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PHILANTHROPIC JUSTICE: THE ROLE OF PRIVATE FOUNDATIONS IN TRANSITIONAL JUSTICE PROCESSES

*Julia Emtseva**

ABSTRACT

In recent years, political transitions have become a major area of interest to private actors, including philanthropies. More and more philanthropic foundations have chosen to donate money to support transitional justice processes across the globe. However, philanthropies often take on not only the role of a funder but also the role of an active participant in transitional justice (TJ) mechanisms. They push for the building of long-lasting partnerships with state authorities and international organizations, and, sometimes, take over and administer certain transitional justice processes. As a result, philanthropic foundations wield considerable power in transitional justice, especially when the state cannot or will not act. Given the significant and growing role of philanthropy in both established democracies and states in transition, it is necessary to look more closely at issues of philanthropic involvement in TJ processes. Their activity remains largely outside the margins of international law scholarship. This article aims to make philanthropic contributions a more visible object of scholarly scrutiny.

This article will introduce the legal problems related to “philanthropic justice,” including concerns that speak for the need of more attention to the phenomenon. It will first show how private foundations engage in transitional justice mechanisms and spell out the concerns related to this philanthropic engagement in transitional justice. It will proceed with a discussion about the potential reasons why private foundations engage in international legal matters such as transitional justice. Further, the article will explore the United Nations’ legal frameworks on cooperation with the philanthropic sector. The last substantial part will cover the

* Research Fellow/PhD Candidate, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany. Preliminary ideas for this paper have been presented at the American Society of International Law Annual Meeting 2021 and consequently published in 115 PROCEEDINGS OF THE ASIL ANNUAL MEETING 295–297 (2021). The earlier draft of this paper was presented at the ASIL Mid-Year Meeting 2021 and I am very grateful for all the comments I received there. Special thanks to the brilliant editorial team of the Michigan Journal of International Law for their careful edits and thoughtful comments.

issues of responsibility of private actors under international law and why it is important in the context of transitional justice.

INTRODUCTION

The events of February 2022 have shaken the Western community. Russia's full-scale invasion of Ukraine mobilized extraordinary support from the international community. Besides foreign governments sending weapons to defend Ukraine, the philanthropic community has stepped up to collect funds for the emergency response to the Russian assault, including for investigations of war crimes committed during this brutal international conflict.¹ The Open Society Foundations ("OSF"), the world's third largest philanthropic fund,² pledged \$25 million U.S. dollars to help Ukrainian civil society groups with post-conflict reconstruction, among other things.³ With this sum, the OSF launched the Ukraine Democracy Fund, which will work toward attracting more donations from private foundations and other private sector entities.⁴ Mark Malloch-Brown, president of the OSF, stated that Russia's president Vladimir Putin is not afraid of NATO or nuclear weapons, but he is afraid of "free and flourishing democracy on his doorstep."⁵ It is indeed interesting to see how the philanthropic community is united by the idea of supporting human rights and how it wishes to be part of Putin's fears – thriving democracies.

This example of how the philanthropic community is engaged in public discourse is far from unique. Private foundations are increasingly taking democracy and justice-related initiatives into their hands. They evolved from being mere donors into actors inherent to international legal discourse, including human rights, promotion of democracy, and, more specifically, transitional justice ("TJ"). Transitional justice is a multifaceted process, comprised of various judicial and non-judicial mechanisms that help victim

1. Liz Longley, *Philanthropy Responds: A Round-up of Efforts to Support Ukraine*, *Inside Philanthropy* (Mar. 3, 2022), <http://www.insidephilanthropy.com/home/2022/3/7/philanthropy-responds-a-round-up-of-efforts-to-support-ukraine>.

2. *The Open Society Foundations and George Soros*, *OPEN SOC'Y FOUNDS.* (Dec. 1, 2020), <http://www.opensocietyfoundations.org/newsroom/open-society-foundations-and-george-soros>.

3. *Open Society Foundations Launches \$25 Million Ukraine Democracy Fund*, *PHILANTHROPY NEWS DIG.* (Mar. 7, 2022), <http://philanthropynewsdigest.org/news/open-society-foundations-launches-25-million-ukraine-democracy-fund>.

4. *Id.*

5. *Open Society Launches Fund for a Free and Democratic Ukraine*, *OPEN SOC'Y FOUNDS.* (Mar. 3, 2022), <http://www.opensocietyfoundations.org/newsroom/open-society-launches-fund-for-a-free-and-democratic-ukraine>.

societies come to terms with past injustices.⁶ TJ mechanisms include accountability for grave human rights violations, diligent investigations of such violations, truth-seeking about past events, reparations payments to victims, and institutional reforms that would guarantee that violations will never happen again. As this article showcases and argues, private foundations are intervening directly or through other organizations in some above-mentioned TJ mechanisms.⁷ Looking at these examples of “philanthropic justice,” this article focuses on the growing role of philanthropic foundations as funders, designers, and administrators of various TJ processes.

For the purposes of the following discussion, private foundations are understood as a type of non-profit organization that are established and funded by a single individual, family, or corporation. Private foundations have the purpose of providing philanthropic support to specific causes (like TJ processes) or organizations (like the United Nations (“U.N.")). Private foundations operate independently from the government and are typically governed by a board of directors appointed by the founders.

Over the last few decades, more and more philanthropic foundations have donated money to support TJ processes across the globe. For instance, the MacArthur Foundation, a United States-based independent foundation, spends millions of U.S. dollars on yearly endowments to local and international criminal justice causes, which constitute part of broader TJ efforts.⁸ The Foundation is also one of the donors and supporters of the International Center for Transitional Justice, which is a leading international non-governmental organization (“NGO”) in the field.⁹ The MacArthur Foundation’s contribution to the development of transitional justice as a field cannot be underestimated. In the late 1990s, the Foundation advocated for the establishment of a permanent international tribunal to deal with international crimes.¹⁰ It lobbied for this idea at several U.N. meetings and funded various civil society groups to enable their participation in the drafting of the Rome Statute.¹¹

The activities of philanthropic foundations, namely assisting the documentation of international crimes, funding reparations programs or criminal tribunals, filing cases before domestic and international courts, and facilitat-

6. International Center for Transitional Justice, *Global Transitional Justice: An Overview* (2009) <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>.

7. See Part I.

8. *Criminal Justice*, MACARTHUR FOUND., <http://www.macfound.org/programs/criminal-justice> (last visited Sep 16, 2022).

9. *International Center for Transitional Justice*, MACARTHUR FOUND., <http://www.macfound.org/grantee/international-center-for-transitional-justice-35992> (last visited Sept. 16, 2022).

10. *A Conversation with Jonathan Fanton: Advancing International Justice*, MACARTHUR FOUND. (May 29, 2018), <http://www.macfound.org/press/40-years-40-stories/conversation-jonathan-fanton-international-justice> (last visited Jun. 30, 2022).

11. *Id.*

ing truth-seeking, cannot be viewed as a mere support to transitioning states, nor can private foundations be viewed as agents of governments to deal with gross human rights violations, because no one delegated these tasks to them. Moreover, international law does not envisage such obligations for foundations and other private actors. Private foundations assume the role of justice designers and administrators on their own—promoting international law without being subject to it.

This article aims to portray a larger spectrum of philanthropic activities in the field of TJ. It argues that the mischaracterization of foundations as participants acting at the direction of states or international organizations might overlook an important development—the shift of international justice administration from public hands into the hands of private actors. As mentioned, international law does not bestow private actors with international obligations, and thus, does not provide guidance or regulation for such activities.¹² Therefore, it is important to look at what exactly philanthropies do in the context of transitional justice and consider which existing legal instruments can help explain, and even regulate, philanthropic justice.

Before jumping into the legal analysis of philanthropic justice, Part I of this article discusses in detail how philanthropies engage with various TJ mechanisms around the globe. Some examples include when a private foundation acts as a donor and when such an actor goes beyond providing financial assistance to also provide human resources to a state, either directly or through an NGO or international organization (“IO”). Part II offers a glance at some possible shortcomings of and concerns regarding philanthropic justice, including lack of accountability, transparency, and regulation of philanthropic activities in the justice field.

Part III analyzes private involvement in TJ from the perspective of philanthropic foundations under the theory that they act as “corporate keepers of international law.”¹³ Multiple factors are discussed, including the motivation of the philanthropic sector to engage in TJ and whether such “corporate keeping” can be considered as a positive development for international law. Further, Part IV considers how the U.N., a principal body in various TJ arrangements, deals with private foundations that either sponsor the U.N.’s activities or help administer them. Part V, in turn, discusses the attribution of responsibility for internationally wrongful acts and confirms that current international law is not yet designed to fully reflect on the multiplicity of actors that are engaged in the administration of public functions, such as TJ. Part VI offers concluding remarks and suggestions for further research in the field.

12. See generally ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006).

13. See Jay Butler, *The Corporate Keepers of International Law*, 114 AM. J. INT’L L. 189 (2020).

I. PHILANTHROPIC INVOLVEMENT IN TRANSITIONAL JUSTICE MECHANISMS

The fundamental goal of TJ is to ensure that in any democracy, whether emerging from a period of armed conflict, violent authoritarianism or, already well-established, TJ processes occupy the central role when deciding the state's behavior toward the violated population. This goal, however, is not just mere guidance for states, but the creation of an international legal obligation to guarantee and realize the rights of victims to truth, reparations, and justice. The necessity for TJ processes puts immense pressure on transitioning governments to search for effective and efficient solutions for fulfilling their obligations and reconciling affected societies while under tight resource constraints.

The private sector, and especially private foundations, has found ways of helping transitioning societies meet their TJ expectations and amplify its capacity to provide essential resources for processes that otherwise would likely have gone unfunded. As this part will later show, the establishment of many criminal tribunals, truth commissions, and reparations funds was made possible partly by philanthropic contributions. The assistance of such actors is vital to building, *inter alia*, universal jurisdiction cases.¹⁴ Furthermore, the concept of strategic litigation has become central to organizations dealing with the protection of human rights.¹⁵ International criminal law scholars recognize the importance of the activities of private actors, naming them as “key agents motivating universal jurisdiction trials” and highlighting that they uphold the victims' right to access justice.¹⁶

Michelle Burgis-Kasthala offers an interesting term, “entrepreneurial justice,” which refers to the involvement of private actors in public services when a public body is unable or unwilling to take over justice processes.¹⁷ In other words, entrepreneurial justice is “the identification of a gap or weakness in existing public accountability fora and the creation of a new private or privatized organization and/or approach that seeks to address (at

14. See, for example, Steve Kostas & Eric White, *Building Roads to Justice in Syria*, OPEN SOC'Y JUST. INITIATIVE (Dec. 17, 2019), <http://www.opensocietyfoundations.org/newsroom/open-society-launches-fund-for-a-free-and-democratic-ukraine>, for how the Open Society Justice Initiative worked to support the case-building efforts in the case against two former officials in Syria's state security service who were standing trial before a German regional court.

15. *Strategic Litigation Impacts: Insights from Global Experience*, OPEN SOC'Y JUST. INITIATIVE (Oct. 2018), <http://www.justiceinitiative.org/publications/strategic-litigation-impacts-insights-global-experience>.

16. Devika Hovell, *The Authority of Universal Jurisdiction*, 29 EUR. J. INT'L L. 427, 449 (2018).

17. Michelle Burgis-Kasthala, *Entrepreneurial Justice: Syria, the Commission for International Justice and Accountability and the Renewal of International Criminal Justice*, 30 EUR. J. INT'L L. 1165, 1167 (2019).

least part of) this gap.”¹⁸ She points out that, although scholarship on entrepreneurship currently is mostly occupied by the disciplines of business, economics, and management, it can also be applied to law and justice since the very essence of being “entrepreneurial” is finding innovative approaches to fill existing gaps.¹⁹ Therefore, philanthropic foundations that identify and fill the gap of justice administration and funding to some extent replace public bodies by utilizing tools and resources that are not available to those bodies.²⁰

Philanthropic assistance to TJ mechanisms can take different forms. The first and perhaps most widely used form is the direct transfer of money from a private entity to a state or IO, or directly to a certain TJ mechanism.²¹ As practice shows, financial support is critical when it comes to establishing a TJ mechanism in a developing or less-developed country and, thus, most TJ mechanisms rely on foreign international financial assistance to initiate or establish a court, truth commission, or a reparations fund.²² Additionally, money can move not only from the private to the public sector, but also from private donors to NGOs. The International Center for Transitional Justice is an example of such a partnership between private actors, where an NGO is responsible for administering some portions of transitional justice in different countries.²³ Private assistance could also be technical, meaning that a private entity can offer non-monetary resources, such as experts or technology. In this section, some examples will be given of how the philanthropic sector cooperates with the public sector in espousing transitional justice by supporting criminal trials, funding truth commissions, allocating money to special reparations funds and victim support programs, changing discriminatory laws, and bringing domestic legal systems in compliance with international standards.

A. Trials

Transitional justice is commonly associated with punishment for grave crimes, and therefore, primarily with trials.²⁴ Indeed, one may argue that

18. *Id.*

19. *Id.* at 1174–76.

20. *Id.* at 1176.

21. See e.g. how the philanthropic community is trying to mobilize financial sources from private entities for justice purposes Delivering Access to Justice for All Needs Sustainable Financing, <https://www.justiceinitiative.org/voices/legal-access-all-who-pays-it> (last visited Feb 25, 2023).

22. Paige Arthur & Christalla Yakinthou, *Changing Contexts of International Assistance to Transitional Justice*, in TRANSITIONAL JUSTICE, INTERNATIONAL ASSISTANCE, AND CIVIL SOCIETY: MISSED CONNECTIONS 1, 7 (Paige Arthur & Christalla Yakinthou eds., 2018).

