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The Protection of Asylum Seekers in Australian-Pacific Offshore Processing: the Legal Deficit of Human Rights in a Nodal Reality

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ABSTRACT

Under Australia's current border control policy, 'Operation Sovereign Borders', migrants arriving irregularly by boat are transferred to offshore processing centres in Nauru and Papua New Guinea. On the basis of their poor human rights record, such centres are often criticized with reference to international human rights law. By conceptualizing the Australian-Nauruan arrangement as one of nodal governance, this article examines whether international human rights law constitutes an appropriate instrument to hold the involved actors responsible and accountable. The analysis of jurisdiction and attribution shows that it is difficult to establish responsibility on behalf of one of the involved actors. Yet even if responsibility can be allocated, proper human rights accountability is still impeded given the weak monitoring system and the non-transparent processing facilities. Establishing *de jure* responsibility in this context is thus extremely difficult, but even if one succeeds, accountability is not sufficiently effectuated *de facto*. The article concludes by questioning the actual legal value of human rights in nodal settings and by providing recommendations for further (extra-legal) analysis.

KEYWORDS: International human rights law, responsibility, accountability, nodal governance, offshore detention, Australia

1. INTRODUCTION

International human rights law purports to provide vital guarantees to all individuals within a State's jurisdiction, yet it can only provide effective legal protection when proper accountability mechanisms are in place. Academic and activist concerns about the lack of such mechanisms have surfaced in many contexts, amongst others in relation to Australia's practice of establishing and maintaining asylum processing centres in Nauru and Papua New Guinea ('PNG').¹ Indeed, the Australian government is

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alleged to erect barriers to reduce transparency and to exclude asylum seekers from judicial review.² At the same time, the human rights situation in these offshore processing centres is reportedly deplorable.³ Consequently, some have called the arrangement a ‘non-solution’,⁴ others have labelled it a ‘Pacific nightmare’.⁵

Calls for proper international human rights accountability in this context echo a more general faith in international law’s power to affect the behaviour of States and to achieve human rights objectives,⁶ as well as the realisation that human rights matter most for the non-citizen: they often constitute the only protection mechanism for those who cannot claim citizen entitlements.⁷ Indeed, ‘human rights activists together with supportive political leadership and scholarly voices keep on calling for the strengthening of human rights enforcement’.⁸ At the same time, international human rights law has not remained void of criticism, amongst others in relation to its universalist claim, its effectiveness in holding States legally accountable and its arguably weak position to genuinely improve the situation of individuals.⁹ It is thus the question whether international human rights law constitutes an appropriate instrument to accurately induce accountability in the first place.

¹ Bem et al., *A Price Too High: The Cost of Australia’s Approach to Asylum Seekers* (A Just Australia and Oxfam Australia), August 2007, available at: www.ajustaustralia.com/resources/53c93e62aebb725295fc6c95f0b19604_a%20price%20too%20high%20-%20email.pdf [last accessed 9 February 2016]; Von Doussa, ‘Human Rights and Offshore Processing’ (2007) 9 *UTS Law Review* 41 at 50; Narayanasamy et al., *Business in Abuse: Transfield’s Complicity in Gross Human Rights Abuses within Australia’s Offshore Detention Regime* (No Business in Abuse), November 2015, available at: d68ej2dhub09.cloudfront.net/1321-NBIA_Report-20Nov2015b.pdf [last accessed 11 February 2016]; Welch, ‘The Sonics of Crimmigration in Australia: Wall of Noise and Quiet Manoeuvring’ (2012) 52 *British Journal of Criminology* 324.

² Francis, ‘Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing’ (2008) 20 *International Journal of Refugee Law* 273; Van Berlo, ‘Australia’s Operation Sovereign Borders: Discourse, Power and Policy from a Crimmigration Perspective’ (2015) 34 *Refugee Survey Quarterly* 75; Welch 2012, supra n 1.

³ Afeef, *The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific* (Refugee Studies Centre), Working Paper No. 36, October 2006, available at: www.rsc.ox.ac.uk/files/publications/working-paper-series/wp36-politics-extraterritorial-processing-2006.pdf [last accessed 9 February 2016]; Babacan and Babacan, ‘Detention Downunder: New Directions in the Detention of Asylum Seekers in Australia’ (2008) 4 *Review of International Law and Politics* 137; Flynn, *The Hidden Cost of Human Rights: The Case of Immigration Detention* (Global Detention Project), Working Paper No. 7, September 2013, available at: www.refworld.org/pdfid/545b41570.pdf [last accessed 9 February 2016]; Narayanasamy et al. 2015, supra n. 1.

⁴ Maclellan, ‘The Pacific’Non Solution’, (2002) 8 *Pacific Journalism Review* 145.

⁵ Taylor, ‘The Pacific Solution or a Pacific Nightmare? The Difference between Burden Shifting and Responsibility Sharing’ (2005) 6 *Asian-Pacific Law and Policy Journal* 1.

⁶ Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (2002) 111 *Yale Law Journal* 1935 at 2025.

⁷ Brysk and Shafir, ‘Introduction: Globalization and the Citizenship Gap’ in Brysk and Shafir (eds), *People Out of Place: Globalization, Human Rights and the Citizenship Gap*, (2004) 3; Posner, ‘The Case against Human Rights’, *Guardian*, 4 December 2014, available at: www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights [last accessed 11 February 2016].

⁸ Oberleitner, ‘Does Enforcement Matter?’ in Gearty and Douzinas (eds), *The Cambridge Companion to Human Rights Law*, (2012) 249 at 249.

⁹ Brown, ‘Universal Human Rights: A Critique’ (1997) 1(2) *The International Journal of Human Rights* 41; Dembour, *Who Believes in Human Rights?: Reflections on the European Convention* (2006); Dembour, ‘What Are

In pursuing this question, the article looks at the Australian-Pacific offshore processing arrangements as a case study. These arrangements were initially part of the ‘Pacific Solution’ policy framework (which was introduced in 2001) and are still in force under Australia’s current border control policy, ‘Operation Sovereign Borders’ (‘OSB’). Both frameworks entail that migrants arriving irregularly by boat in Australia are, without exception, transferred to remote island locations in the Pacific, namely Manus Island (which is part of PNG) and Nauru (a sovereign island nation).¹⁰ At these places, their potential asylum applications are registered and processed. When asylum seekers are recognized as refugees and are accordingly provided with refugee status, they are not resettled in Australia but in Nauru, PNG or Cambodia with which Australia has concluded separate resettlement agreements.¹¹ Australia is currently also exploring further resettlement agreements with other countries, including Kyrgyzstan.¹²

The main focus of this article is on the processing centre in Nauru, amongst others because Nauru is ‘plan A when it comes to offshore processing’.¹³ First, the article questions how the offshore processing centre is set-up in terms of its governance. In answering this, theories of nodal governance and anchored pluralism provide useful analytical frameworks.¹⁴ The article subsequently looks into the question whether international human rights law provides an effective mechanism of responsibility and accountability for this type of governance.¹⁵ This is approached in a two-pronged way: the article first

Human Rights? Four Schools of Thought’ (2010) 32 *Human Rights Quarterly* 1; Douzinas, *The End of Human Rights* (2000); Hathaway, supra n 6; Posner, supra n 7.

¹⁰ Grewcock, ‘Australian Border Policing: Regional ‘Solutions’ and Neocolonialism’ (2014) 55 *Race & Class* 71; Taylor, ‘The Impact of Australian–PNG Border Management Co-Operation on Refugee Protection’ (2010) 8 *Local-Global journal* 76; Van Berlo, supra n 2. It should be noted that the Supreme Court of PNG ruled in April 2016 that Manus Island detention facility is unconstitutional and illegal and as such should be closed. At time of writing, it is not yet clear what will happen to the facility or to the asylum seekers and refugees detained there: see Van Berlo, ‘Did Papua New Guinea’s Supreme Court Just End Offshore Processing?’, *Blog: Leiden Law Blog*, 29 April 2016, available at: <http://leidenlawblog.nl/articles/the-end-of-offshore-processing> [last accessed 30 April 2016].

¹¹ Gleeson, ‘The Cambodia Agreement’, 1 June 2015, available at www.kaldorcentre.unsw.edu.au/publication/cambodia-agreement [last accessed 11 February 2016].

¹² Cook, ‘Reports of up to 1500 Refugees to Be Resettled in Kyrgyzstan’, *The Australian*, 31 October 2015. Available at: www.theaustralian.com.au/news/reports-of-up-to-1500-refugees-to-be-resettled-in-kyrgyzstan/story-e6frg6n6-1227589440131 [last accessed 9 February 2016].

¹³ Former Minister Scott Morrison as quoted in Nauru Government Information Office, ‘Australian Opposition Immigration Spokesman Visits RPC’, *Nauru Bulletin*, 22 August 2013, available at: www.naurugov.nr/media/31516/nauru_bulletin_13_22aug2013_89_-_website.pdf [last accessed 11 February 2016].

¹⁴ Burris, Drahos and Shearing, ‘Nodal Governance’ (2005) 30 *Australian Journal of Legal Philosophy* 30; Shearing and Wood, ‘Nodal Governance, Democracy, and the New ‘Denizens’’ (2003) 30 *Journal of Law and Society* 400; White, ‘The New Political Economy of Private Security’ (2011) 16 *Theoretical Criminology* 85; Wood and Shearing, *Security and Nodal Governance* (2006); Wood, ‘Research and Innovation in the Field of Security: A Nodal Governance View’, in Wood & Dupont (eds), *Democracy, Society and the Governance of Security*, (2006) 217.

¹⁵ This approach closely connects to the concluding paragraph of Van Berlo, where it is advised that further research is conducted ‘looking at the extent to which legal mechanisms are effective in protecting those [detained at the Nauru RPC]’: Van Berlo, supra n 2 at 104. Similarly, Andrew & Eden conclude that ‘[m]ore research is needed into how the practices of state accountability work to highlight and mystify. This will help us see how this process

examines legal responsibility under international human rights law, after which it touches upon the extent to which international human rights law provides a practical and functioning mechanism of accountability in this setting. In the conclusion, some final remarks on the actual value of human rights in the context of the Australian-Nauruan nodal offshore processing arrangements will be made and recommendations for further interdisciplinary and empirical research will be provided.

2. CONTEXTUALISATION

Throughout modern history, concerns over irregular migration have continuously triggered legal responses in the Australian political domain. Restrictions were already implemented in the late 1800s to regulate the immigration of Chinese migrants. In 1901, the Immigration Restriction Act and the White Australia Policy further restricted the migration of non-whites to Australia.¹⁶ The Revision Migration Act abolished some of these restrictions in 1958, with the White Australia Policy being fully abolished in 1972. In 1992, Australia introduced a mandatory detention policy for all arrivals without valid visa. The Pacific Solution was introduced in 2001, followed by OSB in 2013.¹⁷

The Pacific Solution was in force between 2001-2007 and applied to migrants arriving irregularly in Australia by boat. It was a direct response to the 2001 ‘MS Tampa incident’, in which a Norwegian vessel rescued 433 asylum seekers on the high sea but was denied permission to enter the nearest Australian port.¹⁸ Offshore Regional Processing Centres (‘RPCs’) in neighbouring countries were rapidly established for their asylum processing. These arrangements were later formalized with Nauru and PNG.¹⁹ The policy was accompanied by broader border protection measures and relied heavily on deterrence rationales and punitive detention in jail-like establishments.²⁰ It was embedded in a wider

of mandatory detention, as part of a global phenomenon of ‘walling’, which is mobilised by multiple actors, is either accounted for or can be held to account’: Andrew and Eden, ‘Offshoring and outsourcing the ‘unauthorised’: The annual reports of an anxious state’ (2011) 30 *Policy and Society* 221 at 232. It should be noted that the article looks doctrinally into responsibility and accountability under international human rights law, not into (the concrete provision of) specific human rights. Whilst it is true that specific rights carry implications for the precise delineation of responsibility, as is for example the case in relation to the exact extent of positive obligations, there is no need for the purpose of this article – nor does the word limit allow – to zoom-in at the right-specific level.

¹⁶ Jayasuriya, Walker and Gothard, *Legacies of White Australia: Race, Culture & Nation* (2003); Tavan, ‘Long, Slow Death of White Australia’ (2005) 17 *The Sydney Papers* 128; Willard, *History of the White Australia Policy to 1920* (1923).

¹⁷ Van Berlo, supra n 2.

¹⁸ Magner, ‘A Less than ‘Pacific’ Solution for Asylum Seekers in Australia’, (2004) 16 *International Journal of Refugee Law* 53.

¹⁹ Ibid; Afeef, supra n 3; Mathew, ‘Australian Refugee Protection in the Wake of the Tampa’ (2002) 96 *American Journal of International Law* 661; Mountz, ‘The Enforcement Archipelago: Detention, Haunting, and Asylum on Islands’ (2011) 30 *Political Geography* 118; Rajaram, ‘‘Making Place’’: The ‘Pacific Solution’ and Australian Emplacement in the Pacific’, (2003) 24 *Singapore Journal of Tropical Geography* 290; Taylor, supra n 10; Welch, supra n 1.

²⁰ Aas, ‘The Ordered and the Bordered Society: Migration Control, Citizenship, and the Northern Penal State’ in Bosworth and Aas (eds), *The Borders of Punishment: Migration, Citizenship and Social Exclusion*, (2013) 21; Bowling and Sheptycki, ‘Global Policing, Mobility and Social Control’ in Pickering and Ham (eds), *The Routledge Handbook on Crime and International Migration*, (2014) 57 at 68; Hyndman and Mountz, ‘Another Brick in the Wall? Neo-Refolement and the Externalization of Asylum by Australia and Europe’ (2008) 43 *Government and*

discussion on the protection and securitisation of the nation state, in which scapegoating discourse was utilized to frame migrants arriving irregularly by boat as illegals, border threats, queue jumpers and potential criminals.²¹

The Pacific Solution was abolished in 2007 but offshore processing was reintroduced by the Gillard government in 2012 and was continued under the Rudd government in 2013. In September 2013, the newly elected Coalition government headed by Prime Minister Tony Abbott²² continued with offshore processing under the heading of a new policy framework, OSB. It entails a more militarized deterrence policy geared at migrants arriving irregularly by boat and is headed by a senior military commander of three star ranking.²³ The policy militarized maritime patrols, reintroduced a tow-back policy and is accompanied by significant amounts of secrecy, which is justified through discourse emphasising both that these procedures save lives by putting an absolute stop to the drowning of irregular migrants and that they are effective in combatting the businesses and practices of human smugglers.²⁴ It consequently holds that migrants arriving by boat irregularly, even when granted refugee status, will never be resettled in Australia: ‘they will not make Australia home’ has become a key slogan of the operation.²⁵ In a similar vein as the Pacific Solution, OSB focuses on deterrence and border protection by simultaneously fostering public concern and leaving little room for alternative discourses.²⁶

Opposition 249; Kneebone, ‘The Pacific Plan: The Provision of ‘Effective Protection?’ (2006) 18 *International Journal of Refugee Law* 696; Mountz, *supra* n 19; Philpott, ‘Protecting the Borderline and Minding the Bottom Line: Asylum Seekers and Politics in Contemporary Australia’ (2002) 20 *Refuge* 63; Rajaram, *supra* n 19; Welch, *supra* n 1.

²¹ Hyndman and Mountz, *supra* n 20; Klocker and Dunn, ‘Who’s Driving the Asylum Debate?’ (2003) 109 *Media International Australia* 71; Philpott, *supra* n 20; Saxton, ‘‘I Certainly Don’t Want People like That Here’: The Discursive Construction of Asylum Seekers’ (2003) 109 *Culture and Policy* 109. The term ‘crimmigration’ denotes such a merger of immigration control and crime control: on this, see Stumpf, ‘The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power’ (2006) 56 *American University Law Review* 367.

²² Tony Abbott was ousted as Prime Minister by Malcolm Turnbull after a party vote in September 2015: Hurst, ‘Australian Leader Tony Abbott Ousted by Malcolm Turnbull after Party Vote’, *Guardian*, 14 September 2015, available at: www.theguardian.com/australia-news/2015/sep/14/australian-leader-tony-abbott-ousted-by-malcolm-turnbull-after-mps-vote [last accessed 11 February 2016].

