Nicolas Adell, Regina F. Bendix, Chiara Bortolotto and Markus Tauschek (dir.)

Between Imagined Communities of Practice
Participation, Territory and the Making of Heritage

Göttingen University Press

The Community Participation in International Law

Sabrina Urbinati

Publisher: Göttingen University Press
Place of publication: Göttingen University Press
Year of publication: 2015
Published on OpenEdition Books: 12 April 2017
Serie: Göttingen Studies in Cultural Property
Electronic ISBN: 9782821875494

http://books.openedition.org

Electronic reference
The Community Participation in International Law

Sabrina Urbinati
University of Milano-Bicocca

1 Introduction

The purpose of this study is to show, as thoroughly as possible, the ways in which communities play a role in the implementation of international legal instruments. To do so, an analysis of the relevant provisions of several international instruments concerning human rights, environment, health, cultural properties and intellectual property will be carried out.

1 Another interesting survey on communities, groups and individuals in international law was done by Blake (2009).

In the present study, the international instruments taken into account are not only conventions or treaties, but also instruments for their application, declarations and recommendations. These instruments are elaborated by States and international organizations, which are the only subjects (in legal language: parties) that have the legal personality and may act in the international legal order. International treaties or conventions are binding for their parties. With these instruments, States and international organizations establish their rights and obligations. Instruments for the application of conventions or treaties are useful to show their parties’ administrations how to apply international treaties correctly. In declarations and recommendations, which are not binding, parties express an auspice for the future.

By implementing the international instruments in question, States Parties and international organizations inevitably have an effect on the other subjects concerned (stakeholders). In principle these stakeholders could not legitimately act in the international legal order. Nevertheless, as we will show in the present study, for different reasons, some roles in the implementation of the above-mentioned international instruments have been assigned to the stakeholders.

As we will see in more detail in the first paragraph of this study, international law rarely identifies the stakeholders directly with the word “community.” In fact, even if they may have a community dimension, they have different natures. In identifying the stakeholders, the international instruments taken into account in the present study utilise specific words and expressions, for instance, peoples, indigenous, individuals, women and farmers. In the present study, sometimes we will identify these subjects with the words “community” or “communities.” Finally, we have to recall that in other branches of law, the word in question is frequently substituted without changing of meaning, with those of group or groups, individuals, local communities, local institutions and so on.


3 Intangible Operational Directives, Cultural Diversity Operational Guidelines and World Heritage Operational Guidelines.
2 Community: What Does It Mean in International Law?

In English the common meaning of the word “community” is:

1. A group of people living together in one place.
2. The people of an area or country considered collectively; society.
3. A group of people with a common religion, race or profession.⁴

In 1930 the Permanent Court of International Justice, in the attempt to define the word “community,” affirmed that “the existence of communities is a question of fact; it is not a question of law.”⁵

As already mentioned, international instruments only rarely utilise the word community. This is the case for the Intangible Convention, where several provisions utilise the word “community.”⁶ For instance, in the text of the Intangible Convention:

Each State Party shall: […]

b) among the safeguarding measures referred to in Article 2, paragraph 3, identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations.⁷

Furthermore in the Intangible Operational Directives:

U.4 The element has been nominated following the widest possible participation of the community, group or, if applicable, individuals concerned and with their free, prior and informed consent.⁸

In other international instruments words having a community dimension are utilized, such as: people at large,⁹ women,¹⁰ youth,¹¹ indigenous peoples,¹² local com-

---

⁶ For the definition of community in the Intangible Heritage Convention see Blake 2006, and Scozzari 2012.
⁷ Article 11, Intangible Convention. See also Article 15 (below n. 31).
⁸ Paragraph I.1, Intangible Operational Directives. See also paragraphs 1, 2, 7, 79, 80, 81, 82, 85, 86, 87, and 88.
⁹ Recommendation 1976.
¹⁰ Preamble of the Biodiversity Convention, preamble of the Nagoya Protocol and Women Convention.
¹¹ African Youth Charter.
¹² ILO Convention, where we can find the expression of “Indigenous and Tribal Peoples”, or “peoples” in the text of the Convention. Preamble and, among others, Article 15, 17, 18, 27, 30, 32, 36 and 38, Declaration on Indigenous Peoples and Principle 22, Rio Declaration.
munities or local populations, civil society, minorities, public, farmers, cultural site managers, public or private agencies, private sector and non-governmental organizations (NGOs).

