

Dissecting the institution: A response to Jan Klabbers

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Dissecting the Institution

A Response to Jan Klabbers

Rosa Freedman and Ruth Houghton

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Cro.Pt Investigating the impact of institutionalism on human rights is a much-needed project, and for that reason Jan Klabbers' contribution to this collection is welcomed. Institutionalism is concerned with the functioning of an institution; its internal structures and processes. The contested effects of *institutionalization*—or the proliferation of international institutions—on international law are well-documented; on the one hand it has given rise to an idea of centralization, and on the other it has led to the fragmentation of international law into separate legal orders, with competing institutional drivers, such as powers and jurisdiction, funding, and decision-making processes.¹ International law scholars have previously considered the impact of institutional factors on judicial bodies and tribunals, such as the deference to member states at the International Court of Justice (ICJ) so as to ensure the longevity of its roles in dispute settlement between states.² Within human rights, institutionalism and the extraneous effects of decision-making being made by an institution are not as frequently discussed. In this chapter, then, Klabbers makes an important contribution by highlighting the need to examine the functioning of human rights institutions in order to consider the effects they have on the content of human rights norms. In response to Klabbers opening the door on this important area, we will use this comment piece to emphasize the need to differentiate clearly between institutions and actors, and indeed between different types of institutions and different types of actors, in order to explore systematically any impact on how international human rights law is developed and implemented. To do so, we will focus on a few of the examples Klabbers uses, demonstrating why a

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¹ For a discussion on centralization, see Richard Collins, *The Institutional Problem in Modern International Law* (Hart Publishing 2016) 199.

² Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 *Harvard International Law Journal* 271; Ruth Mackenzie, Cesare PR Romano, Yuval Shany, and Philippe Sands, 'The Project on International Courts and Tribunals (PICT)' in Ruth Mackenzie, Cesare P.R. Romano, Yuval Shany, and Philippe Sands (eds), *Manual on International Courts and Tribunals* (Oxford University Press 2010) vii; Gleider I Hernández, 'Impartiality and Bias at the International Court of Justice' (2012) 1 *Cambridge Journal of International and Comparative Law* 183, 190 (hereafter Hernández, 'Impartiality and Bias').

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more nuanced discussion of the institutions and actors would allow greater understanding of the effect—if any—of institutionalism.

C10.P2

As Klabbers explains, one clear manifestation of institutionalism can be seen when an institution prioritizes its own interests over the interests or rights of others. When the United Nations (UN) closed ranks with respect to the outbreak of cholera in Haiti and used a procedural bar to undermine the fundamental rights of cholera victims to access a court and a remedy, it is clear how institutionalism—the need to protect the institution—worked. But what is missing here is what arms of the ‘UN’ were unresponsive and how that was proceduralized and justified. Closing ranks to protect an institution necessitates an interplay between individuals working at the UN and reliance on particular policies, mandates, and processes. Interviews contained in a forthcoming piece by Rosa Freedman and Nicolas Lemay-Hérbert demonstrate that there were a number of actors within and parts of the UN that wanted to resolve the Haiti cholera claims, and that the Office of Legal Affairs—one small but powerful part of the UN—dictated that they all adhere to the closing of ranks.³ Klabbers’ study of institutionalism here would be enhanced by an explicit statement on the distinction between the institution, its different parts, and the actors involved.

C10.P3

Understanding how institutionalism impacts upon international human rights law requires a systematic appraisal of the different types of international human rights institutions: their functions (judicial, bureaucratic, political); their membership criteria; and their decision-making processes (e.g. voting rules and practices). Within the UN human rights system alone—ignoring regional and national human rights mechanisms—there are a plethora of different institutions: the quasi-judicial role played by the treaty monitoring bodies; the political forum of the UN Human Rights Council; the Secretariat, serving the interests of member states; and the Special Procedures (e.g. Special Rapporteurs, Independent Experts, and Working Groups). Each type of institution has its own working methods, types of powers, forms of activity, mandates, indicators of success, and abilities to affect laws or practice or both. Comparing one type with another without explicitly recognizing and addressing those differences is akin to comparing apples and pears. Institutional drivers will be different depending on which human rights institution is being assessed. We shall clearly lay out our marker at this stage: we understand institutionalism to be concerned primarily with institutional markers. Of course, institutions are populated by the individuals that work there and others who interact with the institutions, but decisions made by those people are not institutionalism per se. And while we would be very interested in picking up on Klabbers’ focus on