²³ Chambers, ‘The Embrace of Border Security: Maritime Jurisdiction, National Sovereignty, and the Geopolitics of Operation Sovereign Borders’ (2015) 20 *Geopolitics* 404; Giannacopoulos, ‘Offshore Hospitality: Law, Asylum and Colonisation’ (2013) 17 *Law Text Culture* 163; Grewcock, *supra* n 10; McAdam, ‘Australia and Asylum Seekers’ (2013) 25 *International Journal of Refugee Law* 435; White, ‘Australia’s Boatpeople Policy: Regional Cooperation or Passing the Buck?’ (2014) 1 *Cultural Encounters, Conflicts, and Resolutions* 1.

²⁴ Van Berlo, *supra* n. 2; Grewcock, *supra* n 10; Klein, ‘Assessing Australia’s Push Back the Boast Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants’ (2015) 15 *Melbourne Journal of International Law* 414; Schloenhardt and Craig, ‘Turning Back the Boats’: Australia’s Interdiction of Irregular Migrants at Sea’ (2015) 27 *International Journal of Refugee Law* 536.

²⁵ Laughland, ‘Australian Government Targets Asylum Seekers with Graphic Campaign’, *Guardian*, 11 February 2014, available at: www.theguardian.com/world/2014/feb/11/government-launches-new-graphic-campaign-to-deter-asylum-seekers [last accessed 11 February 2016]; Van Berlo, ‘Stonewalling Asylum Seekers in the Pacific’, *Blog: Leiden Law Blog*, 17 May 2014, available at: leidenlawblog.nl/articles/stonewalling-asylum-seekers-in-the-pacific [last accessed 11 February 2016].

²⁶ Van Berlo, *supra* n 2; Welch, *supra* n 1.

The offshore processing arrangements should be understood against the geographical particularities of the Australian-Pacific region: being a relatively wealthy island nation, the Australian government's border security ideals are unique in that they *could* be realized – thus, ‘the dream of total deterrence expressed by “stop the boats” can come true’.²⁷ This sense of uniqueness is widely shared: whilst offshore processing has also occurred to varying extents elsewhere, including in Europe²⁸ and the United States,²⁹ politicians in a variety of countries frequently refer to the Australian-Pacific arrangements as highly successful and admirable.³⁰ Furthermore, Australia is the hegemonic power in the rather isolated Pacific region: Nauru and PNG used to be under the direct influence and control of Australia and are nowadays still heavily dependent on Australian financial aid and development funding.³¹ This is particularly true in the case of Nauru: having approximately 10,000 inhabitants and comprising approximately 21 square kilometres, it is the smallest sovereign nation in the Pacific (and the smallest country in the world after Vatican City and Monaco) with little stability or economic activity – in fact, it stood at the verge of bankruptcy at the beginning of the 2000s.³² The Nauruan political system is too unstable, inexperienced and polarized to fundamentally alter this and to have a long-term stabilizing impact on the economy.³³

²⁷ Chambers, supra n 23, at 407.

²⁸ Afeef, supra n 3; Francis, supra n 2; Gammeltoft-Hansen, *Access to Asylum* (2011); Den Heijer, *Europe and Extraterritorial Asylum* (2011). The idea to process asylum claims externally has recently come to the fore again in the European debate: Liguori, *The Extraterritorial Processing of Asylum Claims* (Jean Monnet Centre of Excellence on Migrants' Rights in the Mediterranean, 2015), available at: <http://www.jmcmigrants.eu/jmce/wp-content/uploads/2015/07/The-Extraterritorial-Processing-of-Asylum-Claims-LIGUORI.pdf> [last accessed 23 March 2016].

²⁹ Flynn, ‘There and Back Again: On the Diffusion of Immigration Detention’, (2014) 2 *Journal on Migration and Human Security* 165.

³⁰ For example, Dutch politician Geert Wilders based his ‘No way, you will not make the Netherlands home’ campaign on Australia’s ‘No way, you will not make Australia home’ campaign: Tovey, ‘Anti-Islam Campaigner Geert Wilders Video Replicates Controversial ‘No Way’ Campaign’, *Sydney Morning Herald*, 6 October 2015, available at: www.smh.com.au/federal-politics/political-news/antiislam-campaigner-geert-wilders-video-replicates-controversial-no-way-campaign-20151001-gjzix.html [last accessed 11 February 2016]. See also Van Berlo, ‘Asielzoekers Aan de Grenzen van Europa: Het Plan-Azmani En Het Plan-Samsom Vanuit Australisch Perspectief’ (2016) 7(2) *Asiel- en Migrantenrecht* 77. Of course, in addition to the political applause for the Australian system, a lot of concerns and criticisms regarding offshore processing have also been raised by a variety of stakeholders, including NGOs and monitoring bodies: see, e.g., Bem et al., supra n 1; Narayanasamy et al., supra n 1.

³¹ Afeef, supra n 3; Argounès, ‘Australia: the Temptation of Regional Power’ (2012) 141 *Pouvoirs* 103; Chambers, supra n 23; Fry, ‘Pooled Regional Governance in the Island-Pacific: Lessons from History’ in Chand (ed), *Pacific Islands Regional Integration and Governance*, (2005) 89; Grewcock, supra n 10; Narayanasamy et al., supra n 1.

³² Connell, ‘Nauru: The First Failed Pacific State?’ (2006) 95 *The Round Table* 47; McDaniel and Gowdy, *Paradise for Sale* (2000) at 192-3; Taylor, supra n 5.

³³ Connell, supra n 32.

3. NODAL GOVERNANCE AND ANCHORED PLURALISM IN THE AUSTRALIAN-NAURUAN OFFSHORE PROCESSING ARRANGEMENTS

A. Nodal Governance

Safekeeping is often regarded as a core task of nation states: throughout the twentieth century, systems of security such as criminal justice and border control have been firmly based in state sovereignty.³⁴ This is not to say that modern history has not experienced outsourcing in the security branch – on the contrary, fragmentation and pluralisation have frequently featured in the criminal justice systems of predominantly Anglo-Saxon countries.³⁵ We have thus, for example, witnessed a ‘return’ to privatization.³⁶

Such outsourcing developments can be interpreted from the perspective of ‘nodal governance’, according to which a plurality of actors (or ‘nodes’) are involved in contemporary modalities of governance.³⁷ The nodes are interconnected both formally and informally, act simultaneously through a variety of mechanisms and processes and are capable of adapting rapidly to changing circumstances.³⁸ All nodes exhibit four characteristics of governance: (i) mentalities (that is, a cultural narrative guiding the thinking and acting of the node vis-à-vis the governance matter), (ii) technologies (methods to exert control and pursue goals), (iii) resources (providing for the node’s operation, including financial resources and network connections) and (iv) an institutional structure (to mobilize and effectuate technologies, resources and mentalities).³⁹ The more resources an institutional node has, the more likely it is that it can effectively deploy its technologies to reach its goals as defined by its mentality: ‘[i]n cases where there are competing preferences, bargaining power counts’.⁴⁰

Given their diverging mentalities, technologies and resources, the actors in the nodal governance field continuously cooperate, conflict and contest in different ways and configurations.⁴¹ The emphasis in the nodal governance approach is, however, on the *networks* through which such cooperation, conflict

³⁴ Van Berlo, ‘The Crimmigrant as Captive and Commodity: The Rise of Privatised and Offshore Detention from a Crimmigration Perspective’ (2015) 40(4) *JASON Magazine* 126 at 127; Shearing and Wood, *supra* n 14 at 401.

³⁵ Feeley, ‘The Unconvincing Case Against Private Prisons’ (2014) 89 *Indiana Law Journal* 1401; Jones, and Newburn, ‘The Transformation of Policing? Understanding Current Trends in Policing Systems’ (2002) 42 *British Journal of Criminology* 129; Zedner, ‘Policing Before and After the Police: The Historical Antecedents of Contemporary Crime Control’ (2005) 46 *British Journal of Criminology* 78.

³⁶ Aiken, Lyon and Thorburn, ‘Introduction: ‘Crimmigration, Surveillance and Security Threats’ (2014) 40 *Queen’s Law Journal* i; Aman, ‘Privatisation, Prisons, Democracy and Human Rights: The Need to Extend the Province of Administrative Law’ in De Feyter and Gómez Isa (eds), *Privatisation and Human Rights in the Age of Globalisation*, (2005) 91; Hallo de Wolf, *Reconciling Privatization with Human Rights* (2011) at 22–3; Zedner, *supra* n 35.

³⁷ Burris, Drahos and Shearing, *supra* n 14.

³⁸ *Ibid.*

³⁹ *Ibid.*; Burris, ‘Governance, Microgovernance and Health’ (2004) 77 *Temple Law Review* 335.

⁴⁰ Wood and Shearing, *supra* n 14 at 12.

⁴¹ Burris, Drahos and Shearing, *supra* n 14; Shearing and Wood, *supra* n 14; Wood and Shearing, *supra* n 14.

and contestation materializes rather than on the actors themselves.⁴² Power and control are thus everywhere: not with a particular node but with the network.⁴³

According to various scholars, the government should therefore be understood as only one of many actors in a fragmented field.⁴⁴ The work of Lahav and Guiraudon in the field of migration control constitutes a good example of how such reality can be conceived of: they identify the devolution of decision-making and the shifting of control ‘upwards’, ‘downwards’ and ‘outwards’ to intergovernmental fora, local authorities and non-state actors.⁴⁵ As a consequence, analysis of contemporary governance structures requires a nodal perspective that goes beyond the notions of ‘the public-private divide’ and ‘top-down governance’.⁴⁶

B. Anchored Pluralism

Nodal governance theory has attracted criticism predominantly from ‘anchored pluralism’ scholars.⁴⁷ They emphasise that the state’s role in governance is still (and should remain) distinctive.⁴⁸ If this would not be the case, the location of responsibility for monitoring and regulating the governance network would become troublesome, which in turn is problematic as it would leave vulnerable communities with little protection and the governance field with little direction.⁴⁹ Thus, the state’s role remains pivotal: its centralized legal order should license the functioning of other autonomous localities (and the rules that they use).⁵⁰

Although often presented as an alternative perspective,⁵¹ the concept of anchored pluralism should, however, not be regarded as incompatible with nodal governance. Whilst it fundamentally disagrees with the position of the state as ‘just a node’, it nevertheless agrees that the number of actors involved – and their interrelationships – have mushroomed in contemporary security governance. The two can thus be united in a conception of nodal governance with direction: although many actors with their own mentalities, technologies, resources and institutional structures are involved in governance, the boundaries within which they are allowed to roam should arguably be set and supervised by the state

⁴² Ibid.

⁴³ Wood and Shearing, *supra* n 14.

⁴⁴ Burris, *supra* n 39; Shearing and Wood, *supra* n 14 at 401; Shearing, ‘Reflections on the Refusal to Acknowledge Private Governments’ in Wood and Dupont (eds), *Democracy, Society and the Governance of Security*, (2006) 11 at 26–8.

⁴⁵ Guiraudon and Lahav, ‘A Reappraisal of the State Sovereignty Debate The Case of Migration Control’ (2000) 33 *Comparative political studies* 163; Lahav, ‘Immigration and the State: The Devolution and Privatisation of Immigration Control in the EU’ (1998) 24 *Journal of Ethnic and Migration Studies* 675.

⁴⁶ Burris, *supra* n 39; Shearing and Wood, *supra* n 14; Van Berlo, *supra* n 34.

⁴⁷ Boutellier and Van Steden, ‘Governing Nodal Governance: The ‘anchoring’ of Local Security Networks’ in Crawford (ed), *International and Comparative Criminal Justice and Urban Governance*, (2011) 461; Loader and Walker, ‘State of Denial?: Rethinking the Governance of Security’ (2004) 6 *Punishment & Society* 221.

⁴⁸ Boutellier and van Steden, *supra* n 47 at 466.

⁴⁹ Ibid; Loader and Walker, ‘Necessary Virtues: The Legitimate Place of the State in the Production of Security’ in Wood and Dupont (eds), *Democracy, Society and the Governance of Security*, (2006) 165.

⁵⁰ Boutellier and van Steden, *supra* n 47 at 467.

⁵¹ White, *supra* n 14 at 93.

through binding regulations, guidelines and monitoring. The state has significant resources and technologies at its disposal, amongst which the power to make laws and public policies, and as such holds a supreme power to steer the arrangements. Whilst each of the other nodes may have its own separate goals, for example making profit or providing altruistic support, these should be anchored in, compatible with, and circumscribed by, the State's direction. If nodes fail to comply, States may sanction them in a variety of ways – including by their exclusion from the governance field. That is not to say that States per definition heavily rely on this power, nor that they are eager to use it under all circumstances – rather, States *can* (and, from a normative perspective, arguably should) provide anchoring and monitoring to safeguard the public nature of security. The analysis below will assess to what extent this is the case in the Australian-Nauruan arrangements.

C. The Australian-Pacific Arrangements: Mapping the Nodal Field

The involved actors in the RPC are outlined below and schematically depicted in Figure 1. Whilst one may be puzzled by the complex and potentially confusing schematic depiction at first, it accurately reflects the bewildering nature of the governance arrangements.

(i) The Australian Department of Immigration and Border Protection and the Nauruan Government

According to the Australian Department of Immigration and Border Protection ('DIBP'), the RPC is a central element of the Australian government's effort to protect the border, although it is not run by Australia.⁵² This is aptly summarized by Australia's former Minister for Immigration and Border Protection Scott Morrison during a press conference, where he notes that '[e]verything that is done on Nauru is done under Nauruan law under the auspices of the Nauruan Government and there is a significant amount of support which is provided by the Australian Government to ensure the proper running of those facilities'.⁵³ This message is regularly repeated by the Australian government.⁵⁴

As agreed upon via a Memorandum of Understanding ('MoU'), the Government of Nauru formally runs and operates the centres, hosts transferees and provides them with visas, assesses asylum

⁵² DIBP, 'Regional Processing Centre in Nauru', 9 June 2015, available at: www.border.gov.au/about/news-media/speeches-presentations/regional-processing-centre-in-nauru [last accessed 14 December 2015].

⁵³ DIBP, 'Transcript: Press Conference – Operation Sovereign Borders Update', 1 November 2013, available at: newsroom.border.gov.au/channels/Operation-Sovereign-Borders/releases/transcript-press-conference-operation-sovereign-borders-update-12 [last accessed 9 February 2016].

⁵⁴ For example, Minister Morrison likewise states that 'the more [service providers] can just get on with their business of providing care and support in those places, to work with the local host government in terms of processing arrangements which is [sic] run by the local host government, not by a Australia [sic], that is how we can best assist that process work well': DIBP, 'Transcript: Press Conference – Operation Sovereign Borders Update', 11 October 2013, available at: newsroom.border.gov.au/channels/Operation-Sovereign-Borders/releases/minister-for-immigration-and-border-protection-australian-federal-police-commissioner-and-acting-commander-of-operation-sovereign-borders-joint-agency-task-force-address-press-conference-on-operation-sovereign-borders [last accessed 9 February 2016].

claims and arranges resettlement, under Nauruan law, with support from the Australian government.⁵⁵ To this end, the Nauruan Government appoints Operational Managers and Deputy Operational Managers to manage operations at the RPC.⁵⁶ This enables the Government of Nauru to be ‘on top of operational issues’.⁵⁷

Pursuant to the Australian-Nauruan agreement, the DIBP and its contracted service providers provide to Nauru advice and support services.⁵⁸ The Australian government provided specific expertise on a variety of administration functions (such as community liaison, refugee status determination and legislation and policy development).⁵⁹ In addition, the DIBP deploys some members of its departmental staff at the RPC to support the Nauruan Operational Managers and to administer service contracts, coordinate infrastructure and foster community liaison.⁶⁰ The Senior position in this regard is the Assistant Secretary, Nauru Operations.⁶¹ In March 2015, the number of identified DIBP employees on Nauru was 20.⁶²

There is a joint working group (chaired by the Nauruan government) to discuss operational issues (including visas, staffing and events) and a Joint Advisory Committee (‘JAC’) to oversee operational matters at a strategic level. A Joint Ministerial Forum oversees the implementation of the Australian-Nauruan regional partnership. In addition, the Nauru Settlement Working Group is an open-

⁵⁵ DIBP, *Inquiry into Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*, Submission 31 to the Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, May 2015, available at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Submissions [last accessed 9 February 2016]; Moss, ‘Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru’, 6 February 2015, available at: www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf [last accessed 11 February 2016]; Nauru Government Information Office, ‘RPC - Two Returnees and 17 New Arrivals Take Total on Island to 430’, *Nauru Bulletin*, 27 May 2013, available at: www.naurugov.nr/media/25483/nauru_bulletin_08_27may2013_84_.pdf [last accessed 11 February 2016].

