

## Case 49

# Human Rights and the International Criminal Court

*John D. and Catherine T. MacArthur Foundation, Open Society Institute, and Ford Foundation, 1978*

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*Background.* The idea of a permanent judicial body to punish the worst offenses of international law—genocide, war crimes, and crimes against humanity—harks back at least to the late nineteenth century, when Gustav Moynier, one of the founders of the International Committee of the Red Cross, proposed such an institution in the aftermath of the Franco-Prussian War.<sup>79</sup> More than seventy years later, the Nuremberg trials set a precedent that men, not abstract polities, commit atrocities. “Never Again” was the promise of Nuremberg, but that promise was soon lost in the realities of the Cold War. It was not until the mid-1990s that the idea of a permanent international court would gain real traction. That it finally did so is owing to a great many factors. Among the most important of these was a vigorous assault on the status quo of global diplomacy spearheaded by a coalition of NGOs. Foundations played an important role in supporting the work of this movement to build a constituency for universally enforceable international law.

In fact, the creation of the International Criminal Court is the result of a larger worldwide effort, stretching back at least sixty years, to codify and maintain a set of human rights to which even the Earth’s most destitute and grief-stricken peoples are entitled. Supported largely in the civic sector, the human rights movement has been growing stronger at least since 1948, when the United Nations General Assembly passed the Universal Declaration of Human Rights. And with the creation, first, of several ad hoc international tribunals to investigate and adjudicate allegations of human rights abuses in the former Yugoslavia, in Rwanda, and elsewhere, and, more recently, of the International Criminal Court, the human rights movement is stronger than ever. Among this movement’s oldest, most consistent supporters have been a number of private foundations. In this case study, three major philanthropies—the MacArthur and Ford Foundations and the Open Society Institute—are examined. These three are the largest foundation supporters of human rights support, and each has played an important role in bringing human rights monitoring and enforcement along to where they are today.

*Strategy.*

### *John D. and Catherine T. MacArthur Foundation*

The MacArthur Foundation is a major funder of human rights work around the globe. Its grants have not only supported the development of the field as a whole, but have also played a significant part in a critical chapter in the history of human rights—the creation of the International Criminal Court. The Foundation’s work in the field began in 1978 with a \$50,000 grant to Amnesty International.<sup>79</sup> As the field of human rights protection has grown, so too has MacArthur’s support of it. The Foundation has made grants to over 350 human rights organizations. In 1992, the Foundation initiated a major new focus on the protection of human rights. Since then, the Foundation has given out over \$38 million. A very high proportion of the Foundation’s grants to these organizations has been for general operating support “to allow for flexibility to address pressing issues, expand geographical reach, and move to new fields of inquiry.”<sup>79</sup>

The Foundation has also leveraged significant impact from its support of the International Criminal Court. Human Rights Watch—to which the Foundation has given over \$22 million over the last twenty-five years—as well as other MacArthur grantees, have been major supporters of the ICC,

thanks, in part, to programmatic and general support from MacArthur. The Foundation also made grants to the World Federalist Movement<sup>753</sup> and other organizations central to the Coalition for the International Criminal Court, the network of NGOs that worked to bring about the Court. This money helped the coalition prepare for and execute a radical strategy that culminated, in the summer of 1998, at the Rome Conference where a draft statute for the ICC was adopted. In what David Davenport, a fellow at the Hoover Institute, calls “New Diplomacy,” the coalition disregarded the existing work of the U.N. International Law Commission toward the development of a world court and used a range of tactics—not least among which was shame<sup>754</sup>—to force the hand of the 148 nations participating in negotiations.<sup>755</sup> Working with a group of like-minded states, the un-elected group of nonprofits controlled the proceedings to keep the draft statute on track, even over the objection of the U.S. delegation.<sup>756</sup>

### *Open Society Institute*

An enormous portion of the Open Society Institute’s work relates directly or indirectly to advancing the spread of human rights. The Institute’s Justice Initiative, for example, is an OSI-operated effort that “pursues law reform activities grounded in the protection of human rights...”<sup>757</sup> The initiative “combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge. . . .” Among a range of activities, the Open Society Justice Initiative has supported the development of the International Criminal Court, and is now working to convince states to ratify the treaty that grew out of the Rome Statute, and to help states considering ratification amend their domestic laws to enable ratification. The Justice Initiative focuses these efforts on countries “not already addressed by existing organizations and where OSI has particular strengths.”<sup>758</sup> In addition to supporting the development of the ICC, the Justice Initiative works extensively with the ad hoc tribunals created by the United Nations to adjudicate the Rwandan genocide and the human rights abuses committed during Sierra Leone’s years of strife, and the despotic reign of the Khmer Rouge in Cambodia. The Initiative is deeply involved with these tribunals, offering “advice and recommendations on prosecution, investigation, indictment, brief-writing, trial, and appeal strategies.”<sup>759</sup> The Justice Initiative also collaborates with local NGOs, building cases that may at some point be forwarded to the ICC prosecutor.

