



THE CAPTURE



OF THE HUMAN RIGHTS
PROTECTION SYSTEM



BY LARGE PRIVATE
FOUNDATIONS

The Capture of the human rights protection system by large private foundations

Dr Grégor Puppinck

In the age of globalization, international institutions are assuming increasing responsibility and wielding considerable power. Decision-making centers are moving away from the people and their historic capitals, to concentrate in a few new capitals of global governance, whether financial or political, notably New York and Geneva. As power shifts, its nature changes: it claims to be rational and global, and therefore detaches itself from the expression of the (supposedly irrational) will of individual peoples, as well as from the old distinction between public and private actors, in favor of a new distinction between local and global actors. Whereas small states are local players with limited resources, some foundations and private companies are global players. Some of these private global players have an explicit political purpose. These are large foundations and non-governmental organizations (NGOs) with considerable *resources*, high-level *expertise* and, above all, a generally liberal and global *vision of the world*. These three qualities make these private players highly effective instruments of social change, acting in the political and social arena with far greater agility than states, without their administrative and democratic red tape. As a result, a few private players have acquired far greater financial and political power than many governments. The attitude of governments towards them varies according to whether or not they share the same *vision of the world*.

International organizations (IOs) generally share the same liberal, global vision of humanity's future, and are equally committed to its realization. IOs and large foundations and NGOs are similar and seem complementary. Indeed, these NGOs enable IOs "off the ground" to extend their action "in the field", to make it timely and effective, and to act independently of governments; in return, IOs translate the messages of NGOs into political and institutional terms. Basically, IOs and NGOs are supposed to share the same global vision of the world, to be committed to the pursuit of humanity's common good, and to be detached from national political considerations. This common good of humanity would be more easily accessible to IOs and NGOs in that they would not think in terms of "selfish" national interests, but in the universal language of reason. This language of reason also happens to be the language of international law, and of human rights in particular. This complementary relationship creates a constructive dynamic in which IOs and NGOs inform and influence each other.

However, the blurring of the boundary between public and private actors, and the depth of the relationship between IOs, foundations and NGOs, enable global private actors to exert significant influence on IOs and, through them, on the world as a whole. The difficulty lies in determining the acceptable limit to this private influence on public institutions, since it's only a short step from complementarity to dependence, and this can be crossed, in particular, by the funding of IOs by foundations and NGOs.

Such funding is the fruit of another complementarity between IOs and NGOs or foundations: IOs have political power but want more financial resources, while NGOs and foundations have financial resources but want more political power. Such funding is deemed acceptable and beneficial insofar as it enables us to work towards a common world vision, but it is also problematic in that it further blurs the distinction between public and private global players, and has the effect of confusing their political and financial powers. In this way, IOs can become dependent on private foundations and NGOs. This confusion is an essential aspect of global governance.

The boundary between public and private actors can also be blurred in human terms, with the recruitment of foundation and NGO staff as international experts and judges. This can give rise to multiple conflicts of interest. This phenomenon, whereby a private player exerts a significant influence on or within a public institution, is known in the social sciences as "capture"¹ and "privatization". It was first studied in the field of financial and commercial institutions, then in that of human rights².

It is this phenomenon that we will outline in this article, based on two ECLJ reports: the report "NGOs and ECHR judges, 2009-2019" published in 2020, and the report "The financing of UN experts" published in 2021.

The report on NGOs and judges at the European Court of Human Rights (ECHR) exposes the extent of relations between a number of foundations and NGOs and judges, and the resulting conflict of interest issues. It is based on an exhaustive study of the curricula of the 100 judges who have sat on a permanent basis between 2009 and 2019, as well as of all the applications communicated and published by the ECHR over the same period.

The report on the financing of UN experts covers the special procedures of the UN Human Rights Council. It was produced on the basis of a series of interviews with 28 independent UN experts and an analysis of the financial statements published annually between 2015 and 2019 by the Office of the United Nations High Commissioner for Human Rights (OHCHR), by Special Procedures mandate holders, and by the two main foundations funding the system, the *Ford* and *Open Society* Foundations. This report reveals the extent and opacity of the support and funding given to experts outside the UN system. It also exposes the methods used by certain private foundations to influence these experts. Some of the experts interviewed used the word "corruption" to describe this phenomenon.

Both reports analyze central components of the contemporary system of global governance through human rights. They have attracted a great deal of attention and reactions from some of the judges and experts involved, although no factual elements have been disputed to date. Although this study would benefit from being extended to other institutions, it nevertheless offers an insight into the phenomenon of emprise. All references not included in this article can be found in these reports.

¹ See, for example, Caroline Devaux, *La fabrique du droit du commerce international, Réguler les risques de capture*, Bruylant, 2019.

² See Gaëtan Cliquennois, *European Human Rights Justice and Privatisation, The Growing Influence of Foreign Private Funds*, Cambridge University Press, 2020; K. De Feyter and Isa F. Gómez. *Privatisation and Human Rights in the Age of Globalization*. Cambridge: Intersentia, 2005. H. N. Haddad, *The Hidden Hands of Justice: NGOs, Human Rights, and International Courts*. Cambridge: Cambridge University Press, 2018.

Focusing our study mainly on the ECHR and the UN Special Procedures, we will see how private actors invest these public institutions, both in their function and during their operation (1), how they intervene in the appointment of judges and experts (2), and finally, how experts are recruited (3) and financed (4) by private actors to carry out their mandate.