23. *How We Work*, INT’L CTR. TRANSITIONAL JUST., <http://www.ictj.org/how-we-work> (last visited Sep 20, 2022).

24. RUTI TEITEL, TRANSITIONAL JUSTICE 27 (2000).

criminal trials play a “foundational role in laying the basis for a new liberal order.”²⁵ Although it is presumed that trials are a necessary part of a successful transition, they are quite an expensive endeavor and heavy burden to a state recovering from big losses related to conflict or corruption in its old regime.²⁶ The International Criminal Court (“ICC”) had a 2022 budget of €154,855,000 Euros, and although it was established to manage several trials, the enormity of this sum demonstrates how costly the administration of criminal justice can be.²⁷ The *ad hoc* International Criminal Tribunals for Rwanda (“ICTR”) and the former Yugoslavia (“ICTY”) consumed roughly fifteen percent of the UN’s budget, with estimates of the average cost of each trial varying between \$10 and \$15 million USD per person accused.²⁸ The Special Court for Sierra Leone, in turn, has spent roughly \$23 million USD per trial.²⁹

Nonetheless, Carla Del Ponte, former Prosecutor for the ICTY, thinks that these numbers are not high and are the price the international community must pay to prevent future atrocities and assure regional stability.³⁰ She has said: “[I]nternational justice is cheap...Our annual budget is well under 10% of Goldman Sachs’ profit during the last quarter. See, I can offer you high dividends for a low investment.”³¹ In her 2005 address at the Goldman Sachs office in London, Del Ponte further added that:

The UN is dealing with many issues that the private sector is not able to deal with. It is dangerous for companies to invest in a State where there is no stability, where the risk of war is high, and where the rule of law doesn’t exist. This is where the long term profit of the UN’s work resides. We are trying to help create stable conditions so that safe investments can take place. In short, our business is to help you make good business, in the expectation that a stable,

25. *Id.* at 28.

26. See *The Comparative Cost of Justice at the ICC*, DENV. J. INT’L L. & POL’Y (Mar. 26, 2012), <http://djilp.org/the-comparative-cost-of-justice-at-the-icc>.

27. *About the Court*, INT’L CRIM. CT., <http://www.icc-cpi.int/about/the-court> (last visited Nov. 16, 2022).

28. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 42, U.N. Doc. S/2004/616 (Aug. 23, 2004); Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 15 HUM. RTS. BRIEF 6, 6 (2008).

29. Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT’L L. 395, 432 (2011).

30. Carla Del Ponte, Prosecutor, Int’l Crim. Tribunal for the Former Yugoslavia, *The Dividends of International Criminal Justice*, Address at Goldman Sachs (Oct. 6, 2005) (transcript available at http://www.icty.org/x/file/Press/PR_attachments/cdp-goldmansachs-050610-e.htm).

31. *Id.* Goldman Sachs is an American multinational investment bank and financial services company headquartered in New York City.

reasonably prosperous democracy will be a factor of peace and stability in the world.³²

Del Ponte's statements could be taken in two ways: Either the former Prosecutor wanted to highlight that the ICTY serves as a public guarantor for private interests, or she wanted to call upon private entities to donate more to the U.N. since the Organization has the capacity to provide some level of security in unstable or emerging markets.³³ Indeed, given the incredibly high amount of money needed to prosecute sometimes even just one perpetrator, it might be naive to assume that war-torn and vulnerable countries are regularly able to build new criminal systems from scratch without donors' support. For instance, in December 1994, the Rwandan government and the United Nations Development Program ("UNDP") estimated that the restart of the state's justice system would cost \$66 million USD.³⁴ Only one month later, in January 1995, Rwanda received \$44.6 million USD from various donors for human rights and the administration of justice.³⁵ By the end of 1995, an additional \$28 million USD had been pledged for use in criminal justice matters alone.³⁶ The judicial system in Rwanda was brought back into functioning and it also underwent several post-genocide reforms that were, according to some scholars, rather successful.³⁷

Although there are no records that philanthropies donated or otherwise supported the ICTY or ICTR, the philanthropic flow in the more recent criminal tribunals is easy to spot in these institutions' annual reports. The financial statements of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") show that the OSF donated money to the tribunal.³⁸ The same activity can be seen in the annual financial report of the Special Court for Sierra Leone ("SCSL"), to which OSF pledged an unknown amount of money from 2009–2012.³⁹ The OSF, together with the Ford Foundation, the

32. *Id.*

33. Sara Kendall, *Donors' Justice: Recasting International Criminal Accountability*, 24 LEIDEN J. INT'L L. 585, 590 (2011).

34. KRISHNA KUMAR, DAVID TARDIF-DOUGLIN, CAROLYN KNAPP, KIM MAYNARD, PETER MANIKAS, & ANNETTE SHECKLER, U.S. AGENCY FOR INT'L DEV., *REBUILDING POSTWAR RWANDA: THE ROLE OF THE INTERNATIONAL COMMUNITY* 14 (1996).

35. *Id.*

36. *Id.*

37. See, e.g., Nicola Palmer, *Inside the Rwandan National Courts*, in *COURTS IN CONFLICT: INTERPRETING THE LAYERS OF JUSTICE IN POST-GENOCIDE RWANDA* 53 (2015).

38. See *ECCC Financial Outlook As at 15 March 2017*, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, <http://eccc.gov.kh/sites/default/files/ECCC%20Financial%20Data%20as%20at%2015%20Mar%202017.pdf> (last visited May 7, 2020).

39. See, e.g., JON MOADEH KAMANDA, *EIGHTH ANNUAL REPORT OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE* 53 (2010–2011), <http://ilj.org/wp-content/uploads/2016/08/Eighth-Annual-Report-of-the-President-of-the-Special-Court-for-Sierra-Leone.pdf>. There are no indications of the received endowments in concrete numbers in the annual reports of the Court. More reports will be analysed in the course of this research.

MacArthur Foundation, the Oak Foundation, and the Rockefeller Foundation, supported the so-called “Special Court Legacy” initiatives that aspired to bolster the rule of law, strengthen domestic judiciary capacity, conduct fair trials, and more.⁴⁰ The SCSL started relying on private funding in the second year of its establishment, when the Court accepted money from the Ford Foundation in 2005 and used it to hire fundraising consultants.⁴¹ In the SCSL’s third year of operation, it organized several fundraising activities hosted by philanthropic foundations, including briefings for civil society organizations, which shows how close the cooperation between the Court and its philanthropic partners was.⁴²

Philanthropies support criminal justice by both funding tribunals and working directly or through NGOs and IOs to hold those who committed serious crimes accountable. One of the many examples is the Oak Foundation, a family-led foundation with headquarters in Geneva, which in 2021 alone allocated more than \$9 million USD to ending impunity for gross human rights violations.⁴³ TRIAL International, a Swiss-based NGO that investigates serious human rights violations and initiates trials before domestic courts based on the principle of universal jurisdiction, also regularly receives donations from the Oak Foundation.⁴⁴ Another example is how the OSF funds the Commission of International Justice and Accountability (“CIJA”), a private non-profit organization registered in the Netherlands that devotes itself to establishing the individual criminal responsibility of perpetrators in conflict and post-conflict areas.⁴⁵ The CIJA steps in when public actors, such as government authorities, or international bodies, like the ICC, are unable or unwilling to initiate an investigation and prosecution due to jurisdictional, expert, or risk constraints.⁴⁶ Evidence collected by the CIJA serve as a crucial base for some universal jurisdiction trials.⁴⁷

One might say that criminal tribunals that are dealing with gross human rights violations have become a “marketplace of security and development objectives” and an investment option for private-sector actors like private

40. *Id.* at 47.

41. Sara Kendall, *Marketing Accountability at the Special Court for Sierra Leone*, in *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW* 387, 396 (Charles Chernor Jalloh ed., 2013).

42. *Id.*

43. OAK FOUND., ANNUAL REPORT 2021 29 (2022), <http://oakfnd.org/wp-content/uploads/2022/02/Annual-Report-2021-FINAL-16.3.pdf>.

44. *Our Donors*, TRIAL INT’L, <http://trialinternational.org/who-we-are/our-donors> (last visited Sep 20, 2022).

45. COMMISSION FOR INTERNATIONAL JUSTICE AND ACCOUNTABILITY, *CIJA 2019 / 2020 Annual Report* (2020), p.15 <https://cijaonline.org/s/CIJA-Annual-Report-2019-2020-8w3r.pdf>.

46. *Id.*

47. *See, e.g., Koblenz Court Issues Verdict in the Case of Anwar Raslan*, COMM’N FOR INT’L JUST. & ACCOUNTABILITY (Jan. 13, 2022), <http://cijaonline.org/news/koblenz-syria-verdict-anwar-raslan>.

foundations.⁴⁸ The 2007 conference “Donor Strategies for Transitional Justice: Taking Stock and Moving Forward” adds to the point that “donor-driven justice” does not only exist in academic scholarship.⁴⁹ Most participants at this conference represented either wealthy states or charitable foundations, like the Oak Foundation and Aegis Trust.⁵⁰ Kendall argues that “[f]rom their positions as donors, states and foundations are encouraged to assess whether the aims of an international criminal tribunal might fit with their particular policy objectives in development or in the ‘rule of law.’”⁵¹ Therefore, one should not neglect the role of philanthropies in shaping the TJ discourses around the globe. These actors should receive more attention from scholars, including international lawyers.

There are many ways in which the acceptance of non-state contributions might compromise the independence, neutrality, and integrity of a criminal tribunal. A philanthropic foundation could interfere with tribunals’ policies, financial decisions, indictments, and verdicts, and could, in general, harm the tribunal’s reputation. The fact that criminal tribunals are funded through private donors and supported by private entities, however, does not automatically and necessarily mean that the results of such assistance will always undermine judicial independence, the integrity of proceedings, or the fairness of criminal sentences.⁵² However, there is a legal gap that needs to be addressed to ensure that philanthropic engagement is transparent and accountable for undue influence in the form of private gains and political benefits.

B. *Truth-Seeking*

Whether to remember or forget past injustices is one of the hardest questions that an affected society might face during the transition period. Many choose to commemorate tragic historic events in order to prevent similar atrocities from reoccurring.⁵³ Usually, they do so by depicting the trau-

48. Kendall, *supra* note 33, at 591.

49. *Id.*

50. *Id.*

51. *Id.*

52. Socio-legal scholars have argued that the involvement of both state and non-state actors from the Western hemisphere could have negative impact on how transitional justice mechanisms are designed in societies where Western conceptions of justice are not default, where the conceptions might conflict with the perception of accountability within local populations. See, e.g., Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT’L L. 1 (2010); MARK A. DRUMBL, *Legal Mimicry, in ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 123 (2007).

53. See, e.g., Brandon Hamber, Liz`evenko, & Ereshnee Naidu, *Utopian Dreams or Practical Possibilities? The Challenges of Evaluating the Impact of Memorialization in Societies in Transition*, 4 INT’L J. TRANSITIONAL JUST. 397, 399 (2010).

matizing experiences in official reports.⁵⁴ One of the most popular, and arguably successful, examples of a truth commission was the South African Truth and Reconciliation Commission that was set up by the post-apartheid South African government to help people process and address the apartheid-related violence and human rights violations.⁵⁵

Though truth commissions are often described as non-judicial mechanisms, they are still usually established by governments that adopt necessary legislation for their creation.⁵⁶ Such legislation requires truth commissions to conduct their work while abiding by lawful, fair, and effective practices.⁵⁷ Although these commissions are generally cheaper than criminal tribunals, they are still very financially burdensome for transitioning states.⁵⁸ The average cost of a serious truth commission may vary between \$5 to \$20 million USD,⁵⁹ and even the Office of the High Commissioner for Human Rights has acknowledged that most such commissions have to rely on international support in order to successfully fulfill their mandates.⁶⁰

The current trend for funding truth commissions is that national governments provide a portion of funding and leave the rest to be covered by foreign actors.⁶¹ For instance, the nine-year Ugandan truth commission repeatedly ran out of money and had to switch offices and let go of staff members, and, as a result, had to cease operations several times.⁶² The commission did not deliver its final report until after the Ford Foundation pledged almost \$100,000 USD.⁶³ The Haitian truth commission faced similar problems in its one year existence,⁶⁴ but, unlike the Ugandan commis-

54. See, e.g., Michelle Bachelet, U.N. High Comm'r Hum. Rts., Office of the High Comm'r for Hum. Rts. [OHCHR], Comment on Colombian Truth Commission's Final Report (June 28, 2022), <http://www.ohchr.org/en/statements/2022/06/colombian-truth-commissions-final-report>.

55. TRUTH & RECONCILIATION COMM'N, <http://www.justice.gov.za/trc> (last visited Sep 21, 2022).

56. Fabián Salvioli (Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence), *Role and Responsibilities of Non-State Actors in Transitional Justice Processes*, ¶ 55, U.N. Doc. A/HRC/51/34 (July 12, 2022).

57. *Id.*

58. Tricia Olsen, Leigh Payne, & Andrew Reiter, *At What Cost? The Political Economy of Transitional Justice*, 6 TAIWAN J. DEMOCRACY 165, 171 (2010).

59. See PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 270 (Eric Nelson ed., 2nd ed. 2010) (noting the relative costs of the South African Truth and Reconciliation Commission, Peruvian Commission, and Ghanaian Commission).

60. OHCHR, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: REPARATIONS PROGRAMMES 6 (2008), <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>.

