

Establishing a National Human Rights Institution in the United States

A Special Report of the International Justice Clinic

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I. Executive Summary

This report addresses key questions concerning how and why the United States should establish a National Human Rights Institution (“NHRI”) in order to protect, promote and implement its international human rights commitments. Over one hundred governments around the world, including most democratic ones, have established NHRIs which have made improvements in domestic human rights governance. These bodies, based on a number of available models, work to promote human rights compliance in all sectors of society, but the United States, despite its ratification of such central treaties as the International Covenant on Civil and Political Rights (ICCPR), Convention Against Torture (CAT) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD), lacks an independent body that can monitor and apply human rights frameworks to domestic problems. We believe it is time to change that fact and work toward an American NHRI. The road toward an American NHRI involves a number of key decision points. This report presents challenges involved in creating and sustaining an NHRI and lays out key considerations that advocates, policymakers, legislators and others will need to consider.

Our research, including interviews with nearly two dozen NHRI officials from a diverse range of countries and with experts around the world, helped us identify key considerations relevant to developing an American NHRI. It is critical to understand that *NHRIs do not, need not, and should not follow a one-size-fits-all approach*. Rather, successful NHRIs may take on a variety of forms and functions. The functions, authorities and structure of an American NHRI should be designed within the framework of law and governance in the United States.

Any effort to develop a workable, effective NHRI for the United States will require answering a number of key questions, which this report only identifies. For instance, what should be the extent of an NHRI’s authority? Should an NHRI have power to recommend, to initiate studies, to intervene in judicial proceedings? How should an NHRI be funded? Should it have basic and steady Congressional funding? Who should be members of such an institution, and how should they be selected? Should the scope of an NHRI apply only to issues touching on federal government responsibilities, or should it apply to state-level issues as well? If not the latter, should state-level NHRIs be considered? What should be the substantive scope of an NHRI? Should an NHRI be formed from the ground up, or should it involve modifying the mandate of an existing body? These are just a few of the questions open for discussion.

At this stage, in order to begin genuine consideration of an American NHRI, this report concludes that the Biden Administration should initiate a study commission, involving key executive branch officials and legislators and robust, representative civil society participation, to determine the most appropriate model for the United States. It should consider and answer the questions just posed and

others highlighted in the course of this report. It should be strongly multi-stakeholder, such that a broad cross-section of civil society may be encouraged to actively participate.

A successful NHRI model is highly dependent on the context of the country and government structure. To succeed in its mission of implementing human rights domestically, an American NHRI must address the realities and constraints of federalism and the U.S. Constitution. Key considerations regarding advocacy, scope, issue selection, functionality, and independence are crucial to developing an American NHRI in compliance with the Paris Principles, the global set of norms by which NHRIs are judged for their independence and effectiveness.

In short, this report operates on the premise that the United States has not only an opportunity but an obligation to implement its international human rights obligations, at least in part through the development of an independent, empowered national human rights institution.

II. Introduction

How do nations integrate international human rights obligations into their domestic law, policy, and practice? Some do it directly by enabling individuals to pursue remedies under human rights law in their domestic courts. Many others, as a supplement or substitute for judicial remedies, develop National Human Rights Institutions (“NHRIs”).¹ NHRIs are independent institutions, often enjoying broad mandates focusing on the promotion and protection of human rights in their respective countries.² Seeking to hold governments accountable to their human rights commitments,³ NHRIs are widely acknowledged as one of the most important mechanisms to connect a state's international obligations to the actual enjoyment of human rights.⁴

The United States lacks a human rights monitoring body and neither a national strategy nor infrastructure to promote and protect human rights at the federal, state or local levels.⁵ It is an outlier globally, certainly among recognized democratic states. Governments on all continents have created institutions that hold their authorities accountable to their human rights obligations. Whether it is advancing human rights-compliant public policy or providing a vehicle for rights-oriented engagement at all levels of government and civil society, NHRIs often play an important role in democratic and

¹ *Fact Sheet 1: What Are National Human Rights Institutions?*, ASIA PACIFIC FORUM, <https://www.asiapacificforum.net/members/what-are-nhris/what-are-nhris/> (last visited Nov. 15, 2022).

² *Id.*

³ *Id.*

⁴ *A Manual on National Human Rights Institutions*, ASIA PACIFIC FORUM, 6 (2015), https://ganhri.org/wp-content/uploads/2020/07/Manual_on_NHRIs_Oct_2018.pdf.

⁵ See The Hum. Rts. Inst. Colum. L. Sch. & Leadership Conf. Educ. Fund, *The Road to Rights: Establishing a Domestic Human Rights Institution in the United States*, 4 (2010), https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/the_road_to_rights_post_conference_report.pdf.

non-democratic societies.⁶ Often that role involves emphasizing the responsibilities of a state to those within its jurisdiction, linking national laws to regional and international human rights instruments, and holding governments accountable to justify and remedy their deviations from human rights law.⁷

President Joseph Biden has stated that the United States’ “efforts to defend human rights around the world are stronger because we recognize our own historic challenges as part of that same fight. Leading by example means taking action at home to renew and defend our own democracy.”⁸ In demonstrating a commitment to integrating and elevating human rights practices domestically, the U.S. Government should consider answering the global call to design and implement an NHRI and strengthen America’s commitment to human rights.

The International Justice Clinic (“IJC”) at UCI Law has been researching the elements necessary to establish a U.S.-based NHRI compliant with international law and interviewing human rights experts and NHRIs globally to gain insight into their experiences.⁹ IJC roundtables on April 12, 2022, and November 30, 2022, convening human rights advocates to discuss establishing an NHRI in the U.S.¹⁰ Drawing from those interviews, convenings and research, this report begins with an overview of NHRIs: what they are, how they are accredited, common models, and societal impact. Following that, the report focuses on the arguments for an American NHRI, how it can add value to American human rights frameworks, and key considerations for its establishment.

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III. What are NHRIs?

NHRIs are independent state-sponsored bodies with a legal mandate to protect and promote human rights.¹¹ While NHRIs are established and funded by the state, they function independently of it.¹² Thus, while “the administration and expenditure of public funds by an NHRI is regulated by the Government,” this regulation cannot “compromise its ability to perform its role independently and

⁶ *Id.* at 7.

⁷ Off. U.N. High Comm’r Hum. Rts., *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, 13 (2010), https://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf.

⁸ *Joe Biden Human Rights Speech Transcript University of Connecticut*, (Oct. 15, 2021), <https://www.rev.com/blog/transcripts/joe-biden-human-rights-speech-transcript-university-of-connecticut>.

⁹ This report cites to interviews conducted by IJC as part of this study but omits the names of individuals in the interest of confidentiality.

¹⁰ A summary of the first roundtable may be found at International Justice Clinic, UC Irvine School of Law, *Roundtable Summary on Establishing a National Human Rights Institution* (2022), <https://cpb-us-e2.wpmucdn.com/sites.uci.edu/dist/2/4290/files/2022/06/Draft-3-NHRI-Roundtable-Summary.pdf>

¹¹ Off. U.N High Comm’r Hum. Rts., *supra* note 7.