Due to length constraints, this article is limited to a factual account of the situation, reserving the in-depth analysis these data deserve for a longer publication.

1. Financing the foundation and operation of international bodies

a. Foundation funding for international bodies

American foundations have been investing in the creation of an international institutional order since the first half of the twentieth century. As a reminder, the oldest and most prestigious of these foundations - Rockefeller, Ford and Carnegie - helped create the great international institutions of the 20th century. The Rockefeller Foundation financed the League of Nations (League), then the United Nations headquarters in New York, as well as certain branches of the United Nations, such as UNFPA. Early on, the Rockefeller Foundation defined itself as an "international organization" whose "community is the world"³. The *Carnegie Endowment for International Peace* also financed the activities of the League of Nations, while the Ford Foundation played an important role in setting up the International Criminal Court, and financed the promoters of the European Union.

b. Financing the operation of international bodies

International institutions such as the United Nations have long been financed by private global players, alongside and in addition to governments. The amounts involved are considerable. In recent years, for example, these private players have contributed almost a billion and a half dollars to UNICEF in 2020, over a billion dollars to WHO in 2017, \$540 million to the Office of the High Commissioner for Refugees in 2020, \$77.5 million to the United Nations Population Fund (UNFPA) in 2019, and \$69 million to UNESCO in 2020. The same applies to the Organization of American States (OAS), which received over \$410,000 from the OSF between 2017 and 2019⁴, and the Council of Europe, which includes the Inter-American and European Courts of Human Rights respectively. Even the International Criminal Court receives private funding, notably through a special fund for the benefit of victims; it received \$115,000 from the Open Society Foundations (OSF) in 2017. Similarly, the OSF and Microsoft fund the Extraordinary Chambers in the Courts of Cambodia (ECCC, responsible for punishing crimes committed by the Khmer Rouge)⁵, while the Open Society, Ford, MacArthur, Oak and Rockefeller Foundations have supported initiatives linked to the Special Court for Sierra Leone⁶.

³ RF Activities, June 1930, RF 3/900/22/166; quoted by Tournès Ludovic, in " La fondation Rockefeller et la naissance de l'universalisme philanthropique américain ", *Critique internationale*, 2007/2 (n° 35), p. 173-197.
DOI : 10.3917/crri.035.0173. URL: <https://www.cairn.info/revue-critique-internationale-2007-2-page-173.htm>

⁴ See details on the OSF website ([URL link](#)).

⁵ See summary tables of expenditure and contributions by donors as at March 31, 2016,
<https://www.eccc.gov.kh/fr/about-eccc/finances/tableau-recapitulatif-des-depenses-et-des-contributions-par-les-donateurs-au-7> .

⁶ <https://www.justiceinfo.net/fr/45638-philanthrocapitalisme-justice-transitionnelle-devoir-responsabilite.html>

A reading of the Council of Europe's annual financial reports reveals that George Soros' Open Society and Bill Gates' Microsoft are the organization's two biggest private donors. These two organizations respectively gave the Council of Europe almost 1,400,000 euros between 2004 and 2013 and almost 690,000 euros between 2006 and 2014. The Open Society also supports Council of Europe initiatives such as *the European Institute of Roma Arts and Culture*. Since 2015, there has been no trace of such direct funding; instead, the Council of Europe has set up a special fund to receive such extra-budgetary voluntary contributions.

This phenomenon of private funding also very largely affects the Office of the United Nations High Commissioner for Human Rights (OHCHR), around 63% of whose overall budget in 2019 was made up of voluntary contributions (i.e. extra-budgetary donations), for a total of over \$179 million, whereas it has a regular budget of \$105 million⁷. Most of these voluntary contributions come from the European Union and Scandinavian and Anglo-Saxon countries (Sweden, Norway, Denmark, Finland, Germany, Switzerland, United Kingdom, United States⁸). A number of private foundations and companies also fund the OHCHR, in particular the *Ford* Foundation, the *Open Society* Foundation, the *MacArthur* Foundation, the *Call for Code* Foundation (founded and chaired by Bill Clinton), *Microsoft*, *Counterpart International* and the *Wellspring Philanthropic Fund*⁹ . Almost 70% of these voluntary contributions to the OHCHR budget are earmarked by the donor for a specific program they wish to support and promote¹⁰ . For example, OHCHR and *Microsoft* entered into a five-year partnership in May 2017¹¹ whereby *Microsoft* committed not only to donating five million dollars to OHCHR, but even more to developing and managing for OHCHR "cutting-edge technologies designed to better predict, analyze and respond to serious human rights situations". Although this partnership was described as "historic" by its parties, the OHCHR rejected a request from NGOs to publish its content and clarify its policy on private funding.¹²

Such funding cannot be reduced to mere patronage. As the United Nations Development Programme (UNDP) points out: "Foundations see themselves as development partners in their own right, rather than donors, and expect to be closely involved in activities such as policy discussions, advocacy and problem analysis. They influence international development policies¹³ . In fact, it's easy to see that large foundations and NGOs have access to a higher level of decision-making than the thousands of other organizations accredited to the United Nations and the Council of Europe. This is also due to the fact that these large foundations are also the most able to participate competently in the work of international bodies.