61. HAYNER, *supra* note 59, at 217.

62. *Id.*

63. *Id.*

64. *Id.*

sion, it lacked qualified administrative and management personnel, including qualified lawyers and other experts who could lead the process.⁶⁵ Private foundations again helped and offered their support to the commission in delivering the report by supplying their own staff.⁶⁶ The Ford Foundation and the OSF also contributed to the Guatemalan commission, providing both funds and logistical support.⁶⁷ The Ford Foundation has maintained an entire program dedicated to transitional justice, with a special focus on truth commissions.⁶⁸ The Ford Foundation hired several consultants in the early 2000s to conduct research in the field of TJ and, by 2003, had assisted twenty-nine transitioning countries.⁶⁹

Similarly, various truth commissions in other regions of the world had trouble finishing their mandates due to the shortage of funding or staff. For instance, the Liberian Truth and Reconciliation Commission was established in 2005 to address past human rights abuses from the Liberian civil wars of 1979-2003,⁷⁰ and has been funded mainly by the Liberian government and supported by the U.N.⁷¹ Yet, since its inception, the Commission has faced myriad financial and operational problems, namely “lack of transparency and proper process in hiring staff, awarding contracts, and other fiscal matters.”⁷² As a result, the Commission has not been able to properly collect evidence to prosecute perpetrators and had to cease public hearings and postpone statement-taking processes, leading to delays in the completion of the final report.⁷³ One reason why the Commission finally concluded its mandate was funding from the Open Society Initiative West Africa (“OSIWA”). The OSIWA is a part of Open Society Foundations, active in ten countries of West Africa, and focuses on strengthening democratic institutions and civic participation in decision-making.⁷⁴ The OSIWA awarded \$279,606 U.S. dollars to the Liberian Truth Commission to help build its institutional capacity and hold different types of meetings within and out-

65. *Id.*

66. *Id.*

67. *Id.* at 333.

68. WILLIAM KOREY, TAKING ON THE WORLD’S REPRESSIVE REGIMES: THE FORD FOUNDATION’S INTERNATIONAL HUMAN RIGHTS POLICIES AND PRACTICES 259–61 (2007).

69. *Id.* at 261.

70. Carla De Ycaza, *A Search for Truth: A Critical Analysis of the Liberian Truth and Reconciliation Commission*, 14 HUM. RTS. REV. 189, 190 (2013).

71. TRANSITIONAL JUST. WORKING GRP. & CATH. JUST. & PEACE COMM’N, GENERATING RECOMMENDATIONS FOR THE LIBERIAN TRUTH AND RECONCILIATION COMMISSION: CIVIL SOCIETY REGIONAL CONSULTATIONS 5 (2008).

72. De Ycaza, *supra* note 70, at 196.

73. *Id.*

74. *What We Do*, OPEN SOC’Y INITIATIVE WEST AFRICA [OSIWA], <http://www.osiwa.org/about-us/what-we-do> (last visited Oct. 15, 2020).

side Liberia.⁷⁵ Moreover, the Commission had no in-house legal team and, thus, lacked the necessary expertise to make legal evaluations. As a result, it had to refer to experts from the private sector.⁵² Again, a private foundation played a crucial role in the operations of the truth commission whose work might have influenced the reconciliation in the Liberia's fragmented society.

There are many examples of philanthropic donations buried in the annual reports of the truth commissions. However, it is concerning that very often, both commissions and donors do not display the details of such contributions, such as the exact monetary amounts, conditions under which such donations were made, and how a commission decided to spend the funding received. Truth-seeking is extremely important for victim societies, and any assistance might come in handy when a country faces problems financing this important endeavor. Yet, as mentioned earlier, a truth commission should abide by principles of fairness, transparency, and lawfulness. Heavy involvement of philanthropic foundations in truth commissions might undermine the legitimacy of the findings, especially at crucial stages when a commission should make choices of either accepting help, and whatever conditions that might come with it, or ceasing its operations.

C. Reparations

Another costly endeavor for a transitioning state is the emergence of reparations claims. Guaranteed by international law, reparations are an integral part of reckoning with the past.⁷⁶ Reparations have traditionally been viewed primarily as an obligation of states. Additionally, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provide some instructions of what reparations might entail, however, "they refer repeatedly to States rather than non-State actors."⁷⁷ Similarly to criminal tribunals and truth commissions, philanthropic foundations have not overlooked the TJ pillar of reparations, despite the fact that the obligation to design and fund reparations programs does not lie on them.

75. EXECUTIVE MANSION OF THE REPUBLIC OF LIBERIA, SUMMARY OF OPEN SOCIETY INSTITUTE (OSI) AND OPEN SOCIETY INITIATIVE FOR WEST AFRICA (OSIWA) PROJECTS IN LIBERIA 2, http://www.emansion.gov.lr/doc/Summary_of_SFN_Liberia_Funding.pdf.

76. See e.g. DINAH SHELTON, *Reparations for Historical Injustices*, in REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 0 (Dinah Shelton ed., 2006), <https://doi.org/10.1093/acprof:oso/9780199207534.003.0015> (last visited Feb 25, 2023).

77. Salvioli *supra* note 56, ¶ 80. See generally G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006).

Establishing and running truth commissions shows that there are two core models of financing reparations programs.⁷⁸ The most frequently used framework is the creation of a reparations fund that is sponsored by both domestic and external funding.⁷⁹ When a truth commission chooses this financial plan for reparations, it often recommends seeking alternative funding, such as from private actors like individuals and foundations.⁸⁰ The second model of financing reparations uses funds exclusively from the public budget—a model that is not the most sustainable for most of the states that are experiencing budgetary problems during political transitions.⁸¹

Furthermore, a great variety of victims leads to a great variety of needs. The overall cost of a reparations program or fund cannot be calculated with a simple formula such as (number of victims × compensation amount), and it is important not to turn victims only into material beneficiaries. Reparations should include physical and mental health support, educational opportunities, symbolic benefits, and, most importantly, guarantees that experienced sufferings will not repeat. Transitioning states might face not only a lack of funding when establishing a reparations program, but also a shortage of resources such as medical and educational staff, experts, and necessary facilities. Additionally, a state's lack of resources can result in the state postponing the implementation of reparation programs, because governments might have different priorities regarding how the budget is spent. For instance, the post-apartheid government in South Africa bought two submarines for its navy, while refusing to compensate victims of apartheid and claiming that the recommendations of the Truth and Reconciliation Commission were too expensive.⁸² The government of Peru had a similar attitude towards the expansion of its navy and was reluctant to pay reparations deemed necessary by the Peruvian Truth and Reconciliation Commission for the victims of state and rebel groups' human rights abuses.⁸³ This shows that funding of reparation programs is often not a priority for some transitioning states as there could be many conflicting expenditures like strengthening the military and ensuring national security.

Taking everything into consideration, it is difficult to design and implement reparations programs, especially when only relying on public re-

78. Alexander Segovia, *Financing Reparations Programs: Reflections from International Experience*, in *THE HANDBOOK OF REPARATIONS* 650, 660 (Pablo De Greiff ed., 2006).

79. *Id.*

80. *Id.*

81. *Id.*

82. Brandon Hamber & Kamilla Rasmussen, *Financing a Reparations Scheme for Victims of Political Violence*, in *FROM RHETORIC TO RESPONSIBILITY: MAKING REPARATIONS TO THE SURVIVORS OF PAST POLITICAL VIOLENCE IN SOUTH AFRICA* 52, 59 (Brandon Hamber & Thoki Mofokeng eds., 2000).

83. OHCHR, *supra* note 60, at 30.

sources.⁸⁴ Consequently, to fulfill its obligations under international law, a state must be open to receiving external funding, including from philanthropies. However, private sponsorship of reparation programs may entail not only a financial and social relationship between donors and a state, but also a similar relationship between donors and victims. Indeed, the acceptance of private aid has the potential to expand reparations funds and, therefore, to allow redress to a wider circle of victims. In contrast, private funding is unlikely to provide a sustainable solution for a transitioning state because, as soon as the agendas of public and private actors diverge, the state is at risk of either not being able to comply with its obligations toward victims or of shifting its transitional justice strategy in favor of a donor. To give an illustration of how philanthropic foundations are engaged in reparation programs or funds, it is worth examining examples from the ICC Trust Fund for Victims and the new memorialization programs in the framework of the Black Lives Matter movement in the United States.

The ICC chose an interesting scheme for its complex victim compensation system: the Trust Fund for Victims (“TFV”).⁸⁵ The Fund is a hybrid mechanism: it acts as a reparation-implementing agency while simultaneously acting in a very autonomous manner, which is characterized by the system of its funding.⁸⁶ The TFV accepts donations from governments, IOs, private individuals, and corporations, and this money is stored separately from the Court’s other funds.⁸⁷ The TFV actively promotes itself on the donor market and openly calls private donors to allocate funds.⁸⁸ Interestingly, private donors, unlike public ones, have the option to fund only specific projects of the Fund.⁸⁹ This might be a sign of the TFV and ICC recognizing that private donors might have their own priorities when becoming involved with reparations programs.

Frederic Megret suggests that the Fund has extensive discretionary powers, which can be beneficial but also detrimental for victims.⁹⁰ The TFV’s funds are allocated in the framework of official reparations programs, issued by the ICC or designed by the Fund itself.⁹¹ The TFV can de-

84. David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations As Tools of Extraordinary Justice*, 87 WASH. UNIV. L. REV. 1043, 1043 (2010).

85. Rome Statute of the International Criminal Court art. 79, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

86. Frederic Megret, *Justifying Compensation by the International Criminal Court’s Victims Trust Fund: Lessons from Domestic Compensation Schemes*, 36 BROOK. J. INT’L L. 123, 125 (2010).

87. Int’l Criminal Court, Regulations of the Trust Fund for Victims, ¶ 21, ICC Doc. ICC-ASP/4/Res.3 (Dec. 3, 2005), http://www.icc-cpi.int/sites/default/files/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf.

88. Megret, *supra* note 86, at 186.

89. *Id.*

90. *Id.*

91. *Financial Information*, THE TR. FUND FOR VICTIMS, <http://www.trustfundforvictims.org/en/financial-information> (last visited Dec 10, 2022).

rive sources from private actors “whose contribution is hard to subsume under anything resembling a responsibility model.”⁹² Therefore, the TFV walks on thin ice when it accepts endowments from private actors, including philanthropies, who might be interested in a particular region or conflict and who, according to the regulations, have the full right to direct where their money is allocated. This control over allocation of money is one way in which donors might impose their ideologies and development strategies, even when these are not aligned with the transitional justice plan of a victim society.

Memorialization programs taking place in the United States serve as an example of how private actors can actively participate in the reconciliation of societies fragmented by grievances. The nationwide Black Lives Matter movement triggered demands for transitional justice.⁹³ Although the United States can likely be viewed as not the classical transitioning state, TJ tools are required in order for the country to address centuries of abuse and marginalization of Black Americans.⁹⁴ Some of the frequently used forms of reparations are commemorations and memorialization,⁹⁵ which are now widely used by American philanthropies.

The Andrew W. Mellon Foundation, which is the largest humanities philanthropy in the United States, initiated a memorialization program aimed at better reflecting diversity inside the country and highlighting the painful experiences of marginalized people.⁹⁶ In October 2020, the Foundation pledged to spend \$250 million USD on this program, which will build new memorials and museums, and reconstruct or remove some that already exist.⁹⁷ Some experts have already expressed their praise for this initiative, saying that other private philanthropies should join and “lift up the entire history of the country.”⁹⁸ The Kellogg Foundation has also committed \$90 million USD to the fight against racism, including by means of memorialization.⁹⁹ The Foundation will run the project for at least a decade, giving it reasonable time to make visible input.¹⁰⁰

92. Megret, *supra* note 86, at 199.

93. Colleen Murphy, *Transitional Justice in the United States*, JUST SECURITY (July 16, 2020), <http://www.justsecurity.org/71236/transitional-justice-in-the-united-states>.

94. *Id.*

95. G.A. Res. 60/147, *supra* note 77, ¶ 22; *see also* Robin Adèle Greeley, Michael R. Orwicz, José Luis Falconi, Ana María Reyes, Fernando J. Rosenberg, & Lisa J. Laplante, *Repairing Symbolic Reparations: Assessing the Effectiveness of Memorialization in the Inter-American System of Human Rights*, 14 INT’L. J. TRANSITIONAL JUST. 165, 166–67 (2020).

96. Jennifer Schuessler, *Mellon Foundation to Spend \$250 Million to Reimagine Monuments*, N.Y. TIMES (Oct. 5, 2020), <http://www.nytimes.com/2020/10/05/arts/mellon-foundation-monuments.html>.

97. *Id.*

98. *Id.*

99. Sherri Welch, *Kellogg Foundation Commits \$90 Million over Next Decade to Close Racial Equity Gap*, CRAIN’S DETROIT BUS. (Oct. 13, 2020, 5:49 PM),

Historical narratives are tremendously important in every society on the globe. They play a decisive role in collective identity and the transfer of true records to future generations. How people learn about their past can either facilitate stronger respect for human rights and maintenance of peace or uphold the different divisions that exist in societies and contribute to various tensions that lead to the abusive behavior of leaders and regular citizens. The Special Rapporteur in the field of cultural rights has argued that memorialization should be tackled properly because bringing up the traumas experienced might be harmful to victims, rather than helpful.¹⁰¹ There should be a delicate balance between forgetting and remembering, otherwise moving forward will be a complex process for affected societies.¹⁰²

The examples above demonstrate that designing and funding reparation programs is a complex task. Despite these complexities, there is still a study gap of how such programs should benefit from the participation of private actors without jeopardizing reparation programs and the government's capabilities to fulfill their international legal obligations. It is necessary to conduct a study because philanthropic involvement in transitional justice presents certain challenges. The next part sheds more light on some of the risks related to philanthropic justice.