⁵⁶ DIBP, supra n 55; Nauru Government Information Office, ‘Nauru Government Opens Office Space Establishing Presence at RPC’, *Nauru Bulletin*, 14 March 2014, available at: www.naurugov.nr/media/36440/nauru_bulletin_04_14mar2014_101_.pdf [last accessed 11 February 2016]. The Nauruan Government appointed three Operational Managers, one for each site of the RPC. Their tasks include ensuring fair and humane treatment of transferees, ensuring that a transferee is protected from inappropriate forms of punishment, and making rules for the security, good order and management of the RPC, as well as for the care and welfare of transferees, providing information about services, food, access to medical care and treatment and ‘any other item that the Secretary for Justice thinks ought to be provided to the person because of any special needs that he or she has’: DIBP, supra n 55 at 11–12. According to the same source, Operational Managers also ensure that restrictions on the freedom to movement are as limited as possible in light of the security and order of the centre, although this point appears to have become redundant given that – as will be further outlined below – there are no restrictions on freedom of movement any more at the Nauru RPC: Davidson and Hurst, *infra* n 155.

⁵⁷ Nauru Government Information Office, ‘No Change to RPC Plans’, *Nauru Bulletin*, 26 July 2013, available at: www.naurugov.nr/media/31390/nauru_bulletin_26jul2013_88_.pdf [last accessed 11 February 2016].

⁵⁸ DIBP, supra n 52; DIBP, supra n 55.

⁵⁹ DIBP, supra n 55 at 12.

⁶⁰ *Ibid.*

⁶¹ Moss, supra n 55 at 21.

⁶² *Ibid.*

communications forum between the Nauruan and Australian Governments to discuss the potential effects of refugee settlement on the local Nauruan community.⁶³

It should be noted, however, that in particular the Australian discourse on the RPCs is at best confusing, at worst somewhat schizophrenic. The Australian Government has sometimes acknowledged its responsibility for the RPCs whilst it at other times has argued that they are matters of Nauru.⁶⁴ In essence, the picture painted by the Australian Government is one in which Nauru has the ultimate authority but Australia has a *de facto* large influence and a significant discretionary decision making space.⁶⁵

(ii) Construction services: The Australian Defence Force and Canstruct

In August and September 2012, the Australian Defence Force built temporary accommodation, sanitation facilities, kitchen facilities and dining and recreational spaces mostly in (military) tents and marquees.⁶⁶ Canstruct, a construction service provider, was contracted in November 2012 to construct permanent facilities and staff accommodation.⁶⁷ On its website, it states that the ‘multitude of stakeholders’ was one of the major challenges of the project.⁶⁸ Now that the RPC is completed, Canstruct ‘has moved on to various infrastructure assets on Nauru’.⁶⁹

(iii) Service providers for garrison, welfare, security and health services

A number of other service providers contracted by the DIBP have been, and are, operative in the RPC. In September 2012, Transfield Services, the Salvation Army and IHMS were engaged to provide respectively garrison, welfare and health services.⁷⁰ Transfield Services is the lead contractor: thus, ‘there can be no doubt that without Transfield the operation of the [RPC] would be impossible’.⁷¹ According to Transfield Services itself, it has ‘methodically developed the infrastructure, systems and processes that

⁶³ DIBP, supra n 52; DIBP, supra n 55.

⁶⁴ Gleeson, ‘Offshore Processing: Australia’s Responsibility for Asylum Seekers and Refugees in Nauru and Papua New Guinea’, 8 April 2015 at 9, available at www.kaldorcentre.unsw.edu.au/printpdf/1053 [last accessed 11 February 2016]; Van Berlo, supra n 2, at 90.

⁶⁵ Andrew and Eden, supra n 15; Francis, supra n 2; Van Berlo, supra n 2.

⁶⁶ DIBP, supra n 52; DIBP, supra n 55 at 14.

⁶⁷ DIBP, supra n 52.

⁶⁸ Canstruct, ‘Nauru Regional Processing Centres’, 2015, available at: www.canstruct.com.au/project/nauru-regional-processing-centre/ [last accessed 22 December 2015].

⁶⁹ Ibid.

⁷⁰ DIBP, supra n 52; DIBP, supra n 55; Narayanasamy et al., supra n 1 at 17; Transfield Services, ‘Transfield Services Signs Contract with Department of Immigration and Citizenship’, 5 February 2013, available at: www.broadspectrum.com/BlogRetrieve.aspx?PostID=503489&A=SearchResult&SearchID=7691527&ObjectID=503489&ObjectType=55 [last accessed 11 February 2016]; Wilson Security. ‘Nauru and Manus Island Fact Sheet’, available at: www.wilsonsecurity.com.au/ouexperience/Documents/Nauru%20and%20Manus%20Island%20Fact%20Sheet.pdf [last accessed 11 February 2016].

⁷¹ Narayanasamy et al., supra n 1 at 6.

now apply at the offshore processing centre'.⁷² It subcontracted security services to Wilson Security, although it holds responsibility for the subcontractor's actions and the DIBP is therefore unable to deal directly with Wilson Security on a formal basis.⁷³

In February 2014, the Salvation Army's role in providing welfare services was transferred to Transfield Services (welfare for single adult males) and Save the Children Australia (welfare for single adult females, families, children and couples without children).⁷⁴ After having won a tender, Transfield Services took over all welfare services of Save the Children in November 2015.⁷⁵ At the same time, Transfield Services changed its name to Broadspectrum Ltd – allegedly because its parent company tries to distance itself from allegations of abuse and contract controversies over the RPCs in Nauru and PNG.⁷⁶ It now provides transferee services, management and maintenance of assets and the processing site, transport and escort, security services, catering, personnel accommodation, governance, logistics and welfare services.⁷⁷ As the lead private actor, it

*makes decisions about detainee welfare, placement, movement, communication, accommodation, food, clothing, water, security and environment on a daily basis. '....' Transfield's responsibility under the contracts include indemnifying the [DIBP] for any personal injury, disease, illness or death or any person, reduced proportionately to the extent that any act or omission involved fault on the part of the [DIBP].*⁷⁸

⁷² Transfield Services, *Submission by Transfield Services to Senate Select Committee into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*, Submission 29, May 2015 at 7, available at: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Submissions [last accessed 11 February 2016].

⁷³ DIBP, supra n 55; Narayanasamy et al., supra note 1 at 21.

⁷⁴ DIBP, supra n 55 at 14-39; Moss, supra n 55 at 22.

⁷⁵ Doherty, 'Transfield Named Coalition's 'Preferred Tenderer' for Manus and Nauru Centres', *Guardian*, 31 August 2015, available at: www.theguardian.com/world/2015/aug/31/transfield-named-coalitions-preferred-tenderer-for-manus-and-nauru-centres [last accessed 9 February 2016]; Save the Children, 'Save the Children Statement on Nauru Tender Outcome', 31 August 2015, www.savethechildren.org.au/about-us/media-and-publications/media-releases/media-release-archive/years/2015/save-the-children-statement-on-nauru-tender-outcome [last accessed 11 February 2016].

⁷⁶ Doherty, 'Detention Centre Operator Transfield Services to Be Renamed 'Broadspectrum'', *Guardian*, 25 September 2015, available at: www.theguardian.com/australia-news/2015/sep/25/detention-centre-operator-transfield-services-to-be-renamed-broadspectrum [last accessed 9 February 2016]. According to the company itself, '[o]ur new name quite simply represents what we do – it reflects the delivery of a broad range of services that are essential to clients across multiple sectors and essential to thousands of people and communities around the world': Broadspectrum, 'Re-Brand and Re-Energise', 2015, available at: www.transfieldservices.com/about/our-brand [last accessed 9 February 2016].

⁷⁷ Narayanasamy et al., supra note 1 at 19.

⁷⁸ *Ibid* at 22.

The service providers discuss issues of care and well-being with the Nauruan Operational Managers in a number of ‘stakeholder forums’, which is supported by the DIBP.⁷⁹ They also discuss with both the Nauruan Government and the DIBP how to strengthen the personal safety and privacy of transferees.⁸⁰ In addition, the DIBP facilitates information sessions, review meetings and joint service provider forums to encourage information sharing, cooperation and collaboration.⁸¹ Service providers have to adhere to Nauruan standards, but if such standards do not exist, contracts may require providers to adhere to Australian standards in delivering services.⁸²

Increasingly, Nauruans are employed at the Centre and goods and services are as far as possible sourced from Nauruan companies.⁸³ Transfield Services/Broadspectrum Ltd. and Wilson Security are even required to employ a minimum number of local Nauruan staff and sub-contractors.⁸⁴ Consequently, Wilson Security subcontracts part of its responsibilities to the local security providers Sterling Security and Protective Security Services.⁸⁵ Transfield/Broadspectrum does so to Sterling Security, Rainbow Enterprise, Capelle & Partner, One-4-One Car Rentals, Nauru Rehabilitation Corporation, Ronphos, Aiwo Town Ace Petrol Station, Oden Aiwo Hotel, Dei-Naoero Cleaners, Nauru Utilities Corporation, Republic of Nauru Hospital, Eigigu Holding Corporation, Menen Hotel Nauru and Our Airline.⁸⁶ Some of these (for example Eigigu Holding Corporation) are owned by the Government of Nauru.⁸⁷ The DIBP and service providers are working on developing strategies to foster the capacity of Nauruan staff members, for example by expanding Transfield’s/Broadspectrum’s formal training opportunities.⁸⁸

It is seemingly impossible to denote all subcontractors that are currently engaged in the RPC, as both the public authorities and the private contractors provide little clarity in relation to (the extent of) subcontracting and physical access to the RPC is lacking.⁸⁹ Whilst Figure 1 attempts to provide an overview of the involved actors as comprehensive as possible, it cannot be ruled out that additional

⁷⁹ As outlined by the DIBP, ‘[t]he meetings include a daily Operational Management Meeting and the Supportive Monitoring and Engagement meetings. Weekly meetings include the Asylum Seeker Placement and Preventative meeting, Vulnerable Child, Programs and Activities and Complex Behaviour Management meetings’: DIBP, supra n 55 at 14–26; see also Nauru Government Information Office, supra n 56.

⁸⁰ DIBP, supra n 55 at 25.

⁸¹ Ibid at 26.

⁸² Ibid at 12.

⁸³ Ibid.

⁸⁴ Moss, supra n 55 at 22; Wilson Security, supra n 70.

⁸⁵ Moss, supra n 55 at 21.

⁸⁶ Bowles, ‘Examination of Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and Related Bills and Instruments Confirmation of Questions Taken on Notice at Public Hearings’, 30 January 2013, available at: [www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/migration/qon/~media/Committees/Senate/committee/humanrights_ctte/activity/migration/qon/DIAC_QoN.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/migration/qon/~/media/Committees/Senate/committee/humanrights_ctte/activity/migration/qon/DIAC_QoN.ashx) [last accessed 9 February 2016]. This reflects the situation in January 2013. More recent overviews of Transfield’s Nauruan subcontractors are not available.

⁸⁷ Nauru Government Information Office, ‘The Peoples’ Store Re-Opens at Full Capacity’, *Nauru Bulletin*, 27 September.

⁸⁸ DIBP, supra n 55 at 26.

⁸⁹ Narayanasamy et al., supra n 1 at 22; Welch, supra n 1; Van Berlo, supra n 25.

subcontractors are also engaged. This constitutes however no major obstacle for purposes of the present article's argument. In fact, the fluctuating and obfuscated practice of subcontracting relates closely to the nodal governance model as it stresses the hybrid nature of governance and the limited relevance of isolating individual actors from the governance network for analytical purposes.

(iv) Health care: IHMS and the Republic of Nauru Hospital

As outlined above, IHMS is the contracted health care provider, although it sub-contracts torture and trauma counselling to Overseas Services to Survivors of Torture and Trauma ('OSSTT').⁹⁰ Health care is provided for in the RPC in general practitioner, nursing and mental health care clinics. The care provided for is supposed to be consistent with Australian health standards.⁹¹ An emergency physician and after-hours medical staffing are also present, supplemented by 'visiting specialists, other health practitioners, a tele-health service and medical transfers when required'.⁹² Medical transfers are, however, reduced as health services on Nauru are expanded at the Republic of Nauru Hospital.⁹³ In terms of mental health, teams of mental health nurses, psychologists and visiting consultant psychiatrists are present.⁹⁴ In the event of an alleged assault, IHMS has to offer the alleged victim(s) immediate and continuous health care.⁹⁵ Child safety concerns are reported to the Child Safeguarding and Protection Manager of Safe the Children.⁹⁶ All personnel employed in the RPC in Nauru has to sign a mandatory 'working with children code of conduct'.⁹⁷

(v) Policing and incidents: The Nauru Police Force and the Australian Federal Police

The Nauru Police Force has to undertake community policing patrols to the RPC.⁹⁸ In addition, the Nauru Police Force has two officers permanently deployed at the RPC to cooperate with service providers for investigation purposes.⁹⁹ The Australian Federal Police advises the Nauru Police Force on the coordination of policing at the RPC and on investigation training.¹⁰⁰

The DIBP cooperates with the Nauru Police Force, as well as with the Nauruan Operational Managers and the service delivery staff to handle incidents in the RPC.¹⁰¹ To this end, incident management arrangements and management protocols exist, and the DIBP has

⁹⁰ Moss, *supra* n 55 at 21–22.

⁹¹ DIBP, *supra* n 52; DIBP; *supra* n 55.

⁹² *Ibid.*

⁹³ DIBP, *supra* n 52.

⁹⁴ *Ibid.*

⁹⁵ DIBP, *supra* n 55 at 18.

⁹⁶ *Ibid* at 16.

⁹⁷ *Ibid.*

⁹⁸ *Ibid* at 19.

⁹⁹ *Ibid* at 18.

¹⁰⁰ DIBP, *supra* n 52; DIBP; *supra* n 55.

¹⁰¹ DIBP, *supra* n 52.

*formally communicated to all service providers its expectations in relation to compliance with contractual obligations; the personal safety and privacy of transferees; information security and the handling of personal information; the management of the behaviour of company personnel; and strengthened child protection standards.*¹⁰²

In terms of emergency management procedures and protocols, the Australian Federal Police advises both the DIBP and the Nauruan Government.¹⁰³ Service providers must report incidents to the Operational Managers as well as the DIBP.¹⁰⁴ According to the DIBP, any allegation of assault is referred and reported to the Nauru Police Force. If appropriate, prosecution is commenced by the Nauruan authorities.¹⁰⁵ When a person under 18 is reportedly harmed, this is also reported to the Nauru Department of Youth and Community.¹⁰⁶ However, '[a]lleged misconduct by service provider staff, where not criminal in nature, is referred to the relevant service provider to investigate'.¹⁰⁷

(vi) Community liaison and resettlement

The Government of Nauru has installed a Community Liaison Officer network to support transferees who participate in Open Centre arrangements. Connect Settlement Services, an Australian consortium of Adult Multicultural Education Service and the Multicultural Development Association, provides refugee settlement services.¹⁰⁸ The DIBP and the Nauruan Police Force are developing proposals to include refugees resettled in Nauru in law enforcement roles and community policing functions.¹⁰⁹ In assisting transferee and refugee children, the DIBP engages with the Queensland Catholic Education Commission and the Brisbane Catholic Education (and in consultation with the Nauru Department of Education) to provide support to the education system of Nauru.¹¹⁰

¹⁰² Ibid.

