

# Introduction

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ON 3 AND 4 November 1966, the city of Florence was engulfed by water from the River Arno. The city's ancient treasures, its buildings, paintings, sculptures, manuscripts, as well as its inhabitants and their everyday lives became subsumed by raging torrents of water. During a period of significant social, political, economic unrest and turbulence in many societies worldwide, the reactions to these possible losses in Florence were immediate and consistent – and global. Assistance and support to halt and repair the damage and destruction came from all quarters. One of the most enduring images was the people – who came to be known as the *angeli del fango* ('angels of mud') – who formed human chains with the locals as they endeavoured to recover, what could be recovered, from the bowels of the *Biblioteca Nazionale Centrale* on the banks of the Arno which houses centuries' old archives now laden with mud. All felt a deep connection to the city and the repository of human knowledge and creativity that it represented, regardless of their nationality or age. The potential loss and efforts to counteract it spoke to our common heritage and shared humanity, unbounded by time or space.

Much has been written about this historical period, the 1960s and 1970s, during which the disastrous events occurred. It has usually been defined as a time of unrest, disruption and disjuncture – as convulsive as the waters that spread through Florence. Yet, in this upheaval there are innumerable examples of people coming together, united efforts, and common purposes – from the local to the global communities. If the 1966 Florence and Venice floods represent an international communal response to threats to our common heritage, then there are similar responses covering environmental calamities and large-scale human rights abuses which reinforce this sentiment. Public, grassroots responses would within a few short years become translated into multilateral instruments covering human rights, cultural heritage, and the environment.<sup>1</sup> They provide evidence in

<sup>1</sup> The leading exemplars being the International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, entered into force 23 March 1976, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (ICESCR), GA Res 2200A(XXI), 16 December 1966, entered into force 3 January 1976; Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), 16 November 1972, in force 17 December 1975, 1037 UNTS 151; and Declaration of the UN Convention on the

international law of an understanding of an international community unfettered by time or territory, and not exclusively defined by the rights and interests of States.

Modern international law has long been dominated by the State. However, it has been apparent for decades that this bias is unrealistic and untenable in the contemporary world. Despite the seemingly intractable inadequacies and blockages engendered by long-established international institutions, there has been a proliferation of international organisations covering every facet of human activity, which reinforce our global interconnectedness, but also an international society still largely defined by States. However, there is a need to look beyond (or below or within) these institutional developments.

The rise of the notion of common goods challenges this dominance. They may prove to be more fundamental and enduring in defining our conception of an international community. Whether they are common values (like human rights, rule of law, etc) or common domain (including the environment, cultural heritage, space, and so forth), they speak to an emergent international community beyond the society of States and the attendant rights and obligations of non-State actors. This collection of essays details how the idea of common goods in three key areas – human rights, culture and the environment – of international law is pushing the boundaries of this field of law toward a more humanist outlook, while shaping our contemporary understanding and commitment to an international community.

The first part of this book considers the common unifying value: human rights, evidenced by its growing influence on (and reshaping of) the field of international law generally. This was first articulated with the rise of the modern State and its relationship with its citizens. By the mid twentieth century, the veil of the statehood was lifted as individuals were held responsible for gross violations of human rights within States. By the twenty-first century this was reinforced by a commitment to human rights permeating almost every facet of international law and the working of international organisations. Bruno Simma in his chapter entitled *Critical Reconstruction of Human Rights in ICJ's Jurisprudence*, details how despite the inbuilt bias towards States in its constitutive statute, the World Court has implicitly from the beginning and more explicitly in recent years engaged human rights. For Simma, the constructive (and recognisably limited) role the ICJ can play is to mainstream human rights, that is, 'integrating human rights into the fabric of international law'. Simma acknowledges that this is distinctive from the more inventive role undertaken by specialist, regional human rights courts and commissions. It is this

characteristic which is explored by Abdulqawi Yusuf in his essay on the African human and peoples' rights framework, entitled *The Progressive Development of Peoples' Rights in the African Charter and in the Case Law of the African Commission of Human and Peoples' Rights*. Yusuf centres on what renders the African Charter unique among multilateral human rights instruments, its explicit articulation of peoples' rights. He notes that despite its initial slow start, the jurisprudence of the Commission and now the Court has in the last two decades enabled a more fully-formed interpretation of peoples' rights in international law generally.