II. CONCERNS LINKED TO PHILANTHROPIC CONTRIBUTIONS TO TRANSITIONAL JUSTICE

As seen from the earlier discussion, philanthropic foundations occupy a rather central place in various justice initiatives. They are one of the key actors for the TJ processes, which they sponsor, supervise, and even implement. Yves Dezalay argues that in the context of knowledge and expertise dissemination, philanthropies have the capacity to mobilize their resources to impose “universal” principles that conform to their specific interests.¹⁰³ By doing that, philanthropies take on the roles of “reproducers” of the social hierarchies that they claim to challenge.¹⁰⁴ They also expand their networks by financing and training human resources on the periphery for influence in these regions.¹⁰⁵ Dezalay adds that foundations have the ability to present

<http://www.crainsdetroit.com/nonprofit/kellogg-foundation-commits-90-million-over-next-decade-close-racial-equity-gap>.

100. *Id.*

101. Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Report on Memorization Processes in Post-Conflict and Divided Societies*, ¶¶ 15–17, U.N. Doc. A/HRC/25/49 (Jan. 23, 2014).

102. *Id.*

103. Yves Dezalay, *Les Courtiers de l'International: Héritiers Cosmopolites, Mercenaires de l'Impérialisme et Missionnaires de l'Universel*, 151–52 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 4, 27 (2004) (Fr.).

104. *Id.*

105. *Id.*

their goals as aligned with the interests of global society, which can then transform into rules of international law.¹⁰⁶ This ability should interest international lawyers and lawmakers as well.¹⁰⁷

This part explores Dezalay's concerns and identifies other possible shortcomings of philanthropic contributions and assistance to transitional justice processes. While private actors play an immense and often positive role in supporting TJ initiatives, host states and international organizations should be very mindful of the fact that the grant decision-making process is subjected mostly to internal considerations, and foundations are accountable to no one apart from their trustees.¹⁰⁸

During a 2019 interview with television host David Letterman, Melinda Gates said that "[w]hat philanthropy can do that the government can't with taxpayers' money is to take some risks."¹⁰⁹ The risk inherent in donor decision-making could be critical for all stakeholders involved in an aid program, especially in the context of transitional justice. Importantly, philanthropies can go beyond just taking risks. They can even act arbitrarily if they wish because, once again, they are virtually accountable to only themselves.

In his book *Philanthropy in Democratic Societies*, Rob Reich provides some interesting and helpful analogies.¹¹⁰ In the commercial marketplace, companies are accountable to their consumers, such that if customers do not like the product or service, they stop buying it and, consequently, a company might disappear.¹¹¹ A similar phenomenon happens in public institutions within well-functioning democracies: If citizens do not like the policies or money spending of their representative, they simply elect another one.¹¹² However, donors and philanthropists have no market accountability. They earmark to other organizations, which cannot un-elect them or stop "buying" their services because they do not share the same views on grant-making decisions. These organizations and sometimes even states are reluctant to bite the hands that feed them.¹¹³

106. *Id.* at 28.

107. *Id.* at 29.

108. Adam Meyerson, *How Foundations Should and Should Not Be Held Accountable*, Philanthropy Roundtable, <http://www.philanthropyroundtable.org/magazine/how-foundations-should-and-should-not-be-held-accountable> (last visited Feb. 7, 2023).

109. *My Next Guest Needs No Introduction with David Letterman: Melinda Gates*, NETFLIX (May 31, 2019), <http://www.netflix.com/de-en/title/80209096>.

110. See Rob Reich, *On the Role of Foundations in Democracies*, in *PHILANTHROPY IN DEMOCRATIC SOCIETIES: HISTORY, INSTITUTIONS, VALUES* 64 (Rob Reich, Chiara Cordelli, & Lucy Bernholz eds., 2016).

111. *Id.* at 68.

112. *Id.*

113. *Id.*

Many international organizations and their respective agencies provide guidelines on how to engage with private actors.¹¹⁴ However, these guidelines and frameworks for engagement lack comprehensiveness because they do not offer information on when states should refrain from entering public-private partnerships and when they should proceed.¹¹⁵ The lack of clarity and transparency about the amount of donations and of their destination, as well as non-disclosure of compensation of private contractors who administer a TJ mechanism, can open the gates for corruption, since the public sector is not able to subject the process to public scrutiny or to compare projects to similar ones in other countries.

Even going beyond the framework of TJ, interference in different kinds of public functions could be damaging to both the state and its citizens. Philip Alston, former Special Rapporteur on extreme poverty and human rights, emphasized in his July 2020 report that “philanthropy jeopardize[s] governments’ capacity to set priorities, provide funding, and implement programs.”¹¹⁶ He highlights that it is hard to deny that some of the richest people in the world are indeed committed to the public good and have contributed a lot to the well-being of people in need.¹¹⁷ However, the fact that a small number of billionaires own more than the wealth of sixty percent of the global population presents a major challenge.¹¹⁸ The common state practice of taxing labor more than capital and the general openness toward tax reduction for those who contribute to education, health, and justice leads to dire losses of public budgets. Thus, states must rely more and more on private donations.¹¹⁹ This circulation of private funds back into private hands leads to a weakened public system that cannot fulfill its obligations to

114. U.N. Glob. Compact, *Guidelines on a Principle-Based Approach to the Cooperation Between the United Nations and the Business Sector* (2015) [hereinafter *Guidelines on U.N. and Business Cooperation*]. See also Part IV for more examples and details.

115. For recommendations on Public-Private Partnerships (“PPPs”) provided by international organizations, see Organization for Economic Cooperation and Development [OECD], *Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships*, C(2012)86/FINAL (May 2012), <http://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf>; World Bank Group [WBG], *Report on Recommended PPP Contractual Provisions* (2015), http://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/ppp_testdumb/documents/150808_wbg_report_on_recommended_ppp_contractual_provisions.pdf; and U.N. Economic Commission for Europe, *Promoting People First Public-Private Partnerships (PPPs) for the UN SDGs* (July 2016).

116. Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *The Parlous State of Poverty Eradication: Report of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶ 75, U.N. Doc. A/HRC/44/40 (Nov. 19, 2020).

117. *Id.* ¶ 76.

118. *Id.*

119. Chiara Cordelli, *Reparative Justice and the Moral Limits of Discretionary Philanthropy*, in *PHILANTHROPY IN DEMOCRATIC SOCIETIES: HISTORY, INSTITUTIONS, VALUES* 244, 244 (Rob Reich, Chiara Cordelli, & Lucy Bernholz, eds., 2016).

citizens, while the private actors flourish, duplicating their staff and competing to implement global public projects.¹²⁰

Additionally, philanthropies are not structured with a mind toward tackling the underlying structures that lead to gross human rights violations for which victims must be redressed and perpetrators brought to justice. This is because these obligations were not imposed on them by international law. Alston adds that “philanthropic giving is not a democratic or transparent process” and that all decisions on replacing a government are made behind closed doors.¹²¹ This lack of transparency creates clear risks by allowing wealthy individuals and entities, who possess more economic resources than many states around the world, to “convert their economic power into political power.”¹²² Philanthropy represents a private political power through which private entities can impose their views and policies on those who are dependent on their wealth in ways that do not offer adequate accountability and which lack necessary international and domestic legal regulations.¹²³

Another concern is the perception of what is good by donors and the reverse reality of what is actually needed by victim societies. The amount of discretion that donors often have when discharging certain duties depends on the type of duty.¹²⁴ Cordelli argues that a duty to give is based on the Kantian tradition and that this duty can be grounded in justice or beneficence.¹²⁵ Principles of justice base themselves on the doctrine of entitlement: What a person is rightfully entitled to (property, goods, and resources) is rightfully their own.¹²⁶ Principles of beneficence are grounded in a slightly different conception: moral values and promoting a moral end such as repairing people’s traumas or helping those in need even when one was not the cause of the problem.¹²⁷ Consequently, the discretion provided by the differences in normative structures of these two types of principles plays a huge role for victims of gross human rights violations. The duty of beneficence grants an exclusive kind of discretion to a duty bearer (a donor) in discharging the duty, its methods, and all relevant decision-making.¹²⁸

It can be argued that philanthropies act as beneficent duty bearers and have wide discretion in what and how to endow. Private donors discharge the duties that are usually inherent to the public sector, securing most of the decisions to the discretion of the private sector. If this argument is correct, it can be assumed that philanthropies can serve as government substitutes and

120. Alston, *supra* note 116, ¶ 76; see also DAVID CALLAHAN, *THE GIVERS: WEALTH, POWER, AND PHILANTHROPY IN A NEW GILDED AGE* 241–43 (2017).

121. Alston, *supra* note 116, ¶ 77.

122. Cordelli, *supra* note 119, at 254.

123. Alston, *supra* note 116, ¶ 77.

124. Cordelli, *supra* note 119, at 247.

125. *Id.* at 248.

126. *Id.*

127. *Id.*

128. *Id.*

that they should thus follow the same legal standards that exist for the public sector with regard to regulating the administration and supporting international or local justice.¹²⁹ Thus, private actors should also be bound by the limits of discretion in financial decision-making if they act in place of government.¹³⁰ The last two parts touch upon these issues and consider how the U.N. approaches partnerships with private actors, including philanthropic foundations. Before that, the next part looks at why philanthropic foundations decide to engage with TJ mechanisms even though the obligations to investigate, provide reparations, and seek the truth were not imposed on them by international law.

III. PHILANTHROPIC FOUNDATIONS AS “KEEPERS OF INTERNATIONAL LAW”

Private entities that did not commit or aid in the perpetuation of atrocities are not bound by international law obligations to redress victims of gross human rights violations, to prosecute perpetrators, or to establish a truth commission or fact-finding mission. Philanthropies are exactly this type of private actor that have a principal goal of endowing money to support or assist people in distress. Yet private foundations enforce and implement these international law rules even without being required to do so by their home or host state. Jay Butler provides an interesting framework for considering why private actors willingly engage in upholding human rights, which involves labeling such actors as “corporate keepers of international law.”¹³¹ Although Butler primarily describes the behavior of private corporations and businesses, his framework could be applied to philanthropies as well. Private foundations are often financed (and even founded) through corporations or individuals owning a corporation, and, as corporate firms, traditionally, they do not bear obligations to promote compliance with international law.¹³²

Butler provides three different typologies of corporate keepers of international law: 1) that a private entity is “extending” international law when it follows an international legal obligation, even when a state denied this obligation, failed to properly implement it, or insufficiently or inadequately ful-

129. *Infra* Part V.

130. Cordelli, *supra* note 119, at 252.

131. Butler, *supra* note 13, at 191.

132. For discussion on whether corporations can be viewed as subjects of international law, see, for example, Tara Van Ho, *International Legal Personality of Corporations: How Investment Law Answers the Supreme Court Question in Jesner*, JUST SECURITY (2017), <http://www.justsecurity.org/45543/international-legal-personality-corporations-investment-law-answers-supreme-court-question-jesner> (last visited Feb 7, 2023); MARKOS KARAVIAS, *The Concept of Corporate Obligations under International Law*, in CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW 1 (2013), <http://doi.org/10.1093/acprof:oso/9780199674381.003.0002>.

filled its obligation; 2) that a private entity is “enforcing” an international legal obligation by promoting compliance and encouraging others to do so; and 3) a private entity is “exporting” international law by putting pressure on other businesses or even the public sector to comply with obligations and sometimes even to sanction other actors for the non-compliance.¹³³ Philanthropies that are functioning in the transitional justice domain could potentially fit all three categories of corporate keepers of international law. The next paragraphs will test this claim by analyzing some of the examples of philanthropic contributions from Part I of this article.

Butler argues that international law is enforceable through four mechanisms: self-help (speaking beyond self-defense in *jus ad bellum*, e.g. retorsions and diplomatic protection), collective action (e.g. regional organizations incentivize the enforcement of international legal obligations), international institutions (U.N. Security Council, International Court of Justice), and finally enforcement through domestic law.¹³⁴ This last mechanism mandates that citizens and other private entities implement certain obligations linked to international law.¹³⁵ The phenomenon of corporate keepers of international law arises when a state, which serves as a “legal bridge for domestic implementations,” has not announced the need for complying with certain international obligations for the subject under its jurisdiction, including philanthropies.¹³⁶ Indeed, looking at the current state of international law with regard to private entities, only domestic law that incorporates international legal rules can bind private actors to comply with certain international legal provisions.¹³⁷ However, an actor might choose to follow an international rule even if there is no external threat of sanctions that is enshrined in the domestic law of its home state.

How does this theory relate to philanthropies assisting transitional justice processes? Private foundations promote enforcement of soft laws related to TJ, often by acting as a carrying-out entity. Although they are not the duty bearers of international obligations related to TJ, they are still motivated to participate in and assist with these processes. Yet, as mentioned earlier, it is even more apparent nowadays that private actors extend, enforce, and export international law by respecting international obligations, adapting their behavior to this obligation, encouraging the private sector to do the same, and even naming and shaming the non-compliers and sometimes punishing them for violating international law obligations.¹³⁸

133. Butler, *supra* note 13, at 192.

134. *Id.* at 194–96.

135. *Id.* at 196.

136. *Id.*

137. See, e.g., U.N. Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (noting that the obligations under the ICCPR do not have “direct horizontal effect [to private actors] as matter of international law”).

