
ANTARCTICA DECLARATION

(draft of 30 November 2023)

EXPLANATORY MEMORANDUM

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ABBREVIATIONS AND ACRONYMS

ASOC	Antarctic and Southern Ocean Coalition
ATCM	Antarctic Treaty Consultative Meetings
ATS	Antarctic Treaty System
CCAMLR	Convention for the Conservation of Antarctic Marine Living Resources
CEP	Committee for Environmental Protection
COMNAP	Council of Managers of National Antarctic Programs
COP	Conference of the Parties
GOC	The Global Overturning Circulation
IAATO	International Association of Antarctica Tour Operators
NGO	Non-governmental organization
SCAR	Scientific Committee on Antarctic Research
UNFCCC	United Nations Framework Convention on Climate Change

GLOSSARY

Antarctica	means the community of inter-dependent Antarctic beings that exists South of the Antarctic Convergence, and includes the continent of Antarctica, the ice, sea, seabed, and atmosphere, and indigenous species within this area, and the relationships between them.
Antarctic convergence	means the polar front that separates two hydrological regions (the cold surface waters to the South from the warmer waters to the North) forming a natural boundary that circles the whole Antarctic continent and defines the northern extent of the Southern Ocean and two areas of distinct marine life. ¹
Antarctic Treaty	means the Antarctic Treaty signed in Washington D.C., USA on 1 December 1959.
Antarctic Treaty System (ATS)	<p>means the governance system comprising the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force, and the measures in effect under those instruments.</p> <p>Other instruments forming part of the ATS include:</p> <ul style="list-style-type: none">• the Agreed Measures for the Conservation of Antarctic Fauna and Flora (1964) (entered into force in 1982);• the Convention for the Conservation of Antarctic Seals (1972);• the Convention for the Conservation of Antarctic Marine Living Resources (1982); and• the (Madrid) Protocol on Environmental Protection to the Antarctic Treaty (signed October 4, 1991, and entered into force January 14, 1998).

¹ At the front, the sea temperature may drop 6°C to 2°C (43°F to 35°F) in summer, and as much as 10°C (18°F) in winter. The width of the polar front and its exact position varies between seasons, reaching 60°S south of New Zealand and 48°S in the far South Atlantic and Indian oceans. Within the polar front zone, the cold, dense surface waters of the circumpolar ocean sink under the warmer tropical waters from the north and flow northward, creating a major circulation system. At a local scale, the associated zones of mixing and upwelling create an area of high marine productivity. Many marine creatures only thrive in the cold water south of the polar front, including Antarctic Krill (*Euphausia superba*), which is fundamental to the Antarctic marine food web. Bird and mammal communities are quite distinct on each side of the polar front, and most of the true Antarctic species (e.g. emperor, Adélie and chinstrap penguins, and Weddell, crabeater and leopard seals) only live in the cold waters south of the polar front.

	[Note: The Convention on the Regulation of Antarctic Mineral Resource Activities was signed in 1988 but is not in force.]
Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol)	means the protocol to the Antarctic Treaty adopted in 1991. The Parties to the Protocol commit to comprehensively protect the environment of the Antarctic Treaty Area (the area south of 60 degrees South latitude) and dependent and associated ecosystems. The Protocol has five specific annexes on: (1) marine pollution, (2) fauna and flora, (3) environmental impact assessments, (4) waste management, (5) protected areas and (6) liability arising from environmental emergencies. The sixth annex was adopted in 2005 but is not yet in force.
Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)	means the treaty adopted at the Conference on the Conservation of Antarctic Marine Living Resources which met at Canberra, Australia, 7–20 May 1980. The Convention established a Commission that meets annually to, among other matters, adopt conservation measures and other decisions which apply to harvesting activities within the Convention Area.
Consultative Party	means a Contracting Party to the Antarctic Treaty that is entitled to appoint representatives to participate in the Antarctic Treaty Consultative Meetings (ATCM) referred to in Article IX of that Treaty by virtue of the fact that it were either one of the twelve original Signatories to the Treaty, or subsequently acceded to the Treaty and is “conducting substantial research activity” in Antarctica (Art. IX.2).
ice shelf	means the floating ice situated around the periphery of the continent, which varies in thickness but is always less than 1 kilometre thick.
ice sheet	means the glacial ice covering the centre of the continent of Antarctica, which has an average depth of approximately 2 kilometres
Global Overturning Circulation (GOC)	means the system of ocean currents that transport cold, deep waters toward the equator and the poleward transport of warm, near-surface waters towards the poles. The GOC carries heat, carbon, oxygen, and nutrients around the globe, and fundamentally influences climate, sea level, and the productivity of marine ecosystems. As warm water near the surface moves toward the poles it cools and forms sea ice. Salt from the water which becomes ice forms remains in the ocean water, which

	<p>increases its salinity and density which cause the water to sink to the depths where it carried southwards. Eventually, the water gets pulled back up towards the surface and warms up in a process called upwelling, completing the cycle. The GOC is responsible for the transport of water, carbon and heat among the ocean basins and between the ocean and the atmosphere. It plays a critical role in global climate controls through ocean heat distribution and the absorption of atmospheric carbon dioxide levels. The GOC also controls the exchange of ocean carbon and nutrients between the deep ocean and the euphotic zone where photosynthesis occurs.</p>
Thermohaline circulation	means the process whereby trillions of tons of cold salty water sink to great depths off the coast of Antarctica. As the water sinks, it drives the deepest flows of the GOC.

EXECUTIVE SUMMARY

1. Antarctic Rights is global civil society initiative that advocates for the recognition of Antarctica (defined as the area South of the Antarctic Convergence) as an autonomous legal entity with certain rights, including the rights to exist, to continue its regenerative cycles and processes free of human disruptions, and to be represented in decision-making processes that affect its interests.
2. An Antarctic Rights working group of Antarctic scientists, academics and rights of Nature lawyers and activists began meeting on-line in early 2021 and met in person for the first time in August 2023.
3. The Antarctic Rights initiative aims:
 - 3.1. to develop an Antarctica Declaration which recognizes Antarctica and the surrounding Southern Ocean as an autonomous legal entity (analogous to a State) with certain rights (e.g. the right to self-determination and to be represented in human decision-making processes that affect it), and imposes corresponding duties on humans;
 - 3.2. to catalyse the emergence of a global alliance of organizations (“Antarctic Alliance”) that will finalize and proclaim the Declaration and initiate a campaign for a rights-based governance system that would include obligations on all nations and institutions to uphold Antarctica’s rights; and
 - 3.3. to develop innovative approaches for representing Antarctica which would enable the best interests of Antarctica to be advanced in international decision-making processes such as the conferences of the parties (COPs) to the United Nations Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD), and in courts throughout the world.
4. Antarctic Rights has developed a draft Antarctica Declaration that recognises Antarctica as an independent legal entity analogous to a State (“the draft Declaration”). The draft Declaration also sets out the rights, both of Antarctica as a community of inter-related ecological beings, and of individual Antarctic beings, and defines the associated duties of human beings, States and other institutions to respect and uphold those rights
5. Antarctic Rights proposes initiating a collaborative process of refining the draft Declaration, finalising and adopting and then implementing it, as a means of building global support for a rights-based governance system that would include obligations on all nations and institutions to protect Antarctica by its rights.
6. This memorandum explains why this initiative is necessary, important and timely, and provides a commentary on the text of the draft Antarctica Declaration

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1. INTRODUCTION

1.1 The Antarctic rights initiative

Antarctic Rights is global civil society initiative that advocates for the legal recognition of Antarctica (defined as the area South of the Polar Front) as an autonomous legal entity (analogous to a State) with certain legal rights.² These include : the right to exist, to continue its regenerative cycles and processes free of human disruptions, and to be represented in human decision-making processes that affect its interests).

In early 2021, Carola Rackete (a German ship captain and conservation scientist then employed by the Bob Brown Foundation in Tasmania) posed the question of whether the rights of Nature approach could usefully be applied to Antarctica. This led to the formation of a working group of Antarctic scientists, academics and rights of Nature lawyers and activists began meeting on-line in early 2021 but only met in person for the first time in August 2023.

The working group (Antarctic Rights) has developed a draft *Antarctica Declaration* that is based on the perspective that people have an obligation to respect and protect Antarctica as a living community of enormous significance and value in itself and to the ecological communities of Earth (including people). The draft Declaration recognizes Antarctica as having a legal status similar to that of a sovereign State, defines the rights and freedoms of Antarctica as a whole, and of the various “Antarctic beings” which form part of it, and imposes duties on all peoples, organizations, governments, and multilateral entities to take responsibility for recognising, respecting and upholding those rights and freedoms.

Antarctic Rights also proposes developing a *Peoples’ Convention for Antarctica* to establish institutional arrangements to facilitate the implementation of the Declaration. It is envisaged that such a Convention would provide for the establishment of an Antarctic Council to identify what is in the best interests of Antarctica and to articulate this in decision-making processes that may affect Antarctica, and its legal status, rights and freedoms. However finalising such a Convention will require considerable discussion among the prospective parties to it, and its content has not yet been determined.

The Antarctic Rights working group is building a global Antarctica Alliance to finalise, adopt and promote the Declaration as a means of building global support for a rights-based governance system that imposes obligations on all nations and institutions to protect Antarctica by upholding the rights of Antarctic beings and of Antarctica as a whole.

² This natural boundary for “Antarctica” is appropriate for ecological reasons, but this area includes several sub-Antarctic islands, situated between the boundary of the Polar Front and 60 degrees South. Most of these islands are recognised internationally as the sovereign territory of various countries, and consequently a way of resolving the potential for overlapping jurisdictions, will have to be found. (Many countries already recognise mountains, rivers, forests and other aspects of Nature within their territories, as legal subjects with rights.)

This memorandum explains why this initiative is necessary, important and timely, and provides a commentary on the text of the draft Antarctica Declaration to facilitate discussion of it.

1.2 The rationale for the initiative

The Antarctic Rights Initiative is motivated by the following facts.

- First, Antarctica is both unique and critical to the stability and functioning of global ecological systems (see section 2 below) and preserving it in a state close to that observed by humans over the past 200 years is critical to avoiding very significant ecological and societal disruptions.
- Second, Antarctica is now confronted with multiple threats (including climate change) and is undergoing rapid change in response to adverse impacts caused by human activities.
- Third, despite the very significant successes of the Antarctic Treaty System (**ATS**) over more than six decades, it cannot provide adequate protection for Antarctica against the threats now facing it and the prospect of significant reforms originating with the ATS appear remote. (See the discussions in section 3 below).
- Fourth, protecting Antarctica from these threats requires urgent action to transform the governance systems that regulate how humans relate to, and impact on, Antarctica, by adopting an integrated, “Earth systems” approach to governance that ensures that human planning, decision-making and actions are oriented towards avoiding human disruptions of Antarctica’s vital ecological processes.

