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# National human rights institutions: independent actors in global human rights governance?

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In recent decades, the global human rights regime has become increasingly complex. With the United Nations (UN) as the principal international governmental organization (IGO) at its centre, an extensive network of state and non-state governance actors works at the bilateral, multilateral, regional and transgovernmental levels to ensure greater compliance with international human rights treaties.<sup>1</sup> In an effort to monitor and support states with human rights treaty implementation, IGOs have encouraged the growth of independent regulatory bodies such as national human rights institutions (NHRIs). As the primary independent domestic bodies charged with the implementation of international human rights treaties ratified by governments,<sup>2</sup> NHRIs are key to countries' efforts to address a range of rights-related issues like the promotion of fundamental rights.

Since their creation in the 1990s, NHRIs have become increasingly important actors in the global governance of human rights. Described as 'domestic non-judicial institution[s] for the implementation of international human rights law', as cited in Reif,<sup>3</sup> NHRIs are regulatory intermediaries<sup>4</sup> mandated to embed international norms in local structures.<sup>5</sup> One of NHRIs' prominent roles is support national governments when they are being reviewed in international assessment processes such as the UN Universal Periodic Review (UPR), a peer-review mechanism involving an evaluation of the human rights records of all UN member states.<sup>6</sup> In the context of the UPR, NHRIs often contribute to

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<sup>1</sup> Tom Pegram, 'Global human rights governance and orchestration: national human rights institutions as intermediaries', *European Journal of International Relations* 21: 3, 2015, pp. 595–620, <https://doi.org/10.1177/135406611548079>; Martha Finnemore, *National interests in international society* (Ithaca, NY and London: Cornell, 1996); Ryan Goodman and Derek Jinks, 'How to influence states: socialization and international human rights law', *Duke Law Journal* 54, 2004, pp. 621–703.

<sup>2</sup> Gauthier de Beco, 'National human rights institutions in Europe', *Human Rights Law Review* 7: 2, 2007, pp. 331–70, <https://doi.org/10.1093/hrlr/ngm004>.

<sup>3</sup> Linda C. Reif, *The ombudsman, good governance and the international human rights system* (Leiden and Boston: Nijhoff, 2004).

<sup>4</sup> Pegram, 'Global human rights governance and orchestration'.

<sup>5</sup> Sonia Cardenas, 'Emerging global actors: the United Nations and national human rights institutions', *Global Governance* 9: 1, 2003, pp. 23–42.

<sup>6</sup> UN Human Rights Council, 'Universal Periodic Review', 2023, <https://www.ohchr.org/en/hrbodies/upr/>

the national report in preparation for the review processes, and can exercise their speaking rights during the adoption of the report, or advise and monitor governments' implementation of recommendations.

Central to the success of NHRIs is their independence, understood as their capacity to operate independently from outside influence, such as governments and other actors. Since the formulation of a formal rule framework for NHRIs in the 1991 Paris Principles, independence is considered a key feature of their institutional designs.<sup>7</sup> The international support for NHRI independence has continued over the years, as these bodies became important players in the diffusion of liberal democratic norms across borders. However, despite strong endorsement for independence, states have not always granted full independence to their NHRIs, creating great variation across NHRIs around the world. In addition, even NHRIs that on paper appear to possess the necessary features guaranteeing their independence might not be able to fully exert their independence in practice, due to factors such as informal governmental pressures.

We propose that a close examination of NHRI independence as multidimensional is key to the study of human rights protection and promotion. Independence, we argue, ought not to be solely a formal, *de jure* institutional feature; rather, it is essential for it to also manifest as *de facto* independence. While existing scholarship offers valuable insights into the formal independence of NHRIs, with a focus on those institutions that hold accreditation and members of the Global Alliance on National Human Rights Institutions (GANHRI),<sup>8</sup> we have yet to systematically understand (1) variation in formal independence for NHRIs globally, (2) a disparity between *de jure* and *de facto* independence, and (3) the factors that explain variation in the extent of formal independence vs independence in practice, in international peer-review settings like the UPR. More specifically, we propose that central to understanding NHRI independence in the multilevel global governance of human rights is the distinction between *de jure* independence (defined as mandated safeguards of formal independence) and *de facto* independence, defined as the institution's ability to carry out its mandate independently from other actors' interference.

Against this background, we ask: to what extent does the *de jure* independence of NHRIs match their *de facto* independence? What explains possible variation between the two? To answer these questions, we draw on literature on NHRI independence and on the behaviour of regulatory intermediaries, to explore possible differences between formal independence (*de jure*) and independence in practice (*de facto*). The first part of the analysis offers a broader idea of the global

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pages/uprmain.aspx. (Unless otherwise noted at point of citation, all URLs cited in this article were accessible on 21 March 2022.)

<sup>7</sup> UN General Assembly, 'Principles relating to the Status of National Institutions (The Paris Principles)', Resolution 48/134, 20 Dec. 1993 <https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris>.

<sup>8</sup> See, for instance, Katerina Linos and Tom Pegram, 'The language of compromise in international agreements', *International Organization* 70: 3, 2016, pp. 587–621, <https://doi.org/10.1017/S0020818316000138>; Tom Pegram, 'Diffusion across political systems: the global spread of national human rights institutions', *Human Rights Quarterly* 32: 3, 2010, pp. 729–60; Cardenas, 'Emerging global actors'.

context for the distribution of NHRI *de jure* independence around the world. To measure formal independence, we build on existing scholarship<sup>9</sup> and expand on it to propose an original data set of different dimensions of NHRI independence. The second part of the analysis focuses on NHRI's *de facto* independence when they participate in the UPR, building on original data from surveys conducted with staff at NHRIs in the Asia-Pacific region. The analysis allows us to identify the reasons why NHRIs might (or might not) be able to make full use of their independence when carrying out their duties.

As further elaborated below, to study variation between the *de jure* and *de facto* independence of NHRIs we focus on the UPR as the human rights review with the most comprehensively encompassing mechanism, and the first in foreseeing a specific role for NHRIs which is distinct from that of states and civil society actors. The rationale for the focus on the Asia-Pacific is fourfold: first, obtaining survey data on UPR participation from the entire population of NHRIs is very costly and surpasses the resources available to the authors; second, in the absence of regional human rights mechanisms, Asia-Pacific NHRIs play a key role as a link between the national and global levels when it comes to human rights protection; third, we aim to contribute to the relatively limited research on NHRIs in the Asia-Pacific; and fourth, operating in sometimes hostile regional and domestic environments,<sup>10</sup> it is compelling to learn more about the ability of Asia-Pacific NHRIs to carry out their activities effectively and independently from government interference.

Recent International Relations (IR) scholarship has theorized governance dynamics inside global regulatory systems in terms of *orchestration*.<sup>11</sup> Orchestration occurs when the orchestrator (i.e. an IGO) enlists and supports the actions of intermediary actors to influence targets (national governments) in pursuit of IGO governance goals.<sup>12</sup> For human rights governance, orchestration can explain some of the main arrangements between specialized UN agencies as orchestrators, national governments as targets, and different independent regulatory intermediaries. In an orchestration framework, NHRIs are key intermediaries operating as part of international networks of peer institutions, holding states accountable on their behaviour and assisting them to improve compliance.<sup>13</sup> To be successful

<sup>9</sup> Corina Lacatus, 'Explaining institutional strength: the case of national human rights institutions in Europe and its neighbourhood', *Journal of European Public Policy* 26: 11, 2019, pp. 1657–77, <https://doi.org/10.1080/13501763.2018.1545795>.

<sup>10</sup> Rosemary Foot, 'Collateral damage: human rights consequences of counterterrorist action in the Asia-Pacific', *International Affairs* 81: 2, 2005, pp. 411–25, <https://doi.org/10.1111/j.1468-2346.2005.00458.x>.

