

# PERSON AND PROPERTY: CONCEPTUALISING INTANGIBLE CULTURAL HERITAGE IN LAW

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## ABSTRACT

The conceptualisation of culture in international law has been rooted in two main conceptual poles: *persons* – protection of cultural rights of individuals, groups and communities, and *property* – protection of cultural goods. This finds an explanation within the *subject* and *object* dichotomy that is fundamental in law but seems to be insufficient for the interpretation of intangible cultural heritage. The article analyses whether intangible cultural heritage can be interpreted as being linked to the one, the other or both of the named poles of conceptualising culture in international law. The purpose of the article is to seek a conceptual sequence that in the history of international law has led to an existing network of legal concepts and the “intangible cultural heritage” therein.

KEYWORDS: • cultural property • cultural rights conceptualisation • intangible cultural heritage • international law

*Si la notion de biens s'éloigne de la chose corporelle, ses frontières sont aussi mises en cause du côté de la notion de personne.<sup>1</sup>*

Henri Batiffol

## INTRODUCTION

Law is a structured and functional system (Luhmann 1986) in which concepts are significant components. These concepts are expressed through legal terms and underlie legal language. The introduction of a new concept in law changes the system and raises the issue of understanding its position. The concept “intangible cultural heritage” was introduced in international law<sup>2</sup> by the adoption of the United Nations Education, Science and Culture Organization’s (UNESCO) Convention on the Safeguarding of the Intangible Cultural Heritage in 2003 and its entering into force in 2006. It is a recent legal instrument that was further referred to in diverse national laws. There are certain aspects to be raised concerning the introduction of intangible cultural heritage within the particular context of law.

## PARTICULARITIES OF LAW

There are semiotic aspects that characterise law from the perspectives of 1) semantics, 2) syntactics and 3) pragmatics (Morris 1971), and that have to be considered when reflecting on terms and concepts introduced to and used in law.

1) Law is meaningful. The language used in law is an issue of diverse spheres of scientific interest: legal linguistics, legal semiotics, legal philosophy and others (Cornu 2005; Gräzin 2005). Legal language is a testimony of the way humans speak about and construct reality, and it is constantly in interaction with the general use of language. Law is communicative and legal language needs to be clear in order to be understood and applied to a variety of individual cases.

2) Concepts are interrelated in law, they have inner connections and are structured and classified. The legal language is systemic and needs to be interpreted as such. Therefore the systemic interpretation of legal concepts and legal norms is one of the interpretation methods in jurisprudence that complements the grammatical, historical and theological interpretation methods (Melkışis 2003). It is applied in order to interpret law by exploring syntactic links among legal concepts.

3) Law is a crucial reference for human action within society. Legal norms have binding force and the interpretation of legal language may have legal consequences. Legal discourse can be considered as being among those “upon which others are based – that have a particular relationship with the foundations of society and with the signification of human destiny” (Maingueneau 1999: 183).<sup>3</sup> Thus interpretation of a legal concept can influence the perception of concepts and the use of language beyond the borders of law. Law is also perceived as a reference for protection – it is considered as being an instrument for protecting something or somebody against certain threats, thus law itself can serve as an indicator of being in danger.

4) Law is axiological. Legal language reflects a human comprehension of values,<sup>4</sup> putting into legal norms the idea of justice (Ricoeur 2005: 76), prescribing what is a good and bad human behaviour, what are good things to safeguard and bad things to avoid or to destroy, and what is the order to maintain (*cosmos* in opposition to *chaos*) in the world of humans and their objective surrounding. It is metaphorically acknowledged that “culture shapes and mirrors the values” (UN ECOSOC 2009: 4); similarly it might also be said that law shapes and mirrors the values.

The particularity of the semantic, syntactic and pragmatic aspects of law influences the elaboration, interpretation and application of legal concepts and norms. The recognition of meaningful and communicative character of law as a system of concepts having axiological roots and significant societal impact, enhances the identification of the main characteristics of conceptualising culture in law.