1.3 A new vision and approach

Antarctic Rights believes that is now both critical and urgent to reimagine human / Antarctica relations and to begin establishing innovative means of ensuring that the life of Antarctica is protected and allowed to flourish.

Effective protection of Antarctica will require humans to re-evaluate the nature of their relationship with Antarctica and transform existing governance systems to ensure that decisions are made on the basis of what is best for Antarctica and that its rights are respected and upheld. Transformative change is highly unlikely to come from within the ATS.

This initiative aims to provide an alternative vision, focusing on paying close attention to Antarctica and human duties and responsibilities toward Antarctica, to create a global impetus for transforming how we regulate human interactions with Antarctica. We propose an entirely new approach that recognizes Antarctica as an autonomous, self-regulating entity with inalienable rights. A sovereign entity that humans visit and protect, but do not govern. The eco-centric, rights-based governance system which we propose is consistent with Antarctic scientists’ call for an integrated, Earth systems approach to governance.

2. ANTARCTICA

2.1 Unique significance of Antarctica

The Antarctic region South of the Polar Front (comprising land, ice and sea) is huge - it covers approximately 10% of the surface of Earth. The continent itself covers approximately 5.5% of Earth, an area larger than Europe, approximately the same size as Mexico and the continental United States of America combined, and nearly twice the size of Australia.

Antarctica is crucial to maintaining the stability of the global climate, to maintain the global circulation of the ocean, and to support unique ecosystems and vast numbers of life forms.³

A 2022 paper published by the Scientific Committee on Antarctic Research (SCAR) gives a number reasons which, in combination, mean that Antarctica and the Southern Ocean are unique and critical in the Earth System.⁴ These included the following.

- Although the Southern Ocean encompasses about only one-third of the total ocean area, it absorbs more than two-thirds of ocean anthropogenic heat and half of the total ocean anthropogenic carbon. (Oceans have absorbed more than 90% of additional warming in the Earth System since 1900.)
- The Southern Ocean is also disproportionately important in global climate and ecological systems because it links the Atlantic, Pacific and Indian Oceans in the global circulation.
- Ice cores from the Antarctic Ice Sheet provide a record of the changing Earth System, and if it were to melt entirely it would contribute approximately 58 m in sea level rise.
- As a consequence of changing conditions over geological time, new species have evolved in Antarctica, especially, but not exclusively, in marine ecosystems.
- Southern Ocean ecosystems are highly productive, incredibly diverse for some benthic⁵ groups, home to species with extraordinary adaptations to cold, and include some of the world's most iconic vertebrate species such as whales.
- Terrestrial areas form the breeding grounds for most Southern Ocean seabirds.
- The Antarctic continent has some of the largest wilderness areas on Earth and includes large areas that have either never been visited by humans or have very rarely been traversed.

Ecological changes in Antarctic are linked to, and influence, the drivers of global climate change. Change within Antarctica are likely to have the most significant impact on global

³ See for example: https://e360.yale.edu/features/climate-change-ocean-circulation-collapse-antarctica?utm_source=MIT+Water+Club&utm_campaign=dd7c7f59fb-EMAI%E2%80%A6

⁴ Chown, S.L., Leihy, R.I., Naish, T.R., Brooks, C.M., Convey, P., Henley, B.J., Mackintosh, A.N., Phillips, L.M., Kennicutt, M.C. II & Grant, S.M. (Eds.) (2022) *Antarctic Climate Change and the Environment: A Decadal Synopsis and Recommendations for Action*. Scientific Committee on Antarctic Research, Cambridge, United Kingdom. www.scar.org

⁵ "Benthic" refers to species that live on the seabed or near the bottom of the ocean.

mean sea level which will impact ecosystems and societies in all coastal regions of the world. However these changes will also have many other global influences, including on: extreme climate and weather events, droughts, wildfires and floods, and ocean acidification. These will cause ecosystem disruption and loss of biodiversity beyond the Antarctic region with potentially severe adverse impacts on the health of many ecological and human communities.⁶

Antarctica is also unique in geopolitical terms. It is not within the territory or subject to the sovereignty, of any State. It is governed by a collective of States under the Antarctic Treaty System (ATS) - a body of law centred on the Antarctic Treaty which was signed in 1959.

2.2 Threats to Antarctica

The threats to Antarctica are significant and intensifying rapidly.

Climate change in particular poses a very grave threat to Antarctica. In parts of the Antarctic Peninsula, average temperatures are rising faster than almost anywhere else in the world.⁷ In 2022 the extent of Antarctic sea ice reached a new record low.⁸ This sea ice level is approximately 32% below climatological values, and scientists are concerned that might indicate a transition to new, more extreme, annual fluctuations.⁹

Marine species within the Southern Ocean are threatened both by potential over-fishing and by the significant reductions in sea ice which poses a risk to krill populations on which many marine species depend directly or indirectly.

Other threats include the impacts of growing tourism, including increasing numbers of cruise ships and tourists, and unregulated activities such as bioprospecting.

Furthermore, despite the ban on mineral resource activities, and at least one State is undertaking geological surveys apparently motivated by a desire to exploit Antarctic mineral resources in future.

3. HUMAN GOVERNANCE OF ANTARCTICA

3.1 The Antarctic Treaty System (ATS)

Human activities within the area south of sixty degrees South Latitude (which includes the continent of Antarctica, all ice shelves and most of the Southern Ocean) are governed under the Antarctic Treaty System (ATS) by a group of 29 States (known as Antarctic Treaty Consultative Parties or "ATCPs") with input from the other signatories to the Antarctic Treaty.

⁶ Chown et al, supra.

⁷ In March 2022, record-breaking high temperature (38°C above the norm) were recorded in parts of Antarctica.

⁸ On 23 February 2022 the sea ice covered an area of 1.965 million km².

⁹ Raphael, M.N., Handcock, M.S. A new record minimum for Antarctic sea ice. *Nat Rev Earth Environ* **3**, 215–216 (2022). <https://doi.org/10.1038/s43017-022-00281-0>

The Antarctic Treaty was signed on December 1 in 1959 in Washington, D.C. Its two main goals are to dedicate Antarctica to peace¹⁰ and scientific research¹¹.

Over time, the Treaty evolved into the larger ATS which includes the Convention for the Conservation of Antarctic Seals, the CCAMLR (Convention for Conservation of Antarctic Marine Living Resources), and the Madrid Protocol. Further details of the ATS and its advantages and disadvantages are set out in Annex 1.

3.2 Need for rapid evolution of governance systems

The limitation of the ATS governance system have been recognised for some time. In a recent report addressing Antarctica and climate change, the international Scientific Committee on Antarctic Research (**SCAR**) concluded that

“Rapidly changing Antarctic and Southern Ocean environments require similarly rapid environmental governance responses, including potential changes to agreements that have previously taken many years to reach. Impacts of climate change are also likely to challenge geopolitical relations in regions outside the Antarctic, in turn influencing relations within the Antarctic Treaty System.

Past global arrangements and isolated responses have been ineffective in addressing cross-boundary challenges that require an Earth System approach.”¹²

3.3 Consensus decision-making retards fundamental reform

Governance within the ATS is by consensus, meaning that a single Consultative Party can effectively veto a proposal, preventing it from progressing. This makes any form of fundamental reform very difficult to achieve, particularly rapidly. Furthermore, “consensus decision-making was essential to the agreement of claimants to the Antarctic Treaty in the first place, and (as with the UN Security Council Permanent Five) gaining agreement to change seems unlikely.”¹³

¹⁰ Article I of Antarctic Treaty states:

“1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.

2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose.”

¹¹ Article II of the Antarctic Treaty states:

“Freedom of scientific investigation in Antarctica and cooperation toward that end, as applied during the International Geophysical Year, shall continue, subject to the provisions of the present Treaty.”

¹² Chown, S.L., Leihy, R.I., Naish, T.R., Brooks, C.M., Convey, P., Henley, B.J., Mackintosh, A.N., Phillips, L.M., Kennicutt, M.C. II & Grant, S.M. (Eds.) (2022) *Antarctic Climate Change and the Environment: A Decadal Synopsis and Recommendations for Action*. Scientific Committee on Antarctic Research, Cambridge, United Kingdom. www.scar.org

¹³ Klaus Dodds and Alan D. Hemmings, *Antarctic Diplomacy in a Time of Pandemic*, The Hague Journal of Diplomacy, published online on 08 Oct 2020.

3.4 Public opinion has little impact on ATS

Public opinion exerts little if any influence on decision-making processes within the ATS. This is partially as a result of a general lack of appreciation of the significance and relevance of Antarctica to populations distant from it, and partially by the secrecy which surrounds implementation of the ATS. Most decisions are made during the Antarctic Treaty System's yearly Antarctic Treaty Consultative Meetings from which journalists have historically been excluded. NGO participation is via the Antarctic and Southern Ocean Coalition¹⁴ which in 1991 was granted observer status in the ATS and began attending the ATCMs.

3.5 Internal initiatives unlikely to achieve rapid changes in governance

Experience suggests that the prospects of the ATS making the “rapid environmental governance responses” which SCAR identifies as being necessary, are remote. In recent years progress on issues like the declaration of marine protected areas has been disappointing, and many Antarctic scholars do not expect significant advances within the near future. Some experts fear that environmental protection measures under the ATS could be weakened in the longer term as a consequence of States competing for fishing and other “resources”. There is also a concern that at least one State is positioning itself for possible mineral or oil and gas exploitation opportunities, which are not permitted under the ATS.

4. APPROACH TO DEVELOPING DRAFT DECLARATION

4.1 Antarctica as the starting point

The starting point in formulating the draft Declaration was Antarctica itself, rather than outdated doctrines of discovery and occupation. In other words, the draft Declaration reflects the understanding that any system to govern how humans relate to Antarctica must be designed to take into account, and be aligned with, the realities of Antarctica itself and not simply focus on how States should make decisions about managing human activities within the Antarctica. For example, the draft Declaration articulates harmonious coexistence principles which should guide how people relate to Antarctica, which are based on our (incomplete) understanding of the nature of Antarctica and the natural forces that have given rise to and maintain its unique ecosystems.

Antarctica has many unique ecological qualities and plays an enormously significant role in regulating the global climate and weather systems (including by absorbing carbon from the atmosphere and driving the global circulation ocean currents). It is also unique in that it has no indigenous or permanent human inhabitants. Despite the fact that seven countries assert territorial claims to parts of Antarctica and two reserve their right of future claims, it is not part of any country. Instead, a group of countries have claimed co-management authority for Antarctica under the Antarctic Treaty System (**ATS**). This means that it presents a unique

¹⁴ <https://www.asoc.org/>

opportunity to develop a new vision of how humans could relate to other beings in mutually beneficial ways, and to transform the international legal order by recognising Antarctica as a natural being with rights under international and national law, including the right to self-determination. The draft Declaration is also intended to serve as a prototype of an eco-centric governance system at the international level.

