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Human rights elephants in an era of globalisation : commodification, crimmigration, and human rights in confinement

Berlo, P. van

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Human Rights Elephants in an Era of Globalisation

Human Rights Elephants in an Era of Globalisation

Commodification, Crimmigration, and
Human Rights in Confinement

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List of abbreviations

ABF	Australian Border Force
ACHR	Inter-American Convention on Human Rights
ADF	Australian Defence Force
AFP	Australian Federal Police
AHRC	Australian Human Rights Commission
AMES	Adult Multicultural Education Service
ASRC	Asylum Seekers Resource Centre
ATS	Alien Tort Statute (United States)
CAP	Claims Assistance Provider
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CATee	Committee Against Torture
CCA	Corporate Corrections of America
CDA	Critical Discourse Analysis
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEO	Chief Executive Officer
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union
CIA	Central Intelligence Agency (United States)
CJEU	Court of Justice of the European Union
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSR	Corporate Social Responsibility
DCMF	Design, Construction, Management, and Financing model
DHA	Department of Home Affairs (Australia)
DHS	Department of Homeland Security (United States)
DIAC	Department of Immigration and Citizenship (Australia)
DIBP	Department of Immigration and Border Protection (Australia)
DJI	Dienst Justitiële Inrichtingen (Dutch Custodial Institutions Agency)
DOJ	Department of Justice (United States)
DV&O	Dienst Vervoer en Ondersteuning (Dutch Transportation and Support Service)
ECHR	European Convention on Human Rights

ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FNP	Foreign National Prisoner
FRY	Federal Republic of Yugoslavia
G4S	Group 4 Securicor
HCA	High Court of Australia
HCJ	High Court of Justice (Israel)
HIV	Human Immunodeficiency Virus
HRC	United Nations Human Rights Council
HRCEE	United Nations Human Rights Committee
HRLC	Human Rights Law Centre
HRW	Human Rights Watch
HU	Hermeneutic Unit
IACommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IBM	International Business Machines Corporation
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICTY	International Criminal Tribunal for the former Yugoslavia
IHMS	International Health and Medical Services
IHRL	International Human Rights Law
ILC	International Law Commission
ILO	International Labor Organization
IMA	Irregular Maritime Arrival
INS	Immigration and Naturalization Service (United States)
IOM	International Organization for Migration
IRC	Immigration Removal Centre (United Kingdom)
KDI	Kriminalomsorgensdirektoratet (Norwegian Correctional Service)
KPI	Key Performance Indicator
KRUS	Kriminalomsorgens høyskole og utdanningscenter (Training Institute of the Norwegian Prison System)
MDA	Multicultural Development Association
MNF	Multi-National Force
MOC	Migrants Operation Centre (at Guantánamo Bay)
MoU	Memorandum of Understanding
MP	Member of Parliament
MRT	Moldovan Republic of Transnistria
NATO	North Atlantic Treaty Organization
NCP	National Contact Point
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution

NKR	Nagorno-Karabakh Republic
NPF	Nauru Police Force
NPFR	Nauru Police Force Reserve
OAS	Organization of American States
OECD	Organization of Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
OSB	Operation Sovereign Borders (Australia)
OSSTT	Overseas Services to Survivors of Torture and Trauma
PI	Penitentie Inrichting (Dutch Penitentiary Institution)
PNG	Papua New Guinea
PPP	Public-Private Partnership
PTSD	Post-Traumatic Stress Disorder
QC	Queen's Counsel
RAID	Rights and Accountability in Development
RCOA	Refugee Council of Australia
RPC	Regional Processing Centre
SCA	Save the Children Australia
SFIR	Stabilization Force Iraq
TNC	Transnational Corporation
Trb.	Tractatenblad (Dutch Treaty Series)
TRNC	Turkish Republic of Northern Cyprus
TWA	Trans World Airlines
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNGA	United Nations General Assembly
UNGP	United Nations Guiding Principles on Business and Human Rights
UNHCR	United Nations High Commissioner for Refugees
USP	University of the South Pacific
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

Human rights elephants in a globalising world

1.1 INTRODUCTION

An elephant that is deprived by poachers of its tusks, dies. “The only practical way of removing ivory from an elephant is by killing it”, as Harland observed.¹ Even in rare occasions where one succeeds in removing a wild elephant’s tusks without killing it, which requires the highest standards of clinical and chirurgical care, wild elephants ultimately need their tusks for their survival.² Tuskless elephants, therefore, are generally dead elephants.³ In what can be labelled an immensely saddening development at best, recent decades have consequently witnessed the drastic decline of elephant populations as a result of increasing poaching activities driven by demands for ivory. Such demands are, on many accounts, spurred by globalisation: the demand for ivory, most prominently in parts of Asia, grew particularly in the 1970s and 1980s and led to the steadfast export of African tusks.⁴ *Inter alia* as a result of the poaching of one of their most valuable assets, elephants, being the largest and one of the most majestic land animals on this planet, have consequently become an endangered species.

This research, however, is not about animal rights but, somewhat ironically, about *human* rights. Like elephants, human rights have for a long time been considered to be amongst the most impressive and majestic entities of their kind. Like elephants, they may be regarded as somewhat larger than life. Like elephants, however, they also have potentially become endangered as a result of contemporary globalisation developments. The rise of neo-liberal ideologies, transnational stakeholders, and novel categories of belonging have, as this book will argue, indeed potentially forced the domain of human rights into a precarious position. Whereas the poaching threats to elephants have raised alarming prospects for the future, with the potential extinction of the species altogether, in the context of human rights the impact of globalisation is less obvious. Are human rights poached of their most valuable assets under the

1 Harland, 1994, p. 21.

2 Heimert, 1995, p. 1474.

3 Whenever this book speaks about ‘tuskless elephants’, it refers to elephants that were *deprived* of their tusks through poaching, not to elephants that were naturally born without tusks. See also Raubenheimer & Miniggio, 2016.

4 Stiles, 2004, pp. 309–310.

gaze of globalisation, and if so, does that mean that they will inevitably meet their end? This research sets out to denote the impact of globalisation developments on human rights, which may be conceived of as the 'rights elephants' of our times – being grand *and* challenged, demanding reverence *and* commiseration, symbolising tranquillity *and* fragility.

In pursuing this endeavour, it would make little sense to solely focus on human rights in an abstract fashion. They constitute, in essence, a protection framework for people of flesh and blood, not for abstracted conceptions of humanity. They *matter*, accordingly, on the ground, not high up in the air where they may remain largely unattainable and illusionary. Therefore, research in this field should ideally revolve around real-life settings in which human rights protection is of key importance and in which the effects of globalisation are tangible. In this book, immigration detention facilities and prisons are identified as prime examples where such conditions are met. As will be outlined below, human rights arguably matter most for those confined, yet various sub-trends of globalisation mount potentially powerful challenges to accountability under, and the effectiveness and legitimacy of, human rights in contemporary contexts of confinement. By focussing on immigration detention and imprisonment as two forms of confinement, the research thus seeks to understand how globalisation trends impact upon human rights entitlements in sites where they ought to play a vital role as a protection mechanism. In doing so, particular attention will be provided to two case studies that embody transnational cooperation in the fields of respectively immigration detention and imprisonment: an Australian-Nauruan immigration detention facility on Nauru ('RPC Nauru'), and a Norwegian-Dutch prison in the Netherlands ('PI Norgerhaven'). Both case studies will be introduced below.

This book is henceforth concerned with human rights in particular settings of confinement, although it is, ultimately, more encompassing. It essentially deals with the state of human rights in an era of globalisation, in which neo-liberal paradigms, transnational operations, changing ideas of belonging and citizenship, eclectic discourses, and novel fears and anxieties have rapidly changed the social, political, and economic realities that govern our world. This, it may be expected, has had its bearing on the role of human rights in present-day society. Indeed, when the legal codification of human rights had its heyday in the late 1940s, the geopolitical reality much less reflected the cosmopolitan allure of contemporary globalisation. Rather, human rights – at least in their capacity *qua* law – were shaped in a way that focused primarily on the protection of equal individuals present within a territory from and by territorial states, which is in turn reflected in the fundamental tenets that underly international human rights law as will be further explored in this book. Given that the world is an ever-changing place, and since globalisation has significantly altered the way in which power is exercised and the deservingness of individuals is regarded as Part I of this book will address, the question as to human rights' relevance thus becomes relevant in its own right. This is not

to say that globalisation necessarily has had a *negative* impact overall, including in contexts of confinement: for instance, involving multiple public and/or private actors in the confinement of particular populations could be regarded as more effective, more efficient, and in line with concurring globalisation developments – whether it be technological innovations, the advancement of neo-liberal thinking, or changing geopolitical realities that largely seem to have in common that the world has become a smaller place.⁵ Still, from a human rights perspective, such developments should be approached with caution or even suspicion, as they raise questions as to whether human rights are sufficiently equipped to deal with these novel, globalisation-inspired constructions of confinement in pursuing their main goal, i.e. to provide protection to all against abuses and violations of basic needs and entitlements.⁶ In other words, the question arises to what extent globalisation developments deprive the ‘human rights elephant’ of its protection value as one of its core assets, and, consequently, what this means for its life expectancy and future prospects. Can the human rights elephant, faced by globalisation challenges, survive?⁷

1.2 FOCUS OF THIS RESEARCH

1.2.1 Focusing on contexts of confinement

1.2.1.1 *A choice for confinement*

This book looks at human rights in settings of confinement. The choice to focus on confinement may be questioned, however, not only because globalisation has implications for a wide range of social interaction and can be recognised in many aspects of contemporary daily life both in the global North and South, but also because human rights are – or should be – of central importance in a plethora of situational contexts beyond settings of confinement. Indeed, the contemporary normative omnipresence of human rights is undeniable: they have permeated uncountable instances of social and economic interaction and have become a cornerstone of scholarly and professional attention both within

5 Langford, Vandenhole, & Scheinin, 2013, p. 4.

6 Although there is no consensus on what human rights precisely entail, wide-spread support amongst scholars, activists, and others exists that they at least envisage to protect individuals against undue infringements of their dignity and wellbeing by providing basic entitlements to all: see, for example, Blau & Esparza, 2016, p. xi; Brysk, 2002, p. 3; Černič, 2015, p. 70; Gewirth, 1992, p. 10; Jägers, 2002, p. 256; Landman & Carvalho, 2010, p. 1; McKay, 2015, p. 620; Wallace, 2002, p. 232. Human rights and human dignity are however not necessarily equivalent concepts, nor can human dignity only be achieved via the path of human rights: see Donnelly, 1982.

7 The question whether human rights can survive was previously addressed by Gearty, albeit with a completely different focus: see Gearty, 2006.

and far beyond the discipline of law. They feature, furthermore, prominently in political and commercial agendas, where they have become key standards of what might be vaguely considered the ‘good’, the ‘appropriate’, and the ‘just’ in societies that are characterised by their emancipatory endeavours.⁸

Whilst their omnipresence is henceforth undeniable, human rights ultimately remain most pressing in situations where individual liberties are significantly constrained by the state. The protection of an individual’s liberty and dignity is indeed most urgent where state authorities limit the individual’s opportunities to enjoy these very same standards. The state generally has multiple avenues to do so, for example through confinement in so-called ‘total institutions’.⁹ Such confinement is an expression of state power *par excellence* involving power relations and physical infrastructures with on many occasions an intentional exclusionary, coercive, and/or punitive nature.¹⁰ In such situations, human rights are particularly susceptible to 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”.¹¹ Whilst human rights are thus arguably important to all, they are particularly important for those confined given their relative lack of autonomy and the existing power imbalances in confinement.

Human rights standards have therewith become prominent and pivotal tools in scrutinising government’s behaviour in the area of confinement.¹² A significant proportion of scholarly attention has been devoted to scrutinising detention settings in light of human rights standards, providing empirical,¹³ descriptive, and normative accounts of contemporary detention contexts.¹⁴ Viewed in this light, it makes sense to focus on confinement realms, as it are those realms where the exercise of coercive power is most visible and has implications for nearly all aspects of social life. More specifically, this book looks at the relevance of human rights in prisons and immigration detention centres as two particular types of confinement.¹⁵ The choice for a focus on these forms of confinement, as opposed to other types of total institutions,

8 Wallace, 2002, p. 227; L. Weber, Fishwick, & Marmo, 2014, p. 5.

9 That is to say, institutions that govern every aspect of life: see Goffman, 1957; see also Cornelisse, 2011, pp. 339–340; Mouzelis, 1971; Raoult & Harcourt, 2017.

10 Bennett, 2016; Brems, Sottiaux, Vanden Heede, & Vandenhoe, 2005; Cornelisse, 2011; McKay, 2015; Naylor, 2014.

11 McKay, 2015, p. 633.

12 Cassese, 2005, p. 375.

13 ‘Measuring human rights’ has become a significant strand of research with a self-standing methodological framework and a variety of methods: see, for example, Landman and Carvalho, 2010.

14 See, for example, Brané & Lundholm, 2008; Brems et al., 2005; Grange & Majcher, 2017; Naylor, 2015; Naylor, Debeljak, & Mackay, 2014.

15 Consequently, where this book speaks about ‘confinement’, it refers to both immigration detention and imprisonment unless otherwise noted.

is informed by the framework of crimmigration that in part guides the inquiry central to this book and that will be elaborated upon later.

1.2.1.2 Some remarks on confinement in migration control

Whilst the confining capacities of prisons – as part of the punitive criminal justice system – are rather self-explanatory, some further remarks are due in relation to the confinement characteristics of immigration control.

Contrary to imprisonment, immigration control for a long time attracted little attention or concern. Up until the mid-nineteenth century, the border was generally not seen as a core site of regulation and the alien was, except for enemy aliens during times of war, not seen as a prime subject of regulation.¹⁶ The introduction of explicit regulations and policies on international migration – and the related notion of irregular migration – only occurred in the latter half of the nineteenth century.¹⁷ Even more so, in various countries asylum-focused legislation has only been enacted much later.¹⁸ This does not mean that there was no migration control prior to the late nineteenth century at all, yet such processes of control were to be found much more at the internal level or at the level of cities, with membership regimes being developed at the local rather than the national level.¹⁹

As Wilsher almost self-evidently phrases, “[u]ntil there was immigration control, there could be no immigration detention”.²⁰ In various countries, at least in the global North, the converse appears however also to be true: when there was immigration control, there was also immigration detention. In various countries, when international migration came to the forefront of the political agenda, immigration detention indeed grew exponentially.²¹ As Turnbull highlights, the use of immigration detention has “increased dramatically worldwide” since the late 1990s.²² In the wake of immigration control, detention seems hence to have rapidly evolved into a primary response to human mobility and has nowadays to a certain extent become a habitual or even preferred means of controlling certain types of migration.²³

This should be nuanced and contextualised in a number of ways, however. First, to say that immigration detention has become the preferred policy option does not mean that *all* migration is subjected to such forms of control. To the contrary, many countries nowadays apply a bifurcated approach to migration

16 Wilsher, 2011, p. 1.

17 Kraler & Hollomey, 2010, p. 41.

18 Bacon, 2005, p. 2; Silverman & Nethery, 2015, p. 1.

19 Lucassen, 2016, p. 79.

20 Wilsher, 2011, p. 1.

21 Conlon & Hiemstra, 2017, p. 1; Michael Flynn, 2014, p. 170.

22 Turnbull, 2017, p. 2. See also Silverman & Nethery, 2015.

23 Ackerman & Furman, 2013, p. 251; Conlon & Hiemstra, 2017, pp. 1–3; De Genova, 2016; Hiemstra, 2016, p. 434.

and border control, making it increasingly easy for some groups to cross the border whilst making it increasingly difficult for others to do so.²⁴ In this sense, detention is generally targeted primarily at the latter group for the purpose of *inter alia* incapacitation, expulsion, and deterrence. The former group, on the other hand, increasingly experiences largely unrestricted and unlimited opportunities to cross-border mobility – not so much *sans papiers* but rather *avec seulement des papiers*. This bifurcated reality should be continuously kept in mind when dealing with issues of migration control and detention: many migration control policies and strategies indeed impact primarily on only a part of those using – or attempting to use – the global mobility infrastructure.²⁵ In chapter 3, this duality will be further explicated and theorised in the context of ‘crimmigration’ as a second development of globalisation.

Second, the terminology of ‘immigration detention’ itself is highly contested given that such detention is used for a wide variety of purposes and a clear definition is lacking.²⁶ Immigration detention is modelled differently in different contexts and is used for a plethora of migration-related purposes, including “to verify identity, to examine requests to enter a state, to ‘house’ asylum seekers at various stages of a request for refuge, and in order to deport persons whose immigration status is deemed irregular”.²⁷ Consequently, the detained population consists of a “heterogeneous collection of people with a variety of legal statuses including refugees and asylum seekers, former prisoners, migrants with visa problems, and undocumented migrants. They are, however, united in the sense of having a problematic legal identity”.²⁸

Third, there are vast differences between facilities and detention practices across countries. For example, facilities vary widely in size and condition.²⁹ The length of detention may, moreover, differ significantly. In fact, in relation to many countries, it remains unknown what the overall detention capacity is and how many individuals are detained.³⁰ This is in part due to the fact

24 See also De Haas, Natter, & Vezzoli, 2016; Franko Aas, 2011; Van Houtum & Pijpers, 2007, p. 301.

25 See also Spijkerboer, 2018.

26 Sampson & Mitchell, 2013, pp. 99–100.

27 Conlon & Hiemstra, 2017, p. 2. It may however also be used to achieve arguably less legitimate goals such as the deterrence of migration: see Turnbull, 2017, p. 3; Van Berlo, 2015a.

28 Turnbull, 2017, p. 4.

29 Sampson & Mitchell, 2013, p. 100.

30 Sampson & Mitchell, 2013, p. 101. For example, whilst the Global Detention Project attempts to document immigration detention figures in all countries in the world, it is only able to do so in relation to a limited number of countries. See, for the available data, the individual country reports at <https://www.globaldetentionproject.org/> (last accessed 13 February 2019).

that scholarship on the issue remains modest in scope and has primarily focused on particular countries in the global North.³¹

1.2.2 Focusing on the 'glocal' level

Globalisation is a central theme of this book. As a phenomenon, globalisation has gained significant attention over the past decades: in fact, it has become commonplace to talk about an 'era of globalisation'.³² Although significant definitional differences continue to exist, globalisation by and large entails that economic and social interaction is increasingly international in character and involves an ever-expanding number of actors – including states, companies, NGOs, international organisations, and individuals – both at home and abroad.³³ These actors, moreover, interact in novel ways, which comes to the fore in the identified shift from 'government' to governance'.³⁴ This shift includes the changing omnipresence of the nation state, the ever-expanding neo-liberal responsabilisation of private parties, the increasing complexity of supranational organisations as well as of transnational and international cooperation, and the wholesale diffusion of authority. This is not to say, however, that globalisation is somehow a new phenomenon – to the contrary, it has arguably been around for at least centuries – but its development is certainly stronger and faster than before.³⁵ Globalisation thus denotes rapidly shifting forms of human contact and signifies "a set of social processes that transform our present social condition of conventional nationality into one of globality".³⁶ Whereas globalisation has consequently in a sense sewn a variety of local contexts together, it has however simultaneously created greater disparity on the socio-economic plane: global inequality seems to have accelerated under the gaze of globalisation,³⁷ which in part may be attributed to the influence of transnational 'moral entrepreneurs' that emanate from unequal power relations amongst sovereign nation states.³⁸ When speaking about the 'process' of globalisation, it is thus important to remember that it comprises an inherent duality: globalisation involves multiple – often contradictory and

31 Other contexts, such as the use of detention in various contexts of South-South migration, remain largely underexplored. See also Ryburn, 2016, p. 48. See, more generally, also Woldemariam, Maguire, & Von Meding, 2019.

32 See for example O'Neill, 2016, p. 7; Scheper, 2015, p. 741.

33 Coomans, 2011, p. 2. In this sense, we are rapidly moving towards a world that is "increasingly interconnected": Furman, Epps, & Lamphear, 2016, p. 3.

34 Vandenhoe & Benedek, 2013, p. 366.

35 Brysk, 2002, p. 1. Some have traced globalisation back to as far as the year 1000 CE: see Stearns, 2010, p. 5.

36 Steger, 2017, p. 12, see also Brysk, 2002, p. 1.

37 Langford, Vandenhoe, et al., 2013, p. 4.

38 Franko, 2017, p. 362; Jakobi, 2013.

schismatic – trends that simultaneously connect and divide, unite and alienate, converge and diverge.

More specifically, this book will argue that two sub-trends of globalisation potentially mount powerful challenges to accountability under, and the effectiveness and legitimacy of, international human rights law in contemporary contexts of confinement in penal and immigration detention realms. Indeed, as chapters 2 and 3 will respectively provide, the juxtaposed developments of ‘commodification’ and ‘crimmigration’ as two sub-trends of globalisation particularly seems to defy, at least in part, the logic and fundamental tenets of what is often considered the hegemonic articulation of human rights – that is to say, of human rights *qua* (international) law.³⁹ In developing such argument, these chapters will highlight why commodification and crimmigration can be considered trends of globalisation, how they have globally evolved, and what they mean in the contexts of the two case studies at hand.

In pursuing the argument that these trends challenge international human rights law’s fundamental tenets, this research will explore the juxtaposed globalisation developments of commodification and crimmigration both as global phenomena – stressing their generalisable and abstracted content – and as local occurrences – pointing out their context-specificity and parochial implications. Thus, on the one hand, as a result of enhanced global connectivity many of today’s problems are internationally oriented and require solutions that are not solely based on the traditional territorial frames that may have proven useful in the past but that take contemporary interconnectedness into account. Examining such issues requires a global orientation and outreach. On the other hand, it would be incorrect to assume that globalisation can only be examined globally. To the contrary, analysis of globalisation should also take the heterogeneity of such processes into account: on many occasions the most profound impacts of global interconnectedness can be found on the domestic and local planes and globalisation should as such be regarded as a process of hybridisation rather than of plain synchronisation.⁴⁰ Even more so, it is highly questionable whether we can even speak about any significant ‘planetary uniformity’ in the first place: generalised and abstracted conceptualisations of global developments often play out very dissimilarly in different localities as a result of highly contextualised conditions and circumstances.⁴¹

39 Given the legal connotation of rights, it is little surprising that legal scholars have been able to take a hegemonic position in the human rights debate, with ‘human rights’ being equated to the positivist notion of (international) human rights law: T. Evans, 2005. In a sense, for many commentators it has consequently become reflexive to – sometimes even exclusively – refer to international human rights law instruments when discussing human rights. Indeed, it by now is generally accepted that human rights are worldwide basic norms and that human rights violations are a matter of international rather than domestic concern: see Van der Vyver, 2013, pp. 399–400.

40 Franko, 2017, p. 356; Nederveen Pieterse, 1995.

41 Franko, 2017, pp. 355–356.

People tend, furthermore, to retreat into their own localities whenever globalisation is regarded as too threatening.⁴² The local and the global should hence not be epistemologically disconnected from one another – to the contrary, deeply globalised phenomena become visible and tangible in local contexts and can henceforth often only be understood when taking such contexts into account.⁴³ Furthermore, homogeneity as a result of globalisation depends on simultaneous processes of heterogenization, as a result of which “[t]he global can be found in the local, and vice versa”.⁴⁴

It is therefore key to look at global, domestic, and parochial domains integrally to disentangle the meaning and scope of globalisation in present-day realities. The need for such multi-level focus has amongst others been denoted in the context of human rights: “the binary global/local is being dismantled, and any understanding of human rights cannot afford to ignore either the local or the global”.⁴⁵ Likewise, in the field of confinement, Franko contends that

“[a]lthough by their nature territorially separate and local, contemporary sites of confinement are marked by increasing diversity and are being profoundly reshaped by the regimes of global mobility and exclusion. Studying such phenomena demands that we transcend the ubiquitous opposition between the local, national, and global, and are able to detect ‘the presence of globalizing dynamics in the thick social environments that mix national and non-national elements’”.⁴⁶

A case study approach, embedded in broader discussions on the development and impact of globalisation, perfectly suits such purpose. By positioning these case studies in the broader globalisation matrix, the fact that globalisation is ultimately contextualised in and by local settings that are of no less importance for the implications of globalisation than the development of globalisation itself can indeed be accounted for. This focus has also been dubbed ‘global localisation’, or ‘glocalisation’, with the ‘glocal’ increasingly becoming an appropriate focal point for analysis.⁴⁷ As mentioned above, two case studies have been selected for present purposes: an Australian-Nauruan immigration detention facility (‘RPC Nauru’) and a Norwegian-Dutch prison (‘PI Norgerhaven’). This selection will be further explained in section 1.5. below.

⁴² Ife, 2009, p. 147.

⁴³ Globalisation is, as it were, “networked through localities”: Schinkel, 2009, p. 797. Put more sceptically, “global solutions to locally produced problems [...] are no longer available. Just the contrary is the case: all localities [...] are now faced with the need to seek (in vain, it seems) *local* solutions to *globally* produced problems”: Bauman, 2004, p. 6. See also De Ridder, 2016b, p. 14.

⁴⁴ Van Steden & De Waard, 2013, p. 299.

⁴⁵ Ife, 2009, p. 147.

⁴⁶ Franko, 2017, p. 356.

⁴⁷ Robertson, 1995; Van Steden & De Waard, 2013, p. 299.

1.3 RESEARCH QUESTIONS

This research focuses on the viability and protection prospects of the ‘human rights elephant’ in an era in which it is, arguably, imperilled. In doing so, as pointed out above, the focus will be on contexts of confinement, as it are these contexts where human rights are arguably of prime importance. More specifically, the focus will be on immigration detention facilities and on prisons. This research will be guided by the following main research question:

To what extent can human rights as a protection framework remain of relevance in contexts of confinement that are characterised by the globalisation trends of ‘commodification’ and ‘cimmigration’?

In order to answer this question, this research will pursue three sub-questions:

1. *To what extent do ‘commodification’ and ‘cimmigration’ challenge the protection value of human rights qua law?*
2. *To what extent has human rights qua law been able to accommodate these challenges within its framework?*
3. *What other protection values may human rights have in settings of confinement?*

Each sub-question is dealt with in a separate part of this book. Part I (dealing with sub-question 1) comprises chapters 2 and 3, Part II (dealing with sub-question 2) comprises chapters 4 to 7 and an intermezzo, and part III (dealing with sub-question 3) comprises chapters 8 and 9. Chapter 10 finishes this book with a conclusion and a number of reflections.

As becomes clear from sub-questions 1 and 2, whilst the notion of ‘human rights’ has been defined in vastly different ways,⁴⁸ the research set out in this book first focuses on the protection value of human rights *qua* law. This approach is based on the hegemonic influence that legal scholarship has had on the course and shape of human rights discussions: indeed, human rights have an almost inherent legal connotation.⁴⁹ In this regard, it has been argued

⁴⁸ Compare, for instance, Blau & Esparza, 2016, p. x; Brysk, 2002, p. 3; Donnelly, 2013, p. 10; Fleiner, 1999, p. 8; Suresh, 2010, p. 1.

⁴⁹ T. Evans, 2005; Ife, 2009, pp. 141–142. Being a relatively recent branch of the sturdy and bulky tree of public international law, international human rights law has rapidly developed as a mechanism to protect individuals from an arbitrary application of power by – in principle – state authorities. It therewith also is a rather peculiar twig of the public international law tree in that it is not primarily concerned with inter-state relations but focuses on individual and collective rights, constituting a significant departure from the common understanding of public international law as the ‘law of nations’ that governs relationships between rulers in an attempt to “structure or at least moderate the relations between kingdoms, principalities, and republics”: J. Crawford, 2012, pp. 3–4.

that the concept of human rights has gradually developed from a doctrine of aspiration to a body of enforceable rights “in the traditional legal sense”.⁵⁰ Legal human rights provisions are as such argued to be the core or even the heart of contemporary human rights understandings.⁵¹ As Ife identifies, this development has to a certain extent resulted in “the marginalisation of other professions and occupations in human rights work”,⁵² an arguably undesirable result that will be countered in Part III of this book. In the first two parts, however, the focus will be on international human rights *law* as the hegemonic articulation of human rights.