As a counterpoint, it should be noted that public bodies, both national and supranational, also fund private global players. For example, the European Commission awards substantial grants to NGOs and foundations active in the field of human rights, including the Open Society Foundations (500,000 euros in 2018), the Helsinki Committees (2.016 million euros in 2017 and 2018), the International Commission of Jurists (4.389 million euros in 2017

⁷ United Nations Human Rights Office to the High Commissioner, *Human Rights Report*, 2019, p. 87.

⁸ *Ibid*, p.90.

⁹ Between 2015 and 2019, they contributed USD 415,000, USD 107,000, USD 340,000, USD 130,000, USD 2,550,000, USD 748,289, USD 425,050 respectively - OHCHR, *Voluntary Contributions To OHCHR 2008-2019*.

¹⁰ HCDH, *OHCHR's Funding and Budget*.

¹¹ Réseau - DESC, *Letter to Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights*, 2017.

¹² *Idem*.

¹³ UNDP, *Management response to the evaluation of UNDP's partnership with global funds and philanthropic foundations*, September 4-10, 2012, DP/2012/24, p. 15.

and 2018) and Amnesty International (85,000 euros in 2017)¹⁴. Many countries also fund NGOs, and some have made this a specialty, such as Sweden and the Netherlands, in order to act politically beyond their borders despite their diplomatic weakness. The United States, for example, uses the *National Endowment for Democracy (NED)*. This is an informal instrument of influence funded by Congress, foundations and major US corporations, which encourages and finances political initiatives beyond US borders¹⁵.

c. NGO funding by private foundations

Through their policy of funding NGOs, a number of private foundations have placed themselves at the apex of a major NGO network, enabling them to act simultaneously in all the international forums where law is formulated, and thus to implement global strategies for asserting new international standards.

The Open Society Foundation (OSF) has established itself as the richest and most influential organization in this field. Between 1984, the year it was founded, and 2019, the OSF has been endowed with \$32 billion¹⁶, and has invested \$1.2 billion in 2020. The OSF not only funds other NGOs, but also carries out its own actions to influence international bodies, for example through the *Open Society Justice Initiative*, which specializes in strategic litigation in international courts.

The OSF states that the link established with its beneficiaries is not merely financial, but aims to establish genuine "alliances to achieve strategic objectives of the *open society* program"¹⁷. The OSF and the NGOs it funds thus largely share the same objectives.

Among the hundreds of organizations gravitating in the OSF orbit, some are active before the European Court and benefit from substantial funding from the OSF. This is the case of *Human Right Watch*, which has received 100 million US dollars since 2010¹⁸ (and whose honorary president was also president of the OSF)¹⁹, but also of the Helsinki Committees, which received more than two and a half million dollars in 2016, including 460,000 for the Bulgarian Committee, 610,000 for the Hungarian Committee, 1,325,000 for the Polish Helsinki Foundation for Human Rights²⁰. Incidentally, according to data on the European Union's transparency register for 2017²¹, the OSF endowed this Polish Helsinki Foundation with 40%

¹⁴ See parliamentary question "EU funding for controversial NGOs" [E-003054/2020](https://www.europarl.europa.eu/RegData/answers/E-003054/2020) and the answer given by European Commissioner Hahn, EuroParl, E-003054/2020(ASW).

¹⁵ Helmut K. Anheier, Stefan Toepler, *Private Funds, Public Purpose: Philanthropic Foundations in International Perspective*, Springer Science & Business Media, Nov. 11, 2013.

¹⁶ <https://www.opensocietyfoundations.org/george-soros> (accessed 01/02/2020).

¹⁷ https://www.opensocietyfoundations.org/uploads/2519658d-a95b-44bd-b9d3-edec9039de24/partners_20090720_0.pdf (accessed 01/02/2020).

¹⁸ Human Rights Watch 2012 Financial Review: https://www.hrw.org/sites/default/files/related_material/financial-statements-2012.pdf (accessed 01/02/2020); see also:

-watch <https://www.hrw.org/news/2010/09/07/george-soros-give-100-million-human-right> (accessed 01/02/2020).

¹⁹ This is Aryeh Neier: <https://www.opensocietyfoundations.org/who-we-are/staff/aryeh-neier> (accessed 01/02/2020).

²⁰ According to information published by [OSF https://www.opensocietyfoundations.org/grants](https://www.opensocietyfoundations.org/grants) (consulted on 01/02/2020).

²¹ <https://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=657241221166-37#scrollNav-13> (accessed 01/02/2020).

of its overall budget²². The International Commission of Jurists received \$650,000 in 2017, Amnesty International received around \$300,000 in 2016. Interights was also funded in its time²³. Other organizations active at the ECHR in strategic cases, such as ILGA and the Center for Reproductive Rights also received \$650,000 and \$365,000 respectively in 2016.

According to the *Ford Foundation*, its aim is to achieve "social justice", through institutional and social upheaval, as well as "gender, racial and ethnic justice"²⁴ . It has a long history of supporting internationalist initiatives²⁵. Each year, it donates between \$500 and \$700 million to the causes it supports²⁶ . The value of its assets in 2019 exceeds \$14 billion²⁷ . The *Ford Foundation* has funded legal actions since the mid-1960s, first in the United States, then in South America and South Africa. It extended this action to Eastern European countries and to the ECHR in the 1990s. Like the *Open Society*, the NGOs it funds practice strategic litigation, i.e. the use of legal recourse as a means of achieving a more global objective of a political nature. The *Ford Foundation*'s involvement in the human rights sector is growing in importance. It has become the world's leading funder of this sector, with \$387 million in grants in 2017, ahead of the *Open Society* (\$224 million USD) and the *Bill & Melinda Gates Foundation* (\$173 million USD)²⁸.

