scientists' 'knowledge-based attachments' (that is, when the place 'is an object of study for the individual, or when the latter is well acquainted with it because of his/her continued coexistence with it') and about scientists' and logistics personnel's 'activity-based attachments' (when the place in question 'is needed for the unfolding of certain activities that can be more or less central to the individual's life-plans').[73] To this, one could add the emotional and aesthetics-based attachments of some of its visitors and, arguably, of many who have never been to the continent and yet see it as a unique spot where science and wilderness coexist and where wilderness ought to be protected.[74] Furthermore, one could add the special environmental and cultural connection arguably held by the inhabitants of so-called 'gateway cities' to the continent.[75]

Attachments to Antarctica are thus not of the traditional kind. Even if Antarctic scientists and logistics personnel were viewed as a cultural group, the access and usage of the natural resources there have different purposes and are regulated by other ambitions than in the cases of Indigenous peoples and RoN. This is even clearer in the case of tourists and people who care about Antarctica from afar. Nevertheless, part of the justification of RoA could be that scientists need access to and limited use of Antarctica for epistemic reasons. RoA would, to that extent, be a recognition of the importance of protecting Antarctica, and scientists could be epistocratic guardians. (One could argue that the Committee for Environmental Protection already serves this function to some extent, although it only has an advisory role; that is, it can recommend but has no political authority to decide.) It could be objected that these more specific kinds of attachment would only be enough to justify giving rights to certain places in Antarctica rather than to Antarctica as a whole. This is where attachments based on aesthetics and emotional reasons could be a complement and serve to justify not just a piecemeal but a comprehensive, protection of Antarctica – assuming that it is meaningful to talk about attachments to Antarctica as a whole.

[70]See Stone, 'Should Trees Have Standing?' For the ruling, see US Supreme Court, *Sierra Club v. Morton*, 405 US 727, 1972.
[71]Mancilla, 'Greening Global Egalitarianism?', 102.
[72]Mancilla, 'Greening Global Egalitarianism?'.
[73]Ibid., 104.
[74]See, respectively, Bastmeijer and Tin, 'Wilderness Continent for Science' and Neufeld et al., 'Valuing Antarctica'.
[75]See Salazar et al., *Ciudades Antárticas*. We say 'arguably' because it is an open question to what extent these connections arise spontaneously among their inhabitants or are fabricated and fostered by authorities and other interested parties in order to promote a more central role for these cities in the governance of the continent.

4.3. Antarctica as a global systemic resource

Though it has no permanent population, Antarctica matters to everyone. It provides us with unique knowledge regarding the functioning of the Earth's systems and plays a central role in them as a global thermostat and regulator of atmospheric circulation and marine currents. Antarctica is a global systemic resource, understood as an area of the Earth 'that provide[s] key water or ecosystem services, or help[s] to regulate the climate system, so that [its] loss would greatly jeopardize the lives of human beings on earth'.[76]

Some may object that basing the rights of Antarctica on its role as a global systemic resource reduces Antarctica to its instrumental value. However, there are more nuanced accounts of instrumental value. Consider a case where there is only *one means* available to fulfil something of intrinsic value. Say, for example, that there is only one nature area which enables the experience of sublime beauty or only one type of medicine that cures a specific disease. To experience that beauty or to become well for those who have fallen ill with this specific disease, which specific environmental area or medicine carries substantial worth despite having instrumental value. They are the only means enabling the experience of sublime beauty or health, respectively. In these cases, the entity possessing instrumental value could be said to *reflect* that which has intrinsic value: without that particular means, that which has intrinsic value would remain an abstract idea lacking any physical manifestation.[77] Contrast this with the standard case in which there are numerous available means to manifest something of intrinsic value. In that case, the means are substitutable, at least to a degree. By virtue of having a unique role in regulating our Earth's systems, Antarctica is closer to the first category, having unique instrumental value, and to claim that it has *merely* instrumental value is a conceptually poor way of expressing this, as well as erroneous given the additional recognition of its intrinsic value.