It has already been stressed above that this research focuses on the ‘glocal’, looking at processes of globalisation whilst simultaneously focusing on case-study contexts. In dealing with the main question and sub-questions, this book will, accordingly, continuously shift between developments at the macro and the micro level. That is to say, each question is examined by looking at both general patterns *and* local occurrences in the case studies’ contexts, and in doing so, the case studies will be contextualised as being exemplary parts of larger developments. The strength of this approach, in turn, is that it allows for analysis of the ‘glocal’ level: by contrasting local occurrences with general trends, the importance of both global and local developments for processes and impacts of globalisation can be analytically explored. That is to say, both the shaping influence of local features on global dynamics, and the shaping influence of global dynamics on local features, can be included for analytical purposes.

For sub-question 1, this means that the research will examine the processes of ‘commodification’ and ‘crimmigration’ both as global developments that can be denoted in all their hybridity on a macro scale, and as local phenomena materialising in the contextual particularities of the Australian-Nauruan and Norwegian-Dutch case studies. On this basis, the potential challenges of both developments to international human rights law will be formulated. Specifically, the research addresses why both commodification and crimmigration potentially challenge *accountability* under, and the *effectiveness* and *legitimacy* of, international human rights law. In doing so, two fundamental tenets underlying the doctrine of international human rights law will be addressed. First, that human rights are *human* rights: they envisage to protect all individuals against undue infringements of their human dignity by providing basic entitlements.⁵³ In essence, this tenet is a normative one, reflecting the prevailing sentiment and ethic imperative of the post-war 1940s when the grand idea

50 Subedi, 2003, p. 171.

51 A. Buchanan, 2013, p. 274.

52 Ife, 2009, p. 111.

53 Blau & Esparza, 2016, p. xi; Gewirth, 1992, p. 10; Jägers, 2002, p. 256; Landman & Carvalho, 2010, p. 1; McKay, 2015, p. 620. Human rights and human dignity are however not necessarily equivalent concepts, nor can human dignity only be achieved via the path of human rights Donnelly, 1982.

of human rights gained legal foothold at the international level. Second, that human rights are human *rights*: they provide (legal) entitlements to individuals vis-à-vis sovereign states as the primary duty-bearers of human rights obligations.⁵⁴ This tenet reflects the Westphalian idea of the nation state as primary bearer of power that has dominated global politics over the past centuries and to a degree continues to do so.

Whilst both tenets are essential for the character, function, and content of international human rights law, they are at the same time to a large extent paradoxical in nature. This will be the starting point for analysis of sub-question 2, which will provide attention to the extent to which international human rights law has been able to accommodate the challenges of commodification and crimmigration within its framework. In doing so, analysis will again rely on the 'glocal' level: that is to say, attention will be provided both to general developments in (international) human rights law, to the local implications for the Australian-Nauruan and the Norwegian-Dutch case studies, and to the way in which these levels interact.

Sub-questions 3 is of a slightly different nature in that it poses a rather ontological and epistemological question as to the nature of human rights. That is not to say, however, that empiricism has no value here. To the contrary, in dealing with this sub-question, this book will first sketch a holistic framework of human rights, retracting from the previous choice for a legal (or even legalist) approach. Secondly, it will examine the Australian-Nauruan case study context specifically to show how the relevance of human rights as a holistic protection mechanism in settings of confinement is much broader than the protection value inherent to international human rights *law*. Given the in-depth, resource-intensive, and time-consuming nature of such an analytical approach, such analysis has been limited to the Australian-Nauruan case study context. Again, on the basis of a 'glocal' focus, analysis of sub-question 3 will thus first postulate a general framework and will subsequently test and apply such framework in a local setting.

As the foregoing implies, the book continuously attempts to connect theoretical and empirical observations. That is to say, informed by empirical observations both on the macro level and on the level of selected case studies, Part I of this book formulates a theory concerning the extent to which commodification and crimmigration (which, furthermore, are both explicitly theorised as well in their respective chapters) challenge the protection value of human rights *qua* law, *inter alia* by relying on the notions of accountability, effectiveness, and legitimacy. In Part II, this theory is tested primarily through dogmatic analyses of legal doctrine, that is to say, by observing the way in which international human rights law has developed as an internally coherent system

54 Dembour & Kelly, 2011; Hannum, 2016; Kinley & Tadaki, 2004, p. 937; Lauren, 2013.

of norms and rules.⁵⁵ Such endeavour revolves around the notions of ‘veracity’ and ‘resilience’, which are – on the basis of theory – identified as quintessential elements for the legitimate development of international human rights law. Informed by the conclusions of Part II, Part III, in turn, starts with a theoretical exercise by which the notion of ‘human rights’ is reconceptualised as a holistic and multidimensional concept, and by which ‘human rights protection’ is theorised to be dependent on a number of distinct yet interrelated empirical processes. On the basis of qualitative analysis of, amongst others, documents and interviews, this theoretical framework is subsequently empirically applied in relation to RPC Nauru, one of the case studies centralised in this book, in order to illustrate the framework’s empirical dimensions. As such, theory and empiricism are treated as communicative vessels throughout this book, with the former continuously informing the latter and *vice versa*.

1.4 RESEARCH DESIGN

The aim of this study is to assess the relevance of human rights as a protection mechanism in contexts of confinement that are characterised by commodification and crimmigration elements, both at a macro level and in relation to the Australian-Nauruan and Norwegian-Dutch case studies specifically. This section will briefly elaborate upon the selection of case studies after which the methodological specifics of the research will be addressed.⁵⁶

1.4.1 Case study selection

The choice for a case study focus was in the first place guided by the theoretical construct of ‘glocalisation’ that has been outlined above, and that requires one to position globalisation developments – such as commodification and crimmigration – in specific localities in order to examine the meaning and impact of globalisation trends proper. In turn, the choice for RPC Nauru and PI Norgerhaven as specific case studies was guided by the fact that preliminary reading for the development of a research design identified both settings as multi-actor sites of confinement that are of particular relevance in the context of human rights. Whereas the Australian-Nauruan facility has on many occa-

55 Whether this effort is classified as ‘classical’ doctrinal research, or as empirical legal research (ELS) proper, remains subject to discussion and depends on one’s definition of both branches of legal scholarship. The way in which it is put forward in this book constitutes, arguably, a mix of both classical and empirical legal studies. See on this topic also Crijns, Giesen, & Voermans, 2018.

56 The initial research plan also envisaged PI Tilburg as a case study. However, given the impossibility to gather interview data as will be explored below, as well as the closure of the facility in 2016, it was decided not to pursue this case study any further.

sions been condemned for its allegedly detrimental impact on the human rights of those confined, the Norwegian-Dutch prison has frequently been celebrated as an exemplary model for future cooperation between countries with good human rights track records. From a human rights perspective, they are henceforth regarded as almost complete opposites, which turns them into interesting sites for the analysis of human rights 'glocality'. Indeed, they constitute 'extreme' cases of commodification and crimmigration in that they have unique characteristics that ostensibly place them at opposite ends of the human rights protection spectrum. In order to prevent selection bias, these extreme cases are considered in relation to one another and are, by observing them on the 'glocal' level, positioned within the broader field of commodified confinement incorporating crimmigration elements.⁵⁷

Furthermore, the choice for these case study settings was guided by the idea that any study into the impact of 'crimmigration' developments on human rights should ideally involve settings at both ends of the crimmigration spectrum. By focussing on an immigration detention facility *and* on a prison setting, it becomes possible to analyse the impact of crimmigration on both respective facilities, therewith opening up scope not only to denote the 'criminalisation of immigration detention' but also the 'immigrationisation of prisons'. This was the reason to select not, for example, two case studies in the realm of immigration detention, but to include two facilities that at least in theory firmly belong either to the administrative, or to the penal, realm of confinement.

Analysis of the Norwegian-Dutch context concerns the entire period of time in which the Norwegian-Dutch arrangements were in force. It thus comprises a three year period (September 2015 up until September 2018). Since RPC Nauru was still operational at the time that the data collection commenced, and continues to be operational at the time that the manuscript was finalised, the period of time under scrutiny has for practical reasons been limited to August 2012 (when offshore processing was resumed) up until the end of December 2017. Events that occurred after this date will consequently only be discussed where of utmost relevance.

1.4.2 Methods

This research is an eclectic and interdisciplinary endeavour. It does not focus, as legal research tends to do, on using legal frameworks for normative assessment, but rather examines the continued relevance of the human rights framework in light of contemporary developments of globalisation. Human rights are, in this sense, not used to assess the validity of contemporary realities,

57 Koivu & Hinze, 2017, p. 1023; Seawright & Gerring, 2008, pp. 301–302.

but such realities are, conversely, used to assess the validity of human rights. This necessitates the use of a multi-method approach, relying on both doctrinal and empirical inquiries rather than on purely normative ones.⁵⁸

Three distinct methods were used: a review of literature and publicly available documents, doctrinal legal analysis, and qualitative interviewing. The use of such different techniques in exploring the research questions at hand essentially constitutes a process of methodological triangulation for the purpose of completeness: the goal of using these different methods was to complete the resulting data set by focusing not only on legal, but also on socio-empirical, relevance.⁵⁹ This should be contrasted from triangulation for the purpose of confirmation, which has as its goal to confirm a particular data set.⁶⁰ This latter form of triangulation, in turn, was used to confirm certain analyses based on interview data by relying, in addition, on publicly available documents in the case study contexts.

1.4.2.1 *Review of literature and documents*

First, this book relies on a literature review and on analysis of available documents. The review revolves around the topics of ‘commodification’, ‘crimmigration’, and ‘human rights’ in contexts of confinement specifically. Whereas ‘crimmigration’ in contexts of confinement has attracted significant attention over the past decade, ‘commodification’ in context of confinement *as such* has hardly been addressed – in fact, it is a term that is used by this research to describe the commonalities of various trends. This includes the privatisation of prisons, the privatisation of immigration detention facilities, the offshoring of prisons, and the offshoring of immigration detention facilities. The review has thus focussed on the topics of human rights, crimmigration, and, specifically, on these four sub-trends of commodification. In performing such review, a snowballing technique was used, finding relevant literature on the basis of core works.⁶¹

In relation to document analysis, the research has relied primarily on publicly available documents. In the context of RPC Nauru, one crucial document that was not in the public domain was however attained through a request for access to documents of the Federal Court of Australia as filed on 1 November 2018. This concerns the Administrative Arrangements for Regional Processing and Settlement Arrangements in Nauru (the ‘Administrative Arrangements’). This document, which is of significant importance for the case

58 In this sense the research conducted here objects to any assertion that normative research would be “characteristic for legal research”: compare Van den Brink, 2018, p. 12, translated from Dutch. See in particular also Crijns, Giesen, & Voermans, 2018.

59 See also Arksey & Knight, 2011, pp. 21–22.

60 Arksey & Knight, 2011, pp. 21–22.

61 On the snowballing technique, see also Garrard, 2004, p. 87.

study of RPC Nauru but could not be obtained via Freedom of Information Requests with the Australian Department of Home Affairs,⁶² was indeed filed as an affidavit in the case of *ELF18 v. Minister for Home Affairs* before the Federal Court of Australia in Melbourne.⁶³ The judge in this case, Justice Mortimer, granted me access to the redacted version of the affidavit for purposes of this research. As such, it could be included in the analysis, even though it is not publicly available.

1.4.2.2 Doctrinal legal analysis

Second, this book relies on doctrinal legal analysis, which is generally regarded as “the core legal research method”.⁶⁴ Such analysis revolves, as Duncan & Hutchinson point out, around a two-step process: “it involves first locating the sources of the law and then interpreting and analysing the text”.⁶⁵ In particular to denote the way in which international human rights law has accommodated commodification and crimmigration the analysis in this book has included analysis of various human rights law instruments, rules of attribution under public international law, and relevant case law.

1.4.2.3 Semi-structured interviews

Third, the research also relies on interview data. Such data plays a key role in approaching the central question of this research in a socio-empirical way, as it opens up scope for the inclusion of *experiences with*, and *empirical uses of*, human rights as a protection framework. Different from questionnaires or surveys, furthermore, such data allows for in-depth clarification of the practical aspects of human rights as a protection framework: as such, a rich understanding of the role of human rights in practice can be acquired.⁶⁶ This is even more so because human rights are expected to often play implicit rather than explicit roles in social interactions: interviewing, in this sense, “is a powerful way of helping people to make explicit things that have hitherto been implicit – to articulate their tacit perceptions, feelings and understandings”.⁶⁷ The interviews conducted for this research were *semi-structured*, incorporating open-ended as well as theoretically driven questions, thereby “eliciting data grounded in the experience of the participant as well as data guided by exist-

62 See, for a denied Freedom of Information Request, https://www.righttoknow.org.au/request/administrative_arrangements_ando (last accessed 30 May 2019).

63 Federal Court of Australia, *ELF18 v Minister for Home Affairs* [2018] FCA 1368.

64 Duncan & Hutchinson, 2012, p. 85.

65 Duncan & Hutchinson, 2012, p. 110.

66 Arksey & Knight, 2011, p. 32.

67 Arksey & Knight, 2011, p. 32.

ing constructs in the particular discipline within which one is conducting research".⁶⁸

The use of semi-structured interviews was not only informed by the goals of the research, but also by the practical limitations that are placed upon it. As will be explained in detail below, given that both RPC Nauru and PI Norgerhaven are 'closed environments' which are difficult to access, it proved impossible to collect data through, for instance, (participant) observations. The collection of interview data both in relation to RPC Nauru and in relation to PI Norgerhaven will now be discussed in turn, at the same time addressing practical and ethical constraints that were encountered in the data gathering process.

1.4.3 Qualitative interviews: RPC Nauru

1.4.3.1 Access to the research site

As will be further highlighted below when contextualising the case study, RPC Nauru is embedded in a policy framework that is characterised by significant amounts of secrecy. Accordingly, conducting interviews in this context has proven a strenuous task. For the exploratory work that preceded, and led up to, the present research, I attempted to visit Nauru in order to interview the Nauruan authorities on a range of issues pertaining to the geo-political position of Nauru. In doing so, I contacted several academics who had previously visited, or who were closely monitoring developments on, Nauru. They in turn referred me to their contacts on island, as a result of which I ultimately got in touch with an official within the Nauruan government. As he responded to my research request, "[d]oing research on Nauru is not a restricted activity".⁶⁹ He furthermore informed me that I would need to be sponsored in order to be granted a visa for research purposes, and advised me to gain sponsorship from the University of the South Pacific ('USP'), campus Nauru. I was granted sponsorship by the USP accordingly and received a Nauruan visa, issued by the Principal Immigration Officer of the Republic of Nauru, through them in February 2014.⁷⁰ I accordingly booked my flights to and from Nauru with Nauru's national airline (Our Airline), with the outbound flight being scheduled for May 2014 and the return flight being scheduled for June 2014.

In March 2014, however, I received an e-mail from my contact at the USP, with the subject line: "URGENT – DO NOT TRAVEL TO NAURU".⁷¹ As my contact

68 Galletta, 2013, p. 45.

69 E-mail received on 13 January 2014.

70 E-mail received on 26 February 2014.

71 E-mail received on 31 March 2014.

briefly stated, “I am sorry to notify you that there has been changes in Government Policy in terms of Research. Please do not travel to Nauru until this problem has been rectified”. In turn, almost a month later, communication between my USP contact and my contact within the Nauruan government was forwarded to me. In it, my contact person at the Nauruan government informed my USP contact person that “I have received word from the government on the proposed research visit by Patrick Berlo. The advice is against it. Therefore, please advise Berlo for his info. Mr. Berlo will not be allowed to enter the country. I also cannot advise when such visits may be allowed in future.”⁷² Copies of this e-mail were sent to the private e-mail accounts of President Baron Waqa, Justice Minister David Adeang, and Assistant Justice Minister Lionel Aingimea. Seeking clarification from my contact person within the Nauruan government, I was in turn informed that “the decision [was] made at the highest level. This comes from the genuine fear of our political leaders concerning security of information relating to the RPC [...]. I cannot assist you right now and I cannot see in the foreseeable future when government will allow research on RPC issues.”⁷³

My subsequent attempts to gain a Nauruan visa, either as a researcher or as a tourist, have not led to any result over the past years. In October 2015, for example, I contacted my contact person with the Nauruan government to apply for a visa for research purposes again. As my contact person replied, “I shall write to my President on the matter based on the particulars of your request and shall revert once a firm decision is made.”⁷⁴ Soon after, I was informed that the initial decision made by Cabinet was to defer my request to another sitting of Cabinet.⁷⁵ Months later, my contact person at the Nauruan government notified me that “Cabinet had at this stage not granted your request for a research visa.”⁷⁶ The decision was not substantiated. In addition, in early 2017, it proved impossible for me to obtain a tourist visa to Nauru.

The impossibility to visit Nauru had profound implications for the design of this research. Not only have I not been able to be physically present in Nauru, let alone in the RPC, I have also not been able to interview a number of stakeholders present on the island.⁷⁷ As a result I had to rely on alternative, and at times innovative, approaches in order to recruit respondents and gather interview data. Thus, in light of the inability to visit Nauru, I relied on recruiting relevant respondents that could be interviewed outside of Nauru, primarily in Australia.

72 E-mail sent on 24 April 2014.

73 E-mail received on 30 April 2014.

74 E-mail received on 17 October 2015.

75 E-mail received on 23 October 2015.

76 E-mail received on 19 January 2016.

77 See also Van Berlo, 2014a.

1.4.3.2 Ethical considerations

RPC Nauru constitutes a highly sensitive environment. This heightens the ethical concerns that are inherent to the collection of data through interviewing techniques. Fouka & Mantzourou have outlined the major ethical issues that arise in conducting these types of research.⁷⁸ These ethical points relate, however, to a number of specific aspects of the research design. Therefore, it would be artificial to deal with them here separately and they will consequently, integrally, be addressed in the relevant sections. Beneficence (or the ‘do-not-harm principle’) will be explored in sections 1.4.3.3. (under ‘the asylum seeker and refugee voice’) and 1.4.3.4. (under ‘trust and openness’), respect for anonymity and confidentiality and respect for privacy will be addressed in section 1.4.3.4. (under ‘trust and openness’), and concerns for vulnerable groups of people will be elaborated upon in section 1.4.3.3. (under ‘the asylum seeker and refugee voice’).

1.4.3.3 Before the interviews

Targeted respondent groups

In light of the central research question, I was particularly interested in speaking with individuals who work, or worked, for either of the stakeholders involved (or previously involved) in RPC Nauru, with individuals who visited or otherwise dealt with RPC Nauru in their professional capacity, such as medical professionals and legal professionals, and with representatives of NGOs that concern themselves with RPC Nauru and/or offshore processing more generally.

The asylum seeker and refugee voice

One might be surprised that asylum seekers and refugees are not part of the *target* respondent group, although some refugees have ultimately been interviewed. Indeed, the asylum seeker and refugee voice should not be overlooked in dealing with the central question of this research: it is, after all, *their* human rights that are potentially at stake. On the one hand, it has thus rightfully been criticised by others that public and academic discourses frequently fail to take asylum seeker and refugee voices into account.⁷⁹ Being the core subject of much contemporary academic research in the field of migration, their agency and narratives in this sense may too easily be obscured and denied. In the context of Australia’s offshore processing regime, several refugees who are, or have been, detained in either of the offshore processing facilities have in

78 Whilst they did do so in the context of research ethics for nurses, the issues they address also apply here: see Fouka & Mantzourou, 2011.

79 Sigona, 2014; Smets, Mazzocchi, Gerstman, & Mostmans, 2019.

fact shown great willingness to voice their narratives, thereby expressing their desire for their stories and experiences to be heard.⁸⁰

On the other hand, the idea that ‘an’ asylum seeker and refugee voice exists should be refuted: such voices constitute a heterogeneous plurality.⁸¹ There are, furthermore, important practical obstacles to including the voice of asylum seekers and refugees: since, under the Australian policy arrangements in force, no one who arrived after 19 July 2013 is in principle resettled in Australia, and since access to offshore processing sites is restricted, it is difficult to recruit or interview such individuals. Even more importantly, in the context of RPC Nauru, ethical concerns necessitate one to reflect on the question whether it is warranted in the first place to recruit asylum seekers and refugees as respondents. This relates to concerns of beneficence as well as to concerns for vulnerable people.⁸² Speaking out about one’s offshore processing experience can, indeed, be harmful for refugee populations as it may open up scope for traumatic experiences to be relived.⁸³ Indeed, confinement in offshore processing facilities has been a highly traumatising experience for many asylum seekers and refugees, as numerous medical experts have reported.⁸⁴ A majority of those confined have been diagnosed with post-traumatic stress disorder (PTSD), trauma, and depression.⁸⁵ As leading Australian psychologist and traumatologist Paul Stevenson maintains, “[p]ost-traumatic stress disorder is all pervasive in offshore detention. Asylum seekers held on Nauru and Manus are more likely to suffer PTSD than victims of terrorist attacks, shootings, floods and bushfires”.⁸⁶

In other contexts such as those on war trauma, the implications of PTSD for the ethical use of qualitative interviewing methods have been set forth.⁸⁷ Hunt outlines that “[i]t is almost inevitable that, during the course of the research, particularly when the participant is being asked to describe traumatic events in detail, a traumatised participant will become distressed”.⁸⁸ Whilst he subsequently presents a number of ways to mitigate and partially offset the problematic aspects of such relived trauma,⁸⁹ it should be noted that his research was precisely *about* developing psychological insights into trauma and distress, which in turn might inform the development of effective therapy. In these circumstances, research confined by strict ethical limits set by (medical)

80 See notably Boochani, 2017, 2018; Nagaveeran, 2015.

81 Sigona, 2014, pp. 369–370; Temple & Moran, 2006, pp. 14–17.

82 See also Arksey & Knight, 2011, pp. 126–127.

83 It might, in addition, prejudice their legal status, as various respondents have pointed out.

84 See e.g. Corbett, Gunasekera, Maycock, & Isaacs, 2014; De Boer, 2013; Doherty & Marr, 2016; Harding-Pink, 2004; D. Isaacs, 2015a, 2015b; N. Martin, 2018; McCall, 2018; Sundram & Ventevogel, 2017.

85 UNHCR, 2018.

86 Doherty & Marr, 2016.

87 Hunt, 2010, pp. 45–49.

88 Hunt, 2010, p. 46.

89 Hunt, 2010, pp. 46–47.

guidelines can be justifiable. As Fouka & Mantzourou outline, the principle of beneficence dictates that a researcher “must consider all possible consequences of the research and balance the risks with proportionate benefit”.⁹⁰

For the present research, balancing the interests of asylum seekers and refugees as a vulnerable group of people on the one hand, and the academic interests of the research on the other hand, does arguably not provide sufficient basis to engage in the *structural* recruitment of asylum seekers and refugees as respondents. Being a highly vulnerable group, there indeed is a significant risk of opening old wounds and making respondents relive their trauma’s,⁹¹ which is not justified by the more abstracted aim of establishing the relevance of human rights as a protection mechanism in confinement. Since it is the researcher’s “special obligation” to identify and remediate potential harms that may result from the study,⁹² I decided on the basis of this balancing exercise that the potential risks involved outweighed the potential academic benefits. Therefore, asylum seekers and refugees were not structurally included as target groups in the recruitment process. This means, concretely, that I did not specifically look for them as key respondents.

That does not mean, however, that I have deliberately shunned asylum seeker or refugee voices. Whilst I was not explicitly *looking* for them through any standardised recruitment process, asylum seekers and refugees occasionally presented themselves to me in order to be included in the research, for example because they heard about my project through potential respondents that I *did* approach. Being aware of the importance of not purposively excluding their narratives and agency,⁹³ except for valid reasons such as those pointed out above, I decided not to *prima facie* deny them as respondents. However, I made sure to mitigate the potential of re-traumatisation by taking into account guidelines on interviewing traumatised respondents.⁹⁴

Ultimately, this led to interviews with three refugees who had previously been confined offshore and were now resettled. Their accounts have certainly been informative for analytical purposes, yet were not centralised as their narratives cannot be regarded as representing ‘the’ asylum seeker or refugee voice beyond the level of personal experience. In this sense, the narratives of asylum seekers and refugees were not muted as part of the research design, nor did they remain unheard during the research and analytical process, but they do not constitute a focal point of this research as such.

90 Fouka & Mantzourou, 2011, p. 5, see similarly Arksey & Knight, 2011, pp. 126–127; Brinkmann, 2013, pp. 51–52.

91 Ford & Reutter, 1990, p. 188.

92 Mahler, 1986, p. 8.

93 Sigona, 2014.

94 Hunt, 2010, pp. 46–47.

Recruitment process

The recruitment process was approached in various ways. First, for previous research,⁹⁵ I already interviewed some individuals who had been involved in offshore processing on Nauru or in the offshore processing debate, including a former welfare worker, a former DIAC Director, an NGO representative, and academics. I reached out to these individuals again, informing them that I was pursuing further research and that I was looking to interview more people that had either directly or indirectly been involved in RPC Nauru. Amongst others, the welfare worker distributed an outline of my request amongst a large group of former welfare workers. In this sense, this interviewee acted as an important 'gatekeeper' to one of my target respondent groups.⁹⁶ Furthermore, I searched the internet for the contact details of people that had spoken out about their experiences on Nauru, for example in the media, and sent them a message with an outline of my request. I moreover sent e-mails to a wide variety of NGOs involved in the field of offshore processing. Through each of these strategies, I got in touch with relevant potential respondents. In turn, I used snowballing techniques in order to recruit further respondents, asking those with whom I was brought into contact whether they could distribute my interview request to additional relevant individuals. This proved to be a highly effective approach to establish new contacts. The recruitment of respondents continued also *during* the data gathering, up to the point where data saturation occurred.

Inter alia as a result of the Border Force Act 2015, that will be further introduced below, many former workers were hesitant to speak out about their experiences given the potential repercussions. In this regard, it helped on many occasions that I was referred to potential respondents by people that they trusted. Furthermore, it helped that I was quite literally as well as socially distanced from RPC Nauru, in that I conducted my research from Europe, not Australia, and had no ties to Australian institutions. Emphasising my independence and social remoteness overall seemed to help me in gaining a certain level of trust in what can essentially be regarded as a low-trust environment.⁹⁷

All potential respondents whom I corresponded with were informed about what would be required and about the fact that, if they were to participate, they could stop the interview at all times. They were furthermore told that they would remain anonymous both during analysis and in any research output, *inter alia* through the use of pseudonymisation.

95 Van Berlo, 2014b.

96 T. Miller & Bell, 2014.

97 Similar conclusions have been reached in other low-trust environments, such as prisons: see Caulfield & Hill, 2014, p. 97.

Recruited respondents

In total, 47 respondents decided to proceed. A number of these respondents fulfilled a number of roles *in* offshore processing facilities: this includes 21 welfare workers, 4 visiting medical professionals,⁹⁸ 2 individuals having fulfilled leadership roles with private contractors, 2 pastoral workers, 1 former DIAC Director, 1 guard, 1 IHMS nurse, and 1 Claims Assistance Provider (CAP).⁹⁹ In addition, a number of these respondents fulfilled a number of roles *outside of* offshore processing facilities: this includes 9 NGO representatives, 2 lawyers, 1 CEO of a relevant generic stakeholder providing services to the Australian government, and 1 journalist. As mentioned above, in addition, 3 refugees were interviewed.

Close reading of the above reveals that slightly more 'roles' (49) than respondents (47) have been interviewed. Indeed, some of the respondents fulfilled consecutive roles, that is, they have been involved in more than one capacity within offshore processing and/or within the offshore processing debate. Therefore, the total number of roles interviewed differs slightly from the total number of respondents interviewed. Since particular combinations of roles may lead to the identification of certain respondents, further information about the overlapping roles of respondents cannot be disclosed. In the analysis, the functions of interviewees with two or more consecutive roles have likewise been completely separated.