Some of the international instruments on which this study is based are expressly dedicated to the protection of one community and to the assertion of its rights. This is the case of the ILO Convention where references are made only to indigenous peoples. In other instruments references are made, as appropriate, to the participation of several communities. Among these instruments, in the Recommendation 1976 the expression of people at large and also other equivalent expressions such as group participating and public can be found. Moreover, in the Desertification Convention the expressions of local populations, local communities and populations are employed as synonyms. Yet the Biodiversity Convention utilises the words women and public and the Nagoya Protocol those of women and indigenous and local communities. Finally, in the World Heritage Operational Guidelines references are made to cultural site manager, local and regional governments and NGOs.

On the basis of this survey it is possible to conclude that, although community and other relevant terms are employed in international instruments, none of them provide for a definition of these words.

---

13 Article 6, 12 and 21, Nagoya Protocol. Among others, see Article 6, 13 and 16, Desertification Convention.
14 Article 12 Integrated Coastal Protocol.
15 Article 11, Convention on Cultural Diversity and paragraph 3, Cultural Diversity Operational Guidelines.
16 Paragraph 1.3, Cultural Diversity Operational Guidelines.
17 In Article 2, Aarhus Convention, “public” is defined as: “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups”.
18 Article 6 and 9, Plant and Agriculture Treaty.
19 Framework Convention on Tobacco Control.
21 World Heritage Operational Guidelines.
22 Paragraph 6 h), Recommendation 1976.
23 Paragraph 14 g), Recommendation 1976.
24 Among others Article 5, 10, 17, 18.
25 Preamble Biodiversity Convention.
26 Article 14, Biodiversity Convention.
27 Article 6, 12 and 21, Nagoya Protocol.
28 Paragraph 64, World Heritage Operational Guidelines; “States Parties are encouraged to prepare their Tentative Lists with the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, NGOs and other interested parties and partners”.

---
3 The Several Forms of Community Participation

In the international instruments taken into account in this study, the utilization of the word “participation” in its widest meaning is predominant. Nevertheless words such as “cooperation,” “consultation” and “implication,” are also used. Sometimes they are employed as synonyms. For instance, the ILO Convention foresees:

In applying the provisions of this Convention, governments shall:

a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.\footnote{Article 6, paragraph 1, ILO Convention.}

The Declaration on Indigenous Peoples utilises both “consultation” and “cooperation:”

States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.\footnote{Article 15, paragraph 2, Declaration on Indigenous Peoples.}

The internal practice in the implementation of each international instrument further specifies the meaning that has to be given to these words. For instance, in the framework of the Intangible Convention an important debate has been opened on the meanings of “participation” and “consultation.” The result of this debate is that “participation” implies an involvement of the community in its application,\footnote{Article 15, Participation of communities, groups and individuals, Intangible Convention: “Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.”} while “consultation” is limited to the procedure needed by a party to obtain the consent of the interested community.

Moreover, it should be emphasized that the word “participation” lends itself to possible misunderstandings. For instance, under Article 1 of the Recommendation 1976 the participation of the individuals, belonging to the same culture, is intended as their free and full participation in cultural creation and its benefits, in accordance with the requirements of social progress.

The meaning given to community participation in the Intangible Convention is the point of our interest in the present study.

Depending on the international instrument taken into consideration, the community participation may be requested to carry out several purposes:
- the adoption of decisions and measures;
- the elaboration of international instruments;
- the carrying out of activities;
- the sharing of benefits;
- the creation of mechanisms and procedures;
- the utilization of a property.

The first kind of participation is the most widespread. Nevertheless, in order to show the community participation in international law thoroughly, it is necessary to also examine all the other kinds.

3.1 Community Participation in the Adoption of Decisions and Measures

The participation of the communities, concerned by the implementation of an international instrument, in the adoption of decisions and measures is fundamental because it should allow these stakeholders to be involved in mechanisms that may produce effects against them. This kind of participation is intended to give means through which the stakeholders can protect their interests against States.