### *Ford Foundation*

The Ford Foundation began to focus explicitly on the defense of human rights in the mid-1970s, when it made grants to advance such causes as ending apartheid in South Africa and promoting freedom of expression behind the Iron Curtain. Over the past three decades, human rights support has become a major grant-making area for the Foundation, which, in its human rights work, focuses primarily on the rights of “women, migrants, refugees, marginalized racial and ethnic groups, and international human rights efforts.”<sup>760</sup> In the latter field, the Foundation has funded a wide array of activities, such as the ad-hoc tribunals, the International Criminal Court and rights organizations working within the United States. In 1998, for example, the Foundation made grants to the World Federalist Movement to ensure NGO participation in the Rome Conference.<sup>761</sup> Ford is a sponsor of the Coalition for the International Criminal Court, and has substantial funding—\$1.7 million over the last three years, and millions more over a longer period—to the Lawyers Committee for Human Rights, an international NGO committed to encouraging compliance with international human rights standards and strongly supportive of the ICC. As with MacArthur and OSI, it is worth remembering, however, that this is but one part of Ford’s tremendous human rights portfolio. Last year, the Foundation made some 200 grants in the field.

*Outcomes.* The development of international law and human rights enforcement has been dramatic in recent years. The Rome Statute was approved by 120 of the 148 nations at the conference. As of

November 2004, ninety-seven countries had ratified the Statute.<sup>762</sup> The threshold for entry into force was only sixty ratifications, so a nascent ICC now exists and is in the process of initiating its first proceedings. The pace of negotiation, adoption, and ratification has been incredibly fast. As at the Conference to Ban Landmines, this “new diplomacy” has shaken up the traditional model of foreign relations, which works in a far more deliberate and secretive manner. The support of a number of NGOs—most, if not all, funded by these three foundations—has been the key. These organizations have not only facilitated discussions before, during, and after the Rome Conference, but have also worked to gather evidence for the first two ICC trials, promulgate judicial standards, and support ratification in the nations party to the Rome Statute.

*Impact.* Foundations have by no means been the only significant nongovernmental actors in the process. But, by their targeted deployment of funds, and by their long history of building the field, these and other foundations have helped to create an institution that is now the most prominent fixture in the landscape of international law. This case has focused primarily on that story, but the context around it—the growth of the international human rights movement and the strengthening norms of international law—is an even larger development, and one in which foundations have consistently been leaders. Unlike many NGOs, most human rights organizations do not accept government funding. This makes foundations all the more important to their survival. Ford, MacArthur, and the Open Society Institute have given hundreds of millions of dollars, perhaps more, to protect the most basic rights, shared by every person on Earth. By 1988, the Annual Report of the Ford Foundation could rightly note the existence of “a powerful worldwide movement to protect fundamental civil and political liberties and to ensure the social and economic rights of disadvantaged people.”<sup>763</sup> Even today, the human rights movement continues to gather steam. As Jonathan Fanton, the MacArthur Foundation’s president, has said, “[a]lthough serious human rights abuses persist in many places, the direction of history is clear: There is a worldwide movement to prevent those abuses and bring perpetrators to justice.”<sup>764</sup> Although ratification of the International Criminal Court has aroused serious controversy in the United States, and although the Court’s success is still far from assured, the direction to which Fanton alludes is one for which even the most ardent isolationist can be thankful.

## Notes

750. “History” of the International Criminal Court,” available from <http://www.icc.org>.

751. “Background on MacArthur Human Rights Grantmaking” memo, from the John D. and Catherine T. MacArthur Foundation.

752. *Ibid.*

753. “Background on MacArthur Support for the International Criminal Court” memo, from the John D. and Catherine T. MacArthur Foundation.

754. The Canadian Foreign Minister referred to the Coalition’s approach as “the mobilization of shame.” *Ibid.*

755. David Davenport, “The New Diplomacy,” *Policy Review*, No. 116 (2002).

756. On December 31, 2000, President Clinton signed the Rome Statute. At the time, however, he reaffirmed the position of the United States government that the treaty was flawed and would not be sent to the Senate for ratification in its present form. The Bush administration has been even less willing to contemplate joining the ICC. Nonetheless, the Court is now operational, although its relationship to the United States remains problematic at best.

757. <http://www.justiceinitiative.org/>.

758. *Ibid.*

759. *Ibid.*

760. <http://www.fordfound.org/>.

761. Ford Foundation, *Annual Report*, 1998, available from <http://www.fordfound.org/>.

762. “Background on MacArthur Support for the International Criminal Court” memo, from the John D. and Catherine T. MacArthur Foundation.

763. Ford Foundation, *Annual Report*, 1988, available from <http://www.fordfound.org/>.

764. "International Justice: An Emerging Global System," newsletter from the John D. and Catherine T. MacArthur Foundation, Vol. 2 (Summer 2005).