

## **Abstract**

The paper aims at analysing the participatory mechanisms in the environmental decision-making with a particular focus on the participatory rights of indigenous peoples (IP) in the Arctic Council (AC). The first part offers a bird-eye's view of the IP self-determination requirement as the means and the end of their full participation to environmental decisions: self-determination is both the grounding factor for IP participation and the driving force to the empowerment, self-sufficiency and autonomy of the participants themselves.

The second part briefly sketches the role of the Arctic Council as the active arena for the development of international initiatives primarily focusing on the protection of the Arctic environment, as well as looking at it as the platform where non-state actors (IP in particular) play a major role as Permanent Participants.

The third and final part is focused on the participatory tools enabling a pluralistic engagement of IP in general and of the IP within the Arctic Council in particular. As a conclusion, the example of IP in the Arctic Council will be used as pilot study to further research on potential ways forward to broaden the environmental participatory tools.

**Keywords: - Indigenous Peoples - Self-determination – Participatory rights – Environmental Decision Making – Arctic Council**

### **1. Introductory remarks**

The initiatives to engage indigenous peoples (IP) in the environmental decisions follow a linear trend of legal achievements whose milestone is laid down in Article 1 (1b) of the ILO Convention n. 169<sup>1</sup>, where a definition of indigenous peoples is provided. In the present work, I will argue how deeply this definition connects the IP to their land, and therefore works as a driving force to legitimise their engagement in the environmental decisions that by definition directly affect them. Self-determination is crucial also for the recognition of a series of ancillary participatory rights. The tool-kit of participatory rights shall be expanded and implemented, in order to grant the wider involvement of the peoples directly affected by the environmental decisions. This implementation shall aim to classify them of equal rank to fundamental rights.

In this regard, the Arctic Council governance offers a virtuous example of a platform where self-determination and participatory rights take place and are fully implemented.

The work is therefore structured into three parts: Part I will be dedicated to the investigation on the status of IP, as defined at international level; to the study of the principle of self-determination and to the best model (following the so-called spoke-hub paradigm) that can illustrate its relationship with IP participatory rights. Part II is focused on the status of IP as Permanent Participants in the Arctic Council and to the connection between this status and the principle of self-determination as the means and the end of their full participation to environmental decisions.

The third and final part will scrutinise the model of spoke-hub paradigm applied to the IP participatory rights, as well as identify some practical solutions to their scarce effectiveness, always looking at the AC as a pilot case.

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<sup>1</sup> Convention n. 169, International Labour Organisation, (June 27, 1989), <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>. See also *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, joint publication of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Asia Pacific Forum of National Human Rights Institutions (APF), in <http://www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf>, accessed July 22<sup>nd</sup> 2016. For a historical perspective and reconstruction of the indigenous peoples identity see Russel Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law*, *The American Journal of International Law*, Vol. 80, No. 2 (Apr., 1986), pp. 369-385. See also *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1983/21/Add.8, para. 633.

## **PART I**

### **Indigenous peoples' rights**

#### **2. The status of indigenous people**

The most commonly referred definition of IP at international level is in Article 1 (1b) of the International Labor Organization's Convention concerning Indigenous and Tribal Peoples (ILO No. 169), which states that IP are the

“[...] peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”<sup>2</sup>.

As a complementary element, the Special-Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights, José Martínez Cobo, formulated also a working definition. According to Cobo, indigenous peoples are described as:

“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural, social institutions and legal systems.”<sup>3</sup>

The emphasis given on their “distinctive” traits from the societies occupying their territories shows the relevance of the most relevant trait of IP, which is self-determination

Both in the ILO Convention's definition and in the working one, there is a number of relevant factors that help identify IP and somehow connect their status with the territories they live in, contributing to build up the principle of self-determination. In particular, there shall be a historical continuity for a period reaching into the present of the following features: a) occupation of ancestral lands; b) common ancestry with the original occupants of these lands; c) culture; d) language; and e) residence in certain parts of the country, or in certain regions of the world. The foundation stone that contributes to the self-determination of the IP is self-identification, which includes the individual consciousness of belonging to a group (group consciousness) and the recognition from the group itself (acceptance by the group). A group of peoples self-identifying as belonging to the same territory, traditions and culture is self-determined as indigenous entitled to the fundamental rights set up in the Convention<sup>4</sup>.

#### **3. Literature review on the right to self-determination**

Definitions shall serve a practical purpose, and this applies also to the self-determination of IP.

In one of the first studies –yet still relevant today- on IP self-determination, Erica-Irene A. Daes underlined the “close interrelationship” between self-determination and the promotion of human rights<sup>5</sup>, quoting the wording of the Italian delegation in the Declaration on Principles of International

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<sup>2</sup>Convention N. 169, International Labour Organization, (June 27, 1989) cit..

<sup>3</sup> José Martínez Cobo, Study of the Problem of Discrimination Against Indigenous Populations, UN Document E/CN.4/Sub.2/1986/7Add.4, Paragraph 379.

<sup>4</sup> See Key Principles in Implementing ILO Convention No. 169 by John B. Henriksen 2008, Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169, [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@normes/documents/publication/wcms\\_118120.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_118120.pdf), p. 7.

<sup>5</sup> Erica-Irene A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 Transnat'l L. & Contemp. Probs. 1 1993, 7.

## Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations<sup>6</sup>:

“Insofar as the exercise of equal rights and self-determination of peoples as collective entities can be effectively secured, as the individuals composing those entities are allowed effectively to exercise their rights and fundamental freedoms before, during and after the self-determining process. The very existence and functioning of structures and machineries through which self-determination is to be expressed depends upon the possession and effective exercise of individual rights and freedoms”<sup>7</sup>.

Self-determination shall be granted in order to allow the recognition of fundamental rights. And the further step is to include the effective participation to vital decisions for indigenous peoples as a hard core of their sets of rights.

Also in this case, a further classification is needed, for the purpose to guarantee an effective protection to human rights. Self-determination shall be distinguished between internal and external. According to Erica-Irene A. Daes, external self-determination occurs when a people determines its future international status and liberates itself from alien rule; while internal self-determination includes the selection of both the desired system of government and the substantive nature (democratic, socialist, or other) of the regime selected<sup>8</sup>.

This latter meaning is the one connecting the self-determination to the recognition of fundamental rights. According to Michael Byers, though the right of indigenous peoples to self-determine themselves does not lead straightforward to the right to independent statehood, states shall guarantee effective opportunities for political participation, often referred as self-government, to indigenous peoples within their territories.<sup>9</sup> What indigenous peoples normally strive for is “internal self-determination”, that is to say, for human rights and self-government within the borders of existing states.

### **4. Some methodological help to classify participatory rights: ladders, wheels, spoke-hub paradigm**

At this point, it is helpful to sketch a sort of mind map<sup>10</sup> of the participation rights’ range for indigenous people in environmental decisions, having clear in mind that the common founding principle is the explicit recognition of their self-determination, which justifies the emphasis given on this notion in the previous paragraph: there is a set of rights, such as free, prior, and informed consent (FPIC) and other participation rights that are directly derived from the right to self-determination<sup>11</sup>. Mark Reed distinguishes two main approaches in drafting this range of possibilities, by recalling the metaphors used by the scholars<sup>12</sup>.

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<sup>6</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971).

<sup>7</sup> Report of the Special Committee on Principles of International Law concerning Friendly Relations and Cooperation Among States, U.N. GAOR, 25th Sess., Supp. No. 18, at 58, A/8018 (1970) (statement of Italian delegation).

<sup>8</sup> Erica-Irene A. Daes, op. cit., p. 4.

<sup>9</sup> Article 1(2) of the UN Charter mentions the principle of “equal rights and self-determination of peoples”, available at <http://www.un.org/en/charter-united-nations/>, accessed on July 18th 2016.

<sup>10</sup> See Mark S. Reed review on the participatory mechanisms in: *Stakeholder participation for environmental management: A literature review, Biological Conservation*, Volume 141, Issue 10, October 2008, Pages 2417–2431.

<sup>11</sup> Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law*, *Northwestern Journal of International Human Rights*, Volume 10, Issue 2, 2011, 3; Bartolome Clavero, *The Indigenous Rights of Participation and International Development Policies*, 22 *Ariz. J. Int’l & Comparative Law*, 41, 42, 2005; Katsuhiko Masaki, *Recognition or Misrecognition? Pitfalls of Indigenous Peoples Free, Prior, and Informed Consent (FPIC)*, in *Rights-Biased Approaches to Development: Exploring the Potential Pitfalls* 69, 2009; U.N. Common. on Human Rights, supra note 1, p 56

<sup>12</sup> Mark S. Reed, op. cit., 2725.

On the one hand, a first image is Arnstein's ladder of participation, described as a *continuum* of stakeholders' involvement in the environmental decisions<sup>13</sup>. Within the ladder, the involvement mechanisms can go from the passive dissemination of information to the active engagement of the interested parties<sup>14</sup>, which can result in a consultative and collaborative engagement. This way, the participation becomes transformative, since the empowerment of the engaged parties leads to a transformation of the involved communities<sup>15</sup>. In this regard, Anna Lawrence proposes a new model of "multidimensional participation based on the links between society and nature. According to her "Our interactions consist of decision-making or governance and activities each connected through the visible, public, measurable stream of data, and the invisible, personal, intangible stream of individual experience. In their pure form these could be labeled 'subjective' and 'objective'". Her proposition is to see participation as a fusion of these two<sup>16</sup>.

On the other hand, according to Mark Reed, the image of the ladder might imply a kind of hierarchy, where higher rungs tend to be preferred over the lower ones<sup>17</sup>.

For this reason, the image of the wheel used by Davidson seems to be preferable<sup>18</sup>: the wheel is divided into four main sections, such as empowerment, information, consultation and participation, embedding a further gradation of rays, which constitute a *continuum* of participatory tools.

The image of the wheel is certainly effective and shall be maintained.

For the purpose of this study on the participation of indigenous people, I find even more complete the idea of the spoke-hub distribution paradigm, where self-determination works as the gear hub, and all the range of participatory mechanisms radiate from it. In this sense, self-determination gains the position of a milestone concept, functional to the recognition of participatory rights as a *passerelle* to a broader recognition of fundamental rights to indigenous people.