Among the international instruments examined in this study, it is necessary to give special attention to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. As the title of this instrument shows, its content partially overlaps with the subject of the present study and therefore deserves to be examined in detail. Article 3, containing the general provisions, foresees:

1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

2. Each Party shall endeavor to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters. […]

9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimi-
nation as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

Moreover, the Aarhus Convention establishes in which kinds of decision their parties are required to involve their public and in which manner this participation has to be implemented:

- decision concerning the activities listed in Annex I of the Convention and other activities which may have a significant effect on the environment but which are not in that Annex;\(^{32}\)
- plans, programmes and policy connected to the environment;\(^{33}\)
- regulations and other generally applicable binding rules that may have a significant effect on the environment.\(^ {34}\)

Regarding the first kind of decision, the Aarhus Convention states:

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, \textit{inter alia}, of:

(a) The proposed activity and the application on which a decision will be taken;
(b) The nature of possible decisions or the draft decision;
(c) The public authority responsible for making the decision;
(d) The envisaged procedure, including, as and when this information can be provided:
   (i) The commencement of the procedure;
   (ii) The opportunities for the public to participate;
   (iii) The time and venue of any envisaged public hearing;
   (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

\(^{32}\) Article 6, paragraph 1, Aarhus Convention: “1. Each Party: (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I; (b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and (c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.”

\(^{33}\) Article 7, first sentence, Aarhus Convention: “Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public.”

\(^{34}\) Article 8, first sentence, Aarhus Convention: “Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.”
(v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

(vi) An indication of what environmental information relevant to the proposed activity is available; and

(c) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:

(a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;

(b) A description of the significant effects of the proposed activity on the environment;

(c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;

(d) A non-technical summary of the above;

(e) An outline of the main alternatives studied by the applicant; and

(f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.

7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any
comments, information, analyses or opinions that it considers relevant to the proposed activity.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied *mutatis mutandis*, and where appropriate.

11. Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.\(^35\)

In the adoption of the second kind of decision, the Aarhus Convention establishes that States Parties may apply the provisions stated in paragraphs 3, 4 and 8 of Article 6 and specify that:

The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavor to provide opportunities for public participation in the preparation of policies relating to the environment.\(^36\)

As regards the manner of participation in the adoption of the third kind of decision, the Aarhus Convention foresees that:

To this end, the following steps should be taken:

(a) Time-frames sufficient for effective participation should be fixed;

(b) Draft rules should be published or otherwise made publicly available; and

(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.\(^37\)

---

\(^35\) Article 6, Aarhus Convention.

\(^36\) Article 7, Aarhus Convention.

\(^37\) Article 8, Aarhus Convention.
Many other international instruments establish the community participation in the ways that parties are required to follow in the adoption of decisions and measures. Article 3, paragraph 1 a), of the Desertification Convention states, among the guiding principles for its implementation, that parties should ensure that decisions on the design and implementation of programmes to combat desertification and/or mitigate the effects of drought are taken with the participation of populations and local communities. Moreover, Article 10, paragraph 2 f), states that, in the drafting of national action programs, in the decision making process and in the implementation and review of national action programs, parties are required to provide for effective participation at the local, national and regional levels of NGOs and local populations, in particular resource users, such as farmers and pastoralists and their representative organizations.

Yet, Article 9, paragraph 2 c), of the Plant and Agriculture Treaty foresees:

9.2 The Contracting Parties agree that the responsibility for realizing farmers’ rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote farmers’ rights, including:

(c) the right to participate in making decisions, at national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

Another instrument that deserves to be recalled is the ILO Convention. In general, it establishes that parties are required to develop, with the indigenous peoples participation, coordinated and systematic action to protect the rights of these peoples. In particular, this instrument foresees that parties are required to adopt means by which these peoples can participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programs which concern them. Moreover, the indigenous peoples participation is foreseen also for the adoption of measures concerning the regulation of the recruitment and conditions of employment, programs of vocational training and facilities as well

38 Article 2 paragraph 1, ILO Convention.
39 Article 6, paragraph 1 b), ILO Convention.
40 Article 20, paragraph 1, ILO Convention: “Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.”
41 Article 22, paragraph 2, ILO Convention: “Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.”
as educational programs. Finally, the Declaration on Indigenous Peoples deserves to be recalled too. This international instrument foresees that parties are required to adopt, with the participation of indigenous peoples, a number of measures

[...] to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

As well as

[...] to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

And also to ensure, in particular to those indigenous peoples divided by international borders, the rights to maintain and develop contacts and relations (including activities for spiritual, cultural, political, economic and social purposes) with their own members and as well as with their peoples across borders.

3.2 Community Participation in Bodies that Are in Charge of the Elaboration of International Instruments

The only case of the community participation (in this case the participation of indigenous peoples and local communities) is in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Committee). This Committee was established by the World International Property Organisation (WIPO) in order to elaborate one or more international instruments for the protection of traditional knowledge, traditional cultural expressions, folklore and genetic resources. Since its creation, the Committee has encouraged the participation of communities and their involvement in its work.