Most of the foundations funding the Special Procedures (OSF, *Ford, Oak, Sigrid Rausig Trust, Wellspring*) are also members of the *Human Rights Funders Network* (HRFN), a New York-based forum for cooperation and consultation bringing together foundations and private funders of human rights initiatives. The financial weight of foundations, far greater than that of international human rights institutions, is capable of capturing or privatizing human rights, even more so if these foundations act in concert.

The fact that a large proportion of NGOs working in the field of human rights are funded by a few private foundations puts the independence of these organizations into the shade, and calls into question the very notion of "civil society".

2. Appointment of judges and experts to international bodies

Private influence is exerted not only through the funding of major human rights institutions, but also in the selection of their members. The appointment of international experts and judges is of strategic importance, given their power to interpret and apply international standards. According to their statutes, these experts and judges must be independent and highly qualified: they embody the ideal of "wise men" exercising control over national political leaders. Foundations and major NGOs are seeking to intervene in the appointment of judges and experts to international bodies, and even to place some of their staff in these positions.

²² In 2017, the OSF endowed the Helsinki Foundation for Human Rights (Poland) with €820,398 out of a total budget of €2,109,858.

²³ See the website of this defunct organization: <https://www.interights.org/> (consulted on 01/02/2020).

²⁴ Ford Foundation, [About Ford Mission](#).

²⁵ Nicholas R. Micinski, *The Changing Role of the Ford Foundation in International Development, 1951-2001*, International Society for Third-Sector Research and The Johns Hopkins University 2017.

²⁶ Ford Foundation, [Financial Snapshot 2018](#).

²⁷ Ford Foundation, [Financial Statements and Report of Independent Certified Public Accountants](#), 2018-2019.

²⁸ Human Rights Funding Network, *Annual Review of Global Foundation Grantmaking, Advancing Human Rights 2017 Key Findings*, 2017.

a. Participation in the appointment of experts and judges

Some major private players are seeking to participate in the process of appointing experts and judges. They justify this request by claiming that their intervention would contribute to depoliticizing the appointment procedure, making it more open and transparent, and thus enhancing the competence and independence of the experts appointed. These large foundations, though lacking in democratic legitimacy, present themselves as part of and representative of a "civil society" whose contours are indefinite.

An early illustration of a formal willingness to participate in the appointment process of international judges is offered by a report published in 2003 by the organization *Interight*, with the support of the OSF, entitled "Judicial independence: law and practice of appointments to the European Court of Human Rights". In 2017, the *Open Society Justice Initiative* and the International Commission of Jurists jointly published a lengthy report on the rules and practice of selecting judges and commissioners in the field of human rights around the world²⁹, accompanied by a series of recommendations, including that of granting a role to "civil society" in this process, in the name of greater transparency and depoliticization of expert selection.

These recommendations were implemented in the process of appointing judges to the ECHR. In 2012, the Committee of Ministers of the Council of Europe adopted "Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights". This text notably provides for the intervention of "civil society" at all stages of the national phase of the procedure³⁰. Private actors are authorized "*either to invite suitable persons to apply, or to appoint such persons themselves*"³¹. The national body responsible for submitting a list of candidates to the government may also include representatives of NGOs³². Finally, NGOs also play an informal role by lobbying PACE deputies to convince them to elect their candidate.

At the Inter-American Court of Human Rights, civil society has not been given an official role in the procedure for selecting judges, although the Open Society Justice Initiative (OSJI) has taken on a quasi-official role. This branch of the OSF, which specializes in strategic litigation, has set up a panel of "experts" to interview candidates for the position of judge on the Inter-American Court. This process is supported by numerous American NGOs funded by the OSF. Following the hearings, the OSJI evaluates the candidates and submits its recommendations to the General Assembly of the Organization of American States (OAS), which selects and elects the judges. Although the OSJI process is not official, most candidates for the position of judge submit to it, even though the OSJI network is simultaneously lodging appeals with the same jurisdiction. By way of illustration, in 2018, Colombian judge Humberto Antonio Sierra Porto, following his

²⁹ Open Society Justice Initiative and International Commission of Jurists, *Strengthening from Within Law and Practice in the Selection of Human Rights Judges and Commissioners*, Open Society Foundations, New York, 2017: <https://www.justiceinitiative.org/uploads/634afeb7-dd44-42e3-a567-43c36f1dd090/strengthening-within-fr-20180426.pdf> (accessed 01/02/2020).

³⁰ Committee of Ministers, 1138 Meeting, March 28-29, 2012, *Guidelines of the Committee of Ministers concerning the selection of candidates for the post of judge at the European Court of Human Rights* https://www.coe.int/t/dgi/brighton-conference/Documents/Guidelines-explan-selection-candidates-judges_en.pdf, § 41 (accessed 01/02/2020).

³¹ Committee of Ministers, Guidelines, *supra*, § 44.

³² Committee of Ministers, Guidelines, *supra*, § 48.

hearing, was recommended as "*highly qualified to be elected again as a judge to the Inter-American Court*"³³. And so it was.