The category of 'welfare workers' includes a variety of roles, including social workers, case managers, cultural advisers, child protection workers, recreational officers, teachers, teaching assistants, and general support workers. To preserve anonymity, analysis in this research only differentiates between the various roles where necessary and where possible without prejudice to the anonymity of respondents. Of the 21 interviewed welfare workers, 17 were employed by one welfare providing stakeholder only whereas 4 were employed by two or more stakeholders.¹⁰⁰ Specifically, 10 of the interviewed welfare workers worked for the Salvation Army, 12 worked for Save the Children, 3 worked for the Multicultural Development Association ('MDA'), and 1 worked for Transfield/Broadspectrum.

From the numbers above, it transpires that welfare workers were disproportionately much interviewed compared to employees of other stakeholders, such as those providing security or medical services. The reason for this is twofold. On the one hand, the research has been designed from the start in such a way that a significant role was envisaged for welfare workers' perspective.

98 One of these medical professionals visited the facilities under the Pacific Solution (i.e. before the facilities were reopened in 2012).

99 Most respondents worked in RPC Nauru, a few worked in RPC Manus, and a few operated in both. For anonymity purposes, this cannot be further differentiated.

100 In order not to identify specific employees, no further information on the precise combination of employers is disclosed.

ives and experiences. It were their accounts that were expected, indeed, to significantly inform the answers to the research questions pursued here. On the other hand, the efficiency of this design was later on confirmed when recruiting respondents. It indeed turned out to be very difficult to interview individuals who have worked for other stakeholders than those providing welfare. This was seemingly caused by a number of factors, including that such (former) employees had less spoken out publicly and it was thus difficult to find a 'way into' these populations through gatekeepers, and, as some respondents including a former guard point out, that such (former) employees may be less willing to be interviewed either because they fear for their future careers or because they deal with feelings of shame and guilt in relation to their involvement. Whatever the case may be, in the end, the interview opportunities that presented themselves closely aligned with the intended research design.

1.4.3.4 During the interviews

Choice for individual interviews

Respondents were as a rule interviewed individually rather than collectively.¹⁰¹ The choice for individual interviews was based on the sensitivity of the research topic, the personal nature of respondents' testimonies, and the potential implications as a result of the Border Force Act 2015.¹⁰² In light of these considerations, a choice for individual interviews was appropriate: "when studying aspects of people's lives that are personal, sensitive, or even taboo, it is preferable to use individual interviews that allow for more confidentiality and often make it easier for the interviewer to create an atmosphere of trust and discretion".¹⁰³

Topic list

Interviews were conducted in accordance with a topic list. This list reflects the research questions, which were converted into specific topics that could be raised during the interview.¹⁰⁴ It contains a few main topics and a number of sub-topics. Given that the interviews were semi-structured, however, the topic list did not provide a strict interview protocol but was rather used to loosely guide discussions. The topic list has been attached in Annex I.

101 Only twice were two respondents, on the basis of their own explicit preference, interviewed at the same time.

102 These implications will be further addressed below: see footnotes 189-201 of this chapter and accompanying text. Interestingly, some interviewees seemingly had no confidentiality concerns at all: on the basis of previous whistleblowing experiences, they did not expect repercussions. Still, high confidentiality measures were implemented for all respondents.

103 Brinkmann, 2014, p. 289.

104 Compare Boeije, 2010, p. 67.

Timeframe, location, communication media, and duration

The gathering of interview data commenced in March 2017 and concluded in November 2017. Since most respondents lived in Australia, the research included two data gathering moments in Australia (March–April 2017 and October–November 2017).

Interviews were conducted in various ways. In-person interviews were preferred as they allow for face-to-face communication, but where not feasible,¹⁰⁵ interviews were preferably conducted by Skype call or, as a last resort, by phone call.¹⁰⁶ This approach resulted in 27 in-person interviews (of which 25 were conducted in Australia and 2 were conducted in the Netherlands), 18 Skype interviews, and 2 telephone interviews. The duration of interviews depended heavily on a number of factors, including the amount of time that respondents had, the specific role(s) they had fulfilled in relation to offshore processing, and the way in which the interview progressed. The shortest interview lasted for 36 minutes, the longest lasted for 2 hours and 50 minutes.

Rapport, trust, and openness

Given the sensitivity of the subject matter, creating rapport and a trusted environment during interviews was crucial. In relation to respondents who had worked in offshore processing, I also took guidelines to prevent potential re-traumatisation into account.¹⁰⁷

Before the interview, the purposes of the research, the expected duration of the respondent's participation, the anonymity, confidentiality, and privacy measures (such as transcript anonymisation and the use of pseudonyms in research output) in place, any participatory risks, the details of those supervising the research, and the voluntary nature of participation, including that respondents can at all times refuse to participate, or stop their participation, in the research project were discussed.¹⁰⁸ A measure that clearly created a trusted environment during the interview, furthermore, was the use of a loosely structured topic list as discussed above, which allowed respondents to recount their experiences and tell their stories in their own ways without feeling pressured to use particular narratives.

At the beginning of each interview, respondents were explicitly asked whether the interview could be recorded for transcription purposes. It was mentioned that, if they consented to audio recording, the interviews would be transcribed either by me or – where non-vulnerable respondents were concerned – by a professional transcription service operating on the basis of a

105 A variety of reasons could underly the impossibility of in-person interviews, although it most often was related to the fact that respondents either were in other countries than Australia, or lived in remote rural Australian areas that were not visited during the research stay in Australia.

106 On the implications of these different approaches, see N. King & Horrocks, 2010, pp. 84–85.

107 Hunt, 2010, pp. 46–47.

108 See also T. Miller & Bell, 2014.

strict confidentiality agreement. It was furthermore mentioned that both the audio file and the transcription would be stored in a secure location and that they could only be accessed by me (directly) and my supervisors (indirectly). Moreover, it was mentioned that the audio recording could, at their request, be stopped at all times, and that transcriptions could be sent to them after the interview was conducted in order to allow them to rectify particular statements or to redact any identifying information that had not yet been redacted during the transcription process. All respondents consented to the use of audio recordings. The interviews were recorded using a high-quality voice recorder that was visible at all times during the interview, both for the respondent and for the interviewer. The voice recorder was equipped with a visible red light that at all times indicated whether the device was recording or not. A few respondents indicated at several points during the interview that they wished to temporarily interrupt the recording, and one respondent indicated that he wanted to go through the transcription afterwards in order to apply potential anonymisations. Both types of requests were proceeded with accordingly.

1.4.3.5 After the interviews

Transcription

All interviews were transcribed verbatim, using transcription software. This software allowed for timestamps to be inserted in the transcript, providing an easy way to navigate through interview recordings. In the transcription process, personal details were directly anonymised. In doing so, as a researcher, I took responsibility to edit the data and to ensure anonymity, which closely aligns with dominant sociological practices.¹⁰⁹ In relation to the few interviews that were transcribed by a professional transcription service, I ensured that the transcripts were fully anonymised upon receipt. As mentioned above, respondents furthermore were offered the opportunity to go through the anonymised transcriptions in order to indicate whether further redactions for anonymity purposes were required.

Analysis

All interviews were analysed using Atlas.Ti analysis software. Within one hermeneutic unit (HU), each transcript was labelled with the particular role(s) that the respondent had. In addition, for those respondents who had worked in offshore processing, each transcript was provided with a label indicating which offshore processing facilities the respondent had worked in and what employer (s)he had worked for. In this way, different families of respondents were created.

¹⁰⁹ Kaiser, 2009, p. 1637.

The most important tool used in the analysis were *codes*. A set of codes was developed before analysis of the interview data commenced, based on theoretical frameworks including nodal governance, anchored pluralism, membership theory, and human rights schools. Codes were amended, and new codes were created, during the analytical process, based on the identification of recurring themes and narratives. In analysing the data, specific output per code, or per combinations of codes, was generated in relation to the individual level, the level of specific roles fulfilled, the level of specific confinement facilities, and the aggregate level. This allowed for analysis of particular combinations of codes for particular populations, and to cross-reference with other populations in order to reveal differences in perceptions, narratives, and ideas.

1.4.4 Qualitative interviews: PI Norgerhaven

1.4.4.1 Access to the research site

As part of the original research design, access was sought both to PI Tilburg – which, as will be outlined below, was the site of Belgian-Dutch penal cooperation similar to the arrangement between Norway and the Netherlands – and to PI Norgerhaven. Specifically, the research design included, where possible, interviews with the Belgian and Norwegian prison governors in the respective facilities, with the two Dutch Staff and Facility Managers present in both facilities, and with staff members. It furthermore included, where possible, participant observations of staff and analysis of internal documents.

In seeking access, the management board of both prison facilities were approached individually towards the end of 2015. The management board of PI Tilburg was approached through colleague researchers who previously gained access to the facility, whereas the new prison governor of PI Veenhuizen – which comprises both PI Norgerhaven and PI Esserheem – was approached in person at a national prison conference. In both cases, I was advised to submit a formal research application directly to the Director of the Dutch Custodial Institutions Agency, or *Dienst Justitiële Inrichtingen* ('DJI'). This application was, on behalf of my PhD supervisors and myself, submitted in early December 2015. It relied, specifically, on a cooperation agreement between DJI and the Institute of Criminal law and Criminology of Leiden University.¹¹⁰ The application *inter alia* explicated, in accordance with DJI guidelines, the goals of the research, the requested access, the envisaged methods, and the estimated time required per respondent.

110 Cooperation Agreement 2016 between the Institute of Criminal Law and Criminology (Leiden University) and DJI, 'Naar meer en betere kennis over detentie in Nederland', signed 15 September 2015.

Whilst initially a positive response was received,¹¹¹ DJI rejected the research application in February 2016 as it would constitute a too significant burden on the organisation. I consequently narrowed my request down to four interviews only: with the Belgian and Norwegian prison governors and with the two Dutch Staff and Facility Managers. In March 2016, I was however informed that my requests were denied both in relation to PI Norgerhaven and in relation to PI Tilburg. In relation to PI Norgerhaven, it was mentioned that the full initial request had been forwarded to the Norwegian Project Manager who had rejected the application.¹¹² In relation to PI Tilburg, the stated reason for rejecting the narrowed request was that in light of the forthcoming closure of the facility, “division management does not consider it to be a good signal to cooperate with the research”.¹¹³ The request for access was reiterated a few months later, but was again denied.¹¹⁴ Notwithstanding DJI’s commitment to an open dialogue with academia¹¹⁵ and the goal of increasing detention-related knowledge that underlies the cooperation agreement between DJI and the Institute of Criminal Law and Criminology (Leiden University), it proved henceforth difficult to gain access.

Given that the Belgian-Dutch cooperation ended, and PI Tilburg closed, at the end of 2016, the research design was amended so as to focus exclusively on the Norwegian-Dutch cooperation. Whilst for a long time it did not seem possible to gather empirical data, in December 2017, I joined a field trip of Master students in Criminal Justice to the facility. We were given a tour of the facilities and had a question and answers session with the Dutch Staff and Facility Manager. During lunch, I briefly discussed my research with the Dutch Staff and Facility Manager, with whom I followed-up via e-mail afterwards. He agreed to an in-person interview and also arranged for me to speak to the Norwegian prison governor. These interviews were conducted in PI Norgerhaven on 15 February 2018.

1.4.4.2 *The interviews*

Given that only two interviews were conducted in the context of PI Norgerhaven, the way in which the interviews were dealt with will be addressed here succinctly.

The recruitment process has already been outlined in the previous section. The interviewees are not considered vulnerable respondents and fulfilled unique public functions that easily allow for their identification. These issues were discussed before the interview took place, and both respondents indicated

¹¹¹ E-mail received on 12 January 2016.

¹¹² E-mail received on 14 March 2016.

¹¹³ E-mail received on 18 March 2016 (original in Dutch).

¹¹⁴ E-mail received on 6 September 2016.

¹¹⁵ Van den Hurk & Jorna, 2016, p. 45.

that no particular anonymity measures had to be in place. In addition, both interviewees were informed about the purpose of the research, the details of those supervising the research, and the voluntary nature of participation, including that the interview can be stopped at any time. A loosely structured topic list was used, reflecting the central research questions.¹¹⁶ In light of the semi-structured nature of the interviews, however, this list only provided a guideline rather than a protocol. The topic list is attached in Annex II.

The Dutch Staff and Facility Manager was interviewed first in an in-person, individual interview at their offices in PI Norgerhaven. Having discussed the way in which the recording would be used and stored, and having informed him that the audio recording could be interrupted at all times, he agreed to being audio-recorded and to the use of the transcription for research purposes. This interview lasted for approximately 1 hour and 15 minutes and has been transcribed verbatim afterwards, using transcription software. Subsequently, the Norwegian prison governor joined the interview, at which point the audio recording was – at the request of the Norwegian prison governor – discontinued. Both respondents indicated that they wished to proceed with the interview jointly. In what followed, the Norwegian prison governor and the Dutch Staff and Facility Manager were accordingly interviewed together for approximately 45 minutes, which at times led to interesting discussions amongst both interviewees themselves. Given that this part of the interview was not recorded, it has been captured in field notes drafted by the interviewer during the interview, which were expanded soon after the interview took place. The two sets of data gathered in this way, i.e. the transcribed interview and the field notes, have subsequently been analysed in conjunction.

1.5 INTRODUCING THE CASE STUDIES: FROM NAURU TO NORGERHAVEN

As pointed out above, this book constantly switches between the global and the local level in an attempt to indicate and interpret the impact of commodification and crimmigration as trends of globalisation, locating such impact firmly in the 'glocal' sphere. In order to do so, two case study contexts will specifically be focused upon: one located in the Australian-Pacific realm, and one located in Europe.

The first case study focuses on immigration detention in the Australian-Pacific region. On the 18th of September 2013, the newly elected Coalition government in Australia implemented Operation Sovereign Borders ('OSB'), a policy framework that had been central to its election campaign and that closely aligned with its frequently-used one-liner '*stop the boats*'. The policy framework consists of a number of crucial border reforms, including the

116 Compare Boeije, 2010, p. 67.

militarisation of the border and the reintroduction of tow-back practices which involve irregular maritime arrivals (IMAs) being towed back to their country of departure. The policy operates under the promise that no one who seeks to enter Australia irregularly by boat will ever be resettled in Australia – a promise that has been extensively communicated through a campaign with the slogan *'No way, they will not make Australia home'*. In order to live up to this promise, the Australian government has as part of OSB continued and expanded the use of so-called 'regional processing centres' ('RPCs') in the sovereign nations of Papua New Guinea ('PNG') and Nauru, where all irregular boat arrivals are transferred to and where asylum claims are being processed. These centres are frequently referred to as 'RPC Manus', referring to the PNG island on which the facility is located, and 'RPC Nauru'. According to the Australian government, these centres secure the policy's effectiveness and integrity, in particular since nobody who has attempted to enter Australia irregularly by boat will ever gain access to Australia – not even if they are granted refugee status in PNG or Nauru as a result of a successful asylum application. As a result of a legal challenge mounted before the Supreme Court of PNG,¹¹⁷ RPC Manus however closed down on the 31st of October 2017 as will be explored further below. The focus here will therefore be on RPC Nauru as a specific case study.

The second case study focuses on far-reaching penal cooperation between Norway and the Netherlands. On the 1st of September 2015, Norway commenced with the transfer of a group of prisoners to a Dutch prison facility in the village of Veenhuizen in the Netherlands ('PI Norgerhaven'), pursuant to a bilateral treaty between both countries that regulated the Norwegian lease of the prison facility in order to solve issues of prison-overcrowding in Norway as well as looming prison closures in the Netherlands due to an overall surplus. The deal was thus seemingly beneficial for both nations, as it allowed Norway to alleviate the burden on its prison system whilst it allowed the Netherlands to prevent prison closures and to consequently preserve jobs in the prison system – indeed, most staff in PI Norgerhaven remained Dutch. Whilst rather unique, the construction was not a novelty: the governments of Belgium and the Netherlands concluded a similar agreement in 2009 for the lease of Tilburg Prison in the Netherlands ('PI Tilburg') to Belgium, which ended at the end of 2016. The Norwegian-Dutch cooperation, in turn, ended in September 2018.

The RPCs in the Pacific and the leased prison facility in the Netherlands are worlds apart, not only as they are literally on opposite sides of the globe but also in terms of their set-up, rationales, and implications. What they have in common, however, is that they involve the confinement of individuals by more than one primary stakeholder. In the case of the RPCs in the Pacific, two

117 Supreme Court of PNG, *Namah v. Pato* [2016] PGSC 13; SC1497.

governments and a number of private stakeholders are involved in governing the confinement of asylum seekers and refugees. Whilst PI Norgerhaven does not involve private actors as primary stakeholders, two sovereign states are likewise involved in the governance set-up of the confinement realm. These governance structures will further be elaborated upon in chapter 2. Furthermore, both facilities also have in common that they have been used to confine large numbers of non-citizens who are deemed excludable by the offshoring state as will be further explored in chapter 3.

Given the centrality of these case study contexts for the present research, both will be further contextualised in the next paragraphs. This is particularly warranted now that they constitute ‘extreme cases’: their contextual particularities are of great significance for the approach to case study analysis that is used in this research.

1.5.1 Offshore processing in the Pacific: an Australian-Nauruan immigration detention setting

1.5.1.1 *The lead-up to Operation Sovereign Borders*

Migration and migration control have been key aspects of the origin and development of Australia as a sovereign nation.¹¹⁸ Concerns over irregular migration have featured prominently in the Australian political context since the late 1800 onwards, when restrictions were implemented to regulate the immigration of Chinese migrants.¹¹⁹ In 1901, the Immigration Restriction Act was introduced, implementing further restrictions to deter non-Europeans.¹²⁰ It formed the basis for the White Australia Policy, favouring white immigrants.¹²¹ Some of these restrictions were abolished in the Revised Migration Act 1958, after which the White Australia Policy was fully abolished in 1972.¹²² Focus consequently shifted towards irregular boat arrivals in the early 1990s, with a policy of mandatory detention being introduced in 1992 for all IMAs without a valid visa.¹²³

118 See generally also Glynn, 2016; Tazreiter, 2015.

119 Betts, 2001, p. 45; Glynn, 2016, p. 51.

120 Glynn, 2016, pp. 51–52.

121 Jayasuriya, Walker, & Gothard, 2003; Jupp, 2002; Tavan, 2005; Willard, 1923.

122 Glynn, 2016, p. 55.

123 Ghezelbash, 2015, p. 78; Glynn, 2016, pp. 63–64. As Glynn points out, “[m]andatory detention became the norm for all boat people who applied for asylum in Australia. By contrast, migrants who arrived by air on a valid visa and who subsequently applied for asylum were granted a bridging visa. While one asylum seeker who came by boat remained in detention, the other was often entitled to work rights, access to Medicare and other privileges during the assessment of their claim”: Glynn, 2016, p. 64.

A next step was taken in 2001, when the Australian government implemented the so-called 'Pacific Solution'. It was a direct response to the 'MS Tampa incident', which concerned a vessel (the *Tampa*) that had rescued 433 Afghan asylum seekers on the high sea but was denied permission to disembark at the nearest Australian port 'in the national interest'.¹²⁴ This resulted in a political stand-off between Australia, Indonesia, and Norway (where the *Tampa* was registered). In turn, Australia hastily negotiated processing agreements with New Zealand and Nauru for the processing of these asylum seekers' claims.¹²⁵ Instead of allowing the ship to land on the nearby Christmas Island, which is part of Australia, the asylum seekers were thus transferred to New Zealand and Nauru, thereby breaking the ad hoc political deadlock that had ensued.

Soon after, Australia formalised long-term offshore processing arrangements for irregular boat arrivals with Nauru and, later on, Papua New Guinea ('PNG').¹²⁶ This meant that irregular boat migrants *en route* to Australia were to be intercepted and transferred to offshore processing facilities in these countries. The offshore processing arrangements were complemented by additional measures, such as the excision of certain Australian islands from the country's migration zone: initially this included Christmas Island, the Cocos Islands, and the Ashmore and Cartier Islands, whilst later such excision was extended to all territories outside of mainland Australia.¹²⁷ This in turn effectively meant that those landing by boat on these islands did not – at least not for migration purposes – arrive on national soil and were, as such, "barred from making a valid application for a Protection visa unless the Minister exercised a personal, non-compellable discretion to allow it".¹²⁸ In addition, legal measures were introduced that allowed the Australian navy to intercept vessels heading towards Australia in order to tow them back to international waters.¹²⁹

Although offshore processing was an immediate response to the MS Tampa incident, the Pacific Solution was indirectly triggered by various other causes.¹³⁰ First, it was a response to ineffective deterrence policies in general: it was introduced to effectively deter and discourage asylum seekers and human traffickers through broad measures of border protection including

124 Ghezelbash, 2015, p. 99; Glynn, 2016, pp. 125–127; Magner, 2004; Salvini, 2012, p. 18; Van Berlo, 2015a, p. 97, 2017d, p. 36. The vessel was even forced to change course by Australian Special Air Service troops who boarded it and prevented it from entering Australia's territorial waters.

125 Magner, 2004, pp. 54–55. Other countries, such as Fiji, French Polynesia, Kiribati, Palau, Tonga, and Tuvalu declined similar offers: Magner, 2004, p. 56; Salvini, 2012, p. 19; S. Taylor, 2005, p. 7.

126 Afeef, 2006; Ghezelbash, 2015, p. 100; Glynn, 2016, p. 127; Mathew, 2002; Rajaram, 2003.

127 R. A. Davidson, 2003, p. 8; Ghezelbash, 2015, p. 100; Glynn, 2016, p. 128.

128 Ghezelbash, 2015, p. 100. See also Glynn, 2016, p. 128; Rajaram, 2003, p. 297.

129 Glynn, 2016, p. 129.

130 Van Berlo, 2015a, pp. 97–98.

detention.¹³¹ As Pickering outlines, deterrence was at the heart of the Australian Government's response, with the Pacific Solution being "an act of escalated deterrence".¹³² In this sense, it has been argued that deterrence became the *raison d'être* of Australian refugee policy".¹³³ Secondly, and closely connected to this deterrence-centred approach, in an attempt to regain public confidence in the run-up to the 2001 elections, former Prime Minister Howard outlined the need for strict responses to the "threat" of immigration.¹³⁴ In line with these electoral politics, Howard implemented the Pacific Solution to show that his government was exerting effective control and was responding rapidly to influxes of migration as alleged security threats.¹³⁵ Consequently, Howard won the elections "with a margin that had been very unlikely a few months before the introduction of the Pacific Solution".¹³⁶ Indeed, "[t]he fact that boat people from Muslim countries by then constituted the vast majority of those arriving meant that politicians' aspersions often met with approval from voters, as demonstrated by the Liberal-National coalition's surprise election victory in November 2001".¹³⁷ Thirdly, and quite paradoxically, some have argued that the Australian government, pressured by human rights advocates in particular, tried to dilute responsibility and accountability by involving third states within the Pacific Solution policy framework.¹³⁸

When discussing Australia's offshore processing arrangements under the Pacific Solution and its successor policy frameworks, it is important to take into account the relatively hegemonic position of Australia in the Pacific as well as the geographical particularities of the region. Being a relatively remote yet affluent island nation, the Australian government's border security ideals are unique in that they *could* theoretically be realised – thus, "the dream of total deterrence expressed by 'stop the boats' can come true".¹³⁹ This sense of uniqueness is widely acknowledged by politicians elsewhere: in a variety of countries politicians indeed frequently refer to the Australian-Pacific arrangements as an exemplary, successful, admirable, and inspiring framework.¹⁴⁰ Furthermore, Nauru and PNG used to be under the direct influence and control of Australia as hegemonic power in the region and they are nowadays still

131 Afeef, 2006; Hyndman & Mountz, 2008; Kneebone, 2006; Mountz, 2011; Rajaram, 2003; Salvini, 2012, p. 21; Van Berlo, 2015a, pp. 97–98; Welch, 2012.

132 Pickering, 2008, p. 174.

133 Pickering & Lambert, 2002, p. 66.

134 Afeef, 2006; Mathew, 2002; Philpott, 2002; Van Berlo, 2015a, pp. 97–98.

135 Afeef, 2006.

136 Van Berlo, 2015a, p. 98, see in particular also Mares, 2002; McNeill, 2003; Philpott, 2002.

137 Glynn, 2016, p. 123.

138 Afeef, 2006; Van Berlo, 2015a, pp. 97–98.

139 Chambers, 2015, p. 407.

140 For example, Dutch politician Geert Wilders based a 'No way, you will not make the Netherlands home' campaign on Australia's 'No way, you will not make Australia home' campaign. See also Van Berlo, 2016a.

heavily dependent on Australian financial aid and development funding.¹⁴¹ 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 political or economic stability. The Nauruan political system has indeed been argued to be too unstable, inexperienced, and polarised to develop a sustainable economy or a solid democratic system based on the rule of law.¹⁴² Moreover, the nation stood at the verge of bankruptcy at the beginning of the 2000s and the financial compensation offered by Australia for hosting the RPC in this sense offered much-needed relief.¹⁴³

In 2007, Kevin Rudd, Australia's newly elected Prime Minister of the Labor Party, decided to end the existing offshore arrangements.¹⁴⁴ This abandoning did not last long, however: based on advice provided by the Expert Panel on Asylum Seekers, the policy was by and large re-enacted and the offshore centres were reopened in 2012 by the then Labor Government of Julia Gillard and was continued under the subsequent 2013 Rudd government.¹⁴⁵ Whilst the reintroduced policy has tellingly been labelled the 'Pacific Solution *Mark II*', there are some significant differences with the initial Pacific Solution policy framework. Under the new framework, the *entire* Australian mainland was excised from the migration zone in order to inhibit IMAs to apply for a visa on arrival, meaning that *all* unauthorised boat arrivals became liable for transfer to offshore processing centres, not just those who arrived at excised offshore places; status determination was carried out by officials from Nauru and PNG, not by UNHCR or Australian officials; and the Memorandum with PNG allowed for resettlement in PNG in addition to mere status determination, an arrangement also known as the 'PNG Solution'.¹⁴⁶

1.5.1.2 The introduction of Operation Sovereign Borders

After taking office in September 2013, the administration of Prime Minister Tony Abbott emphasised that it would not only continue offshore processing

141 Afeef, 2006; Argounès, 2012; Chambers, 2015; Fry, 2005; Glynn, 2016, p. 127; Grewcock, 2014; Narayanasamy, Ball, Hepworth, O'Brien, & Parfitt, 2015; Salvini, 2012, p. 34.

142 Connell, 2006; Firth, 2016.

143 Connell, 2006; Firth, 2016, p. 297; McDaniel & Gowdy, 2000, pp. 192–193; S. Taylor, 2005; Thomas, 2014. Whilst Nauru is dependent upon Australia, the reverse holds to a certain extent however also true: Australia is dependent upon Nauru's goodwill to host the processing centre and has, in turn, "fostered an atmosphere where the principles of good governance can be flouted with little fear of significant criticism from Canberra": Firth, 2016, p. 300.

144 J. Phillips & Spinks, 2013, p. 10.

145 See in particular recommendations 8 and 9 at page 16 of the report: Houston, Aristotle, & L'Estrange, 2012.

146 Ghezelbash, 2015, pp. 103–104.

in the RPC in Nauru and PNG, but also that it would expand the existing policy arrangements, turning the Pacific Solution into a military-led operation called Operation Sovereign Borders ('OSB') headed by a senior military commander.¹⁴⁷ The operation fell under the responsibility of the Department of Immigration and Border Protection ('DIBP'), which superseded the Department of Immigration and Citizenship ('DIAC') in September 2013.¹⁴⁸ As part of this policy framework, a campaign with the slogan "*No way, they will not make Australia home*" was launched, focusing on irregular migrants' countries of origin.¹⁴⁹ The case study research in this research will focus on OSB specifically: notwithstanding the interesting features of the Pacific Solution, OSB is of particular interest given that it "ratcheted up"¹⁵⁰ the previous framework and is still in force as of today.