¹² *Id.*

effectively.”¹³ Often NHRIs serve as a bridge between civil society and government.¹⁴ However, there are notable differences between NGOs and NHRIs that pertain to the investigation of complaints.¹⁵ Neutrality is a key characteristic of NHRI fact-finding.¹⁶ Just as NHRIs are meant to be independent of the state, they must also be independent of NGOs and other civil society institutions.¹⁷

A. *State Obligations*

States have the duty to implement their human rights obligations.¹⁸ Under Article 2(1) of the ICCPR, for instance, all state parties undertake to protect and ensure all rights that are recognized in the Covenant.¹⁹ States have a duty to ensure that these rights are realized at all levels of governance.²⁰ In turn, NHRIs are rooted in the human rights obligations of states.²¹ States are required to ensure that the rights of the ratified human rights treaty become part of or are recognized by their national legal system.²² They must take “all appropriate steps”, including legislative steps, to ensure that rights are realized at the state level such that there is “effective national implementation”.²³

B. *NHRI Accreditation*

The international community has developed a set of standards to guide the development, establishment and implementation of NHRIs.²⁴ The Paris Principles Relating to the Status of National Human Rights Institutions (“The Paris Principles”), endorsed by the Vienna World Conference on Human Rights and the UN General Assembly in 1993, provide the basic framework for NHRIs.²⁵ The Paris Principles involve six requirements that an NHRI must meet to effectively promote and protect human rights nationally.²⁶ These include:

¹³ *Id.*

¹⁴ *Id.* (noting, “They link the responsibilities of the State to the rights of citizens and they connect national laws to regional and international human rights systems.”).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, U.N. General Assembly Res. A/RES/53/144, Article 2 (9 Dec. 1998).

¹⁹ International Covenant on Civil and Political Rights Art. 2, Dec. 19, 1992, S. Exec. Doc. No. E, 95-2, 999 U.N.T.S. 171.

²⁰ Off. U.N High Comm’r Hum. Rts., *supra* note 8.

²¹ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, U.N. General Assembly Res. A/RES/53/144, Article 2 (9 Dec. 1998).

²² Off. U.N High Comm’r Hum. Rts., *supra* note 8, at 5.

²³ *Id.*

²⁴ Off. U.N High Comm’r Hum. Rts., *supra* note 23, at 30.

²⁵ *Paris Principles*, GLOBAL ALLIANCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS, <https://ganhri.org/paris-principles/#:~:text=Support%20by%20the%20United%20Nations,UN%20General%20Assembly%20in%201993> (last visited Nov. 15, 2022).

²⁶ *Fact Sheet 2: What Do the Paris Principles Say?*, ASIA PACIFIC FORUM, <https://asiapacificforum.net/members/what-are-nhris/paris-principles/> (last visited Nov. 16, 2022).

- 1) a broad mandate based on universal human rights standards;
- 2) autonomy from the government;
- 3) independence;
- 4) pluralism²⁷;
- 5) adequate resources; and
- 6) adequate power of investigation.²⁸

The Global Alliance of National Human Rights Institutions (“GANHRI”) serves as an international review and network for NHRIs and their work. As such, GANHRI uses a peer-review-based accreditation system based on characteristics that make an effective NHRI.²⁹ Research has shown four particular elements to be of significance in the effectiveness of an NHRI: (1) public legitimacy; (2) the complaint handling role; (3) national inquiries; and (4) formal institutional safeguards.³⁰ Other research suggests that independence, inclusiveness, investigatory powers, and promotional powers, along with other formal safeguards, contribute to the efficacy of an NHRI.³¹ As a result, NHRIs with a lack of safeguards risk becoming “governmental façade human rights bodies.”³²

C. NHRI Models

While the Paris Principles promote minimum standards for NHRIs, they do not prescribe any particular model for a national institution to adopt. Instead, states have adopted a range of approaches to establish independent agencies for human rights in their domestic governance. There are four main NHRI models: commissions, ombuds institutions, advisory and consultative bodies, and research institutes. These models can also be combined into multiple institutes or hybrid models to form NHRIs appropriate to their national environment. Some interviewees in the course of this project suggested an American NHRI adopt an advisory role which would allow it to comment on legislative acts that may implicate human rights. Others suggested that functions could include the capacity to serve as a human rights educator and monitoring body for treaties the U.S. has ratified, to participate in court as *amicus*

²⁷ Paris Principles criteria–Pluralism, ASIA PACIFIC FORUM (August 12, 2015),

<https://www.asiapacificforum.net/resources/paris-principles-criteria-pluralism/> (pluralism refers to the need of an NHRI to have membership that broadly reflects their society).

²⁸ *Id.*

²⁹ Int’l Council on Hum. Rts. Pol’y Off. U.N. High Comm’r Hum. Rts., *Assessing the Effectiveness of National Human Rights Institutions* (2005), <https://www.ohchr.org/sites/default/files/Documents/Publications/NHRlen.pdf>; Jonathan Liljeblad, *The Efficacy of National Human Rights Institutions Seen in Context: Lessons from the Myanmar National Human Rights Commission*, 19 YALE HUM. RTS. & DEV L.J. 95 (2017); Richard Carver, *Measuring the Impact and Development Effectiveness of National Human Rights Institutions: A Proposed Framework for Evaluation* (2014), https://www.academia.edu/27945167/Measuring_the_impact_and_development_effectiveness_of_national_human_rights_institutions_a_proposed_framework_for_evaluation.

³⁰ Steven Jensen, *Lessons from Research on National Human Rights Institutions*, THE DANISH INSTITUTE FOR HUMAN RIGHTS, 28 (March 2018), https://www.humanrights.dk/sites/humanrights.dk/files/media/migrated/workingpaper_lessons_research_nhris_w eb_2018.pdf

³¹ Katerina Linos & Tom Pegram, *What Works in Human Rights Institutions?*, 112 AM. J. INT’L L. 628 (2017).

³² *Id.* at 57.

curiae, and to receive complaints if not for dispute resolution then for scoping and identifying key topics of importance. Globally some NHRIs have an individual complaints mechanism that allows for quasi-judicial decision-making. In considering the functions of an American NHRI, it is important to weigh the administrability and practicality of these various mandates.

Commissions: Human rights commissions are the most common form of NHRI and are generally “government-funded, multi-member bodies with an explicit mandate to promote and protect human rights.”³³ The commission model is often characterized by a quasi-judicial investigatory authority with jurisdiction over public and private sectors.³⁴ This model may be seen in Australia, Canada, New Zealand, and the United Kingdom.³⁵ Human rights commissions are typically composed of experts and may have a pluralistic composition that brings together various sectors of society.³⁶ For example, the Australian Human Rights Commission has commissioners for distinct subject areas – ranging from racial discrimination, to children’s rights, to business and human rights – allowing for very specific expertise to be utilized in each area.³⁷

Ombudspersons: Like the commission model, the human rights ombudsman model is characterized by investigative powers and authority to monitor human rights and may engage in educational activities as well.³⁸ The ombudsman model differs from the commission model in that the ombudsman offices generally have a single individual appointed by the legislature and typically investigate the activities of the public sector, often focusing on the executive branch.³⁹ When garnering public support, the benefit of an ombudsman model is the fact that an individual complaint handling function produces more tangible results of efficacy.⁴⁰ For instance, in Poland, an ombudsman-type institution is argued to have played a critical role in the transition to a democratic system.⁴¹

Advisory/consultative council: The advisory committee or consultative council model is the oldest NHRI model and is typically composed of a large governing body with a small staff.⁴² Most lack complaint-handling functions.⁴³ This model emphasizes consultation more than investigation and monitoring and is oriented toward creating bridges between civil society and the government.⁴⁴ One

³³ The Hum. Rts. Inst. Colum. L. Sch. & Leadership Conf. Educ. Fund, *supra* note 5, at 7.

³⁴ Off. U.N High Comm’r Hum. Rts., *supra* note 8, at 16.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Commissioners*, AUSTRALIAN HUMAN RIGHTS COMMISSION, <https://humanrights.gov.au/about/commissioners> (last visited Nov. 16, 2022).

³⁸ Off. U.N High Comm’r Hum. Rts., *supra* note 8, at 17.

³⁹ Catherine Powell, *Human Rights at Home: A Domestic Policy Blueprint for the New Administration*, AM. CONST. SOC’Y FOR L. AND POL’Y PAC. F., 20 (Oct. 2008), <https://www.nlginternational.org/report/adminblueprint.pdf>.

⁴⁰ Interview with European Human Rights and Humanitarian Law Experts (Feb. 15, 2022).