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³ See Rosa Freedman and Nicolas Lemay-Hérbert, ‘The Security Council in Practice: Haiti, Cholera, and the Elected Members of the United Nations Security Council’ (2019) 32 *Leiden Journal of International Law*, forthcoming. Klabbers does highlight the role of the UN lawyers with respect to allegations about sexual assault by peacekeepers.

the impact that individuals may have on human rights, systematically studying the role of individual actors on human rights—something we cannot do justice in this short commentary—is not sufficient to understand the effect of institutionalism.

I. INDIVIDUALS AND THE INSTITUTION

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C10.P4

We would first like to discuss one example that Klabbers draws upon. People who work at the institutions select the direction of travel. Whether it is ambassadors with particular interests in human rights—or those who have no interest at all—individual judges or part-time pro bono experts, the human rights institutions rely upon and are shaped by the people who work within them. Klabbers touches upon this when he discusses, in his chapter, how judges in the European Court of Human Rights might impact upon how the law is developed and applied. It would be interesting to consider the respective impact of the various roles these different types of actors have; that is, what genuine scope there is for an individual actor to develop human rights norms. If we were exploring the effects of individual actors, we would also need to unpack the effect of paid versus pro bono employment, the nature of different roles, and the levels of independence afforded by different governments (even if roles are supposedly independent from national interference). All of these are key factors when analysing and unpacking how institutional actors, individually and collectively, impact upon human rights.

C10.P5

We particularly like talking about Special Procedures because it is the ‘crown jewel’ of the UN human rights system.⁴ Special Procedures mandate holders are appointed for fixed terms as part-time, unpaid, independent experts. Some of those individuals have received (informal) support from their home states during their campaigns, while others have run wholly independently; some are lawyers, some civil society members, some specialists in specific areas, and some academics; some are UN insiders, and some have never previously set foot in a UN human rights body. They hail from across the world—by passport, at least. ~~And they have free reign during their term in office to shape their mandates as they please.~~ They may request to visit any country, and they may take up any thematic issue they deem relevant. They are independent of all entities, including their home states, the UN, and the Secretariat, and perform the role in their ‘spare’ time. As such, it is clear that the personality and personal interests of the experts are able to—and do—shape the contours of the mandate and therefore the human right itself.

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There are too many excellent examples for us to be able to begin to explain the impact of the personalities of some UN Special Procedures mandate holders on the

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⁴ Kofi Anan, ‘Statement at Time Warner Centre’ (New York, 8 December 2006) <<http://www.un.org/sg/en/content/sg/speeches/2006-12-08/urging-end-impunity-annan-sets-forth-ideas-bolster-un-efforts-protect>> accessed 31 January 2019.

development of human rights.⁵ We would encourage readers to look into why the mandate on cultural rights was created—spoiler alert: Cuba intended it to be used as a mechanism for undermining universality of fundamental rights⁶—and then contrast those intentions with what Farida Shaheed and Karima Bennouna have done to advance women's rights, cultural heritage, and minority rights using their platforms as successive holders of that mandate.⁷ Philip Alston has recently used his mandate on human rights and extreme poverty to scrutinize the most powerful countries and their approach to the most vulnerable in their societies,⁸ while Olivier de Schutter chose to shine the spotlight on obesity in a developed country when holding the mandate on the right to food.⁹ Others have used their mandates for purposes somewhat less connected to human rights, such as when Jean Ziegler used his mandate (on the right to food) to compare Israelis with Nazis,¹⁰ or—as Sir Nigel S Rodley pointed out—when the Special Rapporteur on the former Yugoslavia argued in favour of immunity for the Serbian President Slobodan Milosovic, which was at odds with the policy against impunity for human rights violations.¹¹