4.2 Translating an integral worldview into law

The draft Declaration reflects a worldview that differs substantially from the worldviews most prevalent in the world today and that inform the current system of international law. Consequently some of the terms used in the draft Declaration may be unfamiliar and may initially seem strange or inappropriate in a document of this nature.

The draft Declaration is only fully comprehensible from the perspective (shared by many Indigenous Peoples) that human beings are members of a community created by the interrelationships between many natural entities or beings, and that a fundamental purpose of legal systems should be to enable human beings to live well by contributing to, rather than degrading, that life-sustaining community (typically referred to as “Earth” or “Mother Earth”).

One of the main challenges in formulating the draft Declaration has been to articulate this integral worldview in language that is comprehensible (albeit unfamiliar) to the existing governance system applicable to Antarctica. This inevitably requires using some words and terms that are usually used only to refer to humans or human institutions in a wider sense to refer to other-than-human beings, which the current legal order regards as objects rather than subject. For example, the current international law regime (and national legal systems) treats the continent of Antarctica as an area without any subjective or animate qualities. On the other hand the draft Declaration treats it as a subject (i.e. a natural being) whose presence, and perhaps spirit, can be experienced by people, and which is “wild” in the sense of not being subject to human will or control. The draft Declaration reflects an attempt to grapple with our encounter with very different beings, who are nevertheless also members of the Earth community within which humankind evolves and exists, and which is the source of life for us all. The draft Declaration is intended to assist humanity to achieve the aspiration of living harmoniously with Antarctica and Antarctic beings, within the wider context of the Earth community.

4.3 Relationship with existing governance systems

The rights and duties articulated in the draft Declaration are not intended to replace the current governance system any more than the recognition of human rights replaced legal systems. The adoption by the United Nations of the (non-binding) Universal Declaration of Human Rights on 10 December 1948 did not replace the laws of the world. Instead it provided a standard or yardstick of universally accepted norms of human behaviour against which existing laws could be measured, and where necessary, guide the amendment or replacement of laws so that the laws reinforce those norms or rights. Despite the many violations of

human rights that still occur, the world would be a far worse place without human rights.¹⁵ It is hoped that the adoption of an Antarctic Declaration as a platform for action will have a similar positive impact on how people perceive and relate to Antarctica (and the more-than-human world in general), and guide law reform at the international, transnational, national and sub-national levels in order to afford higher levels of protection for Antarctica and Antarctic beings.

4.4 Cooperation and harmonisation

One of the strengths of the ATS is that it promotes cooperation (particularly scientific collaboration) among a range of parties.^{16 17} The Declaration does not envisage reinventing the wheel or abolishing and replacing existing governance measures. Instead it seeks to provide guidance on how governance arrangements based on an outdated understanding of

¹⁵ The website of the United Nations Peacekeeping website expressed the importance of human rights as follows. “Without human rights, there can be no sustained peace, no stability, no protection from harm. No equality, no democracy, no space to speak up. No online safety, no end to the digital divide, no hope of an internet that puts people over profit.

Without human rights, there would be no way to curb climate change, eradicate poverty, tackle racism, misogyny, homophobia, or xenophobia. No way to protect the wellbeing and safety of children, young people, the elderly, disabled persons, refugees, or minorities. There can be no green and habitable future planet, no sustainable development, possibly no human future at all.” (<https://unmik.unmissions.org/can-you-imagine-world-without-human-rights>)

¹⁶ For example Article 6 of the Madrid Protocol reads as follow. “CO-OPERATION

1. The Parties shall co-operate in the planning and conduct of activities in the Antarctic Treaty area. To this end, each Party shall endeavour to:

(a) promote co-operative programmes of scientific, technical and educational value, concerning the protection of the Antarctic environment and dependent and associated ecosystems;

(b) provide appropriate assistance to other Parties in the preparation of environmental impact assessments;

(c) provide to other Parties upon request information relevant to any potential environmental risk and assistance to minimize the effects of accidents which may damage the Antarctic environment or dependent and associated ecosystems;

(d) consult with other Parties with regard to the choice of sites for prospective stations and other facilities so as to avoid the cumulative impacts caused by their excessive concentration in any location;

(e) where appropriate, undertake joint expeditions and share the use of stations and other facilities; and

(f) carry out such steps as may be agreed upon at Antarctic Treaty Consultative Meetings.

2. Each Party undertakes, to the extent possible, to share information that may be helpful to other Parties in planning and conducting their activities in the Antarctic Treaty area, with a view to the protection of the Antarctic environment and dependent and associated ecosystems.

3. The Parties shall co-operate with those Parties which may exercise jurisdiction in areas adjacent to the Antarctic Treaty area with a view to ensuring that activities in the Antarctic Treaty area do not have adverse environmental impacts on those areas.”

¹⁷ For example, Article XXIII of CCAMLR states: “(1) The Commission and the Scientific Committee shall co-operate with the Antarctic Treaty Consultative Parties on matters falling within the competence of the latter.

(2) The Commission and the Scientific Committee shall co-operate, as appropriate, with the Food and Agriculture Organisation of the United Nations and with other Specialised Agencies.

(3) The Commission and the Scientific Committee shall seek to develop co-operative working relationships, as appropriate, with inter-governmental and nongovernmental organisations which could contribute to their work, including the Scientific Committee on Antarctic Research, the Scientific Committee on Oceanic Research and the International Whaling Commission.

(4) The Commission may enter into agreements with the organisations referred to in this Article and with other organisations as may be appropriate. The Commission and the Scientific Committee may invite such organisations to send observers to their meetings and to meetings of their subsidiary bodies.”

the role of humans within Nature and outdated doctrines of discovery, occupation and colonization, can be progressively transformed in accordance with contemporary scientific understandings complemented by a good will flowing from deep connection with, and appreciation for, Antarctica.

Antarctic Rights envisages helping establish institutional arrangements to facilitate the general adoption and implementation of the final Declaration and the harmonisation of existing governance systems with that Declaration. This would include harmonisation at the international, transnational,¹⁸ and national levels.

5. GUIDING PRINCIPLES

Before drafting the Declaration, a set of principles were developed to guide the drafting process (see Annex 1). Those principles are listed below.

1. Human governance systems must be guided by Antarctica.
2. Antarctica is an ecological community of inter-related beings.
3. We celebrate and are grateful for the vitally important contribution that Antarctica makes to the whole Earth community.
4. Antarctica is unique and merits special attention.
5. Antarctica is a self-regulating and autonomous being/ entity.
6. Antarctica must be recognised as a legal subject.
7. The dignity of Antarctica must be respected.
8. Antarctica and Antarctic beings have the rights to exist and the freedom to be wild.
9. Decision-making should be in Antarctica's best interest.
10. Antarctica has the right to a voice in human decision making.
11. Human activities within Antarctica and beyond Antarctica that are contrary to the best interests of Antarctica must not be permitted.
12. Humanity has a collective responsibility to respect and uphold the rights of Antarctica.
13. Humans have specific duties in relation to Antarctica.
14. Disputes must be resolved in ways that restore damaged relationships.

¹⁸ For example, the laws of transnational economic integration entities such as the European Union.

6. COMMENTARY ON DRAFT DECLARATION

6.1 Introduction to commentary

The main purposes of the commentary are to explain the thinking which informed the drafting of each clause, and the purpose and implications of each clause, so that the reader is in a better position to understand and comment on the draft Declaration. (References in the commentary to “the Declaration” are references to the draft declaration of 11 November 2023.)

6.2 Preamble

The purpose of the preamble is to provide a context for the Declaration and an explanation of why the Declaration exists. The preamble celebrates the magnificence of Antarctica and expresses gratitude for the existence of this unique living community. Antarctica is vital to the ecological stability, ordering and functioning of Earth as a whole. For example, they¹⁹ play a very important role in determining the climate, ocean currents, and winds, and include a vast number of organisms. The continental ice sheets of Antarctica retain vast quantities of water which, if it were to melt, would raise global sea-levels by many metres and inundate cities and fertile farmlands. This means that every person has reason to celebrate and be grateful for its continued existence.

The third and fourth paragraph of the preamble use words such as “beautiful”, “awe-inspiring” and “magnificent” to communicate some of the reactions that an encounter with Antarctica evokes in people, with a view to emphasizing that in essence the Declaration is about how we relate to Antarctica.

In order to explain the rationale for the Declaration, the preamble refers to the threats to Antarctica, the desirability of protecting them, the fact that existing governance systems have not succeeded in protecting them sufficiently²⁰ against threats, and the collective responsibility of humanity to take urgent action to safeguard Antarctica from harm caused by humans.

The Declaration is proclaimed with immediate effect but the preamble also calls upon all international bodies making decisions relevant to Antarctica to adopt it, and on all peoples, organizations and institutions to take responsibility for implementing it.

¹⁹ The draft Declaration uses the pronouns “they” and “them” to refer to Antarctica, because it is a singular entity composed of many beings, and because these terms can be used for both plural and singular subjects, and are gender neutral.

²⁰ The word “sufficiently” is intended to make it clear that we recognised that the ATS system has protected Antarctica but that more protection is required.

6.3 Article I. Definitions

6.3.1 *Antarctica and Antarctic beings*

The most important definitions are of Antarctica and of the Antarctic beings of which it is composed.

“Antarctic being” is defined as a natural entity that exists within Antarctica, including both organic elements (e.g. indigenous species) and non-organic elements (e.g. land, water, ice and the atmosphere), in all forms, both collective (e.g. ecosystems) and individual (e.g. a particular seal). In other words, the term may be used to refer to specific organisms, icebergs or mountains as well as to collectives such as ecosystems. The definition specifically excludes any human being (on the basis that no people are indigenous to Antarctica) and any structure, vessel, vehicle or other artifact made by people. It is necessary to distinguish between Antarctica as a whole and beings which form part of Antarctica, since the Declaration recognizes both as rights holders.

Both “Antarctica” and “Antarctic being” are defined to include only species that are “native”. Some commentators have suggested that the word “native” should be deleted so that non-indigenous species (e.g. the reindeer introduced to South Georgia) can be considered part of Antarctica. Another perspective is that if a distinction is not made between indigenous and non-indigenous species, the latter will enjoy full rights which will make it difficult to control invasive alien species.

Antarctica is defined to include the seabed, and as a consequence mining the seabed of the Southern Ocean would be prohibited under Article XI(4)(d). The definition of Antarctica has a rider stating that “unless the context indicates otherwise, “Antarctica” refers also to Antarctic beings;”. This has been included to enable the word “Antarctica” to be used instead of the phrase “Antarctica and Antarctic beings”.