⁴¹ Mirosław Wroblewski, *The Ombudsman before the Polish Constitutional Tribunal*, VERFASSUNGSBLOG (Oct. 14, 2020), <https://www.google.com/url?q=https://verfassungsblog.de/the-ombudsman-before-the-polish-constitutional-tribunal/&sa=D&source=docs&ust=1652120189903219&usg=AOvVaw3Q0dXYUQhHwir7YmeY8eNI>.

⁴² Off. U.N High Comm’r Hum. Rts., *supra* note 8, at 18.

⁴³ *Id.*

⁴⁴ Powell, *supra* note 39.

example of this model is the French National Consultative Commission on Human Rights (“CNCDH”).⁴⁵ The CNCDH may act as a counselor for the government, propose laws, and then survey the application of governmental measures and laws voted in Parliament.⁴⁶ It is presided over by a director and has 64 members: NGOs, representatives of trade union confederations, and representatives of religious groups, academics, magistrates and lawyers.⁴⁷

In contrast to the quasi-judicial role of the human rights commission model, the emphasis of the advisory model is on assisting the government with expert advice, such as through the provision of human rights research.⁴⁸ This encourages in-depth analysis and makes for better results.⁴⁹ As the Office of the United Nations High Commissioner for Human Rights explains:

While their research may be more academic in focus, the main concern with such institutions is that they have no direct experience of individual complaints, which distances their work from direct protection of human rights. The absence of a mandate to investigate individual complaints, which is true of many (but not all) such institutions, may be seen as limiting their effectiveness. On the other hand, the institution will have the time and resources to devote to examining broader, systemic human rights issues.⁵⁰

Research institute: Similar to the consultative council model, the research institute model emphasizes human rights education, information, and research and documentation, rather than investigation.⁵¹ This model may be appropriate for states that already have in place a well-functioning human rights culture and an effective monitoring entity, such as an ombudsman.⁵² Institutes with this model, such as the German Institute for Human Rights, may have the ability to file amicus briefs and intervene in court.⁵³ Another benefit of this model is the ability to address systemic issues and seek to affect policy change.⁵⁴ Although research institutes do not have the power to make policy changes, they can shape the human rights culture within a state.

⁴⁵ *Id.*

⁴⁶ Off. U.N High Comm’r Hum. Rts., *supra* note 7, at 18.

⁴⁷ *Membres*, COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L’HOMME, <https://www.cncdh.fr/fr/membres> (last visited Nov. 16, 2022).

⁴⁸ Off. U.N High Comm’r Hum. Rts., *supra* note 7, at 18.

⁴⁹ *Id.* at 18.

⁵⁰ *Id.*

⁵¹ Powell, *supra* note 39.

⁵² *Id.*

⁵³ Off. U.N High Comm’r Hum. Rts., *supra* note 7, at 17.

⁵⁴ Interview with European Human Rights and Humanitarian Law Experts, *supra* note 41.

D. NHRI Roles

NHRIs serve different roles within a state depending on their functions and the state's political structure.⁵⁵ Some states adopt hybrid models borrowing from more than one model. Because of this, it is important to examine the different roles an NHRI can play because the models are not formulaic nor one-size-fits-all.

A notable example of an NHRI that integrates human rights into the national agenda is the Australian Human Rights Commission (AHRC), which is focused on a broad range of issues, including Aboriginal and Torres Strait Islander Social Justice; Age Discrimination; Asylum Seekers and Refugees; Business and Human Rights; Children's Rights; Disability Rights; LGBTI; Race Discrimination; Rights and Freedoms; Sex Discrimination; and Education. The AHRC investigates and conciliates complaints about discrimination and breaches of human rights, and conducts independent reviews.⁵⁶ For instance, a report released by the AHRC, *Keeping kids safe and well – your voices*, follows a request from the Australian Government Department of Social Services to inquire about what children and their families think would help keep children safe.⁵⁷ The findings of the report have been used to inform the first five-year Action Plan under *Safe and Supported: The National Framework for Protecting Australia's Children 2021-2031*.⁵⁸ Additionally, Australia's National Guidelines for the inclusion of transgender and gender diverse people in sports were developed by the Australian Human Rights Commission in partnership with Sport Australia and the Coalition of Major Professional and Participation Sports ("COMPPS"), which highlights the collaborative opportunities available to NHRIs in promoting human rights.⁵⁹

Similarly, Mexico's National Human Rights Commission ("CNDH") has a mandate committed to "protect, observe, promote, study, and disseminate the human rights protected by the Mexican legal system" and uses conciliation as the mechanism to resolve 90% of the abuses it documents.⁶⁰ Written conciliation agreements with the government authority responsible for the documented abuses contain analyses of the human rights violations and outline which steps the government authorities have agreed

⁵⁵ *French National Consultative Commission on Human Rights*, EUROPEAN NETWORK OF NATIONAL HUMAN RIGHTS INSTITUTIONS, <https://ennhri.org/our-members/france/> (last visited Nov. 16, 2022).

⁵⁶ Since 1987, the Commission has hosted an annual Human Rights Medal and Awards ceremony. The Human Rights Medal is awarded to individuals "for their outstanding contribution to human rights in Australia." The Young People's Human Rights Medal has been awarded since 2008. *Human Rights Awards*, AUSTRALIAN HUMAN RIGHTS COMMISSION, <https://humanrights.gov.au/get-involved/human-rights-awards> (last visited Nov. 16, 2022).

⁵⁷ *New Report Shares Voices of Children and Families*, AUSTRALIAN HUMAN RIGHTS COMMISSION (Apr. 6, 2022), <https://humanrights.gov.au/about/news/new-report-shares-voices-children-and-families>.

⁵⁸ *Id.*

⁵⁹ *New Guidelines Launched to Promote the Inclusion of Transgender and Gender Diverse People in Sport*, AUSTRALIAN HUMAN RIGHTS COMMISSION (June 13, 2019), <https://humanrights.gov.au/about/news/media-releases/new-guidelines-launched-promote-inclusion-transgender-and-gender-diverse>.

⁶⁰ *Mexico's National Human Rights Institution*, HUMAN RIGHTS WATCH (Feb. 12, 2008), <https://www.hrw.org/report/2008/02/12/mexicos-national-human-rights-commission/critical-assessment>.

to take to redress these violations.⁶¹ When investigating systemic abuses or generalized practices, the CNDH may issue a special report or a general recommendation. A 2008 report by Human Rights Watch noted, “The CNDH has played a valuable role in identifying human rights problems in Mexico and, in some cases, pressing the government to act in response to them.”⁶²

The CNDH conducts investigations and reports to the public and the Government on a range of issues, including: (1) grievances against journalists and civil defenders; (2) women’s issues and gender equality; childhood and family issues; (3) attention to migrants; among others.⁶³ The CNDH has adopted many programs to educate and raise awareness about human rights norms including academic courses, workshops, and conferences.⁶⁴

The French CNCDH, established in 1947, is the oldest NHRI and was created by a decree from the Foreign Affairs Ministry with the purpose of monitoring the respect for human rights in the country.⁶⁵ The CNCDH seeks to adhere to three objectives: (1) advising and making proposals through opinions to the Government and Parliament on matters related to human rights and international humanitarian law; (2) overseeing the effectiveness in France of the rights protected under the international human rights conventions; and (3) contributing to the work of the United Nations human rights bodies, as well as to the Universal Periodic Review.⁶⁶ Related to the second objective, “the CNCDH monitors the implementation in France of all recommendations from the international and European committees. It also raises public awareness and educates on human rights topics, by organizing trainings and public events, or publishing educational tools.”⁶⁷ Notably, France’s NHRI has convocative power to request people to appear before the Commission, and the requested individual is required to appear before the body.⁶⁸ A recent example of the CNCDH’s impact includes the survey it published early April 2022 on prejudices and stereotypes with regard to disability in France in response to a request from the Prime Minister.⁶⁹ “As part of a broader mandate, this survey should contribute to reporting on the persistence or otherwise of stereotypes related to disability, and is part of a global approach aimed at knowing, evaluating and acting on this theme of the fight against prejudice and the discrimination they may engender.”⁷⁰

⁶¹ *Id.*

⁶² *Id.*

⁶³ COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS, <https://www.cndh.org.mx/> (last visited Nov. 16, 2022).