As said above, self-determination is at the same time a means and the end of environmental participation: on the one hand, it is the key that allows indigenous peoples to exercise their participatory rights without resorting to the definition of NGOs<sup>19</sup>; on the other hand, the engagement of indigenous peoples in decision-making helps strengthen their self-determination from within. This latter phenomenon recalls Mark Reed idea of the "service contract". According to the author, when the participants in decision making consolidate a long-term relationship they develop mutual trust and respect as they learn from each other to negotiate solutions. In other words, the "service contract" shall serve to strengthen the position of the participants and their negotiating power, through its different components: 1. Empowerment of the participants, by ensuring that they have the power and the technical capability to really influence the decision; 2. Training of the participants, developing the knowledge and confidence that is necessary for them to meaningfully engage in the process; 3. Breaking down the barriers of power inequality (age, gender, culture).<sup>20</sup>

As implementing actions to these three components, Mark Reed quotes the example of participants that are asked to listen to expert witnesses, as well as working intensively in small groups, building in opportunities to socialise with each other<sup>21</sup>.

All these techniques when applied to the indigenous people's participation could lead to an effective reinforcement of both their internal and external self-determination, by helping respectively to

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<sup>13</sup> Sherry R. Arnstein, A ladder of citizenship participation *Journal of the American Institute of Planners*, 26 (1969), pp. 216–233

<sup>14</sup> Stephen Biggs, *Resource-Poor Farmer Participation in Research: a Synthesis of Experiences From Nine National Agricultural Research Systems*. OFCOR Comparative Study Paper, vol. 3, 1989, International Service for National Agricultural Research, The Hague.

<sup>15</sup> Anna Lawrence, *No personal motive? Volunteers, biodiversity, and the false dichotomies of participation*, *Ethics, Place and Environment*, 9, 2006, pp. 279–298.

<sup>16</sup> *Ibidem*, 282.

<sup>17</sup> Mark Reed, *op. cit.*, 2726.

<sup>18</sup> Scott Davidson, Spinning the wheel of empowerment, *Planning* (3) (1998), pp. 14–15.

<sup>19</sup> Timo Koivurova and Leena Heinamaki, *The participation of indigenous peoples in international norm-making in the Arctic*, *cit.* 102.

<sup>20</sup> Mark Reed, *op. cit.*, 2422.

<sup>21</sup> *Ibidem.*, 2422.

develop grounding foundations for self-government without outside interference and by freeing themselves from alien influence and domination.

In the following paragraph, I will take a closer look at the scholarship's trends related to the indigenous peoples' involvement in decision making, starting from the legal perspective as commented by scholars and experts of indigenous peoples' fundamental rights.

## **PART II**

### **Indigenous peoples in the Arctic**

#### **5. Arctic governance and the major role played by the Arctic Council**

That the Arctic Council (hereinafter AC) is part of a multilayered governance has been repeatedly confirmed by the most advanced studies and it is testified by its central role in gathering the efforts to protect the Arctic environment and to contrast climate change. As known, the AC has consolidated its structure from the establishment of the 1991 Arctic Environmental Protection Strategy (AEPS), primarily concerned to address pollutants and environmental protection in the Arctic. The AC was established on September 19<sup>th</sup>, 1996 to strengthen a regional cooperation among the Arctic countries, with the Declaration adopted in Ottawa<sup>22</sup>.

The intention of the signatory parties, eight in total, was to establish

“a mechanism for addressing the common concerns and challenges faced by their governments and the people of the Arctic... refer[ing] particularly to the protection of the Arctic environment and sustainable development as a means of improving the economic, social and cultural well-being in the North”<sup>23</sup>.

As said, it is composed by eight member states and its innovative structure includes indigenous organisations as permanent participants, as well as observers<sup>24</sup>. Andrew Jenks reminds it in the Introductory Note to the Declaration on the Establishment of the AC:

“A key feature of the Council initiative is the involvement of the Arctic region's indigenous peoples. In addition to the eight member nations, three [currently: six] organizations representing the majority of indigenous peoples in the circumpolar Arctic will be Permanent Participants in the Arctic Council: the Inuit Circumpolar Conference, the Saami Council and the Association of Indigenous Minorities of the North, Siberia and the Far East of the Russian Federation. The Permanent Participant category recognizes the interests of Arctic indigenous peoples and is intended to provide for their meaningful participation in the Council. Permanent participation is open to other Arctic organizations of indigenous peoples not currently represented by the existing three organizations and who meet the criterion set out in the Declaration”<sup>25</sup>.

In this sense, it is clear that the AC is a virtuous example of a global organisation with both flexibility and permanency features.

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<sup>22</sup> Declaration on the Establishment of the Arctic Council, 35 I.L.M. 1387, Sept. 19, 1996. See David L. VanderZwaag, *The Arctic Council and the future of the Arctic Ocean governance: edging forward in a sea of governance challenges*, (2014) in Tim Stephens and David L. VanderZwaag (ed. by), *Polar Oceans Governance in an Era of Environmental Change*, Edward Elgar Publishing, UK, 30 and ff.

<sup>23</sup> Canada-Denmark-Finland-Iceland-Norway-Russian Federation Sweden-United States: Joint Communique And Declaration On The Establishment Of The Arctic Council, 35 I.L.M. 1386, 1386 (1996), with an Introductory Note of Andrew Jenks.

<sup>24</sup> The state members of the AC are: Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden and the United States of America.