Cio.P7

Clearly, even just within this one part of the international human rights system the role of the individual depends on many factors. At the very least, we would advise taking into account the individual actor's role, employment status, personality traits, nationality, academic background, formal training (e.g. in law) or expertise, work experience, and potential connections, amongst others.¹² But to account for the impact of institutionalism would necessitate an understanding of the creation of the mandate (and the flexibility of the mandate), potential accountability

Cio.N5

⁵ See, e.g., Jessie Hohmann, 'Principle, Politics and Practice: The Role of UN Special Rapporteurs on the Right to Adequate Housing in the Development of the Right to Adequate Housing in International Law' in Aoife Nolan, Rosa Freedman, and Thérèse Murphy (eds), *The United Nations Special Procedures System* (Brill 2017) 271.

Cio.N6

⁶ For a discussion on Cuba's involvement with mandates on cultural rights see Rosa Freedman and Jacob Mchangama, 'Expanding or Diluting Human Rights?: The Proliferation of United Nations Special Procedures Mandates' (2016) 38 *Human Rights Quarterly* 164, 184–5.

Cio.N7

⁷ See Report of the Special Rapporteur in the field of cultural rights (Farida Shaheed), GA Res. A/67/287 (10 August 2012); Report of the Special Rapporteur in the field of cultural rights (Karima Bennouna), GA Res. A/72/155 (17 July 2017).

Cio.N8

⁸ Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America (Philip Alston), GA Res. A/HRC/38/33/Add. 1 (4 May 2018).

Cio.N9

⁹ Report submitted by the Special Rapporteur on the right to food (Olivier De Schutter), GA Res. A/HRC/19/59 (26 December 2011).

Cio.N10

¹⁰ Alan Johnson, 'Appointment with farce' *The Guardian* (London, 5 April 2008) <<http://www.theguardian.com/commentisfree/2008/apr/05/appointmentwithfarce>> accessed 31 January 2019. See also Nigel S Rodley, 'On the Responsibility of Special Rapporteurs' (2011) 15 *The International Journal of Human Rights* 319, 320: '[T]he first special rapporteur on the right to food, Jean Ziegler, who apparently referred to the thousands dying from malnutrition in Brazil, which he was visiting, as genocide' (hereafter Rodley, 'Responsibility of Special Rapporteurs').

Cio.N11

¹¹ Ewen MacAskill and Ian Traynor, 'Fury as UN envoy suggests war crimes amnesty for Milosovic' *The Guardian* (London, 5 October 2000); Rodley, 'Responsibility of Special Rapporteurs' (n. 10) 320.

Cio.N12

¹² This is an indicative list and not an exhaustive list. Some of these things Hernández has considered with respect to the judges at the ICJ (importantly, the role of their homogenous legal training). Hernández, 'Impartiality and Bias' (n. 2).

mechanisms, and funding. Indeed, Inga T Winkler and Catarina de Albuquerque have shown how funding streams—and in particular, informal funding—shape how the right to water is applied: projects that promote the right to water, rather than identify violations or protect against violations of the right are more likely to be funded by philanthropic donors.¹³ And while external funding does need to be transparently documented on a mandate holder's website, there are many instances where funders (governments, charities, or private organizations) have only granted the money if mandate holders use it to focus on particular themes.

Cio.P8 Studying the personal choices of individual actors, and the impacts of their personalities on the decision-making of human rights institutions, is another worthy project, but even that would not be sufficient to understand and interrogate how institutionalism affects human rights.¹⁴ Klabbers gives the example of one academic judging an essay competition, highlighting that the individual's concern with the funding of a human rights-related programme affected his judgement, but that—like the personality of a Special Procedures mandate holder—is a question of personality and personal concerns, rather than an institutional driver. Some individuals may wear their 'institutional-hat', but others leave such hats at the door.