<sup>11</sup> Kenneth W. Abbott, Philipp Genschel, Duncan Snidal and Bernhard Zangl, eds, *International organizations as orchestrators* (Cambridge, UK and New York: Cambridge University Press, 2015); Kenneth W. Abbott, David Levi-Faur and Duncan Snidal, 'Theorizing regulatory intermediaries: the RIT model', *The Annals of the American Academy of Political and Social Science* 670: 1, 2017, pp. 14–35, <https://doi.org/10.1177/0002716216688272>; Kenneth W. Abbott and Duncan Snidal, 'Strengthening international regulation through transnational new governance: overcoming the orchestration deficit', *Vanderbilt Journal of Transnational Law* 42: 2, 2009, pp. 1–80; Christian Downie, 'How do informal international organizations govern? The G20 and orchestration', *International Affairs* 98: 3, 2022, pp. 953–72, <https://doi.org/10.1093/ia/iiaa060>.

<sup>12</sup> Abbott and Snidal, 'Strengthening international regulation'; Abbott et al., *International organizations as orchestrators*; Pegram, 'Global human rights governance and orchestration'.

<sup>13</sup> Pegram, 'Global human rights governance and orchestration'; Corina Lacatus, 'Human rights networks and regulatory stewardship: an analysis of a multi-level network of human rights commissions in the

as regulatory intermediaries for human rights, NHRIs require as high a degree as possible of *de jure* and *de facto* independence from national governments. At the UPR, NHRI independence is particularly important, allowing the human rights institution to present an impartial expert view of its government's human rights performance while maintaining a separate voice.

Our analysis shows that most NHRIs enjoy medium or high degrees of *de jure* independence, with the majority of fully independent NHRIs being located in Europe. When zooming in on the Asia-Pacific region, our findings were somewhat surprising: while most Asia-Pacific NHRIs enjoy medium degrees of *de jure* independence, they reportedly possess higher degrees of *de facto* independence. We explain this discrepancy by focusing on the role of NHRI leadership and the institutional ability to form constructive ties with governmental and civil society actors. Staff at surveyed NHRIs report that *de facto* independence in the context of the UPR is high. We highlight that the UPR is designed in such a way as to facilitate the *de facto* independence of participating NHRIs, allowing them to support and monitor their governments when they are being reviewed. NHRIs that hold full *de jure* independence hold more rights than the less independent ones when they participate in the UPR (i.e. speaking rights) and are more likely to be monitors of their own governments. At the same time, *de facto* independence allows even NHRIs with lower *de jure* independence to participate in the UPR and to be intermediaries in global human rights governance.

Our findings expand on existing theoretical insights on the role of institutional independence as a key determinant for the successful participation of intermediary actors in international human rights processes<sup>14</sup>. Our analysis adds much-needed nuance to the debate about NHRI independence and, more generally, about the independence of regulatory intermediaries for human rights governance. We show that, contrary to existing belief, institutional independence is not monolithic; rather, independence is multifaceted, containing both *de jure* and *de facto* aspects. We demonstrate that regulatory intermediaries like NHRIs can be successful in IGO-coordinated network settings like the UPR even when they lack full *de jure* independence. A key condition for NHRIs' success in monitoring and reporting on their governments human rights violations is their *de facto* independence, allowing NHRIs to participate in the peer-review processes at UPR autonomously from government interference.

In what follows, we provide some key information on the independence of NHRIs and their participation in the UPR, introducing the concept of regulatory orchestration. Subsequently, we outline the way we have operationalized and measured the *de jure* and *de facto* independence of NHRIs. Finally, we apply those measurements to our cases and explain the observed variation between *de jure* and *de facto* independence.

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United Kingdom', *The British Journal of Politics and International Relations* 20: 4, 2018, pp. 809–26, <https://doi.org/10.1177/1369148118798529>.

<sup>14</sup> Linos and Pegram, 'The language of compromise in international agreements'; Lacatus, 'Explaining institutional strength'.

## The independence of national human rights institutions

In the early 1990s, the UN began promoting a novel idea: the creation and consolidation of independent NHRIs to facilitate the domestic implementation of international human rights law.<sup>15</sup> Since then, widespread international endorsement has triggered a global norm cascade, with the number of NHRIs increasing from 20 before 1990 to 120 NHRIs that are GANHRI members (A and B accreditation status) alongside other non-accredited NHRIs around the world in 2022.<sup>16</sup> NHRIs can play a key role in the promotion and protection of human rights due to the unique position they occupy domestically, working between government, civil society, and NGOs,<sup>17</sup> to promote and monitor governments' efforts to implement international human rights law.

A feature that is widely considered central to the success of NHRIs is their independence. In the 1991 Paris Principles, endorsed by the UN General Assembly in 1993, the UN recommended that safeguards for NHRI independence be built into institutional mandates, specifying institutional design features required for an institution to function autonomously. However, states have not been equally open to granting full independence to their NHRIs, and governments have often sought to retain different degrees of influence in institutional activities. This has led to great variation in the independence of NHRIs globally, and the issue of independence has been problematic in competing NHRI models, varying greatly across institutional types (from advisory bodies to ombudsmen).<sup>18</sup>

## NHRIs in the Asia-Pacific

NHRIs play a central role for human rights in the Asia-Pacific region. The Asia Pacific Forum—the platform bringing together and supporting the NHRIs in the region—is the oldest and arguably the most active regional network of NHRIs in the world.<sup>19</sup> Its existence is somewhat surprising, given that, of all world regions, the Asia-Pacific has had the lowest concentrations of NHRIs since the 1990s.<sup>20</sup> Australia was the first country to establish an NHRI in the 1970s, and New Zealand and the Philippines followed. In the 1990s, nine other countries established NHRIs. Unlike other world regions in which more developed systems for human rights protection are present (Africa, the Americas and Europe), the Asia-Pacific still lacks regional human rights institutions which complement the tasks

<sup>15</sup> An NHRI is defined broadly as 'a body which is established by a government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights'. United Nations Centre for Human Rights, *National human rights institutions: a handbook on the establishment and strengthening of national institutions for the promotion and protection of human rights* (Geneva: UN Centre for Human Rights, 1995), p. 6.

<sup>16</sup> Global Alliance on National Human Rights Institutions, *Membership*, <https://ganhri.org/membership/>.

<sup>17</sup> Anne Smith, 'The unique position of national human rights institutions: a mixed blessing?', *Human Rights Quarterly* 28: 4, 2006, pp. 904–46.

<sup>18</sup> Linos and Pegram, 'The language of compromise'.

<sup>19</sup> See <https://www.asiapacificforum.net/> for further information about the Asia Pacific Forum.

<sup>20</sup> Sonia Cardenas, *Chains of justice: the global rise of state institutions for human rights* (Philadelphia: University of Pennsylvania Press, 2014).

performed at the UN level. According to Burdekin<sup>21</sup> this is mostly due to the large size and heterogeneity of the region, which includes a whole range of countries from world powers such as China to small Pacific island states, encompassing a variety of governmental regimes. Some governments are hostile to human rights due to factors such as armed conflict or a strong attachment to non-interference norms.<sup>22</sup> Hence, human rights promotion, protection and monitoring tasks in the Asia-Pacific are performed either at the UN or the national and local levels, creating unique opportunities for NHRIs to act as key linkages between the national and global arenas.

While studies on European and Latin American NHRIs abound,<sup>23</sup> only limited research has been conducted on NHRIs in the Asia-Pacific, with most works consisting of single case-studies, such as those on India,<sup>24</sup> Indonesia,<sup>25</sup> Malaysia<sup>26</sup> and the Philippines.<sup>27</sup> A recent edited volume<sup>28</sup> provides a thorough overview of the functioning of NHRIs in the region and their potential to advance human rights protection.