The remaining four essays in Part I examine how human rights law is interacting with and shaping key fields of public international law. Federico Lenzerini in his chapter, *From Jus in Bello to Jus Commune Humanitatis: The Interface of Human Rights Law and International Humanitarian Law in the Regulation of Armed Conflicts* examines the jurisprudence of the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights and the European Court of Human Rights concerning human rights violations during (more often than not internal) armed conflicts. Such conflicts invoke two distinct spheres of international law, international humanitarian law (which is *lex specialis*) and human rights law, which remains operable. Lenzerini's analysis highlights how recent case law arising from these regional human rights bodies is humanising the impact and conduct of war, and thereby complements the aim of international humanitarian law. The next two contributions focus on the influence of human rights law on State responsibility. Riccardo Pisillo Mazzeschi's chapter entitled *Human Rights and the Modernization of International Law* focuses on the primary rules of State responsibility and how human rights law is redefining rights and obligations beyond States to encompass non-State actors, particularly individuals. While Natalino Ronzitti's contribution entitled *Reparation for Damage Suffered as a Consequence of Breaches of the Law of War* centres on the secondary rules of State responsibility. He lays bare the continuing limitations of international humanitarian law in addressing individual claims for compensation for harm inflicted during armed conflict which may be more beneficial addressed through human rights law (and international criminal law). Ernst-Ulrich Petersmann in his essay entitled *Why Justice and Human Rights Require Cosmopolitan International Economic Law* takes up these similar concerns and extends them to the ever increasing ambit of international economic law to argue that it protects economic freedom and rule of law for States but also for their individual citizens and their human rights.

The second part focuses on cultural heritage as a common good and the attendant growing body of international law governing its protection. Culture and its manifestations have long attracted protection at the international level from the earliest copyright conventions to its specialized treatment in international humanitarian law in the nineteenth century.

What has altered in the intervening period is the articulation of a specialist body of instruments which cover movable and immovable, tangible and intangible heritage and which aligns this with the protection of cultural diversity and human rights. The first three essays in Part II explore this latter development. In my contribution entitled *Human Rights and Cultural Heritage in International Law* considers the idea of cultural diversity as a common good by detailing the evolving relationship between culture, heritage and human rights in international law. I show that the international community is increasingly acknowledging that that cultural diversity is a source of peace and stability rather than disunity and strife. This shift has influenced how cultural heritage is protected in international law away from the dominance of national interests to ensuring the contribution of all peoples. Siegfried Wiessner in his chapter, *The Cultural Dimension of the Rights of Indigenous Peoples*, details this shift with particular reference to indigenous peoples. Drawing on developments in domestic law and international law across a range of instruments and culminating in the 2007 UN Declaration on the Rights of Indigenous Peoples, Wiessner lays out the intrinsic importance of culture to the enjoyment of human rights generally by indigenous communities and their members. While Lucas Lixinski in his contribution, *Heritage for Whom? Individuals' and Communities' Roles in International Cultural Heritage Law*, takes this thread further by examining the interplay and sometimes competing roles of individuals and communities in the protection of cultural heritage in international law and the possible utility of human rights law in resolving such tensions.

The final three contributions in Part II explore how international law conceptualizes the protection of cultural heritage as a common good. Tullio Scovazzi in his chapter, *Underwater Cultural Heritage as an International Common Good*, argues that while there is growing consensus of *erga omnes* obligations for the protection and conservation of the cultural heritage of all peoples, this remains contested in respect of underwater cultural heritage. Scovazzi maintains that the main blockage to this development is the UN Convention on the Law of the Sea which provides that underwater archaeological and historical heritage must be preserved and disposed for 'the benefit of mankind as a whole' but nonetheless gives precedence to salvage law and other rules of Admiralty. He argues that only the specialist Convention for the Protection of Underwater Cultural Heritage adopted under the auspices of UNESCO can properly protect the interests of the international community in underwater heritage. Valentina Vadi in her chapter entitled *Public Goods, Foreign Investments and the International Protection of Cultural Heritage* explores in detail a point touched upon by Scovazzi. By examining the interaction between direct foreign investment and cultural goods as public goods, Vadi suggests that foreign investment law may offer enrichment to the international protec-

tion of cultural heritage but cautions that these developments must conform with human rights and other international law norms. Alessandro Chechi in his chapter entitled *New Rules and Procedures for the Prevention and the Settlement of Cultural Heritage Disputes* highlights the growing body of norms, formal and informal procedures and diverse fora for the settlement of the often fraught disputes concerning movable cultural heritage. He advocates a multidimensional approach as the most effective means of ensuring the protection of cultural objects as common goods.

The third part revisits the idea of the environment as a common good through the critical deliberation of multilateral efforts covering climate change, land degradation, and desertification, and the polar regions, and current developments in fields as diverse as international investment law and EU law. Whilst the environment probably may take prominence within global public consciousness today, it is the latest of our trio of themes which has defined a space within the corpus of international law. The first three contributions consider the articulation of a unifying trope to tie multilateral efforts in distinct areas of environmental protection. Massimiliano Montini in his *Revising International Environmental Law through the Paradigm of Ecological Sustainability* argues for an overarching paradigm to guide environmental law efforts. He suggests that the notion of 'ecological sustainability', that is, the duty to protect and restore the integrity of ecosystems which support life should underpin all international environmental law. A complementary theme is taken up by Ben Boer in his chapter, *Land Degradation as a Common Concern of Humankind*. Focusing on soils with particular reference to land degradation and desertification, Boer considers the evolution of the concept of 'common concern of humanity' in international environmental law and compares this with the idea of 'common goods'. He concludes that this concept is an important component in the protection of soils when combined with established international law principles. Patricia Vigni examines the concept of the 'common concern' of the international community in respect of the Arctic and Antarctica in her chapter entitled *Protecting the Environment of Polar Regions*. She reviews the effectiveness of the State-centred system governing the Arctic with the international regime covering the Antarctica and argues that there are lessons to be learnt from both which would serve to protect the environment more generally.