¹⁰³ DIBP, supra n 55 at 25.

¹⁰⁴ Ibid at 18.

¹⁰⁵ DIBP, supra n 52; DIBP; supra n 55.

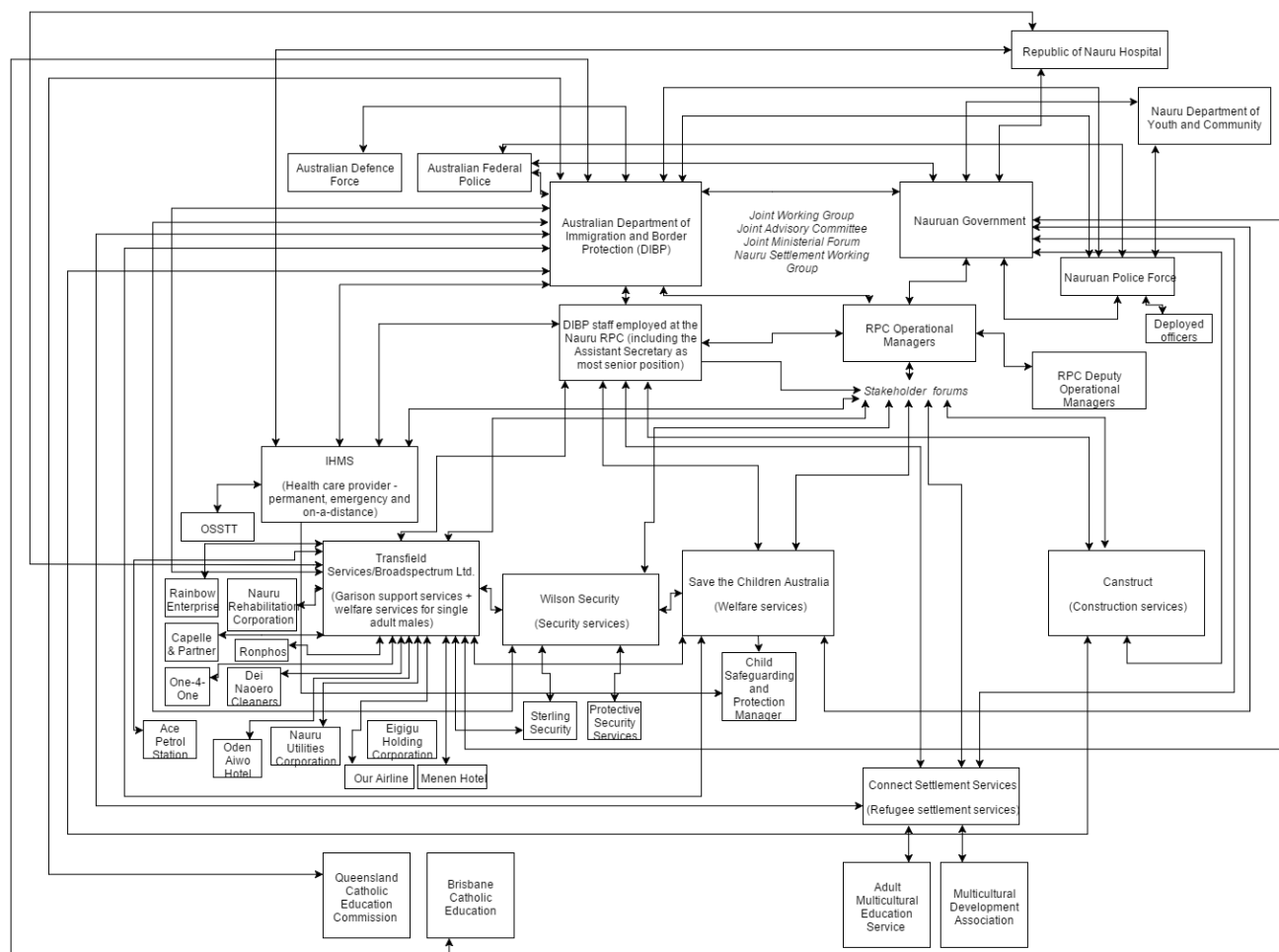
¹⁰⁶ DIBP, supra n 55 at 18.

¹⁰⁷ Ibid. The DIBP maintains that 'the Department will work with service providers to review processes to ensure that allegations that are not formally reported are recorded and tracked in a similar manner. This will ensure a comprehensive understanding of issues and enable follow up action to be transparently monitored': *ibid*, at 9.

¹⁰⁸ Ibid, at 14 and 55.

¹⁰⁹ Ibid, at 26.

¹¹⁰ Ibid, at 40.



**Figure 1: Governance in the Nauru RPC*

As the complexity of Figure 1 depicts, the Australian-Nauruan arrangements can thus be regarded as combining nodal governance and anchored pluralism – at least to a certain degree. Through the networked interaction between a variety of cooperating, contesting and conflicting actors, governance and power materialize. At the same time, the Nauruan and Australian governments have implemented a number of anchoring points including contractual stipulations, formal and informal communications, incident management arrangements and management protocols, daily and weekly meetings, minimum standards for service providers, codes of conduct, joint committees and working groups. Through these anchoring mechanisms, they curtail – at least on paper – ‘the unfettered “invisible hand” of capitalist economies’.¹¹¹

¹¹¹ Boutellier and van Steden, *supra* n 47 at 468.

4. HUMAN RIGHTS RESPONSIBILITY AND ACCOUNTABILITY IN THE NAURU REGIONAL PROCESSING CENTRE

A nodal set-up is not per definition problematic under international law: there are no international legal norms directly prescribing, endorsing, or prohibiting the trend towards nodal governance of State services, tasks and functions.¹¹² Nevertheless, nodal governance in the immigration realm seems to raise a plurality of legal accountability questions which are only addressed since ‘relatively recently’.¹¹³

Effective legal human rights protection depends on both responsibility and accountability. They are key concepts of a democratic and legitimate government: without them, democracy remains a ‘paper procedure’.¹¹⁴ Both are connected through a two-step process: first, an actor can be responsible for certain legal obligations, which can be identified and delineated by looking at the relevant legal instrument, whilst second, the actor can be held accountable for the way in which it exercises its responsibilities. Such accountability exists of both ‘answerability’ and ‘enforcement’.¹¹⁵ There thus needs to be ‘a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences’.¹¹⁶

A. Responsibility

Three types of actors are involved in the RPC: territorial (Nauruan) state actors, extraterritorial (Australian) state actors and private actors. For international human rights responsibility to be triggered, an alleged abuse must be a breach of one of these actors’ international obligations (for which the notion of jurisdiction provides guidance) and must be attributable to that actor.¹¹⁷ Both will be assessed below for each of the three types of actors involved.

¹¹² Gómez Isa, ‘Globalisation, Privatisation and Human Rights’ in De Feyter and Gómez Isa (eds), *Privatisation and Human Rights in the Age of Globalisation*, (2005) 9 at 16–17; Hallo de Wolf, supra n 36 at 69–71.

¹¹³ Gammeltoft-Hansen, ‘The Rise of the Private Border Guard: Accountability and Responsibility in the Migration Control Industry’ in Gammeltoft-Hansen and Nyberg Sørensen (eds), *The Migration Industry and the Commercialization of International Migration*, (2013) 128 at 136; Hallo de Wolf, supra n 36.

¹¹⁴ Bovens, ‘Public Accountability’ in Ferlie, Lynn and Pollitt (eds), *The Oxford Handbook of Public Management*, (2009) 182 at 182.

¹¹⁵ Staphenurst and O’Brien, ‘Accountability and Governance’, 2000, available at: siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf [last accessed 11 February 2016].

¹¹⁶ Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13 *European Law Journal* 447 at 450; Bovens, supra n 114 at 184; Day and Klein, *Accountabilities: Five Public Services* (1987) at 5; McCandless, *A Citizen’s Guide to Public Accountability: Changing the Relationship Between Citizens and Authorities* (2001) at 22; Pollitt, *The Essential Public Manager* (2003) at 89; Romzek and Dubnick, ‘Accountability’ in Shafritz (ed), *International Encyclopaedia of Public Policy and Administration Volume 1*, (1998) 6 at 6.

¹¹⁷ Gammeltoft-Hansen, supra n 28; Den Heijer, supra n 28 at 66; Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011) at 41 ff.

(i) *Responsibility for obligations under international human rights law: jurisdiction*

Jurisdiction of Nauru

Under international human rights law, States are obliged to respect, protect and fulfil the rights of those ‘within their jurisdiction’.¹¹⁸ Many international human rights frameworks are indeed limited in their scope of application to the jurisdiction of a State,¹¹⁹ which in turn is associated with the territory ‘as the primary realm of state power’.¹²⁰ The main presumption for jurisdiction is thus territoriality.¹²¹ It has traditionally been, and still remains, the cornerstone of international human rights protection owed by a State, and it has therefore become reflexive to limit human rights obligations to a State’s territorial borders.¹²² As Subedi puts it, ‘[n]o matter how much the world has changed since the adoption of the Universal Declaration of Human Rights in 1948, the fact remains that the primary responsibility of protecting the rights of individuals residing within a state rests with that state’.¹²³

Jurisdiction on behalf of Nauru as the territorial State is consequently presumed to exist. To speak with the European Court of Human Rights (ECtHR), ‘jurisdiction is presumed to be exercised normally throughout the state’s territory. This presumption may be limited in exceptional circumstances [only], particularly where a state is prevented from exercising its authority in part of its territory’.¹²⁴ In this case, such exceptional circumstances are not present: the Nauruan Government knowingly and wilfully entered into an MoU, provides special visas to asylum seekers, processes asylum claims under Nauruan law, resettles refugees and is actively engaged in the RPC via various state actors, including its (Deputy) Operational Managers and the Nauruan Police Force. Nothing indicates that Nauru is unwillingly prevented from exercising its authority in the RPC: the RPC cannot be regarded as occupied

¹¹⁸ Ruggie, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (2011) 29 *Netherlands Quarterly of Human Rights* 224.

¹¹⁹ This includes, for example, Article 2(1) International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (‘ICCPR’) and Article 1 of the European Convention on Human Rights 1953 (ECHR), 213 UNTS 222.

¹²⁰ Gammeltoft-Hansen, *supra* n 28 at 56; Den Heijer, *supra* n 28 at 24; Vandenhoe and Van Genugten, ‘Introduction: An Emerging Multi-Duty-Bearer Human Rights Regime?’ in Vandenhoe (ed), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime*, (2015) 1.

¹²¹ Gammeltoft-Hansen, *supra* n 28; Milanovic, *supra* n 117 at 58; Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (2015); Tzevelekos, ‘Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent’ (2015) 36 *Michigan Journal of International Law* 129.

¹²² Coomans and Kamminga, ‘Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties’ in Coomans and Kamminga (eds), *Extraterritorial Application of Human Rights*, (2004) 1 at 1; Vandenhoe and Gibney, ‘Introduction: Transnational Human Rights Obligations’ in Vandenhoe and Gibney (eds), *Litigating Transnational Human Rights Obligations: Alternative Judgments*, (2014) 1 at 1.

¹²³ Subedi, ‘Multinational Corporations and Human Rights’ in Arts and Mihyo (eds), *Responding to the Human Rights Deficit: Essays in Honour of Bas de Gaay Fortman*, (2003) 171 at 183–4.

¹²⁴ *Itasca a.o. v Moldova and Russia* Application No 48787/99, Merits and Just Satisfaction, 8 July 2004, para 312. Also see *Assanidze v Georgia* Application No 71503/01, Admissibility, Merits and Just Satisfaction, 8 April 2004, para 139. See also *Al-Skeini and Others v United Kingdom* Application No 55721/07, Judgment, 7 July 2011, para 131.

by a foreign power and Nauru exercises a certain degree of sovereign control over the asylum seekers processed in the RPC. As such, Nauru is bound to respect, protect and fulfil its human rights obligations and is responsible for potential human rights violations that it commits in the RPC as part of its territory.¹²⁵

Jurisdiction of Australia

Assessing whether Australia has human rights obligations in the Nauru RPC likewise requires an evaluation of its jurisdiction. Such jurisdiction, however, appears more problematic as human rights obligations beyond the territory of a State were for a long time regarded as ‘non-existent or minimalistic at best’.¹²⁶ As Gammeltoft-Hansen points out, a clash may be observed in this respect between the *sollen* and the *sein* of human rights law: whilst the idea of universality and inalienable protection is inherent to international human rights norms, they are simultaneously put forward as positive law in the form of international covenants and treaties based on the primacy of territorial jurisdiction.¹²⁷ Amongst others, this discrepancy has caused the territorial paradigm to be increasingly questioned, in particular because States nowadays have the ability to impact upon human rights far beyond their own borders.¹²⁸

In recent case law and scholarship, the notion of ‘extraterritorial jurisdiction’ has gained importance. It entails that a state also carries responsibility for human rights obligations beyond its sovereign territory. Treaty monitoring bodies indeed increasingly clarify that a State’s jurisdiction under international human rights law can and does extend beyond its sovereign borders.¹²⁹ Whilst for some such jurisdiction remains the exception to the norm,¹³⁰ others have argued that it is more than exceptional.¹³¹

In examining this topic, one cannot ignore the gist of the ECtHR’s case law as it is arguably the strongest human rights protection mechanism at the international level and has had a significant influence on the conceptualisation of extraterritorial jurisdiction.¹³² The ECtHR has primarily

¹²⁵ Taylor, supra n 5 at 15–16.

¹²⁶ Vandenhole and Van Genugten, supra n 120 at 1.

¹²⁷ Gammeltoft-Hansen, supra n 28; see also Milanovic, supra n 117.

¹²⁸ Vandenhole and Van Genugten, supra n 120 at 1; Vandenhole and Gibney, supra n 122 at 1–2.

¹²⁹ Coomans and Kamminga, supra n 121; Gammeltoft-Hansen, supra n 28; Den Heijer, supra n 28; Mantouvalou, ‘Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality’, (2005) 9 *The International Journal of Human Rights* 147; Mccorquodale and Simons, ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 70 *Modern Law Review* 598; Milanovic, supra n 117 at 59.

¹³⁰ Miller, ‘Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention’ (2009) 20 *European Journal of International Law* 1223 at 1223; Ratner, supra n 121 at 268–9.

¹³¹ Mantouvalou, supra n 129 at 157.

¹³² Kirby, ‘Australia and the European Court of Human Rights’, 14 February 2011, available at www.michaelkirby.com.au/images/stories/speeches/2000s/2011/2524-ANU-CONF-EUROPEAN-STUDIES-14-FEB-2011.pdf [last accessed 11 February 2016]; Milanovic, supra n 117 at 4; Power and Allison, ‘Introduction’ in Power and Allison (eds), *Realizing Human Rights: Moving from Inspiration to Impact* (2000) xiii at xx; Williams,

acknowledged extraterritorial jurisdiction in cases where states exercised authority and control over a person ('personal jurisdiction') or where they had effective control of an area ('spatial jurisdiction').¹³³ Fulfilling the legal thresholds of these tests has proven difficult in various cases, most notoriously in the much criticized *Bankovic* decision where the ECtHR declared that the bombing of the *Radio Televizije Srbije* building in Belgrade during the Kosovo crisis in 1999 fell outside the jurisdictional scope of the respondent NATO member states.¹³⁴ The restrictive and problematic implications of this judgment were later revisited (and arguably repaired) by the Court in *Al-Skeini*,¹³⁵ in which it introduced a third hybrid way (in addition to the personal jurisdiction and spatial jurisdiction) to establish extraterritorial jurisdiction: that of exercising 'military authority pursuant to the assumption of public functions in a foreign territory'.¹³⁶

For Australia, the ECtHR's case law is – although of relevance – not authoritative. Arguments that Australia's domestic laws should be interpreted consistently with European law have not remained uncontroversial and have been labelled as 'heretical'.¹³⁷ At the same time, the significant influence of the ECtHR on the concept of extraterritorial jurisdiction cannot go unnoticed, in particular because we currently witness a 'shift in the conceptualization of international human rights towards a holistic rights framework, emphasizing the universality, interdependence, 'indivisibility' and justiciability of civil, political, economic, social and cultural human rights'.¹³⁸ Recent literature on the matter has argued for a 'normative synergy amongst human rights treaties': a collapse of normative boundaries that traditionally divided the human rights treaties and their monitoring bodies.¹³⁹ Thus, the various human rights monitoring bodies should 'consider their six treaties as interconnected parts of a single human rights

'Human Rights in Europe' in Power and Allison (eds), *Realizing Human Rights: Moving from Inspiration to Impact*, (2000) 77 at 77.