<sup>25</sup> Andrew Jenks, *An Introductory Note*, cit., fn 2. Currently, six indigenous organisations have permanent participant status: Aleut International Association, Arctic Athabaskan Council, Gwich'in Council International, Inuit Circumpolar Council, Association of Indigenous Peoples of North (RAIPON) and the Saami Council in Arctic Council “Permanent Participants” <http://www.arctic-council.org/index.php/en/about-us/permanent-participants> accessed 15 July 2016. Observer status in the Arctic Council is open to non-Arctic states, intergovernmental and inter-parliamentary organisations, and non-governmental organisations (NGOs).

The AC's feature as a permanent organisation, has allowed it to play a relevant role as decision-maker as in the case of most multilateral environmental agreements.

According to the Declaration on the Establishment of the Arctic Council, its mandate includes the duty to provide:

“A means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic”<sup>26</sup>.

Unlike the Antarctica, the Arctic does not have a strictly binding regime.

Nevertheless, global treaties and norms have increasingly influenced the content of domestic laws, and have therefore enhanced domestic legal developments. Marine treaties in particular have influenced the content of Arctic states' domestic environmental laws, so that the focus of the Arctic environmental legal regime has been on marine conservation. Bilateral agreements between individual Arctic states on issues such as fisheries, wildlife and protection from pollution are numerous<sup>27</sup>.

The Arctic legal framework is formed by a series of non-binding agreements, which started with the 1991 Declaration on Protection of the Arctic Environment and the Arctic Environmental Protection Strategy (AEPS), dealing with the monitoring, assessment, protection, emergency response, and conservation of the Arctic zone. The AEPS can be therefore considered as the starting point of the regional cooperation between the Arctic States.

Hence, it is remarkable the AC role as facilitator for intergovernmental negotiations and fora. All land areas within the Arctic territories fall under the uncontested sovereignty of one of the eight Arctic states and so national domestic laws have the primary legal controls on the environment. However, international environmental laws and principles play an increasing role in this legal regime, since many of the most urgent Arctic environmental issues, such as climate change and persistent organic pollutants can only be solved through global, multilateral approaches as the roots of these problems lie outside the Arctic.

## **6. The Arctic Council as the ideal platform for the explication of participatory rights**

On the one hand the Arctic plays a major role as a facilitator of international agreements and treaties, on the other hand its unique soft law structure has facilitated and strengthened the participatory approach within the Arctic Council itself.<sup>28</sup>

The AC can be seen as a platform where also non-state actors can play a major role in tackling environmental issues such as climate change and protection of marine resources<sup>29</sup>. In particular, as far as the internal participatory mechanisms are concerned, in the process leading to the creation of the Arctic Council, Indigenous People's Organisations (IPOs) were originally included under the traditional status of observers, as in the case of NGOs, and non-Arctic states.

After the adoption of the Ottawa Declaration on the Establishment of the Arctic Council<sup>30</sup>, a specific category for the participation of IPOs was created and the three organisations already recognised as

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<sup>26</sup> Art. 1 (a) Declaration On The Establishment Of The Arctic Council, 35 I.L.M. cit., p. 1388.

<sup>27</sup> Linda Nowlan, *Arctic Legal Regime for Environmental Protection*, IUCN Environmental Policy and Law Paper No. 44 IUCN - The World Conservation Union, 2001, accessed in March 23<sup>rd</sup> 2016.

<sup>28</sup> See Jennifer McIver, *Environmental Protection, Indigenous Rights and the Arctic Council: Rock, Paper, Scissors on the Ice?*, *Geo. Int'l Env'tl. L. Rev.*, 147 1997-1998.

<sup>29</sup> Member States of the Arctic Council are Canada, Denmark, Finland, Iceland, Norway, Russian Federation, Sweden, and U.S.A. See <http://www.arctic-council.org/index.php/en/>, visited in September 2016.

<sup>30</sup> See fn 23.

observers were granted the status of Permanent Participants<sup>31</sup>. According to Article 2 of the Ottawa Declaration:

“[t]he category of Permanent Participation is created to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council”. The Arctic Council’s rules of procedure further stipulate that “[t]his principle applies to all meetings and activities of the Arctic Council”.

Nowadays, the organisations are six and the category of Permanent Participants is still open to all the Arctic organisations with a majority of Arctic Indigenous constituency representing: a single indigenous people resident in more than one Arctic State; or more than one Arctic Indigenous people resident in a single Arctic State<sup>32</sup>.

The Permanent Participants have almost equal participatory rights as the state members to the Council, with an exception in regard to decision-making. Permanent Participants shall be consulted through the preparations of any official meetings, as they can raise issues to be added to the agenda or can propose collaborative activities.

This is why the Arctic Council approach to the participation of indigenous people is quoted as a virtuous example of civic engagement that shall inspire other international fora best practices<sup>33</sup>.

The IP engagement in the AC environmental decisions very much depends on the close relationship that they have with their natural habitat<sup>34</sup>. The protection of natural resources is crucial for the Arctic peoples since their economic and cultural survival depends on them. Their self-determination is based on the close connection they have with the natural resources. The position of the Sami (indigenous Finno-Ugric people inhabiting the Arctic area of Sápmi) well depicts this bond: they view the right of self-determination as crucial, and the right to exercise control over their traditional lands and natural resources as an integral part of it<sup>35</sup>.