Some authors have focused on the interaction between Asia-Pacific NHRIs and UN human rights bodies.<sup>29</sup> Notably, Zipoli<sup>30</sup> highlights the value added by Asia-Pacific NHRIs to the work of UN human rights treaty bodies, by acting as linkages between the local and the international levels. In contrast, not much attention has been given to the intermediary role played by NHRIs (within or beyond the Asia-Pacific region) in the UPR, with the exception of Cardenas's book,<sup>31</sup> which discusses a few cases where NHRIs in the region act as bridges between international actors and national governments on human rights, and a

<sup>21</sup> Brian Burdekin, *National human rights institutions in the Asia-Pacific region*, Raoul Wallenberg Institute Human Rights Library, vol. 27 (Leiden and Boston: Nijhoff, 2006).

<sup>22</sup> Foot, 'Collateral damage'.

<sup>23</sup> de Beco, 'National human rights institutions in Europe'; Lacatus, 'Human rights networks and regulatory stewardship'; Lacatus, 'Explaining institutional strength'; Pegram, 'Diffusion across political systems'; Thomas Pegram, 'National human rights institutions in Latin America: politics and institutionalization', in Ryan Goodman and Thomas Pegram, eds, *Human rights, state compliance, and social change: assessing national human rights institutions* (Cambridge: Cambridge University Press, 2012), pp. 210–40.

<sup>24</sup> Sonia Cardenas, 'Adaptive states: the proliferation of national human rights institutions' (Cambridge, MA: Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University. Working Paper Series T-01-04, 2001); Carolyn Evans, 'Human rights commissions and religious conflict in the Asia-Pacific region', *International & Comparative Law Quarterly* 53: 3, 2004, pp. 713–29, <https://doi.org/10.1093/iclq/53.3.713>.

<sup>25</sup> Cardenas, 'Adaptive states'; Philip Eldridge, 'Emerging roles of national human rights institutions in Southeast Asia', *Pacifica Review: Peace, Security & Global Change* 14: 3, 2002, pp. 209–26, <https://doi.org/10.1080/1323910022000023129>; Hugo Stokke, *Taking the Paris Principles to Asia. A study of three human rights commissions in Southeast Asia: Indonesia, Malaysia and the Philippines* (Bergen: Chr. Michelsen Institute, 2007); Domenico Zipoli, 'National human rights institutions and the United Nations human rights treaty body system: a rebuttal to the skeptics', in James Gomez and Robin Ramcharan, eds, *National human rights institutions in Southeast Asia: selected case studies* (Singapore: Springer Singapore, 2020), pp. 55–80.

<sup>26</sup> Eldridge, 'Emerging roles'; Evans, 'Human rights commissions and religious conflict'; Catherine Renshaw, Andrew Byrnes and Andrea Durbach, 'Testing the mettle of national human rights institutions: a case study of the Human Rights Commission of Malaysia', *Asian Journal of International Law* 1: 1, 2011, pp. 165–98, <https://doi.org/10.1017/S204425131000038X>; Stokke, *Taking the Paris Principles to Asia*.

<sup>27</sup> Cardenas, 'Adaptive states'; Eldridge, 'Emerging roles'; Evans, 'Human rights commissions and religious conflict'; Stokke, *Taking the Paris Principles to Asia*.

<sup>28</sup> Gomez and Ramcharan, eds, *National human rights institutions in Southeast Asia*.

<sup>29</sup> Burdekin, *National human rights institutions in the Asia-Pacific region*; Cardenas, *Chains of justice*; Eldridge, 'Emerging roles'; Zipoli, 'National human rights institutions'.

<sup>30</sup> Zipoli, 'National human rights institutions'.

<sup>31</sup> Cardenas, *Chains of justice*.

study by Glušac<sup>32</sup> showing the extent to which NHRIs, including those in the Asia-Pacific, have participated in the UPR between 2008 and 2016.

## **Regulatory orchestration and peer review**

Recent IR scholarship has captured multilevel governance arrangements using the concept of orchestration, which can be defined as a model in which an IGO enlists and supports intermediary actors to address target actors in pursuit of IGO governance goals.<sup>33</sup> Targets are national governments and regulators are international organizations<sup>34</sup> like the specialized UN agencies and regional bodies including the Council of Europe and the OECD. Distinct from hierarchy, delegation and collaboration, orchestration occurs when: (a) an IGO, as the orchestrator, seeks to influence the behaviour of the target (state) via intermediaries; and (b) the orchestrator lacks authoritative control over the intermediaries, which, in turn, lack the ability to compel compliance of the target. Within this framework, networks are seen as a particular type of intermediary that integrates expert knowledge in institutionalized yet dynamic network structures and formalizes their communication with both international regulators and national governments. Scholars have provided valuable insights into what orchestration means for global human rights governance, focusing on the important role that NHRIs play as regulatory intermediaries between, on the one hand, the UN human rights treaty bodies and the Office of the High Commissioner for Human Rights (OHCHR) as the principal UN-based international regulators and, on the other hand, national governments as their main targets.<sup>35</sup>

In the realm of human rights, peer-review mechanisms occupy a special place as a particular type of regulatory intermediary between IGOs and their member states. The most encompassing human rights peer review is the UPR, set within the framework of the UN Human Rights Council. The UPR is the only *universal* human rights peer review, both in its geographical scope—all UN states are subject to review—and its thematic scope, as states are reviewed on all their human rights obligations.<sup>36</sup> This universality sets the UPR apart from other human rights

<sup>32</sup> Luka Glušac, 'Universal Periodic Review and policy change: the case of national human rights institutions', *Journal of Human Rights Practice* 14: 1, 2022, pp. 285–304, <https://doi.org/10.1093/jhuman/huab055>.

<sup>33</sup> Abbott et al., *International organizations as orchestrators*; Abbott, Levi-Faur and Snidal, 'Theorizing regulatory intermediaries'; Kenneth W. Abbott and Duncan Snidal, 'The governance triangle: regulatory standards institutions and the shadow of the state', in Walter Mattli and Ngaire Woods, eds, *The politics of global regulation* (Princeton, NJ and Oxford: Princeton University Press, 2009), pp. 44–88; Giovanni Agostinis and Stefano Palestini, 'Transnational governance in motion: regional development banks, power politics, and the rise and fall of South America's infrastructure integration', *Governance* 34: 3, 2021, pp. 765–84, <https://doi.org/10.1111/gove.12529>.

<sup>34</sup> Abbott, Levi-Faur and Snidal, 'Theorizing regulatory intermediaries'; Pegram, 'Global human rights governance and orchestration'.

<sup>35</sup> Lacatus, 'Human rights networks and regulatory stewardship'; Pegram, 'Global human rights governance and orchestration'; Tom Pegram, 'Regulatory stewardship and intermediation: lessons from human rights governance', *The Annals of the American Academy of Political and Social Science* 670: 1, 2017, pp. 225–44, <https://doi.org/10.1177/0002716217693986>; Zipoli, 'National human rights institutions'.

<sup>36</sup> United Nations Human Rights Council, 'Resolution 5/1. Institution-building of the United Nations Human Rights Council', A/HRC/RES/5/1, 18 June 2007, [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_5\\_1.doc](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_5_1.doc), art. 1.



bodies, both within and beyond the UN, whose mandate only covers specific human rights treaties or a specific geographical region.