¹³³ For example, the ECtHR acknowledged personal jurisdiction in, *inter alia*, *Hassan v United Kingdom* Application No 29750/09, Admissibility and Merits, 16 September 2014; *Issa and Others v Turkey* Application no 31821/96, Merits, 16 November 2004; *Cyprus v. Turkey* Application no 6780/74 and 6950/75, Commission Report, 10 July 1976; *X v United Kingdom* Application no 7547/76, Admissibility, 15 December 1977; *M v Denmark* Application no 17392/90, Commission Decision, 14 October 1992; *Sanchez Ramirez v France* Application no 59450/00, Commission Decision, 24 June 1996; *Al-Sadoon and Mufdhi v United Kingdom* Application no 59450/00, Admissibility, 30 June 2009; *Öcalan v Turkey* Application no 46221/99, Judgment, 12 May 2005. It acknowledged spatial jurisdiction in amongst others *Loizidou v. Turkey* Application no 15318/89, Judgment, 23 May 1995; *Ilaşcu and Others v. Moldova and Russia* Application no 48787/99, Judgment, 8 July 2004. For a thorough examination on this point, see Altıparmak, 'European Convention on Human Rights: Extra-Territorial Application' (2005) 69 *Journal of Criminal Law* 295. See also Coomans and Kamminga, *supra* n 121; Mantouvalou, *supra* n 129; Stewart, 'Back to the Drawing Board: *Al-Skeini v. UK* and the Extraterritorial Application of the European Convention on Human Rights' (2011) 4 *UCL Human Rights Review* 110.

¹³⁴ *Banković and Others v Belgium and Others* Application no 52207/99, Admissibility, 19 December 2001.

¹³⁵ *Al-Skeini and Others v. United Kingdom*, *supra* n 124.

¹³⁶ Conte, 'Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?' (2013) 18 *Journal of Conflict and Security Law* 233 at 255.

¹³⁷ Kirby, *supra* n 132 at 42.

¹³⁸ Petersmann, 'On 'Indivisibility' of Human Rights,' (2003) 14 *European Journal of International Law* 381 at 381.

¹³⁹ *Ibid*; Scott, 'Toward the Institutional Integration of the Core Human Rights Treaties' in Merali and Oosterveld, *Giving Meaning to Economic, Social, and Cultural Rights*, (2001) 7 at 11.

“constitution” and thereby consider themselves as partner chambers within a consolidating supervisory institution’.¹⁴⁰ From this perspective, the ECtHR’s lines of reasoning can (and does) significantly influence the global perception of human rights concepts. It is for this reason that it will occasionally be referred to in the remainder of this article.

Discussions on extraterritorial jurisdiction have also featured in the case law of amongst others the UN Human Rights Committee (HRC), which monitors the International Covenant on Civil and Political Rights (ICCPR) to which Australia *is* party. In interpreting the ICCPR’s jurisdictional provision as codified in Article 2(1), the HRC has applied an expansive approach to also include extraterritorial responsibility.¹⁴¹ It mentioned such jurisdiction for example explicitly in its General Comment 31 of 2004.¹⁴² The HRC acknowledged extraterritorial jurisdiction in cases where State agents had committed human rights violations on the territory of another State (personal jurisdiction),¹⁴³ where there was effective control of an area (spatial jurisdiction),¹⁴⁴ and where the applicant was residing abroad.¹⁴⁵ The HRC has thus to a large extent applied a similar approach to extraterritorial jurisdiction as the ECtHR – a development which is likely welcomed by advocates of a normative synergy amongst human rights treaties.¹⁴⁶ In fact, the HRC has been argued to be a frontrunner in advocating such a broad conception of jurisdictional applicability.¹⁴⁷

In general, there appears to be agreement on the spatial and personal tests for extraterritorial jurisdiction between the various international supervisory bodies, although there is no agreement on the applicability of human rights law to other types of extraterritorial behaviour.¹⁴⁸ Nonetheless, these tests remain premised on significant evidentiary thresholds which in each alleged instance of extraterritorial violation need to be fulfilled.¹⁴⁹ Indeed, for jurisdiction to be extended extraterritorially, an additional step of authority or control over the victim or geographical location is needed, which Gammeltoft-Hansen has called the ‘sovereignty threshold’.¹⁵⁰ Extraterritorial jurisdiction hence remains problematic

¹⁴⁰ Scott, *supra* n 139 at 8.

¹⁴¹ Conte, *supra* n 136 at 235–41; Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (2012); Mantouvalou, *supra* n 129.

¹⁴² Human Rights Committee, General Comment No 31: Nature of the General Legal Obligation on States Parties to the Covenant, 29 March 2004 at para 10.

¹⁴³ *Saldías de López v Uruguay* (52/1979), Views, CCPR/C/13/D/52/1979, at para 12; *Celiberti de Casariego v Uruguay* (56/1979), Views, CCPR/C/13/D/56/1979, at para 10.

¹⁴⁴ Human Rights Committee, Concluding observations regarding Israel, 18 August 1998, CCPR/C/79/Add.93, at para 10.

¹⁴⁵ *Vidal Martins v Uruguay* (57/1979), Views, CCPR/C/15/D/57/1979, at para 7; *Lichtensztein v Uruguay* (77/1980), Views, CCPR/C/18/D/77/1980, at para 6.

¹⁴⁶ Scott, *supra* n 139.

¹⁴⁷ Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (2011) at 206.

¹⁴⁸ Conte, *supra* n 136 at 241; Coomans and Kamminga, *supra* n 121; Milanovic, *supra* n 117.

¹⁴⁹ Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’ (2012) 25 *Leiden Journal of International Law* 857.

¹⁵⁰ Gammeltoft-Hansen, *supra* n 28 at 22–3.

in light of this threshold – and, arguably, in light of the confusing and inconsistent case law on the matter.¹⁵¹

Whether Australia has extraterritorial jurisdiction in the Nauru RPC consequently depends on one's view of Australia's control over the location and/or the people situated there – yet these views tend to differ. A number of commentators argue that Australia's extraterritorial jurisdiction is triggered in the Nauru RPC. Although weighing different facts in testing the level of personal and/or spatial control, these commentators maintain that Australia's extraterritorial jurisdiction is triggered either because it has effective control over the asylum seekers in the RPC or because it has a significant amount of (financial, practical and otherwise) influence and control over the activities undertaken by other actors and as such has effective control over the RPC.¹⁵² In discussing the comparable case of the PNG agreement, Taylor on the other hand seems to have more problems with asserting that Australia has extraterritorial jurisdiction: she first argues that the spatial test is not fulfilled as Australia does not have effective control over PNG's territory (or a part of it) and subsequently outlines that the personal test is neither fulfilled because PNG is the detaining State and that

*[a]t the present stage of development of international jurisprudence, it seems highly unlikely that an individual would be regarded as being subject to the effective control of a state unless an agent of that state is exercising some kind of coercive power over that person [...]. [T]here is no evidence to suggest that [...] Australian officials are actually exercising coercive power over those asylum seekers.*¹⁵³

Support for this assertion can be found in Gammeltoft-Hansen's work, who states that the threshold for personal jurisdiction has so far merely been reached in cases where *full* physical control was involved.¹⁵⁴ This is, in this case, at least questionable given that the Nauruan government decided in October 2015 to change the nature of the RPC to an open centre, with detention thereby having 'ended'.¹⁵⁵

This lacking consensus is also a result of the RPC's nodal set-up: because each involved actor has a continuously fluctuating power and influence and because service-providing actors are regularly

¹⁵¹ Altiparmak, *supra* n 133.

¹⁵² Committee against Torture, Concluding Observations on the Fourth and Fifth Periodic Reports of Australia, 26 November 2014, CAT/C/AUS/4-5/18888 at 6; Dastyari, 'Detention of Australia's Asylum Seekers in Nauru: Is Detention by Any Other Name Just As Unlawful?' (2015) 38 *UNSW Law Journal* 669; Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2014) 1 *Michigan Journal of International Law* 223; Francis, *supra* n 2; Den Heijer, *supra* n 28. In this regard, some authors argue that effective control on behalf of Australia is suggested by the available evidence, although a lack of transparency makes it difficult to establish the exact nature of Australia's control: see Gleeson, *supra* n 64.

¹⁵³ Taylor, 'Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and Papua New Guinea: All Care but No Responsibility?' 2010 33 *UNSW Law Journal* 337 at 350.

¹⁵⁴ Gammeltoft-Hansen, *supra* n 28 at 132.

¹⁵⁵ Davidson and Hurst, 'Nauru Says It Will Process Remaining 600 Refugee Claims within a Week', *Guardian*, 5 October 2015, available at: www.theguardian.com/australia-news/2015/oct/05/nauru-says-it-will-process-remaining-600-refugee-claims-within-a-week [last accessed 9 February 2016].

replaced, the governance nature of the RPC as well as the levels of actual control of the various actors are constantly changing. For example, Nauru introduced Operational Managers in the RPC in 2014,¹⁵⁶ which – at least in theory – provides the Nauruan Government with better technologies to influence the governance field and with a larger extent of control. Another example is the fluctuating involvement of private actors, which at some stages have a significant influence and at other stages a more modest one. Transfield/Broadspectrum, for example, has gained in control and importance over the past years as it is gradually given more responsibility for providing a host of services.¹⁵⁷ Whilst the effective control requirement necessitates a factual assessment, the facts and power relations thus continuously change, thereby influencing the level of control of the various actors involved in unpredictable and often indiscernible ways. Control rests primarily with the network, not so much with a single actor – at least not all the time. Determining that an actor has effective control today does, therefore, not mean that it has such effective control tomorrow: in the face of a concrete alleged human rights abuse, this question needs to be constantly re-assessed on the basis of the evolving circumstances and the ever-changing power structure of the nodal network. Den Heijer aptly summarizes that the multitude of actors involved in the Nauru RPC, as well as the complex legal arrangements, make it difficult to give a final answer: whether the sovereignty threshold is met depends on the specific complaint and the particular involvement of the various actors.¹⁵⁸ At the same time, the governance arrangements and the Nauru RPC are neither very transparent nor accessible as will be further outlined below. This hampers the factual assessment of effective control that is needed to establish extraterritorial jurisdiction in the face of a concrete allegation of a human rights abuse.

A potential way to get around these problems is to look at case law on extradition, where various monitoring bodies including the HRC and the ECtHR have noted that a State may be in violation of its obligations if it extradites an individual to a State where his or her rights are likely to be violated.¹⁵⁹ Nevertheless, these cases concerned scenarios in which the person to be extradited faced a real risk of being tortured or being inhumanely or degradingly treated, which are rather clear potential future violations of human rights. In the present case, this is different: given the lack of transparency and the fact that Australia has sought assurances and monitors the facilities, it is hardly possible to establish *a priori* whether and to what extent a transferred migrant will face a violation of his or her rights at the Nauru RPC. This is particularly the case now that the RPC has been transformed into an open-centre arrangement, thereby ending the practice of indiscriminate and indefinite mandatory detention which before its abolition could arguably be construed as a foreseeable violation of the human right to liberty and the prohibition of arbitrary detention. Whilst there may be some indications that the RPC's

¹⁵⁶ DIBP, supra n 55 at 11; Nauru Government Information Office, supra n 56.

¹⁵⁷ Doherty, supra n 75; Save the Children, supra n 75.

¹⁵⁸ Den Heijer, supra n 28 at 294.

¹⁵⁹ See for example *Chitat Ng v. Canada* (469/1991), Views, CCPR/C/49/D/469/1991, at para 14; *Soering v. UK* Application no 14038/88, Judgment, 7 July 1989. See also OSCE and ODIHR, *Extradition and Human Rights in the Context of Counter-Terrorism*, ODIHR.GAL/22/07, 20 March 2007 at 5–6, available at: www.osce.org/odihr/24392 [last accessed 11 February 2016].

conditions are not optimal, under the open-centre arrangements it is hence not *clear* that a violation of for example the prohibition on torture and cruel, inhuman and degrading treatment will occur and is foreseeable, which depends on a factual assessment and the level and credibility of assurances attained. Australia argues that the implemented monitoring mechanisms prevent such violations, and given that first-hand and real-time information on the present human rights situation in the Nauru RPC remains incidental and scarce, it is difficult to reject such a proposition in the context of potential future violations. It would consequently be too easy to reject Australia's assurances right away, yet at the same time it is too difficult to irrefutably prove them wrong.

The private actors

In the Westphalian system, international human rights law was particularly created and modelled to circumscribe the extent and use of public power by sovereign States.¹⁶⁰ Only States can thus be the respondent to complaints under human rights treaties that provide for a complaint mechanism.¹⁶¹

Trends of nodal governance challenge this traditional view because non-State actors increasingly engage as governance actors in human rights-related conduct.¹⁶² Multinational corporations involved in such arrangements often have a far larger economic power than some sovereign States (including Nauru) which seems an appropriate reason to impose human rights duties on corporations.¹⁶³ The option of extending human rights duties horizontally to private actors is for some consequently a promising strategy,¹⁶⁴ yet such developments have not changed the state-centric approach from being the dominant foundation of positive international human rights law.¹⁶⁵ To some extent, norms are developed by international and regional organisations, the corporate world itself and civil society in order to enhance

¹⁶⁰ De Feyter and Gómez Isa, 'Privatisation and Human Rights: An Overview' in De Feyter and Gómez Isa (eds), *Privatisation and Human Rights in the Age of Globalisation*, (2005) 1; Hallo de Wolf, supra n 36; McGrew, 'Globalization and Global Politics' in Baylis, Smith and Owens (eds), *The Globalization of World Politics: An Introduction to International Relations*, (2011) 14; Mégret, 'Nature of Obligations' in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law*, (2014) 96; Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 *Cornell International Law Journal* 21; Subedi, supra n 123.

¹⁶¹ McBeth, 'Privatising Human Rights: What Happens to the State's Human Rights Duties When Services Are Privatised' (2004) 5 *Melbourne Journal of International Law* 133; Tomuschat, *Human Rights: Between Idealism and Realism* (2014) at 119–20.

¹⁶² Hallo de Wolf, supra n 36; Robbins, 'Privatisation of Corrections: Violation of US Domestic Law, International Human Rights, and Good Sense' (2006) 13(3) *Human Rights Brief* 12; Ronen, supra n 160 at 21; Van Berlo, supra n 34; Vandenhoe, 'Obligations and Responsibility in a Plural and Diverse Duty-Bearer Human Rights Regime', in Vandenhoe (ed), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime*, (2015) 115 at 115.

¹⁶³ Tomuschat, supra n 161.

¹⁶⁴ Ibid; Alston, 'The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Alston (ed), *Non-State Actors and Human Rights*, (2005) 3; Vandenhoe and Van Genugten, supra n 120; Vandenhoe, supra n 162.

¹⁶⁵ Ronen, supra n 160; Vandenhoe, supra n 162.

corporate social responsibility.¹⁶⁶ However, these norms largely constitute soft law and embody legal aspirations and moral values rather than binding norms of hard law.¹⁶⁷

Thus, ‘as yet there does not appear to be an international consensus on the place of businesses and other nonstate actors in the international legal order’.¹⁶⁸ Put more sceptically, ‘too many of them currently escape the net’.¹⁶⁹ For purposes of legal accountability under positive international human rights law, it is therefore not needed to further examine the human rights responsibility of Transfield/Broadspectrum, Wilson Security, Save the Children Australia, Canstruct and the other (sub)contractors. Whilst maybe desirable, as of yet they have no legally binding international human rights obligations for which they can be held accountable on the legal level. At most, they may have contractual obligations which can include certain duties to uphold human rights standards, yet such obligations are not part of the body of international law.