The key feature of the OSB policy framework is that no irregular migrant arriving by boat will ever be resettled in Australia: those granted refugee protection will instead be resettled in third countries, including Cambodia and, later, the United States with which Australia signed agreements to that effect.¹⁵¹ In addition to continuing offshore processing, the policy militarised maritime patrols, reintroduced a tow-back policy, and is accompanied by significant amounts of secrecy, which is justified through discourse emphasising simultaneously that these procedures save lives by putting an absolute stop to the drowning of irregular migrants, and that they are effective in disrupting human smugglers.¹⁵²

Tony Abbott was ousted as Prime Minister by Malcolm Turnbull after a party vote in September 2015. In turn, Turnbull was ousted by Scott Morrison – who notably was the Minister for Immigration and Border Protection in the Abbott administration overseeing the introduction of OSB – after a party vote in August 2018. OSB has, however, continued throughout, even though it has been plagued by a number of significant controversies and challenges since its introduction.

147 See generally Chambers, 2015; Ghezelbash, 2015, p. 104; Grewcock, 2014; McAdam, 2013; Van Berlo, 2015a, 2016a, 2017d; C. C. White, 2014.

148 On 19 December 2017, DIBP was – together with a number of other Departments – subsumed into the newly created Department of Home Affairs (DHA). Since this book is concerned with the operation of RPC Nauru until the end of December 2017, it will primarily refer to DIBP as the responsible Australian Department.

149 The campaign is communicated in various languages so as to reach as many potential irregular migrants, i.e. Albanian, Arabic, Bahasa, Bengali, Dari, Farsi, Hindi, Kurdish Sorani, Nepalese, Pashtu, Rohingya, Sinhala, Somali, Sudanese Arabic, Tamil, Urdu, and Vietnamese.

150 Grewcock, 2014, p. 71.

151 Carrera et al., 2018, p. 12. For reflection on the so-called 'Cambodia-deal', see in particular Failla, 2016.

152 See also Grewcock, 2014; Klein, 2015; Schloenhardt & Craig, 2015; Van Berlo, 2015a.

1.5.1.3 Controversies relating to offshore processing

Offshore processing under OSB has aroused significant controversy over the past years. This includes (i) the July 2013 incident in RPC Nauru, (ii) the February 2014 incident in RPC Manus, (iii) the dismissal of Save the Children staff on Nauru, (iv) the case of *Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Others*, (v) the introduction of the Australian Border Force Act 2015, (vi) the PNG Supreme Court decision in *Namah v. Pato*, (vii) the publication of the so-called 'Nauru Files', and (viii) the domestic political developments on Nauru. Since these events will be referred to throughout this book, it is important to have a firm understanding of what they entail. This section therefore addresses them in turn.

The July 2013 RPC Nauru incident

On 19 July 2013, a serious incident that some have described as a riot occurred in RPC Nauru, which resulted in the destruction of the majority of infrastructure and, more specifically, the burning-down of newly built accommodation and facilities.¹⁵³ As Keith Hamburger points out in a commissioned Review into the incident ('Hamburger Review'), in the morning of the 19th of July 2013 intelligence already suggested that a significant protest might take place and threat levels were accordingly raised.¹⁵⁴ Underlying the rising tension was the fact that asylum seekers demanded to speak to representatives of the Nauruan government as they were seriously concerned about delays in their refugee status processing as well as in the arrival of Claims Assistance Providers ('CAPs').¹⁵⁵ As the Hamburger Review concludes, the 19 July 2013 incident was not caused by a single factor but rather by a myriad of elements, including (i) the fact that no refugee status determinations had been handed down after four months; (ii) misunderstandings about the continued presence of a legal assistance programme and CAPs; and (iii) ongoing and rising frustration and uncertainty.¹⁵⁶ In a public statement issued on the 23th of July 2013, more than 30 staff members of the Salvation Army – which had been contracted to provide welfare services on Nauru – maintained that "[t]he most recent incident in Nauru was not borne out of malice. It was a build up of pressure and anxiety over ten months of degrading treatment, and a planned peaceful protest that degenerated".¹⁵⁷

Throughout the day, the protest rapidly escalated with various self-harm attempts and on-going large-scale protests, which in turn led to the ad hoc

¹⁵³ Hamburger, 2013, p. 3.

¹⁵⁴ Hamburger, 2013, p. 4.

¹⁵⁵ Hamburger, 2013, p. 4.

¹⁵⁶ Hamburger, 2013, pp. 5–6.

¹⁵⁷ M. Isaacs et al., 2013.

evacuation of non-essential staff from the facility.¹⁵⁸ According to the Hamburger Review, “large crowd movement increased in the centre and [...] large numbers of transferees pushed down temporary fencing and a large number of transferees were observed picking up weapons and throwing rocks”, which was responded to by the Nauruan riot police who formed a cordon to contain the asylum seekers at the RPC.¹⁵⁹ Shortly after, asylum seekers reportedly committed acts of arson, which caused significant fires that burned down the newly built asylum seeker accommodation, health centre, and dining room.¹⁶⁰ In turn, Nauru’s Justice Minister David Adeang issued an emergency decree authorising Nauruan civilians to take action.¹⁶¹ After a text message had been sent out across the island that called for locals to defend their homeland, more than 1000 Nauruans made their way towards the RPC “with pipes and machetes to help authorities contain the violence”.¹⁶²

The February 2014 RPC Manus incident

In February 2014, there was a significant outbreak of violence in RPC Manus after asylum seekers were informed by authorities of PNG and Australia that they would never be resettled in Australia and were likely to stay in the Manus facility for an indeterminate period of time, with asylum processing potentially taking up to five years.¹⁶³ As a response to the disturbances, which have also been described as violent protest or a riot,¹⁶⁴ contracted security staff, local PNG police, part of the local Manus community, and some expatriates used severe violence – including attacks with knives and machetes – on asylum seekers, which resulted in the serious injury of more than 60 asylum seekers and the death of Reza Barati, a 23-year-old asylum seeker from Iran, on 17 February 2014.¹⁶⁵ As Robert Cornall found in his ‘review into the circumstances surrounding the Manus Island disturbances’ (‘Cornall Review’), which was commissioned by DIBP, Barati died from cardiac arrest which resulted from severe brain injury.¹⁶⁶ According to eye witnesses, he had been kicked and punched, after which a PNG national “put a very big stone on his head”.¹⁶⁷ The injuries of other asylum seekers included notably the loss of an eye respectively a bullet in the buttocks as well as various broken bones and lacerations, with various asylum seekers requiring specialised medical

¹⁵⁸ Hamburger, 2013, p. 4.

¹⁵⁹ Hamburger, 2013, p. 4.

¹⁶⁰ Firth, 2016, p. 288; Hamburger, 2013, pp. 4–5.

¹⁶¹ Firth, 2016, p. 288.

¹⁶² AFP, 2013; Hall & Flitton, 2013.

¹⁶³ O’Brien & Ball, 2016, p. 14; Tan, 2016, p. 95.

¹⁶⁴ This is contested, however: different accounts exist as to what caused the violence in the first place: see Larking, 2014, p. 1.

¹⁶⁵ Larking, 2014, p. 1; O’Brien & Ball, 2016, p. 14; Penovic & Dastyari, 2016, p. 141.

¹⁶⁶ Cornall, 2014.

¹⁶⁷ Cornall, 2014, pp. 64–65; Tan, 2016, p. 96.

treatment in the PNG capital of Port Moresby or in Australia.¹⁶⁸ The use of excessive violence, in particular the death of Barati, caused significant outcry in the Australian public and resulted in protests and vigils.¹⁶⁹ Two PNG nationals working for respectively the contracted garrison provider at the time (G4S) and the contracted welfare provider at the time (the Salvation Army) were arrested, tried, convicted, and sentenced for the murder of Reza Barati by the PNG authorities.¹⁷⁰

Dismissal of Save the Children staff on Nauru & the Moss Review

In October 2014, then Minister for Immigration and Border Protection Scott Morrison commissioned a Review into allegations relating to conditions and circumstances at RPC Nauru between July 2013 and October 2014 (the 'Moss Review').¹⁷¹ Specifically, it was a response to concerns expressed by Senator Hanson-Young concerning allegations of assault, as well as to the ad hoc removal of ten Save the Children staff members from Nauru after allegations that they had fabricated stories of child abuse and had coached asylum seekers into self-harm.¹⁷²

The Moss Review therefore investigated both asylum seekers' claims of sexual and physical assault, and the behaviour of contract service providers' staff members.¹⁷³ In relation to the former, the Moss Review concluded that there had been a number of allegations of rape, indecent assault, sexual harassment, and physical assault, including of minors, at the RPC.¹⁷⁴ In relation to the latter, it was concluded that "[t]here is [...] no conclusive information to suggest that particular staff members of Save the Children or any other contract service provider were either colluding with transferees to fabricate allegations or were fabricating them of their own accord".¹⁷⁵ Furthermore, "[t]he Review has also been unable to obtain any conclusive information to suggest that Save the Children staff members coached or encouraged transferees to self-harm".¹⁷⁶ On this basis, the Moss Review *inter alia* recommended DIBP to review its decision requiring Save the Children to remove the ten staff members concerned, and in doing so, to consider each staff member individually.¹⁷⁷

168 Cornall, 2014, p. 8.

169 Safi, 2014.

170 Nethery & Holman, 2016, p. 8.

171 The final version of the Moss Review was published in March 2015: P. Moss, 2015.

172 P. Moss, 2015, p. 12.

173 P. Moss, 2015, p. 3.

174 P. Moss, 2015, p. 42.

175 P. Moss, 2015, p. 69.

176 P. Moss, 2015, p. 70.

177 P. Moss, 2015, p. 9.

DIBP in turn commissioned Professor Christopher Doogan to review this recommendation ('Doogan Review').¹⁷⁸ Both reviews ultimately resulted in the compensation of the staff members of Save the Children that had been removed by DIBP, which published a statement in which it detailed that "[t]he Department has acted on all of Professor Doogan's recommendations including the recommendation to place the SCA employees in the position they would have been in, had the removal letter not been issued".¹⁷⁹

Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Others In May 2015, a Bangladeshi asylum seeker who had been detained in RPC Nauru and who had been transferred to Australia in 2014 for medical treatment filed a case against the Australian Minister for Immigration and Border Protection, the Commonwealth of Australia, and Transfield Services (Australia) Pty Ltd – the latter being the then lead contractor in RPC Nauru as will be further detailed in chapter 2 – in seeking to prevent her return to Nauru.¹⁸⁰ The main question posed in this case was "whether the Australian government had the power, either in the form of a statutory or non-statutory executive power, to contract for and control the detention of asylum seekers in the offshore detention centre in Nauru".¹⁸¹ The judgment – and in particular its implications for human rights protection – will be dealt with at a later stage in this book. It is also addressed here, however, as the case already had serious implications for offshore processing *before* it was heard by the High Court of Australia in October 2015.

First, the Australian government inserted section 198AHA into the Migration Act by means of the Migration Amendment (Regional Processing Arrangements) Act 2015 (Cth), which passed both houses of the Australian parliament in, as Gleeson puts it, "record time with bipartisan support".¹⁸² Section 198AHA, which was given retroactive effect from 18 August 2012 onwards, granted the Australian government a broad power to (a) take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country; (b) make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country; and (c) do anything else that is incidental or conducive to the taking of such action or the making of such payments.¹⁸³ With the rapid insertion of this retroactive section in the Migration Act, the focus in *M68* was shifted "from whether the impugned conduct was unlawful by reason of it not being supported by or based on a valid exercise of the non-statutory executive power

¹⁷⁸ Doogan, 2015.

¹⁷⁹ DIBP, 2017.

¹⁸⁰ High Court of Australia, *Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors* [2016] HCA 1.

¹⁸¹ Gleeson, 2016a.

¹⁸² Gleeson, 2016a.

¹⁸³ Gleeson, 2016a; McBeth, 2016, p. 44.

under s61 [of the Constitution], to a case primarily concerned with the construction, scope and validity of the new statutory provision".¹⁸⁴

Second, just before the hearing of the case of *M68* by the High Court in October 2015, the Nauruan government announced that full open centre arrangements would be implemented in RPC Nauru.¹⁸⁵ Thus, asylum seekers previously detained in RPC Nauru would now be allowed to move freely within the country at all times, although they were still required to reside within the RPC.¹⁸⁶ As such, the Government of Nauru maintained that there was "no more detention".¹⁸⁷ For the case of *M68*, the introduction of such extensive open centre arrangements raised new questions as to whether claimant had standing to bring her case before the Australian High Court. Still, the Court held that plaintiff still had standing to seek a declaration on the lawfulness of her past detention.¹⁸⁸

Introduction of the Australian Border Force Act 2015

In 2015, the Australian Border Force (ABF) was established as part of DIBP under the Australian Border Force Act 2015 ('Border Force Act 2015').¹⁸⁹ On the 1st of July 2015, the newly created agency took over all responsibilities in the field of immigration, customs, and border protection, with the Border Force Act 2015 outlining *inter alia* the structure of command and the applicable secrecy and disclosure provisions. In relation to the latter, the Act provides that

"[a]n entrusted person must not make a record of or disclose Immigration and Border Protection information unless the making of the record or disclosure is authorised by a provision of [Part 6 of the Border Force Act 2015], is in the course of the person's employment or service as an entrusted person or is required or authorised by law or by an order or direction of a court or tribunal."¹⁹⁰

In this regard, 'entrusted person' is defined as the Secretary of DIBP, the Australian Border Force Commissioner, or an Immigration and Border Protection worker.¹⁹¹ The latter category includes consultants or contractors who are engaged to perform services for the Department as well as their employees insofar as they perform services for DIBP and are specified in a determination by the Secretary or the Border Force Act Commissioner.¹⁹²

184 Gleeson, 2016a.

185 Department of Justice and Border Control of the Republic of Nauru, 2015.

186 Department of Justice and Border Control of the Republic of Nauru, 2015; Gleeson, 2016a.

187 Government of Nauru, 2015c. Compare ECtHR, *J.R. and Others v. Greece*, 28 January 2018, Application no. 22696/16, para 86.

188 See also Gleeson, 2016a.

189 *Australian Border Force Act 2015*, No. 40, 2015.

190 *Border Force Act 2015*, section 41.

191 *Border Force Act 2015*, section 4(1).

192 *Border Force Act 2015*, section 4(1). See also Bevitt, 2017, p. 262.

‘Immigration and Border Protection information’, furthermore, is broadly defined as information of a variety of kinds that was obtained by a person in his or her capacity as an entrusted person.¹⁹³ As such, an entrusted person making an unauthorised record of, or disclosing, Immigration and Border Protection information commits an offence that is punishable by imprisonment up to two years.¹⁹⁴

Including in the context of offshore processing, the introduction of the Border Force Act 2015 has primarily raised concerns in relation to these secrecy and disclosure provisions. Indeed, the secrecy provisions of the Border Force Act 2015 are “relatively broad in coverage when compared with other such provisions”.¹⁹⁵ Whilst it is commonly accepted that security provisions have a legitimate place in government operations, the provisions in the Border Force Act 2015 have been argued to extend “beyond these justifications” with “the effect of shutting down or limiting legitimate public discussion regarding Australia’s border protection activities”.¹⁹⁶

Concerns about these provisions in the context of offshore processing were voiced on the very same day that the Border Force Act 2015 came into force: by means of an open letter, 41 current and former workers at RPC Nauru and RPC Manus – including health professionals, teachers, and social workers – stated that they “have advocated, and will continue to advocate, for the health of those for whom we have a duty of care, despite the threats of imprisonment”.¹⁹⁷ In turn, they immediately challenged DIBP to prosecute them under the new secrecy provisions for speaking out so that “these issues may be discussed in open court and in the full view of the Australian public”.¹⁹⁸ No prosecutions have ever been brought on the basis of these provisions, however.

In addition to the open letter, medical practitioners continued to voice their concerns as the secrecy provisions would potentially undermine their ability to perform their professional duties, which ultimately culminated in a constitutional challenge by Doctors for Refugees – a non-profit collaboration of health practitioners – in July 2016.¹⁹⁹ A few months later, the Border Force Act 2015 was amended to excluded medical professionals from the secrecy provisions.²⁰⁰ Notwithstanding, significant concerns remained as amongst others

193 *Border Force Act 2015*, section 4(1).

194 *Border Force Act 2015*, section 42.

195 Bevitt, 2017, p. 259.

196 Bevitt, 2017, p. 258.

197 Sanggaran et al., 2015.

198 Sanggaran et al., 2015.

199 Bevitt, 2017, p. 258.

200 *Determination of Immigration and Border Protection Workers 2015* (Cth), para. D, as amended by *Determination of Immigration and Border Protection Workers -Amendment No. 1 2016* (Cth).

social workers and teachers – including those working offshore – have not been excluded from the application of these provisions.²⁰¹

PNG Supreme Court decision in Namah v. Pato

On 26 April 2016, the Supreme Court of PNG handed down its judgment in *Namah v. Pato*. The case had been brought by the Leader of the PNG Opposition, Belden Norman Namah MP, and challenged the legality of the offshore processing centre on Manus Island. The ensuing judgment had far-reaching implications for OSB, as the Supreme Court of PNG ruled unanimously that the detention of asylum seekers on Manus Island was unconstitutional as it breached the right to personal liberty under Section 42(g) of the PNG Constitution. As the Court found,

“[t]he power to detain and therefore deprive a person’s liberty [...] is available only against persons who have entered and or remain in the country without a valid entry permit or an exemption. Any deprivation of a person’s liberty outside what is provided for will undoubtedly be unconstitutional and illegal. In the present case, the undisputed facts clearly reveal that the asylum seekers had no intention of entering and remaining in PNG. Their destination was and continues to be Australia. They did not enter PNG and do not remain in PNG on their own accord. This is confirmed by the very fact of their forceful transfer and continued detention [at the Manus Island Processing Centre] by the PNG and Australian governments. It was the joint efforts of the Australian and PNG governments that has seen the asylum seekers brought into PNG and kept at the [Manus Island Processing Centre] against their will. This [sic] arrangements were outside the Constitutional and legal framework in PNG.”²⁰²

Although the Constitution has been amended in 2014 in order to allow detention of non-PNG nationals pursuant to an agreement with another nation, the Court held that this amendment was unconstitutional – amongst others because Respondents had not demonstrated that it met the requirement of respect for ‘the right and dignity of mankind’ – and therefore invalid with no force and effect.²⁰³ Consequently, the governments of both Australia – although not being a party to the legal proceedings – and PNG were called upon to “forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued breach of the asylum seekers or transferees [sic] Constitutional and human rights”.²⁰⁴

Initial responses of both governments to the judgment differed widely. In a press release, Australia’s immigration minister Peter Dutton considered

201 H. Davidson, 2016c.

202 *Namah v. Pato*, paras. 38-39.

203 *Namah v. Pato*, paras. 52 and 74.

204 *Namah v. Pato*, para. 74.

that the decision “is binding on the PNG government, but not on the Australian government, so we will work with the PNG government to look at the situation, to provide what assistance we can, but we are not going to allow people smugglers to get back into business”.²⁰⁵ PNG’s Prime Minister Peter O’Neill, however, maintained that “[r]especting this ruling, Papua New Guinea will immediately ask the Australian government to make alternative arrangements for the asylum seekers”.²⁰⁶ As such, both governments pointed towards one another insofar as the implications of the judgment were concerned. In turn, acknowledging O’Neill’s announcement, Dutton reiterated that “the Australian Government [...] will work with our PNG partners to address the issues raised by the Supreme Court of PNG”.²⁰⁷

Notwithstanding the judgment, it took both governments approximately five months to present contingency plans for the facility’s closure and almost 1,5 years in total to close RPC Manus effectively. The facility was officially shut down on the 31st of October 2017. At that time, 600 transferees were still residing there. Those not granted refugee status were to be transferred to Hillside Haus in the Manus town of Lorengau, in order to prepare for their voluntary repatriation or deportation.²⁰⁸ Those granted refugee status, on the other hand, were to be moved to one of two open transit facilities in the vicinity of Lorengau to prepare for their settlement in the PNG community or in third countries.²⁰⁹ This caused significant resistance amongst the transferee population, given that various refugees and asylum seekers had previously experienced significant mistreatment by the local population and police and therefore feared for their safety at the Lorengau facilities.²¹⁰ In fact, on the 31st of October 2017 – when the facility was officially shut down – refugees barricaded themselves into RPC Manus and refused to leave the facility, notwithstanding the fact that they were cut off from food, water, and electricity.²¹¹ It took another few weeks before the PNG police had removed all transferees from the facility’s premises – many by force – with the final transferees being evicted on the 23th of November 2017.²¹²

The publication of the ‘Nauru Files’

In August 2016, The Guardian Australia published a database of 2116 incident reports that leaked from RPC Nauru.²¹³ Dubbed the ‘Nauru Files’, these incident reports were written by individuals working in the facilities – e.g.

205 H. Davidson & Doherty, 2016a.

206 Hasham, 2016.

207 H. Davidson & Doherty, 2016a.

208 Hartcher, 2017.

209 Hartcher, 2017.

210 Fox, 2017.

211 H. Davidson & Wahlquist, 2017; Whiteman, 2017.

212 Baxendale, 2017.

213 Farrell, Evershed, & Davidson, 2016.

teachers, guards, caseworkers, and medical personnel – between May 2013 and October 2015, and serve to internally escalate incidents that these workers encountered. The leaked documents provide detailed insight into alleged assaults, (sexual) abuse, substandard and impoverished living conditions, and self-harm attempts by transferees. As The Guardian outlines, 51.3% of these incident reports concern minors, notwithstanding the fact that only 18% of those detained in RPC Nauru are children.²¹⁴

The Australian government responded to the Nauru Files by publishing a statement outlining that these files are “evidence of the rigorous reporting procedures that are in place in the regional processing centre” and that many of these incident reports “reflect unconfirmed allegations or uncorroborated statements and claims – they are not statements of proven fact”.²¹⁵ The leaking of the Nauru Files resulted in a number of protests and rallies across Australia and at Australian embassies abroad, calling upon the government to end offshore processing.²¹⁶ Furthermore, a Senate Inquiry into allegations of abuse, self-harm, and neglect of asylum seekers both at RPC Nauru and RPC Manus was launched, being the third Senate Inquiry into offshore processing under OSB after the previous separate inquiries into RPC Manus (2014) and RPC Nauru (2015).²¹⁷

Nauru political developments

A factor that has arguably complicated offshore processing on Nauru is the persistent criticism of Nauru’s democratic system, political stability, and implementation of the rule of law. Indeed, these instabilities have continuously informed critical questions as to the country’s ability to operate the processing facility.

After the Nauruan elections of 2013, incumbent Member of the Nauruan Parliament for Boe, Baron Waqa, was named the nation’s new President. He, in turn, appointed David Adeang as the Minister for Justice & Border Control and as the Minister for Multicultural Affairs, therewith being responsible for amongst others the RPC, refugee status determination, and Nauru’s legal system. Various domestic incidents since the inauguration of Baron Waqa as President of Nauru have led to significant and sustained criticism of Nauru’s democracy and rule of law.

First, in January 2014, the Nauruan parliament amended the Immigration Act to allow the Minister for Justice & Border Control to sign removal orders.²¹⁸ Nauru’s Justice Minister Adeang subsequently signed the removal order of an Australian citizen who, in turn, sought a stay on his deportation.

²¹⁴ Farrell et al., 2016.

²¹⁵ DIBP, 2016.

²¹⁶ H. Davidson, 2016b.

²¹⁷ S. Anderson, 2016.

²¹⁸ Section 11 of Nauru’s Immigration Act 2014, No. 1, 28 January 2014.

Then resident magistrate Peter Law, acting as Nauru's chief magistrate, in turn granted a temporary injunction against the removal.²¹⁹ Ten days later, the Nauruan police force delivered a number of official documents to Law: two letters terminating his employment contracts as magistrate and as registrar without stated reason, one letter pertaining to a removal order that declared him to be a 'prohibited immigrant', and a plane ticket for that same afternoon. Law immediately contacted Geoffrey Eames QC, serving as the Chief Justice of Nauru, seeking an injunction against his deportation from Nauru. Eames issued such injunction – which was served to Nauru's police commissioner, Justice Minister, President, and national state-owned airline – yet this did not prevent the actual deportation of Law. Eames consequently tried to fly to Nauru the next day, but his visa was cancelled by the Nauruan government. After being unable to go to Nauru for two months, Eames decided to resign from his position as Nauru's Chief Justice as it had become impossible for him to fulfil his duties.²²⁰ Nauru was as a result without courts for over six months.

Second, in May 2014, three opposition members of parliament were suspended for giving interviews to international media.²²¹ In a number of interviews, the MPs had voiced criticism in relation to the dismissal of chief magistrate Law and the obstructed return of Chief Justice Eames to the country. According to Justice Minister Adeang, these interviews had damaged Nauru's development.²²² He stated that the MPs "were suspended due to their deliberate attempts and damaging comments to foreign media undermining the good work of the Waqa Government".²²³ It was claimed that by suspending these opposition MPs, Nauru's parliament had "voted to protect the nation's international standing and future investment".²²⁴ Later, in June 2014, two other opposition MPs were also suspended since they would have behaved "in an unruly manner" in Parliament.²²⁵ The five MPs were indefinitely suspended, which fuelled the already existing frustrations amongst their constituents.²²⁶ The ensuing criticism prompted the Nauruan government to block Facebook in May 2015.²²⁷ A few weeks later, in June 2015, ABC News reported that President Waqa, Minister Adeang, and other government officials were implicated in a bribery scandal involving the Australian phosphate mining company Getax.²²⁸ Ultimately, these developments led to a large protest of

219 Doherty, 2017.

220 Doherty, 2017.

221 ABC News, 2014.

222 ABC News, 2014.

223 Government of Nauru, 2014.

224 Government of Nauru, 2014.

225 Cooney, 2014.

226 Fox, 2015a.

227 Firth, 2016, pp. 292–293.

228 A. McDonald & Cooper, 2015.

hundreds of Nauruan citizens outside the Parliament building in June 2015.²²⁹ During this protest, one of the suspended MPs was arrested for “disrupting the legislature”, whilst two other suspended MPs were arrested a couple of days later on account of involvement “in the act of lawlessness”.²³⁰ As a response to the protest, the Nauruan authorities furthermore stripped protesters from their old-age pensions.²³¹ After criticizing Nauru’s curbing of free speech in the media, one of the suspended MPs who visited Nauru for four days from his home in New Zealand was detained when he was about to board a plane to Australia and his passport was cancelled.²³² The government of New Zealand decided to suspend its aid budget to Nauru a few months later,²³³ and ultimately granted the suspended MP citizenship in order to facilitate his departure from Nauru.²³⁴

In response to the protest outside of Parliament, the Nauruan government brought charges against 19 individuals in relation to the protests, including against three suspended MPs.²³⁵ However, in September 2018, Judge Geoffrey Muecke – sitting as the Supreme Court of Nauru – permanently stayed the proceedings of the 19 suspects because they were not provided with a fair trial, referring to “a shameful affront by the Minister for Justice to the rule of law in Nauru”.²³⁶ The Nauruan government has indicated that it will appeal the decision.²³⁷ Interesting in this regard, however, is that the Nauruan government in December 2017 terminated a Treaty with Australia that regulated the possibility of appealing decisions from the Nauruan Supreme Court to the High Court of Australia.²³⁸ This termination entered into force on 12 March 2018. Ever since, the Nauruan government is in the process of establishing its own Court of Appeal with appellate jurisdiction vis-à-vis most cases of the Supreme Court. Any appeal by the Nauruan prosecutorial authorities in the case against those that have become known as the ‘Nauru-19’ thus will have to be lodged with this novel appellate court.