⁶⁴ *Mexico’s National Human Rights Institution*, *supra* note 60.

⁶⁵ *French National Consultative Commission on Human Rights*, EUROPEAN NETWORK OF NATIONAL HUMAN RIGHTS INSTITUTIONS, <https://ennhri.org/our-members/france/> (last visited Nov. 16, 2022).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Interview with Human Rights Expert from France (Nov. 11, 2021).

⁶⁹ *Enquête sur les préjugés et les stéréotypes à l’égard du handicap en France*, COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L’HOMME (Apr. 4, 2022), <https://www.cncdh.fr/publications/enquete-sur-les-prejuges-et-stereotypes-legard-du-handicap-en-france>.

⁷⁰ *Id.*

The Office for the Commissioner of Human Rights in Poland serves as an example of how an NHRI can be useful during times of political transition and when faced with the challenges to democracy.⁷¹ In 2020, when the term of the ombudsperson was coming to an end, the Constitutional Tribunal of Poland declared Article 3, paragraph 6, of the Act on the Commissioner for Human Rights of Poland unconstitutional.⁷² This provision provided that the Commissioner remain in office until a new one is appointed.⁷³ The European Network of National Human Rights Institutions (“ENNHRI”) issued a statement expressing concern over the Office of the Polish NHRI functioning without a Commissioner for Human Rights should a successor not be appointed within the given timeframe, limiting the NHRI’s effectiveness as an institution.⁷⁴ Poland’s Senate finally heeded the call for a new ombudsman and confirmed a new commissioner in July 2021.⁷⁵

Though its NHRI has been forced to cease its work since the Taliban takeover, Afghanistan had set an example of the role an NHRI may have in establishing a robust human rights agenda amidst war and a transition to a rights-respecting governance. Afghanistan’s Independent Human Rights Commission (“AIHRC”) was established in 2001, and paved the way for significant human rights advances over the past two decades including the creation of a number of civil society organizations across the country, and integrating women in public roles and leadership positions in public office, government, and media, as well as education.⁷⁶ In 1999, 9,000 girls were enrolled in primary school and no girls were permitted to attend secondary school.⁷⁷ In contrast, in 2021, 3.5 million girls were attending schools.⁷⁸ “Human rights defenders have contributed to the economic, political and social development of their communities across the country,” and “a courageous and independent national human rights institution” has played an instrumental role in such successes.⁷⁹ Reports by the Commission range from a number of different issue focus areas, including but not limited to, reports on (1) social group discrimination; (2) survivors of trafficking/persons at risk of trafficking; (3) torture; (4) transitional justice; (5) war crimes; (6) women’s rights; (7) women-at-risk, among others.⁸⁰ Interviews with Afghan human rights defenders have also shed light on the Commission’s ability to hold the

⁷¹ Linda C. Reif, *What We Can Learn from Poland’s Fight for Human Rights*, THE QUAD (Mar. 5, 2020),

<https://www.ualberta.ca/the-quad/2020/03/what-we-can-learn-from-polands-fight-for-human-rights.html>

⁷² ENNHRI and Partners Issue a Joint Statement in Support of the Polish NHRI, EUROPEAN NETWORK OF NATIONAL HUMAN RIGHTS INSTITUTIONS (May 14, 2021),

<http://ennhri.org/news-and-blog/ennhri-and-partners-issue-a-joint-statement-in-support-of-the-polish-nhri/>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Poland’s Senate Confirms New Ombudsman After Long Standoff*, AP NEWS (July 21, 2021),

<https://apnews.com/article/europe-government-and-politics-poland-98f4d5e647524d9f615cad041080494d>.

⁷⁶ *French National Consultative Commission on Human Rights*, EUROPEAN NETWORK OF NATIONAL HUMAN RIGHTS INSTITUTIONS, <https://ennhri.org/our-members/france/> (last visited Nov. 16, 2022).

⁷⁷ Press Release, Education Cannot Wait, Woman and Girls Take the Lead in Afghanistan (October 11, 2018), <https://reliefweb.int/report/afghanistan/women-and-girls-take-lead-afghanistan>.

⁷⁸ *Id.*

⁷⁹ Michelle Bachelet (U.N. High Commissioner for Human Rights), *The serious human rights concerns and situation in Afghanistan*, U.N. Doc A/HRC/S-31/2 (24 Aug. 2021),

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27403>.

⁸⁰ *Afghanistan Independent Human Rights Commission*, REF WORLD,

<https://www.refworld.org/publisher/AIHRC.ANNUALREPORT.AFG...0.html> (last visited Nov. 16, 2022).

government, courts, and other institutions accountable to human rights obligations, and serve as a mechanism for Afghan nationals to file complaints for remedy or investigation.⁸¹

IV. Imagining an American NHRI

NHRIs have become vital in implementing international obligations around the world.⁸² Human rights movements are growing in the U.S., particularly at the state and local level. Human rights mechanisms such as the NYC Commission on Human Rights in New York⁸³, and the Civil + Human Rights and Equity Department in Los Angeles⁸⁴, are seeking to address discrimination and empower, amplify, and lift up under-served communities.⁸⁵ The federal government can play a positive role around these movements by supporting the creation of a body dedicated to the articulation, promotion, and protection of these standards for human rights. An American NHRI could serve a vital function assessing legislation, policies, and practices in light of human rights principles and impacts.⁸⁶ It could monitor, implement, and educate about the United States' human rights obligations.⁸⁷ A human rights framework could also seek to increase community participation, improve transparency and accountability, reduce vulnerabilities by focusing on the marginalized, empower capacity building, promote the realization of human rights and greater impact on policy and practice, and promote sustainable results and sustained change.⁸⁸

A. *Human Rights Institution as Educator*

An American NHRI could provide educational seminars, workshops, and other programs to educate about human rights. The Paris Principles recommend NHRIs promote human rights education programs, stating NHRIs have the responsibility to “publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially

⁸¹Interview with Human Rights Expert from Afghanistan (Nov. 19, 2021).

⁸² *Id.*

⁸³ *Our Team*, NYC COMMISSION ON HUMAN RIGHTS, <https://www1.nyc.gov/site/cchr/about/our-team.page> (last visited Nov. 16, 2022).

⁸⁴ The NYC Commission on Human Rights “reached an agreement with Zara to create employment opportunities for non-gender conforming and non-binary people, after a transgender person was turned away from the dressing room of their preference at one of the retailer’s NYC locations.” *Restorative Justice in our Work*, NYC COMMISSION ON HUMAN RIGHTS, <https://www1.nyc.gov/site/cchr/about/restorative-justice-work.page> (last visited Nov. 16, 2022); CIVIL + HUMAN RIGHTS AND EQUITY DEPARTMENT, <https://civilandhumanrights.lacity.org/> (last visited Nov. 16, 2022).

⁸⁵ The Civil + Human Rights and Equity Department in Los Angeles started a campaign called “LA for All” that “meets at the intersection of art, advocacy, and community” to stand against hate and encourage the city to “speak up and speak out against hate crimes and hate incidents.” *The LA for All Campaign*, CIVIL + HUMAN RIGHTS AND EQUITY DEPARTMENT, <https://civilandhumanrights.lacity.org/laforall/thecampaign> (last visited Nov. 16, 2022).

⁸⁶ Sonia Cardenas, *Confronting Racism in the US: Are Civil Rights Enough?*, OPEN DEMOCRACY (Jan. 29, 2015), <https://www.opendemocracy.net/en/openglobalrights-openpage-blog/confronting-racism-in-us-are-civil-rights-enough/>.