## **7. Indigenous peoples in the Arctic: who they are**

The Arctic region -a vast area with approximately 13.4 million square kilometers of land<sup>36</sup>- it is home to various groups of indigenous peoples that have a diverse set of cultural and historical background and basis of economy. The indigenous peoples of Alaska include the Inupiat, Inuvialuit, Yupik and the Aleut. The Inuit are considered as indigenous peoples in the Canadian Arctic and Greenland. In Northern Russia there are dozens of indigenous peoples, including the Chukchi, Nivkhi, Saami, Even, Evenk and Nenets. The indigenous peoples in Fennoscandia are the Saami.

It is noteworthy that the term used is “indigenous” despite the fact that it is not a common term for all Arctic countries. In Alaska, the most common reference is “Alaska Native” while the Constitution of Canada uses the term “aboriginal”. “First nations” is also a widely used term in Canada as it is preferred by Indian people themselves. The Russian legislation defines indigenous peoples based on their population size. Groups with less than 50,000 people are defined as “indigenous numerically-

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<sup>31</sup> Sébastien Duyck, Participation of Non State Actors in Arctic Environmental Governance, Nordia Geographical Publications, 40:4 (2012) 99-110.

<sup>32</sup> See <http://www.arctic-council.org/index.php/en/about-us/permanent-participants>, visited in September 2016.

<sup>33</sup> Ibidem, 100.

<sup>34</sup> Aurélien Baron, Participation of indigenous peoples of the Arctic at the crossroads of natural habitat destruction and economic prosperity, ICL Journal available at [https://www.icl-journal.com/download/cdbd677b2c5332d84829e222821a39a7/ICL\\_Thesis\\_Vol\\_8\\_3\\_14.pdf](https://www.icl-journal.com/download/cdbd677b2c5332d84829e222821a39a7/ICL_Thesis_Vol_8_3_14.pdf), 2012. Visited in August 2016.

<sup>35</sup> John B. Henriksen, *The continuous process of recognition and implementation of the Sami people’s right to self-determination*, *Cambridge Review of International Affairs*, Volume 21, Number 1, March 2008, 28-40.

<sup>36</sup> Source from the Arctic Council Working Group AMAP (Arctic Monitoring Assessment Programme) <http://www.amap.no/> accessed July 18th 2016.

small peoples” whereas non-Russian peoples with a population size of over 50,000 are denied indigenous status<sup>37</sup>.

### **8. Indigenous peoples in the Arctic Council: which rights they have**

As said above, IP groups in the Arctic Council are granted the status of Permanent Participants, which has a series of virtuous consequences in terms of their involvement to any environmental decision affecting them. The reason for this opening to a full engagement lays in the high level of consciousness of their connection with the land they live in, as expressed in the Sami wording I have quoted above: the Arctic People consider themselves as a whole with the natural resources they live in, they self-identify with their natural environment and therefore they self-determine themselves by participating to the decisions that affect it.

In other words, the close bond that there is between the peoples and the territory entitles them to a full right to participate to the decisions affecting their territory.

Furthermore, the self-determination as a legitimating factor of the indigenous peoples’ occupation of a certain land/landscape/territory implies that they shall not prove to be part of an environmental non-governmental organisation (eNGO) to be entitled to participate to the environmental decisions.

This is crucial, since participatory rights -seen as instrumental to legal standing in case of liability- are usually granted to eNGOs on behalf of damaged individuals. Usually, other groups of consociates otherwise classified, are not entitled the right to participate nor to claim a damage before the court *per se*, unless they prove to be directly affected by the decision<sup>38</sup>.

As Timo Koivurova and Leena Heinamaki underline<sup>39</sup>, contrarily to what normally happens in international and national environmental liability law, where IP’s opportunities to participate in the international law-making processes are seriously restricted by their qualification as NGOs, this is not the case within the Arctic Council.

According to the authors, the flexibility provided within the AC Declaration to the participation of IP to the environmental decisions, when extensively applied at international level, might disclose the high potential of a better standing in intergovernmental organisations.

This happens for the above-mentioned application of the self-determination principle: since the IP’s participatory rights are not connected to any external recognition of their status, rather they are closely linked to the IP’s self-determination and ultimately to the IP’s discretionary power to evaluate whether they regard themselves as indigenous<sup>40</sup>.

As Koivurova and Heinamaki brilliantly underline:

“It would seem that international law is not too promising an avenue for indigenous peoples, at least when it comes to participating in international law making processes. Indigenous peoples do not constitute states. Few in fact have ambitions of statehood, with most working to establish some form of self-governance within existing nation-states. Without state status, however, indigenous peoples are excluded from international law-making processes. They are regularly categorised as nongovernmental organisations (NGOs) along with the other groups participating in the international policy-making process, and have only very limited rights to participate in that process. This binary structure of representation leads to unjust and bizarre outcomes, with industrial and environmental associations put on the same footing as indigenous people”<sup>41</sup>.

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<sup>37</sup> See <http://www.arcticcentre.org/EN/communications/arcticregion/Arctic-Indigenous-Peoples> accessed July 22nd 2016. Winfried K. Dallmann “Indigenous Peoples of the Arctic Countries”, Norwegian Polar Institute, [www.galdu.org](http://www.galdu.org), accessed in July 22nd 2016.