The UPR is also unique in that it grants states different roles. In the UPR, all UN member states are reviewed in four-year cycles and may take part in the reviews of other states and issue recommendations for improvement. When reviewed, states are targets, and their behaviour is under assessment. When they act as reviewers of other states, they are monitors. In a sense, the peer-review process lends some flexibility to states' regulatory powers inside the network, granting them monitoring and accountability tools that are usually in the purview of orchestrators. It is in this context that the *de facto* independence of NHRIs, particularly of the staff participating in the review process, is particularly important.

Concretely, reviews start with the collection of information on the state under review, which consists of a state self-assessment report; a report by the OHCHR Secretariat containing information by UN bodies; and an additional report by the Secretariat compiling information from other relevant non-UN sources, such as NHRIs and civil society.<sup>37</sup> Representatives from the state under review present the state report during a meeting known as the interactive dialogue, where the other member states may deliver recommendations for improvement.<sup>38</sup> Finally, a Human Rights Council plenary session adopts the outcome report containing a summary of proceedings and a list of recommendations.<sup>39</sup> Reviewed states must indicate whether they accept or simply 'note' each recommendation<sup>40</sup> with the expectation—but without any legal obligation—that they will implement the accepted recommendations.

Independent contributions by NHRIs can play key roles in the UPR. They may submit information to the UN in preparation of the state report,<sup>41</sup> with information provided by GANHRI-accredited NHRIs being included in a dedicated section.<sup>42</sup> Whereas governments may consult NHRIs when preparing their country's report, NHRIs are expected to provide information to the UN independently, and not to act on behalf of their governments. To safeguard independent participation, the UPR—similarly to all other UN mechanisms—provides safe opportunities for NHRIs and other actors to report reprisals.<sup>43</sup> Further, NHRIs can attend the interactive dialogue but cannot intervene in the discussions,<sup>44</sup> and GANHRI-accredited NHRIs enjoy speaking rights during the adoption of their own country's report.<sup>45</sup> Finally, NHRIs are expected to assist their own govern-

<sup>37</sup> United Nations Human Rights Council, 'Resolution 5/1', art. 15.

<sup>38</sup> United Nations Human Rights Council, 'Resolution 5/1', art. 18.

<sup>39</sup> United Nations Human Rights Council, 'Resolution 5/1', art. 26.

<sup>40</sup> United Nations Human Rights Council, 'Resolution 5/1', art. 32.

<sup>41</sup> United Nations Human Rights Council, 'Resolution 5/1', art. 15.

<sup>42</sup> United Nations Human Rights Council, 'UN Resolution 16/21', A/HRC/RES/16/21, 12 April 2011, at I.C.1.9.

<sup>43</sup> Hina Jilani, *The Universal Periodic Review (UPR) and its potential to foster freedom of expression, access to information and safety of journalists. guidelines for national human rights institutions (NHRIs)* (Paris: UNESCO, 2022).

<sup>44</sup> United Nations Human Rights Council, 'Resolution 5/1', art. 18.

<sup>45</sup> United Nations Human Rights Council, 'Resolution 16/21', at I.C.2.13.

ments in the implementation of the recommendations received.<sup>46</sup> Although not all NHRIs contribute to all stages, such provisions for independent contribution by NHRIs are certainly unique and remarkable.<sup>47</sup>

In this peer-review context, NHRI independence is key. When their *de jure* independence is high, NHRIs are more likely to hold A-status accreditation in GANHRI, hence they can be granted speaking rights at the UPR and their contributions to their countries' reports are highlighted in dedicated sections. Lower *de jure* independence can be an indicator of governments' unwillingness to support a strong monitoring NHRI on their territory and, by extension, to maintain more direct control over the content of the report they submit to the UPR and limit the NHRI's voice in the UPR process. Nevertheless, looking at *de jure* independence does not tell us the complete story. NHRIs' *de facto* independence is essential for these bodies to successfully navigate the delicate relationships they have with national governments, particularly when governments tend to be hostile to human rights. In the context of the UPR, *de facto* independence is also very important: it has the potential to give NHRIs with weaker *de jure* independence a voice and a say (however limited) in the review of their own government.

Within the analytical framework of orchestration, both the UPR and NHRIs can be seen as regulatory intermediaries in global human rights governance, operating between the UN as the main human rights orchestrator and states as targets. While both act as intermediaries established by national governments with international support, the UPR is essentially different from NHRIs and unique among all intermediaries in human rights governance. Human rights governance mechanisms such as the UN treaty bodies are generally conceptualized as orchestrators (see, for example, Pegram, 'Global human rights governance and orchestration'), as they set out to monitor and promote respect for global human rights standards, acting as entities that are entirely independent both from the states that have established them and from the views of the OHCHR Secretariat.<sup>48</sup> In contrast, despite being an instrument operating under the umbrella of the UN, the UPR is a state-led mechanism lacking, by design, the independence from government interference that UN bodies generally enjoy. Thus, the UPR is best seen as an intermediary forum where states come together to play the double role of targets (when being reviewed) and monitors with regulatory powers, usually in the hands of orchestrators, when they carry out reviews.

Considering the strongly state-led nature of the UPR, and the fact that states' implementation of recommendations is voluntary, it is essential for the peer review to be seen as a credible instrument based on reliable information.<sup>49</sup> NHRIs

<sup>46</sup> United Nations Human Rights Council, 'Resolution 5/1', art. 33.

<sup>47</sup> This section aims to highlight the key official provisions for NHRI involvement in the UPR. For a thorough overview of NHRI involvement, see Jilani, *The Universal Periodic Review (UPR) and its potential*.

<sup>48</sup> Valentina Carraro, 'Electing the experts: expertise and independence in the UN human rights treaty bodies', *European Journal of International Relations* 25: 3, 2019, pp. 826–51, <https://doi.org/10.1177/1354066118819138>.

<sup>49</sup> Cosette D. Creamer and Beth A. Simmons, 'Ratification, reporting, and rights: quality of participation in the convention against torture', *Human Rights Quarterly* 37: 3, 2015, pp. 579–608; Valentina Carraro, 'Promoting compliance with human rights: the performance of the United Nations' Universal Periodic Review and treaty bodies', *International Studies Quarterly* 63: 4, 2019, pp. 1079–93, <https://doi.org/10.1093/isq/sqz078>.

thus potentially play a major role in the UPR: they are highly knowledgeable on their countries' situation and have a direct line of communication with national governments, while seeking to remain independent actors. This gives them the ability to complement the work performed by the OHCHR Secretariat and to review states in the UPR. However, to perform this counterbalancing role, their independence from states must not only be *de jure*, but also *de facto*.

## Measuring NHRI independence

This study builds on the combined strength of different data collection methods, taking two steps. Focusing on the global level, it measures the formal independence of NHRIs—their *de jure* independence—by means of content analysis. Then, it focuses on the Asia-Pacific region to measure the extent to which NHRIs are *de facto* independent—namely, the extent to which they are able to act independently when they conduct daily functions and participate in the UPR process.

Due to resource constraints, it was not feasible for the authors to survey the whole population of NHRIs, and the choice was made to focus on the Asia-Pacific for both research-related and pragmatic reasons. As discussed earlier, the Asia Pacific Forum is the oldest and arguably the most active regional network of NHRIs in the world.<sup>50</sup> Additionally, when it comes to human rights governance, the Asia-Pacific, unlike other regions, does not have its own regional human rights institutions. This creates unique opportunities for NHRIs to act as links between the global and national levels.