229 Fox, 2015a.

230 ABC News, 2015; Fox, 2015a.

231 Fox, 2015b.

232 Firth, 2016, pp. 294–295.

233 Firth, 2016, p. 296.

234 ABC News, 2016.

235 Doherty, 2018b.

236 Supreme Court of Nauru, *Republic of Nauru v. Mathew Basiua & Others* [2018] Criminal Case no. 12 of 2017, para. 370.

237 Doherty, 2018c. Indeed, the Supreme Court of Nauru is not the highest court of appeal and judgments – except for those on constitutional matters – can thus be appealed.

238 *Agreement between the Government of Australia and the Government of the Republic of Nauru relating to Appeals to the High Court of Australia from the Supreme Court of Nauru* (Nauru, 6 September 1976), available at <http://classic.austlii.edu.au/au/other/dfat/treaties/ATS/1977/11.html> (last accessed 30 May 2019). See, for a historical overview of Australia’s High Court’s appellate jurisdiction on Nauru, Murray, 2018.

1.5.2 Offshore imprisonment in Northern Europe: a Norwegian-Dutch penal experiment

1.5.2.1 *Background of the Norwegian-Dutch cooperation: a novel Belgian-Dutch penal construction*

The second case study that this book focuses upon is the Norwegian-Dutch penal collaboration in a Dutch prison establishment, 'PI Norgerhaven', located in the Dutch town of Veenhuizen. To understand the context of this collaboration, however, another bilateral penal experiment that inspired the Norwegian-Dutch cooperation should first be addressed: that between Belgium and the Netherlands.

In 2009, Belgium and the Netherlands started to cooperate intensively in the penal field in an ostensibly unique and novel way. In that year, the Belgian and Dutch governments entered into a Treaty (hereinafter: 'Belgian-Dutch Treaty')²³⁹ under which a Dutch penitentiary institution located in the city of Tilburg ('PI Tilburg') was leased to the Belgian authorities for the detention of approximately 500 Belgian prisoners for an annual payment of 30 million euro.²⁴⁰ The maximum lease capacity was later extended to 650 prisoners in exchange for an additional 7,9 million euro.²⁴¹ The agreement was said to be beneficial for both Belgium, where prisons had been overcrowded by 26.8%, and the Netherlands, where prison capacity exceeded the prison population and the unemployment of prison staff lurked.²⁴² The first transfers of Belgian prisoners took place in February 2010.²⁴³ By 2011, PI Tilburg hosted more convicted Belgian detainees than any prison in Belgium itself.²⁴⁴

Under the Belgian-Dutch Treaty, PI Tilburg remained a Dutch facility on Dutch territory but functioned as a section of the Belgian penitentiary facility of Wortel (*Strafinrichting Wortel*).²⁴⁵ As such, PI Tilburg implemented a Belgian prison regime yet prisoners were guarded by Dutch penitentiary staff working for DJI.²⁴⁶ Given the novelty of the arrangements, the nature of the prison regime caused confusion amongst observers and scholars alike: some state

239 *Verdrag tussen het Koninkrijk der Nederlanden en het Koninkrijk België over de terbeschikkingstelling van een penitentiaire inrichting in Nederland ten behoeve van de tenuitvoerlegging van bij Belgische veroordelingen opgelegde vrijheidsstraffen*; Tilburg, 31 October 2009, *Trb.* 2009, 202.

240 Article 26(1) Belgian-Dutch Treaty. See also Beyens & Boone, 2013; Levin, 2014. PI Tilburg has a rich history, functioning previously as a military barrack, a detention centre for irregular migrants awaiting deportation, and a women's prison: Beyens & Boone, 2015, p. 482.

241 Federale Overheidsdienst Justitie, 2010; League for Human Rights, 2011, p. 26.

242 Beyens & Boone, 2015, p. 479; Kontorovich, 2012.

243 Beyens & Boone, 2015; CPT, 2012; De Ridder, 2013.

244 League for Human Rights, 2011, p. 2; Robert, 2011, p. 15.

245 Article 1 sub e Belgian-Dutch Treaty.

246 De Ridder, 2016b, p. 128.

that it was “Belgian”²⁴⁷ or “(mostly) Belgian”,²⁴⁸ whereas others argue that it was “in essence Dutch”²⁴⁹ or “an international hybrid”.²⁵⁰

In 2015, the Belgian government decided to end the lease agreement. This meant that all detainees in PI Tilburg were to be returned to Belgium by 31 December 2016.²⁵¹

1.5.2.2 ‘The Garden of Norway’: Norwegian-Dutch penal cooperation

The Belgian-Dutch agreement did not remain a one-off experiment. In 2015, the Dutch government concluded a Treaty with the Norwegian government in relation to the lease of PI Norgerhaven for a three-year period (hereinafter: ‘Norwegian-Dutch Treaty’).²⁵² PI Norgerhaven – which coincidentally translates as ‘the garden of Norway’ in Norwegian – is situated in the town of Veenhuizen in Drenthe, a rather sparsely populated province of the Netherlands. It is one of two locations of penitentiary institution Veenhuizen, the other being location Esserheem, a prison facility for repeat offenders.

The lease period commenced in September 2015. Administratively, PI Norgerhaven functioned as an annex of Ullersmo Prison in Norway,²⁵³ which is situated in the vicinity of Oslo. In exchange for the use of the prison facility with 242 detention places, Norway paid an annual sum of 25.5 million euros to the Netherlands.²⁵⁴ Similar to the Dutch-Belgian cooperation, the agreement was beneficial for both countries: it allowed the Dutch government to preserve jobs in the prison system whilst it provided the Norwegian authorities, which were dealing with temporary prison shortages as a result of renovation works, with alternative prison capacity.²⁵⁵ Since the Norwegian government decided not to prolong the lease agreement, the Norwegian-Dutch cooperation ended on the 31st of August 2018.

Notwithstanding the Belgian-Dutch precedent, the Norwegian-Dutch cooperation appears to be a next step in the offshore execution of prison sentences: whereas Belgium and the Netherlands have close cultural, historical and economic ties, Norway is not a neighbouring country of the Netherlands,

²⁴⁷ CPT, 2012, p. 7.

²⁴⁸ De Ridder, 2013.

²⁴⁹ League for Human Rights, 2011, p. 4.

²⁵⁰ Levin, 2014, p. 526.

²⁵¹ Rijksoverheid, 2015a.

²⁵² *Verdrag tussen het Koninkrijk der Nederlanden en het Koninkrijk Noorwegen inzake het gebruik van een penitentiaire inrichting in Nederland voor de tenuitvoerlegging van bij Noorse vonnissen opgelegde vrijheidsstraffen*; Veenhuizen, 2 March 2015, Trb. 2015, 37. The Treaty can be renewed multiple times for at least one year each time, although the Norwegian Parliament decided that the Treaty can only be renewed for a period of maximum two years – until September 2020 latest: see Struyker Boudier & Verrest, 2015, p. 911.

²⁵³ Article 1 sub e Norwegian-Dutch Treaty.

²⁵⁴ Article 27 Norwegian-Dutch Treaty.

²⁵⁵ Struyker Boudier & Verrest, 2015, pp. 909–910.

does not share the same national language, and is not a European Union ('EU') member state.²⁵⁶ Furthermore, whereas the Belgian penitentiary facility of Wortel was only approximately 25 kilometres – or roughly a 45 minutes' drive – away from PI Tilburg that functioned as its annex, Ullersmo Prison in Norway and PI Norgerhaven are almost 850 kilometres apart and require one to use various modes of transportation – including, on most occasions, a flight from Oslo to either Amsterdam Schiphol Airport or Groningen-Eelde Airport.

1.5.2.3 PI Norgerhaven: from extensive compliments to the occasional controversy

Whereas the introduction of RPC Nauru above has extensively detailed a number of controversies and developments, the Norwegian-Dutch cooperation has sparked significantly less controversy both domestically – in the countries involved – and in international attention. To the contrary, the novel and ostensibly rather unique collaborations between Belgium and the Netherlands and between Norway and the Netherlands have been widely vaunted and have seemingly inspired policy makers and politicians elsewhere. Indeed, PI Tilburg and PI Norgerhaven have frequently been considered as 'best practices' and 'shining examples' of penal cooperation in an international setting.²⁵⁷ Ideas for policy transfers have, accordingly, been coined in a number of countries: Switzerland has, for example, showed an interest in leasing Dutch prisons in the future.²⁵⁸ Also in the UK and the US, ideas for similar constructions have been raised.²⁵⁹ In Norway, based on the experiences with the Norwegian-Dutch cooperation, "[v]oices within Norway's anti-immigration Progress Party have even suggested securing prison capacity in East European countries so that nationals from those countries who are convicted in Norway can serve their sentence back in Eastern Europe".²⁶⁰ In this sense, the Belgian-Dutch and Norwegian-Dutch arrangements may eventually evolve into prototypes, or potentially even archetypes, which in turn may signal a next step in the materialisation of a global prison market that is concerned with what may be labelled 'transnational prisoners'.²⁶¹ So far, however, the Belgian-

256 Kontorovich, 2014; Rijksoverheid, 2015b. Norway is part of the European Economic Area (EEA) and the Schengen Zone but not of the EU.

257 This is not only true for foreign policy makers but also for academic researchers: thus, in examining the Norwegian-Dutch cooperation, an international group of criminologists from the UK, Norway, the Netherlands, and Belgium have recently qualified PI Norgerhaven as "the most reflexive, 'deliberative' prison [they] have ever encountered" and the collaboration between Norway and the Netherlands as "an outstanding example of international cooperation": Liebling & Schmidt, 2018.

258 Pakes & Holt, 2015, p. 12; Rijksoverheid, 2015b; Van der Naald, 2015.

259 W. Buchanan, 2010; Levin, 2014, p. 510; V. Moss, 2012.

260 Pakes & Holt, 2017, p. 71.

261 Levin, 2014, p. 514; Liebling, 2013, p. 223; Pakes & Holt, 2015. Kontorovich speaks in this regard about 'gaolbalization': Kontorovich, 2012, 2014.

Dutch and Norwegian-Dutch penal collaborations have remained unique experiences and it thus remains to be seen whether a transnational prison market along the lines of extraterritorial imprisonment and inter-state cooperation will eventually materialise.

Notwithstanding the relative lack of profound criticism, a number of concerns about PI Norgerhaven have been raised over the past years. The most pressing ones have been summarised by the Norwegian NGO Forum for Human Rights in its 2018 submission regarding the 8th Periodic Report of Norway to the UN Committee Against Torture.²⁶² In recommending the abolishment of extraterritorial prison leasing, it points out that the Norwegian-Dutch construction was problematic for a number of reasons.²⁶³ First, it is argued that convicts perceived their transfer to another country to serve their prison sentence as a “severe infringements on their rights”, and that such transfers were consequently not justifiable, in particular given that the deprivation of liberty is one of the most serious ways in which a state can sanction.²⁶⁴ Second, the legal standing of convicts in PI Norgerhaven would be weakened by the fact that decision-making processes would take longer compared to domestic Norwegian facilities and Dutch staff would not be sufficiently familiar with the applicable Norwegian legislation.²⁶⁵ Third, the cooperation would not do sufficient justice to the rehabilitation principle underlying Norwegian’s correctional system given that those transferred to PI Norgerhaven (i) would not be permitted leave of absence, (ii) would receive very few visits as a result of the lengthy and expensive travel involved, and (iii) would not receive educational and job-training programmes that were equal to those offered in domestic Norwegian facilities.²⁶⁶ Consequently, the Norwegian NGO Forum for Human Rights concludes that “[b]eing placed in the Norgerhaven prison, the inmates’ progression is adversely affected, complicating their reintegration into society after they have served their sentence”.²⁶⁷ In addition, as corroborated by the Norwegian Ombudsman who operates as Norway’s National Preventive Mechanism, inmates were argued not to be sufficiently protected against torture now that Norwegian authorities could not as a matter of principle or discretion initiate police investigations in the event of a potential violation of the prohibition against torture and ill-treatment.²⁶⁸

As academic research has shown, however, such concerns should be nuanced. In particular, whilst acknowledging a number of difficulties in relation to rehabilitation and available programmes, a ‘climate survey’ published in 2017 shows that inmates had a positive overall assessment of the

262 Norwegian NGO Forum for Human Rights, 2018.

263 Norwegian NGO Forum for Human Rights, 2018, p. 11.

264 Norwegian NGO Forum for Human Rights, 2018, p. 11.

265 Norwegian NGO Forum for Human Rights, 2018, p. 11.

266 Norwegian NGO Forum for Human Rights, 2018, p. 11.

267 Norwegian NGO Forum for Human Rights, 2018, p. 11.

268 Norwegian NGO Forum for Human Rights, 2018, p. 11; Sivilombudsmannen, 2016, p. 6.

facility and that relationships and practices in the prison facility were of a very high quality.²⁶⁹ In fact, “[t]he high scores at Norgerhaven compare favourably to the scores found in both open and small closed Norwegian prisons generally, and are similar to those found in the open prison Bastøy”.²⁷⁰ The survey is furthermore very positive about the cooperation and dialogue between the Norwegian and Dutch personnel and about their reflectiveness, professional orientation, engagement, and experience, with the Norwegian-Dutch cooperation being classified as a showcase example of “what makes a prison and its staff operate at their best”.²⁷¹ Nevertheless, as already noted, the survey does confirm some concerns as to inmates’ personal development, their opportunities to prepare for their rehabilitation into society, and the transparency and fairness of procedures: according to the researchers, inmates “seemed to be ‘doing’ rather than using, calm, foreign time”.²⁷²

1.6 DEFINITIONAL ISSUES

Some remarks on definitions used in this book are due. First, in relation to the Nauruan-Australian case study, this book speaks about the Regional Processing Centre Nauru (‘RPC Nauru’)²⁷³ rather than the Regional Processing Centres Nauru (in plural form). Technically, RPC Nauru consists of three different sites that are situated on different parts of the island and that house different populations and fulfil different functions within the offshore processing framework. Accordingly, this has led some to speak about the Regional Processing Centres on Nauru in a plural form. At the same time, this plural form is also used to denote more generally the two Regional Processing Centres that were created under the Pacific Solution and that were maintained during OSB.²⁷⁴ In order to prevent confusion about the proper meaning of Regional Processing Centres (or ‘RPCs’) in a plural form, this term will only be used to describe the facilities in both nations unless otherwise noted.

²⁶⁹ Johnsen et al., 2017.

²⁷⁰ Johnsen et al., 2017, p. 3. Bastøy prison, an open prison regime located on a Norwegian island and designed without cameras or fences, has frequently been described as Norway’s ‘showcase prison’ in that it has a particular liberal regime and is – albeit arguably misleadingly – presented as “a story about Norwegian tolerance and inclusiveness and celebrating the achievements of the welfare state”: see Franko Aas, 2014, p. 536; Pratt, 2008, p. 123.

²⁷¹ Johnsen et al., 2017, p. 10.

²⁷² Johnsen et al., 2017, p. 10.

²⁷³ Likewise, it speaks about the Regional Processing Centre Manus (‘RPC Manus’).

²⁷⁴ Although the latter facilities are not part of the case study at hand, they will at times be referred to given that the facilities in Nauru and PNG are to a large extent similar in their set-up, are highly interrelated in their operation and functioning, and events happening in the facilities in one of both countries has proven to also have significant implications for the facilities in the other country.

Second, where the Norwegian-Dutch case study is concerned, this book prefers to speak about 'PI Norgerhaven' instead of 'PI Veenhuizen'. Whilst the correctional facility is officially called 'PI Veenhuizen', it comprises two different locations: Norgerhaven – with which this book is concerned – and Esserheem – which is a Dutch prison facility specifically for systematic offenders. When speaking about 'PI Veenhuizen', one thus formally speaks about both locations, even though they fulfilled completely different functions and largely operated as self-standing facilities during the Norwegian-Dutch cooperation. Therefore, for sake of clarity, this book will refer to the facility leased by Norway as 'PI Norgerhaven'.

1.7 ROADMAP

This book tells the human rights story of two environments, embedded in larger macro-level developments, that have been heavily influenced – or even shaped – by globalisation developments: RPC Nauru and PI Norgerhaven. At the same time, these two specific environments have in turn also influenced and shaped contemporary understandings of globalisation, for the Australian-Nauruan and Norwegian-Dutch collaborations have frequently been regarded as prototypical or even archetypal expressions of the globalisation trends of commodification and crimmigration and have become text-book examples of novel types of cooperation in the 'glocal' sphere.

Nevertheless, the story told here is not *only* that of RPC Nauru and PI Norgerhaven: to the contrary, this research attempts to be of value for a variety of cases far beyond the case studies centralised here. These case studies function as focal points – rather than as exclusive paradigms – for the human rights lens applied in this book, and in doing so attempt to make clear that a similar lens could be directed at alternative contexts characterised by commodification and/or crimmigration. Furthermore, they function as reminders of the importance of the 'glocal' as an appropriate sphere of study, with local particularities being of crucial importance for the shaping of simultaneously universalistic and hybrid trends of globalisation and vice versa. Therefore, the topic will be presented through what may be conceived of as a 'funnel' approach: the developments of commodification and crimmigration, and their impact on human rights, are approached both in a general sense – thereby outlining broad trends of globalisation – and in relation to case studies specifically – thereby opening up scope for analysis of the 'glocal'.

Even more so, the story told in this book is not necessarily about the interplay of globalisation and confinement. Rather, it pursues a reality check of *human rights* in an era of globalisation. As has been explained above, the research assesses the validity of human rights by looking at confinement, rather than that it assesses the validity of confinement by looking at human rights. Of course, both are to some extent intertwined: in examining whether human

rights remain of relevance as a protection framework in contexts of confinement, the question whether contemporary contexts of confinement meet human rights requirements is almost inevitably addressed, at least in part. Still, it should be emphasised that confinement in this book is used as a prism, or lens, to examine the prospects of the ‘human rights elephant’, and that other, concurrent contexts where human rights are deemed of importance could also be used to approach this topic from a different angle.

The book is divided in three parts, as Figure 1 outlines. Each part deals with one of the three sub-questions of this research as set out above. In the conclusion, the findings of each part are drawn together in order to answer the main research question. The conclusions of each part that will be drawn in the concluding chapter, then, inform the conclusions about the prospects of the ‘human rights elephant’.

	PART I	PART II	PART III
	<i>Setting the scene</i>	<i>A legal approach</i>	<i>An empirical approach</i>
Crimmigration in confinement	Chapter 2 The crimmigration challenge to IHRL	Chapter 4 Adapting IHRL to crimmigration realities through accepted interferences	Chapter 8 Reconceptualising human rights protection: towards a holistic approach Chapter 9 Exploring human rights as a holistic protection mechanism in RPC Nauru
Commodification in confinement	Chapter 3 The commodification challenge to IHRL	Chapter 5 Adapting IHRL to commodification realities through private responsibility Chapter 6 & Chapter 7 Adapting IHRL to commodification realities through state responsibility <i>Intermezzo</i> <i>Reflections in the contexts of RPC Nauru and PI Norgerhaven</i>	

Case study: RPC Nauru

Case study: PI Norgerhaven

Figure 1: Schematic outline of this book.

Part I of this book looks at *the elephant in the room*. It deals with the conceptual framework that guides this research and sets out the potential human rights problem that is inherent in the globalisation developments discussed. Thus, this part ‘sets the scene’ by elaborating upon the juxtaposed developments of commodification (chapter 2) and crimmigration (chapter 3). In each respective chapter, it also examines the ways in which these developments may challenge accountability under, and the effectiveness and legitimacy of, inter-

national human rights law. The use of the funnel approach means that the developments of commodification and crimmigration are first theorised and addressed at a macro level and that their relevance for the case studies are subsequently dealt with. As will become clear, crimmigration and commodification potentially challenge international human rights law both 'in the books' and 'in action'.²⁷⁵ This in turn informs the approach taken in Part II (discussing the law in books) and Part III (including discussion of the law in action).

Part II of the book deals with international human rights law as a *tuskless elephant*. This part thus looks at how human rights law deals with the challenges posed by globalisation developments. Returning to the metaphor of human rights elephants, it thus looks at the extent to which the human rights law elephant has been able to sustain itself in light of attempts to deprive it of its two tusks as its main assets, that is, to deprive it of on the one hand its potential to provide equal protection, and on the other hand its ability to hold territorial states as primary duty bearers responsible. Informed by Part I, it elaborates upon the *legal framework* by examining the 'law in books' in light of crimmigration and commodification developments. It hence maintains a clear doctrinal legal perspective: analysis focuses on the extent to which international human rights law can remain of relevance in confinement contexts characterised by commodification and crimmigration by looking at relevant developments of international (human rights) law. Attention will further be provided to the extent to which international human rights law has been able to accommodate *crimmigration* challenges (chapter 4), after which the extent to which international human rights law been able to accommodate *commodification* challenges will be analysed. In relation to this latter part, addressed are, in turn, private human rights obligations (chapter 5), responsibility for conduct (chapter 6), and the scope of human rights obligations (chapter 7). In order to holistically outline the way in which commodification developments may frustrate human rights protection in both RPC Nauru and PI Norgerhaven specifically, a brief intermezzo draws together the implications of each of these commodification-related topics for the two case studies at hand ('intermezzo'). Through the funnel approach applied in each chapter, the various aspects of international human rights law that are addressed are first examined at the macro level, focussing on global and regional legal regimes and developments, after which these frameworks are applied to the case studies at hand specifically. As will become apparent, international human rights law has to some extent been able to show resilience in the face of crimmigration and commodification challenges, but ultimately its veracity to its underlying fundamental tenets obstructs it from doing so in a coherent and full-fledged manner. Being partially deprived of their two tusks, i.e. of being able to provide equal pro-

²⁷⁵ For the distinction between the 'law in books' and the 'law in action', see Pound, 1910.

tection for all and of being able to hold power-bearers responsible, the human rights elephant is thus substantially weakened.

This also means, as Part III of the book explores, that the future existence of the human rights elephant is potentially endangered. However, this part will elaborate upon human rights' desire paths, or *olifantenpaadjes* ('elephant paths') in Dutch,²⁷⁶ to engage in analysis of alternative routes that can be traversed in order for human rights protection to materialise. Specifically, taking the ensuing 'legal impasse' as analysed in Part II as a starting point, it inquires into the role of human rights 'in action' in what may be called the *socio-empirical framework*. In doing so, the argument will be developed that human rights are not necessarily *legal* constructs but can be understood in four distinct ways. The ensuing analysis therefore does not squarely rely on socio-legal research, which examines the nature and role of *law* in society,²⁷⁷ but is implicitly linked to the more encompassing – albeit highly understudied and hardly developed field of – *sociology of human rights*.²⁷⁸ As Frezzo defines, the sociology of human rights applies sociological theories and methods in order to understand human rights' social practice.²⁷⁹ Rather than the doctrinal legal research approach, which places human rights claims at the heart of (international) law, the sociology of human rights thus situates human rights claims in society.²⁸⁰ Clément furthermore adds that "a sociology of human rights puts aside the idealistic musings of political scientists and legal scholars, and roots our understanding of rights in social practice".²⁸¹ He also points out that human rights are not necessarily legal but can "manifest outside the law".²⁸² Part III will rely, albeit in a somewhat implicit fashion, on such approaches to argue that an altogether novel analytical framework is needed to holistically examine the relevance of human rights 'in action'. It thus situates human rights protection not only in legal processes but also in social practices, therewith linking analysis to both legal and sociological understandings of human rights. Such paradigm is, through the funnel approach, first addressed in a general sense (chapter 8), after which it is applied to the context of RPC Nauru specifically in order to illustrate what a holistic analysis of human rights might include (chapter 9).

276 This phrase refers to unofficial routes or shortcuts. The Dutch phrase is named after the fact that elephants typically choose the shortest route towards their destination, as a result of which visible unofficial routes are created. It is also used to denote pragmatic solutions to imposed restrictions.

277 See e.g. Mather, 2011; Van Aeken, 2015.

278 For a leading work on this understudied branch of scholarship, see Frezzo, 2015.

279 Frezzo, 2015.

280 Frezzo, 2015.

281 Clément, 2015, p. 564.

282 Clément, 2015, p. 564.

PART I

The elephant in the room

Commodification & crimmigration as challenges to international human rights law accountability, effectiveness, and legitimacy

2 | Bars with barcodes

The commodification of confinement

2.1 INTRODUCTION

Migration control and criminal justice are often conceived of as exercises of sovereign state power. Whereas criminal justice processes are considered to constitute ways for the state to sanction breaches of the 'social contract',¹ migration control is considered to be a process by which states can regulate entry to the polity – and, potentially, to the social contract – in the first place. The idea that states are in charge of criminal justice and migration control as such is not revolutionary. It is, for example, common to speak about the sovereign state's 'monopoly' of crime control.² Likewise, the control of cross-border migration has to some extent always been within the ambit of sovereign power given that it is intrinsically based on notions of sovereign territory and borders that delineate the geographical spheres of influence of sovereign states.³

In turn, in addition to the use of other mechanisms, many states utilise migration control and criminal justice in attempting to provide domestic safety and security. Indeed, for the pursuit of safety and security, it has become reflexive to turn to the public authorities governing the territory in which one is residing. Such state-centred understanding appears to be a relic of the recent past in which the coupling of public authority with matters of safekeeping and security became gradually entrenched in thought.⁴ In dealing with such responsibilities, on the one hand, states deploy the three 'Cs' of criminal justice – cops, courts, and corrections – that generally have become associated with publicly provided safety and security.⁵ On the other hand, states increasingly employ migration control in the pursuit of domestic safety and security. Indeed, as migration is increasingly conceived of as endangering public order,

1 On the terminology of criminal justice *processes*, rather than 'systems' or 'chains', see Padfield 2008, pp. 5–6.

2 Garland, 1996, p. 448.

3 Infantino, 2016, pp. 4–5; Rudolph, 2005.

4 Garland, 1996, p. 448; Schuilenburg, 2009; Shearing & Wood, 2003, p. 402.

5 Daems & Vander Beken, 2018, p. 9; Kempa, Wood, & Shearing, 1999; Shearing & Wood, 2003, p. 402. This association is by no means unjustified: as any introductory textbook on the matter will explain, the criminal justice process is essentially geared towards the control of crime and the safeguarding of individuals: see, e.g., Travis III & Edwards, 2015, pp. 3 and 19.

domestic stability, labour markets, and cultural identity, migration control has in a host of countries been gradually securitised.⁶

In a globalising world, however, such state-focused conceptions of safekeeping and security are increasingly challenged.⁷ In the face of economic, social, and cultural globalisation, we are witnessing a radical change in the way governments deal with their responsibilities related to criminal justice and migration control. Globalisation has amongst others spurred innovative interaction of the state with a variety of other actors, including private companies, NGOs, third states, international organisations, and local communities, which has resulted in a gradual shift from 'government' to 'governance'.⁸ As a result of this shift, responsibilities and decision-making processes that were traditionally within the state's exclusive ambit are increasingly diffused amongst other actors. The work of Lahav and Guiraudon in the field of migration control is illustrative of such diffusion: they identify the devolution of decision-making and the shifting of control 'upwards' to intergovernmental fora, 'downwards' to local authorities, and 'outwards' to non-state actors.⁹

For some time, this process was linked to a presumed loss of power and control of the state and an erosion of public authority altogether. In reality, however, many of these processes have resulted in a reinforcement of state power and authority: on many occasions the state retains a key position in the governance of criminal justice and migration control, although its role may shift significantly.¹⁰ Some have likened this to a rowing boat: whilst the state used to steer and row simultaneously, it on various occasions has altered its position in the boat to focus on the steering task whilst letting others row.¹¹ Alternatively, some have claimed that the state on many occasions is not simply moving from rowing to steering but rather does part of both with the help of third actors in a non-fixed partnership role.¹² Overall, it is claimed that

6 Bourbeau, 2011, p. 1; Huysmans, 2000, p. 752; Rudolph, 2005, pp. 9-12. This 'securitisation of migration' nowadays occurs across countries in the global North: Van der Woude, Van der Leun, & Nijland, 2014, p. 560. It also occurs elsewhere, but scholarship relating to the securitization of migration in the global South remains scarce. See also, however, Turnbull, 2017, p. 2.