<sup>38</sup> See, for all, Marie-Louise Larsson, *The Law of Environmental Damage. Liability and Reparation*. Kluwer Law Int., 1999, 595. The legal standing in case of environmental damages is obviously always granted to the State, in all matters concerning its territory.

<sup>39</sup> Timo Koivurova and Leena Heinamaki, *The participation of indigenous peoples in international norm-making in the Arctic*, *Polar Record* 42 (221): 101–109 (2006), 102.

<sup>40</sup> *Ibidem.*, 101.

<sup>41</sup> *Ibidem.*, 101.



The flexibility provided by the participatory means within AC can be used as lever and a good practice to unleash the rights of IP and extend their active role in the international decisions.

### **PART III**

#### **IP participatory rights: the tool-kit and the strategies to improve their application**

##### **9. IP Participatory rights: an overview**

I have argued that the spoke-hub paradigm offers a key for reading the connections between the right to self-determination and the other participatory rights that shall be recognised to IP. According to the ILO Convention (Art. 1 1(b) and the Cobo's working definition above mentioned, the IP rights connected to self-determination comprise the ownership of lands and territories traditionally owned or occupied by IP, the right to prior, informed consent to any development projects affecting their lands and resources, and the right to self-identification.

In this sense, the model offered by the Arctic Council shows how successful can be to place self-determination at the core and as a practical consequence to acknowledge the role of permanent participants in the Arctic Council decisions to the IP.

For this purpose, the third part of the work is dedicated on a brief literature overview on the most relevant participatory rights ancillary to self-determination, and more specifically on consultation, free prior and informed consent, right to participate and legal standing.

Consequently, it will be highlighted the importance to detach the definition of participatory rights from a mere procedural perspective.

Finally, the case of the IP of the Arctic Council will be considered as the way forward to the expansion and consolidation of IP engagement in the decision making process.

##### **10. Consultation, free prior informed consent (FPIC), participation and legal standing**

In her study on Indigenous People in Decision Making, Mililani Trask embraces the legal approach on participation, by analysing the main legal provisions that set up the participatory rules as general norms for indigenous peoples. As the scholar reminds, currently, the ILO Convention n. 169 builds up a framework where a preliminary and preparatory function to participation is performed by consultation and free prior informed consent (FPIC)<sup>42</sup>.

In her comment on the legal provisions, the scholar traces the main difference between consultation and free prior informed consent, by stating that through consultation, indigenous peoples are only provided with the right to be informed and heard on a particular issue, while free prior and informed consent is the way to allow an effective participation in the decision-making process:

“‘Consultation’ refers to the process and/or procedure by which indigenous peoples participate in decision making by States on issues which impact and affect their lives. For example: Article 6 of ILO Convention 169 requires States to consult with indigenous peoples regarding legislative or administrative measures that directly affect them, and that this consultation should be through appropriate procedures and through their representative institutions. It is important to note that although the Convention requires that ‘consultations’ be pursued in good faith and with the objective of achieving agreement or consent, the ILO authorities have conceded that ‘consultation’ does not have to result in agreement with indigenous peoples”<sup>43</sup>.

Moreover, as Mililani Trask recalls, the connection between consultation and free prior and informed consent is established by Art. 19 UNDRIP, which connects State consultation and cooperation with indigenous peoples to their free, prior and informed consent.<sup>44</sup>

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<sup>42</sup> Mililani Trask, *Indigenous Peoples Participation in Decision Making - A Paper Prepared for the UN Expert Mechanism on the Rights of Indigenous Peoples*, January 2010, Working paper, available at [www2.ohchr.org](http://www2.ohchr.org), accessed in July 18<sup>th</sup> 2016.

<sup>43</sup> Statement of the International Labor Office in the Report of the Committee on Convention 107, International Labor Conference, Provisional Record 25, 76<sup>th</sup> Sess. at 25/12 para. 74 (1989).

<sup>44</sup> Art. 19 UNDRIP.

Ipshita Chaturvedi has also provided a comprehensive analysis on the same provision<sup>45</sup>, though highlighting its scarce impact at international level, since only twenty-two States have ratified it so far. The author tracks the development of FPIC by quoting the Convention on Biological Diversity (the “CBD”) and the subsequent Nagoya Protocol.<sup>46</sup>

The following development in the recognition of participatory rights in environmental decisions is marked by the Aarhus Convention, which provides for FPIC in the form of rights of access to information and participation in decision-making<sup>47</sup>.

More specifically, the Aarhus Convention has structured participation into three main pillars, dealing with: (1) the right of access to information; (2) the right to participate in decision-making, and (3) the right of access to justice in environmental matters.

The pillars reflect the shift in mentality required to the Aarhus Convention parties in terms of opening up the doors of environmental decisions to good administration principles, such as transparency, participation, and judicial review.

### **11. Thinking out of the box: substantive and not merely procedural participatory rights**

One of the most relevant impacts of the Aarhus Convention is the improved connection between environmental protection and human rights at international level, at least from a procedural perspective.

These improvements relate to the harmonisation of administrative proceedings concerning environmental impact assessments, with an emphasis on the participatory rights conferred to the interested parties in the decision making process.