Cio.S2 II. INSTITUTIONALISM: THE STRUCTURE AND FUNCTION OF AN INSTITUTION

Cio.P9 Institutionalism, as we understand it, is the way in which the structure and function of an institution shapes decision-making and has negative or positive effects on the content of human rights norms. Keeping the focus on the UN, we would like to turn to the UN Human Rights Council to unpack and demonstrate, albeit briefly, how institutionalism might be explored. The Council is often criticized for facilitating the inclusion of known human rights abusers as part of its membership. The criteria for election are weak and, as Klabbers demonstrates, this leads to problematic membership. Focusing on individual members is only part of the story; Freedman has shown how the groups of member states forge practices that negatively politicize the work of the Council.¹⁵ It is the institutional make-up of the Council that facilitates these negative practices. Created as a political body, the Council's forty-seven member states are elected from regional groups; an attempt

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¹³ See Inga T Winkler and Catarina de Albuquerque, 'Doing It All and Doing It Well? A Mandate's Challenges in Terms of Cooperation, Fundraising and Maintaining Independence' in Aoife Nolan, Rosa Freedman, and Thérèse Murphy (eds), *The United Nations Special Procedures System* (Brill 2017) 188.

¹⁴ Hernández draws a distinction between the function of the judge and the function of the court. Hernández, 'Impartiality and Bias' (n. 2) 190.

¹⁵ Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Routledge Research in Human Rights Law 2013) (hereafter Freedman, *Human Rights Council*); see also Rosa Freedman and Ruth Houghton, 'Two Steps Forward, One Step Back: Politicisation of the Human Rights Council' (2017) 17 *Human Rights Law Review* 753.

to ensure geographical representation.¹⁶ There are thirteen seats for states from the Group of African States, thirteen seats for the Group of Asian States, six seats for the Group of Eastern European States, eight for the Group of Latin American and Caribbean States, and seven for the Group of Western European and other States.¹⁷ One of the results of this set-up is the power of regional groupings to shape proceedings at the Council. Regional groups, or political blocs, such as the African Group, the Organization of Islamic Cooperation (OIC), the Western European and Others Group (WEOG), and the Non-aligned Movement (NAM) use tactics such as bloc voting, the repetition of positions, and statements of allegiance to undermine the work of the Council. The Council's forum nature—its drive to offer a discursive environment—and the regional distribution of members facilitates the use of bloc tactics. Nothing in the Council's mandate or its institutional building package creates a bulwark against these practices.

C10.P10 The 'talking-shop' nature of the Council has affected the implementation of human rights norms. Certain states are shielded from criticism because allied states use valuable Council time and resources to praise the state instead; for example, at the Special Session on Sri Lanka, its allies rallied round to write a resolution that put forward the government's version of events, praised State forces, and pointed the finger only at abuses committed by the Liberation Tigers of Tamil Eelam (LTTE).¹⁸ Delays on resolutions with respect to protections for LGBT+ persons, focusing on 'the family' and 'traditional values', or the lengthy insistence that defamation of religion might be a right created smoke-screens that meant states were able to continue to violate rights. Similar tactics also have a negative impact on the content of norms, with a recent example being the amendment to Resolution 32/2 that sets the precedent for cultural relativism to be enshrined in relation to the fundamental rights of LGBT+ individuals not to be subject to State-sponsored or condoned violence or discrimination.

C10.P11 Observing the EU at the Council offers an additional layer of institutionalism. EU member states at the Council are driven by the EU position,¹⁹ and thus can fail to weigh in on certain countries' violations of human rights, such as the silence from the EU on the crisis in Darfur.²⁰ EU states agree to uphold a unified position—it is not just a choice on the part of a delegation—and as such, this is an effect of institutionalism that comes about due to the internal structures of the

C10.N16 ¹⁶ Human Rights Council, GA Res. 60/251 (3 April 2006) para. 7.