## CONCEPTUALISATION OF CULTURE IN INTERNATIONAL LAW

The conceptualisation of culture<sup>5</sup> in the history of international law has been a long process with a permanent evolution of legal regulations and also the legal concepts

used. In the history of international law there have been diverse legal concepts referring to culture – to mention few of them: “historic monument”, “cultural property”, “cultural heritage” and “cultural rights”. Their differences have been an issue of attentively elaborated analysis (Mucica 2003; Frigo 2004). Legal concepts and legal norms used for different domains of culture reflect the *semantic* aspect of law – the understanding of culture, the role of a person in culture, the role of a thing in culture and the link between both: persons and things. It has been crucial for legal reasoning that “our view orders the world in two distinct entities: on the one hand there are things and on the other there are persons” (Supiot 2005: 59).<sup>6</sup>

Thus, there are two general and fundamental poles that have been important to conceptualising culture in law: *person* and *property*. Symbolically we might put these concepts on equal grounds having both a substantial role for perceiving culture – *person* as creator, as owner; *property* as an alienated human expression (Hegel 1989: 100–108) or appropriated part of the objective world. It is to be considered that legal protection has always tended to be directed towards the one or the other. The perception of the distinction and the link between persons and things in legal reasoning has its roots profoundly based in the recognition of the *subject* and *object* dichotomy.

The issue of understanding rights in question is a starting point of a legal reflection – whether it is a *property* that has a right to exist, to be preserved, circulated, etc. or a *person* (or persons) that has (have) a right to maintain her or his (their) cultural identity and cultural practices. Legal rules have been directed towards the protection of the one or the other:

- 1) On the one hand, there is a legal *protection of properties* – paintings, architectural monuments, results of scientific and technological innovations, archives of documented testimonies and other – as being separated *objects* that, once created and expressed, have their objective existence on their own, possibly raising authorship and intellectual property issues, etc. but being separated from the person: creator, owner, user or other.
- 2) On the other hand, there are legally protected *rights of persons* – the right to take an active part in cultural life, right to be a creator, owner or user of cultural properties, right to create, own and use, etc. These legal norms are oriented towards the *subject* as being in the centre of law.

The distinction between *persons* and *properties* as the main general axes for conceptualisation in law has its roots in Roman law. Person and goods (Lat. *persona, res*) were two fundamental concepts in the Roman law. The system of law was considered as having a part devoted to the rights of goods (Lat. *in rem*) and a part devoted to the rights of persons (Lat. *in personam*). The first regulated generally and impersonally the status and legal protection of goods (Garner 2004: 809); the second regulated concrete rights ascribed to persons as being subjects of law. The conceptual poles of *persons* and *properties* have evolved historically and found an application to the sphere of culture, still maintaining the named distinction as a timeless axiom for legal reasoning.

In order to have an insight into the two different poles of conceptualising culture in the history of international law – *persons* and *properties* – there are two legal concepts that are historically significant: “cultural property” and “cultural rights”. The following

insight tends to highlight the elements that might serve for eventual synthesis within the analysed concept of intangible cultural heritage.

### *Cultural Property*

The conceptualisation of cultural objects in international law as a property to preserve came hand in hand with realising that there is an eventual possibility of their destruction. The consciousness of necessary preservation thus stimulated the elaborating of international legal instruments. The process of conceptualising cultural objects of legal protection was a crucial precondition for the elaboration of legal norms. A new emerging branch of international law enhanced the elaboration of concepts devoted to objects of culture: this was the law of war.<sup>7</sup> Despite the fact that the terms 'culture' or 'cultural' were not yet introduced into the legal language of international law, there are several examples of the law of war that reflect the way objects – that we can currently name as cultural – were perceived and described:

1) In the second part of the 19th century, in the International Declaration concerning the Laws and Customs of War (Brussels Declaration 1874) it was said in Article 8 that: "The *property*<sup>8</sup> of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as *private property*. All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, archives,<sup>9</sup> works of art and science should be made the subject of legal proceedings by the competent authorities." It has to be noted that private property was considered as generally protected including during the military offences of the time of war.