138. Butler, *supra* note 13, at 199.

Extending international law, as Butler argues, implies that a private entity willingly adopts an international obligation in its policies and tries to genuinely achieve compliance with this rule. For instance, OSF, as shown earlier in this article, grants money to states, IOs, and to separate TJ mechanisms. The United States did not oblige the Foundation to carry out these tasks. But it is nevertheless very committed to promoting justice and criminal accountability around the globe. OSF has special programs, like the Open Society Initiative West Africa, whose strategies clearly pronounce their commitment to promoting the rule of law and justice for victims of gross human rights violations.¹³⁹

Enforcement is probably the most appropriate category of private support for international law in the context of this paper. According to Butler, “[e]nforcing captures instances in which the company moves beyond merely adopting an international law standard for itself,” meaning that a private actor actively pursues compliance with an international norm or encourages an actor, to whom the norm is addressed, to fulfill its international legal obligations.¹⁴⁰ Financially supported partly by philanthropic capital, the Commission of International Justice and Accountability, an NGO registered in the Netherlands, directly participates in TJ initiatives. The Commission’s main task is to collect evidence that will help bring perpetrators before criminal tribunals.¹⁴¹ They risk the safety of their employees by smuggling secret documents from conflict zones, which later serve as a basis for universal jurisdiction cases in different countries. By acting as a private investigative body, the CIJA takes an international legal obligation to properly investigate violations and builds its work around this rule. The Ford Foundation’s truth commission program is another example of how a private entity actively participates in promoting legal obligations related to truth-seeking. The program helped at least twenty-nine transitioning states to establish and run truth commissions by providing expertise and financial assistance when these states faced hurdles in complying with their international legal obligations.¹⁴²

Exporting international law presumes an intention to sanction those who do not comply with an international rule respected by a corporate keeper.¹⁴³ Exporting can also take the form of using private actors’ policies as a tool to push others to comply with a certain norm of international law.¹⁴⁴ In cases when the leverage on other actors does not work, a corporate keeper

139. *What We Do*, OPEN SOCIETY INITIATIVE FOR W. AFR., <http://www.osiwa.org/what-we-do> (last visited Nov 13, 2022).

140. Butler, *supra* note 13, at 199.

141. *What We Do*, COMMISSION FOR INT’L JUST. & ACCOUNTABILITY, <http://cijaonline.org/model-of-work> (last visited Dec 10, 2022).

142. See WILLIAM KOREY, TAKING ON THE WORLD’S REPRESSIVE REGIMES: THE FORD FOUNDATION’S INTERNATIONAL HUMAN RIGHT POLICIES AND PRACTICES (2007).

143. Butler, *supra* note 13, at 200.

144. *Id.*

of international law could impose sanctions on a violator or punish it for noncompliance. As mentioned in Part I, in some cases philanthropic donors might choose a specific program on which the money will be spent. Like in the case of the ICC's Trust Fund for Victims, a donor can decide which particular program of reparations to finance. By having this discretion, a private entity, like a private foundation, has the power to sanction a public actor responsible for administering the program in case of non-compliance with the agreed conditions of the donation by withdrawing an endowment or stopping the future financial assistance. This structure for private donations is inherent to many international organizations.

It is not certain whether the commitment of philanthropic actors to enforcing international law is necessarily a positive development, because international law was not created for private actors. If a state has not mandated that private actors administer transitional justice via domestic law, the question is what allowed private actors to act on their own without clear standards, rules, and sanctions in case of violations. The fundamental order of the international legal system presupposes that only states are obliged by the rules established by this order.¹⁴⁵ In the context of transitional justice, private entities are taking the responsibilities of states on themselves, although these obligations have never been designed for this purpose.

Additionally, a state that is so dependent on private donors and partners risks becoming incapable of finding solutions itself and stops learning from the process of implementing TJ programs, creating a growing dependence on private competencies. The risk of detachment from the victims might be high when victims also see that they would rather trust a private actor than their own state. Butler argues that if the enforcer of an obligation will change, the norm that is enforced is at risk to be changed as well.¹⁸⁰ He further adds that "enabling corporations to make such choices may well lead to the prioritization of certain norms . . . over others."¹⁴⁶ Transitional justice is an extremely sensitive period for vulnerable societies and states; philanthropic foundations should be aware that a balancing of rights and obligations, which is usually inherent to states and their interests, can bring more harm than benefit when followed improperly.¹⁴⁷ Finding and sustaining this

145. However, the rapid development of the business and human rights field presents new views on responsibility of private actors under international law and some domestic courts have taken note. See, e.g., *Suing Corporations for Violating International Law: A Step Forward*, OPINIO JURIS (June 28, 2021), <http://opiniojuris.org/2021/06/28/suing-corporations-for-violating-international-law-a-step-forward>. Ekaterina Aristova, *The Future of Tort Litigation Against Transnational Corporations in the English Courts: Is Forum [Non] Conveniens Back?*, 6 BUSINESS & HUM. RTS. J. 399 (2021).

146. *Id.* at 216.

147. For instance, when assuming the mantle of a state, a private actor has the capacity to hinder inclusive and participatory processes given the power imbalance that might exist between resourceful private foundations and local organizations or not wealthy states. Moreover, by assuming the roles of human rights protectors, private actors may have unintended

balance between allowing philanthropic actors to engage with transitions and restraining or limiting their interference in justice-making is one of the biggest challenges of international law, and it will probably remain until properly and collectively addressed by states, IOs, and private actors. For a better understanding of how potential standards or regulations of philanthropic engagement can be formed, it is helpful to look at how the U.N., one of the main actors in the field of TJ, handles cooperation with private actors, and in particular philanthropic foundations.

IV. UNITED NATIONS GUIDELINES ON PUBLIC-PRIVATE COLLABORATIONS

As seen from Part I, private foundations operate in different modes of cooperation. Sometimes, they cooperate with governments by providing them funding or other services and sometimes, they work bilaterally with a TJ mechanism, without involving state officials in their matters. It is rather hard to analyze domestic legal frameworks of the states that partner with private actors in the TJ context. Instead, this part describes how the United Nations, one of the most important actors in the field of transitional justice, approaches its work with private actors, including philanthropic foundations.

This part describes the U.N. Office for Partnerships, which was established in the early 2000s to manage the cooperation with private actors. The Office for Partnerships oversees other bodies of the U.N., including various funds, agencies, and organizations. One of the examples described in detail is the U.N. Democracy Fund and the document, which governs private collaborations of the Fund—the Guidelines on a Principle-based Approach to the Cooperation between the United Nations and the Business Sector. The Democracy Fund accepts donations both from states and the private sector.¹⁴⁸

However, to illustrate the potential risks of participation in the projects and activities of the U.N. by private actors, the current public-private battles related to the World Health Organization (“WHO”) are also discussed. The threats related to the private involvement in the activity of WHO include well-organized efforts by various industries including tobacco, pharmaceuticals, and meat, as they often hide behind philanthropies to push forward their agendas. Hence, in response to all the criticism, the WHO introduced the Framework for Engagement with Non-State Actors (“FENSA”).

UN bodies and agencies have been cooperating with the private sector, and with philanthropic foundations, for a long time. Still, the problems of transparency, accountability, and achieving positive results in partnerships

consequences on transitional justice processes, such as promoting short-term solutions over more comprehensive and transformative approaches.

148. *Donors*, U.N. DEMOCRACY FUND, <http://www.un.org/democracyfund/donors> (last visited Dec 18, 2020).

persist, and the demand for enhanced global supervision of these partnerships remains pressing. Article 17 of the U.N. Charter states that the organizations should be financed by the member states, but it is unclear whether this implicitly prohibits or allows the acceptance of funds from other parties.¹⁴⁹ The following discussion suggests that the United Nations encourages philanthropies to donate and support U.N. functions and projects. The U.N. has various guidelines on how to cooperate with the private sector, but these have proven less effective than they were intended to be.¹⁵⁰

On December 22, 2015, the General Assembly adopted Resolution 70/224, “Towards global partnerships: a principle-based approach to enhanced cooperation between the United Nations and all relevant partners.”¹⁵¹ This resolution served as a basis for holding the Partnership Forum, which was organized by the Economic and Social Council (“ECOSOC”) at the request of the General Assembly.¹⁵² The discussion, prompted by the acknowledgment of the importance of public-private partnerships in the realization of the goals and programs of the U.N., was focused on best practices and ways to improve accountability and transparency of the acts of such partnerships.¹⁵³ One of the main questions posed before the ECOSOC and General Assembly was the question of who pays what to the U.N. and how the organization uses the donated money.¹⁵⁴ The answer to this question has not been properly addressed up until today. The majority of concerns related to multi-stakeholder partnerships in the U.N. are rooted in risks associated with collaborating with private actors or receiving money from them.¹⁵⁵

The biennial U.N. General Assembly resolutions can be an important instrument for tackling the challenges with public-private partnerships, but

149. U.N. Charter art. 17 states: “1. The General Assembly shall consider and approve the budget of the Organization. 2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly. 3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.” Paragraph 2 suggests that the Organization is supposed to be sponsored by the UN Member States. It makes no mention of the participation of non-state actors. Hence, it is unclear whether the Charter could be interpreted in a restrictive or permissive manner.

150. See, e.g., Ayelet Berman, *Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors*, 32 EUR. J. INT’L L. 227 (2021).

151. G.A. Res. 70/224 (Dec. 22, 2015).

152. *Id.*

153. U.N. ECONOMIC & SOCIAL COUNCIL, 2016 PARTNERSHIP FORUM: PROMOTING ACCOUNTABILITY AND TRANSPARENCY OF MULTI-STAKEHOLDER PARTNERSHIPS FOR THE IMPLEMENTATION OF THE 2030 AGENDA, II ISSUES NOTE, (Mar. 31, 2016).

154. Wade Hoxtell, *Multi-Stakeholder Partnerships and the 2030 Agenda: Challenges and Options for Oversight at the United Nations*, GLOB. PUB. POL’Y INST. (Mar. 9, 2017), <http://gppi.net/2017/03/09/multi-stakeholder-partnerships-and-the-2030-agenda-challenges-and-options-for-oversight-at-the-u>.

155. *Id.*

there remains a lack of instruments for monitoring, reporting, and effective review of private involvement in the operations of the United Nations. In the same 2015 resolution discussed above, the U.N. itself pointed out that acting without further guidelines would be complicated, saying that there is a “need for the United Nations system to develop, for those partnerships in which it participates, a common and systemic approach that places greater emphasis on transparency, coherence, impact, accountability, and due diligence, without imposing undue rigidity in partnership agreements.”¹⁵⁶ The resolution further suggests that the Guidelines on a Principle-based Approach to the Cooperation between the United Nations and the Business Sector shall be implemented; that the partners, contributions, and matching funds for all relevant partnerships shall be disclosed; and that due diligence and risk management measures shall be strengthened to safeguard the reputation of the Organization.¹⁵⁷ Indeed, several U.N. bodies, like the WHO, have adopted guidelines on how to work with the private sector, although these guidelines still seem to lack the efficiency they expected.¹⁵⁸

In the early 2000s, the U.N. established the Office for Partnerships, which grew out of years of collaboration with the private sector and, in particular, with Ted Turner’s U.N. Foundation.¹⁵⁹ The Foundation is not a U.N. body but is rather a private entity created to deal specifically with Ted Turner’s \$1 billion USD gift in support of the U.N. projects and operations. A separate legal entity was established because the U.N. is not a tax-exempt public charity in the United States, and this enormous gift could consequently cost Turner much more than he expected.¹⁶⁰ However, shortly after the announcement of the donation, Turner’s stocks decreased dramatically, which made it difficult for him to keep his promise and donate the \$1 billion USD.¹⁶¹ To continue its work without this money, the U.N. foundation began attracting other private donors and, by the end of 2007, the Office for Partnerships reported that \$1.03 billion USD of grant money had been spent on different projects, with only \$406 million USD of this coming from Turner’s funds.¹⁶²

Apart from cooperation with the U.N. Foundation, the Office for Partnerships uses this model of cooperation with many other private and public actors. The Office was created to take over the role of the United Nations

156. G.A. Res. 70/224, *supra* note 151, ¶ 13.

157. *Id.* ¶ 14(a)–(c).

158. Berman, *supra* note 150.

159. See U.N. Secretary-General, *United Nations Office for Partnerships: Report of the Secretary-General*, U.N. Doc. A/65/347 (Sept. 3, 2010).

160. BARBARA ADAMS & JENS MARTENS, GLOBAL POLICY FORUM, FIT FOR WHOSE PURPOSE?: PRIVATE FUNDING AND CORPORATE INFLUENCE IN THE UNITED NATIONS 22 (2015), http://sustainabledevelopment.un.org/content/documents/2101Fit_for_whose_purpose_online.pdf.

161. *Id.* at 22–23.

162. *Id.* at 23.

Fund for International Partnerships (“UNFIP”), which was established as the principal interface between the U.N. system and the aforementioned U.N. Foundation.¹⁶³ The Office for Partnerships takes a more general approach to work on partnerships and enjoys increased supervisory capacity over the UNFIP, although the two bodies share a lot of common tasks and it is hard to differentiate between their mandates.¹⁶⁴ Overall, both UNFIP and the Office for Partnerships are authorized by the U.N. to make administrative and tactical decisions on partnerships of the Organization with other entities.¹⁶⁵ UNFIP and the Office for Partnerships have become very influential within the U.N. system and have brought significant growth to various U.N. programs and agencies by allowing the private sector to be an active participant in the U.N. functions.¹⁶⁶ However, despite the amount of money circulating between the U.N. and its partners, decision-making seems to be rather informal.¹⁶⁷ Therefore, it is still unclear on which basis and under which guiding standards the U.N. typically decides to cooperate with private entities when it comes to all sorts of public issues, including justice and peace.