Multi-method research on NHRIs in this region is limited. Our larger dataset on formal independence features of NHRIs helps to offer a broader view of patterns of formal NHRI independence around the world, contextualizing the analysis of *de jure* and *de facto* independence of NHRIs in the Asia-Pacific. To measure NHRIs' formal independence, the authors conducted a manual content analysis of institutional documentation available online, particularly institutional mandates and annual reports. In these institutional documents, the authors identified information regarding features of formal institutional independence, and coded these features following the coding scheme in table 1. To study the extent to which NHRIs carry out their activity independently, this research includes respondents' views collected via an online survey. The authors disseminated the survey via email in February 2021. The target population consisted of all 24 NHRI members of the Asia Pacific Forum, contacted through the latter's contact list.<sup>51</sup> The survey had ten respondents, which represents a 41.6 per cent response rate, with five of the surveyed respondents having directly participated in the UPR process for their countries.

<sup>50</sup> We identified Asia-Pacific NHRIs through their membership of the Asia Pacific Forum. It is to be noted that there is not a unique definition of the Asia-Pacific region, and different organizations consider its boundaries slightly differently. For example, whereas Australia is part of the Asia Pacific Forum – and thus within the scope of this article – and considered as part of the Asia-Pacific region by GANHRI, it is included by the UN in the 'Western European and Others Group', rather than in the 'Asia and the Pacific Group'.

<sup>51</sup> The Asia Pacific Forum comprises 25 NHRIs. However, Palestine's NHRI was excluded from this count as Palestine is not a UN member state, and therefore does not participate in the UPR process.

## Measuring *de jure* institutional independence

Theoretical literature on institutional independence informs the operationalization and coding of institutional safeguards for independence. The first step of the present study examines a total of 187 countries and ranks existing NHRIs according to four different aspects of independence from government intervention, based on mandated rules of organization: (1) financial independence; (2) government representation in decision-making; (3) the independence of appointment practices for commissioners or ombudsmen; and (4) the independence of the institutional system of reporting (table 1). These are considered the main criteria for assessment of independent NHRIs and, in part, these categories also match the qualitative criteria included in the Paris Principles and used for the processes of NHRI accreditation. Notwithstanding the importance of informal rules and procedures, we focus on formal and written rules. This theoretical focus informs the operationalization of institutional safeguards for NHRI independence along four main dimensions of independence.

The second step consisted of rescaling these categories of independence into ordered, categorical indicators of institutional independence, for consistency of measurement across all indicators. Data are cross-sectional for 2014, the year for which most countries had publicly available annual reports. Collecting more recent data would create significant gaps in data collection due to gaps in the institutional documentation that is publicly available. *De jure* independence remains relatively stable over time,<sup>52</sup> as institutional mandate changes necessitate lengthy legal processes and involve multiple public and civil society actors.<sup>53</sup> To generate our dependent variable—NHRI independence—we rescaled the individual nominal indicators into a ranked categorical index, the result of factor analysis that aggregates the values of the four indicators of independence. Data were collected and coded using manual content analysis, beginning with the analysis of institutional annual reports, mandates and national constitutions available on NHRI websites. We followed the same coding strategy as previous published research on NHRI strength.<sup>54</sup>

NHRI independence is an index calculated following a two-step process (see figure 1). The independence of each NHRI is calculated along each indicator additively from the values for each of the four disaggregated indicators which constitute it, ranging from a maximum value of 16 (fully independent) to the lowest value of 4 (not independent). Then the additive score is used to generate a new ranking of NHRIs on a five-point scale as not independent (4) low independence (5–8), medium independence (9–12), high independence (13–15), and fully independent (16). Re-ranking in this way allows us also to align the *de jure* and *de facto* measurements.

<sup>52</sup> Linos and Pegram, 'The language of compromise'.

<sup>53</sup> Lacatus, 'Explaining institutional strength'.

<sup>54</sup> Corina Lacatus, *The strength of our commitments: a study of national human rights institutions in Europe and beyond* (Chicago: University of Chicago Press, forthcoming).

**Table 1: Indicators and respective coding scheme for the variable of independence of national human rights institutions**

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*The degree of formal autonomy from government*

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<i>Sources of institutional funding</i>	<ul style="list-style-type: none"> <li>(4) Parliament through yearly budget</li> <li>(3) International donations</li> <li>(2) Dedicated budget line allocated by ministry or government</li> <li>(1) Non-applicable</li> </ul>
<i>Government representation in decision-making</i>	<ul style="list-style-type: none"> <li>(4) None or very limited</li> <li>(3) Government can participate but no power of decision</li> <li>(2) Government incorporates NHRI or has power of decision</li> <li>(1) Non-applicable</li> </ul>
<i>Leadership appointment structure</i>	<ul style="list-style-type: none"> <li>(4) The institution alone</li> <li>(3) Parliament</li> <li>(2) Government</li> <li>(1) Non-applicable</li> </ul>
<i>Formal reporting</i>	<ul style="list-style-type: none"> <li>(4) To parliament</li> <li>(3) To president and the public</li> <li>(2) To government or ministry</li> <li>(1) Non-applicable</li> </ul>

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The first of the rescaled dimensions measures the degree of independence from government based on NHRIs' sources of funding. An institution is considered fully independent when it has an allocated budget line in the national budget voted annually by national parliaments. Once allocated, fully independent NHRIs enjoy the right to administer the budget without interference from government or other external actors. Certain NHRIs established in countries where human rights institutions do not enjoy support from government can receive international financial support for years after their creation, allowing them to operate with a higher degree of autonomy in relatively hostile environments. For instance, the NHRI in Afghanistan historically received financial support for its operations from international sources and, despite working in an unfavourable national context, was one

of the most active in the region until its dissolution in 2022.<sup>55</sup> In the Asia-Pacific and other world regions, governments can have some control of the NHRI by retaining the power to decide and administer the institutional budget. In these very common cases of low financial independence, NHRIs are considered public agencies and are expected to report to a government ministry on budget administration and management.

The second dimension captures the degree of interference by government representatives in strategic and operational decision-making. When fully independent, an NHRI has no government input in day-to-day decisions. Sometimes NHRIs have government representatives as passive participants in executive decision-making, but they do not grant them any power of decision or voting rights. NHRIs with low levels of independence are often fully incorporated in a government ministry and operate a public agency whose decision-making is entirely coordinated by government.

The third dimension measures the degree of government input in the process of appointing the institutional leadership. Some institutions are fully autonomous and elect or appoint their own leadership through transparent nomination and selection processes. Other NHRIs with a medium level of independence have their leadership appointed by the national parliament and sometimes require presidential approval. NHRIs that are ministerial agencies have a stronger government presence in their appointment processes and thus do not enjoy much autonomy in the selection and appointment of their leaders.

The fourth dimension measures the independence of the institutional reporting structure set up as part of the design of the NHRI. Fully independent NHRIs can issue an annual report of activities and sometimes also an additional independent report on the human rights situation in their country. They are free to decide the content of the report and to present the report to parliament. They enjoy the liberty to disseminate the report publicly on their website and share it with civil society and through press outlets. Other NHRIs, however, have the power to present their reports only (or primarily) to the country's president and the public. NHRIs with a low degree of independence are required to submit the annual report directly to government for approval before they can disseminate it more widely. Some NHRIs do not have a formal reporting system in place, even if some of them might still report on the human rights situation in their countries.

### *Measuring de facto institutional independence*

This study builds on the assumption that it is possible for differences and tensions to exist between the formal independence of NHRIs granted to them through mandates, on the one hand, and their *de facto* independence when they carry out their work in international forums, on the other. In general, *de facto* independence is likely to be more responsive than *de jure* independence to changes of government

<sup>55</sup> Trilochan Upreti and Lara Griffith, *UN support to the Afghan Independent Human Rights Commission Project: final evaluation* (New York: UN Development Programme, 2008).

and in policy priorities related to human rights. Thus, we investigate the extent to which *de jure* and *de facto* independence align, as well as the main factors facilitating and limiting NHRIs' *de facto* independence when participating in the UPR.