2) Another example of later sources of international law of war, elaborated at the beginning of the 20th century, was devoted specifically to war in the air – the Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, of 1923 drafted by a commission of jurists at The Hague. The rules stated in Article 26: "The following special rules have been adopted to permit the States to ensure a more efficient protection of *monuments* of great historic value situated on their territory."<sup>10</sup> This legal regulation used "monument" as the central legal concept concerning the protection of a particular property. The concept of monument may be perceived as referring to a cultural significance even if not explicitly so stated in the legal norm.

The overall aim of elaborating the law of war certainly was not to preserve and safeguard monuments and properties of cultural value but to establish equal and just rules for war. Among other issues was the question of defining what should not be destroyed, what should be maintained because of having a recognised value.<sup>11</sup> The protection of cultural *objects* continued in international law with concepts like "cultural institution", "cultural treasure", "cultural value" – to mention the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact) of 1935; and further "cultural property", "cultural heritage" both used in the Hague convention of 1954, the Convention for the Protection of Cultural Property in the Event of Armed Conflict. They were devoted to the preservation of testimonies of human creativity, still very

much being concentrated on the protection of *property*. Since 1954 new international legal instruments have been elaborated for the protection of cultural *objects*. Nevertheless only the historically initial use of concrete legal concepts of cultural expressions are mentioned here as being of interest for illustrating historical developments of the continuous conceptualisation of culture in law.

Legal protection of *objects* of particular cultural value was complemented with another branch of conceptualising culture in law that emerged with a gradual elaboration of cultural rights. It was a domain of legal protection oriented towards a possibility to defend the link between a *subject* (or subjects) and culture.

### *The Cultural Rights of Persons*

The other fundamental pole of the conceptualisation of culture in international law was grounded in the understanding of the significance of cultural identity and the involvement of persons in cultural practices. Thus it was the maintenance of cultural expressions, activities and practices of *persons* that was recognised as legally protected. This legal thinking was directed towards the protection of the cultural rights of persons. This approach was present in the history of international law even before the elaboration of international human rights law:

1) Article 38 of the International Declaration concerning the Laws and Customs of War (Brussels Declaration 1874) stated: "Family honour and rights, and the lives and property of persons, as well as their religious convictions and their practice, must be respected." The legal protection of family honour, family rights, religious conviction and their practice can be interpreted as examples of attributing cultural rights to *persons*.

In the more recent history of international law there are two fundamental legal sources that have to be mentioned concerning the conceptualisation of cultural rights: the Universal Declaration of Human Rights of 1948 and the International Covenant on Economic, Social and Cultural Rights of 1966. Both of these legal instruments use the legal term "cultural" without defining what was at that time understood by the concept of culture itself.

2) The Universal Declaration of Human Rights of 1948 states in Article 22: "Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Article 27 of the same declaration states: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."

3) The International Covenant on Economic, Social and Cultural Rights of 1966 states in Article 1: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Further, Article 15 declares: "The States

Parties to the present Covenant recognise the right of everyone to take part in cultural life.”

The cited sources of international law position cultural rights as one of fundamental human rights, although there are difficulties of interpretation (Niec 2000; Prott 2000). The named legal instruments use the concepts “cultural life” and “cultural development”. In this line the United Nations Committee on Economic, Social and Cultural Rights indicate: “The expression ‘cultural life’ is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future” (UN ECOSOC 2009: 3). The Committee particularly underlines that the implementation of the cited Article 15 “should go beyond the material aspects of culture (such as museums, libraries, theatres, cinemas, monuments and heritage sites) and adopt policies, programmes and proactive measures that also promote effective access by all to intangible cultural goods (such as language, knowledge and traditions)” (ibid.: 17).

