

## WHERE'S THE COMMUNITY? CONTOURS, PLACE, AND THE ROLE OF COMMUNITIES IN INTERNATIONAL LAW AND PARTICIPATORY GOVERNANCE

This panel was convened at 9:00 a.m. on Thursday, April 7, 2022 by its moderator, Yousuf Aftab of Enodo Rights, who introduced the speakers: Elena Baylis of the University of Pittsburgh School of Law; Julia Emtseva of the Max Planck Institute; Ezequiel Heffes of Geneva Call; and Wai Wai Nu of Women's Peace Network.

### THE PHILANTHROPIC COMMUNITY AND INTERNATIONAL LAW

*By Julia Emtseva\**

In my contribution today, I will focus on the role of the philanthropic community in promoting international law. For at least a century, philanthropists, mainly from the Global North, have been engaged in the discussions of the development of international law and its principles and sometimes, they even shaped these discussions. Yet, the contributions by the philanthropic community very often stay in the shadows, especially among international lawyers. Private foundations have been increasingly influential and very often if not for their support, we might not have seen the flourishing of some international institutions or international legal concepts. Here are a few examples.

One of the well-known contributions by philanthropists to international law was the \$1.5 million donation by Andrew Carnegie, the founder of the Carnegie Foundation, for building the Peace Palace in the Hague in 1904.<sup>1</sup> A rather less-known contribution was done by the founders of the Rockefeller Foundation. When in 1946, the United Nations was looking for a place to locate its headquarters, John D. Rockefeller Jr. bought a plot of land in Manhattan, New York City, and donated it to the organization.<sup>2</sup> The price of the plot was \$8.5 million (approximately \$128 million in 2022 dollars).

The year 2005 has a special place in the history of international law, because the World Summit happened that year. This Summit was the birthplace of the concept of the responsibility to protect (R2P). Yet, few know that the MacArthur Foundation, a U.S.-based private foundation, provided funding for the establishment of the Commission on Intervention and State Sovereignty.<sup>3</sup> It was an ad hoc commission instigated by the Canadian government and composed of the UN General Assembly member states—whose primary goal was to answer the question of whether it is appropriate for states to take coercive (military) action against another state for the purpose of protecting people at risk in that other state. The work of the Commission culminated in the 2001 report “The

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<sup>1</sup> David S. Clark, *American Participation in the Development of the International Academy of Comparative Law and Its First Two Hague Congresses*, 54 AM. J. COMP. L. 11 (2006).

<sup>2</sup> *United Nations Headquarters Building, New York*, MORE TRAVEL TIPS, at <http://travel-tips.s3-website-eu-west-1.amazonaws.com/holiday-travel-tips-new-york-ny-United-nations-headquarters-UN-HQ-building.htm>.

<sup>3</sup> *A Conversation with Jonathan Fanton: Advancing International Justice*, MACARTHUR FOUND. (May 29, 2018), at <https://www.macfound.org/press/40-years-40-stories/conversation-jonathan-fanton-international-justice>.

Responsibility to Protect.”<sup>4</sup> The MacArthur Foundation also funded outreach programs on the responsibility to protect for NGOs around the world that greatly increased knowledge of this principle and likely influenced subsequent UN votes endorsing it.<sup>5</sup>

Another, not less important example for the development of international law, again relates to the work of the MacArthur Foundation. Their funding enabled civil society groups from around the world to participate in the drafting of the International Criminal Court’s Rome Statute.<sup>6</sup> These groups then played a key role in promoting the Statute in their domestic jurisdiction and spreading information about the importance of its ratification. The supported NGOs were also advising governments on how to integrate the Statute into domestic legislation—the development of which also influenced the rise of universal jurisdiction laws around the globe.

There are many examples like these in relation to the philanthropic contribution to the development of international law. Yet, why do so few know and talk about these contributions, especially within the field of international law?

I believe that the philanthropic community has not received enough attention from international lawyers and the reasons for that might be twofold. First, given the state-centrism of human rights obligations, lawyers tend to forget that behind almost each and every “victory for human rights” there is someone pushing for it. The philanthropic sector, i.e., private foundations and their intermediaries, such as NGOs, remain the hidden force driving human rights agendas. Secondly, philanthropic involvement in the issues related to the protection of human rights has its own “dark sides” and thus, both foundations and the actors they support, most probably prefer to stay rather humble with regard to philanthropic contributions to human rights achievements.

Speaking about the “dark sides” of philanthropy, it is necessary to mention that usually, private foundations step in and design or fund certain programs when states are unwilling or unable to solve global challenges. Private foundations break out from state-centered international law by taking over the provision on the protection of human rights and initiating court litigation,<sup>7</sup> creating programs to fight impunity,<sup>8</sup> establishing organizations to increase the quality of social and economic living standards,<sup>9</sup> and much more. Moreover, it seems that major international actors like the United Nations also recognize the power and importance of philanthropic foundations. This recognition is expressed in various partnership programs,<sup>10</sup> calls for participation and assistance,<sup>11</sup> as well as in mentioning that private actors, especially those with extensive financial capabilities, also have international legal obligations.<sup>12</sup>

<sup>4</sup> International Commission on Intervention and State Sovereignty Report, *The Responsibility to Protect* (Dec. 2001), at <https://web.archive.org/web/20070731161527/http://www.iciss-ciise.gc.ca/report2-en.asp>.

<sup>5</sup> *A Conversation with Jonathan Fanton*, *supra* note 3.