(ii) Responsibility for conduct: attribution, derived responsibility and positive obligations

Apart from jurisdiction, international responsibility on behalf of a State can only be established when the conduct allegedly constituting an abuse of human rights can be seen as conduct of that State. To approach this issue in the context of the Nauru RPC, three distinct (yet complementary) mechanisms will be discussed: that of attribution, derived responsibility and positive obligations.¹⁷⁰

Attribution

Rules of attribution are central to international law, because sovereign states are legal entities and can only act through the conduct of natural persons.¹⁷¹ A set of rules on attribution was developed by the International Law Commission (‘ILC’) in its Draft Articles on the Responsibility of States for international wrongful acts (‘Draft Articles’).¹⁷² The Draft Articles are not legally binding as such yet codify rules of customary international law.¹⁷³

In relation to acts of natural persons or groups of persons, we can distinguish between state responsibility for acts (a) of *de jure* state organs, (b) of *de facto* state organs, (c) of private persons and (d) directed or controlled by the State.¹⁷⁴ Attributing the conduct of *de jure* and *de facto* state organs to the State is rather unproblematic: as Den Heijer outlines, it is the most basic rule of attribution and is

¹⁶⁶ Hallo de Wolf, supra n 36 at 113 ff.

¹⁶⁷ Hallo de Wolf, supra n 36; Tomuschat, supra n 161.

¹⁶⁸ Weissbrodt and Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Enterprises with Regard to Human Rights’ (2003) 97 American Journal of International Law 901.

¹⁶⁹ Alston, supra n 164 at 6.

¹⁷⁰ For a similar approach, see Den Heijer, supra n 28; see also Mccorquodale and Simons, supra n 129.

¹⁷¹ Den Heijer, supra n 28 at 69.

¹⁷² International Law Commission, Responsibility of States for Internationally Wrongful Acts, annexed in UN General Assembly resolution 56/83 of 12 December 2001.

¹⁷³ Hallo de Wolf, supra n 36 at 79.

¹⁷⁴ Den Heijer, supra n 28 at 70.

stipulated in Article 4 of Draft Articles.¹⁷⁵ States are thus in principle only responsible for their own behaviour, as well as for the conduct of their subsidiary agents and institutions in the exercise of their respective official functions.¹⁷⁶ This includes all entities that form part of the State organisation and act on its behalf.¹⁷⁷ In this case, the DIBP staff employed at the Nauru RPC, the Australian Federal Police and the Australian Defence Force can be seen as Australian state agents and their behaviour in the exercise of their duty can thus be attributed to the Australian State.¹⁷⁸ The RPC (Deputy) Operational Managers and the Nauru Police Force can be seen as state agents of the Nauruan State, to which their actions in the RPC as performed in their official capacities can be attributed.

The conduct of private actors can also be attributed to the State in some instances (Article 5 Draft Articles). This is, however, not a presumptive norm.¹⁷⁹ Private conduct can only be attributed to the State when the private actor is legally empowered to exercise elements of governmental authority and the particular act or omission is conducted in that governmental capacity.¹⁸⁰ However, the accompanying tests are onerous and there are no internationally accepted definitions of 'governmental authority',¹⁸¹ thereby leaving leeway to states to adopt their own tests.¹⁸²

In this case, it is difficult to assert indefinitely whether the private contractors act under the governmental authority of Nauru and/or Australia – this very much depends on the test applied to, and interpretation of, 'governmental authority'. One option is to follow the US Supreme Court's approach, which outlined that it suffices that a private actor fulfils a 'public function' that has 'traditionally been the exclusive prerogative of the State'.¹⁸³ Another is the approach of McCorquodale and Simons, who argue that governmental authority appears to include 'a wide variety of public functions, from running prisons, health and education facilities, to private airline corporations having delegated immigration or

¹⁷⁵ Ibid, at 71.

¹⁷⁶ This rule was confirmed and was outlined to be of a customary nature by the ICJ: *Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights* Advisory Opinion, ICJ Reports 1999, 62. As the ICJ has noted, 'the fundamental principle governing the law of international responsibility [is that] a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf': *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment, ICJ Reports 2007, 43 at para 406. For further support, see also Hallo de Wolf, supra n 36 at 201.

¹⁷⁷ United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (2012).

¹⁷⁸ Gleeson, supra n 64.

¹⁷⁹ Gammeltoft-Hansen, supra n 28 at 138; McCorquodale and Simons, supra n 129 at 606; United Nations, supra n 177 at 27.

¹⁸⁰ Clapham, *Human Rights Obligations of Non-State Actors* (2006) at 239; Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002); Gammeltoft-Hansen, supra n 113; Hallo de Wolf, supra n 36 at 209; Den Heijer, supra n 28 at 74; Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (2002) at 250.

¹⁸¹ Indeed, '[b]eyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances': Crawford, supra n 180 at 101.

¹⁸² Gammeltoft-Hansen, supra n 113 at 138–9.

¹⁸³ *Rendell-Baker v. Kohn*, 25 June 1982, 457 US 830 at 842.

quarantine power and a corporation having a role in the identification of property to be expropriated by the state'.¹⁸⁴ Crawford, the last ILC Special Rapporteur on the issue, has stated that an example of an entity falling under Article 5 is the outsourcing of prison guarding to private entities.¹⁸⁵ These approaches however still raise the question which of the actors involved in the Nauru RPC do in fact serve such functions.¹⁸⁶ Thus, for example, the service providers providing safety and garrison services may be considered as exercising a traditional core function of sovereignty, and as such governmental authority,¹⁸⁷ but this is less obvious with, for example, service providers providing accommodation, welfare or construction services.

A further question is whether the provider's behaviour – when exercising governmental authority – should be attributed to Nauru or Australia. Processing formally happens under Nauruan law and the asylum seekers are in the RPC as Nauruan visa holders – yet Australia contracts and remunerates the primary contractors. This difficulty is intensified by the condition of Article 5 of the Draft Articles that for attribution to be applicable, the private entity must exercise a governmental authority that was delegated to it *by law*. It remains unclear whether privatization through a contractual agreement, as is the case with the Nauru RPC, fulfils this criterion and allows for attribution to the State.¹⁸⁸ According to Weigelt and Märker, a mere contract is insufficient.¹⁸⁹ Accordingly, attribution of the conduct of private actors is difficult for three reasons: (i) not all private contractors arguably exercise a 'governmental authority', (ii) those that do exercise such an authority do so according to a contractual arrangement, not a legal provision, and (iii) even if such contractual arrangements can be construed as legal provisions, it remains unclear whether they exercise governmental authority on behalf of Australia or Nauru.

As laid down in Article 8 of the Draft Articles, conduct can also be attributed to the state when the conduct is directed or controlled by the State. In this case, 'it is not the quality of being an 'agent' of the state which is decisive for establishing state responsibility, but the factual relationship between the state and the conduct complained of'.¹⁹⁰ This thus concerns an incidental form of attribution of private conduct to the state: that is, when the individual or private actor is acting under the instructions or control

¹⁸⁴ Mccorquodale and Simons, *supra* n 129 at 607.

¹⁸⁵ Crawford, *supra* n 180 at 100.

¹⁸⁶ See also Gammeltoft-Hansen, *supra* n 113 at 138–9.

¹⁸⁷ Since the RPC has recently become an open centre arrangement, however, even this remains questionable and unsettled.

¹⁸⁸ Hallo de Wolf, *supra* n 36 at 222.

¹⁸⁹ Weigelt and Märker, 'Who Is Responsible? The Use of PMCs in Armed Conflict and International Law' in Jäger and Kümmel, *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects*, (2007) 377 at 389. For a different perspective, see Taylor, *supra* n 153 at 345, who argues that the 'empowered by law' requirement must be interpreted broadly to also include the lawful delegation of a governmental function by contract or otherwise. Likewise, Gleeson, *supra* n 64 has little difficulties in assessing that the conduct of the private contractors may be attributed to Australia.

¹⁹⁰ Den Heijer, *supra* n 28 at 75.

of the State.¹⁹¹ The extent of such instructions or control needed to invoke attribution has, however, not remained uncontested.¹⁹²

The International Court of Justice (ICJ), for example, has imposed a high threshold for attribution on the basis of State control in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*.¹⁹³ It accepted that a State can be liable for violations committed by private actors outside the State's territory if it can be proven that the State had 'effective control' over the non-State actor in relation to the alleged violations.¹⁹⁴ This entails a strict test, yet a realistic one: a State cannot be expected to guarantee that private actors will refrain from violating human rights abroad when it has no effective control over them.¹⁹⁵ Consequently, 'it is hard to imagine circumstances where a state would exercise the level of control [...] required by the ICJ in Nicaragua, over a corporate national except, perhaps, in rare cases with respect to wholly state-owned corporations'.¹⁹⁶

In the present case, neither Australia nor Nauru is exercising the required amount of control over the contractors – except for some of the smaller subcontractors which are fully owned by the Nauruan State, including Eigigu Holding Corporation.¹⁹⁷ Australia has contracts with the primary service providers, yet there is no academic consensus on whether this means that any concrete breach of international human rights law can thus be attributed to Australia on the basis of effective control.¹⁹⁸ The ICJ's approach in *Nicaragua* seems to imply that it does not: it held that the control has to go beyond financial or material support and/or a situation of dependence and that it has to be proven in relation to each of the alleged human rights violations that the State directed or enforced their perpetration.¹⁹⁹ Attribution becomes even more difficult when subcontractors are in play because their involvement waters down the 'real link' between the State and the behaviour.²⁰⁰ There is for example no formal basis for the Australian Government to deal with Wilson Security as a subcontractor and hence no genuine control over their conduct.²⁰¹

Alternatively to State control, State instructions also suffice for attribution under Article 8 of the Draft Articles – yet the ILC has outlined that a State that provides a lawful instruction (to for example private contractors) 'does not assume the risk that the instructions will be carried out in an internationally unlawful way'.²⁰² Likewise, the Appeals Chamber of the International Criminal Tribunal for the Former

¹⁹¹ Ibid, at 76.

¹⁹² Ibid.

¹⁹³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 14.

¹⁹⁴ Ibid, at para 115.

¹⁹⁵ Hallo de Wolf, supra n 36 at 225; Jägers, supra n 180 at 169-70.

¹⁹⁶ Mccorquodale and Simons, supra n 129 at 609.

¹⁹⁷ Nauru Government Information Office, supra n 87.

¹⁹⁸ Crawford, supra n 180; Taylor, supra n 153.

¹⁹⁹ Hallo de Wolf, supra n 36 at 225–6; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, supra n 193.

²⁰⁰ Gammeltoft-Hansen, supra n 113 at 139.

²⁰¹ DIBP, supra n 55; Narayanasamy et al., supra n 1 at 21.

²⁰² Crawford, supra n 190 at 113). For an alternative view, see Taylor, supra n 153 at 347.

Yugoslavia maintained that in relation to acts of (non-militarily organized) private actors, the instructions need to be issued with regard to each particular alleged violation of human rights.²⁰³ Yet this is not the case in the Nauru RPC, where there is no conclusive evidence that the Australian or Nauruan Government issued instructions to private contractors that entail specific abuses of human rights. To the contrary, the Australian Government contractually requires service providers to comply with human rights norms.²⁰⁴ It is thus problematic to maintain that alleged human rights abuses of private actors can be attributed to Australia or Nauru on the basis of lawful instructions or generic service contracts.

Joint responsibility of states

Conduct constituting an alleged human rights abuse can also be attributed to multiple States at the same time (Article 47 Draft Articles). This can happen in three situations: (a) when a number of States have acted independently in relation to the same abuse and their actions can be attributed to them via the above outlined attribution rules, (b) when a State takes part in the abuses of another State ('derived responsibility') and (c) when multiple states genuinely act in concert and this joint act engages the responsibility of each of these States.²⁰⁵

The former encounters the same attribution problems as outlined above. In relation to the latter, holding States involved in 'the joint management of facilities for external processing of migrants' responsible for joint conduct or conduct of a joint organ does not appear problematic: it is confirmed by the ILC and remains rather uncontested.²⁰⁶ What *is* problematic, however, is determining when acts and organs must be considered as 'joint': the logic of international State responsibility may imply that conduct and organs are only 'joint' 'when the activity complained of was carried out in accordance with the instructions of all states involved and that all responsible states had it in their power to prevent the alleged misconduct'.²⁰⁷ It is very questionable whether this is the case in the Nauru RPC: with a myriad of actors cooperating, contesting and conflicting, it is difficult to discern what the involvement of the Australian and Nauruan authorities is in relation to specific conduct. Are acts of the deployed DIBP staff 'joint' acts? Are those of the Operational Managers? Or those of the private contractors? As nodal governance theory informs us, all these actors pursue different goals, with different mentalities, resources, technologies and institutional structures. In doing so, human rights may be abused— yet the plethora of interaction going on in the governance network makes it difficult, if not impossible, to observe whether the Australian and/or Nauruan State either instructed the specific rights-abusing behaviour or had the power to prevent it, and whether they did so individually, jointly or otherwise.

²⁰³ *Tadić* IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, at para 137. On this issue, see Hallo de Wolf, supra n 36 at 226–227.

²⁰⁴ See, for example, stipulation 14.1.1. of the Contract in relation to the provision of services on Nauru between the Department of Immigration and Citizenship and Transfield Services, available at: <https://www.border.gov.au/AccessandAccountability/Documents/FOI/FA140201059.pdf> [Last accessed 12 February 2016].

²⁰⁵ See also Den Heijer, supra n 28 at 95.

²⁰⁶ *Ibid.*, at 96.

²⁰⁷ *Ibid.*, at 98.

In relation to the concept of derived responsibility, it is stipulated in Chapter IV of the Draft Articles that a State involved in the wrongful acts or omissions of another State can be held responsible separately on account of its involvement. This differs from attribution of conduct to the State in that derived responsibility applies in exceptional situations where the State's international responsibility is dependent upon, and derives from, another state's conduct. In these instances, the State itself did not carry out a human rights abuse but was involved in the human rights abuse of another State. This includes situations (i) when a State assists another State in the commission of a human rights abuse (Article 16 Draft Articles), (ii) when a State controls and directs another State in committing a human rights abuse (Article 17 Draft Articles) and (iii) when a State exercises coercion vis-à-vis another State to commit a human rights abuse (Article 18 Draft Articles).²⁰⁸

Option (i) is particularly interesting in the domain of migration control, as migration-receiving States (such as Australia) often provide all kinds of assistance to origin, transit or processing countries (such as Nauru).²⁰⁹ However, there is no academic consensus and little jurisprudence on derived responsibility on the basis of aid and assistance. Its customary law status is therefore disputed.²¹⁰ In addition, a problematic aspect of derived responsibility on the basis of aid and/or assistance is that it requires the assistance-providing State to provide such assistance 'with knowledge of the circumstances of the international wrongful act', which has been interpreted by the ILC as not only containing a requirement of knowledge, but also one of intent. Thus, the aid and assistance must be provided with the goal of enabling the commission of an international wrongful act.²¹¹

In the present case, it will again depend on the concrete circumstances whether or not Australia and/or Nauru can be held responsible on the basis of derived responsibility. It requires, on the one hand, the attribution of human rights violating conduct to either Australia or Nauru and, on the other hand, proof that the other State provided assistance in the commission of that particular conduct with both knowledge and intent. On first sight, it thus provides a workable solution for nodal settings: not one, but multiple States can be held accountable for human rights violating conduct, even if not all of these States carried out the conduct themselves or had the power to instruct or prevent it. On second thought, however, nodal governance difficulties persist: derived responsibility requires that the violating conduct can be attributed to at least one State, after which other States can also be implicated for their assistance. Even when it is clear that abuses result from particular conduct of one of the private contractors – which in practice provide the services with the largest potential of abusing rights –²¹² the subsequent attribution

²⁰⁸ See also *ibid*, at 101.

²⁰⁹ *Ibid*, at 101.