Antarctica is defined as the community comprised of Antarctic beings which exists South of the Antarctic Convergence.²¹ This means that the geographic extent of Antarctica is defined by a natural boundary rather than by a political boundary. However Article IV(3) provides that animals that are native to Antarctica (e.g. certain whales, birds and fish) remain Antarctica beings with the same rights and freedoms while they are North of the Antarctic Convergence.

Article I includes a definition of “justifiable limitation” which refers to a limitation on a rights or freedom that is regarded as acceptable because it is consistent with Article VI(2) which explains how the rights of all beings are limited by the rights of other beings.²²

²¹ Also known as “the polar front”. CCAMLR states in Article I(4) that: “*The Antarctic Convergence shall be deemed to be a line joining the following points along parallels of latitude and meridians of longitude: 50°S, 0°; 50°S, 30°E; 45°S, 30°E; 45°S, 80°E; 55°S, 80°E; 55°S, 150°E; 60°S, 150°E; 60°S, 50°W; 50°S, 50°W; 50°S, 0°.*”

²² The question of justifiable limitations also arises in article VIII(4)(c), and article IX(1)(f).

6.3.2 Humans and human beings

A distinction is made between human beings (people) and “Humans” which includes both human beings and any public or private entity created by human beings in a jurisdiction which regards that entity as a legal subject. The Declaration treats human beings (as natural entities who are part of the Earth Community) as being primarily responsible for caring for Antarctica. However, this wider definition is necessary to ensure that duties are also imposed on juristic persons because so much ecological harm is caused by humans acting through States, companies and other juristic persons.

6.4 Article II. Antarctica

A fundamental question when seeking to define the relationship between humanity and Antarctica is: “Who is Antarctica?” The definition of “Antarctica” in Article I answers this question in legal terms whereas Article II seeks to communicate a description of Antarctica as a natural entity or being with a vital role within the Earth Community, to whom humans can relate.

The reference to Antarctica having a unique presence and spirit may be contentious. The Working Group will seek further input from Indigenous Peoples on the formulation of this aspect of the Declaration.

Like any community, Antarctica is constituted by the inter-relationships between the members of the community which are themselves beings (i.e. entities that have come into being and have co-evolved within, or been shaped by, this community).

Many people would agree that the whales, penguins, fish, seals, and other animals that inhabit Antarctica, are beings who have a right to exist (or to be) and the right to habitat conducive to their survival, reproduction and general well-being. However for people not exposed to the perspectives of Indigenous Peoples or ancient wisdom traditions, it may be difficult to conceive of a continent, ice shelf or the Southern Ocean as a being. However these entities are fundamental to this community of life and Antarctic animals would not exist without them. Consequently Antarctica is described as an “indivisible” community.

Antarctica is described as “autonomous and self-regulating” because it organises and regulates itself and does not require human management to function or flourish. The Declaration seeks to convey that people must have the humility to accept the reality that we do not have the powers or knowledge necessary to regulate or govern Antarctica. Instead, we must recognise that Antarctica and the many entities that are part of Antarctica are not inert objects, but components of an autonomous, self-organising, community of life that we must pay attention to and respect.

6.5 Article III. Legal status of Antarctica

This article seeks to articulate the legal implications of the description of Antarctica in the previous article. It recognizes Antarctica as an entity with a legal status and “legal personality”

under international law.²³ Paragraph (1) describes this legal status and personality as “unique” to convey that it is “*sui generis*”. In other words it has an international personality “of its own kind” which is unprecedented and unique within international law. This is important to make it clear that, although Antarctica may in many ways be regarded as similar to a state under international law, it is a unique being with its own kind of legal status.²⁴

Antarctica is described as independent and autonomous which means that it is not subject to the sovereign power of nation States. The ATS addresses the thorny issue of competing territorial claims to part of the continent of Antarctica by providing that all claims are suspended, and that nothing done under the ATS will affect those claims. The Declaration seeks to remove the potential for territorial rivalry between states in relation to Antarctica by making it clear that Antarctica is independent and not subject to the sovereignty of any State. (In any event, for as long as the ATS is in place, the “loss” of these claims is purely symbolic since the claimant states are effectively already precluded by the ATS from exercising their claims.)

Paragraph (2) sets out the rights of Antarctica that follow from its legal status, which are analogous to the powers of sovereign States under international law. The paragraph records that Antarctica’s rights in this regard include: the rights to independence and to exercise all its legal powers freely and without dictation by States;²⁵ the right to exercise jurisdiction over its territory, over all Antarctic beings, and over all Humans (i.e. including States and corporations) within its territory;²⁶ and the right to equality in law with States.²⁷

Paragraph (3) describes the powers of Antarctica as including any powers which a state could exercise under international law in order to exercise and protect its legal status, powers, rights and freedoms.

6.6 Article IV. Inherent rights and freedoms of Antarctica and Antarctic beings

This article sets out those rights and freedoms of Antarctica as a whole, and of Antarctic beings (as part of that whole) which are regarded as inherent and inalienable like human rights. They derive their legitimacy from the existence of Antarctica, and the beings in

²³ An entity with international legal personality is capable of possessing international rights and obligations and to take certain types of action on the international level. The main subjects of international law are states. For centuries the only recognised subjects of international law were states and a few entities that states have historically recognised as similar to states (e.g. the Holy See and the Sovereign Order of Malta). Today various intergovernmental organizations (e.g. the United Nations, the European Union, the International Monetary Fund and the World Trade Organization) are also recognised as subjects of international law.

²⁴ In this regard see also Art V(1)(b).

²⁵ Article 1 of the Draft Declaration on Rights and Duties of States (1949) reads: “Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government.”

²⁶ Article 2 of the Draft Declaration on Rights and Duties of States (1949) reads “Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law.

²⁷ Article 5 of the Draft Declaration on Rights and Duties of States (1949) reads: “Every State has the right to equality in law with every other State.”

question, not from their recognition by humans.²⁸ Similarly humans claim human rights, even if their governments do not recognize those rights.

Subparagraph (1)(a) sets out the fundamental right to exist and to maintain and regenerate themselves and the relationships in order to continue to exist as a living community.

Subparagraph (1)(b) refers to a right to be respected as a being, (i.e. a being's right to be respected for who it is). The effect is that Humans have a corresponding duty to respect these beings. This is intended to mirror the human right to dignity which is central to the application of human rights. However there is on-going debate within Antarctic Rights as to whether or not it is appropriate to apply the term "dignity" - a concept that comes laden with moral and philosophical connotations - to the more-than-human world. Article 1 of Universal Declaration of Human Rights states: "All human beings are born free and equal in dignity and rights." The preamble to the International Covenant on Civil and Political Rights, adopted in 1966, states "...these rights derive from the inherent dignity of the human person." Recognising "dignity" as something all humans are born with means that all people deserve respect, and so provides a basis for the universality of human rights. Applying the concept of a right to be respected as a being to Antarctica and Antarctic beings is a way of reinforcing the idea that humans must respect their existence as beings (i.e. not as objects or natural resources which humans act on), and provides a basis for the recognition that they have rights. The corresponding duty on humans is in Article VIII(1)(a).

Subparagraph (1)(c) sets out the freedom to be "wild" and free of human disruption and control. This could be expressed as a right but the term "freedom" has been used to emphasize that this is liberty which Humans are not entitled to interfere with and if they did so without adequate justification, the interference would be unlawful.²⁹ This freedom flows from the characterization of Antarctica as autonomous, independent and not subject to dictation by States (article III(1) and (2)(a)). The right to be free of contamination and pollution flows from the freedom from human disruption. The reference to radioactive waste is consistent with the prohibition on the disposal of radioactive waste in Antarctica under the ATS.

Subparagraph (1)(d) refers to a right of self-expression and self-determination³⁰. These are regarded as fundamental aspect of an autonomous being. For example, keeping wild animals in captivity which restricts their ability to express themselves and their agency in determining how they live their lives, amounts to diminishing their autonomy. The reference to self-

²⁸ Further rights are set out in Article V but those rights arise from the proclamation of the Declaration rather than from the source of existence.

²⁹ The question of justification is addressed in article VIII(4)(c), and article IX(1)(f) which places the onus of proving that a limitation is justifiable, on Humans.

³⁰ The references to a right of "self-expression" is analogous to a right to "free speech" and the right of "self-determination" to a right of "self-governance".

Article 1 in both the International Covenant on Civil and Political Rights (ICCPR)[29] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[30] reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. "

determination is consistent with the characterization of Antarctica as autonomous and self-regulating.

International law recognizes the rights of peoples to self-determination and this Declaration seeks to extend the principle to beings other than humans.³¹

These rights also support the recognition of the rights of Antarctica and Antarctic to be represented in human decision-making that affects them (Article V(2)(d) and (e) and Article X).

It is arguable whether the right to self-protection against Human violations of their dignity, rights or freedom (sub-paragraph (1)(e)) is strictly speaking necessary. This right is envisaged as analogous to the right of both people and States to self-defense and has been included to provide a legal basis for the taking of protective measures on behalf of Antarctica.

Paragraph (2) specifies the inherent rights that each Antarctic being has in addition to those recognized in paragraph (1). Each of these rights is subject to the proviso in Article VI(1)(a) which recognizes that given the wide-range of Antarctic beings, some of those right and freedom will not be relevant or applicable to every Antarctic being.

The first right is to maintain their identity and integrity ((2)(a)); the second is to remain part of Antarctica and contribute to the integrity (used here in the sense of "wholeness") and ecological functioning of Antarctica as a whole ((2)(b)); and the third is to be free of human disruptions or treatment that may threaten its well-being or ability to regenerate themselves ((2)(c)).

Paragraph (3) has been included to ensure that when animals that are native to Antarctica (such as whales, fish, and sea birds) move North of the Antarctic Convergence and out of the geographical area of Antarctica, they do not lose their status as Antarctic beings or the rights and freedoms associated with that status

6.7 Article V. Further rights of Antarctica and Antarctic beings

The rights articulated in this Article are not expressed as being inherent by virtue of the existence of these beings, but as rights which are recognised for the purposes of requiring humans to respect and protect the inherent rights. This article explains that in order to facilitate the harmonious coexistence of people and Antarctica, the Declaration not only recognizes the inherent rights of Antarctica and of Antarctic beings (set out in Article IV), it also recognizes: (a) certain other rights of Antarctica and Antarctic beings (set out in

³¹ For example, the purpose of the UN Charter is: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." (Chapter 1, Article 1, part 2). Article 1 in both the International Covenant on Civil and Political Rights (ICCPR)[29] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[30] reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

paragraph (2)), that Antarctica is unique and merits a unique form of legal personality, and that Humans have a range of duties to Antarctica and Antarctic beings.