C10.N17 ¹⁷ *Ibid.*

C10.N18 ¹⁸ Assistance to Sri Lanka in the promotion and protection of human rights, HRC Resolution S-11/1 (27 May 2009).

C10.N19 ¹⁹ Article 34(1) of Treaty on European Union (TEU) states that EU member states 'shall coordinate their action in international organisations and ... shall uphold the common positions in such forums'; see Karen E Smith, 'Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations' (2006) 44 *Journal of Common Market Studies* 113.

C10.N20 ²⁰ See Freedman, *Human Rights Council* (n. 15).

institution and its members. Many an opportunity to promote, protect, or develop human rights has been missed owing to the need for constant internal EU negotiation, or the adherence to a common position that often reflects the lowest common denominator.

C10.P12 Drawing a distinction between the actors that work in the institution and the institution itself is fundamental when considering potential reforms. You can take the individual out of the institution, but this might have minimal impact if the institution's processes, powers, and funding are such that it facilitates abuses by individuals.

Bibliography

- C10.S3
- C10.P13 Anan K, 'Statement at Time Warner Centre' (8 December 2006) <<http://www.un.org/sg/en/content/sg/speeches/2006-12-08/urging-end-impunity-annan-sets-forth-ideas-bolster-un-efforts-protect>> accessed 31 January 2019
- C10.P14 Collins R, *The Institutional Problem in Modern International Law* (Hart Publishing 2016)
- C10.P15 Freedman R, *The United Nations Human Rights Council: A Critique and Early Assessment* (Routledge Research in Human Rights Law 2013)
- C10.P16 Freedman R and Mchangama J, 'Expanding or Diluting Human Rights?: The Proliferation of United Nations Special Procedures Mandates' (2016) 38(1) *Human Rights Quarterly* 164
- C10.P17 Freedman R and Houghton R, 'Two Steps Forward, One Step Back: Politicisation of the Human Rights Council' (2017) 17 *Human Rights Law Review* 753
- C10.P18 Freedman R and Lemay-Hérbert N, 'The Security Council in Practice: Haiti, Cholera, and the Elected Members of the United Nations Security Council' (2019) 32 *Leiden Journal of International Law*, forthcoming
- C10.P19 Hernández GI, 'Impartiality and Bias at the International Court of Justice' (2012) 1 *Cambridge Journal of International and Comparative Law* 183
- C10.P20 Hohmann J, 'Principle, Politics and Practice: The Role of UN Special Rapporteurs on the Right to Adequate Housing in the Development of the Right to Adequate Housing in International Law' in Nolan A, Freedman R, and Murphy T (eds), *The United Nations Special Procedures System* (Brill 2017) 271
- C10.P21 Johnson A, 'Appointment with farce' *The Guardian* (London, 5 April 2008) <<http://www.theguardian.com/commentisfree/2008/apr/05/appointmentwithfarce>> accessed 31 January 2019
- C10.P22 MacAskill E and Traynor I, 'Fury as UN envoy suggests war crimes amnesty for Milosovic' *The Guardian* (London, 5 October 2000)
- C10.P23 Mackenzie R and Sands P, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 *Harvard International Law Journal* 271–85
- C10.P24 Mackenzie R, Romano CPR, Shany Y, and Sands P, 'The Project on International Courts and Tribunals (PICT)' in Mackenzie R, Romano CPR, Shany Y, and Sands P (eds), *Manual on International Courts and Tribunals* (Oxford University Press 2010) vii
- C10.P25 Rodley NS, 'On the Responsibility of Special Rapporteurs' (2011) 15 *The International Journal of Human Rights* 319

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- C10.P26 Smith KE, 'Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations' (2006) 44 *Journal of Common Market Studies* 113
- C10.P27 Winkler IT and de Albuquerque C, 'Doing It All and Doing It Well? A Mandate's Challenges in Terms of Cooperation, Fundraising and Maintaining' Independence' in Nolan A, Freedman R, and Murphy T (eds), *The United Nations Special Procedures System* (Brill 2017) 188