7 In fact, it is questionable whether the paradigm of the state as beacon or guardian of safekeeping and security has ever been fully justified. For example, until well into the nineteenth century, private policing, prosecution, and punishment practices existed in a number of countries including the UK and the US: Emsley, 1999, p. 32; Feeley, 2002, p. 326; Johnston, 1992, pp. 3-24; Simmons, 2007, pp. 921-923. Although migration control is a relatively recent phenomenon, it has likewise featured private stakeholders ever since its inception. Consider, for instance, the involvement of private carriers for transporting unauthorised migrants from Europe to the US in the early 1900s: Infantino, 2016, pp. 7-8.

8 Vandenhoe & Benedek, 2013, p. 366.

9 Guiraudon & Lahav, 2000; Lahav, 1998. See also Franko, 2017, p. 362.

10 Doty & Wheatley, 2013; Michael Flynn, 2014, 2017; Gammeltoft-Hansen, 2011; Shichor, 1999.

11 A. Crawford, 2006, p. 459; Osborne & Gaebler, 1993, pp. 35-36; Shichor, 1999, pp. 241-243; Verkuil, 2007, pp. 159-160.

12 Kerr, 2013, p. 254; Scholten & Minderhoud, 2008, p. 145.

globalisation enables states to simultaneously retreat and advance, and to ultimately extend and diffuse the exercise of sovereign power.¹³ A resurrection of third-party involvement in both criminal justice and migration control has been identified across a number of countries, from policing to probation and from border checks to expulsion procedures.¹⁴ Settings of penal and immigration-related confinement have not been exempted from this development, which can be labelled as a development of 'commodification'. Commodification in this sense refers to the transformation of confinement into a commodity or object of trade: confining inmates and detainees has become a tradeable service on the global market offered to states around the world.¹⁵ As will be further detailed below, the providers of these services – including private actors and foreign states – stand to gain from their involvement in such arrangements, whether on the basis of pecuniary rewards, domestic or institutional interests, or the acquisition of leverage. The sponsors or customers of these services – outsourcing states – likewise stand to gain from these constructions, for example because outsourced facilities are more cost-effective, because they meet policy goals, or because they allow for the preservation, acquisition, or amplification of power.¹⁶ Commodification is therefore not something that simply 'happens' to them: to the contrary, commodification should be understood as a central technology of contemporary government.¹⁷ In sum, commodification constitutes a process of outsourcing, commercialisation, and/or jurisdiction-shopping that creates markets for control in which a variety of entities may take part.¹⁸ In this sense, it is an umbrella term, as it captures various novel modes of interaction between states and miscellaneous third actors. It is, however, not a streamlined process. Indeed, instances of commodification often follow unique trajectories and henceforth do not lend themselves

13 Doty & Wheatley, 2013, p. 435; A.A. White, 2001b, p. 113.

14 For instance, private policing has been reintroduced in primarily Anglo-Saxon countries: Fairfax, 2010, pp. 273-275; Jones & Newbum, 2002; Shearing & Wood, 2003, pp. 402-403; Simmons, 2007. In addition, there has been a rebirth of private prosecution practices in a few countries: see, e.g., Fairfax, 2010, p. 266. Likewise, in various countries, actors other than the territorial state actors are involved in managing and controlling migration: Van Berlo, 2015b. This holds true for migration control before the border, where private carriers under carrier sanction legislation are obliged to check travel documents and carry responsibility for returning unauthorised migrants: Scholten, 2014; Van Berlo, 2016b. At the border, private border guards increasingly perform immigration and security checks: Gammeltoft-Hansen, 2013. Moreover, deportation *àzavay* from the border is frequently effectuated by private security operators: Khosravi, 2009.

15 See also Matthew Flynn, 2015, p. 9; Hallett, 2004, p. 55; Loader, 1999; Pakes & Holt, 2015, p. 90; Price, 2006; Welch, 2012, p. 333.

16 Compare Guiraudon & Lahav, 2000, p. 177; Immerwahr, 2016, p. 18.

17 L.L. Martin, 2017.

18 Bosworth, Franko, & Pickering, 2018; Gammeltoft-Hansen, 2011; Gammeltoft-Hansen & Vedsted-Hansen, 2017.

for generalisation per se.¹⁹ Commodification is, hence, like a colour: as a concept it is difficult to exhaustively circumscribe, in particular when taking into account all existing shades, but you recognise one when you see one.²⁰

In the next section, the development of commodification will be further theorised in order to clarify not only how commodified spaces of confinement can be properly visualised but also how their operation can be fathomed. Whilst various theories have been developed “to capture this reality of governance beyond the state”,²¹ the focus here will be on two of the most influential theories: nodal governance and anchored pluralism. In combination, these theories address both the empirical and normative questions connected to the shift from government to governance under the banner of commodification. The chapter subsequently addresses two global trends of commodification in penal and immigration-related confinement: (i) privatisation and (ii) off-shoring. In turn, the commodification aspects of RPC Nauru and PI Norgerhaven are focussed upon in order to illustrate how, as part of ‘glocalisation’, global trends are locally translated. In doing so, a proper visualisation of both facilities’ ‘nodal’ set-up will be provided. In the final part, the challenges posed by commodification to international human rights law protection in settings of confinement will be addressed. Attention will be drawn to a first fundamental tenet of international human rights law as well as to the ways in which commodification potentially challenges accountability under, and the effectiveness and legitimacy of, international human rights law in settings of confinement.

2.2 THEORISING COMMODIFICATION: NODAL GOVERNANCE AND ANCHORED PLURALISM

As mentioned above, to theorise commodification, two theoretical frameworks will be looked at: nodal governance and anchored pluralism. As will become apparent below when the case studies of RPC Nauru and PI Norgerhaven are examined, these theoretical frameworks are of crucial importance not only for the *visualisation* of the case studies’ commodified nature, but also for a proper understanding of the *impact* of such commodification on how these facilities are governed.

Nodal governance theory has been described as “an elaboration of contemporary network theory that explains how a variety of actors operating within

19 See also Chacón, who complains that pivotal differences between manifestations of commodification in immigration detention are frequently carved out “with insufficient specificity”: Chacon, 2017, p. 44.

20 Unless, of course, one suffers from colour blindness. One should rest assured, however: unlike the persistent nature of colour blindness, once familiarised with the concept of commodification, it is easily recognised in the confinement realm.

21 Holley & Shearing, 2017, p. 164.

social systems interact along networks to govern the systems they inhabit".²² It is based on the idea that contemporary governance is no longer within the exclusive purview of the nation state but is rather typically complex. Thus, it characterises governance as a system involving a plurality of more or less interconnected actors, a plethora of mechanisms that are used to influence the course of events, and rapid adaptive change.²³

Consequently, nodal governance envisages governance as a network of nodes – each involved actor clothed with tasks and responsibilities being a node – that continuously interact, conflict, and contest in different ways and configurations.²⁴ These nodes can take a variety of forms, including public institutions, private for-profit organisations, NGOs, protest movements, supra-national bodies, local authorities, and so on, and may vary as to their size, connectedness, inclusivity, and level of specialisation.²⁵ Nodes are considered 'auspices' or 'providers' of governance that are not merely points established through the intersection of network flows but rather "sites of capacity, knowledge and resources" that are ultimately relevant for how the flow of events in the network is being shaped.²⁶ The nodes involved in a governance system are interconnected both formally and informally and act simultaneously through a variety of mechanisms and processes.²⁷ Nodes may thus simultaneously mobilise and resist one another "in a variety of ways so as to shape matters in ways that promote their objectives and concerns".²⁸ As a result, nodal governance systems are often highly diverse and complex.²⁹

Each node exhibits four defining characteristics: (i) mentalities (that is, a cultural narrative guiding the thinking and acting of the node vis-à-vis the management of the course of events), (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 mobilise and effectuate technologies, resources and mentalities).³⁰ 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".³¹ As mentioned above, given that nodal governance networks are subject to rapidly changing circumstances, the division of labour and responsibilities – or "who does what" – may likewise rapidly change across time and

22 Burris, Drahos, & Shearing, 2005, p. 33.

23 Burris et al., 2005, pp. 31–32; Holley & Shearing, 2017, p. 163.

24 Burris et al., 2005; Shearing & Wood, 2003; J. Wood & Shearing, 2006.

25 Compare Holley & Shearing, 2017, p. 168.

26 Holley & Shearing, 2017, p. 165.

27 Burris et al., 2005; Quéro & Dupont, 2017.

28 J. Wood & Shearing, 2007, p. 149.

29 J. Wood & Shearing, 2007, p. 149.

30 Burris, 2004; Burris et al., 2005; Holley & Shearing, 2017, p. 168.

31 J. Wood & Shearing, 2006, p. 12.

space, making nodal governance networks not only diverse and complex but also inherently fluid and flexible.³²

Although nodes are an essential part of nodal governance frameworks, the emphasis in the nodal governance approach is on the *networks* through which their coordination, cooperation, conflict, and contestation materialises rather than on the actors themselves.³³ The idea is that power and control are not with one particular node, but with a network: power and control are everywhere.³⁴ Power hence becomes a collaborative and coproduced project rather than a singular projection based in one central leviathan.³⁵ As a consequence, interpretation and analysis of contemporary governance structures requires a nodal perspective that goes beyond the notions of ‘the public-private divide’ and ‘top-down governance’: in order to comprehend the polycentric distribution of power in networked governance, a mapping exercise in which the interrelationship between nodes is clarified is required. As Holley and Shearing rightfully remark in this regard, the question who is governing and in what way they are governing cannot be determined *a priori* but require an empirical and context-specific exploration of the nodes involved and the way they interrelate.³⁶ Nodal governance theory provides such a framework in that it does not only allow for empirical description of even the most complex governance designs but also provides insight in their operation and functioning.

Nodal governance theory has not remained void of criticism, however. Notable criticism has been voiced from the perspective of ‘anchored pluralism’. Such critique emphasises that the concept of nodal governance unjustifiably devaluates the role of the state to that of merely ‘one of many’ nodal actors and argues that the state’s role in governance is – and should be – distinctive.³⁷ If this would not be the case, the allocation 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.³⁸ The state should hence maintain a pivotal position in order for governance to remain legitimate: its centralised legal order should license and oversee the functioning of other autonomous localities and the rules that they use.³⁹ Nodal governance, in this regard, would unduly underestimate the continued dominance of public authority.⁴⁰ As Holley and Shearing explain,

32 Holley & Shearing, 2017, p. 167; Johnston & Shearing, 2003, p. 21.

33 Holley & Shearing, 2017, p. 167.

34 J. Wood & Shearing, 2006, p. 2.

35 Holley & Shearing, 2017, p. 167.

36 Holley & Shearing, 2017, p. 165.

37 Boutellier & van Steden, 2011, p. 466.

38 Boutellier & van Steden, 2011, p. 466; Loader & Walker, 2006, p. 165.

39 Boutellier & van Steden, 2011; A. Crawford, 2006; Holley & Shearing, 2017, p. 166.

40 Sogaard, Houborg, & Tutenges, 2016, p. 135.

“[t]hese critiques echo concerns [...] that nodal governance thinkers are inclined to treat states as ‘idiots’ and, in so doing, have lost sight of the important role states play in ‘civilising’ governance processes. [...] According to this line of critique, nodal governance thinking runs the risk of unintentionally weakening state institutions and ceding legitimacy to nodes of uncertain virtue”.⁴¹

Although often presented as an alternative perspective, the concept of anchored pluralism should, however, not be regarded as incompatible per se with nodal governance theory. Whilst anchored pluralism fundamentally disagrees with the position of the state as ‘just a node’, it nevertheless recognises that the number of actors involved – and their interrelationships – have mushroomed in contemporary security governance. The real difference between nodal governance and anchored pluralism appears to be that the latter is essentially a *normative* framework whereas the former is concerned with an *empirical* enquiry. Nodal governance, in this sense, is somewhat value-free in that it does not consider certain arrangements of nodal governance superior to others. The prime focus of anchored pluralism, conversely, are the questions “who *should* govern, how they *should* govern and to whom they *should* be accountable”.⁴²

Nodal governance and anchored pluralism can accordingly be united in one conceptual framework of what may be labelled ‘state-directed nodal governance’ or, as others have called it, ‘anchoring nodes’.⁴³ Such unified framework entails that although many actors with their own mentalities, technologies, resources, and institutional structures are involved in governance, the boundaries within which they are able to legitimately roam is, or should be, set and supervised by the state through binding regulations, guidelines, and monitoring. This does not diminish the underlying idea of nodal governance as such: to the contrary, conceptualising the state’s distinct position and its unique standard-setting powers as its distinctive technologies allows for the embedding of anchored pluralism in the nodal governance framework. Put differently, since the state enjoys significant resources and has a unique set of technologies at its disposal, amongst which the powers to create laws and direct public policy, it has a unique and often supreme position to steer governance arrangements. Whilst each of the other involved nodes may have its own separate goals, including that of making profit or providing altruistic support, these should be anchored in, compatible with, and continuously 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 rely heavily on this power, nor that they are eager to use it under all circumstances – rather,

41 Holley & Shearing, 2017, p. 171.

42 Holley & Shearing, 2017, p. 166.

43 Sogaard et al., 2016, p. 136.

states *can* (and, from a normative perspective, arguably should) provide anchoring and monitoring to safeguard the public nature of security. In the words of Crawford, whilst states often assume steering rather than mere rowing roles, “[t]he boat now is not free floating but has points of anchorage”.⁴⁴

2.3 COMMODIFICATION IN CONFINEMENT ON A GLOBAL LEVEL

In settings of confinement, shifts from government to (anchored) nodal governance have *inter alia* been informed by commodification. This section will deal, on a macro level, with two developments of commodification: (i) privatisation and (ii) offshoring.⁴⁵ In turn, this exploration will not only position and contextualise the case studies central to this book in the broader trends of privatisation and offshoring, but will also show that RPC Nauru and PI Norgerhaven are examples *par excellence* of the globalisation development of commodification.

2.3.1 Privatisation

Privatisation is an often-used but largely ill-defined concept. As Hallo de Wolf outlines, privatisation has been argued to mean anything from a reduced role of the state coupled with an enhanced role of the private sector to a transfer of ownership of state-owned enterprises to private operators, a transfer of management duties of a public facility to private entities, or a *de jure* or *de facto* delegation of responsibilities to private actors.⁴⁶ In asking what privatisation actually means, Miller & Simmons likewise respond with the hardly illuminating answer that “it depends”.⁴⁷ A common feature of most understandings of privatisation is, however, that at the very least it de-

⁴⁴ A. Crawford, 2006, p. 459.

⁴⁵ This part is descriptive rather than normative in nature. It should be noted, though, that a significant normative debate has arisen in this context. In the literature, the question whether the provision of security is and/or should be a core state function has indeed been discussed for some decades and has not yet been settled. According to one strand of scholarship, outsourcing security tasks to other actors outside the public domain is “an abandonment of a core state function”, which, in turn, “is always politically, morally and philosophically wrong”: Harding, 2012, pp. 133–134. See also Robbins, 2005. As DiIulio illustrates in the context of criminal justice, “[t]he bade of the arresting police officer, the robes of the judge, and the state patch of the corrections officers are symbols of the inherently public nature of crime and punishment”: DiIulio, 1991, p. 197. Piret, in this light, speaks about a “disastrous cocktail of privatisation and commercialisation of safety”: Piret, 2005, p. 54. Other scholars have taken issue with such propositions and have critically reflected upon the state-centric notion of security. For Feeley, for example, theories that exclude any form of outsourcing at all times are unconvincing and unpalatable: Feeley, 2014.

⁴⁶ Hallo de Wolf, 2011, pp. 19–20.

⁴⁷ H.T. Miller & Simmons, 1998, p. 513.

nominates “an increased reliance on private actors and market forces to take over functions or responsibilities that had in recent decades come to be regarded as properly within the governmental sphere”.⁴⁸ It is this common feature that will be the basis of the exploration here.

2.3.1.1 *Privatising prisons*

Scholarly attention for prison privatisation gained significant traction in the mid-1980s.⁴⁹ Prison privatisation is, however, by no means a recent phenomenon.⁵⁰ Ancient Roman and Greek societies already sporadically used private prisons to incarcerate debtors or individuals prior to trial or execution.⁵¹ Going forward in time, so-called ‘workhouses’ were established in England in 1555, constituting antecedents to penitentiary institutions and typically operating on a private basis.⁵² From the Medieval Times to the Industrial Revolution, furthermore, European jails were considered the personal responsibilities of “local sheriffs and their analogues, enterprising minor noblemen, or everyday entrepreneurial ‘keepers’”.⁵³ In fact, in sixteenth century Europe, specific ‘houses of correction’ were established that combined the function of poorhouse, jail, and manufacturing place under private management.⁵⁴ Likewise, in the American colonial period, jails and prisons hardly existed but where they did, they were mostly privately run.⁵⁵ Even after the introduction of a public penitentiary system in the US, private actors remained of particular importance for the penal system given the practice of substituting the plantation for the penitentiary that continued in the postbellum South, albeit under the guise of a variety of different regimes of forced labour and exploitation.⁵⁶ In turn, in 1870, a US National Prison Congress held in

48 Feigenbaum, Henig, & Hamnett, 1998, p. 1; Hallo de Wolf, 2011, p. 20.

49 As Google Ngram Viewer shows, the use of the terms ‘prison privatization’, ‘private prison’ and ‘private prisons’ in academic books inflated since the mid-1980s: see <https://bit.ly/2QAA4uR> (last accessed 30 May 2019). Not only academic attention but also public attention increased significantly from the 1980s onwards: McCrie, 1993, p. 22.

50 A.A. White, 2001a, p. 122.

51 Peters, 1995; Roth, 2006, p. 55.

52 Aman, 2005, p. 526; Sellers, 1993, pp. 48–49.

53 A.A. White, 2001a, p. 123.

54 A.A. White, 2001a, p. 124. See also Blakely & Bumphus, 2004, p. 27; Rynne & Harding, 2016, p. 149; Spierenburg, 1995, p. 66.

55 Aman, 2005, p. 526; Feeley, 2002, p. 326; A.A. White, 2001a, p. 124.

56 Deckert & Wood, 2011, p. 221; Dolovich, 2005, pp. 450–454; Lichtenstein, 2001, p. 193; McCrie, 1993, p. 23; Sellin, 1958, p. 589; A.A. White, 2001a, p. 126. In Alabama and Florida, the ‘convict lease system’ continued well into the 1920s. See in particular Mancini, 1996.

Cincinnati, Ohio laid the groundwork for an understanding of modern prisons as industries and as potentials for profit.⁵⁷

In modern-day world, the United States, the United Kingdom, and Australia are generally seen as the birthplaces of, and frontrunners in, prison privatisation.⁵⁸ Whereas the US has by far the highest absolute number of prisoners in private prisons, England & Wales and Australia have constantly had the highest proportion of their prison population imprisoned in private facilities over the past years.⁵⁹

In the US, the re-emergence of prison privatisation was ushered in the 1900s by the gradual introduction of profit and non-profit organisations in the provision of services in prison, including the preparation of food, the transportation of inmates, vocational training, and health care.⁶⁰ In 1976, the first modern private prison in the US – the Weaversville Intensive Treatment Unit, a juvenile prison in Pennsylvania – was opened.⁶¹ For the first time that century, a high-security institution has been entirely privatised, with ownership and operations being transferred to private corporations under contract to the State of Pennsylvania.⁶² Privatisation accelerated from the 1980s onwards, with jails and prison facilities at federal, state, and county levels being transferred into private ownership and management.⁶³ This acceleration was catalysed by a number of factors. Thus, amongst others due to new drug laws and harsher prison sentences, there was a notable and dramatic growth in nationwide incarceration rates from the 1980s onwards.⁶⁴ As a result, many US states faced overcrowded prisons and increasing costs associated with the mainten-

57 Price, 2006, p. 4. Much earlier, in 1825, the entire prison system of Kentucky was already leased: Cripe & Pearlman, 2005, p. 455. The same happened in Louisiana: Dolovich, 2005, p. 451; Durham III, 1993, p. 36. By 1885, 13 US states signed lease agreements with private companies for the running and maintenance of prisons. The private contractors claimed that they could make prisons financially rewarding without neglecting rehabilitative purposes. See Austin & Coventry, 2001, p. 10; Ethridge & Marquart, 1993, p. 34; McCrie, 1993, pp. 23–24.

58 Feeley, 2002, p. 323; Mason, 2013, pp. 1–2; D.C. McDonald, 1994, pp. 29–31; Sachdev, 2008, p. 83; Shichor, 1999, p. 226.

59 In 2016, England & Wales and Australia held respectively 18,46% and 18,28% of their prisoners in private facilities, followed by Scotland (15,3%), New Zealand (10%), and the US (8,41%): Keng Kuek Ser, 2016. These figures are more or less comparable to figures from 2013, although England & Wales surpassed Australia as frontrunner due to the growth of its private prison population between 2013 and 2016: Mason, 2013, p. 2.

60 Aman, 2005, p. 527; Austin & Coventry, 2001, pp. 11–12; Durham III, 1993, p. 33; Hunter, 2000, p. 325; Pozen, 2003, p. 258; Welch & Turner, 2007, p. 58.

61 Aman, 2005, p. 527; Durham III, 1993, p. 33; Sellers, 1993, p. 64.

62 Austin & Coventry, 2001, p. 12.

63 Aman, 2005, p. 527; Dolovich, 2005, p. 439; Durham III, 1993, pp. 33–34; Jing, 2012, p. 56; Y. Kim, 2012; D.C. McDonald, 1994, p. 30; A.A. White, 2001a, p. 134.

64 Dolovich, 2005, p. 455; M. T. King, 2012, p. 16.

ance of the prison system.⁶⁵ Budgetary-wise, this was problematic because many states reached their constitutional debt ceilings and required voter approval, which often was highly unlikely, for the issuing of state bonds in order to fund further infrastructural projects.⁶⁶ At the same time, by means of court orders or consent decrees, the judiciary started to demand the improvement – or, otherwise, the closure – of overcrowded facilities.⁶⁷ The public sector consequently turned to its private counterpart, both to finance prison constructions and to take over – on the promise of lower costs and more efficiency – the daily management of prison facilities.⁶⁸ Private alternatives that previously were considered controversial therewith became politically acceptable,⁶⁹ and even became federal policy in the early 1990s.⁷⁰ This resulted in a continuously expanding “multibillion-dollar industry”⁷¹ at federal, state, and county levels.⁷²

The UK’s first private prison – Wolds prison in Everthorpe – was opened in 1992.⁷³ Privatisation rationales gained foothold a few years earlier under the Thatcher administration, with formal legislation eventually allowing the Home Office to privatise the incarceration of both non-sentenced (remand)

65 Overcrowding was indeed a serious issue on various levels of government and across the country. See particularly Hunter, 2000, pp. 323–324. See also Dolovich, 2005, p. 456; Feeley, 2014, p. 1421; Y. Kim, 2012, pp. 26–27.

66 Harding, 2001, p. 270.

67 Harding, 2001, p. 270; Rynne & Harding, 2016, p. 151.

68 Dolovich, 2005, p. 457; Hunter, 2000, pp. 323–324; Y. Kim, 2012, pp. 26–27; Y. Kim & Price, 2014, p. 256; M. T. King, 2012, p. 16; Robbins, 2006; Rynne & Harding, 2016, p. 152; Shichor, 1999, p. 227; Tabarrok, 2003.

69 Austin & Coventry, 2001, pp. 12–13; Dolovich, 2005, pp. 457–458; Y. Kim, 2012, p. 25.

70 Hunter, 2000, p. 326. This federal support was subsequently met by support on the state level: see Hunter, 2000, p. 327. The year 2016 seemed to mark a political turning point at the federal level, however. In a Memorandum for the Acting Director of the Federal Bureau of Prisons, Deputy Attorney General Sally Q. Yates announced the federal government’s plan to reduce – and ultimately end – the use of privately operated prison facilities given their poor performance. She directed that “as each contract [with private prison companies] reaches the end of its term, the Bureau should either decline to renew that contract or substantially reduce its scope”: Yates, 2016, p. 2. Whilst this only concerned federal prisons and as such did not affect the use of private prison facilities on state level, state level governments were consequently called upon to follow suit: see O’Hara, 2016; compare, however, D.C. McDonald, 1994, p. 35. Under the Trump administration, former Attorney General Jeff Sessions rescinded the guidance issued and ordered the Federal Bureau of Prisons to return to its previous approach: Sessions, 2017.

71 Barfield-Cottledge, 2012a, pp. 17–18; Y. Kim, 2012, p. 25.

72 Although most private facilities are located in the South, most notably in Texas, Arizona, Florida, Oklahoma, Mississippi, Colorado, Georgia, Tennessee, New Mexico, and Louisiana: Aman, 2005, p. 528; Kenter & Prior, 2012, pp. 89–90; Y. Kim, 2012, p. 28; Nossal & Wood, 2004, p. 24; P.J. Wood, 2007, p. 225. According to some, this is partly due to the fact that fiscal conservatism is strong and organised labour is weak in these states: Pozen, 2003, p. 260.

73 Barfield-Cottledge, 2012a, p. 47.

and sentenced prisoners in both new and existing prisons.⁷⁴ Prison privatisation soon became standard policy, with Home Secretary Michael Howard announcing in 1993 that all new prison management and construction would be privatised.⁷⁵ To a certain extent, privatisation of prisons in the UK is a clear policy transfer from the US. Notably, at its inception, it involved many of the same internationally-operating entrepreneurial actors.⁷⁶ Furthermore, it was spurred by a number of similar catalysts: like the US government, the UK authorities were faced by expanding prisoner populations, overcrowding and deplorable conditions in prison, and reform pressures – although not originating from court orders but rather from reviews and enquiries.⁷⁷ Nevertheless, the development of privatisation in the UK also has a number of distinct features. For instance, the Home Office implemented a type of privatisation that differed significantly from the American model.⁷⁸ Moreover, privatisation in the UK did not follow a similar pattern as in the US: whereas in the US juvenile prisons were amongst the first to be privatised, in the UK the first privately managed juvenile facility was only established in 1999.⁷⁹ Privatisation was, furthermore, an ideological policy decision rather than a pragmatic one, implementing a symbolic message of an independent, radically-driven ‘conviction government’ that the Conservative government under Thatcher was eager to convey.⁸⁰ In addition, in light of the allegedly ‘dysfunctional’ service delivery and organisational cultures in public prison facilities, privatisation was seen as a catalyst for cultural and organisational development and as a means to improve the quality of service delivery.⁸¹ By equating privatisation of prisons with better performance and better conditions for prisoners, lobbyists and advocates for privatisation in the UK were thus “able to assume the moral high ground in the debate over prison reform”.⁸²

In Australia, prison privatisation started not at the federal but at the state level – in Queensland and New South Wales.⁸³ The first privately operated prison, Borallon Correctional Centre in Queensland, was opened in January

74 Jones & Newburn, 2004, p. 135; Kenter & Prior, 2012, p. 90; Pozen, 2003, pp. 259–260.

75 Kenter & Prior, 2012, p. 91; Panchamia, 2015, p. 2.

76 Beyens & Snacken, 1996, p. 262; Jones & Newburn, 2004, p. 135.

77 Pozen, 2003, pp. 263–264; Rynne & Harding, 2016, pp. 151–152.

78 Pozen, 2003, p. 262.

79 This seems to reflect wider national debates at the time. In the US, the privatisation of adult facilities caused significant controversy: Jones & Newburn, 2004, p. 134; D.C. McDonald, 1994, p. 30. In the UK, on the other hand, private involvement in juvenile imprisonment was seen as much more controversial. Contractor Premier Prisons, for example, was accused of putting profits before young people’s safety and welfare: Berry-James, 2012, p. 212.