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., GAËTAN CLIQUENNOIS, *EUROPEAN HUMAN RIGHTS JUSTICE AND PRIVATISATION: THE GROWING INFLUENCE OF FOREIGN PRIVATE FUNDS* (2020).

<sup>8</sup> See, e.g., *Gender, Racial, and Ethnic Justice*, FORD FOUND., at <https://www.fordfoundation.org/work/challenging-inequality/gender-racial-and-ethnic-justice/criminal-justice>.

<sup>9</sup> See, e.g., GAVI, *The Vaccine Alliance*, at <https://www.gavi.org>.

<sup>10</sup> See, e.g., United Nations Economic and Social Council Event, *Partnering with the Philanthropic Community to Promote Education for All*, at <https://www.un.org/ecosoc/en/content/%E2%80%9Cpartnering-philanthropic-community-promote-education-all%E2%80%9D>.

<sup>11</sup> See, e.g., UN Office of the High Commissioner for Human Rights, Michelle Bachelet, *Human Rights Philanthropy: Past, Present, and Future Challenges* Roosevelt House Public Policy Institute, Hunter College, New York (Apr. 4, 2022), at <https://www.ohchr.org/en/statements/2022/04/human-rights-philanthropy-past-present-and-future-challenges-roosevelt-house>.

<sup>12</sup> *Id.*

Earlier this year, Michelle Bachelet, the UN High Commissioner for Human Rights, was invited to speak at the conference, where I also had the chance to participate. Her speech struck me, especially the part where she said, “it is not only Governments who are bound to these [human rights] obligations. This is also where private sector, philanthropic and civil society actors can all commit to working together in a more collaborative and effective way.”<sup>13</sup> This is a very interesting development in the rhetoric of international organizations, who perhaps cannot afford to rely only on the help coming from their member states and now are trying to create a discourse of expanded human rights obligations—non-state-centered obligations (although she remains ambiguous in the second sentence and talks about the commitment, and not obligation). Additionally, Bachelet was concerned about the reduction of philanthropic contributions to her office and its detrimental effect on the work of the UN in general. Yet we, international lawyers, despite all these developments with regard to the cooperation of public and private sectors, missed this moment when philanthropic actors became inherent to the human rights movements and international law in general. We should finally catch up and focus on the philanthropic community, as many things are now dependent on its funding, expertise, and innovative approaches.

Yet, we should not only focus on the positive aspects of philanthropic involvement in human rights issues. We should be wary of the question of whether the communities, where foundations and their partners operate, welcome these rather untraditional agents of human rights. It is a common criticism of philanthropy that it is white, colonialist, and too blind to see that their values and interests might not align with those of the local communities. The perception of what is good by givers and the reverse reality of what is actually needed for the affected societies remains a big problem. What I learned from my conversations with people working at private foundations is that they very often chose to work with international human rights organizations, which are usually based in the Global North but work on the issues of the Global South. Big foundations are often hesitating to build direct partnerships with grassroots organizations. The reasons for that are rather obvious—the risks associated with cooperation with a big Global North organization are likely to be lower than with a local small organization. This carefulness also contributes to the increasing biases related to the “westernization” of the world while this is not what the world, and especially societies affected by gross human rights violations, need.

Moreover, Philip Alston, the former UN Special Rapporteur on Extreme Poverty and Human Rights, emphasized in his report of July 2020 that “philanthropy jeopardizes governments’ capacity to set priorities, provide funding, and implement programs.”<sup>14</sup> The states’ practice to tax labor more than capital and their openness toward tax reduction for those who contribute to human rights leads to dire losses of public budgets and thus, states have to rely more and more on private donations. This circulation of private funds back into private hands leads to a weakened public system that cannot exercise its obligations toward citizens.

Those are all reasonable concerns and the philanthropic community has to do more to reflect and reshape their practices. Yet we, international lawyers, can also contribute to overcoming these challenges. Apart from paying more attention to the activities of the philanthropic community in the sphere of human rights, we need to rethink the current framework of international law, in particular human rights law. By remaining state-centric, international law is disconnected from reality. It overlooks important players—philanthropic actors—who have the power to shape discourses and the practice of international (human rights) law. It is finally the time to incorporate them into international legal frameworks. Thus, international lawyers should carefully approach

<sup>13</sup> *Id.*

<sup>14</sup> GA Res. 44/40, The Parlous State of Poverty Eradication. Report of the Special Rapporteur on Extreme Poverty and Human Rights, para. 75 (Nov. 19, 2020).

philanthropic involvement and try to come up with a framework, which would help deal with the pitfalls of human rights philanthropy.

Such a framework should focus on decreasing potential negative influence on human rights but also preserving the participation of philanthropic actors. International law could help to tackle these complexities. For instance, international lawyers might have to invest more into thinking that private actors willing to fulfill human rights obligations should also take all responsibilities coming with that. More simply, if a private actor implies fulfilling international legal obligations that were created for states, it should also be ready to answer for its performance. Discussions on the status of private actors in international law should continue and we should switch our focus from the technical classification of subjects and objects to the question of who actually participates in the global process of decision making and who performs what functions. The speech by Michelle Bachelet, described above, shows us that field actors, such as the UN, already see private actors as bearers of the same obligations toward human rights protection.

I hope that my short speech sparked further interest in the topic and during our future meetings in DC and elsewhere, we will collectively tackle the issues related to philanthropy and international law and create a solution for better engagement between the philanthropic community, the international law community, state community, and others.