42 Article 27, paragraph 1, ILO Convention: “Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.”

43 Article 15, paragraph 2, Declaration on Indigenous Peoples.

44 Article 17, paragraph 2, Declaration on Indigenous Peoples.

45 Article 36, Declaration on Indigenous Peoples.

In the Committee, communities are represented by NGOs to which the status of observers is attributed. Although in general, in other international instruments and in the WIPO’s bodies this status does not allow the presentation of proposals, amendments and motions, the Committee has always given observers the possibility to intervene during the sessions on all the points of its agenda and to make proposals. However, these interventions will be inserted in the relevant texts under discussion, only if they are supported by, at least, a State member of the Committee. In the opposite case, the proposals are only inserted in the reports of the Committee if it is foreseen.

Today the accredited NGOs to the Committee are 329.

3.3 Community Participation in the Carrying out of Activities

In general, community participation in the carrying out of functional activities to the implementation of an international instrument is established because they have the useful knowledge in safeguarding a property. This is the case for the Biodiversity Convention, where for in situ conservation and the sustainable use of biological diversity, parties are required to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyle”47 and to “promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices”48.

Moreover, community participation in the carrying out of functional activities to the implementation of an international instrument may be required when parties are looking to improve their knowledge concerning the production and the use of a property in a certain place. This is the case of the Plant and Agriculture Treaty, where it is established that the sustainable use of plant resources may include measures to

(c) promot[e], as appropriate, plant breeding efforts which, with the participation of farmers, particularly in developing countries, strengthen the capacity to develop varieties particularly adapted to social, economic and ecological conditions, including in marginal areas.

Finally, in some of the international instruments under consideration, the participation in question is justified, at the same time, by several of the previously mentioned reasons. This is the case of the Intangible Convention, in which the participation of the communities, groups and individuals is required in order, firstly, to ensure the interests of these subjects on their heritage and, secondly, because they have the indispensable knowledge to its management, conservation and safeguarding.49

47 Article 8 j), Biodiversity Convention.
48 Article 8 j), Biodiversity Convention.
49 Article 15, Intangible Convention (above n. 31). See also paragraphs 79 to 88, Intangible Operational Directives.
3.4 Community Participation in the Sharing of Benefits

In some cases, implementing an international instrument may require the carrying out of some activities in order to obtain a benefit, which will be shared with the relevant communities. This is the case of the ILO Convention. This instrument foresees that in the case of the exploitation of mineral resources the concerned indigenous peoples, whenever possible, shall take part in the benefit deriving from this activity and shall receive fair compensation for any damages, which they may sustain.\(^{50}\)

Moreover, Article 8 of the Biodiversity Convention establishes the same possibility. Regarding the *in situ* conservation of knowledge, innovations and practices of indigenous and local communities this instrument establishes that:

Each Contracting Party shall, as far as possible and as appropriate: […]

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

3.5 Community Participation in the Creation of Mechanisms and Procedures

Community participation is also required for the creation of mechanisms, which are useful for the implementation of international instruments. In this regard Article 12, paragraph 2 of the Nagoya Protocol, foresees that parties, with the effective participation of the indigenous and local communities concerned, create mechanisms to inform the potential users of the traditional knowledge associated with genetic resources about their obligations.\(^{51}\)

Moreover, Article 27 of the Declaration on Indigenous Peoples foresees that parties establish and implement, in conjunction with the indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due

\(^{50}\) Article 15, paragraph 2, ILO Convention: “In case in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”

\(^{51}\) Article 12, paragraph 2, Nagoya Protocol: “Parties, with the effective participation of the indigenous and local communities concerned, shall establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations […]”
recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. In this provision it is also established that indigenous peoples shall have the right to participate in this process.

3.6 Community Participation in the Utilisation of a Property

The Declaration on Indigenous Peoples gives two examples of community participation in the utilisation of property, such as lands, which belong to these peoples. The first example is established in Article 30 and concerns the utilisation of land for the carrying out of military activities:

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through their representative institutions, prior to using their lands or territories for military activities.

The second example is in Article 32, where after the affirmation of the right of indigenous peoples to determine and develop priorities and strategies for the development or use of their lands or territories and other resources, it is established that parties shall consult and cooperate in good faith with the indigenous peoples concerned, through their own representative institutions, in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.