The rights to be represented in human decision-making that affects Antarctica and to be represented in any legal or administrative proceedings that may affect the recognition, exercise or protection of its legal status, powers, rights or freedom (referred to in paragraph (2)(e)) is elaborated upon in Article X.

Paragraph (3) has been included to make it clear that the rights recognized in this Declaration are not intended to be exhaustive and that the door remains open for additional rights to be recognized in future.

6.8 Article VI. Limitation on rights and freedoms

Paragraph (1) recognizes that not every right and freedom recognized in the Declaration may be applicable to every Antarctic being because a particular right or freedom may not be capable of being applied to a specific kind of Antarctic being. Paragraph (1)(c) is intended to balance that by ensuring that such rights and freedoms may not be denied on the basis of classifications or distinctions peculiar to specific human cultures (e.g. organic/ inorganic).

Paragraph (2) recognizes that all rights must be limited and states that any conflicts between rights must be resolved in a manner that benefits the whole community (i.e. Antarctica or, where appropriate, the whole Earth Community). This is consistent with the approach taken in the legal systems of many democratic societies which provide for the human rights of particular citizens or classes of citizens to be restricted to the extent necessary to protect the greater good of society as a whole.

In order to facilitate the implementation of the Declaration it will be necessary to establish institutional arrangements to determine whether or not a proposed Human activity is a justifiable restriction on rights and freedoms recognised in this Declaration. The Working Group envisaged that this may include concluding a *Peoples' Convention for Antarctica* that will facilitate the implementation of the Declaration by specifying some of the factors that should be taken into account when determining whether or not a limitation is justifiable.³² A Court or other institution could then deal with limitations on the rights and freedoms of Antarctica and Antarctic beings in the same way that a court would decide whether or not a provision in legislation, or some government action, constitutes a justifiable limitation of a

³² For example, a draft of that Peoples' Convention states: "In determining the extent to which a Human act or omission that limits a right or freedom recognised in the Declaration is justifiable, all relevant factors must be taken into account, including:

- (a) the need to promote harmonious coexistence with Antarctica and Antarctic beings;
- (b) the importance of sustaining the integrity, functioning, balance and health of Antarctica as an integral part of the Earth Community;
- (c) the nature of the right or freedom;
- (d) the importance of the purpose of the limitation;
- (e) the nature and extent of the limitation; and
- (f) the relationship between the limitation and its purpose, and the extent to which the purpose could have been achieved by less restrictive means."

human right. For example, in balancing rights, a court would typically give more fundamental rights (such as the right of a species to exist) precedence over less important rights or freedoms (such the human right of predation on Antarctic beings referred to in article XI).

6.9 Article VII. Principles of harmonious coexistence

The primary challenge facing humanity in the Anthropocene is to (re)discover how to coexist harmoniously with the other beings with whom we co-evolved and upon whom we depend for life and wellbeing. This article sets out guiding principles to facilitate the harmonious coexistence between human beings on the one hand, and Antarctica and Antarctic beings on the other. Some were principles which informed the drafting of this Declaration. It is anticipated that these principles may be further developed in response to consultations with Indigenous Peoples whose cultures and cosmologies have developed sophisticated means of guiding people to live harmoniously with other beings, within Nature.

Paragraph (3) addresses the fundamental question of how people should relate to Antarctica and Antarctic beings. This principle emphasizes that this relationship must be one of respect for these beings and that people must also defend their dignity, rights and freedoms. This is contrasted with the current situation in which humans seek to own, manage or rule Antarctica. Antarctica organizes and regulates itself and does not require human management in order to function or flourish.

The primary role of humans in relation to Antarctica is to respect the rights of Antarctica as a whole and of the members of the Antarctic community, and to prevent them from being violated. Each person bears this responsibility, but it must be recognized as a collective and universal responsibility of humankind. This means that States and other institutions must regulate the people and entities over which they have jurisdiction, wherever they are in the world, in order to ensure that they uphold these rights. As a consequence, humanity is responsible for stopping the activities that cause global warming and the melting of the Antarctic icesheets, wherever they occur.

Humans must have the humility to accept the reality that we do not have the powers or knowledge necessary to regulate or govern Antarctica. Instead, we must recognize that Antarctica and the many entities that are part of Antarctica are autonomous and self-organizing and not inert objects, and that human management must be directed at managing human interactions with an impacts on, Antarctica and Antarctic beings.

Paragraph (4) is intended to explain why humans, as members of the Earth Community, should prioritize harmonious coexistence with Antarctica and Antarctic beings and manage human activities in order to prevent violations of the rights and freedoms of Antarctica.

Paragraph (5) is intended to require the application of precautionary and preventive approaches and to give effect to the principle "*in dubio pro natura*". This principle is similar to the "precautionary principle" of international environmental law and means that when in doubt as to whether an activity harmful to the environment should proceed, the doubt should

be resolved in favour of protecting the environment. Guidance on how to determine what is in the best interests of Antarctica is provided by Article X(4).

The principle in paragraph (6) is intended to guide the development and implementation of governance systems to give effect to this Declaration. These may include new governance instruments (such as the proposed Peoples' Convention on Antarctica) and institutions, as well as the transformation of existing systems of governance such as the ATS. The ATS has been influenced by national claims of sovereignty over part of Antarctica based on colonial doctrines of discovery and occupation. This principle is intended to ensure that the transformation of existing legal systems that govern how humans relate to Antarctica is based on the realities of Antarctica. New governance arrangements should be designed to take into account, and be aligned with, our understanding of the nature of Antarctica and the natural forces that have given rise to, and maintain its unique ecosystems. In other words, systems for governing how people relate to Antarctica must take account of the characteristics of Antarctica and the importance of not constraining it from playing its ecological roles within the Earth community.

6.10 Article VIII. General human duties of Humans

One of the most important aspects of recognizing the rights and freedoms of Antarctica and of Antarctic beings is to create corresponding duties on Humans to respect and uphold those rights and freedoms. This article defines the specific duties of both individual humans, and human institutions, in relation to Antarctica as a whole and specific Antarctic beings. The additional duties specifically applicable to States are set out in the Article IX.

Subparagraph (a) expresses the fundamental duty to respect Antarctica and Antarctic beings for who they are (as opposed to how they may be used). This sub-paragraph seeks to communicate some of the essence of Antarctica and Antarctic beings as subjects (beings) who have their own ways of expressing themselves (or being) and are not subject to human control (i.e. are wild). The importance of respecting the other for who they are is self-evident in relation to relationships between human beings, but requires an imaginative leap to fully develop and appreciate in relation to Antarctica and Antarctic beings. One aspect of this, which is also recognized in the Madrid Protocol, is an appreciation for and acknowledgement of the intrinsic value and wildness of Antarctica.³³

Subparagraphs (b) to (f) address the primary duty of humans to respect the legal status and rights of Antarctica as a whole and of the members of the Antarctic community, and to prevent them from being violated.

Paragraph (1)(e)(iv) is intended to ensure that the preventive measures that Humans must take include considering the potential impacts that using Antarctic beings might have on them and on Antarctica as a whole, in order to promote an ethos of consideration for the members

³³ The environmental principle in Article 3(1) of the Madrid Protocol refers to “the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research”.

of the Antarctic community. The intention is not to require a form of EIA for every activity (including research activities) although that might be appropriate in some circumstances.

The preventive measures that must be taken in accordance with include measures to eliminate economic and other incentives to violate those rights and freedoms (see paragraph (1)(e)(v)). This is intended to require the elimination of economic incentives that are ecologically perverse. For example, State subsidies for harvesting Antarctic marine species are likely to contravene this requirement.

The responsibility to take these measures apply to each person, but they are also the collective and universal responsibilities of humankind and so also apply all public and private entities recognised by law. This means that States and other institutions must regulate the people and entities over which they have jurisdiction, wherever they are in the world, in order to ensure that they uphold these rights. For example, humanity is responsible for restricting human activities that cause global climate change to ensure that they do not cause the destruction of the ice shelves and sea ice which are essential to the survival of many Antarctic beings.

6.11 Article VIII. Specific duties of States

This article defines the specific duties that States have in addition to the general duties of Humans defined in the preceding paragraph. These duties only apply to State because they have the power to legislate and enforce national legislation, and to enter into treaties. Since this Declaration is not intended for signature by States, these duties are not legally binding on States. They are included to communicate that many people (represented by the signatories to the Declaration) believe that State's should be bound by these duties. This is intended to be 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.

The duties include exercising State powers:

- to recognise and respect the legal status of Antarctica;
- to reform national legal systems: to enable Antarctica and Antarctic beings to be effectively represented in human decision-making; to uphold the rights and freedoms recognised in the Declaration; to impose and enforce legal liability for violation of those rights and freedoms; and to treat any Human act or omission that limits such a right or freedom as unlawful, unless, and to the extent that, the party responsible proves that the limitation is justifiable;
- to control persons under their jurisdiction to ensure that they do not engage in any activity in Antarctica contrary to the principles or purposes of the Declaration³⁴ and do

³⁴ Article X of the Antarctic Treaty states:

not violate the rights and freedoms recognised in the Declaration while outside Antarctica; and

- to reform national economic systems in order to promote economic, social and other means of enhancing the wellbeing of people through harmonious coexistence with Antarctica.

One of the implications of these duties is that it would require States to consider how to harmonise the ATS with the Declaration where required.

Paragraph (2) refers specifically to the power of a State to appoint ambassadors or other representatives to promote harmonious coexistence with Antarctica and the effective implementation of the Declaration. Appointing a person with such responsibilities would be an effective means of developing harmonious coexistence in practice.

6.12 Article X. Decision-making in relation to Antarctica

Given the impact of humanity on Earth, human decision-making will have an enormous impact on the future of Antarctica. Consequently, changing how decisions that affect Antarctica are made is crucial.

The first step is to ensure that the best interests of Antarctica are articulated and advanced in human decision making that affects Antarctica. Paragraph (1) places a general duty on all Humans (which includes corporations) to ensure that Antarctica can be effectively represented and paragraph (2) imposes additional duties on States in this regard. Given how many human activities have the potential to have a significant impact on Antarctica, it will be important to devise means of ensuring that it is effectively represented in many forums at each level of governance³⁵ and in legal proceedings before national and international courts.

This raises the crucial question of how Antarctica would be represented and by whom. The Working Group envisages that an Antarctic Alliance would work with partners to develop modalities for doing so, which would include a *Peoples' Convention for Antarctica* to record their agreements in that regard.

The second step is to guide how decisions are made. The draft Declaration seeks to promote decision-making that is wise, that advances the best interests of Antarctica and that promotes harmonious coexistence by applying the principles in Article VII (which include applying a precautionary and preventive approach that prioritises the protection of Antarctica).³⁶

"Each of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present treaty."

³⁵ For example, these could include bodies established under the ATS, the International Panel on Climate Change, the Conference of the Parties to the United Nations Framework Convention on Climate Change, and the United Nations.