The United Nations includes several jurisdictional and quasi-jurisdictional bodies, such as international tribunals and UN committees responsible for ensuring that States comply with their international commitments (the best known being the Human Rights Committee). The Human Rights Council, which brings together 48 States elected by the United Nations General Assembly, has also set up some forty "special procedures", i.e. functions of independent experts and rapporteurs whose mission is to promote respect for human rights on particular themes, or in given territories. These UN experts have considerable authority and power, as they are the source of international law and guide its interpretation and application. These experts are most often academics, but may also be heads of NGOs. The procedure for applying for these positions is totally open, from a formal point of view, since anyone can apply, with the final choice resting with government representatives, following non-public diplomatic negotiations.

b. Appointment of judges and experts from NGOs and foundations

The major private players not only participate in the selection process for judges and experts; they also manage to get some of their staff appointed to these public positions. This is evident at the ECHR and at the special procedures of the UN Human Rights Council, as detailed by ECLJ in the two reports mentioned in the introduction.

The appointment of private-sector collaborators as judges at the ECHR

The ECLJ report "NGOs and the Judges of the ECHR", published in February 2020, revealed the stranglehold of a number of foundations and NGOs on the European Court of Human Rights. It shows that between 2009 and 2019, 22 of the Court's 100 permanent judges came from seven NGOs active at the Court. Among these seven NGOs, the Open Society network stands out for the number of judges linked to it (12) and for the fact that it funds the six other organizations cited in the report. These seven NGOs are A.I.R.E. Centre, Amnesty International, the International Commission of Jurists (ICJ), the Helsinki Committees and Foundations Network, Human Rights Watch (HRW)³⁴, Interights and the Open Society Foundations (OSF) and its various branches, in particular the Open Society Justice Initiative (OSJI). Judges associated with OSF include former executives, employees and financial beneficiaries of the foundation. Collaboration between NGOs and future judges exists at different levels, ranging from founding and directing NGOs, to significant participation in their activities.

The staff of the European Court

The composition of the European Court's registry is not public, except in the case of its directors. It is therefore not possible to know precisely the links between ECHR jurists and NGOs. Only scattered information published on the Internet makes it possible to identify cases

³³ "Final report of the independent panel for the election of judges to the Inter-American Court of Human Rights" May 31, 2018, [accessible here](#), pp. 25-29.

³⁴ Originally in 1978, this NGO was known as *Helsinki Watch*. In 1988, *Helsinki Watch* and its affiliates became *Human Rights Watch*. <https://www.hrw.org/our-history> (accessed 01/02/2020).

of NGO employees or former students financed by the OSF, recruited as lawyers at the ECHR. What's more, it is not uncommon for temporary lawyers from the ECHR Registry to join NGOs active at the ECHR, who themselves have former collaborators at the Court. It can happen that the lawyers submitting an application for an NGO and those handling the case for the ECHR are former colleagues of the NGO or the Court. By way of illustration, a series of cases in favor of abortion liberalization have been lodged with the ECHR (see, for example, case *M.L. v. Poland* no. 40119/21), by a former ECHR jurist (Ms Agata Bzdyń), in collaboration with the Warsaw-based *Helsinki foundation for human rights*, which has at least one of her former colleagues in the Polish section of the ECHR (Marcin Sczaniecki). Agata Bzdyń and Marcin Sczaniecki are also campaigning within the same movement for the legalization of abortion in Poland.

Appointment of Human Rights Council special procedures mandate-holders (special rapporteurs)

A significant proportion of UN Special Procedures mandate-holders are also former collaborators of these NGOs and foundations, or joined them shortly after the end of their mandate. Thus, of the 222 Special Procedures mandate holders between 2010 and 2020, at least 52 have held, or hold, a position of responsibility within the *Open Society* or an NGO funded by the *Open Society* or *Ford Foundations*, such as the *Center for Reproductive Rights* and the *International Center for Transitional Justice*. Of these 52 experts, 14 have held (or will hold in 2021) a position at *Amnesty International*, 12 at the *International Commission of Jurists*, 6 at the *Open Society*, 4 at *Human Rights Watch*, and one at the *Helsinki Committee*. 41 of these experts also have responsibilities in these organizations during their term of office. These situations are likely to give rise to conflicts of interest prohibited by resolution 5/1, which stipulates that "persons holding decision-making positions within the government or any other organization or entity that may give rise to a conflict of interest with the responsibilities inherent in the mandate shall be excluded"³⁵. It also appears that 9 experts receive funding for their mandate from the NGOs or foundations on which they sit or have sat (or from foundations that have subsidized them).

Appointment to the post of Commissioner for Human Rights

This phenomenon can also be observed in the position of Commissioner for Human Rights at the Council of Europe. For example, Nils Muižnieks, who held this position from 2012 to 2018, was also Program Director of Latvia's Open Society until 2012. In 2009, he explained that Open Society wants to create a new man - *homo sorosensus* [referring to Soros] - the man of the open society, **as opposed to** *homo sovieticus*³⁶. As part of his duties, he has condemned several Hungarian government initiatives, including the so-called "anti-Soros" bill³⁷.

This study should be supplemented by the examination of experts from other international human rights bodies, notably the United Nations committees, the African Court and the EU Fundamental Rights Agency.

³⁵ Human Rights Council, Resolution 5/1 "Institution-building of the Human Rights Council", June 18, 2007.

³⁶ Nils Muižnieks, Creating the "Open Society Man" (and Woman!), Open Society News, Fall 2009, p. 6.