⁸⁷ *Id.*

⁸⁸ *Id.*

through information and education and by making use of all press organs.”⁸⁹ The German Institute for Human Rights, for example, distributes educational materials including specialist articles, opinions, and analyses on target groups.⁹⁰ It advises people on planning human rights education projects or events, and hosts seminars and workshops on selected topics.⁹¹ As Switzerland is in the process of developing an NHRI, human rights experts developed the NGO Platform for Human Rights in Switzerland, an online website dedicated to education and advocacy of human rights.⁹²

Individuals, private entities, and government bodies need to be informed about human rights and the responsibility associated with respecting and effectively monitoring those rights.⁹³ NHRIs should consider tailoring education programs to the needs of particular groups. For instance, “programmes targeting persons with disabilities should issue their material in accessible formats such as Braille, large print, plain language, closed-captioning or accessible electronic formats.”⁹⁴

B. *Human Rights Institution as Fact-Finder*

No central body in the United States monitors and reports on human rights compliance by federal, state, and local authorities.⁹⁵ Regardless of the model finally adopted, an American NHRI could collect valuable data and promote accountability for upholding human rights.⁹⁶ An NHRI could monitor international recommendations made to the United States during treaty body and Universal Periodic Report cycles and begin identifying laws and new pathways to implement those recommendations.⁹⁷ Additionally, through fact-finding, an NHRI can offer evidence of the need for human rights-oriented legislation and provide meaningful updates on the implementation of recommendations. There is value in adopting a human rights framework that highlights marginalized and vulnerable populations, especially with respect to highly stigmatized issues.⁹⁸ Thus, the objective fact-finding component of an

⁸⁹ Principles Relating to the Status of National Institutions (The Paris Principles), G.A. Res. 43/134 ¶ 2, U.N. Doc. A/RES/48/134 (Dec. 20, 1993),

<https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris>.

⁹⁰ *Frequently Asked Questions*, GERMAN INSTITUTE FOR HUMAN RIGHTS

<https://www.institut-fuer-menschenrechte.de/das-institut/faq> (last visited Nov. 16, 2022).

⁹¹ *Id.*

⁹² Interview with Human Rights Expert in Switzerland (April 28, 2022).

⁹³ UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities*, “Chapter Seven: Creating national institutions to implement and monitor the Convention - National human rights institutions,” available at:

<https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-seven-creating-national-institutions-to-implement-and-monitor-the-convention-3.html>.

⁹⁴ *Id.*

⁹⁵ The Hum. Rts. Inst. Colum. L. Sch. & Leadership Conf. Educ. Fund, *supra* note 5, at 13.

⁹⁶ *Id.* at 24.

⁹⁷ *Id.* at 21.

⁹⁸ *Health and Human Rights Resource Guide*, FXB CENTER FOR HEALTH AND HUMAN RIGHTS AT HARVARD UNIVERSITY, <https://www.hhrguide.org/153-2/> (last visited Nov. 16, 2022).

American NHRI could ensure adequate resources and attention is devoted to fact-finding missions that help the United States comply with international human rights standards.

An objective fact-finder is a key component to addressing human rights issues and bridging the gap between current practices and the United States' human rights obligations as defined by international law. NHRIs can measure compliance and advise the federal government accordingly. For instance, the Office of the Ombudsman in Samoa established its Special Investigation Unit in 2016 to receive, investigate, and determine any complaints about law enforcement officers.⁹⁹ The Unit also has procedures and regulations in place to prevent duplicating the efforts of the police or courts.¹⁰⁰

C. Human Rights Institution as Civil Society Partner

A strong and effective civil society is vital to a successful human rights system.¹⁰¹ An essential part of establishing an NHRI is to make sure that there is a clear role for civil society institutions, either through formal representation or inclusion in working groups, hearings or other activities.¹⁰² In order to effectively engage civil society, an NHRI must have transparent, public guidelines as to how it can be accessed. The Paris Principles require that NHRIs ensure pluralism, not just in terms of the makeup of the institution, but also in terms of how outreach and programming are conducted.¹⁰³ Including civil society organizations in the work of the NHRI is vital to finding pathways to impacted communities.¹⁰⁴ The Paris Principles require NHRIs to maintain ties with civil society, which includes: human rights organizations such as NGOs, associations, and victim groups; related issue-based organizations; coalitions and networks such as women's and children's rights groups, among others; persons with disabilities and their representative organizations; community-based groups such as indigenous peoples and minorities; faith-based groups; unions; social movements including peace movements, students, pro-democracy groups; professionals such as humanitarian workers, lawyers, doctors and medical workers; relatives of victims; and public or para-public institutions such as schools, universities, research bodies, etc.¹⁰⁵ By partnering with various institutions, an American NHRI can ensure it is holding the United States government accountable for its human rights obligations in the context of a plurality of interest groups.

D. NHRI as a link to UN mechanisms

During the 2022 Committee on the Elimination of Racial Discrimination's (CERD) review of the United States, several states and members of civil society recommended that the United States adopt an

⁹⁹ OFISA OLEKOMESINA OSULUFAIGAM, <https://ombudsman.gov.ws/special-investigations/> (last visited Nov. 16, 2022).

¹⁰⁰ *Id.*

¹⁰¹ The Hum. Rts. Inst. Colum. L. Sch. & Leadership Conf. Educ. Fund, *supra* note 5, at 26-27.

¹⁰² *Id.*

¹⁰³ Off. U.N High Comm'r Hum. Rts., *supra* note 7, at 24.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

NHRI.¹⁰⁶ An NHRI in the U.S. can advance and work to fulfill obligations under treaties the U.S. has ratified, including the CERD, ICCPR, and CAT. An NHRI could help promote and coordinate U.S. civil society participation in treaty bodies and other activities carried out under the UN umbrella. Because NHRIs have continuous engagements with UN mechanisms, an American NHRI could present independent reports to U.N. experts, based on information gathered and engagement with community members, as well as host those aspects of UN expert visits that involve non-state engagement (i.e., meetings with civil society).¹⁰⁷

E. *Human Rights Institution as Legislative Counsel*

An American NHRI could conduct human rights assessments on proposed legislation.¹⁰⁸ This could be an important advisory function that entails commenting on legislation, helping to advise when national legislation may vary from international human rights instruments that the United States has ratified.¹⁰⁹ Typically, this process could begin with identifying legislative drafts or policy initiatives with human rights implications such as proposed laws or policies relating to crime and the administration of justice, emergency or security regulations, matters regarding the family (divorce, maintenance, custody), labor regulations, immigration, elections reform, nationality and citizenship laws, or social welfare legislation.¹¹⁰ An NHRI could then determine the degree to which the draft law or proposed policy complies with the State's international and domestic human rights obligations.¹¹¹ An NHRI could publicly report its findings in a way that injects human rights compliance into the legislative process.¹¹² The CNCDH in France advises public authorities on the development of national policies in compliance with France's international human rights commitments and evaluates and monitors their implementation.¹¹³

F. *Human Rights Institution as Policy Innovator*

An American NHRI can work with elected representatives to facilitate inclusive and effective policy debates, and make policy recommendations that take into account a human rights perspective.¹¹⁴ For example, in 2019 the Scottish Human Rights Commission called for the right to food to be

¹⁰⁶ Comm. on the Elimination of Racial Discrimination, Concluding observations on the combined tenth to twelfth rep. of the U.S., U.N. Doc. C/USA/CO/10-12, at 3 (2022).

¹⁰⁷ The Hum. Rts. Inst. at Columbia L. Sch. & Leadership Conf. Educ. Fund, *supra* note 5, at 21.

¹⁰⁸ Off. U.N. High Comm'r Hum. Rts. *supra* note 8, at 127.