Cultural rights, as rights protected and to be claimed subjectively,<sup>12</sup> cover rights to have access to and create both tangible and intangible cultural goods, including traditions and folklore. The possibility to claim cultural rights subjectively is acknowledged to everyone and people, thus persons or subjects of law. The concept of everyone is to be interpreted as “the individual or the collective; in other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such” (UN ECOSOC 2009: 3). Thus, cultural rights may be claimed individually or collectively (Prott 2000: 275–277).

In the cited legal norms there is no direct reference specifically to traditional cultural life, right to pursue a practice of expressions of folklore, traditional knowledge or skills, etc. Nevertheless the interpretation of the legal concepts used – “cultural life” and “cultural development” – can be broad and open to cultural expressions having their roots in traditional culture, being a part of what is currently called intangible cultural heritage. Moreover, prominence is also given to the existence of a “perception of cultural heritage as an element of fundamental human values and as a *dimension of human rights*” (Francioni 2007: 234).

A *person’s* rights to practice traditional culture and folklore, transmit traditional knowledge and skills – to participate in cultural life in a general manner – are covered by the human rights documents devoted to cultural rights. The rights to cultural identity, intangible heritage and association with a cultural community are already identified by certain authors as being a part of the catalogue of cultural rights (Niec 2000: 292–300). There are also particular examples in international law of giving an explicit identification of cultural rights of certain groups. For instance, the United Nations Declaration on the Rights of Indigenous Peoples adopted by the General Assembly on 13 September 2007. The Article 11 of this declaration states: “Indigenous peoples have the right to practice and revitalise their cultural traditions and customs.” This is a particular example, devoted to indigenous peoples, but it also serves as explicit example of eventual interpretation of the general terms of cultural rights.

The position of the concept of intangible cultural heritage within law remains a question to be answered in order to understand how the concept of intangible cultural heritage is to be interpreted with regard to the named poles – *person* and *property* – of conceptualising culture. The legal protection of cultural property and cultural rights

has been conceptually separated, and further analysis will be required to know whether intangible cultural heritage will also pursue this distinction.

#### INTANGIBLE CULTURAL HERITAGE: *PERSON* AND *PROPERTY*

The Convention on the Safeguarding of the Intangible Cultural Heritage is a part of international legal system, which is pragmatically constructed and in which every single component is linked to other parts of the system. Thus, the *syntactic* aspect of international law is to be considered. The text of the Convention on the Safeguarding of the Intangible Cultural Heritage affirms the necessity for the legal system to be coherent and functional and for existing legal practice to ensure its functionality. This can be observed for instance within the reference to the international human rights law. Article 2 of the Convention on the Safeguarding of the Intangible Cultural Heritage says: "For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments".

The created concept of intangible cultural heritage has to be positioned within the existing network of legal concepts. The division of the conceptualising of culture in international law into the separate poles of *person* and *property* becomes questionable when reflecting on positioning intangible cultural heritage. The named poles lose their clear conceptual borders. The concept of intangible cultural heritage is a challenge that focuses reflection on a possible conceptual synergy. There is also the question of clarity within law. Every new legal concept raises the question of whether it can be classified as a part of an existing more general and abstract legal concept, as does the intangible cultural heritage.

The Convention on the Safeguarding of the Intangible Cultural Heritage proposes an explanation of intangible cultural heritage that corresponds to a form of vast description lacking a proper definition of the legal term.<sup>13</sup> The description of intangible cultural heritage in the Convention states: "For the purposes of this Convention, the 'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognise as part of their cultural heritage." The link between intangible cultural heritage and the concepts of *property* and *person* is complex:

- 1) If intangible cultural heritage is interpreted as a *property* – the question is whether intangible cultural heritage has any objective existence alienated from *person*; and is there a distinction line possible between the named heritage and persons inheriting and transmitting it. It certainly has to be admitted that active and permanent involvement of a person, group or community is essential for the existence of intangible cultural heritage. The specificity of intangible cultural heritage lies within its substantial link to a person, a group or a community. Intangible cultural heritage is a set of cultural expressions that have no living existence without a person, a group or a community actively practising, creating and reproducing it, through performances of traditional music, oral expressions of knowledge, know-how of craftsmanship, storytelling, etc. The question may arise on the documentation as a recog-

nised safeguarding measure. Despite the fact that documentation can be crucial for maintaining information about cultural practices, traditional knowledge, etc., it has to be acknowledged that documentation is an insufficient means for assuring living traditions. Thus it might be considered that intangible cultural heritage is a specific type of property that is inalienable from its bearers, persons, but which can be transmitted, inherited, given from person to person. This property has no identifiable author, meaning that tradition and culture have symbolic authorship over these cultural expressions.