80 Jones & Newburn, 2004, p. 136.

81 Pozen, 2003, pp. 265–266; Rynne & Harding, 2016, p. 153.

82 Pozen, 2003, p. 266.

83 Victoria’s government opposed privatisation whilst the Northern Territories government awarded a new prison contract to the public sector after having reviewed private tenders: Kenter & Prior, 2012, p. 93.

1990.⁸⁴ Australia at the time was also dealing with increasing imprisonment rates and overcrowding, albeit to a much lesser extent.⁸⁵ There was consequently less pressure – judicial or otherwise – on the national and state governments to implement changes in order to better the conditions.⁸⁶ Like in the UK, privatisation was henceforth not motivated by a sense of pragmatism or urgency, but by a concern with regime improvement and by neo-liberal political ideologies.⁸⁷ For instance, the privatisation of Borallon Correctional Centre was based on a review commissioned by the Queensland Corrective Services Commission (the ‘Kennedy Report’), advising that private sector involvement would create competition and would speed up reform of the existing prison system.⁸⁸ An additional financial review outlined that privatisation could be more cost-effective.⁸⁹ In addition to concerns over regime improvements and neo-liberal ideologies, union obstructionism also accelerated privatisation.⁹⁰ For example, soon after Borallon Correctional Centre was privatised, a second private prison – Arthur Gorrie Correctional Centre in Brisbane – became operational in June 1992, which mainly resulted from a breakdown of negotiations between the Queensland Corrective Services Commission and the labour union that represented prospective employees.⁹¹ By 1997, seven prison facilities were privately owned and/or operated, housing approximately 18% of all Australian prisoners.⁹² Many of these facilities involved, and continue to involve, American corporations, and operate on the basis of management methods imported from the American private prison industry.⁹³

The US, UK, and Australian contexts have largely dominated academic debate on prison privatisation. Still, the privatisation of prisons has developed into a genuinely *global* multi-million industry.⁹⁴ Prison privatisation has thus also occurred, been experimented with, or been seriously considered in a host of countries across the globe. This includes Belgium,⁹⁵ Belize,⁹⁶ Brazil,⁹⁷

84 Russell, 1997, pp. 7–8.

85 Baldry, 1996, p. 165; Feeley, 2014, p. 1422.

86 Feeley, 2014, p. 1422.

87 Feeley, 2014, pp. 1423–1424; Harding, 2001, pp. 272–273.

88 Kenter & Prior, 2012, p. 93; D.C. McDonald, 1994, p. 35.

89 Kenter & Prior, 2012, p. 93.

90 Harding, 2001, p. 272.

91 Beyens & Snacken, 1996, pp. 242–243; D.C. McDonald, 1994, pp. 35–36.

92 Kenter & Prior, 2012, p. 94.

93 Beyens & Snacken, 1996, p. 243; Kenter & Prior, 2012, p. 94.

94 Barfield-Cottledge, 2012a, p. 48.

95 Prison privatisation has been discussed in Belgium since the early 1990s: Beyens & Snacken, 1996, p. 248. In 2014, a private consortium was contracted for the design, building, financing, and management of a prison in Beveren: Wouters, 2014.

96 Some prisons in Belize are operated by private alliances: Dammer & Albanese, 2014, p. 230. Belize has also contracted one prison to a religious foundation: Allen & English, 2013, p. 6.

97 In addition to the introduction of a new PPP prison in Minas Gerais in January 2013, various tasks in approximately 25 Brazilian prisons were privatised: Allen & English, 2013, p. 6; Pachico, 2013.

Cambodia,⁹⁸ Canada,⁹⁹ Chile,¹⁰⁰ Colombia,¹⁰¹ Costa Rica,¹⁰² Germany,¹⁰³ Estonia,¹⁰⁴ France,¹⁰⁵ Hungary,¹⁰⁶ Ireland,¹⁰⁷ Israel,¹⁰⁸ Jamaica,¹⁰⁹ Japan,¹¹⁰ Lebanon,¹¹¹ Lesotho,¹¹² Mexico,¹¹³ the Netherlands,¹¹⁴ the Netherlands Antilles,¹¹⁵ New Zealand,¹¹⁶ Nigeria,¹¹⁷

⁹⁸ Cambodia seeks to open its first privately built and operated prison: Turton, 2016.

⁹⁹ As explored below, some Canadian prisons have been operated privately: Dammer & Albanese, 2014, p. 230; Nossal & Wood, 2004, pp. 10–11.

¹⁰⁰ Chile was the first South American country to privatise prisons: Liebling, 2013, p. 240; Roth, 2006, p. 59.

¹⁰¹ The Colombian government announced that it wants to partially privatise the funding and construction of prisons: Bartell, 2016.

¹⁰² The Costa Rican government signed a pre-contract for the construction of a private prison but ultimately decided not to proceed: Carranza, 2010, p. 136; Liebling, 2013, p. 240; Sassen, 2014, p. 71.

¹⁰³ In 2005, Serco was awarded a five-year contract to provide a host of services in prison: Sassen, 2014, p. 70.

¹⁰⁴ Estonia pronounced that private contractors should be able to operate prisons: Jing, 2012, p. 72; Lember, 2004.

¹⁰⁵ Some French prisons are operated by private alliances: Dammer & Albanese, 2014, p. 230. France has developed more than 30 mixed management prisons: Liebling, 2013, p. 220. At the same time, the non-profit sector has been heavily involved in juvenile facilities: Cavadino & Dignan, 2006b, pp. 321–322.

¹⁰⁶ In Hungary, the construction of a private prison started in 2005: Sassen, 2014, p. 69.

¹⁰⁷ In the mid-2000s, the Irish Inspector of Prisons and Places of Detention recommended privatisation of at least one prison, which formed the basis for government plans for prison privatisation: Irish Penal Reform Trust, 2005, p. 3; Sassen, 2014, pp. 69–70.

¹⁰⁸ As discussed below, the Israeli Supreme Court delivered a famous judgment declaring the private operation of a prison facility near Beersheba unconstitutional: Feeley, 2014; Hallo de Wolf, 2011, pp. 65–66; Harding, 2012.

¹⁰⁹ The Jamaican government considered PPPs: Allen & English, 2013, pp. 6–9; Henry, 2013; Luton, 2013.

¹¹⁰ Japan privatised a number of its prisons and jails during the late 2000s: Prasol, 2010, pp. 258–259. As explored below, Japan has also developed a prestigious PPP prison that embraces rehabilitation, re-entry, and restorative justice: Leighton, 2014, p. 3.

¹¹¹ The Lebanese government negotiated with a French company about the privatisation of its prisons: Allen & English, 2013, p. 6; Othmani & Bessis, 2008, p. 54.

¹¹² In the early 2000s, the government of Lesotho coined the idea to bring “all the prisoners in Lesotho together from the four corners of the country and [hold] them in a new 2,500-bed private prison in Maseru”: Stern, 2006, pp. 118–119; Thakalekoala, 2002. Such plans were based on offers by private contractor Group 4 Corrections Services SA (Pty) Ltd., yet were criticised for clashing with Lesotho’s culture and traditions: Coyle, 2008, pp. 663–664. After a government reshuffle, the idea was not further entertained.

¹¹³ Mexico opened two private prison facilities in 2012: Cattán & Sabo, 2012; Documenta Due Process of Law Foundation, 2016.

¹¹⁴ Before 2010, prison privatisation was discussed in the Netherlands but remained a bridge too far: Cleiren, 2010, p. 5. In 2010, a newly formed coalition government announced that it would prepare the privatisation of the prison system. When the coalition government fell in 2012, these preparations stopped: Raad voor Strafrechtstoepassing en Jeugdbescherming, 2015, p. 3. Still, the prison facility in Zaandam was built and is managed by a PPP: Ledegang, 2016.

Peru,¹¹⁸ the Philippines,¹¹⁹ Poland,¹²⁰ Russia,¹²¹ South Africa,¹²² South Korea,¹²³ Tanzania,¹²⁴ and Thailand.¹²⁵

As the experiences of these countries show, prison privatisation is a highly heterogeneous phenomenon. For instance, a number of different ‘public private partnership’ (‘PPP’) options exist.¹²⁶ In the US, the UK, and Australia, for example, private contractors have often been contracted to provide for a prison in its entirety, including for its design, construction, management, and financing (the ‘DCMF’ model).¹²⁷ This model reduces the government’s role to one of contract monitoring, although variations in this regard also exist.¹²⁸ Other countries, including France, Hungary, Japan, and a number of Latin American countries, allow private contractors to finance and build new prison facilities and to operate some but not all functions within such facilities.¹²⁹ Yet other countries, such as the Netherlands, have allowed for the contracting-out of

115 The Netherlands Antilles privatised the management of one of its prisons in 2000: Nathan, 2003, p. 191. This construction was ended a year later: Raad voor Strafrechtstoepassing en Jeugdbescherming, 2015, p. 12; Wilms, Frierson, & Weda, 2011, p. 58.

116 As explored below, although New Zealand used to have a private prison, the government re-nationalised the facility after a few years: Hallo de Wolf, 2011, p. 32; Sassen, 2014, p. 71. The facility was later reconstructed and re-privatised, but the private contract was not extended after March 2017: Radio New Zealand, 2016.

117 The Nigerian government has voiced plans to invite bids for private prison facilities: Allen & English, 2013, p. 9; Nnanna, 2012.

118 Peru enacted laws to allowed private contractors to build and operate prison facilities in September 2015: Post, 2015.

119 The Philippines put out a tender for the creation of a prison in Nueva Ecija under a PPP-construction in 2015: Dela Paz, 2015.

120 Some Polish prisons are operated by private alliances: Dammer & Albanese, 2014, p. 230.

121 In 2005, Russia’s economy ministry considered the private construction of prisons: Sassen, 2014, p. 70.

122 Some South African prisons are operated by private alliances: Berg, 2003; Dammer & Albanese, 2014, p. 230; Sassen, 2014, p. 71; Stern, 2006, p. 119. On the African continent, South Africa is the frontrunner in private incarceration. It even had the largest private prisons in the world in 2008: Mangaung Prison in Bloemfontein (3,024 places) and Kutama-Sinthumule Prison in Louis Trichardt (2,928 places). See Coyle, 2008, p. 663.

123 South Korea launched a tendering process for the privatisation of a prison in 2001, inviting both religious groups and commercial businesses: Gluck, 2001; Nathan, 2003, p. 191. The first private prison, Somang Correctional Institution in Yeosu, was opened in 2010: Dae Yoo & Ahn-Park, 2014.

124 The Tanzanian Prison Department has sought private partners to engage in PPP constructions: Wa Simbeye, 2014.

125 A substantial feasibility study on the privatisation of prisons in Thailand was conducted in 2005: Sassen, 1996, p. 71. First experiments with private prisons have been reported: Mason, 2013, p. 3.

126 Allen & English, 2013, pp. 4–5; Coyle, 2008, pp. 661–662; Van Berlo, 2015c.

127 Allen & English, 2013, p. 4; Coyle, 2008, p. 662; Pozen, 2003, p. 260; Robbins, 2005.

128 The UK and Australia are for example characterised by rigorous oversight, whereas in the US oversight is less thorough Allen & English, 2013; Gran & Henry, 2007; Harding, 2012, p. 132.

129 Allen & English, 2013, p. 4; Nathan, 2003, p. 191.

ancillary tasks, including transportation, maintenance, catering and the provision of activities, whereas the core task of imprisoning remains within the exclusive purview of the state.¹³⁰

The prison privatisation experiences of some countries are particularly interesting as they show that prison privatisation is not irreversible per se (Canada and New Zealand), is not necessarily uncontested by the judiciary (Israel), and does not always pursue cost-effectiveness over rehabilitation (Japan).

Thus, Canada and New Zealand once operated private prisons, yet these facilities were later de-privatised. In New Zealand, the Auckland Central Remand Prison was privatised by the conservative government in 2000 but later that year, when the Labour Party assumed power, it was decided that the facility would be renationalised.¹³¹ This decision took effect in 2005, when the contract with the private service provider expired and the management of the prison facility reverted back to New Zealand's Public Prison Service.¹³² The prison was later rebuilt, redeveloped, and renamed to Mt Eden Corrections Facility, after which it was privatised again.¹³³ However, after allegations of an organised fight club in the facility, the Corrections Department took over the day-to-day management of the facility and the Government announced that the contract would not be renewed per March 2017.¹³⁴ Likewise, in Canada, the Central North Correction Centre in Penetanguishene, Ontario, was – on the basis of its overall performance – returned to public control in 2006 after five years of private management.¹³⁵

In 2004, the Prison Ordinance Amendment Law (Amendment 28) was introduced in Israel, providing for the establishment of a privately managed and operated prison facility near the city of Beersheba. Whilst construction was underway, various petitioners challenged Amendment 28 on the basis of its alleged unconstitutionality, more particularly on the basis that it would contravene the Basic Law of Israel since it would entail a serious violation of a number of human rights including the right to life, the right to personal liberty, and the right to human dignity.¹³⁶ The majority decision in this case considered that no concrete empirical proof existed that private prisons led to greater violations of inmates' human rights, and that therefore the issue had to be argued in the abstract, involving the question whether prison management is a non-derogable core state function regardless of the actual perform-

¹³⁰ Allen & English, 2013, p. 5.

¹³¹ Hallo de Wolf, 2011, p. 32.

¹³² Hallo de Wolf, 2011, p. 32.

¹³³ Radio New Zealand, 2016.

¹³⁴ Radio New Zealand, 2016.

¹³⁵ Ministry of Community Safety and Correctional Services, 2006; Raad voor Strafrechtstoepassing en Jeugdbescherming, 2015, p. 8.

¹³⁶ HCJ, 2605/05, *Academic Center of Law, Business and Human Rights and others v. Minister of Finance and others*, 19 November 2009.

ance of private prisons in practice.¹³⁷ A majority of the Israeli Supreme Court consequently held that imprisonment is a core state function and that imprisonment in privately managed prisons would be a contradiction of the Basic Law, in particular of human dignity and liberty.¹³⁸ The Basic Law of Israel thus created “a super-legislative constitutional right for prisoners to serve their sentences under the direct management of the State”.¹³⁹ Since the state “should have a monopoly of ‘permitted violations of human rights’”, Amendment 28 was held to be unconstitutional *per se*.¹⁴⁰

Finally, attention should be drawn to the Shimane Asahi Rehabilitation Center in Japan. As Leighton explores, the Japanese authorities call this facility a ‘model prison’ for the next 50 years: it is “a high-tech, public-private partnership prison that embraces rehabilitation, reentry and restorative justice – and that also strives to have the local community as a partner in ways that go beyond economic development”.¹⁴¹ Thus, the facility ostensibly combines privatisation with rehabilitation as “a relevant and realistic political compromise”.¹⁴² It is built on three pillars: first, that of public-private cooperation, which is supposed to bring cost-effectiveness and innovation; second, that of preventing recidivism, which is attempted through educational, vocational, and rehabilitative activities; and third, that of the importance of the local community, with an emphasis on the idea that the facility should be ‘co-built’ with the local community.¹⁴³ This showcases that the privatisation of contemporary prison facilities does not necessarily conflict with an emphasis on rehabilitation and that private prison facilities can maintain strong ties, other than mere economical ones, with local communities.¹⁴⁴

2.3.1.2 *Privatising immigration detention*

As a consequence of the rapid evolution of immigration control and significant expansions of immigration detention in at least parts of the world, the immigration detention systems of various countries have been privatised from the

137 HCJ, 2605/05, para 19.

138 HCJ, 2605/05, para 19. See also Feeley, 2014, pp. 1402–1405; Hallo de Wolf, 2011, p. 65; Harding, 2012, p. 136.

139 Harding, 2012, p. 131.

140 See also Harding, 2012, p. 131. For an alternative view to this monopolist theory, see Feeley, 2014.

141 Leighton, 2014, p. 3.

142 Leighton, 2014, p. 3.

143 Leighton, 2014, p. 4.

144 Whilst the facility is built with an awareness of its regional economic impact, its primary focus is on building prisons together with the local community in order to create legitimate and integrated facilities that are understood, supported, and embraced locally: Leighton, 2014, pp. 10–11.

late 1970s and early 1980s onwards.¹⁴⁵ Over the past decades, this has accelerated up to the point where in various national contexts the privatisation of immigration detention is nowadays considered business-as-usual.¹⁴⁶

The US, the UK, and Australia were the first countries to privatise (parts of) their immigration detention system and are nowadays frontrunners in the private immigration detention domain.¹⁴⁷ To a certain extent, prison privatisation catalysed the privatisation of immigration detention in these countries: without the momentum of prison privatisation, the privatisation of immigration detention would likely not have expanded to its current proportions.¹⁴⁸ At the same time, the privatisation of immigration detention did not only *result* from the prison privatisation trend but was, conversely, also a *precursor* of modern private penal institutions.

In the United States, for example, the Immigration and Naturalization Service (INS)¹⁴⁹ was one of the first agencies that utilised privatisation: it has contracted with private firms to run immigration detention facilities since 1979, years before modern-day private prisons emerged.¹⁵⁰ As some argue, the privatisation of immigration detention facilities has even been “[o]ne of the principal seedbeds” for the subsequent wave of private imprisonment in the US.¹⁵¹ Contrary to prison privatisation, this form of privatisation “in low-security environments at the fringes of the U.S. penal system” did not cause significant controversy.¹⁵² By 1988, INS had privatised seven of its detention facilities housing approximately 800 of the 2,700 aliens in INS custody.¹⁵³ After 9/11, new measures significantly expanded the scope of immigration control and enforcement, which drove the further expansion of private involvement in immigration detention.¹⁵⁴ In recent years, the private share in immigration detention has grown exponentially.¹⁵⁵

In the UK, private immigration detention facilities long preceded private prisons: British contracts with private contractors for the detention of suspected

145 Michael Flynn, 2014, p. 171.

146 Conlon & Hiemstra, 2017, pp. 1–3; Gammeltoft-Hansen & Vedsted-Hansen, 2017, pp. 4–5.

147 Menz, 2011.

148 Bacon, 2005, p. 13.

149 The INS, a department within the Department of Justice (DOJ), was abolished in 2003, with its functions being transferred to distinct agencies within the Department of Homeland Security (DHS).

150 D.C. McDonald, 1994, p. 30; Menz, 2011, pp. 24–25; Pozen, 2003, p. 258.

151 D.C. McDonald, 1994, p. 30.

152 Michael Flynn & Cannon, 2009, p. 15; D.C. McDonald, 1994, p. 30; Pozen, 2003, p. 258.

153 Austin & Coventry, 2001, p. 12; Dolovich, 2005, p. 457; D.C. McDonald, 1994, p. 29.

154 Koulis, 2011, p. 102; Welch & Schuster, 2005, pp. 335–336.

155 It constituted 62% of the entire immigrant detention capacity in 2015 compared to 8% in 2013: Conlon & Hiemstra, 2017, p. 3; Mason, 2013, p. 9.

unauthorised immigrants have been around since 1970.¹⁵⁶ The UK therewith was the first European country to privatise part of its immigration detention system.¹⁵⁷ In May 2018, 7 out of 8 Immigration Removal Centres were run privately by Mitie, GEO, G4S, and Serco.¹⁵⁸ In addition, holding rooms and two out of three residential short-term holding facilities are privately run.¹⁵⁹

In Australia, mandatory detention was introduced in 1992, and privatisation was subsequently introduced in 1997-98.¹⁶⁰ Australasian Correctional Services, which was the first company that won a contract to run an immigration detention centre, was severely criticised for its operations, after which the Australian government entered into a new contract with a different service provider, Group 4 Falck (now G4S), in 2003.¹⁶¹ Privatisation developed rapidly, and by 2009 the entire immigration detention system had been privatised – a unique situation in the world.¹⁶² Privatisation has bi-partisan support: after the Labour government of Kevin Rudd came in power in 2007, for example, tendering was not ended but unabatedly continued.¹⁶³

In each of these three countries, yet primarily in the US and the UK, the introduction of private immigration detention facilities was generally regarded as less controversial than the privatisation of prisons.¹⁶⁴ In contrast to most adult prison facilities, immigration detention initially involved primarily minimum security levels and was used to house detainees for short periods of time under administrative rather than punitive regimes.¹⁶⁵ Immigration detention was, furthermore, hardly publicly visible,¹⁶⁶ and privatisation in this realm was only implemented gradually.¹⁶⁷ The privatisation of immigration detention has recently attracted more scholarly attention, though, now that immigration detention increasingly involves higher security levels, houses an ever-expanding population of excluded populations,¹⁶⁸ and is used for longer periods of time.¹⁶⁹ Similar to the privatisation of penal settings, neo-liberalist beliefs seem to underlie this increasing reliance on private actors.

156 Barfield-Cottledge, 2012a, p. 47; Pozen, 2003, p. 259. The then Conservative government contracted Securicor to run Harmondsworth immigration detention centre near London Heathrow airport as well as a smaller facility at Manchester airport: Bacon, 2005, p. 6; D.C. McDonald, 1994, p. 32.

157 Menz, 2011, p. 17.

158 Silverman & Griffiths, 2018.

159 Silverman & Griffiths, 2018.

160 Fleay, 2017, pp. 71–72; Menz, 2011, p. 22; Penovic, 2014, pp. 10–11.

161 Michael Flynn & Cannon, 2009, pp. 4–5; Menz, 2013, p. 121.

162 Mason, 2013, p. 5.

163 Menz, 2011, pp. 21–24; Penovic, 2014, p. 13.

164 Bacon, 2005, p. 2; 7; Michael Flynn & Cannon, 2009, p. 15; D.C. McDonald, 1994, p. 30; Pozen, 2003, p. 258.

165 Bacon, 2005, p. 3; Michael Flynn & Cannon, 2009, p. 15.

166 Fleay, 2017, pp. 71–72; Koulis, 2008, pp. 465–466; D.C. McDonald, 1994, p. 30.

167 Swanson, 2002, p. 98.

168 This link with ‘crimmigration’ will be explored in more detail in chapter 3.

169 Conlon & Hiemstra, 2017, pp. 2–3; Gammeltoft-Hansen & Nyberg Sørensen, 2013.

Thus, privatisation was initially argued to constitute a more cost-effective and less cumbersome alternative to publicly-run detention.¹⁷⁰

Privatisation of immigration detention has also occurred elsewhere, although its emergence across the world has been much less extensively mapped than prison privatisation. Still, attention is increasingly drawn to the privatised aspects of immigration facilities in, amongst others, Belgium, Canada, the Czech Republic, Denmark, Germany, Estonia, Finland, France, Ireland, Italy, Japan, Luxembourg, Norway, Portugal, South Africa, Spain, and Sweden.¹⁷¹ The situation in Scandinavia is particularly interesting: whilst Scandinavian countries generally tend to resist the privatisation of prisons and are as such frequently labelled 'exceptional', they are less hesitant to implement privatisation in the immigration detention domain.¹⁷²

2.3.1.3 *The private actors*

Private actors hence are key players in the growing global prison and immigration detention industries.¹⁷³ Two types of private actors can be distinguished: for-profit and non-profit entities.

In relation to the for-profit entities, it is remarkable that many of the corporate actors involved in the context of immigration detention at the same time dominate the private prison market. Thus, a handful of companies are nowadays at the forefront of private imprisonment, including notably CoreCivic (previously Corporate Corrections of America, 'CCA'), GEO Group, G4S, Serco, and Sodexo Justice Services.¹⁷⁴ CoreCivic expanded significantly over a few decades and is nowadays the largest private prison corporation in the world, although it has – save for some British and Australian joint venture operations – primarily developed its business within the US.¹⁷⁵ GEO Group (US-based), G4S (UK-based), Serco (UK-based), and Sodexo (France-based), on the other hand, are much more internationally geared.¹⁷⁶ In addition, G4S,

170 Michael Flynn, 2017, p. 15; Michael Flynn & Cannon, 2009, p. 15; D.C. McDonald, 1994, p. 30; Swanson, 2002, p. 98; Taylor-Grover, Horent, Cal, & Sterlin Jr., 2012, p. 194.

171 Baird, 2016, p. 12; Bloom, 2015, pp. 154–155; Brekke & Vevstad, 2007, pp. 18–19; Michael Flynn & Cannon, 2009, p. 4; Gammeltoft-Hansen, 2013, p. 133; Lahav, 1998, p. 685; Liebling, 2013, p. 221; Loewenstein, 2016; Menz, 2009, p. 322, 2011; S. Ugelvik & T. Ugelvik, 2013, p. 714.

172 Cavadino & Dignan, 2006b, p. 325; Liebling, 2013, p. 221.

173 Ackerman & Furman, 2013, p. 256; Fulcher, 2012, p. 599; Shichor, 1999, p. 228; P. J. Wood, 2007, p. 232.

174 Barfield-Cottledge, 2012a, p. 48. According to some accounts, CoreCivic and GEO Group control three fourth of the entire global private prison market J.I. Ross, 2016, p. 67; Taylor-Grover et al., 2012, p. 189. It should however be noted that, *inter alia* due to mergers and acquisitions, the group of market leaders tends to fluctuate over time Barfield-Cottledge, 2012b, p. 254.

175 Barfield-Cottledge, 2012a, p. 47; Fulcher, 2012, p. 602; Mattera, Khan, & Nathan, 2003, p. 42.

176 Barfield-Cottledge, 2012a, pp. 48–49; Fulcher, 2012, pp. 602–603; Mason, 2013, p. 2.

GEO Group, Serco, and CoreCivic simultaneously dominate the global for-profit immigration detention market.¹⁷⁷ For these companies, immigration detention is a fruitful alternative business plan: it is generally not important *who* they confine, nor *for whom* they confine, but *that* they confine.¹⁷⁸ Consequently, these corporations are able to switch conveniently between both markets. Van Steden & De Waard speak about the ‘McDonaldization’ of private security: “with the arrival in the market of multinational brands [...], we are witnessing a McDonaldization of security commodities”.¹⁷⁹ In turn, private involvement has been critically received by many scholars who signal that for these companies profit is the number one concern, with commercial concerns potentially trumping inmate interests.¹⁸⁰

At the same time, such understandings of private involvement should be qualified in three ways. First, one should not ignore the fact that it is not *just* corporate actors that may act on profiteering incentives, but that also public counterparts may on many occasions do so: “public actors [...] respond to the same market pressure as their private counterparts”.¹⁸¹ Moreover, various local communities display profiteering motives in pursuing the infusion of private facilities in their communities, with such facilities frequently being considered growth strategies, potentials for employment, and, ultimately, catalysts of prosperity.¹⁸²

Second, the involvement of non-profit organisations remains relatively unnoticed and largely escapes the unabated criticism of privatisation. Non-commercial organisations such as churches, charities, and neighbourhood groups are indeed also frequently involved in private confinement. In the prison realm, such non-profit involvement occurs in ‘traditional’ privatisation countries such as the US,¹⁸³ but also in newer private prison markets like South Korea.¹⁸⁴ In the immigration detention realm, private stakeholders have been contracted to provide a range of services in amongst others Portugal, Italy, and France.¹⁸⁵ Likewise, Australia has in the past contracted with

177 Matthew Flynn, 2015, p. 10, 2016, p. 13; Gammeltoft-Hansen, 2013, p. 133; Garner, 2015, p. 199; Mason, 2013; Saldivar & Price, 2015, p. 29; Taylor-Grover et al., 2012, p. 189.

178 Ackerman & Furman, 2013, p. 257. As illustrated by one of the co-founders of CCA, one sells confinement “just [...] like you were selling cars, or real estate, or hamburgers”: Schlosser, 1998, p. 70.

179 Van Steden & De Waard, 2013, p. 294.

180 Barfield-Cottledge, 2012a, p. 48; Cavadino & Dignan, 2006a, p. 439; Neill, 2012, pp. 100–102; J.I. Ross, 2016, p. 69. For Kunny, for example, private prisons under commercial control ultimately have “nothing to do with social rehabilitation or reform” and address “not [...] a social ill, but rather a business opportunity”: Kunnie, 2015, p. 211.