One of the most disturbing consequences of this is that the absence of clear guidelines for accountability and oversight mechanisms opens up the potential for agenda distortion. The private sector can distract the U.N. from its ultimate goals by dictating where and how money and resources should be allocated.¹⁶⁸ Mary Ann Glendon also said that “economic pressures . . . may aggravate the danger of capture of UN agencies by well-financed special interests.”¹⁶⁹ This problem could be observed again in the cooperation between the U.N. and United Nations Foundation.

According to the UNFIP annual report from 2005, “projects and activities were identified in conformity with the [Turner’s U.N.] Foundation’s strategic objectives.”¹⁷⁰ The U.N. Foundation, could have been seen as an agenda-setter and gatekeeper of decision-making power and makes sure that its own priorities dominate within the U.N. Glendon also observed that

163. U.N. Secretary-General, *United Nations Office for Partnerships: Report of the Secretary-General*, ¶ 1, U.N. Doc. A/75/230 (July 24, 2020) [hereinafter *2020 Partnerships Office Report*].

164. Christopher G. Bradley, *Partner Capture in Public International Organizations*, 44 AKRON L. REV. 261, 267 (2011).

165. *Id.*

166. See, e.g., Stephen Tully, *The Opportunities and Challenges of Private Sector Engagement by UN Secretariats*, 3 INT’L ORG. L. REV. 225, 233 (2006); Maria Ivanova, David Gordon, & Jennifer Roy, *Towards Institutional Symbiosis: Business and the United Nations in Environmental Governance*, 16 REV. EUR. COMP. & INT’L ENV’T L. 123, 129 (2007).

167. Bradley, *supra* note 164, at 268.

168. *Id.* at 276.

169. Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, 44 AM. J. JURIS. 1, 11 (1999).

170. U.N. Secretary-General, *United Nations Fund for International Partnerships: Report of the Secretary-General*, ¶ 1, U.N. Doc. A/60/327 (Nov. 15, 2005).

Turner's \$1 billion USD endowment to the U.N. "looks less like a gift and more like a take-over bid aimed at UN agencies with privileged access to vulnerable populations."¹⁷¹ The risks of agenda distortion are associated with the fact that private actors like philanthropies with sufficient financial and sometimes even political influence could skew the goals of member states and exploit the U.N. for personal interests.¹⁷² It is, however, hard to detect agenda distortion, especially when it comes to matters of justice and democracy. This is because agenda distortion is deeply rooted in the structures of decision-making processes, which are usually highly confidential and do not offer researchers much access.¹⁷³ Nonetheless, structural problems exist and require structural solutions, like the creation of international rules and standards on cooperation with the private sector, including foundations. As mentioned, the various U.N. bodies and agencies have developed such documents, and it is worth looking deeper into some of them.

There are multiple U.N. internal documents, and it is worth exploring them to understand what does not work and why. The following discussion analyzes two of these U.N. documents: 1) the Guidelines on a Principle-based Approach to the Cooperation between the United Nations and the Business Sector and 2) the Framework of Engagement with Non-State Actors. These two documents are used by different U.N. bodies, but their principles are similar. The most important feature is that the documents are not binding and thus have very limited impact.¹⁷⁴ It is also interesting to see how sophisticated the system of financing of different U.N. entities is. The WHO, for instance, allows private contributions to be allocated to specific projects at the wish of a donor, although state donors do not have this opportunity.¹⁷⁵ In contrast, the budget of the U.N. Democracy Fund is almost exclusively used for projects in transitioning countries and for various transitional justice mechanisms.¹⁷⁶ This fund actively tries to attract money

171. Glendon, *supra* note 169, at 11.

172. For example, the tobacco industry has a long history of trying to influence the WHO's policies on tobacco control. The industry has used its financial resources and political influence to try to undermine WHO's efforts to reduce tobacco consumption and protect public health. It has also funded research and advocacy groups that have worked to undermine WHO's anti-tobacco policies and promote a more favorable view of tobacco use. *See, e.g.*, WORLD HEALTH ORG., TOBACCO INDUSTRY INTERFERENCE: A GLOBAL BRIEF (2017), http://www.euro.who.int/__data/assets/pdf_file/0005/165254/Tobacco-Industry-Interference-A-Global-Brief.pdf; *Statement on Phillip Morris Funded Foundation for a Smoke-Free World*, WORLD HEALTH ORG. (Sept. 28, 2017), <http://www.who.int/news/item/28-09-2017-who-statement-on-philip-morris-funded-foundation-for-a-smoke-free-world>.

173. JENS MARTENS & KAROLIN SEITZ, GLOBAL. POL'Y F., RULES OF ENGAGEMENT BETWEEN THE UN AND PRIVATE ACTORS: TOWARDS A REGULATORY AND INSTITUTIONAL FRAMEWORK 3 (2019).

174. Berman, *supra* note 150, at 262.

175. *How WHO is Funded*, WORLD HEALTH ORG., <http://www.who.int/about/funding> (last visited Sept. 22, 2022).

176. *UNDEF Projects*, U.N. DEMOCRACY FUND, <http://www.un.org/democracymfund/projects> (last visited Dec 11, 2022).

from the private sector by creating different strategies, including impact or social bonds, while promoting itself as independent and not beholden to donors.¹⁷⁷ The following two subsections discuss in detail these U.N. Guidelines and once again confirm the imminent need for more unified and harmonized rules or standards at the international level on cooperation with private actors, including philanthropies.

A. *The U.N. Democracy Fund and the Guidelines on a Principle-based Approach to the Cooperation between the United Nations and the Business Sector*

The U.N. Democracy Fund (“UNDEF”) was established by the Secretary-General in July 2005 to support democratization throughout the world.¹⁷⁸ The fund focuses on supporting democratic institutions and promoting human rights and justice, primarily funding projects in countries that are undergoing political transitions and states that have just emerged from a violent conflict or dictatorial regime.¹⁷⁹ One of the main functions of the fund is supporting civil society by filling in the gaps in public services by partnering with businesses to support local communities to hold governments involved in human rights violations accountable.¹⁸⁰ The fund’s projects database shows that it supports different transitional justice mechanisms, including the Truth, Justice, and Reconciliation Commission in Kenya; institutional reforms in Ghana, Kyrgyzstan, Tajikistan, and Uzbekistan; and transition in Colombia.¹⁸¹ In 2010, the U.N. Office for Partnerships channeled approximately \$75 million USD to more than 270 projects in 127 countries around the world through the Democracy Fund.¹⁸² In 2020, thirteen rounds of funding worth \$178 million USD total led to the implementation of 830 projects in more than 130 countries.¹⁸³

UNDEF also positions itself as “accountable to all, but beholden to none” by stating on its website that “[a]s independent third-party evaluators have found, UNDEF is not beholden to the vision, doctrine, or geostrategic interests of any Member State, commercial entity, or philanthropic institution.”¹⁸⁴ Rather, the UNDEF’s “evaluation process and lessons learned da-

177. *Donors*, *supra* note 148.

178. *About UNDEF*, U.N. DEMOCRACY FUND, <http://www.un.org/democracyfund/about-undef> (last visited Sept. 22, 2022).

179. *2020 Partnerships Office Report*, *supra* note 163, ¶¶ 42, 54–60.

180. *Id.* ¶ 43.

181. *See Project Database*, U.N. DEMOCRACY FUND, <http://projects.undemocracyfund.org> (last visited Nov. 19, 2022).

182. Press Release, General Assembly, Under-Secretary-General for Management Briefs Budget Committee, Describes ‘Mixed’ United Nations Financial Situation, U.N. Press Release GA/AB/3960 (Oct 12, 2010).

183. *2020 Partnerships Office Report*, *supra* note 163, ¶ 45.

184. *Donors*, *supra* note 148 (emphasis added).

tabase advance accountability to not only donors but partners and participants” and as such the organization “answer[s] to project participants and to a governance structure unlike any in the field of democracy support.”¹⁸⁵ Nevertheless, UNDEF acknowledges the importance of public-private partnerships in its final reports and highlights the fact that philanthropic organizations, companies, and NGOs can not only donate money, but also adopt innovative approaches for sustained investment through the work of UNDEF.¹⁸⁶ While the organization’s claimed independence and unaccountability before donors might well be accurate, it is worth discovering how the Fund collaborates with its private donors.

In the early 2000s, the U.N. made efforts to diversify its funding sources, however, without full acknowledgment of reputational risks associated with cooperating with the private sector. The U.N. introduced guidelines detailing how its agencies were to interact with the private sector and was accused of being manipulated by the rich.¹⁸⁷ Based on the UNDEF’s Terms of Reference, the fund is a Secretary-General Trust Fund and is under his personal authority, meaning that UNDEF is established and run by funds collected on a voluntary basis.¹⁸⁸ The “monitoring authority” of UNDEF is the aforementioned U.N. Fund for International Partnerships, which means that while engaging with the private sector, UNDEF has to follow the Guidelines on a Principle-based Approach to the Cooperation between the United Nations and the Business Sector, which include philanthropic foundations in their definition of the business sector.¹⁸⁹

These Guidelines first appeared in 2000. They were then revised in 2009 and then again in 2015, upon the request of U.N. Member States.¹⁹⁰ The Guidelines make clear that cooperation between the U.N. and the business sector shall refer to the United Nations Guiding Principles on Business and Human Rights as a benchmark for expected business conduct and responsible business implementation.¹⁹¹ While no clear instructions are given on how to limit or control the engagement of private actors, the Guidelines do include a provision on the monitoring and evaluation process. It states that these processes “should seek to ensure that the partnership’s activities have been responsive to the concerns and objectives of the communities that the activities were intended to address.”¹⁹² The “obligation,” however, is scaled down by the wording “seek to ensure,” as it is something that is al-

185. *Id.*

186. *2020 Partnerships Office Report*, *supra* note 163, ¶¶ 66–67.

187. *See* MARTENS & SEITZ, *supra* note 173.

188. *See* U.N. Democracy Fund, Terms of Reference, ¶ 1, http://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/undef_terms_of_reference.pdf.

189. *Guidelines on U.N. and Business Cooperation*, *supra* note 114, ¶¶ 8–9.

190. Barbara Adams, *United Nations and Business Community: Out-Sourcing or Crowding In?*, 59 DEVELOPMENT 21, 27 (2016).

191. *Guidelines on U.N. and Business Cooperation*, *supra* note 114, ¶ 7.

192. *Id.* ¶ 23.

most impossible to measure. Paramount here is also the fact that these Guidelines, while providing an accountability mechanism, leave the implementation of these rules and standards in the hands of partnership agreements. Adams writes that such agreements, especially in public-private arrangements of self-selected partners, lack impartiality, “[w]ithout the capacity to monitor risk and assess the contribution of partnerships within UN mandates, norms and standards system-wide, partnerships are vulnerable to conflicts of interest.”¹⁹³ Moreover, the absence of systematic reporting on the funds received and spent by the U.N. with regard not only to justice, peace, and security but to all other questions of global agendas, complicates the disclosure of information and thus leaves the U.N. and its project vulnerable to public backlash.

Some scholars observe that not all U.N. guidelines for private sector engagement are doomed to fail. The WHO’s Framework for Engagement with Non-State Actors received some positive feedback in this regard.¹⁹⁴ Therefore, to identify the gaps that exist within the Guidelines on a Principle-based Approach to the Cooperation between the United Nations and the Business Sector, it is worth looking at the WHO’s document a bit more closely.

B. *The World Health Organizations and the Framework for Engagement with Non-State Actors*

The fact that private actors have become influential in international projects and their funding is well known among international organizations. In 2016, to address concerns about the rising powers of the private sector, the U.N. established detailed rules to regulate the WHO’s interaction with various private actors, including philanthropic foundations, NGOs, and private companies.¹⁹⁵ This document has been entitled the Framework of Engagement with Non-State Actors.¹⁹⁶ FENSA has replaced the Guidelines on working with the private sector to achieve health outcomes, and it is the first document of this kind that comprehensively deals with issues of how the WHO should cooperate with the private sector.¹⁹⁷

Daugirdas and Burci write that the concern of developing states over undue influence exercised by private actors and rich donors was the driving

193. Adams, *supra* note 190, at 28.

194. Brook M. R. Dambacher, Matthew T. Stilwell, & Jeffrey S. McGee, *Clearing the Air: Avoiding Conflicts of Interest Within the United Nations Framework Convention on Climate Change*, 32 J. ENVIRON. LAW 53, 60–63 (2020).

195. World Health Assembly Res. 69.10, Framework of Engagement with Non-State Actors, at 1 (May 28, 2016).

196. *Id.*

197. Karolin Seitz, *FENSA – A Fence Against Undue Corporate Influence? The New Framework of Engagement with Non-State Actors at the World Health Organization*, GLOBAL POL’Y F. BRIEFING, Sept. 2016, at 1.

force for drafting FENSA.¹⁹⁸ FENSA contains many provisions concerning aspects like communication strategies with the private sector and risk assessments, and it largely focuses on fundraising. For example, FENSA states that WHO “can accept financial and in-kind contributions . . . as long as such contributions fall within WHO’s General Programme of Work, do not create conflicts of interest, are managed in accordance with the framework, and comply with other relevant regulations, rules, and policies of WHO.”¹⁹⁹ The document further adds that “philanthropic foundations shall align their contributions to the priorities set by the Health Assembly in the approved Programme budget.”²⁰⁰ Additionally, FENSA establishes some transparency requirements by publicly acknowledging financial contributions coming from philanthropies and their inclusion in the Organization’s financial reports.²⁰¹ FENSA, however, does not impose an obligation to reflect contributions in donor reports.²⁰²

The WHO’s FENSA can serve as an important example for all international organizations that work directly with vulnerable populations. Establishing these guidelines was certainly a risky endeavor because private donors might be overburdened with all these regulations and become reluctant to provide funds. It is probably too early to know whether this is the case with private donations to the WHO, but FENSA promises not only a greater assurance of the stability of the WHO’s budget but also that influence by private actors like philanthropies on the WHO’s decision-making will be minimal (or at least somehow regulated).