²¹⁰ *Ibid*, at 102–103.

²¹¹ *Ibid*, at 105.

²¹² Providing security services, Wilson Security is for example often alleged to infringe upon human rights entitlements by arbitrary detention, insufficient detention conditions, abuse, (sexual) violence, insufficient protection of the special circumstances and needs of groups of asylum seekers, and discrimination: see for example Doherty and Davidson, 'Wilson Security Guards Handcuffed Asylum Seeker Boy on Nauru as a 'Joke'', *Guardian*, 28 August 2015, available at: www.theguardian.com/australia-news/2015/aug/28/wilson-security-guards-handcuffed-asylum-seeker-boy-on-nauru-as-a-joke [last accessed 9 February 2016]; McKenzie-Murray, 'Nauru

of that conduct to a State remains difficult for the reasons set out above, continuing to obstruct effective attribution also in the case of derived responsibility. In addition, establishing intent on behalf of the aiding State to facilitate the occurrence of human rights abuses remains difficult in practice.²¹³

Positive obligations

The concept of positive obligations has slowly but progressively been introduced in international human rights law, largely through decisions of international courts.²¹⁴ It entails that national authorities have to adopt reasonable and suitable measures to safeguard human rights, either of a judicial nature (such as the provision of sanctions for individuals infringing a right) or of a practical nature (such as the provision of measures to protect an individual within its jurisdiction from the potentially harmful activities of other actors).²¹⁵ Positive obligations of the state comprise both substantive obligations, requiring that basic measures are taken to ensure the full enjoyment of rights, and procedural obligations, requiring the provision of proper remedies in cases of rights abuses.²¹⁶

Whilst not constituting a rule of attribution, positive obligations provide an alternative way of establishing State responsibility for human rights abuses. Even when particular conduct cannot be attributed to the State, the State can still have acted in breach of its own positive obligation under international human rights law. This includes the responsibility to protect individuals from a horizontal human rights violation – that is, an abuse of human rights by for example one of the private contractors. As states are ‘neither omniscient nor omnipotent’, positive obligations are however not absolute but require a State to exercise due diligence by adopting the required measures reasonably within their power to achieve the protection of individuals.²¹⁷ This closely aligns to the anchored pluralism concept: the State should provide ‘anchoring points’ in the nodal field and actively monitor the behaviour of the various parties involved.²¹⁸

In case of an alleged human rights abuse, it should thus first be established that Nauru and/or Australia has jurisdiction (which, as outlined above, is presumed to exist for Nauru but is more uncertain and requires a factual assessment in relation to Australia which is difficult to perform). Second, it must be proven that Nauru and/or Australia did not adopt the required measures reasonably within their power (a) to prevent the abuse from occurring or (b) to provide procedural redress.

Abuse Goes Further than the Moss Review’, *The Saturday Paper*, 28 March 2015, available at: www.thesaturdaypaper.com.au/news/politics/2015/03/28/nauru-abuse-goes-further-than-the-moss-review/14274612001684 [last accessed 11 February 2016]; Moss, supra n 55; Narayanasamy, supra n 1.

²¹³ Den Heijer, supra n 28 at 105–107.

²¹⁴ Akandji-Kombe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights* (Council of Europe), Human Rights Handbook No. 7 (2007) at 5-6, available at: rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4d [last accessed 9 February 2016].

²¹⁵ Ibid, at 6; Hallo de Wolf, supra n 36 at 143 ff.; Den Heijer, supra n 28 at 65.

²¹⁶ Akandji-Kombe, supra n 214 at 16.

²¹⁷ Hallo de Wolf, supra n 36 at 192; Milanovic, supra n 117 at 110; Taylor, supra n 153.

²¹⁸ Boutellier and van Steden, supra n 47 at 468.

In relation to (a), although it remains difficult to see what happens in practice, the Australian and Nauruan Government seem to have taken such measures by implementing a number of regulatory provisions and monitoring mechanisms to prevent human rights abuses of private actors from occurring. This includes contractual stipulations, formal and informal communications, incident management arrangements and management protocols, daily and weekly meetings, minimum standards for service providers, codes of conduct, joint committees and working groups, deployment of Operational Managers with monitoring tasks, internal and external reviews,²¹⁹ and the involvement of the Nauru Police Force and the Australian Federal Police. In addition, further monitoring and supervisory bodies were created by the DIBP in 2014-2015. The Detention Assurance Team is supposed to strengthen assurance and integrity in managing detention services, the Child Protection Panel provides advice on child protection in immigration detention, a Regional Processing and Settlement Branch is responsible for the coordination and management of all regional processing, settlement and returns operations, and the position of ‘ABF Attaché South Pacific’ was established within the DIBP to provide a link between the DIBP and all international partners in the South Pacific, including Nauru.²²⁰ In case of a human rights abuse, these mechanisms need to be evaluated to assess whether they satisfied the positive obligation of Nauru and/or Australia to exercise the required level of due diligence.

In relation to (b), whether sufficient redress is provided likewise depends on the specific rights violation and the procedural mechanisms made available by the involved States. In some cases, the violation will constitute a criminal offence after which police investigations and potentially criminal prosecutions will be commenced. In other cases, investigations by for example the service provider or the DIBP may be sufficient to provide proper redress. Still in other cases, grave violations may necessitate the existence of an impartial judicial or non-judicial complaint mechanism which can easily be accessed by potential victims. Under some circumstances, the absence of adequate redress mechanisms thus could be an avenue to hold Nauru and/or Australia responsible.

The obligation to provide sufficient procedural redress is, however, somewhat paradoxical. States violate their positive obligations if they do not provide sufficient procedural redress – including access to justice – to a victim of a human rights abuse, yet if no access to justice is provided and no procedural redress mechanisms are in place, it is difficult or even impossible for victims to have such positive obligations enforced. Put simply, without a remedy being available, the violation of a right to a remedy is difficult to enforce in practice. Here, there is thus an inherent tension between *de jure* responsibility and *de facto* enforceability – which brings us to the second step of proper legal human rights protection: that of accountability.

²¹⁹ See for example Moss, *supra* n 55.

²²⁰ DIBP, *supra* n 52; DIBP, *supra* n 55.

B. Accountability

In light of the foregoing, it is extremely difficult to definitely establish and delineate *de jure* human rights responsibilities in the Australian-Nauruan offshore RPC arrangements. International human rights law is only triggered when abuses happen within the jurisdiction of a State and can be attributed to that State, yet the nodal set-up of the processing arrangements, including the developments of offshoring and privatisation, increasingly challenges the accuracy and effectiveness of these fundamental prerequisites. Demarcating legal international human rights responsibilities in these situations indeed becomes increasingly difficult because the factual arrangements and power structures constantly change in an ever-reconfiguring nodal field, distancing the State from abuses through the involvement of additional public and private actors. The on-going trend towards nodal governance consequently provides States with opportunities to explore the legal margins of human rights law and manoeuvre themselves outside of its reach, both in relation to negative and positive obligations.

In concrete cases, establishing human rights responsibility could however still be possible. Indeed, some cases entail clear-cut breaches of human rights that fall within the jurisdiction of, and are attributable to, Australia and/or Nauru – one could, for example, think about potential misconduct by the Australian Federal Police or the Nauruan Police Force resulting in a human rights abuse. In such cases, human rights law appears to provide a spark of optimism in relation to a victim's protection – yet such optimism fades when considering the level of accountability on which *de jure* responsibilities ought to be transformed into *de facto* safeguards. Illustrated by two examples, this section argues that the setting in which the RPC is situated, as well as its nodal structure, raise a number of accountability issues which inhibit the proper legal protection of human rights even when responsibility can be clearly demarcated.

First, there is no regional human rights court in the Australian-Pacific region, nor any international monitoring body that can issue binding judgments. Human rights consequently have a 'precarious foothold' in Australia's legal system.²²¹ Australia is a signatory to various international human rights treaties, yet it remains the only democratic country in the world without a national bill of rights.²²² Whilst most European, American and African countries are supervised by regional courts, a similar structure is absent in the Oceanian region. There is moreover almost no initiative based on a clear roadmap to achieve such regional protection in the Australian-Pacific region.²²³ Although Australia and Nauru are monitored by international monitoring bodies such as the HRC and the UN Committee Against Torture, these bodies issue non-binding views and comments only and cannot consider real penalties for non-compliance.²²⁴ Their rulings are consequently, as Peers and Roman put it, thrown 'on

²²¹ Byrnes, Charlesworth and McKinnon, *Bills of Rights in Australia: History, Politics and Law* (2009) at xv.

²²² *Ibid.*

²²³ European Parliament Directorate-General for External Policies Policy Department, *The Role of Regional Human Rights Mechanisms*, EXPO/B/DROI/2009/25, November 2010 at 13, available at: [www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET\(2010\)410206_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/410206/EXPO-DROI_ET(2010)410206_EN.pdf) [last accessed 9 February 2016].

²²⁴ Hathaway, *supra* n 6 at 2023; Klein, *supra* n 24 at 441; Posner, *supra* n 7.

the barbeque' by politicians.²²⁵ The Australian Human Rights Commission ('AHRC') likewise monitors Australia's human rights obligations but has no enforcement power and cannot make binding recommendations.²²⁶ The Australian Government has moreover blocked the AHRC's request to visit the Nauru RPC for investigative purposes as its jurisdiction does not extend beyond Australia's sovereign borders.²²⁷ Consequently, monitoring how Australia and Nauru deal with their international legal human rights obligations in practice is limited and does not produce binding results: *de jure* rights therefore hardly materialize as *de facto* safeguards and are consequently compromised.²²⁸ Conversely, Australian national courts which do deliver binding judgments often cannot and/or do not take (international) human rights obligations into account. This is aptly illustrated by a recent High Court case, in which a challenge to the legality of the Australian-Nauruan offshore processing arrangements brought by lawyers on behalf of a Bangladeshi woman was rejected on the basis of the Australian Constitution (which does not contain a bill of rights) and national law.²²⁹ Human rights obligations were not mentioned in the judgment and thus largely remain international figments in a nationally-oriented juridical system. This distinguishes the Australian-Pacific region from other parts of the world where human rights law, be it to varying extents, finds application through national bills of rights and regional supervisory courts.

Second, as has also been mentioned above, the Nauru RPC is characterized by limited transparency and openness. This is on the one hand due to the walls of governance that are erected: many of the bilateral and contractual arrangements between the various public and private actors involved remain secret and the corporate actors involved act without much public scrutiny.²³⁰ On the other hand, the lack of transparency and openness is enhanced by the physical and procedural remoteness of the centre.²³¹ A variety of observers are indeed unable to visit the RPC, either because they are denied permission to enter the RPC or because they are denied a visa to Nauru. Visas were, for example, denied to a UN Working Group on Human Rights,²³² Amnesty International and other human rights

²²⁵ Peers and Roman, 'The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?', *Blog: EU Law Analysis*, 5 February 2016, available at: eulawanalysis.blogspot.co.uk/ [last accessed 11 February 2016].

²²⁶ Branson, 'President Speech: The Role of the Australian Human Rights Commission in Protecting and Promoting Human Rights in Australia', 27 April 2010, available at www.humanrights.gov.au/news/speeches/president-speech-role-australian-human-rights-commission-protecting-and-promoting [last accessed 9 February 2016].

²²⁷ Gordon, 'Human Rights Commission Boss Gillian Triggs Blocked from Visiting Nauru', *Sydney Morning Herald*, 4 February 2014, available at: www.smh.com.au/federal-politics/political-news/human-rights-commission-boss-gillian-triggs-blocked-from-visiting-nauru-20140203-31xg6.html [last accessed 11 February 2016].

²²⁸ Liguori, *supra* n 28; McKay, 'Review Essay: Human Rights in Closed Environments' (2015) 37 *Sydney Law Review* 617 at 622; Van Berlo, *supra* n 30.

²²⁹ *Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors* (M68/2015), 3 February 2016.

²³⁰ Welch, *supra* n 1 at 334.

²³¹ McKay, *supra* n 228; Mountz, *supra* n 19; Penovic, 'Privatised Immigration Detention Services : Challenges and Opportunities for Implementing Human Rights' in Naylor, Debeljak and Mackay (eds), *Human Rights in Closed Environments*, (2014) 10 at 46; Van Berlo, *supra* n 2; Welch, *supra* n 1.

²³² OHCHR, 'Cancellation of the First Official Visit to Nauru by the UN Working Group on Arbitrary Detention', 9 April 2014, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14495&LangID=E [last accessed 11 February 2016]; Whyte and Cox, 'Gillian Triggs Accuses Government of Pulling Strings to Deny

organisations,²³³ human rights advocates,²³⁴ and researchers.²³⁵ Nauru has furthermore raised the non-refundable visa application fees for journalists in January 2014 with 4000%, from AUD\$200 to AUD\$8000.²³⁶ In addition, Nauru has a limited media scene and freedom of press.²³⁷ It is thus simultaneously ‘difficult to look *into* and to look *out of*’ the RPC.²³⁸ Information only comes out incidentally through whistle-blowers and leaked reports that were never meant for publication.²³⁹ It is therefore difficult to see whether human rights abuses occur and which actors contribute to potential abuses – a problem which has been labelled as one of ‘many hands’.²⁴⁰ This lack of transparency and comprehensibility of the nodal governance system makes it difficult not only to assert legal responsibility (as it inhibits an assessment of the factual power arrangements and allows the various involved actors to refer to one another as the relevant responsible actor, as outlined above), but also to hold States accountable in practice (as abuses remain covert and do not surface).²⁴¹ It is as such difficult for the inside world to speak out and for the outside world to either witness or hear about concrete human rights abuses and to subsequently step in to hold actors accountable, no matter how clear that actor’s responsibility is on the legal plane.

UN’, *Sydney Morning Herald*, 9 April 2014, available at: www.smh.com.au/federal-politics/political-news/gillian-triggs-accuses-government-of-pulling-strings-to-deny-un-20140409-zqsr5.html [last accessed 11 February 2016].

²³³ Amnesty International, ‘Nauru’s Refusal of Access to Detention Centre Another Attempt to Hide Conditions’, 29 April 2014, available at: www.amnesty.org/en/news/nauru-s-refusal-access-detention-centre-another-attempt-hide-conditions-2014-04-29 [last accessed 9 February 2016]; Human Rights Law Centre, ‘The Pacific Non-Solution: Two Years On, Refugees Face Uncertainty, Restrictions on Rights’, 16 July 2015, available at: hrlc.org.au/the-pacific-non-solution-two-years-on-refugees-face-uncertainty-restrictions-on-rights/ [last accessed 11 February 2016].

²³⁴ Connell, *supra* n 32.

²³⁵ Van Berlo, *supra* n 25.

²³⁶ Jabour and Hurst, ‘Nauru to Increase Visa Cost for Journalists from \$200 to \$8,000’, *Guardian*, 8 January 2014, available at: www.theguardian.com/world/2014/jan/09/nauru-visa-to-cost-8000 [last accessed 11 February 2016].

²³⁷ Freedom House, ‘Nauru’, 2014, available at: freedomhouse.org/report/freedom-press/2014/nauru [last accessed 9 February 2016].

²³⁸ Van Berlo, *supra* n 2 at 96; see also Penovic, *supra* n 231.

²³⁹ Doherty, ‘Leaked Transcripts from Moss Review Reveal Nauru at Risk of ‘Dramatic Meltdown’’, *Guardian*, 24 March 2015, available at: www.theguardian.com/australia-news/2015/mar/24/leaked-transcripts-from-moss-review-reveal-nauru-at-risk-of-dramatic-meltdown [last accessed 9 February 2016]; Farrell, Bull, and Bacon, ‘Salvos Worried About Nauru Chaos’, *NewMatilda*, 25 June 2013, available at: www.newmatilda.com/2013/06/25/salvos-worried-about-nauru-chaos [last accessed 9 February 2016]; Isaacs, *The Undesirables: Inside Nauru* (2014); Iser et al., ‘Life on Manus Island a State of Despair, Documents Show’, *The Citizen*, 29 May 2014, available at: www.thecitizen.org.au/news/life-manus-island-state-despair-documents-show [last accessed 11 February 2016]; Marr, ‘Doctors Reveal ‘Harmful’ Standards of Medical Care for Asylum Seekers’, *Guardian*, 19 December 2013, available at: www.theguardian.com/world/2013/dec/19/revealed-doctors-outrage-over-unsafe-refugee-patients [last accessed 11 February 2016].