³⁶ Note that references to "wise" decision-making is not a reference to the so-called "wise use" approach applied in the USA as a means of increasing the degree of use of Nature.

6.12.1 Wisdom

Paragraph (3) requires Humans to strive to ensure that decision-making in relation to Antarctica is “wise”. In most democracies, wisdom (or even expertise) is not a requirement for election or appointment to important decision-making positions. One of the key innovations is that the draft Declaration provides some guidance on what wise decision-making requires (Article X(4)).³⁷ It is envisaged that the measures adopted to implement the Declaration would include criteria and procedures to ensure that persons who represent Antarctica have the necessary expertise, insight and wisdom to do so as well as reasonably possible.

6.12.2 Antarctica’s best interests

Paragraph (3) requires Humans to strive to ensure the decision-making in relation to Antarctica promotes harmonious coexistence and the best interests of Antarctica and Antarctic beings. Determining what is in the best interests of Antarctica is a challenging task that some may regard as impossible. However it is anticipated that this requirement will spur further collaboration among those who know Antarctica best in order to identify what is the interest of Antarctica rather than on the basis of the national interests of Contracting Parties to the ATS.

Although it may not be possible for people to ever determine in the abstract what the best interest of Antarctica are, in many cases there will be sufficient information or evidence to enable available choices to be ranked on the basis of which would contribute most to the integrity, functioning and health of the ecosystem in question. Furthermore, since acting in the best interests of Antarctica as an ecological community will also be in the long-term best interests of humanity, it is more important to make choices on this basis (albeit imperfectly) than to choose among competing human interests.

Paragraph (4) is intended to provide some guidance to decision-makers on how to determine what is in the best interests of Antarctica. It provides that decision-makers must be sensitive to the fact human beings are not indigenous to Antarctica, and actively seek to hear and understand the ways in which Antarctica and Antarctic beings express themselves. They must also take account of all relevant factors including the best available scientific information (most of which is likely to have been generated under the ATS) and different cultural perspectives (such as traditional wisdom).

6.13 Article XI. Human activities within Antarctica

This article deals with the prohibition and restriction of activities within Antarctica. Paragraph (1) specifies in general terms the essential characteristics for an activities to be acceptable.

³⁷ The draft Convention requires the establishment of an Antarctic Council “composed of people who are committed to safeguarding Antarctica and have the personal attributes necessary to make wise decisions in the best interests of Antarctica (Draft Convention, article II(3))

The requirement for a compelling reason for undertaking the activity within Antarctica is to allow for the prohibition of trivial activities that need not take place in Antarctica.

A core requirement is that the activity in question “does not violate any right or freedom recognised in this Declaration” (Article XI(1)(b)). An activity that limits such a right or freedom in a manner that cannot be justified, would constitute a violation.

Paragraph (2) provides specific examples of human activities that would ordinarily be acceptable within Antarctica, including scientific research, conservation, low impact tourism, and (arguably) some fishing/ predation. This also requires further debate. For example, some members of the Working Group believe that no tourism is “low impact” because travelling there involves emitting large quantities of greenhouse gases, and it is questionable whether tourism meets the “compelling reason” requirement.

Paragraph (3) specifies in very general terms how such activities should be planned and conducted.

6.13.1 Scientific research

One of the successes of the ATS has been its promotion of collaborative research and the protection of Antarctica as an area within which such research can take place.³⁸ However some research being undertaken within the Antarctic Area (e.g. seismic surveys to locate oil and gas deposits) seem motivated by considerations that are contrary to the aims of the ATS and Antarctica's best interests. Consequently Article XI(3)(b) refers to giving priority to scientific research that improves our understanding of how to coexist harmoniously with Antarctica and within Earth and how to identify what is in the best interest of Antarctica. This is intended to reorient the focus of research to research that benefits Antarctica without limiting freedom of scientific enquiry. However Article XI(4)(e) would prohibit planning for, preparing, or undertaking within Antarctica, research for the purposes of facilitating the exploitation of Antarctica in contravention of the Declaration.

³⁸ Article III of the Antarctic Treaty states: “1. To promote international cooperation in scientific investigation in Antarctica, as provided for in Article II of the present treaty, the Contracting Parties agree that, to the greatest extent feasible and practicable:

(a) information regarding plans for scientific programs in Antarctica shall be exchanged to permit maximum economy and efficiency of operations;

(b) scientific personnel shall be exchanged in Antarctica between expeditions and stations;

(c) scientific observations and results from Antarctica shall be exchanged and made freely available.”

Paragraph 3 of Article 3 (Environmental Principles) of the Madrid Protocol states: “Activities shall be planned and conducted in the Antarctic Treaty area so as to accord priority to scientific research and to preserve the value of Antarctica as an area for the conduct of such research, including research essential to understanding the global environment.”

6.13.2 Activities that may not be planned or undertaken within Antarctica

The draft Declaration prohibits the same activities as the ATS system as well as certain additional categories. The prohibited activities common to both the ATS and the draft Declaration are:

- any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, or the testing of any type of weapons;³⁹
- nuclear explosions or the storage or disposal of radioactive waste;⁴⁰ and
- any activity relating to the extraction or use of Antarctic minerals, other than scientific research;⁴¹

Article XI goes further and also prohibits the planning or undertaking within Antarctica of: research for the purposes of facilitating the exploitation of Antarctica in contravention of the Declaration (paragraph XI(4)(e)) and any other activities that have been reliably shown to be contrary to the best interests of Antarctica (paragraph XI(4)(e)).

6.14 Article XII. Predation on Antarctic beings

Natural predation is normally an important part of maintaining food chains which are vital to the continued existence of ecological communities, and so maintaining predator-prey relationships is consistent with the rights of Nature approach. However, since human beings are not indigenous to Antarctica, these ecological communities evolved without human predation and it is debatable whether human predation on Antarctic animals is in the interests of Antarctica and consequently whether all fishing and other forms of predation (e.g. sealing) should be prohibited.

The question of what level of human predation (if any) is reasonable and justifiable in the circumstance will inevitably be a contested issue. The main purpose of this article is to establish the principle that human predation should not be permitted except to the extent that it can properly be justified in the circumstances. That enquiry will involve considering what is in the best interest of Antarctica.

³⁹ Article I of the Antarctic Treaty states: "1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons. 2. The present treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purposes."

⁴⁰ Article V(1) of Antarctic Treaty states: "Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited."

⁴¹ This mirrors Article of the Madrid Protocol which states: "Any activity relating to mineral resources, other than scientific research, shall be prohibited." The draft Declaration makes specific reference to research activities that are in reality disguised prospecting.

Broadly-speaking this article would prohibit human predation on Antarctic beings (including seals, fish, krill and plankton) unless it had been established that the proposed predation meets the following criteria.

- First it must be consistent with **Error! Reference source not found.** (Limitations on Rights and Freedoms). In order to determine that it will be necessary to determine whether the limitations on the rights of the prey animals is justifiable in the circumstances. As discussed above, it is proposed that the governance arrangements established to implement the Declaration (e.g. the proposed People’s Convention on Antarctica) will provide guidance on the factors to be considered in determining whether or not a limitation of the rights of Antarctic Beings (e.g. fish and krill) are justifiable in particular circumstances.⁴²
- Second it must be consistent with the harmonious co-existence principles in **Error! Reference source not found.**
- Third it must satisfy the general criteria for human activities within Antarctica to be acceptable as set out in **Error! Reference source not found.** (Human activities within Antarctica).
- Fourth, the predation must be unlikely to have a significant adverse impact on the populations of those animals or the ecosystems within which they live. Although not stated in the draft Declaration, in practice this would mean that any predation that is not permissible under CCAMLR or the Convention for the Conservation of Antarctic Seals would not be permissible under the Declaration.⁴³

⁴² For example, it is anticipated that one of the implications of this paragraph is that even if some harvesting of krill is considered justifiable to provide essential protein for humans, it would not be permissible to harvest krill to feed farmed salmon to meet the tastes of wealthy consumers.

⁴³ Article II(3) of CCAMLR states: “3. Any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of this Convention and with the following principles of conservation:

(a) prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment. For this purpose its size should not be allowed to fall below a level close to that which ensures the greatest net annual increment;

(b) maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the levels defined in subparagraph (a) above; and

(c) prevention of changes or minimisation of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources.”

6.15 Article XIII. Human activities outside Antarctica

The approach which the draft Declaration takes to activities outside Antarctica is similar to that applied in respect of activities within Antarctica. Instead of prohibiting specific human activities, this article:

- establishes a threshold (the article applies only to activities may potentially have a “significant adverse impact on Antarctica or Antarctic beings”); and
- specifies that in planning and conducting such activities humans must consider and uphold the rights and freedoms recognised in the Declaration and apply the harmonious coexistence principles in Article VII.

As a consequence of paragraph (2), all activities that exacerbate climate change (which would include activities that emit greenhouse gasses as well major deforestation) have the potential to have an adverse impact on Antarctica, but paragraph (1) only applies if that adverse impact is likely to be significant.

6.16 Article XIV. Relationship with other legal obligations

The rights and freedoms of Antarctica and Antarctic beings recognized in the Declaration are not currently recognized under international law or by the laws of most States which treat Nature as an aggregation of objects consisting primarily of “natural resources”. Consequently, it is challenging to define the relationship between these legal systems and the Declaration. The Declaration, however, does so in three ways.

First, it does not deny the validity of any existing law to the extent that it is consistent with the Declaration.

Second, it regards provisions of law as invalid to the extent that they are inconsistent with an inherent rights or freedom recognized in Article IV. This follows from the fact that the pre-existing, intrinsic and inalienable rights, which are recognised in this Declaration, were not created by humans, preceded human laws, and cannot be altered by humans. In other words, since human laws cannot overrule the laws of Nature (which must take precedence), it must follow that human laws that are in conflict with the laws of Nature are inherently and automatically, invalid in the same way as a law that is conflict with a constitution (i.e. a higher law) is invalid.

Third, with regard provisions of law that are inconsistent with a rights or freedom recognized in Article V, it requires States to repeal or amend them to eliminate any such inconsistencies, as soon as reasonable possible. . This is intended to facilitate a process of harmonization that involves the progressive and orderly revision and replacement of such provisions.

6.17 Article XV. Implementation

This article imposes a duty on those who proclaim and support the Declaration to collaborate to ensure its effective implementation, including by establishing appropriate institutions and

processes. It is envisaged that an Antarctic Alliance of people and organisations that support the Declaration will enter into a Peoples' Convention for Antarctica which will establish the necessary processes and institutions (e.g. an Antarctic Council) to articulate what they believe to be in Antarctica's best interests in relation to particular issues, and to appoint human representatives to advance those interests in various human institutions.