4 Means for the Carrying out of Community Participation

Even if, in some international instruments under examination in the present study, community participation is foreseen, the means for its implementation are not established. In other words, the provisions of these instruments use general formulations, such as “that local communities are involved in these activities” or “each Party shall evaluate, with the participation of affected populations,” without establishing through which mechanisms the participation shall be carried out.

Some instruments, such as the Declaration on Indigenous Peoples, establish that the indigenous peoples participation shall be carried out through their representatives, chosen by the procedures specific to these populations. For instance, Article 18 of this instrument foresees:
Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Another example is in Article 6 of the ILO Convention:

1. In applying the provisions of this Convention, governments shall:
   (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.

5 A Qualified Participation of the Communities

Several instruments, among those examined in this study, establish community participation without qualifying it. For instance, they state that indigenous peoples participate in the procedure for the adoption of a decision or a regulation necessary for the national implementation of the relevant international instrument. In other instruments, community participation is qualified by requiring that parties ensure the effective and full, or as wide as possible participation, etc.

The following examples will help us to explain this affirmation more clearly. Article 19, paragraph 1 a), of the Desertification Convention asks for the full participation:

They shall promote, as appropriate, capacity-building:
   (a) through the full participation at all levels of local people, particularly at the local level, especially women and youth, with the cooperation of non-governmental and local organizations.

Paragraph 3 b), of the same provision, requires to promote, on a permanent basis, the access of the public to the relevant information, and the wide public participation in education and awareness activities.

Principle 22 of the Rio Declaration foresees that the parties should recognize and support in an adequate manner the identity, culture and interests of indigenous peoples. Moreover, this article foresees that parties should allow the effective participation of indigenous people to the carrying out of the sustainable development. This position is due to the fact that with their knowledge and traditional practices, indigenous peoples, their communities and other local communities have a vital role in the management of the environment and development.52

52 Principle 22, Rio Declaration: “Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”
Another example is contained in the Aarhus Convention, where it is established that each party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules, that may have a significant effect on the environment.

Moreover, Article 12, paragraph 2, of the Nagoya Protocol states that the parties, with the effective participation of local and indigenous community, create mechanisms to inform the potential users of the traditional knowledge, associated with the genetic resources, about their obligations, including the measures made available through the Access and Benefit-Sharing Clearing-House for access to and fair and equitable sharing of benefits arising from the utilisation of such knowledge.

Finally, other international instruments ask for a free, prior and informed community consent. Article 16, paragraph 2, of the ILO Convention states that where the relocation of the indigenous and tribal peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. In the same provision it is also established that where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including where appropriate public inquiries, which provide the opportunity for effective representation of the peoples concerned. In the same direction, the Declaration on Indigenous Peoples establishes:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

6 Conclusion

Among the international instruments taken into consideration in the present study, the Intangible Convention deserves special attention because, in its implementation, a central role is given to community participation.

Under the Intangible Convention communities are considered the bearers of the intangible cultural elements. Despite this important recognition, the Intangible Convention does not give a definition of community (Blake 2006; Scovazzi 2012). Until now, several attempts to define this word have been useless, because of the
reticence and opposition of some States, during both the negotiation of the convention and its implementation. Nevertheless, this absence of definition must not be interpreted in a totally negative way because it allows the inclusion of various subjects, such as indigenous peoples, minorities, local communities, etc., including also those that are usually emarginated (Urbinati 2012a, 2012b).

In order to safeguard the intangible cultural heritage on their territories Intangible Convention parties shall adopt a set of measures, both at national and at international level. In implementing national measures, parties shall involve communities that are the intangible cultural element bearers. Nevertheless, the formulation of the relevant provisions is too general and it does not allow the creation of exact obligations for the parties, leaving the door open to misuse. As regards the international safeguarding measures nothing is foreseen about community participation.

However, the relevant parts of the Intangible Operational Directives and the practice of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage and of the Subsidiary and Consultative Bodies, witness that a will exists to attribute a central role in the implementation of the Intangible Convention to the communities. In fact, this instrument and the above mentioned bodies have repeatedly adopted provisions that aim to ensure community participation in the implementation of the Convention, both at national and at international level, and they affirm that the involvement of the communities is fundamental (Urbinati 2012a, 2012b).

Acknowledgments. The Author thanks Dr. Benedetta Ubertazzi for her contribution in the research of documents on which this study is based on.
References