The assessment of *de facto* independence of NHRIs is carried out through an analysis of involved NHRI staff members' perceptions. Involved actors' direct experiences might not necessarily be equivalent to the actual levels of *de facto* NHRI independence in all international human rights processes, and might differ from the views of other actors such as NGOs, states, or individuals whose rights are promoted by the NHRI. However, in this article we study NHRIs' *de facto* independence as perceived by NHRI staff—as the most relevant stakeholder category—for a variety of reasons. Methodologically, judging the objective level of *de facto* independence of all NHRI staff involved in different areas of institutional activity is overly ambitious, if not unfeasible, for an external researcher. Similarly, while surveying the views of all relevant stakeholders would provide valuable insights into how different actors perceive the independence of NHRIs, doing so surpasses our resources. Therefore, we focus on NHRI staff as actors that are best positioned to assess the institution's independence. To reduce the risk that respondents might answer untruthfully, the survey was conducted under full conditions of anonymity. Respondents were informed that data was being collected without the possibility to trace responses to a particular individual or institution. While it must be acknowledged that such self-assessments may introduce biases, as NHRI staff might either have particularly positive views on their independence, or even an interest in reporting their NHRI as more (or less) independent than it is, the analysis suggests that respondents provided balanced assessments on the whole and did not hesitate either to express criticism in the open-ended questions or to openly discuss the strengths and weaknesses of their institutions. These results, combined with the strict anonymity guarantees we offered, strengthen our confidence in the objectivity of the self-reported information.

Three sets of questions included in the survey address aspects linked to institutional independence (table 2). Two initial questions ask respondents to assess the overall independence of their NHRI from government and civil society actors when carrying out mandated duties. Two questions are dedicated to an assessment of the NHRIs' capacity to participate independently in the UPR. One last general question aims to elicit more information about the broader barriers NHRIs might face when participating in the UPR, offering contextual information about the determinants of NHRI participation and independence in the UPR. It is important to note the seven-year time lag between the institutional documents used as sources of data about *de jure* independence and the survey data collected on *de facto* independence. As mentioned earlier, *de jure* independence is relatively stable over time, with changes to formal mandates happening only very rarely in the life of an NHRI and requiring great coordination effort involving a large number of domestic actors. By contrast, *de facto* independence is much more responsive to and dependent on changes in government priorities with regard to human rights. Our survey questions focus primarily on *de facto* independence in general and in

## National human rights institutions

the UPR; in particular, the open-ended questions offer respondents the chance to reflect on significant changes.

**Table 2: Independence survey questions**

<i>Survey question</i>	<i>Answer categories</i>
<i>General assessment of independence</i>	
In general terms, to what extent do you consider that your NHRI can carry out its mandated duties with a high degree of independence/autonomy from governmental actors?	Not at all To a minor extent To a large extent Completely I do not know
Please mention up to three main measures that would enhance the independence of your country's NHRI when carrying out its human rights work domestically.	Open-ended question
<i>Questions about NHRI independence in the UPR</i>	
To what extent do you find that your institution can participate as a fully independent actor in the UPR process? Please note: this is not an assessment of whether or not your institution is formally independent, but rather of whether any other institution can limit your institution's powers of action in the UPR process.	Not at all independent Partially independent Largely independent Fully independent I do not know
To what extent do you find that your institution's voice/input in the UPR is distinct from that of your country's government?	Not at all Partially Largely Fully I do not know
<i>General question about barriers to participation in the UPR</i>	
What are the main three barriers to the participation of your country's NHRI in the UPR process? Please explain why they are important limitations to consider.	Open-ended question

## Assessing institutional independence

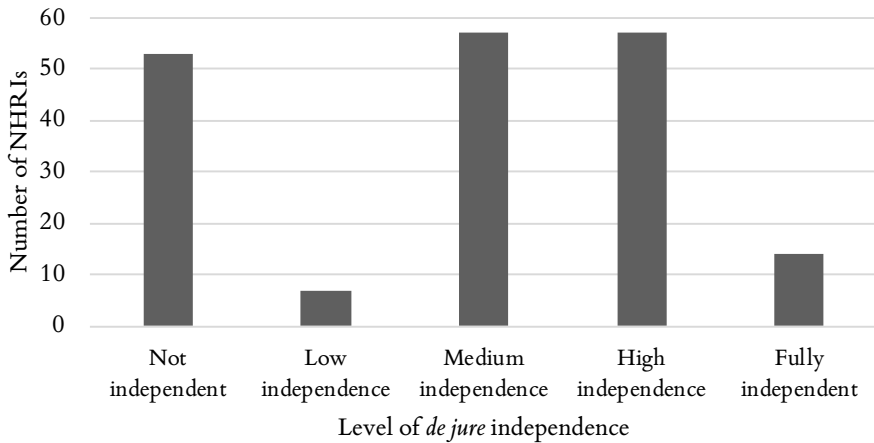
### Assessing *de jure* independence

Our coding of *de jure* independence features for NHRIs in 187 countries has showed that most NHRIs around the world (114) have medium and high levels of formal independence (figure 1). This is an indication that most NHRIs, by design, have a significant degree of independence from government and other political interference. However, they are not designed to operate fully autonomously from external involvement and, formally, remain vulnerable to attempts at weakening



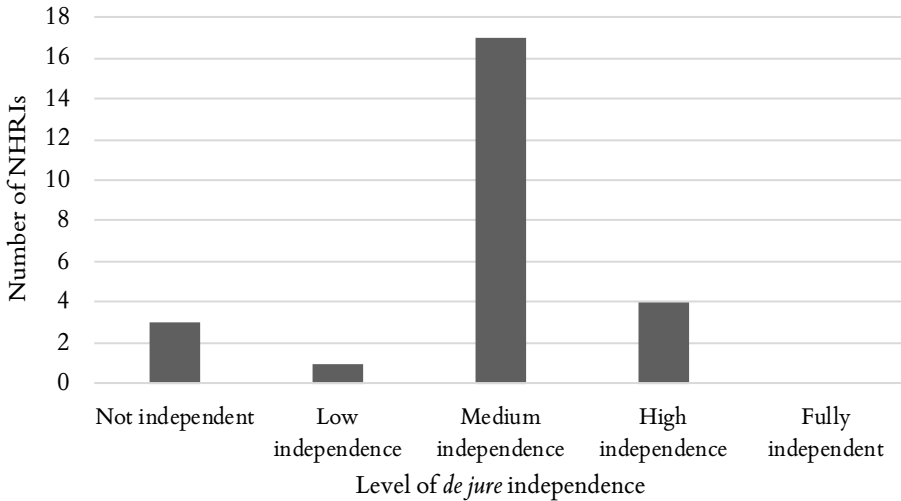
their power. In this respect, the most vulnerable areas of institutional design are the leadership appointment structure, which is not fully autonomous from political intervention, and the system of institutional financing, which can involve some ministerial approval for budget allocation or the lack of a dedicated line in the state budget. A much lower number of institutions—only 14—have been assessed as fully independent by design, while 53 of them are not independent from government. Except for the National Commission for Human Rights of Rwanda, all 14 fully independent NHRIs are in Europe.

**Figure 1: De jure independence of NHRIs in 187 countries (2014 data)**



The distribution of *de jure* independence within NHRIs in countries which are members of the Asia Pacific Forum follows a relatively similar trend to that found globally, particularly with respect to the higher prevalence of medium- and high-independence institutions (figure 2). Yet, some important differences separate the global and the regional distributions, pointing to a specific regional clustering of institutions mostly in the medium independence category. Most NHRIs in the Asia-Pacific operate with a medium level of independence, with no institution being assessed as fully independent. At the same time, several NHRIs in the region have been powerful and influential international leaders in the field—such as the Australian and the Indian NHRIs—supporting the development of NHRIs across the region and the consolidation of these institutions’ role at the UN. Despite their often impressive actions in human rights promotion and protection, their formal independence is limited by insufficient financial autonomy from government, as well as by ministerial oversight and political authority of government or the country president over the appointment of human rights commissioners.