With the implementation of the Aarhus Convention, the door to participatory rights in the environmental decision-making process can be considered as fairly open<sup>48</sup>. Therefore, not only damaged parties, but also civil society is now an active player in the environmental decisions.

Despite the remarkable attempt to frame the participatory rights in environmental decisions, the Aarhus Convention has shown its endogenous limits, such as the lack of a clear definition of substantive environmental rights. Michael Mason refers to this omission as

“A practical obstacle impinging on its commitment to human rights, as it arguably reduces the scope for public deliberation on the appropriateness of environmental decision-making according to competing social value”<sup>49</sup>.

Similarly, Alan Boyle acknowledges that the focus of the Convention is strictly procedural in content, limited to public participation in environmental decision-making, access to justice and information.

“The Aarhus Convention is widely ratified in Europe and has had significant influence on the jurisprudence of the European Court of Human Rights, whose decisions are considered below. The Aarhus Convention is important in the present debate because, unlike the ECHR, it gives particular emphasis to public interest activism by NGOs. But [...] while the Convention endorses the right to live in an adequate environment, it ‘stops short, however, of providing the means for citizens directly to invoke this right.’ Moreover, it also stops short of giving the public any right to participate

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<sup>45</sup> Ipshita Chaturvedi, *A Critical Study of Free, Prior and Informed Consent in the Context of the Right to Development - Can “Consent” be Withheld?*, *Journal of Indian Law and Society*, Vol. 5, Winter, 2014, 39.

<sup>46</sup> The Convention on Biological Diversity is an international agreement signed during the 1992 Rio Earth Summit and aims to achieve sustainable development through the protection of biological diversity.

<sup>47</sup> Ipshita Chaturvedi, *op. cit.*, 40.

<sup>48</sup> Margherita Poto, *Strengths and weaknesses of environmental participation under the Aarhus Convention: what lies beyond rhetorical proceduralisation?* in Eva Lohse, Margherita Poto, *Participatory Rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective*, Duncker und Humblot, Berlin, 2015.

<sup>49</sup> Michael Mason, *Information disclosure and environmental rights: the Aarhus Convention*, 2010, *Global Environmental Politics*, 10, 3, 26. The author continues that “[i]nformation disclosure and public participation become more a means for legitimizing rather than interrogating governance institutions and for bench-marking public authorities against procedural check-lists rather than substantive environmental standards.”

in decision-making on matters of policy. It is of course precisely at this point that governments make decisions about the balancing of social, environmental and economic objectives. The Convention is not completely blind to the point, because Article 7 provides that '[t]o the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.' As any good lawyer will appreciate, however, this wording has little substance and cannot be portrayed as creating rights for individuals. However, no other human rights treaty goes even this far."<sup>50</sup>

The necessary step forward would be to move away from a merely procedural perspective and to establish the human right to environment: this process has been set in motion almost since the late '60s<sup>51</sup>, but it is still far to be fully implemented, especially considering that the environmental protection as a fundamental right has been always connected to other human rights rather than being fully recognised as a right *per se*<sup>52</sup>. In particular, the right to a safe environment has been considered at times a corollary to the right to life, health, property, food, development, culture and indigenous rights. In this latter regard, and for the purpose of this study, the deep connection with the fundamental right of indigenous people's shows how important is to set up the category of environmental right as a fundamental one:

"The destruction of humanity, as a species in the global environment, all too clearly demonstrates the need for the world community to devote greater attention to the right of all peoples to a sound environment." In the extreme case of ecological destruction aimed at minority groups (constituting genocide or ecocide), international environmental law clearly overlaps with the international law of human rights. Environmental destruction creates the clearest legal precedent of a violation of humanity's natural law right to life. Life itself and the mere physical existence of humanity clearly shows the need for greater recognition of the human right to environment. A potential convergence of ideals arises for protecting the environment while simultaneously protecting minority rights"<sup>53</sup>.

## **12. IP in the Arctic Council: the pilot case to improve IP engagement in the decision making process**

The connection between indigenous rights and self-determination has been thoroughly examined above.

The right to self-determination is central for the recognition of fundamental rights to IP, and participatory rights shall be included among them. As for the effective implementation of self-determination, both at international and at national level, the approach shall be twofold: on the one hand, it shall focus on regulating the establishment of permanent positions for the IP as participants in the regulatory bodies; on the other hand, policy making on funds allocation shall be defined and improved, in order to grant the effective implementation of fundamental rights.

At least with regard to the former aspect, the goal of establishing a permanent position for the indigenous group has been fully achieved by the IP in the Arctic Council.

In paragraph 5, I have mentioned that the position as Permanent Participants of IP groups in the Arctic Council has marked their official entrance in a global multi-layered platform where environmental decisions are approved via international agreements (Ottawa Declaration<sup>54</sup>). After it, their role in the AC has been increasingly developed.

One virtuous application of this role of Permanent Participants comes from IP groups participation to the decision making processes in the approval of the Arctic Search and Rescue (SAR) Agreement adopted in May 2011, followed by the Agreement on Cooperation on Marine Oil Pollution

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<sup>50</sup> Alan Boyle, *Human Rights and the Environment: A Reassessment*, 2007, 18 *Fordham Environmental Law Review*, 2007, 471 ff.