4.4. Recurrent threats

Many rights are justified not solely by the values they protect but also by how those values are threatened. For instance, human rights theorist Nickel includes recurrent threats as one of six justificatory tests to assess whether something is to be regarded as a human right, suggesting that 'an early step in justifying a specific right as a human right involves showing that important interests or claims are significantly threatened in the area that the right would protect'.[78] While direct analogies between human rights and rights of natural entities are troublesome, and not every valuable thing under threat merits the thing to hold rights, the threats to Antarctica could be included as an *additional* reason for justifying RoA alongside intrinsic value, human attachment, and Antarctica's role as a global systemic resource. There are both internal threats (that is, happening within Antarctica as we have defined it), like the growth of tourism, fishing, and bioprospecting, and the increased interests of individuals, companies, and states to be present in the continent, and external threats (that is, caused beyond the continent but directly affecting

[76]Mancilla, 'Rethinking Land', 138.
[77]Baard, 'Goodness of Means'; Baard, *Ethics in Biodiversity Conservation*.
[78]Nickel, *Making Sense of Human Rights*, 70–71.

it) like air and water pollution, and, above all, climate change. While internal threats are to some extent taken care of by the current legal framework, external threats are not addressed by the Environmental Protocol and are only indirectly (and insufficiently) addressed through other mechanisms, like the United Nations Framework Convention on Climate Change (UNFCCC).[79] For the main components of our defense of RoA, see Table 2.

Table 2. Four conditions for recognising RoA.

Condition	Description
Intrinsic value	Antarctica's intrinsic value is deemed relevant enough to support attributing some enforceable rights to Antarctica (in analogy with basic human rights).
Knowledge, activity, emotion, and aesthetic-based attachments	Scientists, logistics personnel, visitors, and even people from afar may build certain attachments to Antarctica, even if these are not the usual ones attributed to permanent, stable populations.
Unique function of Antarctica as a global systemic resource	Antarctica serves as a key resource for the global climatic system and is thus of importance to all.
Recurrent threats	Antarctica is currently under threat by internal and external factors.

5. Conclusion: if not rights, then what?

We have suggested that RoA may merit recognition in international law, based on combining the following four reasons: (1) Antarctica's intrinsic value, (2) specific forms of human attachments, (3) Antarctica's substantial role as a global systemic resource, and (4) the fact that Antarctica is under recurrent and substantial threats. These four reasons taken together suggest that it is the whole of Antarctica that is to be considered as a rights-holder, towards which all agents have duties.

While we concede that the language of rights is not appropriate for entities that fulfil only some of the individual conditions we identified above, we suggest they are a flexible enough legal concept to express the status of Antarctica in international law and, more specifically, within the Antarctic Treaty System.

As briefly mentioned in the introduction, a parallel can be drawn between our defence of RoA and how Næss, the founder of what has been dubbed *deep ecology*, regarded the concept of rights. Næss suggested that all animals and plants have rights to life, and that there is a universal right to live and blossom.[80] Despite the vagueness of the concept of rights applied to natural entities, Næss recognised they were the best expression for the intuition that one should protect them and value them in and of themselves.[81] Moreover, one could concede that rights are appropriate, because framing the environment – and here Antarctica – as important merely because of its use for human rights-holders 'distorts what we are really doing, discouraging the development of a more accurate and noble discourse'.[82]

[79]The fact that Antarctica is both a global systemic resource and a place under recurrent threat (mainly related to climate change) is captured by Jessica O'Reilly's designation of Antarctica as a *terra clima*: 'a place essential to climate, a place reacting to, creating and being altered by anthropogenic climate change'. See O'Reilly, 'Antarctic Climate Futures', 395.
[80]Næss, *Ecology, Community, and Lifestyle*, 164ff.
[81]Ibid., 167.
[82]Stone, 'Response to Commentators', 109.

The time may be ripe for the recognition of RoA, given the urgency of combating climate change, the loss of biodiversity, air and water pollution, and the depletion of natural resources by overexploitation. RoA could serve as a springboard towards a new phase in international law, where nonhuman natural entities stop being merely the backdrop for human action and become subjects to be considered in their own right. At the same time, we concede that our argument here opens more questions than it answers, which is not surprising, given the novelty of the enterprise. Among them, it is unclear what status RoA would have. Would the rights-based claims of Antarctica be easily overridden, or should they always override other rights – including the territorial rights of states? And what is it that an entity such as Antarctica has valid claims to? This would presumably require assessing what is harmful or not harmful for Antarctica. Moreover, even if Antarctica as such were granted legal standing, how to appoint its representatives and how to create the institutional structures to allow for such representation? We admit that more research is required not only regarding RoA but also regarding RoN. Rather than a definite argument for defending RoA, we hope to have provided the material to kickstart a discussion on the topic and to continue the discussion on what RoN may look like beyond domestic jurisdictions.

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