**Figure 2: De jure independence of NHRIs in 25 members of the Asia Pacific Forum (2014 data)**



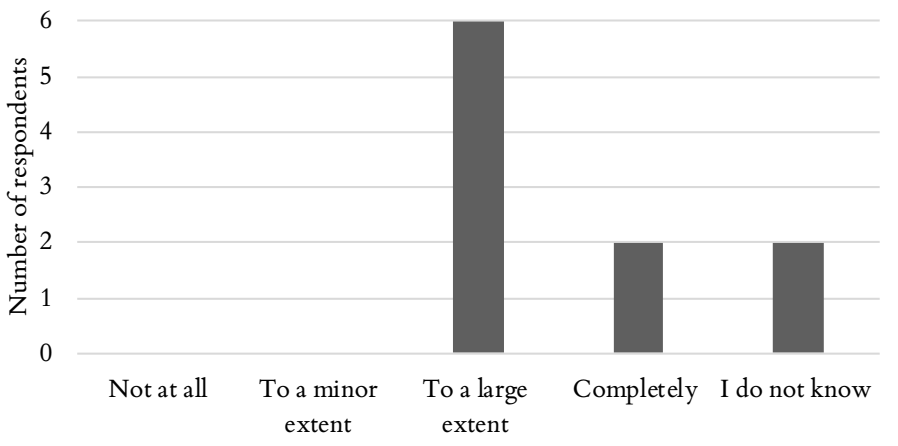
### *Assessing de facto independence and NHRI participation in the UPR*

Perhaps surprisingly, given the earlier assessment of *de jure* independence, survey respondents assess their own institutions as being largely or completely independent from government, and none of them believe that their NHRI is unable to act independently from political interference (figure 3). Similarly, the ten respondents largely agree that their NHRIs can participate in the UPR unencumbered by government intervention.

Despite the positive general assessment of *de facto* independence, answers to the open-ended questions that were posed in the survey (as reported in table 2) offer more nuance, pointing to a number of formal limitations to NHRIs' autonomy: the lack of a dedicated charter or mandate, in addition to the country constitution, specifying in greater detail the statutory function of the institution and the nature of NHRI independence in practice (respondents A and B). One respondent mentions an additional limitation to institutional independence, which is built into the leadership appointment system—as the selection of human rights commissioners is carried out by the country's president and not by the NHRI (respondent A). Three respondents also indicate the lack of sufficient financial support as an impediment to carrying out their mandated duties in an unconstrained manner (respondents B, C and E).

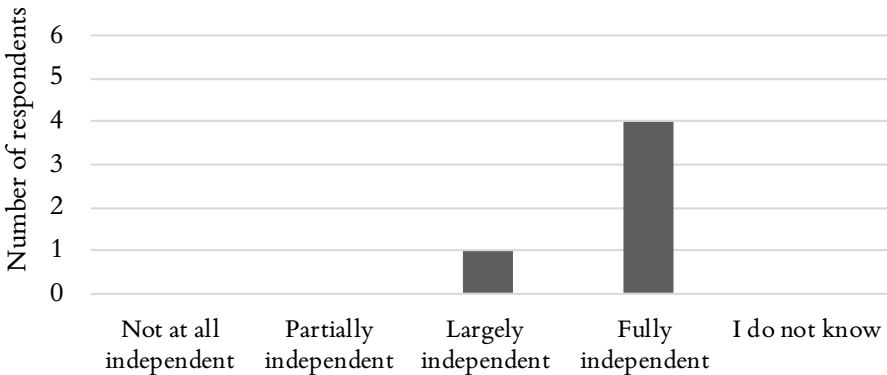
**Figure 3: General assessment of NHRI independence: independence from government**

Q: In general terms, to what extent do you consider that your NHRI can carry out its mandated duties with a high degree of independence/autonomy from governmental actors?



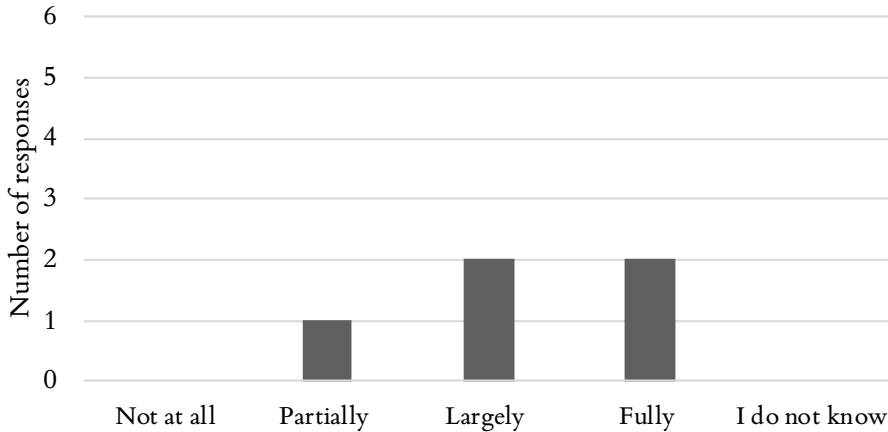
**Figure 4: Questions about NHRI independence in UPR: general assessment of NHRI independence in UPR**

Q: To what extent do you find that your institution can participate as a fully independent actor in the UPR process? Please note: this is not an assessment of whether or not your institution is formally independent, but rather of whether any other institution can limit your institution's powers of action in the UPR process



**Figure 5: Questions about NHRI independence in the UPR: NHRI voice in UPR distinct from government**

Q: To what extent do you find that your institution's voice/input in the UPR is distinct from that of your country's government?



Regarding their participation in the UPR, our analysis of NHRI submissions to the UPR over the latest complete review cycle (the third cycle, which ran between May 2017 and February 2022) shows that Asia-Pacific NHRIs are active: 20 out of 24 relevant Asia-Pacific NHRIs submitted information on their country, which was included by the UN in their stakeholder report.<sup>56</sup> This is consistent with findings by Glušac<sup>57</sup> on previous UPR review cycles, when the percentage of Asia-Pacific NHRIs with A-status accreditation by GANHRI submitting such information was 71 per cent in the first cycle (2008–11) and 93 per cent in the second (2012–16).

Three respondents indicate the need for sufficient funds to be allocated by the relevant countries' legislatures to make possible the institution's capacity to contribute to the UPR, especially when NHRIs want to participate in person (respondents A, C and D). Despite their NHRI lacking adequate funding, respondent A indicated that their institution can make a valuable contribution to the UPR, providing expertise to government and facilitating dialogue with civil society. Respondent A credits the integrity and independence of the NHRI's leaders for the institution's independent participation, in line with our earlier findings about the key role of strong institutional leadership. Over the years, the NHRI in respondent A's country has cultivated a constructive working relationship with the national ministry of foreign affairs, facilitated through regular meetings and

<sup>56</sup> Data on NHRI submissions to the UPR was retrieved from United Nations Human Rights Council, 'Documentation by country', <https://www.ohchr.org/en/hr-bodies/upr/documentation> (last accessed 13 June 2022).