<sup>51</sup>In her study on the topic, Melissa Thorne dates it back to 1968 when the General Assembly of the United Nations recognised that technological changes could threaten the fundamental rights of human beings: *Establishing Environment As a Human Right*, 19 *Denv. J. Int'l L. & Pol'y* 301 1990-1991

<sup>52</sup> Melissa Thorne, *Establishing Environment As a Human Right*, cit., 319-328.

<sup>53</sup> *Ibidem*, 330.

<sup>54</sup> Fn 23 and 31.

Preparedness and Response in the Arctic in 2013<sup>55</sup>. It is remarkable that these two agreements are actually the first two legally binding instruments negotiated under the auspices of the Arctic Council and in both cases the IP groups played their active role in making their voice heard and consequently their participatory rights emphasised in the text of the agreements.

In particular the 2013 Agreement remarks in its *incipit* the need to engage Permanent Participants in the delicate decisions regarding the protection of the Arctic marine environment:

“Mindful further that indigenous peoples, local communities, local and regional governments, and individual Arctic residents can provide valuable resources and knowledge regarding the Arctic marine environment in support of oil pollution preparedness and response”<sup>56</sup>.

Additionally, the Agreement provides further transparency tools, such as the provision to exchange and make publicly available information, data and experience

“in the field of marine oil pollution preparedness and response, especially regarding the Arctic environment, and on the effects of pollution on the environment, and of regularly conducting joint training and exercises, as well as joint research and development”<sup>57</sup>.

Another case that shows the emphasis given to IP in the AC is the Iqaluit Declarations<sup>58</sup>, paragraphs 3 and 5, where the need to strengthen the cooperation among the interested parties has been expressly connected to the participation of Permanent Participants in the Arctic decisions:

“3. Confirming the commitment of the Arctic states and permanent participants to respond jointly to new opportunities and challenges in the Arctic, noting the substantial progress the Council has made to strengthen circumpolar cooperation, and affirming the important leadership role of the Council in taking concrete action through enhanced results-oriented cooperation”

“5. Recognizing that the Arctic is an inhabited region with diverse economies, cultures and societies, further recognizing the rights of the indigenous peoples and reaffirming our commitment to consult in good faith with the indigenous peoples concerned, and also recognizing interests of all Arctic inhabitants, and emphasizing the unique role played by Arctic indigenous peoples and their traditional knowledge in the Arctic Council.

Along this line, as co-leads, Canada and Norway, have shepherded the Guide through three rounds of broad consultations, including Arctic Council members states, permanent participants, working groups and other external stakeholders”.

In sum, the regulatory solution offered by the Arctic Council in promoting the IP’s engagement to the broadest extent is certainly remarkable and exemplar.

There is still plenty of scope for improvement, though, also in the virtuous Arctic region. As said, the effective participation very much depends also on a long-term policy making vision and more specifically on the national economic policies on funding allocations to IP groups. This has been remarked in one of the most updated studies conducted by John B. Henriksen on the right of self-determination of the Sami peoples, following a series of seminars organised by the Gáldu -The Resource Centre for the Rights of Indigenous Peoples- and held in Guovdageaidnu (Kautokeino) in October 2009<sup>59</sup>.

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<sup>55</sup> The text of the 2013 Agreement is available at [https://oaarchive.arctic-council.org/bitstream/handle/11374/529/EDOCS-2067-v1-ACMMSE08\\_KIRUNA\\_2013\\_agreement\\_on\\_oil\\_pollution\\_preparedness\\_and\\_response\\_in\\_the\\_arctic\\_formatted.PDF?sequence=5&isAllowed=y](https://oaarchive.arctic-council.org/bitstream/handle/11374/529/EDOCS-2067-v1-ACMMSE08_KIRUNA_2013_agreement_on_oil_pollution_preparedness_and_response_in_the_arctic_formatted.PDF?sequence=5&isAllowed=y), visited in September 2016.

<sup>56</sup> See the Incipit of the 2013 Agreement.

<sup>57</sup> Ibidem.

<sup>58</sup> Iqaluit Declaration, The Ninth Ministerial Meeting of the Arctic Council. April 24, 2015. Iqaluit, Yukon, Canada, available at <https://oaarchive.arctic-council.org/handle/11374/662>, visited in September 2016.

<sup>59</sup> John B. Henriksen, *Sami Self-Determination. Autonomy and Self-Government: Education, Research and Culture, Gáldu Čála – Journal of Indigenous Peoples Rights* No. 2/2009, p. 46.

The outcomes of this research are extremely interesting and essentially point out on two different aspects:

1. As for the legal framework, the right of self-determination is grounded on both the ILO Convention n. 169 and on national laws
2. As for the effective implementation of the self-determination, it's a matter of policies on the allocation of funds to indigenous peoples.

Henriksen study's outputs showed that education, research and culture are to be regarded as internal and local Sami affairs, where it would be natural to have extensive Sami autonomy and self-government.

In Henriksen's opinion, the recognition of fundamental rights to the Sami shall also be in the priority agenda of the national government. In this regard, the way to effectively enforce the Sami self-determination requires the effective establishment of a more detailed dialogue between the indigenous institutions and the central government authorities, with a financial plan on the allocation of funds to grant the effective implementation of the IP fundamental rights.