2) If protection of intangible cultural heritage is interpreted as a defence of the cultural rights of *persons* – individuals or groups, communities – it does not give an answer on the role of the legal concept of intangible cultural heritage and the separate legal instrument adopted – the Convention. In addition, the legal term “heritage” is confusing. The concept of heritage was already used in the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989. Its preamble stated “*Considering that folklore forms part of the universal heritage of humanity*”. This introduced in law the idea of the traditions and folklore as heritage, which is a broad concept. However, the concept of heritage has certain passive semantic aspect of inheriting something already existent, although intangible cultural heritage has its living existence only in active and continuous involvement of persons and its recreation. This raises an illustrative question: is intangible cultural heritage something to have, or is it something to do?

There is a significant aspect to consider. According to the Convention on the Safeguarding of the Intangible Cultural Heritage there is no fixed or finished existence to intangible cultural heritage, it is constantly in transformation, practised and recreated by *persons*. As stated in the Convention, “This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.” The substance of intangible cultural heritage is recreated, and has no fixed existence: there is nothing fixed to protect. The concept of intangible cultural heritage legally is at the crossroads of heritage and creativity (Cornu 2004). This has legal consequences for understanding what the possibilities and specific legal instruments are for its protection. The synthesis of heritage and creativity is complex and difficult to position in the legal system (*ibid.*) thus the concept of intangible cultural heritage is a challenge for existing system of legal concepts.

There is another aspect to take into account for the current reflection, and that is the *pragmatic* aspect of the legal instrument in question – the goal and function of the Convention on the Safeguarding of the Intangible Cultural Heritage. The text of the Convention gives several answers: to safeguard intangible cultural heritage, to ensure respect for, and raise awareness of intangible cultural heritage. The named goals are to be perceived as axiological. It is a recognition that the intangible cultural heritage is something worth safeguarding and respecting, or something of value. Thus there is a perception of values underlying law. This leads to acknowledgement of the fact that these legal regulations have primarily an axiological function: they reflect the existing values within a society and, according to the *pragmatic* particularity of law, strengthen

their role. The axiological functionality of the Convention nevertheless does not solve the conceptual issue of the interpretation of intangible cultural heritage as a legal term. The interpretation of this concept is to evolve, both in jurisprudence and legal doctrine. The process of conceptualising intangible cultural heritage in law is still under way.

## CONCLUSION

The semantic, syntactic and pragmatic aspects of law are significant for an insight into the characteristics of legal instruments, underlining the meaning of legal concepts, their interrelation and positions within the system of law and the functions of law within a society. The three named aspects all have an impact on tracing the interpretation and application of the concept of intangible cultural heritage.

The legal concept of intangible cultural heritage is to be perceived within the system of law as a synergy of the poles of conceptualising culture in law – *person* and *property*. The history of the conceptualising of culture in international law has led gradually to the establishment of a network of legal concepts and the practice of their interpretation, both having the named polar structural characteristics.

The interpretation of the legal concept of intangible cultural heritage also raises a wider debate on the use of legal concepts, the conceptualisation of culture in law and the role of law as a source for analysis of the gradual changes within the general reflection on culture.

## NOTES

1 Citation translated into English: “If the concept of property moves away from corporal things, its borders are also put under question from the side of the concept of person” (Batiffol 1979: 13).

2 It has to be noted that the domain covered by the concept of intangible cultural heritage has been partly referred to by a previously adopted soft-law instrument – the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989.