¹⁰⁹ *Id.*

¹¹⁰ *UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions*, U.N. DEV. PROGRAMME OFF. U.N. HIGH COMM'R HUM. RTS., 228 (Dec. 2010),

<https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *L'institution*, COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME, <https://www.cncdh.fr/fr/linstitution> (last visited Nov. 16, 2022).

¹¹⁴ *Election Obligations and Standards: An Implementation Guide for National Human Rights Institutions*, THE CARTER CENTER, 9 (Mar. 4, 2019), https://www.cartercenter.org/resources/pdfs/peace/democracy/cc_nhri_handbook.pdf.

incorporated into domestic law in response to government proposals.¹¹⁵ To inform its response, the Commission held a workshop with people who experienced barriers accessing their right to food and published a report summarizing the workshop's discussion.¹¹⁶

G. *Human Rights Institution as Mediator*

Many NHRIs promote human rights by providing mediation and conciliation services.¹¹⁷ These NHRIs allow an aggrieved person to directly contact a mediation or conciliation officer to express their concerns.¹¹⁸ For example, the Australian Human Rights Commission serves as an impartial third party and assists parties to resolve disputes and provide information about possible terms of settlement.¹¹⁹ Settlements can range from an apology, reinstatement to a job, compensation for lost wages, changes to a policy or putting in place anti-discrimination policies.¹²⁰ If the complaint cannot be resolved through conciliation, the matter may be heard in the Federal Court of Australia or the Federal Circuit and Family Court of Australia.¹²¹ While an American NHRI may not be in a position to enforce mediation, it could serve as an umbrella mechanism for disputing parties to seek common ground. One could imagine an NHRI in the United States might establish a pool of dispute resolution specialists with expertise in human rights.

H. *Human Rights Institutions as Amicus Curiae*

An NHRI could seek to intervene in court proceedings as a 'friend of the court' (*amicus curiae*) in cases that involve significant human rights issues.¹²² Through this role, an NHRI could promote the development of law consistent with international human rights standards.¹²³ In some countries, NHRIs are required to obtain court permission before they can intervene.¹²⁴ Other countries provide their NHRI with a right to intervene and do not require court permission.¹²⁵ The South African Human Rights

¹¹⁵ *Right to Food*, SCOTTISH HUMAN RIGHTS COMMISSION, <https://www.scottishhumanrights.com/our-law-and-policy-work/right-to-food/> (last visited Nov. 16, 2022).

¹¹⁶ *Id.*

¹¹⁷ *Chapter Seven: Creating National Institutions to Implement and Monitor the Convention*, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-seven-creating-national-institutions-to-implement-and-monitor-the-convention-3.html> (last visited Nov. 16, 2022).

¹¹⁸ *Id.*

¹¹⁹ *Conciliation - How it Works*, AUSTRALIAN HUMAN RIGHTS COMMISSION, <https://humanrights.gov.au/complaints/complaint-guides/conciliation-how-it-works> (last visited Nov. 16, 2022).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Fact sheet 8: Responsibilities and Functions of NHRIs: Intervening in Court Proceedings*, ASIA PACIFIC FORUM, <https://www.asiapacificforum.net/members/what-are-nhris/fact-sheet-8-responsibilities-and-functions-nhris-intervening-court-proceedings/> (last visited Nov. 16, 2022).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

Commission, for instance, intervenes as amicus in a wide range of cases.¹²⁶ Similarly, the German Institute for Human Rights also has the ability to intervene in court.¹²⁷

V. The Road to Establishing an American NHRI

A. *How should the scope of an American NHRI be determined?*

Identifying an NHRI's subject areas and scope is an important and strategic step in the pre-establishment phase.¹²⁸ NHRIs can vary in scope, with some NHRIs focusing on a small number of issues—such as anti-discrimination and equality—while others have a much broader focus, protecting and promoting human rights in general.¹²⁹ Different types of mandates also inform scope and can include anti-discrimination mandates, economic, social, and cultural rights mandates, and “mixed” mandates.¹³⁰

The United States is a large country, and a domestic NHRI could cover a massive range of issues. Representation matters, both for the decision-making function and to promote public trust in the NHRI.¹³¹ In considering potential powers of an American NHRI it is important to have realistic expectations about its capacity. An institution may have limitations placed on the types of rights it can enforce.¹³² Some NHRIs only address civil and political rights; some protect only the rights of a particular group (such as women); some deal only with discrimination.¹³³ Limitations like these are common and do not prevent an institution from complying with the Paris Principles.¹³⁴ An American NHRI might have a limited scope at the outset with room to grow and expand coverage of issues over time.

Several NHRIs have identified issues through scoping and connecting with human rights NGOs. For example, Catalonia conducted over 100 meetings with civil society organizations during its establishment phase to determine what issues were most relevant to various communities.¹³⁵ Other experts suggest starting with less polarizing, basic rights that a large majority can agree upon before moving to more controversial issues.¹³⁶ An American NHRI might have a broad scope which allows discussions of human rights obligations the United States has committed to through ratification of UN human rights treaties such as the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Convention on Elimination of Racial Discrimination.

¹²⁶ The Hum. Rts. Inst. Colum. L. Sch. & Leadership Conf. Educ. Fund, *supra* note 5, at 32.

¹²⁷ Interview with NHRI Expert from Germany (March 29, 2022).

¹²⁸ Off. U.N High Comm'r Hum. Rts., *supra* note 7, at 151-52.

¹²⁹ *Id.* at 128, 16.

¹³⁰ *Id.* at 50.

¹³¹ *A Manual on National Human Rights Institutions*, *supra* note 4, at 65.

¹³² *Id.* at 33.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Interview with European NHRI Expert (Oct. 17, 2022).

¹³⁶ Interview with United States Constitutional Law Expert (Sept. 18, 2022).

B. Should an American NHRI be established by modifying an existing institution?

The United States has institutions that address civil rights issues as a matter of domestic law. However, to be in compliance with the Paris Principles, NHRIs are required to be independent bodies, which would require evaluation of the extent to which it would be required to transform one of these bodies (such as the Tom Lantos Commission or the Civil Rights Commission) into an institution that meets the standards of human rights institutions globally.¹³⁷

The Road to Rights report provides guidance on the process of establishing an American NHRI to effectively monitor human rights and “defend and extend” the rights for individuals and groups.¹³⁸ The report includes a campaign “to strengthen and transform” the U.S. Commission on Civil Rights.¹³⁹ The Commission was established in 1957 as part of the Civil Rights Act.¹⁴⁰ It is “an independent, bipartisan, fact-finding federal agency” committed to “inform[ing] the development of national civil rights policy and enhanc[ing] enforcement of federal civil rights laws” through studying alleged violations on voting rights, as well as alleged discrimination based on race, color, religion, sex, age, disability, or national origin, among others.¹⁴¹

Without prejudging the direction that debate will take, the following categories of questions would need to be addressed in making an American NHRI come to fruition: the scope and subject matter, the kinds of powers, the relationship with the judiciary, funding, and independence, among others. If an American NHRI is built from the ground up instead of modifying one of these institutions, the ways in which an NHRI will interact with these bodies must be considered.

C. How can an NHRI be structured to be independent?

In order to be compliant with the Paris Principles, NHRIs must be designed to be independent from the government.¹⁴² Main considerations in creating and protecting independence turn to how an NHRI interacts or works alongside already existing policy and legal mechanisms in a nation, as well as the role an NHRI would serve in communications and other interactions with international human rights bodies.¹⁴³

¹³⁷ The Tom Lantos Human Rights Commission was established in 2008 with unanimous consent from the House of Representatives. The Commission is identified as being “charged with promoting, defending and advocating for international human rights as enshrined in the Universal Declaration of Human Rights and other relevant human rights instruments,” in collaboration with congressional staff, the U.S. Senate and the executive branch, as well as engaging with civil society organizations on a domestic and global level. The Hum. Rts. Inst. Colum. L. Sch. & Leadership Conf. Educ. Fund, *supra* note 5, at 5.