The next cluster of chapters in Part Three coalesces around the interplay of the environment and human rights law. Riccardo Pavoni in his chapter, *Public Interest Environmental Litigation and the European Court of Human Rights*, challenges the European Court's jurisprudence in the protection of the environment because of its emphasis on individual interests. He shows that by allowing public interest litigation and recognising collective concerns, the Court would further allow its work to flourish in the field of environmental law whilst more effectively protecting the environment as a

common good. Christine Bakker in her chapter, *Children's Rights Challenged by Climate Change: Is a Reconceptualization Required?*, provides an important point of intersection between key international law concepts such as inter-generational equity, the notion of common good and human rights law. By covering a longitudinal environmental concern through the lens of the human rights of children, she explores the notion of common good as not being wed to the present but something that is also for the benefit of future generations. While Ottavio Quirico in his chapter entitled, *A Human Rights-Based Approach to Climate Change? Insights from the Regulation of Intangible Cultural Heritage*, brings the three thematic threads of the volume together. He explores how States' obligations in respect of cultural human rights, and related protection of cultural heritage, impact upon their international obligations to combat the present day and potential long term impact of climate change.

The final two contributions to Part III consider the interrelation between international law and EU Law for the protection of the environment as a common good. Emanuela Orlando in her chapter, *Public and Private in the International Law of Environmental Liability*, lays out the complexities and possibilities of holding persons and entities responsible and obtaining reparations for environmental damage through public and private law avenues. She shows that national and international regimes are not mutually exclusive but can and should coexist and operate cooperatively. Elisa Morgera in her chapter entitled *Protecting Environmental Rights through the Bilateral Agreements of the European Union* shows how the EU can be more effective when finalising bilateral agreements, which cover environmental impact assessment, corporate environmental accountability, traditional knowledge, climate change and forest protection, to ensure coherence between human rights and environmental protection in its external relations and take a leadership role in environmental protection.

Every book, including the present one, is the result of the efforts of its author(s). Sometimes we tend to consider a book only for the explicit message offered by its text, but if one reads between the lines, it is usually possible to detect that those lines are the result of a number of activities and events which have intertwined with each other, eventually resulting in what is visible for the eyes of the reader. Usually, however, the 'invisible' says much more than what results from the black characters. The present book is the result of the personal experiences and efforts of all the contributors who have provided a chapter, but beyond the amalgam of contributions composing the book there is a unifying line – a *trait d'union* – which provides such an amalgam with a precise and well evident coherence. Obviously, such a *trait d'union* is represented by the theme of the safeguarding of *common goods* in international law. Each of the contributors to the present book has devoted at least a notable part of her or his professional life to the study of certain features belonging to this theme.

However, there is one person in particular who embodies the latter in its *entirety*: Francesco Francioni. During his academic career he has been able to show that the three common goods represent – each of them – a component of a unique whole deserving to be evaluated in its entire complexity, rather than considering them separately from each other. His epilogue at the end of this volume best encapsulates this ethos.

This volume represented the contributions and deliberation arising from a conference hosted by the Academy of European Law, European University Institute, in Florence in mid-2012. The conference was designed as a celebration and forensic analysis by leading scholars in fields engaged by the oeuvre of Francesco Francioni, at the time of the completion of his tenure as Professor of International Law and Human Rights at the Law Department, EUI. We thank all the participants and contributors who have been unflinchingly enthusiastic in their commitment to this project – we recognize that it is reflective of the esteem and affection with which Francesco is held by his colleagues and students through the decades of service to the Academy and the field of international law.

It is no accident that our introduction starts with the story of the 1966 Florentine floods. It is a story which we have heard told numerous times by Francesco – who was a first-hand witness to its destruction – observed from the hills overlooking Piazzale Michelangelo on the eve of the completion of his legal studies at the University of Florence. He is both an embodiment of the city's humanist traditions but also unique in seeking to explore and engage the world beyond it. These characteristics are evident in the themes and range of contributions to this volume which are designed around key concerns of his work during this academic career to date.

Francesco has always understood learning to be a collective process – being open, curious and receptive to the views and contributions of colleagues and students alike – to what has gone before, with a deep and critical understanding of the present, and consciousness of our legacy for future generations. A true teacher equips others with a way of understanding the world which is constructive and positive – not with predetermined answers which are impossible in any milieu because of flux and diversity but an ethical outlook which makes one open to others, to other points of view, to changing realities whilst knowing oneself and remaining true to oneself and what it means to be human – with all one's frailties and gifts. Francesco is a rare example of a true teacher and for this we owe him an abiding debt of gratitude.