3 According to a theory of constituting discourses, elaborated by French linguist and one of the founders of the French school of discourse analysis Dominique Maingueneau and his colleague Frédéric Cossutta, law has a constituting character and the legal discourse is a fundamental stone of discursive reality where other discourses, like political, academic and other, have their conceptual roots in legal terminology, legal definitions, legal descriptions, etc. As it is explained in this theory, these discourses “take charge of what could be called the *archeion* of discursive production in a given society. This Greek word, the origin of Latin *archivum*, has, from our viewpoint, an interesting polysemy: derived from *arché* (‘source’, ‘principle’, ‘order’, ‘power’), the *archeion* is the centre where authority sits, a group of magistrates, and public archives too. So, this notion of *archeion* binds tightly founding operations in and by discourse, the determination of a place for legitimate speakers and addressees, and the management of memory.” (Maingueneau 1999: 183). This theory characterises the founding role of the legal discourse within the interrelation of diverse discourses but it also has to be recognised that legal discourse always has an external source of legitimisation. See also Maingueneau, Cossutta 1995.

4 The role of values in law has been an issue of discussion in diverse schools of legal philosophy: a speaking example is the opposition between legal positivism (for an example of refer-

ence see Kelsen 1996) and, for instance, legal axiology that defends the role of values within law, including the value of justice as a fundamental basis for any legal norm (see Vassilie-Lemeny 2000; on the discussion devoted to the link between values and legal norms see Ferry 2002: 43–91).

5 There are several uses of the concept of culture; one, relatively recent, defines culture as “the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs” (UNESCO Universal Declaration on Cultural Diversity, 2001, fifth preambular paragraph). This definition emphasises the social character of culture, which is significant to acknowledge for the understanding of the concept of intangible cultural heritage.

6 Human life perceived under concepts of individuality, subjectivity and personality poses a legally unsolved and still discussed issue of two boarders of a human being: birth and death. The legal issue to answer is whether birth and death are the borderlines for existence of a person. The answer whether a human body before his birth and after death is to be treated legally as a person, or as a thing, certainly provokes completely different legal consequences. For reflections on the legal perception of the human body beyond both boarders of human life see Wagner 2005; Cornu 2009.

7 “An early limitation on this unfettered treatment of cultural objects began to emerge in the middle of the eighteenth century in order to promote respect for and eventual restitution of State property, such as archives, State libraries and art collections, which became the object of specific provisions in the treaties ending the Thirty Years War (Westphalia 1648), in the Oliva Treaty between Sweden and Poland (1662) and in the Treaty of Whitehall between England and the Low Countries (1662)” (Francioni 2007: 223).

8 Here and further the *Italic* is used in citations of international legal instruments for underlining chosen keywords.

9 The notion of archives was added in 1880.

10 The rules also stated that: “A State, if it deems it suitable, may establish a protected area around such monuments situated on its territory. In time of war, such areas shall be sheltered from bombardments. [...] The protected area may include, in addition to the space occupied by the monument or the group of monuments, a surrounding zone, the width of which may not exceed 500 meters from the periphery of the said space.” We can observe that there is a similarity with the buffer zone principle used for the world heritage that is protected under the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage.

11 It is also worth mentioning that the use of value as a legal term is ambiguous. The term is used both as a criterion for protecting and as an object of protection, thus having unclear meaning. It is also an open axiological reference in legal texts that may be followed by varied interpretations.

12 The legal norms stating subjective rights contribute to the construction of the legal subjectivity of a person. Thus there is an anthropological essence of law to perceive humanity within the concepts of individuality, subjectivity and personality (Supiot 2005: 48).

13 Despite many efforts to define the concept of intangible cultural heritage (see for instance van Zanten 2002), the Convention does not propose more than a description including explicit domains of manifestation of intangible cultural heritage which repeat the same concepts – practices, expressions, knowledge – as those used for the main description, thus lacking a pertinent form of definition. For a very detailed overview on the elaboration process of the Convention see Lankarnani 2002.

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