¹³⁸ *Id.* at 4.

¹³⁹ *Id.* at 5.

¹⁴⁰ *Official Views*, U.S. COMMISSION ON CIVIL RIGHTS, <https://www.usccr.gov/> (last visited Nov. 16, 2022).

¹⁴¹ *Our Mission*, U.S. COMMISSION ON CIVIL RIGHTS, <https://www.usccr.gov/about/mission> (last visited Nov. 16, 2022).

¹⁴² *Paris Principles criteria—Pluralism*, *supra* note 28.

¹⁴³ The Hum. Rts. Inst. Colum. L. Sch. & Leadership Conf. Educ. Fund, *supra* note 5, at 32-34.

An NHRI's independence must be guaranteed by law.¹⁴⁴ According to a survey by OHCHR, roughly one-third of NHRIs are created by constitution, a third by legislation, and a further fifteen percent have both a constitutional and a legislative base.¹⁴⁵ The United States would likely need to establish an NHRI through a legislative mandate, one that would be sufficient to develop an NHRI independent from courts, the legislature, and the executive branch. An initiative for an American NHRI should identify any lessons that can be learned from other states' efforts to maintain the independence of their institutions, for example, through systems that guarantee funding by law or protect the appointment and termination processes.

D. How would an American NHRI be funded?

The Paris Principles require NHRIs to have sufficient funding for their own staff and premises “in order to be independent of the Government.” NHRIs are at an arm's length from the governments of their respective states and yet they are funded exclusively or primarily by those governments.¹⁴⁶ According to the General Observations of GANHRI's Sub-Committee on Accreditation, “Provision of adequate funding by the state, as a minimum should include: a) The allocation of funds for adequate accommodation, at least its head office; b) Salaries and benefits awarded to its staff comparable to public service salaries and conditions; c) Remuneration of Commissioners (where appropriate); and d) The establishment of communications systems including telephone and internet.”¹⁴⁷ Institutions with investigation and complaint handling functions tend to have the majority (at least 50%) of their funding dedicated to these activities and related support.¹⁴⁸ NHRIs require some flexibility to realign their spending targets depending on national situations of crisis or longer term issues as they evolve.¹⁴⁹

If the administration and expenditure of public funds by an NHRI is regulated by the Government, that regulation must not compromise the NHRI's ability to perform its role effectively and independently.¹⁵⁰ Funding from external sources, such as from development partners, should not be the main source of funding for an NHRI.¹⁵¹ It is the state's responsibility to ensure a minimum activity budget for its NHRI in order to allow the NHRI to operate and fulfill its mandate.¹⁵² The funding should be secure in that it is protected from the retaliatory budget cuts from the state or any other arbitrary reduction in funding.¹⁵³

¹⁴⁴ *Id.*; see also *A Manual on National Human Rights Institutions*, *supra* note 4.

¹⁴⁵ *Survey of National Human Rights Institutions: Report on the Findings and Recommendations of a Questionnaire Addressed to NHRIs Worldwide*, OFF. U.N. HIGH COMM'R HUM. RTS. (Jul. 2009).

¹⁴⁶ Off. U.N. High Comm'r Hum. Rts., *supra* note 7, at 13.

¹⁴⁷ *Id.* at 191.

¹⁴⁸ *UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions*, *supra* note 111, at 27.

¹⁴⁹ *Id.* at 178.

¹⁵⁰ Off. U.N. High Comm'r Hum. Rts., *supra* note 7, at 13.

¹⁵¹ *Id.* at 41.

¹⁵² *Id.*

¹⁵³ Interview with NHRI Expert from Poland (May 3, 2022).

NHRIs in many regions are under-resourced. Other areas of government spending typically take precedence over NHRIs. OHCHR writes, “It is not unusual to see the financial situation of NHRIs worsen with time.”¹⁵⁴ Most NHRIs are “kick-started into existence with external donor funds, and then budgetary responsibility is handed over to national authorities after a few years.”¹⁵⁵

E. Should an American NHRI handle individual complaints?

Another important consideration is whether an American NHRI should have a complaint handling function or take an advisory approach. In the United States, there are many federal, state, and local agencies where complaints may be brought.¹⁵⁶ NHRIs with complaint handling functions frequently tout the number of complaints they handle in order to justify their existence, but this may not be a good measure of long-term, structural influence or change. It is likely that a complaints function would require substantial resources and may thus be something to consider at a later stage of an NHRI’s development.

As for an advisory function, having a national institution that can perform a public education role might be of particular use to state and local governments that have almost no reference for human rights framing.¹⁵⁷ An NHRI can advise the United States legislature of how to come into compliance with U.S. obligations under international treaties. Additionally, NHRIs that take advisory approaches have significant impacts on public perception and education about human rights issues. For example, in Samoa, the general public had no concept of how human rights related to salient domestic issues, such as domestic violence.¹⁵⁸ However, the Samoan Ombudsman office created campaigns to educate the public, and in turn the legislature, about what human rights were and how they related to Samoan issues.¹⁵⁹ An American NHRI that has an advisory role can educate the public about human rights, serve as a monitoring body for treaties the U.S. has signed, participate in court as *amicus curiae*, and receive complaints for issue scoping purposes.

F. Should NHRI decisions be binding? Will an NHRI have enforcement powers?

Binding enforcement typically arises in the context of individual complaint mechanisms. If the U.S. were to adopt such a mechanism, the question of whether its decisions would be binding needs to be addressed. In some countries the NHRI may bring a decision to an enforcement body (such as a tribunal or court) if a party refuses to comply with it within a period of time.¹⁶⁰ For instance, the

¹⁵⁴ Off. U.N High Comm’r Hum. Rts., *supra* note 8, at 216.

¹⁵⁵ *Id.*

¹⁵⁶ Interview with Human Rights Expert in Switzerland, *supra* note 93.

¹⁵⁷ See Roundtable Summary on Establishing a National Human Rights Institution, *supra* note 13; see also Interview with U.S. Human Rights Expert (Nov. 11, 2021).

¹⁵⁸ Interview with NHRI Expert from Samoa (Sept. 23rd, 2022).

¹⁵⁹ *Id.*

¹⁶⁰ Off. U.N High Comm’r Hum. Rts., *supra* note 8, at 90-1.

Australian Human Rights Commission may issue binding decisions.¹⁶¹ It could be argued that, in an initial stage of NHRI development, the NHRI should have a broad mandate and a robust budget rather than binding legal authority that would ultimately be contested.¹⁶²

G. How will members of the NHRI be selected?

A critical question will involve member selection: whatever the model, how will the leadership of an NHRI be selected? The United States would have to implement election or alternative selection processes for the NHRIs' members and determine term limitations.¹⁶³ Doing so in a difficult political environment is challenging, since it is important that an NHRI not be seen as a function of any particular political party. This is especially difficult in the United States since human rights are often framed as progressive tools when they are not meant to be the province of any particular party or political orientation. Transparency about who is sitting on the commission and how they are selected is also important to build trust with civil society.¹⁶⁴

According to a constitutional law expert in the United States, the combination of independent appointment mechanisms and protection from removal enhances judicial independence in the context of American courts.¹⁶⁵ This same principle should also apply to an American NHRI. Many NHRIs have appointed commissioners that serve for a set term. The commissioners often have smaller governing boards that vote on decisions. Countries that have regional offices such as Australia, the United Kingdom, and Scotland appoint commissioners for each individual NHRI office.¹⁶⁶ Some experts have suggested that there should be a mechanism of removal for cause where a commissioner's misconduct must be shown to justify removal. Another safeguard against corruption is to have staggered, fixed terms. NHRI employees should be hired based on merit and expertise within a given field. Many NHRIs are dominated by attorneys because of the nature of the work, but an NHRI should strive to have diversity of expertise and opinions when they are hiring employees and appointing commissioners.¹⁶⁷ These details must be decided during the pre-establishment phase of the NHRI.