³⁷ "Hungary. The Council of Europe criticizes the "anti-Soros" law", *Ouest France*, February 15, 2018:

<https://www.ouest-france.fr/europe/hongrie/hongrie-le-conseil-de-l-europe-critique-la-loi-anti-soros-5567285>
(accessed 01/02/2020).

c. Problems identified

The most obvious problems caused by the pervasive presence of private actors within public institutions stem from the phenomenon of informal networks both between members of the institution from the same foundation or NGO, or between these individuals and their former employers. Such networks enable privileged information to be exchanged and influence to be wielded. An even more glaring problem concerns the numerous conflicts of interest observed within the ECHR. Between 2009 and 2019, 18 of the 22 judges from foundations and NGOs sat on at least 88 occasions in cases involving "their" organization. In very many other cases, a judge from the OSF has judged cases brought or supported by OSF-funded NGOs, or conversely, a judge from an OSF-funded NGO is likely to judge cases brought by the OSF or its affiliated organizations.

The data protection case *Big Brother Watch v. United Kingdom* is emblematic of the ambiguous relationship between NGOs and the Court. Of the 16 applicants, 14 are NGOs, 10 of which are funded by the OSF. The same applies to third parties, including the Open Society Justice Initiative, and five other NGOs funded by the OSF. The community of interests and the institutional and financial links between the plaintiffs and the interveners cast a shadow over the impartiality of the third parties and call into question the equality of arms before the judge, as the defendant government finds itself alone facing a swarm of NGOs which, although presenting themselves distinctly, pursue the same objective and are linked. Even more significantly, at least six of the 17 judges who sat on the Grand Chamber in this case are also linked to the applicant and intervening NGOs.

There are also numerous other cases in which judges have failed to withdraw from matters they had previously dealt with within their NGOs. For example, Judge Darian Pavli advised on judicial reform in Albania on behalf of the Open Society, before subsequently hearing a case at the ECHR concerning its implementation³⁸.

This situation calls into question the judicial independence and impartiality required by Article 21 of the Convention and Article 28 of the Rules of Court. It is obvious that a judge faces a conflict of interest when an application is lodged by an organization of which he or she is, or has been, close, or even of which he or she has been a collaborator.

The problem of conflicts of interest is compounded by the frequent opacity of NGOs' dealings with the ECHR, as they do not always reveal their involvement in a case examined by this court. By way of illustration, the Court's database shows that the Polish Helsinki Foundation for Human Rights intervened 9 times as a representative of applicants in cases decided and published between 2009 and 2019³⁹. Yet according to the organization's activity reports⁴⁰, in 2017 alone, it claims to have lodged 16 applications and defended 32 cases before the ECHR.

³⁸ *Xhozhaj v. Albania*, no. [15227/19](#), February 9, 2021.

³⁹ Cf. Appendix 2 "Third-party intervention by NGOs at the ECHR since 2009" and Appendix 3 "Direct action by NGOs at the ECHR since 2009".

⁴⁰ Polish Helsinki Foundation for Human Rights reports:

Landmark human rights cases 2017, <https://www.hfhr.pl/wp-content/uploads/2018/11/Raport-litygacyjny-ENG-20181108-WEBrózka%C5%82ado%C5%81wki.pdf> (accessed 01/02/2020);

Human Rights in Strategic Litigation 2018 Report, <https://www.hfhr.pl/wp-content/uploads/2019/01/raport-roczny-PSP-2018-EN.pdf> (accessed 01/02/2020).

The figures for 2018 are much the same⁴¹. For four cases mentioned in the activity reports of the Helsinki Foundation for Human Rights (HFHR) as lodged between June 2017 and November 2018, only one appears on HUDOC as linked to this foundation⁴². In the other three cases, the fact that the applicants' lawyers belong to the foundation's *strategic litigation* team is not mentioned. Moreover, when these lawyers do act, it is difficult - if not impossible - in the absence of details, to know whether they are acting in a personal capacity for their clients or as members of the NGO. In the case of *D.H. et al. v. Czech Republic*⁴³, the president of OSJI was listed as the applicants' lawyer, but the organization did not appear in the proceedings, despite claiming the initiative in its activity report⁴⁴. On the other hand, other NGOs founded or financed by the OSF acted visibly as third-party interveners. In other cases, the NGO only appears in the part of the judgment relating to costs. This lack of clarity makes it impossible to ascertain the extent of the NGOs' involvement with the Court, but even more so, it is likely to affect the proceedings, not only because the real applicant is sometimes the NGO acting through a particular case, but also because only the former collaborators of these NGOs, judges or registry lawyers, are able to identify which group is "behind" the application, either because they have been informed of it informally through acquaintances, or because they know the lawyer. In this case, any links between the judges and the petitioners are less visible, but no less present.

3. Recruiting experts for international bodies

Sometimes, a new Special Procedures mandate-holder is recruited by a pre-existing structure, which proposes to "support" him or her in fulfilling the mandate⁴⁵. This is the case, for example, of the University of Essex, whose *Human Rights Centre* says it has a "tradition of supporting and welcoming UN Special Rapporteurs"⁴⁶. It has recruited Rapporteurs Hunt, Shaheed and Pūras. The *Human Rights Centre* is itself generously funded in this activity by foundations such as the *Open Society* and the *Sigrid Rausing Trust*⁴⁷. It describes itself as follows: "We influence and define human rights agendas. We make concrete differences around the world, and are a

⁴¹ Number of cases brought by the Helsinki Foundation for Human Rights (Poland) in 2018: 11; it appeared in 40 cases before the ECHR during the same year.