6.18 Article XVI Interpretation

This article imposes a duty on any court, tribunal or forum which interprets the Declaration or any treaty, international instrument, regional, national, or sub-national law (including common and customary law) or measure that affects Antarctica: (a) to recognise and give effect to the legal status, rights and freedoms of Antarctica and Antarctic beings, (b) to apply the principles of harmonious co-existence; and (c) to promote the spirit, purpose and objects of this Declaration.

Article 39 of the South African constitution includes a requirement similar to (c) above, which has been effective in enabling the courts to progressively develop the common law and customary laws to accord with the Bill of Rights.

ANNEX 1: THE ANTARCTIC TREATY SYSTEM (ATS)

The Antarctic Treaty (1959)

The Antarctic Treaty was signed on December 1 in 1959 in Washington, D.C. by the twelve countries whose scientists were active in the Antarctic region during the International Geophysical Year prior to it (1957-1958). December 1 is now known as Antarctica Day. The original signatories were twelve nations: seven states that had asserted territorial claims in Antarctica (Argentina, Australia, Chile, France, New Zealand, Norway, and United Kingdom); two states that had reserved the right to assert future claims (the United States and the Soviet Union), and three other states (Belgium, Japan, and South Africa)

The cornerstone of the Treaty, Article IV, codified an “agreement to disagree” on the territorial claims. During the duration of the Treaty, the positions of claimants, reserved claimants and non-claimants were to be preserved as they were. In practice, some of the claims are mutually acknowledged by some of the claimants themselves but are not recognized by international law and other states.

The Treaty applies to the area south of sixty degrees South Latitude, including all ice shelves.

The two main goals of the Treaty were to dedicate Antarctica to peace⁴⁴ and scientific research⁴⁵. As a direct result of the peace goal, the Treaty prohibited military activities, nuclear explosions and the disposal of radioactive waste in Antarctica.

Over time, the Treaty evolved into a larger system of governance. The self-determining definition of the system is: “the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments.”⁴⁶

This definition covers other treaties in force adopted on the basis of the Antarctic Treaty: the Convention for the Conservation of Antarctic Seals, the CCAMLR (Convention for Conservation of Antarctic Marine Living Resources), and the Protocol.

⁴⁴ Article I of Antarctic Treaty states:

“1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.

2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose.”

⁴⁵ Article II of the Antarctic Treaty states:

“Freedom of scientific investigation in Antarctica and cooperation toward that end, as applied during the International Geophysical Year, shall continue, subject to the provisions of the present Treaty.”

⁴⁶ Article 1 of the Madrid Protocol (Definitions) states that: “For the purposes of this Protocol: ...

(e) "Antarctic Treaty system" means the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments;

The Treaty also established how the regime will operate from the institutional perspective. The main platform to make decisions is the Antarctic Treaty Consultative Meetings (**ATCM**), where representatives of the states that have consultative status were to meet and make decisions based on consensus.

To gain the consultative status a state, other than the original states as they retain the consultative status, must meet a requirement of a substantial scientific research activity in Antarctica. Customarily, to meet this requirement a state must have a scientific research base or participate in the expedition, however, this requirement has relaxed over the years. For example, in 1990 the Netherlands acquired consultative status without having a base.

There are currently 54 signatories to the Treaty and only 29 have the consultative status, known as Antarctic Treaty Consultative Parties or “ATCPs”. The limited number of consultative parties has drawn some criticism, i.e., that the system that governs such an important region excludes most of the nations-states and requires states to perform an activity that not all states can afford.

The ATCM used to occur every two years, but since 1994 the meetings happen every year. Since 1983 non-Consultative Parties can attend the meetings to observe, without any formal decision-making participation. Additionally, since 1987 inter-governmental and non-governmental organizations (NGOs) that work in areas related to Antarctic issues have been allowed to attend as observers and experts.

Current observers are the Scientific Committee on Antarctic Research (SCAR), the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), and the Council of Managers of National Antarctic Programs (COMNAP). Invited experts include the Antarctic and Southern Ocean Coalition (ASOC) and the International Association of Antarctica Tour Operators (IAATO).⁴⁷

Convention on the Conservation of Antarctic Marine Living Resources – CCAMLR (1980)

CCAMLR was adopted in 1980 with the mission of conserving marine living resources in the Antarctic in response to increasing commercial interest. Its structure reflects the Antarctic Treaty in two ways: it functions based on consensus decision-making and it is a two-tier system based on the criterion of substantial interest. Similar to the Antarctic Treaty, if a state is recognized as active in the area, it has a say at the decision-making table.

The main decision-making body is the Commission, which meets every year and relies on advice of a Scientific Committee. Membership of the Commission is limited, like in the ATCM, to the original signatory states to the Convention and the states which engage “in research

⁴⁷ There is no “permanent” list of experts, but there are several organizations that are usually invited to attend the ATCM every year. In 2023 experts from the following international organisations and non-governmental organisations attended the ATCM: the Antarctic and Southern Ocean Coalition (ASOC), the International Association of Antarctica Tour Operators (IAATO), the International Hydrographic Association (IHO), the International Union for the Conservation of Nature (IUCN), the United Nations Environment Programme (UNEP), and the World Meteorological Organization (WMO).

or harvesting activities in relation to the marine living resources.”⁴⁸ It consists of twenty-seven members (twenty-six states and the European Union) and ten states that have acceded to the Convention. Acceding states, just like non-Consultative Parties to the Treaty, can attend meetings but do not take part in the decision-making.

The Protocol of Environmental Protection to the Antarctic Treaty (Madrid Protocol) (1991)

The Protocol, which is currently in force, was agreed after negotiations to establish a regime to govern exploration and exploitation of minerals and hydrocarbons in the Antarctic. Throughout the 1980s Consultative Parties discussed mineral resources at ATCMs and to avoid unmanaged exploitation of resources and to prevent potential monopolies, the Consultative Parties aimed at developing a regulatory framework, the Convention on the Regulation of Antarctic Mineral Resources Activities (CRAMRA).

After about 6 years of negotiations, CRAMRA collapsed and never went into force, as there was a strong backlash from environmentalists (especially in Australia and France) and opposition from the UN. As a result, Australia and France refused to sign CRAMRA.

From seeking to establish a regime that would allow and would govern mineral exploitation, the result was a complete opposite: The Madrid Protocol) banned all activities relating to mineral resources, except for scientific research purposes.

The Protocol was signed in 1991 and entered into force in 1998. All Consultative Parties to the Treaty are also signatories to the Protocol. The Protocol commits Parties to “...the comprehensive protection of the Antarctic environment and dependent and associated ecosystems...” and designates Antarctica “...as a natural reserve, devoted to peace and science.” In practice, the Protocol added a third goal of the ATS, the goal of environmental protection.

The Protocol established the Committee for Environmental Protection (CEP), an expert body to provide advice and recommendations to the ATCM, relevant to the implementation of the Protocol. The CEP meets every year together with the ATCM.

The Protocol has the following annexes:

- Annex I: Environmental Impact Assessment;⁴⁹
- Annex II: Conservation of Antarctic Fauna and Flora;⁵⁰

⁴⁸ CCAMLR, Art. VII, para. 2.

⁴⁹ Annex 1 sets out the procedures for prior environmental assessment of all proposed activities, and requires the consideration of alternatives. Activities that are likely to have more than a minor or transitory impact on the environment (the highest level of impact) may not be undertaken unless a Comprehensive Environment Evaluation has been prepared and the Committee for Environmental Protection and Parties has been given an opportunity to comment on the proposal.

⁵⁰ Annex II includes a mechanism to declare Antarctic specially protected species (threatened species), provisions to prevent the introduction of non-native species, and requires that a permit be issued for any proposal to ‘take’ or ‘harmfully interfere with’ Antarctic fauna and flora.

- Annex III: Waste Disposal and Waste Management;⁵¹
- Annex IV: Prevention of Marine Pollution;⁵²
- Annex V: Area Protection and Management (adopted in 1998, in force 2002);⁵³ and
- Annex VI: Liability Arising from Environmental Emergencies (adopted in 2005 but not yet in force).⁵⁴

Benefits of the ATS

The ATS have been very successful in many ways.

First, the ATS regime ensured that the continent was free of military conflict and denuclearized. Considering the period of tensions during the Cold War, this was a remarkable achievement.

Second, the ATS is committed to freedom of scientific investigation in the region and international cooperation. Research conducted in the Antarctic is essential for geosciences, life sciences and physical sciences. Scientific programs in the Antarctic are crucial to our understanding of global climatic changes.

Third, since the establishment of the Protocol, environmental protection became another goal of the ATS.

In sum, the ATS is often celebrated as a very successful international regime for setting territorial claims aside, maintaining peace on the continent, and protecting the environment.

Limitations of the ATS

Despite the very significant successes of the Antarctic Treaty System (ATS) over more than six decades, it cannot provide adequate protection for Antarctica against the threats now facing it, for several reasons, including those discussed below.

ATS only applies to the Treaty Area and cannot address outside threats

The ATS only applies within the “Treaty Area” and its institutions do not have jurisdiction to regulate human activities outside that area. This means that they cannot play a role in controlling the main threat to Antarctica (climate change) because it is being driven by activities occurring outside the area of jurisdiction of the ATS. Since Antarctica is not a State,

⁵¹ Annex III requires the Parties to develop waste management plans, details requirements for managing operational wastes (including the removal of some wastes from the Antarctic Treaty area), and the clean-up of wastes remaining from past activities. Particularly harmful products such as Polychlorinated biphenyls (PCBs), polystyrene packaging beads and pesticides are prohibited in the Antarctic.

⁵² Annex IV regulates the discharge of substances from ships, including general prohibitions on the disposal at sea of oily mixtures, noxious liquid substances garbage and plastics.

⁵³ Annex V provides for the designation of Antarctic Specially Protected Areas, Antarctic Specially Managed Areas and Historic Sites and Monuments, which enjoy additional protection.

⁵⁴ Annex VI specifies measures to prevent and respond to environmental emergencies arising from scientific research programs, tourism and all other governmental and non-governmental activities.

it cannot become a party to treaties like the United Nations Framework Convention on Climate Change (**UNFCCC**) which would enable it to participate in the Conference of the Parties (**COP**) of the UNFCCC, and be represented in climate change decision-making processes. Furthermore, in practice, the interaction of the ATS with the United Nations is very limited

Limited number of participants in Antarctic decision-making

The system effectively excludes the majority of states from the governance of the Antarctic, which has been a point of contention since the very beginning of the regime.⁵⁵

Decision-making does not prioritise best interests of Antarctica

The governments that participate in the ATS make decisions about Antarctica on the basis of their common and national interests, rather than on the basis of what is in the best interests of Antarctica. Furthermore, some of the most influential Consultative Parties within the ATS are also among the biggest emitters of greenhouse gases and so major causes of climate change impacting Antarctica.