H. Should an American NHRI address systemic issues at state and local levels?

Another consideration is whether an NHRI should apply only to the federal government or whether it can address systemic issues at state and local levels. While it is important to have a national, centralized body, an American NHRI could still coordinate with local governments to engage in state reviews and human rights assessments. In the United States, federal civil rights agencies have very

¹⁶¹ Interview with Human Rights Expert from Australia (Nov. 1, 2021).

¹⁶² Interview with United States International Law Expert (Oct. 4, 2022).

¹⁶³ *A Manual on National Human Rights Institutions*, *supra* note 4, at 65-66.

¹⁶⁴ *Id.* at 44.

¹⁶⁵ Interview with United States Constitutional Law Expert, *supra* note 135.

¹⁶⁶ Interview with Human Rights Expert from Australia, *supra* note 162; Interview with NHRI Expert from the U.K. (Oct. 10, 2022); Interview with NHRI Expert from Scotland (Oct. 5, 2022).

¹⁶⁷ Interview with NHRI Expert from Netherlands (Oct. 17, 2022).

limited jurisdiction and may not be politically independent.¹⁶⁸ Therefore, they may not meet the well-established criteria for NHRIs set out in the Paris Principles, including the need for a broad mandate.

The federal structure of the United States poses a challenge for an American NHRI to impact all of the individual states.¹⁶⁹ It is important for rights holders to know where to go if they need assistance with an issue or if they would like to submit a claim. Some argue that, once an NHRI is created, there should be one body that covers the entire territory where people can go to submit their claims.¹⁷⁰ However, federal NHRIs that cover issues within large states can become slow to make decisions and recommendations. The United Kingdom, in part for that reason, has decentralized human rights bodies that regionally divide the responsibility so that different issues can be covered at a regional level.¹⁷¹ This regional split has the benefit of disseminating responsibilities to separate offices and creating more robust ties to the community.

An American NHRI would need to develop an advocacy strategy that weighs the benefits of a state or regional versus national level institution, or how to integrate state and regional institutions into a national one. It could be argued that a state level institute would offer a relatively easy pathway to creation. At the same time, one might be concerned that a diversity of institutes could reinforce divergent approaches to U.S. international obligations, which could be difficult to defend within human rights bodies globally.

In the American context, an NHRI could first be established on a state-level and disseminated to other states. While more politically feasible than starting at the national level, this strategy risks a lack of international recognition and may result in further politicization of human rights issues, with some states failing to adopt human rights institutes altogether. Alternatively, an NHRI could be established federally with one governing body that monitors human rights in the United States. This model would overcome the political challenges that an NHRI might face if it was established on a state-by-state basis. Additionally, a national institution may be in a position to establish regional offices across the United States to address human rights concerns that are specific to geographic areas.

I. How would an NHRI interact with the UN bodies?

An American NHRI could have a direct, positive impact on the UPR process. NHRIs cooperate with national and international stakeholders and the international human rights system.¹⁷² Additionally,

¹⁶⁸Andrew Park, *By foregoing a National Human Rights Institution, the United States is foregoing an opportunity to identify discrimination against LGBT people*, 1 (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Comment-NHRI-US-LGBT-Data-Collection-Sep-2015.pdf>

¹⁶⁹ Interview with NHRI Expert from Germany, *supra* note 128.

¹⁷⁰ Interview with NHRI Expert from Europe. (Nov. 9, 2021).

¹⁷¹ Interview with NHRI Expert from Netherlands, *supra* note 167.

¹⁷² *The Role of National Human Rights Institutions (NHRIs)*, UPR INFO, <https://upr-info.org/en/get-involved/national-human-rights-institutions-nhris/role> (last visited Nov. 16, 2022).

NHRIs can play an active role during the UPR stages by acting as a bridge between the state and UPR stakeholders, reporting independently on information, sharing best practices and lessons learned on UPR engagement, providing advice to the state on UPR recommendations, monitoring recommendation implementation, raising awareness and encouraging participation in the UPR process, and delivering human rights training.¹⁷³

An NHRI can also serve as an essential actor for Special Procedures of the Human Rights Council by providing them with independent and substantiated information.¹⁷⁴ NHRIs are encouraged to contact special rapporteurs, working groups and treaty bodies to exchange information and discuss possible activities in relation to the NHRI state, including country visits.¹⁷⁵ NHRIs can be a valuable resource ahead of and during country visits.¹⁷⁶ NHRIs may also be invited to support the referral of submissions to UN missions and to provide substantive input in preparation for thematic reports.¹⁷⁷

Moreover, NGOs and NHRIs can be accredited to participate in the Human Rights Council's sessions as Observers.¹⁷⁸ They can address the Council during interactive discussions and debates to highlight human rights situations around the globe.¹⁷⁹

VI. Next Steps & Moving Forward

The United States has an unfulfilled promise of advancing human rights at home, but establishing an NHRI could begin to alter that fact. In October 2021, in response to the United States being elected to the United Nations Human Rights Council, the American Civil Liberties Union (ACLU) urged President Biden to prioritize human rights in domestic policy. The ACLU called on the Biden administration to, among other proposals, “establish a National Human Rights Institution to monitor, document, investigate and protect human rights here at home.”¹⁸⁰ The petition for “International Accountability for Racist Police Violence,” which included a call for the establishment of an NHRI, currently has nearly 20,000 signatures.¹⁸¹

¹⁷³ *Id.*

¹⁷⁴ *U.N. Special Rapporteur on Transitional Justice: News and opportunities for engagement*, EUROPEAN NETWORK OF NATIONAL HUMAN RIGHTS INSTITUTIONS (Nov. 23, 2018), <http://ennhri.org/news-and-blog/un-special-rapporteur-on-transitional-justice-news-and-opportunities-for-engagement/>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *NGO and NHRI Information*, UNITED NATIONS HUMAN RIGHTS COUNCIL, <https://www.ohchr.org/en/hr-bodies/hrc/ngo-nhri-info> (last visited Nov. 16, 2022).

¹⁷⁹ *Id.*

¹⁸⁰ Press Release, American Civil Liberties Union, ACLU Urges Biden Administration to Prioritize Human Rights in Domestic Policy Following Uncontested Election to United Nations Human Rights Council, (October 14, 2021), <https://www.aclu.org/press-releases/aclu-urges-biden-administration-prioritize-human-rights-domestic-policy-following>.

¹⁸¹ *International Accountability for Racist Police Violence*, AMERICAN CIVIL LIBERTIES UNION,, <https://action.aclu.org/petition/international-accountability-racist-police-violence> (last visited Nov. 16, 2022).

Continuing outreach efforts to exemplary NHRIs and interviewing more experts to gain insight and enrich the understanding of civil society, legislators, and government officials is crucial to informing the different routes an American NHRI can take. **Given the range of issues that would need to be address, the optimal approach of the United States, at this moment, would be a presidential-level commission to explore the questions identified in this report, among others, and thus lay the groundwork for creation of an American NHRI.** A process that engages executive branch officials, legislators and a broad cross-section of American civil society could build support for such an institution and identify the common ground for its adoption.

President Biden has pledged to take concrete steps to put human rights back at the center of U.S. foreign policy.¹⁸² Establishing an NHRI is a critical way to reinforce America’s commitment to human rights and operationalize this promise, rather than letting it go unfulfilled.

¹⁸² “Demonstrating that our commitment to human rights begins at home is among the most powerful and persuasive tools in our foreign policy kit.” Press Release, Joseph R. Biden, President of the U.S., Remarks by President Biden at the Dedication of the Dodd Center for Human Rights (Oct. 15, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/15/remarks-by-president-biden-at-the-dedication-of-the-dodd-center-for-human-rights/>.