⁴² These are the following 4 cases: 3 without mention of the Helsinki Foundation: ECHR, *Kośc v. Poland*, no. 34598/12, 1st June 2017; ECHR, *Wcislo and Wabaj v. Poland*, no. 49725/11, November 8, 2018; ECHR, *Bistieva and others v. Poland*, no. 75157/14, April 10, 2018. 1 case with mention of the Helsinki Foundation for Human Rights: ECHR, *Solska and Rybicka v. Poland*, no. 30491/17 and no. 31083/17, September 20, 2018.

⁴³ ECHR, *D.H. and others v. Czech Republic*, no. 57325/00, November 13, 2007. Interview with Judge Zupančič available on the ECLJ website, December 2019.

⁴⁴ The Open Society Justice Initiative, *Global Human Rights Litigation Report*, <https://www.justiceinitiative.org/uploads/4e9483ab-a36f-4b2d-9e6f-bb80ec1dcc8d/litigation-global-report-20180428.pdf> (accessed 01/02/2020).

⁴⁵ Research to date has focused only on Special Procedures mandate holders.

⁴⁶ University of Essex, Essex supports UN mandate holder to promote health rights, 13 August 2015. https://www1.essex.ac.uk/news/event.aspx?e_id=7854, accessed December 20, 2021.

⁴⁷ Colchester Campus, UN Special Rapporteur joins the University, 21 September 2012. https://web.archive.org/web/20130612020259/http://www.essex.ac.uk/news/event.aspx?e_id=4502, accessed on 20 December 2021.

See also: Sigrid Rausing Trust, Grant History University of Essex. <https://www.sigrid-rausing-trust.org/Grantees/Human-Rights-Centre-University-of-Essex>, [Accessed 10/12/2021].

leading voice for change⁴⁸." The *Human Rights Centre* provides financial, logistical and human resources to the rapporteurs, and thus contributes to the fulfillment of their mandates.

The *Open Society* has funded other mandates via the Universities of New York, New Jersey and Sungkyunkwan in Korea, in addition to the University of Essex. Similarly, the *Ford Foundation* has funded mandates via the Universities of New York, Washington, Arizona, California, São Paulo and the Graduate Institute of International and Development Studies.

Experts are also recruited by NGOs. This is notably the case of Melissa Upreti, a member since 2017 of the United Nations Working Group on Combating Discrimination against Women (which she currently chairs). She was simultaneously recruited by the Center for Women's Global Leadership (CWGL), a radical feminist organization, to be in charge of global lobbying, notably at the United Nations. Previously, she worked for the *Center for Reproductive Rights*⁴⁹. Shortly after the publication of the ECLJ report, she was appointed to the self-regulatory body of the Special Procedures.

The practice of recruiting practising experts is distinct from, and even more problematic than, that of the "revolving door" whereby experts are recruited at the end of their mandate by an organization acting in the same field.

4. Financing experts for international bodies

UN experts undertake to perform their duties on a voluntary basis, refusing to accept any donations; their expenses are covered by the UN. However, some experts have interpreted their independence as allowing them to receive funding directly from public and private actors, bypassing the Office of the High Commissioner for Human Rights (OHCHR). Between 2015 and 2019, 37 of the 121 experts reported receiving an additional 134 direct financial payments, for a total of \$10,725,328, mostly from private donors. One expert claims to have received more than two million dollars, another more than one million, six experts more than 500,000 dollars and 11 others more than 100,000 dollars. According to the experts' voluntary declarations, they received \$5,515,523 from private foundations and NGOs, including \$2,190,000 from the *Ford Foundation* for 9 mandate holders and \$1,584,517 from the *Open Society Foundations* (OSF) for 6 mandate holders. Four mandate holders were funded by both the *Ford Foundation* and the *Open Society Foundations*. 3,844,163 dollars were declared paid by 17 States, the main ones being Norway, Australia, Germany, Sweden, the Netherlands and Switzerland. 1,142,757 were declared by 49 universities. 13 official international organizations were also reported to have contributed \$222,886, including the Organisation Internationale de la Francophonie with \$26,637.

In addition, there was support in kind. According to the annual reports of the Special Procedures, 36 mandate holders out of 121 declared having received 125 donations in kind between 2015 and 2019. This most often involves the provision of office space, staff and administrative support.

⁴⁸ University of Essex, Human Rights Centre, Pioneering the theory and practice of human rights from the local to the global: "We influence, and set human rights agendas. We make concrete differences around the globe, and we are a dominant voice for change."

⁴⁹ The *Center for Reproductive Rights* is funded by *Open Society Foundations*, *Macarthur Foundation* and *Ford Foundation*, among others https://reproductiverights.org/sites/default/files/documents/2018_Annual.pdf [Accessed 10/12/2021]

This direct funding is marked by opacity and poses numerous problems, in addition to the fact that it violates the prohibition on accepting any donation.

Experts have only a moral obligation to declare their extra-budgetary funding. As a result, some of them fail to declare their direct funding on an annual basis (this was the case in 2019 for 19 mandate holders in 2017). In addition, when experts declare support and funding, these declarations are often inconsistent and incomplete, the amounts declared as received by such and such an expert do not correspond to that declared as paid by such and such a foundation or government, or as received by OHCHR. Experts have also been known to declare donations without specifying the amount (18 times between 2015 and 2019), or omitting the identity of the donor (8 times for a value of \$906,944).