While FENSA could be a model for other public actors on what to ask of a private donor when it comes to public services, its non-binding nature results in low compliance. The fear of pushing potential donors away was likely a key reason for the decision regarding the documents’ ability to bind its signatories. Some WHO employees have said that FENSA has “no clear impact” on the acceptance of donations from private actors.²⁰³ They have added that there are no sufficient instructions on how FENSA provisions should be interpreted.²⁰⁴ Moreover, the overarching principles for the engagement with non-state actors pose some concerns regarding undue influence by the corporate and philanthropic sectors. Several NGOs and Civil Society Organizations have expressed their concerns regarding FENSA’s

198. Kristina Daugirdas & Gian Luca Burci, *Financing the World Health Organization: What Lessons for Multilateralism?*, 16 INT’L ORG. L. REV. 299, 316 (2019).

199. World Health Assembly Res. 69.10, *supra* note 195, at 31.

200. *Id.*

201. *Id.* at 31–32.

202. *Id.* at 32.

203. Daugirdas & Burci, *supra* note 198, at 329.

204. *Id.* at 330.

effectiveness in fighting agenda distortions and influences.²⁰⁵ Health Action International has stated that “[t]he approach to Philanthropic foundations deserves more attention because the WHO has become extraordinarily dependent upon and influenced by perhaps two very large Philanthropic Foundations. Both inside and outside the WHO, the largest global philanthropic donor is now perceived to wield extraordinary influence over the institution, with inadequate transparency and oversight of this relationship.”²⁰⁶

The principle of inclusiveness, which is spelled out multiple times throughout the first pages of FENSA, can also add to conflict-of-interest problems when applied to private actors.²⁰⁷ This principle might reinforce the framing of policy and solutions to public health problems that favor the interests and agenda of private actors. Furthermore, the principle of inclusiveness can compromise the integrity of WHO by removing its ability to choose which actors to exclude from its decision-making process. FENSA allows international business associations to participate in its processes on the same footing as NGOs and CSOs, even though business actors represent the interests of their corporate members. This has also been criticized by Civil Society Organizations, who argued that the principle of inclusiveness does not distinguish between private and public sectors.²⁰⁸ It seems that FENSA treats public actors, whose responsibilities are to promote the public good, and private actors, who are mostly driven by profit or other interests, equally. This equality in approach does not help the WHO to better tackle the risks associated with cooperating with the private sector.

Despite the fact that the WHO wanted to minimize the risks associated with the rising power of private actors in the health sector, the organization decided to establish the WHO Foundation.²⁰⁹ The foundation’s main goal is to help the WHO finance its projects in extreme circumstances, such as pandemics, and to support critical global health needs.²¹⁰ The WHO Foundation is an independent grant-making entity incorporated under Swiss law whose aim is to provide funds to the WHO that are contributed by individuals, corporations, and philanthropic foundations.²¹¹ The foundation is legally separate from the WHO, which is guaranteed by an affiliation agreement

205. Open Letter from Civil Society Organizations to Members of the One-Hundred-Thirty-Eight Executive Board of the World Health Assembly, http://www.fian.org/fileadmin/media/publications_2015/Letters_and_statements/Civil_Society_Open_Letter_-_WHO.pdf.

206. Seitz, *supra* note 197, at 7 (citing *Non-State Actors Statements*, WORLD HEALTH ORG., <http://apps.who.int/ngostatements/content/stichting-healthaction-international-hai-11> (last visited Feb. 12, 2023)).

207. World Health Assembly Res. 69.10, *supra* note 195, at 5.

208. Seitz, *supra* note 197, at 8.

209. *Who We Are*, WHO FOUND., <http://who.foundation/who-we-are> (last visited Sept. 28, 2022).

210. *WHO Foundation Established to Support Critical Global Health Needs*, WORLD HEALTH ORG. (May 27, 2020), <http://www.who.int/news/item/27-05-2020-who-foundation-established-to-support-critical-global-health-needs>.

211. *Id.*

signed by the two parties.²¹² This new phenomenon of enhancing the budget of an IO through a separate legal *private* entity raises several concerns with regard to the actual independence of public actors from private ones.

As discussed above, the WHO has consistently received voluntary financial contributions from private entities. However, the relationship between the WHO and the WHO Foundation is of a different nature. The affiliation agreement mentioned above is written in the form of a memorandum of understanding (“MoU”).²¹³ As Aust and Feihle write, the legal nature of this MoU is unclear, but it is definitely not an international agreement.²¹⁴ Since the WHO Foundation is a charity under Swiss private law, it cannot “enter into legally binding agreements on the level of international law.”²¹⁵ The FAQ document provided by the WHO Foundation emphasizes that the function of the foundation, *inter alia*, is to protect the normative work of the WHO from undue influence.²¹⁶

Interestingly, article 12.1 of the MoU states that the WHO Foundation “shall ensure that between seventy percent and eighty percent of all funds raised over any given two-year period are provided to WHO in direct support of its General Program of Work, WHO priorities[,] and WHO technical norms and standards.”²¹⁷ This implies that the money coming through the Foundation will go to the general program of the WHO and not to specific projects pre-determined by donors, as is the case when a private entity decides to grant money directly to the WHO.²¹⁸ Therefore, the funding mechanism of the Foundation ensures that the WHO retains its autonomy in making decisions on how the money will be utilized to achieve its mission, rather than being swayed by the priorities of individual donors. As mentioned earlier, Daugirdas and Burci claim that the main concern with regard to private voluntary contributions is that decision-making shifts from the organization to donors, and the funding decisions are usually made behind closed doors.²¹⁹ As a result, private actors can dictate “what kind of activi-

212. *Id.*

213. See Affiliation Agreement between The World Health Org. and the Found. in Support of the World Health Org. (May 27, 2020), (available at <http://www.whofoundationproject.org/wp-content/uploads/2020/09/MOU-WHO-WHOF-signed.pdf>).

214. Helmut Philipp Aust & Prisca Feihle, “I Want to Break Free”: The WHO Foundation as an Experiment in the Financing of International Organisations, EUR. J. INT’L L.: TALK! (Oct. 14, 2020), <http://www.ejiltalk.org/i-want-to-break-free-the-who-foundation-as-an-experiment-in-the-financing-of-international-organisations>.

215. *Id.*

216. WHO Foundation: Frequently Asked Questions (FAQ), WHO FOUND. (June 2020), http://www.whofoundationproject.org/wp-content/uploads/2020/06/FAQ-WHOF_June-2020.pdf.

217. Affiliation Agreement, *supra* note 213.

218. Aust & Feihle, *supra* note 214.

219. Daugirdas & Burci, *supra* note 198, at 331.

ties WHO will undertake.”²²⁰ Therefore, the creation of the WHO Foundation might enhance the transparency of decisions made on funding and policy priorities. However, it is too early to assess whether this financial scheme will actually contribute to the independence of the WHO. Aust and Feihle argue that the fact that the WHO Foundation uses the WHO logo might create confusion in the public such that “it will not always be easy to distinguish between the WHO and its private off-shoot. The jury is still out on the question of whether the independence of the WHO will actually be strengthened.”²²¹

There is an obvious need for further explorations of the legal implications of such public-private cooperation between private actors and IOs, including the schemes of funding. Needless to say, the public sector will struggle with fulfilling its obligations to their respective societies without the help of philanthropies. Nevertheless, this enterprise should be better governed by international law. The discussed guidelines on how to cooperate with private actors – FENSA and Guidelines for the Business Sector – show that these standards and rules set very low expectations towards full compliance. Reliance on the voluntary nature of these documents very rarely leads to the incorporation of these rules in partnership agreements between the public and private sectors. Therefore, the issues of regulations of private funding of international organizations and their cooperation with private actors require greater attention from international lawyers.

V. A PATH TO MORE TRANSPARENT PHILANTHROPIC JUSTICE

As discussed throughout this article, philanthropic justice is an important development, yet one with remaining concerns related to transparency, accountability, and responsibility of private foundations involved in transitional justice. In the development and humanitarian aid sectors, for instance, calls for responsibility and accountability are not new.²²² These calls, however, mostly concern publicly funded aid.²²³ While it is possible to trigger international law for the violations and non-compliance with obligations by states and international organizations, this is rather questionable regarding private actors such as philanthropic foundations. This problem has been raised in various circles, including by journalists who have been asking

220. *Id.*

221. Aust & Feihle, *supra* note 214.

222. See, e.g., Sophie Komujuni & Saul Mullard, *Downward Accountability in Humanitarian Aid: Lessons from a Hotline for Refugees*, U4 ANTI-CORRUPTION RESOURCE CTR., <http://www.u4.no/blog/downward-accountability-in-humanitarian-aid> (last visited Dec 12, 2022); Natalie Klein-Kelly, *More Humanitarian Accountability, Less Humanitarian Access? Alternative Ideas on Accountability for Protection Activities in Conflict Settings*, 100 INT’L REV. RED CROSS 287 (2018); Hyman van Zyl & Frederik Claeyé, *Up and Down, and Inside Out: Where do We Stand on NGO Accountability?*, 31 EUR. J. DEV. RSCH. 604 (2019).

223. See Devesh Kapur & Dennis Whittle, *Can the Privatization of Foreign Aid Enhance Accountability?*, 42 N.Y.U. J. INT’L L. & POL. 1143, 1152 (2009).

about the accountability of private service providers in crisis situations, “[Private actors] may claim to be acting in the interests of the people—but then so do the objects of their criticism, governments and the despised international institutions. In the West, governments and their agencies are, in the end, accountable to voters. Who holds the activists accountable?”²²⁴ This concern has not been in the spotlight of international lawyers so far, especially in the context of transitional justice.

As seen from Part I, private assistance to or the administration of TJ mechanisms is mostly done by private foundations either directly or through their intermediaries—NGOs.²²⁵ Interestingly, aside from the moral imperative to help victims of gross human rights violations obtain deserved justice, little is known about what obligations private actors have to espouse TJ mechanisms and who bears responsibility for the actions of private actors in the TJ context. As discussed in Part III, private entities have no positive obligations under international law to bring about justice to victim societies (at least when they were not involved in such violations).²²⁶ However, questions of responsibility and accountability arise at the very conceptual stage of philanthropic justice. These questions might range from who bears the responsibility in cases when something goes wrong with a certain TJ mechanism to who determines priorities of certain TJ mechanisms over the other. In general, the problem of negative influence or private gains in the context of TJ could be avoided if responsibility and accountability issues are explored. This part offers a discussion of several topics important to the issues of responsibility and accountability of private actors under international law.

A. *Why International and Not Domestic Law?*

TJ processes have roots in the foundations of international law, and transitional justice is usually a response to international crimes. The principles of accountability, reparations, and non-recurrence, which are central to the field of transitional justice, are all rooted in international law. Therefore, when assumed to have TJ obligations, private actors’ behavior should be assessed as that of states and international organizations. Generally, philanthropic actors enjoy the possibility of creating their own rules on how to make themselves accountable and when to assume responsibility. This possibility is provided by weak domestic laws and regulations, and the frail international set of norms.

The latter provides some restraints on private behavior that assist in determining the attribution of responsibility and accountability. Although the premise of this article is not to show that banning private foundations from participating in TJ processes is the way to proceed, it aims at highlighting

224. *Angry and Effective*, THE ECONOMIST (Sept. 21, 2000), <http://www.economist.com/business-special/2000/09/21/angry-and-effective>.

225. *See supra* Part I.

226. *See supra* Part V.

that these actors can be a powerful force that is currently under-regulated. This is partly due to a lack of understanding of how private foundations can effectively be used to catalyze positive change. But most importantly, there is a lack of guidance on how philanthropies can connect with states and IOs to manage conflicts and developmental challenges, improve stability, provide justice, and sustain peace. The clarification of international legal responsibility issues is one of the most important steps to shape private behavior and encourage philanthropies to help affected societies reconcile and achieve justice in a non-harmful way.

Most of the propositions for legally empowering private actors to accumulate additional layers of influence in the form of replacing a government in delivering public services, including searching for and administering justice, are rather unpopular. When a private actor assumes a mantle of authority by financing, running, and therefore controlling a public process such as transitional justice, this certainly makes some people feel uneasy.²²⁷ By taking on the responsibility to regulate a TJ process—either as mere acts of altruistic philanthropy or pragmatic decisions to stabilize the region, a private actor takes the role of a government without inheriting legal responsibility for things that might go wrong. Taking a broader context of why people tend to mistrust private actors in providing services and organizing them in ways that prevent harm to vulnerable groups (e.g., trusting the data to social media platforms, relying on private health providers, believing tax-exempt foundations etc.), the roots of this mistrust come from the knowledge that if something goes wrong, there are almost no mechanisms to get reparations, exactly because of the lack of a set of rules for attributing responsibility. This reaches a new level when such scenarios happen transnationally (like in philanthropic justice – where a foundation is usually a foreign entity), as there is no protection from violations on the level of international law.