<sup>57</sup> Glušac, 'Universal Periodic Review and policy change'.

continuous engagement related to the UPR process, as the leading coordinating body for the country's participation in the UPR. Additionally, as stressed by respondent A, the very set-up of the UPR seems to favour an independent role for NHRIs, particularly in the information-collection phase. As discussed earlier, NHRIs do not submit their information on state performance within the report prepared by the state, but deliver it to the UN in a separate document. Respondent A further mentions that the NHRI has carved out a key domestic role for itself as a bridge between government and civil society, facilitating vital dialogue between the two. This has resulted in the NHRI's increased credibility with both parties and particularly with the government, which in recent years has become more receptive to NHRI feedback about the government's input into the UPR.

Three other respondents indicate that there have been no governmental attempts to impede the NHRIs' participation in the UPR (respondents B, C, and D). Only one respondent mentioned that the NHRI's participation is only partially distinct from the contribution made by government (see figure 5). Although they can offer independent feedback directly to the UPR, NHRI participation in the UPR can differ based on the main focus of its contribution. Respondent B mentions that the NHRI oversees an evidence-based assessment of the government's compliance with UPR recommendations and works closely with civil society and relevant public agencies to ensure coordination and monitoring of compliance with the UPR. Respondent C indicates that the focus of the NHRI's current work related to the UPR centres on advocacy for the ratification of the Convention on the Rights of Persons with Disabilities as well as conducting a review of policies and laws.

Respondents further elaborate on how NHRIs can maintain *de facto* independent action from governments when involved in the UPR, indicating that two NHRIs can participate fully in all UPR stages without external interference (respondents B and C), while another NHRI has even seen its autonomy regarding submission to the UPR increase over the years (respondent C). Respondent C indicated that in 2012 the NHRI worked with civil society organizations to contribute a shared report to the UPR. In 2016, however, the NHRI submitted an independent report to the second assessment by the UPR and was preparing its contribution to the third UPR at the time our survey was conducted. Progress has only been made possible with great institutional effort, including work by NHRI staff to overcome a language barrier to contribute to the UPR as well as close collaboration with civil society (respondent C). Respondent D indicates that the NHRI is a fully independent actor in the UPR, formulating its own shadow reports and submitting them directly. While the NHRI often supports issues put forward by civil society organizations, it also seeks to provide impartial opinions, thus providing a unique assessment of the human rights situation on the ground.

Two respondents offer insights into the main barriers to NHRI participation in the UPR, pointing to fears that governments will seek reprisals for NHRIs that speak out against human rights violations (respondents A and B). Pressure on governments from the international community is suggested as the main deter-

rent against these direct threats (respondent A). In addition, as mentioned earlier, the UPR provides safe opportunities to report reprisals.<sup>58</sup> To increase the impact of NHRI activity on the UPR, respondents mention the need to raise awareness about the UPR in the population (respondents A and B). This finding indicates the broader importance of ensuring widespread knowledge of the UPR and the significance of government taking seriously recommendations made by the peer review. Awareness of the UPR goes hand in hand with the need to make it an inclusive mechanism involving several stakeholders, including perhaps more NHRIs with lower levels of *de jure* independence, and the need for a more thorough effort to monitor implementation of recommendations (respondents A and B).

## **Broader relevance of findings**

Our findings are valuable for both scholars and practitioners, whether they work in NHRIs and at the UPR, or in other regulatory settings where independence is key. In an increasingly complex human rights regime, orchestrators like the UN and other IGOs rely on a growing number of intermediary actors to monitor and support states' human rights compliance. In this context, the independence—*de jure* and *de facto*—of regulatory intermediaries like NHRIs is crucial. Our work lends additional support to existing research showing that strong institutional leadership is a key determinant for NHRI effectiveness<sup>59</sup> by providing evidence that strong and impartial NHRI leadership is fundamental to safeguarding independence. Additionally, it advances such studies by showing that it is equally important for the leadership to forge a constructive relationship with both governmental actors and civil society. More generally, our findings contribute to existing insights on the independence of human rights bodies, supporting evidence that it is not uncommon for expert bodies to be able to act more independently than their formal design may suggest:<sup>60</sup> even though states may exert some degree of financial or operational control over the work of expert bodies, they are generally less able to control their daily functioning.

Equally important is the need for orchestrators like the UN and other IGOs to foster the development of operational environments conducive to greater *de facto* independence of intermediaries. As we have shown, the UPR is a peer network designed to facilitate greater *de facto* independent participation of NHRIs even when they might have lower *de jure* independence. Specifically, the provisions requiring NHRIs to submit information independently from states and mechanisms for reporting possible reprisals contribute to safeguarding independent contributions by NHRIs. This is particularly important for NHRIs operating in domestic environments that are generally hostile to human rights, where they do not enjoy sufficient support for strong institutional designs with full *de jure* independence.

<sup>58</sup> Jilani, *The Universal Periodic Review (UPR) and its potential*.

<sup>59</sup> Lacatus, *The strength of our commitments*.

<sup>60</sup> Carraro, 'Electing the experts'.

## Conclusions

This article expands our knowledge of institutional independence as a key aspect of orchestration for human rights governance, focusing on the independence of NHRIs. As intermediaries in global human rights governance, NHRIs play the key dual role of supporting government efforts to implement and comply with human rights treaties and of monitoring and reporting on their governments' human rights violations. For NHRIs to operate effectively in their dual role, independence is essential. More specifically, independence should not only be a formal (*de jure*) feature, but should also exist in practice (*de facto*).

In this article, we first focus on the variation in the *de jure* independence of NHRIs. We expand on an operationalization of NHRI independence along four key categories: sources of institutional funding; governmental representation in decision-making; leadership appointment structure, and independence of their internal reporting structure. We propose an original dataset of NHRI formal independence for 187 NHRIs in the world. We find that at the global level most NHRIs have high and medium levels of independence, with the most problematic institutional design features being the leadership appointment structure and the funding sources.

Highlighting the importance of the distinction between *de jure* and *de facto* independence, we focus on the Asia-Pacific, where most NHRIs show a medium level of *de jure* independence. However, we show that respondents consider their NHRIs to have higher *de facto* independence, in general and at the UPR. Our findings show a large part of this surprising success is to be found in the role played by the NHRI leadership: integrity and the ability to forge a constructive working relationship with the government have made it possible for NHRIs to carve out a largely independent role for themselves, acting as credible links between government, civil society and international institutions. Although, on paper, Asia-Pacific NHRIs struggle with institutional limitations, the credibility, networks and expertise that they have built throughout the years are key in explaining their largely independent functioning in practice.

Additionally, the set-up of the UPR itself seems to facilitate independent participation on the part of NHRIs: for example, NHRIs submit their information to the UN separately from their government, and this information is included in a UN-compiled report. When it comes to fear of possible reprisals for speaking up against their government, the international pressure stemming from the UPR, and the possibility of reporting reprisals confidentially, might function as a partial deterrent against states' opposition to their NHRIs. Our article speaks to the relevance of further research explicating the regulatory strategies that intermediary bodies such as NHRIs design to maintain independence from government interference in practice (whether or not their formal mandates grant them *de jure* independence), particularly when operating in global forums. Such research should ideally take the shape of larger-scale comparative studies including all regions of the world.

## *National human rights institutions*

Our call to practitioners involved in governance institutions where independence is crucial is to pay special attention to two sets of institutional features: the first concerning the independent body—in our case, the NHRI—and the second concerning the international forum in which the body is to operate. First, given the key role played by the leadership in both the *de jure* and *de facto* dimensions of independence, it is crucial to provide safeguards to ensure the appointment of impartial, credible and strong leaders. Equally important is to ensure the institution has sufficient and also, as far as possible, independent sources of funding. Second, it is important where independent participation is vital to provide multi-actor international mechanisms with features that facilitate the safe participation of actors that might be vulnerable to reprisals.