What's more, the purpose of more than a quarter of funding is not made public (143 out of 439 between 2015 and 2019). Similarly, the contracts between the experts and their funders are not disclosed to the public, or even to the UN administration, even though these agreements may precisely describe the beneficiary's obligations, objectives and funding terms and conditions. Last but not least, this funding is also marked by a lack of transparency regarding the terms and conditions of payment as the experts have no official bank account attached to their position. They must therefore find their own way of cashing in these funds.

Questioning the independence of experts

These extra-budgetary payments, especially when they are direct, call into question the independence, at least apparent, of the experts. Richard Falk, former Special Rapporteur between 2008 and 2014, believes that direct funding "*can have a corruptive effect*".

The independence of experts can be affected in several ways. Firstly, the payments received can cause dependence which varies according to the size of the funding. The situation of an expert who has received \$10,000 to finance a conference differs from that of an expert who benefits from a working team, or several hundred thousand dollars from the Ford or Open Society Foundations, or from a single government. This dependence can be heightened when it relates to the structural costs of the mandate, such as the payment of premises and staff salaries.

Such funding also calls into question the confidentiality of the experts' mandate, as they are required to report on their activities to their funders, which in turn conditions the renewal of the grant award in subsequent years. Neither the *grant agreement* nor these activity reports are made public, or even forwarded to OHCHR.

There are even cases where experts receive a salary or remuneration from an external funder, in violation of their code of conduct. For example, the Ford Foundation paid \$100,000 in 2017 to the NGO employing an expert, in order to give her time off to work on her mandate⁵⁰. Similarly, Mireille Fanon-Mendes-France and Cecilia Jimenez-Damary state that they received *per diems* from universities and USAID, without indicating the number (in 2015 and 2016). A former expert from an NGO also told us that she had been paid as a consultant through a "portage salarial" company, itself paid by a private structure that received private and state funding for the expert.

This funding also influences the expert's "agenda".

⁵⁰ Facts and figures with regard to the special procedures in 2017, A/HRC/37/37/Add.1 - Annex X, p.31: "Separately, US\$100,000 was received from Ford Foundation to the NGO that SR works for that provides her the release time to work in the mandate."

Nearly all the experts interviewed acknowledge that direct payments have an influence on the experts' political agenda, in particular on the choice of theme or country considered in the annual reports, or even on the execution of the mandate itself.

Several experts point out that it is common practice for a public or private funder to make its "financial support" conditional on the completion of a specific project, more or less closely linked to the mandate in question. The financial statements of the Ford and Open Society Foundations give several examples of payments made with a view to producing a report on a particular subject. Thus, according to the example used by one expert, a foundation wishing to promote gender issues may have proposed to the Working Group on Enforced Disappearances to finance work on the theme of "*gender and enforced disappearances*". This is also the case for a report entitled "*Gender perspectives on the prohibition of torture*⁵¹" presented to the Human Rights Council in January 2016 by the Rapporteur on Torture, and another report on "*The gender dimension of contemporary forms of slavery*" presented in 2018 by the Rapporteur on Slavery. Convergent funding of this kind, offered to several experts and other players in international law, enables a theme to emerge on the international scene: it's a gateway into international law.

The *Open Society Foundations* has even openly admitted to wanting to "influence" an expert. The OSF thus declared that in 2017, under its women's rights program, it had paid 100,000 USD to the *Center for Women's Global Leadership* (CWGL), a feminist activism center attached to Rutgers University⁵² (New Jersey), "to influence the United Nations Special Rapporteur on Contemporary Forms of Slavery⁵³". The aim was to get the Special Rapporteur to recognize domestic work as a form of slavery. This goal was achieved, because the following year, the Special Rapporteur, Urmila Bhoola, devoted her official report to this theme⁵⁴, in close collaboration with the CWGL, both for the drafting and promotion of the report. The Chair of the Board of Directors of the *Open Society Foundations' Women Program* between 2011 and 2018 was Fionnuala Ní Aoláin, who in turn became Special Rapporteur in 2017. The CWGL also financed, with *Open Society*, the promotion of a report by Juan Pablo Bohoslavsky, UN "independent expert" on foreign debt.

Conclusion

These few facts give an idea of the depth of power acquired by a few private foundations at all levels of the international human rights protection system. This picture is still incomplete, however, and exposes only the visible, objective part of this power. The whole subjective, relational and ideological dimension largely escapes analysis. The human rights protection system was set up after the Second World War to protect individuals from the arbitrary power of states. Since then, other major players have appeared on the international scene. It would be naive to believe that these new private players are acting solely out of philanthropy.

⁵¹ Juan Mendez, *Gender Perspectives on the Prohibition of Torture and Cruel, Inhuman and Degrading Treatment* [A/HRC/31/57](#).

⁵² Rutgers - School of Arts and Sciences, [Programs, Centers, and Institutes](#).

<https://sas.rutgers.edu/giving/sas-departments/programs-centers-and-institutes>, [Accessed 10/12/2021].

⁵³ Open Society Foundations, [Awarded Grants](#), 2017.

https://www.opensocietyfoundations.org/grants/past?grant_id=OR2017-39720 [Accessed 10/12/2021].

⁵⁴ Document [A/HRC/39/52](#), July 27, 2018.