²⁴⁰ Thompson, ‘Moral Responsibility of Public Officials: The Problem of Many Hands’ (1980) 74 *American Political Science Review* 905.

²⁴¹ Den Heijer *supra* n 28 at 294; Penovic, *supra* n 231; McKay, *supra* n 228 at 624. As McKay notes at 633, ‘individuals within closed environments are susceptible to human rights violations due to the non-public nature of these sites and their inherent power imbalances, and the resulting individuals’ own disempowerment and lack of voice’.

Remarkably, after its contract at the RPC ended, Save the Children Australia explicitly called upon the Australian Government to increase transparency at the RPC and to introduce mandatory reporting by all of the service providers on human rights.²⁴² The problematic lack of transparency and openness is thus not only ascertained by external commentators, but also explicitly acknowledged by a former actor in the field.

5. CONCLUSION: HUMAN RIGHTS AS LOST CAUSE?

Whereas some consider the concept of human rights as a conundrum with internationalist allure, others consider it to be a panacea for governance accountability. When international human rights law gained momentum, the focus was very much on the latter: curtailing the public powers of sovereign States as the prime (and arguably sole) duty bearers.²⁴³ In contemporary reality, however, sovereign territorial States have long ceased to be – or, on a different reading, never in fact were – the primary actors with a significant impact on human rights entitlements. Processes of privatisation and extra-territorialisation nowadays cross and bridge the borders between sovereign territories and between the public and private spheres, thereby diffusing the State's role as main governance actor. The Nauru RPC provides an accurate example of both developments, combining the extraterritorialisation and privatisation of immigration control in the Australian-Pacific realm.

This article has questioned whether international human rights law continues to constitute a proper framework of legal responsibility and accountability in such cases – especially as it is often relied upon in pressuring Australia,²⁴⁴ Nauru²⁴⁵ and the involved private contractors.²⁴⁶ On the level of responsibility, both jurisdiction and attribution constitute significant obstacles. Private contractors do not carry human rights duties as of yet and can thus not be held responsible under international human rights law. The jurisdiction of Nauru is presumed on the basis of territoriality, whilst establishing Australia's jurisdiction requires the effective control over territory and/or persons – which, in turn, depends on a difficult-to-perform assessment of the constantly changing factual arrangements and power structures. In relation to attribution, the conduct of *de jure* or *de facto* state actors can be attributed to the respective State, but in this case, most human rights-sensible conduct is exercised by private contractors.²⁴⁷ For both the attribution of their conduct to either Australia or Nauru and the determination of derived responsibility, one of the various attribution tests needs to be fulfilled, which is however likewise

²⁴² Save the Children, 'In Its Last Act on Nauru, Save the Children Calls for Independent Oversight across All Australian-Run Processing Centres', 31 October 2015, available at: www.savethechildren.org.au/about-us/media-and-publications/media-releases/media-release-archive/years/2015/in-its-last-act-on-nauru,-save-the-children-calls-for-independent-oversight-across-all-australian-run-processing-centres [last accessed 11 February 2016].

²⁴³ De Feyter and Gómez Isa, supra n 160; Hallo de Wolf, supra n 36; McGrew, supra n 160; Mégret, supra n 160; Ronen, supra n 160; Subedi, supra n 123.

²⁴⁴ Dastyari, supra n 152; Francis, supra n 2; Gleeson, supra n 64.

²⁴⁵ Dastyari, supra n 152; Taylor, supra n 5.

²⁴⁶ Narayanasamy et al., supra n 1.

²⁴⁷ Doherty and Davidson, supra n 212; McKenzie-Murray, supra n 212; Moss, supra n 55; Narayanasamy et al., supra n 1.

problematic because of the constantly changing factual governance arrangements. This is not different in relation to positive obligations: to establish responsibility on this basis, the factual arrangements and systems in place are decisive yet significantly opaque.

For establishing international human rights responsibility, the biggest problem is therefore not the mere reality that additional States and private actors are involved. Rather, it is the fact that in such cases, the avenues to address responsibility under international human rights law require a factual assessment of effective control (and thus of the way in which the RPC is governed). Nodal governance theory shows, however, that power and control are everywhere, not with a particular actor – at least not at all times. This inhibits distilling effective control on behalf of a specific actor. Transfield/Broadspectrum has for example taken over the responsibilities of other private contractors in providing a number of services and is consequently potentially exercising a more dominant power and a larger extent of control than before. Likewise, Nauru has increasingly taken over responsibilities from the Australian government over the past years, including in relation to managing the centres at an operational level²⁴⁸ and in relation to the processing of asylum claims.²⁴⁹ Also, Nauru increasingly acknowledges its own active and leading role in requesting Australia to provide services and support.²⁵⁰ The Nauruan Government even issued a media release in relation to its asylum processing with the title ‘Nauru is not Australia’, in which it emphasised its position in the RPC arrangements through ‘a simple message - remember that Nauru is not a state of Australia!’²⁵¹ As such, Nauru’s role in governing the RPC has arguably become more prominent and leading – although the question remains whether these transfers of responsibilities are genuine or amount to mere window-dressing. The Australian High Court has recently answered this question in the negative: transferred asylum seekers should, in the Court’s opinion, be regarded as ‘detained in custody under the laws of Nauru’²⁵² and subjected to ‘the independent exercise of sovereign legislative and executive power by Nauru’.²⁵³ It also found that there was no joint governmental authority being exercised: only the Nauruan government exercises authority at the RPC.²⁵⁴

In the end, it remains unclear how exactly the mix of various mentalities, technologies, resources, institutional structures and goals of the plethora of actors plays out in practice and who, thus, potentially controls whom or what at which stage. This article has hence explicitly not argued that it is impossible to

²⁴⁸ DIBP, supra n 55 at 11; Nauru Government Information Office, supra n 56.

²⁴⁹ Nauru Government Information Office, ‘Transferee Interviews Commence at Nauru Processing Centre’, *Nauru Bulletin*, 27 November 2012, available at: www.naurugov.nr/media/18513/nauru_bulletin_23_27nov2012_74.pdf [last accessed 11 February 2016].

²⁵⁰ Nauru Government Information Office, ‘Nauru Looks at RPC Issues’, *Nauru Bulletin*, 27 November 2012, available at: www.naurugov.nr/media/18513/nauru_bulletin_23_27nov2012_74.pdf [last accessed 11 February 2016].

²⁵¹ Government of Nauru, ‘Nauru is Not Australia – Government’, 28 October 2015, available at: www.naurugov.nr/government-information-office/media-release/nauru-is-not-australia-government.aspx [last accessed 11 February 2016].

²⁵² *Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors*, supra n 229 at 32.

²⁵³ *Ibid* at 34.

²⁵⁴ *Ibid* at 35.

determine human rights responsibility, but rather that it can continuously change and is difficult to establish given the fluctuating and hybrid arrangements and power structures. As a result, the rules of international human rights law allow a certain leeway to States to dispute and ignore responsibility both in general and in concrete cases. As Gammeltoft-Hansen points out, ‘assessing what may reasonably be expected from a state is open to contestation and States have been keen to argue that they were either unknowing or incapable of taking action to prevent human rights abuses’.²⁵⁵ This leads to the danger that

*the State that has chosen to privatize will argue that it is not responsible for the decisions or conduct of privatized actors, since it no longer exercises those activities, while the latter could argue that they are not responsible since they are just private actors and the State is the one which should be held accountable.*²⁵⁶

Both Australia and Nauru have in fact denied responsibility.²⁵⁷ That is the reality, and arguably the weakness, of international human rights law in a nodal setting. As Kennedy puts it in the context of privatisation, if we do not come to terms with this reality, ‘we will find ourselves dealing with Nineteenth century animals in a twenty-first century legal zoo’.²⁵⁸

Yet even if these problems can be overcome, human rights monitoring in the Australian-Pacific context remains weak and does not produce binding judgments or penalties. In addition, many human rights abuses remain hidden because of the nodal field’s limited transparency and openness, which beats even the most absolute norm and the clearest legal responsibility. Establishing *de jure* responsibility is thus extremely difficult, but even if one succeeds, accountability is not effectuated with sufficient force *de facto* because many abuses remain undetected whilst those detected generally are not enforced through binding sanctions. This is detrimental to the legal protection of human rights, as treaty provisions remain paper tigers without proper enforcement of sanctions in cases of non-compliance.²⁵⁹ No matter the noble promises of internationally codified human rights – in the end of the day, you cannot eat them²⁶⁰ nor use them as physical shields against abuse or maltreatment. Human rights violations accordingly ‘all too often seem to make a mockery of the proliferation of procedures, committees and commissions on human rights’.²⁶¹

The conclusion is hence a rather pessimistic one: international human rights law’s value as legal protection mechanism in the context of the Nauru RPC is limited at best, seriously flawed at worst. The

²⁵⁵ Gammeltoft-Hansen, supra n 113 at 139.

²⁵⁶ Hallo de Wolf, supra n 36 at 239.

²⁵⁷ Van Berlo, supra n 2; Gleeson, supra n 64; Den Heijer, supra n 28 at 294; Narayanasamy et al., supra n 1.

²⁵⁸ Kennedy, ‘When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships’ (2001) 11 *George Mason University Civil Rights Law Journal* 203 at 223.

²⁵⁹ Umozurike, ‘The Protection of Human Rights under The Banjul (African) Charter on Human and Peoples’ Rights’ (1988) 1 *African Journal of International Law* 65 at 82–3.

²⁶⁰ Pieterse, ‘Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited’ (2007) 29 *Human Rights Quarterly* 796.

²⁶¹ Oberleitner, supra n 8 at 249.

system of human rights is based on faith²⁶² and hope²⁶³ – yet in this context, such faith and hope materialize insufficiently on the legal plane.

At this point, two suggestions are in place. First, as explored in the literature on ‘cimmigration’, immigration control increasingly merges with crime control instruments, rationales and structures.²⁶⁴ Immigration detention facilities thus increasingly shows resemblance to prisons as they both functioning as exclusionary detention facilities for marginalised communities and perceived security threats, not only in Australia but also elsewhere.²⁶⁵ Whilst such a development is often criticized, it may also provide a pathway to re-conceptualize asylum seeker protection. Indeed, in a variety of jurisdictions, criminal procedural law generally provides those detained with more protection than administrative immigration law, including access to a lawyer and to courts.²⁶⁶ Maybe – and this is, if anything, a hypothetical position – one should thus on the basis of the cimmigration development divert attention from international human rights law as a legal framework of accountability towards the particularities of the different branches of law under which people are detained. Wilsher already seems ahead of this debate: he argues that immigration detention should be tied more closely to criminal law, and states that ‘in this important sense immigration detention has not been criminalized enough’.²⁶⁷

Second, does the foregoing mean that human rights have reached their limits and are largely redundant in nodal settings? No, not necessarily. Whilst human rights are codified in international law, they are not necessarily a mere legal concept but can also have a beneficial influence and effect outside the legal realm. It can well be imagined, for example, that human rights play a crucial role in the discourse²⁶⁸ and interaction between the various nodal actors, not necessarily because these actors may

²⁶² Hathaway, *supra* n 6 at 2025.

²⁶³ Tomuschat, *supra* n 161 at 71.

²⁶⁴ Stumpf, *supra* n 21; Aas, ‘‘Cimmigrant’ Bodies and Bona Fide Travelers: Surveillance, Citizenship and Global Governance’ (2011) 15 *Theoretical Criminology* 331; Van der Woude, Van der Leun and Nijland, ‘Cimmigration in the Netherlands’ (2014) 39 *Law & Social Inquiry* 560; Aiken, Lyon, and Thorburn, *supra* n 36; Van Berlo, *supra* n 2; Welch, *supra* n 1.

²⁶⁵ Aas, *supra* n 264; Van Berlo, *supra* n 34; Welch, *supra* n 1; Leerkes and Broeders, ‘A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention’ (2010) 50 *British Journal of Criminology* 830; Chelgren, ‘Preventive Detention Distorted: Why it is Unconstitutional to Detain Immigrants without Procedural Protections’ (2015) 44 *Loyola of Los Angeles Law Review* 1477; McLeod, ‘The U.S. Criminal-Immigration Convergence and its Possible Undoing’ (2012) 49 *American Criminal Law Review* 105; Garland, ‘Introduction; The Meaning of Mass Imprisonment’, in Garland (ed), *Mass Imprisonment: Social Causes and Consequences*, (2001) 1.

²⁶⁶ Bosworth, ‘Human Rights and Immigration Detention in the United Kingdom’, in Dembour and Kelly (eds), *Are Human Rights for Migrants?*, (2011) 165; Chacón, ‘Managing Migration Through Crime’ (2009) 109 *Columbia Law Review* 135; Chelgren, *supra* n 265; Hernández, ‘Immigration Detention as Punishment’ (2014) 61 *UCLA Law Review* 1346; Wilsher, *Immigration Detention: Law, History, Politics* (2011); Zedner, ‘Seeking security by eroding rights: the side-stepping of due process’ in Goold and Lazarus (eds), *Security and Human Rights*, (2007) 257; Bianchini, ‘Legal Aid for Asylum Seekers: Progress and Challenges in Italy’ (2011) 24 *Journal of Refugee Studies* 390; Boone, ‘Penitentiaire beginselen en de bewaring van vreemdelingen’ (2003) 6 *PROCES: Tijdschrift voor Strafrechtspleging* 301.

²⁶⁷ Wilsher, *supra* n 266 at 168.

²⁶⁸ In this regard, it has been noted that human rights discourse ‘continues to flourish’: Posner, *supra* n 7. At the same time, this runs the risk of turning human rights into an ‘empty vessel’: Van Berlo, ‘The Danger of Over-

be held accountable for them under international law but because the language of human rights carries significant symbolic power and rights-respecting behaviour may be considered a condition or advantage when awarding a (sub)contract to a private actor.²⁶⁹ The contrary can also be imagined: rights can be used as argument or frame of reference to explain away injustices and moral wrongs: the minimum standards of human rights can, as such, discursively be reframed as the maximum standard of protection owed.²⁷⁰ Whilst beyond the scope of the present article, these potential extra-legal functions need to be empirically examined to further assess the actual value and impact of the human rights concept in a concrete context. In particular in nodal settings, such additional roles may constitute a cause for more overall optimism or further pessimism about the actual merit of human rights.²⁷¹ With nodal detention increasingly being utilized, the time has indeed come to combine the legal with the empirical plane in order to draw conclusions on whether human rights constitute a durable normative, conceptual and practical framework to provide detained individuals with adequate protection in the long run.

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Inclusive Human Rights', *Blog: Leiden Law Blog*, 16 September 2015, available at: <http://leidenlawblog.nl/articles/the-danger-of-over-inclusive-human-rights> [last accessed 11 February 2016]. In particular, expectations about what human rights (law) can achieve have, as a result of the increased attention, inflated to unrealistic dimensions: Witteveen, *De Wet als Kunstwerk: Een andere filosofie van het recht* (2014) at 14.

²⁶⁹ As Witteveen puts it, '[t]he repeated ritual confirmation of the universal ideal of human rights, notwithstanding the precise formulations and in spite of practices that violate the set norms, results in the gradual creation of a language that every party to the negotiations will have to use' (translated from the original Dutch text): Witteveen, *supra* n 268 at 153.

²⁷⁰ Posner, *supra* n 7.

²⁷¹ In her work, Dembour outlined four 'schools of thought' on human rights that could be indicative for the various roles and functions that the human rights notion can fulfil beyond the legal realm: see Dembour (2006; 2010), *supra* n 9. Understanding human rights respectively as natural entitlements, deliberative principles, protest claims and discursive expressions, these schools could function as a basis for further analysis of the actual value and merit of human rights as a multi-faceted, multi-interpretable and cross-disciplinary concept.