Since international law does not recognise Antarctica as a legal entity and it does not have a government to represent it in international affairs, no international body is able to represent its best interests.⁵⁶ (It also means that litigation to challenge activities that harm Antarctica, including those causing climate change impacts, cannot be instituted on behalf of Antarctica.)

Any consultative Party can veto new initiatives

ATS decisions must be made by consensus, which means that one or more of the Consultative Parties can veto new initiatives to protect Antarctica (and often do). Russia's invasion of Ukraine has further eroded the prospect of significant consensus-based reforms since both participate in the ATS.

⁵⁵ Some Antarctic Treaty states note that, while the ATS represents a minority of states, it represents the majority of the world's (human) population (as it includes China, India, Brazil, USA and other populous countries).

⁵⁶ The Antarctic and Southern Ocean Coalition (ASOC) which is an alliance of non-governmental organizations concerned about Antarctica comes closest but only has observer/expert status within the ATS and cannot be a party to multilateral treaties between States.

ANNEX 2: PRINCIPLES THAT INFORMED THE DRAFTING OF THE ANTARCTICA DECLARATION

Introduction

This document sets out proposed principles to guide the drafting of an Antarctica Declaration for discussion and further development. The intention is to use the Declaration as a basis for building popular support for a new approach to the whole Antarctic region by demonstrating the value of applying the Earth Jurisprudence/rights of Nature approach to it.

Although “Antarctica” is often used to refer to the continent of Antarctica, the term is used here in a wider sense to refer to the whole ecological community South of the Polar Front, an area which extends over more than 10% of the surface of Earth.

1. Human governance systems must be guided by Antarctica

The starting point is Antarctica. The principles which guide how humans relate to Antarctica, and the Declaration itself must be informed by our understanding of the nature of Antarctica and the natural forces that have given rise to, and maintain its unique ecosystems. Any system to govern how humans relate to Antarctica must be designed to take into account, and be aligned with, the realities of Antarctica. The out-dated, colonialists doctrines of discovery and occupation applied by some states in Antarctica are no longer relevant.

2. Antarctica is an ecological community of inter-related beings

Understanding Antarctica as an aggregate of objects available for humans to acquire (e.g. by making territorial claims or harvesting “living resources”) is a perspective that is ultimately inconsistent with scientific and traditional knowledge. The Declaration must articulate our understanding of the nature of Antarctica as an ecological community constituted by the interrelationships between many different kinds of entities (including the continent, sea, winds, ocean currents and upwellings, ice sheets and shelves, and many different organisms), and the ecologically-defined geographical area that it covers. One of the consequences is that the geographic extent of Antarctica will be defined by a natural boundary (the polar front / Antarctic convergence) rather than by the politically determined boundary specified in the Antarctic Treaty.

The Declaration would define and describe Antarctica in these terms.

3. We celebrate and are grateful for the vitally important contribution the Antarctica makes to the whole Earth community.

Antarctica is vital to the ecological stability, ordering and functioning of Earth as a whole. For example, it plays a very important role in determining the climate, ocean currents, and winds, and supports a vast number of organisms. The continental ice sheets of Antarctica retain vast

quantities of water which, if it were to melt, would raise global sea-levels by metres and inundate cities and fertile farmlands. This means that every person has reason to celebrate and be grateful for its existence.

4. Antarctica is unique and merits special attention

Antarctica has many unique ecological qualities and plays an enormously significant role in regulating the global climate and weather systems (including by absorbing carbon from the atmosphere). It is also unique in that it has no indigenous or permanent human inhabitants. Despite the fact that seven countries assert territorial claims to parts of Antarctica, it is not part of any country. This means that it presents a unique opportunity to develop a new vision of how humans could relate to Antarctica in mutually beneficial ways and to transform the international legal order by recognising a natural being as a subject with rights under international and national law. The Declaration is intended to serve as a prototype of an eco-centric governance system at the international level.

5. Antarctica is a self-regulating and autonomous entity, with rights of self-determination

Antarctica organises and regulates itself and does not require human management to function or flourish. Humans must have the humility to accept the reality that we do not have the powers or knowledge necessary to regulate or govern Antarctica. Instead, we must recognise that Antarctica and the many entities that are part of Antarctica are autonomous and self-organising, and not inert objects, and that we must instead govern ourselves.

6. Antarctica must be recognised as a legal subject

To give practical effect to the recognition of Antarctica as an ecological community, it is essential that Antarctica be recognised by both the international and national legal systems as a legal subject with the capacity to hold rights and freedoms that are enforceable in national and international courts, rather than as object in the eyes of the law.

The Declaration would define the legal status of Antarctica in a manner that is similar to the Universal Declaration of the Rights of Mother Earth's (UDRME) definition of the legal status of Mother Earth.⁵⁷

The Declaration would recognise Antarctica as having a legal status (or legal "personality") similar to that of an independent State, rather than being subject to the sovereign powers of other nation States. If it had such a status, it could conceivably appoint ambassadors (or the

⁵⁷ For example the UDRME states: "(5) Mother Earth and all beings are entitled to all the inherent rights recognized in this Declaration without distinction of any kind, such as may be made between organic and inorganic beings, species, origin, use to human beings, or any other status.

(6) Just as human beings have human rights, all other beings also have rights which are specific to their species or kind and appropriate for their role and function within the communities within which they exist.

(7) The rights of each being are limited by the rights of other beings and any conflict between their rights must be resolved in a way that maintains the integrity, balance and health of Mother Earth."

equivalent) to promote good relationships between their peoples and Antarctica, rather than appointing delegates or policy-makers.

7. The dignity of Antarctica must be respected

One of the most important lessons that humanity can learn from its relationships with Antarctica is how to respect it as an independent entity. This involves shifting from a human centred approach that regards Antarctica as an object available for human use, to one which recognises Antarctica as a natural entity with inherent rights which humans must relate to with respect. It also involves establishing principles and practices that reflect and give effect to this respectful relationship, taking responsibility for acting accordingly and making sure that other humans do too. The guidance of Indigenous Peoples worldwide who, over thousands of years have developed and sustained cultures that embody such respectful relationships, will be critical in this regard.

It is anticipated that the Declaration would specify some of the principles or attitudes that humans should adopt in order to promote respect for Antarctica, and the harmonious coexistence of humanity and Antarctica. For example, these may include principles regarding respecting other beings, relationality (Antarctic beings are our kin), reciprocity (for every taking there must be a giving, even in the form of a symbolic gift), and assuming collective responsibility for human actions.

These principles should also guide how humans treat Antarctic beings (e.g. fish, whales and birds) when they are outside Antarctica.

8. Antarctica and Antarctic beings have the rights to exist and the freedom to be wild

Recognising that Antarctica as an ecological community has the right to exist and the freedom to function and evolve (i.e. to be wild), rather than being subjected to human manipulation and management, is fundamental. The Declaration would recognize the legal status of Antarctica and Antarctic beings and set out their fundamental rights and freedoms.

9. Decision-making should be in Antarctica's best interests

When making decisions that affect how humans relate to Antarctica, decision-makers should seek to advance the best interests of Antarctica as an ecological community, taking account of all relevant factors including the best available science and traditional wisdom. Acting in the best interests of Antarctica as an ecological community will also be in the long-term best interests of humanity.

An outdated, colonialist approach - which is divisive, acquisitive and promotes competition between States that assert competing claims to parts of Antarctica, or which aspire to use Antarctic "resources" - is neither in the best interest of Antarctica nor in the best interest of humanity. Although the ATS has been influenced by a colonial perspective, it also represents a creative response to potentially harmful colonial ambitions. Several of the principles of the ATS are clearly in the best interest of Antarctica and should be preserved; e.g., the emphasis

on peace, scientific collaboration, the protection and preservation of the Antarctic environment, and the ATS's recognition of the intrinsic value of Antarctica.

10. Antarctica has the right to its voice in human decision-making

In order to give effect to the requirement to make decisions in the best interests of Antarctica, it is important to address how human beings can first hear, and then best articulate, the interests of Antarctica and Antarctic beings, to both ensure Antarctica and its beings participate and are represented in human decision-making that may affect Antarctica, and ensure they may effectively exercise their own [self-determination/self-governance]. This could include participation in the ATS and its bodies, the IPCC, and the United Nations and should include the right to participate in legal proceedings before national and international courts.

The guidance of Indigenous Peoples worldwide will be essential in identifying those approaches for listening to the voice of Antarctica and its beings and representing that voice in human decision-making, including both selecting and providing guidance to human representatives for Antarctica, and in processes for Antarctica self-governance.⁵⁸

11. Human activities that are contrary to the best interests of Antarctica must not be permitted

Humanity must take collective responsibility for ensuring that humans entering Antarctica do not undertake activities within Antarctica that are harmful to Antarctica and where there is uncertainty about the impacts, must take a cautious (precautionary) and risk averse approach. This means that the existing bans on mineral resource activities, military and nuclear explosions and the disposal of nuclear waste on Antarctica must be maintained permanently, and potentially harmful activities like tourism and fishing for krill and toothfish must be more strictly regulated for the benefit of Antarctica's well-being and integrity, and consistent with its rights.

Activities harmful to Antarctica that happen outside Antarctica (e.g. emissions of greenhouse gasses and plastic pollution) should similarly be strictly regulated to avoid harming Antarctica.

12. Humanity has a collective responsibility to respect and uphold the rights of Antarctica

The primary role of humans in relation to Antarctica is to respect the rights of Antarctica and the members of the Antarctic community as a whole, and to prevent them from being violated. Each human being bears this responsibility, but it also must be recognised as a collective and universal responsibility of humankind. This means that States and other institutions must regulate the people and entities over which they have jurisdiction, wherever they are in the world, in order to ensure that they uphold these rights. As a consequence,

⁵⁸ Indigenous Peoples have been listening and responding to other-than-human beings for millennia, and will be essential in providing guidance here. Also, science (e.g., bioacoustics) has been developing significantly in this regard.

humanity is responsible for stopping the activities that cause global warming and the melting of the Antarctic icesheets, wherever such activities occur.

13. Humans have specific duties in relation to Antarctica

The Declaration should define the specific duties of both individual humans, and human institutions such as States, in relation to Antarctica as a whole and specific members of it. For example, States should also take individual and collective responsibility for ensuring that the Declaration is implemented and that their citizens comply with this Declaration while within the Antarctic area. This could include duties to amend existing treaties to accord with this Declaration, making provision for Antarctica to be represented in national courts and promoting actions that inform people about this community and strengthen their relationships with it.

14. Disputes must be resolved in ways that restore damaged relationships

The Declaration should specify that enforcement efforts should include a restorative justice approach to the resolution of disputes about Antarctica, and that the dispute resolution process must be aimed achieving outcomes that are in the best interest of Antarctica.