As a first step to figuring out what international law says about the legal responsibility of private actors, it is worth looking at existing instruments that explicitly or implicitly touch upon these issues. Private foundations generally cannot be a party to international treaties and, therefore, there are obvious limits to holding them responsible for any potential wrongdoings under international law. Even when acting as partners in joint projects with states and international organizations, there are not many instruments that attribute responsibility to private actors.

The issues of international responsibility of private actors for their wrongdoings are different from the international legal responsibility of states and international organizations. However, the international responsibility for public actors is one of the few basic structures to use for discussing the international responsibility of philanthropies involved in transitional justice. Clapham argued that even when acting as partners with states (as in

227. See generally Alon Harel, *Why Privatization Matters: The Democratic Case Against Privatization*, 60 *NOMOS* 52 (2019).

most of the cases of philanthropic justice), they are not considered to be bound to respect and fulfil international legal obligations.²²⁸ Instead, Clapham adds that all wrongdoings will be attributed to a state when a private entity was empowered, instructed, and controlled by a state.²²⁹

Indeed, according to Article 5 of the Articles for Responsibility of States for Internationally Wrongful Acts (ARSIWA), the acts of a private entity will be attributed to a state, especially when this entity exercises the sovereign authority of a state (which can also be transitional justice).²³⁰ This Article was created to prevent a state to get away with the responsibility for violations through outsourcing its functions.²³¹ Article 5 gives no details on the situation when a private actor has not obtained consent to exercise a state function.

Logically, states cannot be responsible for the acts of every individual or entity that functions within its jurisdiction.²³² This rule has been taken into account by the International Law Commission when drafting ARSIWA (as seen from the current wording of Article 5 of ARSIWA)²³³, although it was not featured in the final draft.²³⁴ Therefore, one of the few elements attributing responsibility to states became the delimitation of the public from the private realm, which is not an easy task, especially when talking about philanthropies that act as donors and TJ administrators.²³⁵ A rather similar instrument, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights links state responsibility not only to state conduct in breach of international obligations but to the conduct (acts or omissions) of non-state actors controlled by the state as well as of persons or entities “empowered by the State to exercise

228. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 460 (2006).

229. *Id.*

230. Draft Articles on the Responsibility of States for Internationally Wrongful Acts art. 5(1), *in* Int'l Law Comm'n, Report on the Work of Its Fifty-Third Session, at 31, U.N. Doc. A/56/10 (2001).

231. *Id.*

232. Draft Articles on State Responsibility art. 11, *in* Int'l Law Comm'n, Report on the Work of Its Twenty-Seventh Session, at 59, U.N. Doc. A/10010/Rev.1 (1975) (“The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law”).

233. “The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”*Supra* note 230.

234. *Id.*

235. MELANIE FINK, FRONTEx AND HUMAN RIGHTS: RESPONSIBILITY IN “MULTI-ACTOR SITUATIONS” UNDER THE ECHR AND EU PUBLIC LIABILITY LAW 98 (Paul Craig & Gráinne de Búrca, eds., 2018).

elements of governmental authority.”²³⁶ Yet still, responsibility for potential wrongful acts by private actors will be attributed to a state, similarly as in ARSIWA.

While it is not always clear whether private actors are able to do their work only when a state allows such involvement or when acting as proxies and agents of states, big liability gaps still exist on the international level.²³⁷ Thus, when a private foundation takes on responsibility for the provision of governmental services, they are guided merely by good faith efforts to do no harm. However, by revising the current responsibility model and ensuring that private actors have the capacity of violating international law, the legitimacy and effectiveness of private projects in the public domain will be greatly strengthened. Ten years after ARSIWA, the International Law Commission (“ILC”) adopted its Articles on the Responsibility of International Organizations (“ARIO”).²³⁸ ARIO, unlike ARSIWA, were drafted without relying on extensive practice simply because there was almost no practice to draw from, as IOs enjoy immunity as institutions as well, as for their agents. Nevertheless, ARIO are considered to be a novel and critical development in international law, especially with regards to the regulation of humanitarian and development projects.²³⁹ For instance, Article 6(1) provides that: “The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.”²⁴⁰ The term “agent” was defined by the ILC as “an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.”²⁴¹ Therefore, when an IO partners with private foundations, it is possible that the conduct of private actors will be attributable to IOs, as there is no requirement to prove that the IO controls the conduct of private entities

236. ETO CONSORTIUM, MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL, & CULTURAL RIGHTS §§ 11, 12 (Sept. 28, 2011).

237. While on the domestic level some responsibility mechanisms might exist, it is known that such mechanisms are relatively weak and as a result, the international community started initiatives like the Ruggie Principles.

238. Draft Articles on the Responsibility of International Organizations, in *Int'l Law Comm'n, Report on the Work of Its Sixty-Third Session*, ¶¶ 87–88, U.N. Doc. A/66/10 (2011), reprinted in [2011] 2 Y.B. Int'l L. Comm'n 40, U.N. Doc. A/CN.4/SER.A/2011/Add.1 (Part 2).

239. Kristen E. Boon, *New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations*, YALE J. INT'L L. ONLINE, Spring 2011, at 1.

240. Draft Articles on the Responsibility of International Organizations, supra note 238, art. 6.

241. *Id.*

that implement functions of the IO.²⁴² Even if an IO includes a clause in the contract that a private partner is neither the agent nor the staff member of that IO, this type of clause does not save an IO from being held responsible for the conduct of the contractual partners.²⁴³ Yet again, according to this framework, private actors are not directly responsible for their potentially wrongful conduct.

Similarly, public-private partnerships are also exempted from international legal responsibility, as such partnerships develop outside of the international legal framework. They belong neither to purely private nor public spheres, as they involve entities who have international legal personality as well as those who traditionally do not have it. Moreover, public-private partnerships are immune to the jurisdiction of domestic courts in some states.²⁴⁴ Therefore, holding public-private partnerships responsible as a single entity is nearly impossible.²⁴⁵

It is, however, true that private actors have already concluded treaties with states, acquired privileges and immunities, participated in the drafting of international legal instruments, and importantly, sued states on the international level.²⁴⁶ This feels like a power imbalance when a state cannot do the same with regard to a private entity, which has no international legal personality and therefore, in most cases cannot be a defendant in an international tribunal.²⁴⁷ On the functional level, the distinction between a government and a private entity is empirically invalid as the lines between what is public and private are excessively blurred: The government invests its authority in private entities or private entities take up government services without any formal transfer.

David Karp argues that private actors have the capacity to fulfil human rights and therefore, they also have to share some degree of responsibility

242. Maja Janmyr, *Attributing Wrongful Conduct of Implementing Partners to UNHCR: International Responsibility and Human Rights Violations in Refugee Camps*, 5 J. INT'L HUMANITARIAN LEGAL STUD. 42, 65 (2014).

243. Int'l Law Comm'n, Seventh Report on Responsibility of International Organizations, U.N. Doc. A/CN.4/610 (Mar. 27, 2009).

244. LISA CLARKE, PUBLIC-PRIVATE-PARTNERSHIPS AND RESPONSIBILITY UNDER INTERNATIONAL LAW: A GLOBAL HEALTH PERSPECTIVE 102 (2014).

245. While under general international law, PPPs cannot be held responsible for violations of international law, under the regime of international investment law, PPPs could face certain degrees of liability based on their contractual obligations. See U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON PUBLIC-PRIVATE PARTNERSHIPS, U.N. Sales No. E.20.V.2 (2020), for more details.

246. Menno T. Kamminga, *The Evolving Status of NGOs Under International Law: A Threat to the Inter-State System?*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 387, 403–04 (Gerard Kreijen, Marcel Brus, Jorri Duursma, Elisabeth De Vos, & John Dugard eds., 2002).

247. See, e.g., Peter Tzeng, *Non-State Actors As Respondents Before International Judicial Bodies*, 24 ILSA J INT'L & COMPAR. L. 397 (2018).

while fulfilling these rights, or, as he says, at least co-responsibility.²⁴⁸ In most cases, philanthropies active in transitional justice (as well as in other public fields) are not mere order receivers or service providers—they are powerful and influential actors that design, fund, and implement publicly important projects.

The similarities in the structure and function of a state and those of a foundation are striking, especially in the last decade. Yet, the private capacity to function as a state does not result in legal responsibility for private actors. At best, the proxy nature of private actors can support the claims for moral and social responsibilities. Yet, as Karp adds, this capacity approach provides for “the latent human rights responsibilities of secondary, or tertiary (and so on) human rights responsibility bearers become activated when those higher up the responsibility ladder [states or even IOs] fail to act as they should.”²⁴⁹ Moreover, if private actors claim the right to be involved in the provision of public services that concern human rights, as discussed above, their rights come with duties, and therefore obligations, including the attribution of responsibility for failures to comply with the duties. This claim even received support from the European Union, when in 2008, the European Consensus on Humanitarian Aid observed that “[h]umanitarian action is a collective responsibility at an international level, involving many different organi[z]ations, governments, local communities and individuals,” implying that states bear the primary responsibility, but other actors might have or even claim secondary or subsidiary responsibility.²⁵⁰ This framework of a human rights approach to humanitarian assistance can be applied by analogy to philanthropic justice, since it requires all kinds of actors to fulfil certain obligations like ensuring that while implementing projects they are not discriminating and using their power for their own benefits.²⁵¹ Perhaps this approach can strengthen the expectations for foundations to, first, fulfil human rights when a state failed to do so (in the context of TJ – provide reparations, find the truth, and bring perpetrators to account), and second, invoke responsibility for failing to fulfil human rights obligations within their capacities or for using their power for private gains or political benefits.

248. DAVID JASON KARP, RESPONSIBILITY FOR HUMAN RIGHTS TRANSNATIONAL CORPORATIONS IN IMPERFECT STATES 3 (Christian Reus-Smit & Nicholas J. Wheeler, eds., 2015).

249. *Id.*

250. Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament, and the European Commission, European Consensus on Humanitarian Aid, European Commission, 2008 O.J. (C 25/01) 66; Tom Kabau & Shahla Ali, *A Human Rights-Based Approach to the Global Regulation of Humanitarian Relief: The Emerging Obligation to Incorporate Local Participation*, 40 BROOK. J. INT'L L. 791, 808 (2014).

251. Kabau & Ali, *supra* note 250, at 809.

VI. CONCLUSION

Transitional justice is not a technical set of tools that fits every transitioning society. It is often just one among many other pressing needs that a transitioning state faces after a conflict or dictatorship. States must pay attention to and spend money on other imperatives such as rebuilding and restructuring social services including health, education, resettlement of internally displaced persons, broken governmental institutions, and economies. As a result, transitional justice might find itself not in the center of concerns of the transitioning government, and thus, delivering justice to victims may require considerable financial, technical, and human resources from outside. The field of transitional justice needs philanthropies, which are driven by ambition, a belief in justice, and even possibly private interests. The multiplicity of actors often results in a transitioning state being caught up in asymmetrical powers of public and private actors, who lack common strategy, understanding of the local cultures, and communication with victim societies. This article showed that TJ initiatives very often depend on private actors and philanthropic foundations, who push TJ forward but also risk altering the processes because of their potential political and ideological motives. Thus, one of the main takeaways from this article is that private donor support to transitional justice should not be seen as unproblematic. To tackle the threats and dangers, international legal scholars should closely scrutinize private earmarking and assistance to vulnerable states.

Philanthropic justice should be of substantial concern to international law. Given current developments, international law no longer refers to states as its main and only subjects. As seen from the above discussion, private actors, including philanthropic foundations, began to feature extensively in the functions of states and international organizations. These globalization processes entrenched non-state actors, who have ability to make decisions with regards to the public good, in the international legal order, but international law has not yet caught up with such changes. In this light, it is important to spell out why everything that has been written above is a matter of international law.

In 2004, the U.N. Secretary-General noted that the “success [of transitional justice processes] will depend on a number of critical factors, among them the need to ensure a common basis in international norms and standards and to mobilize the necessary resources for a sustainable investment in justice.”²⁵² The problem of funding transitional justice has been present since the very inception of the field of TJ. The analysis offered by this article, however, does not aim to criticize the concept of private funding or of outsourcing the administration of justice to philanthropic actors. Rather, it discusses the possible shortcomings of these arrangements without the ex-

252. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004).

istence of international legal norms governing the interference of private actors in transitional justice.

While the philanthropic sector has several advantages in taking up responsibility for justice and reconciliation, these advantages may pose danger to TJ processes. The higher possibility of taking risks and the lack of responsibility mechanisms is what gives private foundations the freedom and maybe even motivation to interact with states and IOs in the context of TJ. However, these factors can result in arbitrary actions. As Rob Reich rightly pointed out, private actors, especially philanthropies, have no market accountability.²⁵³ Moreover, international law, and in particular transitional justice, were not designed to be implemented by the private sector. Therefore, these private initiatives should be thoroughly scrutinized and somehow regulated by international norms. Due to the lack of international regulations, private donors can give funding to transitional justice mechanisms that align with their own agendas. TJ processes could actually end up serving the political and economic interests of private donors because of the inability to operate these processes by the state itself.

This article is to be read as a reflection on the development of the phenomenon of philanthropic justice, where the notions of what can or must be done exclusively by state or private actors are blurred. Partnerships can bring about justice and peace to affected societies, and more clarity about philanthropic justice under international law will only increase the efficiency and positive impact of private efforts to support liberal democratic development in post-conflict and post-authoritarian countries where transitional justice is at stake.

253. Reich, *supra* note 110.