181 Aviram, 2014, p. 447.

182 N. Christie, 2000, pp. 136–138; Huling, 2002; R. S. King, Mauer, & Huling, 2003; Neill, 2012, pp. 105–106. Compare, however, Leighton, 2014.

183 Armstrong, 2002; Burkhardt, 2015.

184 Dae Yoo & Ahn-Park, 2014.

185 Michael Flynn & Cannon, 2009, p. 4.

amongst others the Salvation Army Australia and Save the Children Australia to provide welfare services in immigration detention, as will be further explored below.¹⁸⁶ Positioning private establishments as sites of profit and as business opportunities thus misrepresents the diversity amongst private stakeholders. At the same time, it should be kept in mind that non-profit organisations are not necessarily motivated mainly by altruistic reasons either, do not necessarily support rehabilitative ethics, and cannot be trusted unconditionally to do the right thing.¹⁸⁷ Indeed, various organisations that started on a not-for-profit basis nowadays have become what Armstrong calls ‘entrepreneurial bureaucrats’.¹⁸⁸ In her study of juvenile facilities in Massachusetts, Armstrong hence finds that “[t]he biggest juvenile providers, organizations that started out on shoe-string budgets run by idealistic university graduates, are earning in the tens of millions of dollars”.¹⁸⁹ They are able to do so because they work from a very particular and distinctive position of power: like for-profit actors they can claim that they are more efficient and more innovative in running prisons and detention centres, yet in addition they can claim legitimacy given that they arguably serve a specific charitable purpose.¹⁹⁰

Third, one should not overlook the significant amount of corporations with ancillary interests in settings of confinement. In the US, for example, both public and private prison systems have (or had) labour contracts with various private corporations, including IBM, MCI, Boeing, Microsoft, Texas Instruments, Honeywell, Chevron, Motorola, TWA, Victoria’s Secret, and Compaq Computers.¹⁹¹ A wide variety of companies moreover enjoy further secondary economic benefits by providing a range of utilities, products, and services to both prison and immigration detention facilities.¹⁹² Lichtenstein & Kroll already argued in 1990 that the ‘prison industrial complex’ thus does not only comprise the companies directly involved in the managing and running of prison facilities, but also the plethora of private actors related to or dependent on such facilities.¹⁹³

186 Van Berlo, 2017d, p. 12.

187 Armstrong, 2002, p. 346.

188 Armstrong, 2002, p. 362.

189 Armstrong, 2002, p. 362.

190 Armstrong, 2002, pp. 363–364. See also Galaskiewicz, 1985, p. 297.

191 Aman & Greenhouse, 2014, pp. 389–390; Hallett, 2002, p. 378; Lichtenstein & Kroll, 1990, p. 21; Neill, 2012, pp. 103–104; Price, 2006, p. 123.

192 Fleay, 2017, p. 72; Silverman, 2014, pp. 4–5; Trujillo-Pagán, 2013, p. 33.

193 Lichtenstein & Kroll, 1990, pp. 19–20.

2.3.2 Offshoring

The second trend of commodification discussed here is offshoring. The concept of offshoring is traditionally used to refer to the relocation of jobs and other business processes from one country to another.¹⁹⁴ Over the past decades, the notion has increasingly found its way into practices of confinement, denoting the practice of relocating or ‘extra-territorialising’ those confined to the territory of a third state.¹⁹⁵ The involvement of host countries can vary widely and may include anything from the mere provision of territory to the provision of staff and the full management of facilities.

2.3.2.1 Offshoring immigration detention

Offshoring of immigration detention has not, or not yet, evolved in widespread practice. Notable examples include the US immigration detention facilities at Guantánamo Bay (Cuba) and the RPCs on Manus Island and Nauru as addressed in the introductory chapter of this book. In addition, various European countries have proposed – and, at some points, implemented – offshore facilities.

The US introduced offshore immigration detention in 1991, when it detained Haitian asylum seekers in a Migrants Operation Centre (MOC) located in the leased Cuban territory of Guantánamo Bay.¹⁹⁶ Offshore detention was a compromise: the US government did not want to return asylum seekers to Haiti given the military coup against President Jean-Bertrand Aristide, yet also did not want to bring asylum seekers intercepted at sea to its territory in order to avoid that more Haitians would attempt to enter the US.¹⁹⁷ The detention facility at Guantánamo Bay was set up quickly and in an improvised way. Detainees were, for example, accommodated in “drafty, tin-roofed huts”, “fenced in by barbed wire”, and “guarded by Marines armed with automatic

¹⁹⁴ Vietor, Rivkin, & Seminerio, 2008; Zuckerman, 2008.

¹⁹⁵ Or, occasionally, that of an autonomous region. This is for example the case with immigration detention on the island of Tinian, part of the Commonwealth of the Northern Mariana Islands, an unincorporated territory of the United States: Mountz, 2011. Still, ‘offshoring’ does not necessarily involve the literal distancing of prisoners or immigrant detainees from the shores of a State to, for example, island zones. For the more literal form of offshore detention, i.e. detention on islands, see Baldacchino, 2014; Michael Flynn, 2014; Mountz, 2011.

¹⁹⁶ Barta, 1998, p. 323; Dahlstrom, 2003, p. 674; Dastyari, 2015a, p. 96; Michael Flynn, 2014, p. 172; Ghezelbash, 2015, p. 95. The lease of Guantánamo Bay by Cuba to the US was negotiated in 1903, costs the US a mere \$4,085 USD a year, and can only be terminated by mutual agreement. Under the perpetual agreement, ultimate sovereignty is retained by Cuba whilst the US exercises complete jurisdiction and control: De Zayas, 2004, pp. 288–291; Koh, 1994, p. 143; Wilsher, 2011, p. 240.

¹⁹⁷ Dastyari, 2015a, p. 96.

machine guns".¹⁹⁸ During their detention, asylum interviews were conducted. Unsuccessful applicants were returned to Haiti, successful applicants were transferred to mainland US for further status determination.¹⁹⁹ Haitians who were found to be refugees but who tested positive for the human immunodeficiency virus (HIV), however, were not permitted to enter the US and continued to be detained in separate, prison-like sections at Guantánamo Bay.²⁰⁰ This was challenged in 1993, with the District Court for the Eastern District of New York ruling that the HIV-positive detainees had to be brought into the US by the relevant authorities.²⁰¹ This effectively ended the so-called 'Guantánamo HIV Camp' in 1993.²⁰²

In 1994, offshore immigration detention at Guantánamo Bay was extended to Cuban asylum seekers intercepted outside US territorial waters.²⁰³ This resulted in a remarkable situation, as Cubans were now detained by the US in a leased part of their home country. Since at that time 15,000 Haitians were already detained at Guantánamo Bay, the number of detainees increased rapidly to more than 45,000.²⁰⁴ The US accordingly negotiated alternative spaces of confinement in Antigua, Dominica, the Dominican Republic, Grenada, Jamaica, St. Lucia, Suriname, and the Turks and Caicos Islands.²⁰⁵

Power was restored in Haiti later in 1994, which resulted in the US returning Haitians detained at Guantánamo Bay.²⁰⁶ The US and Cuba furthermore entered into an agreement curtailing irregular migration by boat from Cuba to the US.²⁰⁷ This ended large-scale detention at Guantánamo Bay, although the MOC remains operative and continues to detain a small number of Cuban nationals as well as new boat migrants without pre-authorisation.²⁰⁸ Nowadays, various private actors run the MOC: between 2006 and 2012, GEO Group

198 Barta, 1998, p. 323.

199 Dastyari, 2015a, pp. 96–97; Ghezelbash, 2015, p. 95.

200 Barta, 1998, p. 332; Dastyari, 2015a, p. 97.

201 US District Court for the Eastern District of New York, *Haitian Centers Council, Inc. v. Sale*, 8 June 1993, 823 F. Supp. 1028. This decision was later vacated in US Supreme Court, *Sale v. Haitian Centers Council, Inc.*, 21 June 1993, 509 US 155.

202 M. Ratner, 1998.

203 Dastyari, 2015a; Den Heijer, 2011; Loyd, Mitchell-Eaton, & Mountz, 2016; Wilsher, 2011.

204 Dastyari, 2015a, p. 98.

205 Den Heijer, 2011; Michael Flynn, 2014; Ghezelbash, 2015; Koh, 1994; Loyd et al., 2016; Mountz & Loyd, 2014.

206 Dastyari, 2015a, p. 98.

207 In turn, the US allowed all Cubans at Guantánamo Bay to access its mainland: Dastyari, 2015a, p. 98; Koh, 1994, p. 156.

208 One may argue that the MOC at Guantánamo Bay nowadays does not constitute *detention* as such, at least not for those awaiting resettlement: they may leave the facility during the day by signing themselves in and out and are provided with a variety of services, programs, and employment facilities. At the same time, "[d]istinctions between deprivation of liberty (detention) and lesser restrictions on movement is one of degree or intensity and not one of nature or substance": UNHCR, 2012, p. 9. As Dastyari argues, Guantánamo Bay's MOC therefore still constitutes, to a large extent, detention: Dastyari, 2015a, pp. 100–101.

managed the facility.²⁰⁹ In 2012, MVM Inc. was awarded a contract for the provision of security services.²¹⁰ The International Organization for Migration (IOM) was attracted to provide ancillary services at the MOC at Guantánamo Bay, including community liaison assistance, education and recreation programmes, coordination of medical services, translation, and interpretation and employment facilitation.²¹¹ Whilst President Obama issued Executive Order 13492 in January 2009, which ordered the closing down of the *military* detention facilities at Guantánamo Bay used for the ‘war on terror’,²¹² the US government does not seem to have any intention to also close the MOC. To the contrary, the US is conducting “topographical surveys and earth-moving estimates on unused land at Guantánamo Bay for a facility that will accommodate a larger number of people”.²¹³ Remarkably, the MOC has attracted little attention or concern, which in part seems to be due to the fact that there is a general lack of information on the facility and it is generally overshadowed by the military detention facilities.²¹⁴

Guantánamo Bay is an example *par excellence* of offshore immigration detention, yet it is not unique in its kind. As elaborated upon in the introductory chapter, one of the main case studies of this book is RPC Nauru, which constitutes, together with RPC Manus, the backbone of Australia’s offshore processing policy under OSB. According to some, Australia’s approach in this regard is largely a transfer of law and policy from the US experience.²¹⁵ Given that these offshore constructions have already been introduced in the introductory chapter, and given that the governance set-up of RPC Nauru will be further detailed below, this will not be further elaborated upon here.

In Europe, offshore immigration detention measures have been proposed at different times, although most have either not materialised or concern a more broad-ranging approach covering various issues including regional protection and development assistance.²¹⁶ For example, in 2003, the UK proposed offshore ‘regional processing areas’ and ‘transit processing centres’, for

209 Dastyari, 2015a, p. 100; Dastyari & Effeney, 2012, p. 57.

210 Dastyari, 2015a, p. 100.

211 Dastyari & Effeney, 2012, p. 58.

212 The US transferred hundreds of suspected Taliban soldiers and al Qaeda operatives to detention facilities at Guantánamo Bay: Dahlstrom, 2003, p. 662; Johns, 2005, pp. 616–617; Sadat, 2014, p. 311. The Executive Order has however not been acted upon.

213 Dastyari, 2015a, p. 100.

214 The use of Guantánamo Bay as a military detention site on the other hand has been widely discussed and criticised: see, for example, Annas, 2006; Aradau, 2007; Cucullu, 2009; De Zayas, 2004; Gregory, 2006; Hansen, 2011; Hernandez Lopez, 2010; Johns, 2005; Koh, 1994; Reid-Henry, 2007; C. Rosenberg, 2016; Steyn, 2004.

215 Ghezelbash, 2015, p. 108; Glynn, 2016, p. 127; Salvini, 2012, p. 22.

216 Afeef, 2006, pp. 6–7; Garlick, 2006; Léonard & Kaunert, 2016, p. 49.

which a wide variety of countries were allegedly considered.²¹⁷ The British proposals were, in the end, heavily criticised by a number of other EU member states and were consequently rejected.²¹⁸ Proposals for extraterritorial processing nevertheless continuously resurface, in particular whenever another tragic loss of life occurs in the Mediterranean Sea.²¹⁹ Some forms of offshore detention have, furthermore, been implemented, as deals with Libya and Turkey witness.²²⁰ These developments highlight how the EU attempts – similar to the US and Australia – to externalise its borders and to implement strategies of what Hyndman and Mountz have called ‘*neo-refoulement*’, i.e. “the return of asylum seekers and other migrants to transit countries or regions of origin before they reach the sovereign territory in which they could make a claim”.²²¹

2.3.2.2 Offshoring prisons

Offshoring in the penal realm has remained vastly underexplored.²²² This may have a number of causes: the offshoring of prisons has only recently re-incarnated,²²³ it has arguably been geographically restricted to the territory

217 Including Albania, Croatia, Iran, Morocco, Romania, Russia, Somalia, Tanzania, Turkey, and Ukraine: Andrijasevic, 2010, pp. 153–154; Hyndman & Mountz, 2008, p. 266; Léonard & Kaunert, 2016, p. 49; Salvini, 2012, p. 85.

218 Afeef, 2006, p. 6; Andrijasevic, 2010, pp. 153–154; Léonard & Kaunert, 2016, p. 49; Salvini, 2012, p. 86.

219 Léonard & Kaunert, 2016, p. 49; Liguori, 2015. In 2016, for example, Germany’s Minister for the Interior proposed stopping asylum seekers at sea and returning them to North Africa for asylum processing: Nielsen, 2016. Similar plans for offshore ‘safe havens’ or ‘hotspots’ have also been coined in amongst others the Dutch political debate: Van Berlo, 2016a.

220 Under the EU-Turkey deal, Turkey takes back all migrants who irregularly travelled to Greece whilst the EU resettles a migrant from Turkey on a 1:1 ratio, eases EU visa restrictions for Turkish nationals, and pays 3 billion euro to Turkey. On this topic, see e.g. Gkliati, 2017; Ignatieff, Keeley, Ribble, & McCammon, 2016; Oudejans, Rijken, & Pijnenburg, 2018; Rygiel, Baban, & Ilcan, 2016. On the deal between Italy and Libya, see e.g. Andrijasevic, 2006, p. 121, 2010, pp. 154–155; Forgacs, 2016, p. 189.

221 Hyndman & Mountz, 2008, p. 250.

222 Offshore prisons must be distinguished from offshore *military* detention, such as the military detention facilities at Guantánamo Bay or the extraordinary rendition and detention by the CIA of terror suspects, prisoners of war, and civilian internees in foreign ‘black sites’ in various countries including Thailand, Afghanistan, Poland, Lithuania, and Romania: Carey, 2013; Sadat, 2014. Such excessive arrangements should remain separated, both conceptually and empirically, from penal imprisonment. Compare Vervaeke, 2015, p. 35, who discusses the Belgian-Dutch cooperation in PI Tilburg the telling title “[t]he *Guantánamoisation of Belgium*”.

223 The transportation of prisoners overseas is indeed no new phenomenon. From the seventeenth century onwards, convict transportation from Europe to facilities across the world was a usual practice: Feeley, 2002, pp. 326–327; A.A. White, 2001a, p. 124. For instance, England shipped convicts to Australia and North America: Feeley, 2002, p. 327. Likewise, France transported convicts to French Guiana, Spain to Hispaniola (the current Haiti and Dominican Republic), Portugal to North Africa, Brazil, and Cape Verde, Italy to Sicily,

of the Netherlands so far, and its implications may appear less far-reaching. The Belgian-Dutch and Norwegian-Dutch penal experiments as discussed in the introductory chapter have indeed arguably been the only contemporary instances of offshore imprisonment. Whilst it could henceforth theoretically suffice at this point to refer to the relevant sections of the introduction in combination with the discussion of PI Norgerhaven's governance structure below, the present section will further contextualise offshore imprisonment by paying brief attention to practices in the US that have also been framed in terms of the "new geo-economy of shipping prisoners".²²⁴

In the US, primarily for reasons of efficiency, prisoners are frequently transferred to correctional facilities in other US states than the one in which they were sentenced and convicted ('out-of-state imprisonment'). Whilst on the federal level it may make sense to incarcerate prisoners throughout the nation, Welch and Turner rightfully point out that "for state correctional systems to do so [...] is inherently significant".²²⁵ Indeed, each individual US state has its own criminal codes, its own system to administer criminal justice, and its own penitentiary system.²²⁶ In this sense, out-of-state imprisonment resembles offshoring: whilst it does not concern the relocation of prisoners across *sovereign* borders, it does involve the relocation of prisoners across *jurisdictional* boundaries.

Instances of such out-of-state imprisonment have come and gone.²²⁷ By means of an illustration, in 2016, at least six facilities housed out-of-state prisoners: Florence Correctional Center (Florence, Arizona) and North Lake Correctional Facility (Baldwin, Michigan) housing prisoners from Vermont, La Palma Correctional Center (Eloy, Arizona) and Tallahatchie County Correctional Facility (Tutwiler, Mississippi) housing prisoners from California, Saguaro Correctional Center (Eloy, Arizona) housing prisoners from Hawaii and Citrus County Detention Facility (Lecanto, Florida) housing prisoners from the US Virgin Islands. In total, they housed approximately 10.000 inmates.²²⁸ When examining this list of out-of-state facilities, two issues stand out: first, three out of six facilities are located in close proximity of one another near Phoenix, Arizona, housing prisoners from as far away as Vermont, California,

Denmark to Greenland, and the Netherlands to the Dutch East Indies: Welch & Turner, 2007, p. 60. Offshore transportation was stimulated by private entrepreneurs, who did not only transport convicts but also imprisoned them and employed them in forced labour: Austin & Coventry, 2001, p. 8; Feeley, 2002, pp. 328–329; M. T. King, 2012, p. 13; Welch & Turner, 2007, pp. 60–61.

224 Levin, 2014, p. 509, at fn 2; Welch & Turner, 2007.

225 Welch & Turner, 2007, p. 62.

226 Feeley, 2014, p. 1432.

227 Aman, 2005, p. 542; Barfield-Cottledge, 2012b, p. 251; Harding, 2001, p. 280; Jing, 2012, p. 58; Welch & Turner, 2007, p. 62.

228 Rivero, 2015.

and Hawaii.²²⁹ This area has, as such, become a hub for out-of-state imprisonment. Second, Citrus County Detention Facility houses prisoners from the US Virgin Islands, an unincorporated and organised territory of the US, therewith even to a larger extent resembling offshore imprisonment.²³⁰

Out-of-state imprisonment continues unabatedly: as recent as September 2018, for instance, Idaho and Vermont implemented new out-of-state schemes with prisons in Texas respectively Mississippi.²³¹ The impact of out-of-state imprisonment is however significant given that such facilities are typically located at great distance from the offender's community and support networks,²³² and as such do little to foster reintegration in the community – rather, they deepen the experience of incarceration and result in further isolation.²³³

In addition to out-of-state prison facilities, there is an emerging trend of so-called 'bed brokering' or 'bed renting', whereby private companies find a prison bed – or, for that matter, an immigration detention space – anywhere in the country whenever a federal agency, state, or municipality cannot accommodate a detainable individual.²³⁴ These arrangements are typically less structured than designated out-of-state facilities and are driven by several agencies that negotiate on a flat-fee-per-bed basis, such as the Inmate Placement Services of Nashville which maintained the motto "a bed for every inmate and an inmate for every bed".²³⁵ For a while, there was even a website, *JailBedSpace.com*, with the sole purpose of putting "the buyers and sellers of 'county jail bed space' in touch with each other".²³⁶

229 La Palma Correctional Center and Saguaro Correctional Center are next to each other and are only half an hour drive away from Florence Correctional Center.

230 The US Virgin Islands are not considered an integral part of the US and has its own government, although it remains under the supreme sovereignty of US Congress: Thornburgh, 2007, p. 11.

231 Brown, 2018; Lipton, 2018.

232 A striking example is the Saguaro Correctional Center in Arizona, which was specifically built to address Hawaii's prison overcrowding. It houses exclusively Hawaiian inmates and observes Hawaiian customs and holidays: see Rivero, 2015. The facility is located at 2,934 miles (4,722 kilometres) of Hawaii's capital Honolulu.

233 Ackerman & Furman, 2013, p. 259; Feeley, 2014, p. 1433; Gottschalk, 2016, p. 38; Welch & Turner, 2007, pp. 62–63.

234 Aman, 2005, pp. 543–544; Gottschalk, 2016, p. 37; Harding, 2001, pp. 280–281.

235 Harding, 2001, pp. 280–281.

236 The original website no longer exists, but has been captured at <https://web.archive.org/web/20171117064913/http://www.jailbedspace.com/jbs/> (last accessed 4 October 2018).

2.4 COMMODIFICATION IN CONFINEMENT ON A LOCAL LEVEL: EXAMINING THE CASE STUDIES

2.4.1 RPC Nauru: a nodal perspective

Outlining the nodal governance network of RPC Nauru is a strenuous task.²³⁷ This is in part due to the fact that the arrangements on Nauru are characterised by a strong fluctuation of actors involved: the field perpetually develops and consists of continuously changing hybrid arrangements. Whilst the nodal governance network at a certain point in time can be mapped, such an outline hence does not represent a static structure: actors come and go, relationships strengthen and weaken, the delicate balance between cooperation and contestation continuously shifts, and the mentalities, resources, technologies, and institutional structures of actors are by no means stable per se. Such vicissitudes condition the analysis of the governance structures in place.

RPC Nauru's nodal arrangements will be mapped below, primarily on the basis of a wide variety of publicly available information and, to a lesser extent, on interviews conducted with a former DIBP (then DIAC) Director on island and with a few former managers of stakeholders as detailed in chapter 1 of this book. Specifically, this section will denote and visualise how the governance structures have changed over time up until the end of 2017.

2.4.1.1 *The Australian Government and the Nauruan Government*

The Australian Government – by means of DIBP until 19 December 2017 and the Department of Home Affairs (DHA) from 19 December 2017 onwards –²³⁸ maintains that the existence of RPC Nauru is a central element of its effort to protect Australia's sovereign borders, but that the facility itself is not run by Australia.²³⁹ As former Minister for Immigration and Border Protection Scott Morrison summarised during a press conference, “[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 facil-

²³⁷ This section is an expanded version of part of previously published work: see Van Berlo, 2017d.

²³⁸ As also noted in the introduction, on 19 December 2017, DIBP was subsumed into DHA. Since this book is concerned with the operation of RPC Nauru until the end of December 2017, it will continue to refer primarily to DIBP.

²³⁹ 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).

ities".²⁴⁰ The Australian government reiterates this message frequently and unwaveringly.²⁴¹

As agreed upon in a bilateral Memorandum of Understanding ('MoU') and the Administrative Arrangements, Nauru runs and operates the RPC, hosts transferees and provides them with visas, conducts asylum status determinations, and arranges resettlement for those receiving refugee status, under Nauruan law but with the support of the Australian government.²⁴² To this end, the Nauruan Government appointed Operational Managers and Deputy Operational Managers to manage operations at the RPC.²⁴³ This enables the Government of Nauru to be "on top of operational issues".²⁴⁴

The Australian government provides advice and expertise to the Nauruan government on a variety of administrative functions (such as community liaison, refugee status determination, and legislation and policy development).²⁴⁵ Australia and Nauru also exchange information and data, including

240 DIBP, *Transcript: Press Conference – Operation Sovereign Borders Update*, 1 November 2013, available at: <https://newsroom.abf.gov.au/channels/transcripts-operation-sovereign-borders/releases/press-conference-operation-sovereign-borders-update-2> (last accessed 30 May 2019).

241 For example, then Immigration Minister Morrison stated 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: <https://newsroom.abf.gov.au/channels/transcripts-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 30 May 2019).

242 DIBP, *Submission 31: Inquiry into Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*, Submission 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); P. Moss, 2015; Nauru Government Information Office, 2013b.

243 Sections 4.1.2. and 4.1.3. of the Administrative Arrangements. See also DIBP, *Submission 31*, supra n 242; Nauru Government Information Office, 2014. 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, *Submission 31*, supra n 242, p. 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.

244 Nauru Government Information Office, 2013a.

245 DIBP, *Submission 31*, supra n 242, p. 12.

biometric data, of transferees.²⁴⁶ In addition, DIBP deploys some members of its departmental staff at the RPC to support the Nauruan Operational Managers and to administer and oversee service contracts, coordinate infrastructure, and foster community liaison.²⁴⁷ The senior position on island in this regard was first the DIAC Director, or DIAC Service Convener, which was in September 2014 changed to the Assistant Secretary, Nauru Operations.²⁴⁸ This position essentially revolved around two core functions: as an interviewed former DIAC Director points out,

“[i]n one capacity, I was [the Australian government’s] lead representative on the island. In the other capacity, the Australian government’s agreements with Nauru was that we would ‘convene the services’ [...] and my job was to oversee that convening of services. So, [...] we had an agreement with Nauru that certain things would happen and certain services or support would be offered by the Australian government to support Nauru’s running of the centre, one of which was to provide the person who would oversee the convening of those services and that was me.”

Whilst Nauru agreed to host the facility, it is hence conversely the Australian government that, pursuant to the Administrative Arrangements and through private contractors, provides services to Nauru.²⁴⁹ Australia also bears all costs incurred under the MoU.²⁵⁰ As the former DIAC Director maintains,

“the [Nauruan] minister for Foreign Affairs was ultimately responsible for the centre, because it was in their country and they were the host. We said we would do certain things, we did those things through my work and the people who worked for me and through the contracts that we had. But it was under the legal oversight of the Nauruan government, even though I worked for the Australian government.”

Initially, as this former DIAC Director recalls, the number of DIBP (then DIAC) staff on island was small, with approximately five or six other members of staff on island. This number grew steadily over time: by 2015, 20 identified DIBP employees worked on Nauru.²⁵¹

A number of bilateral bodies have been established to monitor the RPC. A Joint Working Group (chaired by the Nauruan government) has been established to discuss operational issues related to the RPC (including visas, staffing, and events) and a Joint Advisory Committee was created to oversee operational matters at a strategic level.²⁵² A Joint Ministerial Forum oversees

246 Section 5.4.1. of the Administrative Arrangements.

247 Section 4.1.4. of the Administrative Arrangements; DIBP, *Submission 31*, supra n 242, p. 12.

248 P. Moss, 2015, p. 21.

249 Sections 4.1.3. and 4.1.4. of the Administrative Arrangements.

250 Section 1 of the Administrative Arrangements.

251 P. Moss, 2015, p. 21.

252 Section 8 and Attachments A and B of the Administrative Arrangements.

the implementation of the Australian-Nauruan regional partnership. In addition, an open-communications forum between the Nauruan and Australian Governments – the ‘Nauru Settlement Working Group’ – discusses the effects of refugee settlement on the local Nauruan community.²⁵³

2.4.1.2 Construction services

In August and September 2012, as part of the Pacific Solution Mark II, the Australian Defence Force (ADF) built temporary accommodation, kitchen facilities, sanitation facilities, and dining and recreational spaces predominantly in (military) tents and marquees.²⁵⁴ Canstruct, a private construction service provider, was contracted in November 2012 to build permanent facilities and staff accommodation.²⁵⁵ On its website, Canstruct emphasised that the ‘multitude of stakeholders’ was one of the major challenges it encountered over the course of the project.²⁵⁶ After construction work at the RPC ended, Canstruct “moved on to various infrastructure assets on Nauru”.²⁵⁷

2.4.1.3 Service providers for garrison, welfare, security, health services, and claims assistance

The Australian government has contracted a number of other private contractors for service provision in the RPC, both prior to and after the introduction of OSB. When offshore processing was recommenced in 2012, Transfield Services, the Salvation Army, and IHMS were contracted to provide respectively garrison, welfare, and health services.²⁵⁸ At the beginning, the Salvation Army hired a number of personnel from MDA. Furthermore, the Australian government contracted with Claims Assistance Providers (‘CAPs’) that support asylum seekers in their application for refugee status – for Nauru, law firm Craddock Murray Neumann Lawyers was contracted.²⁵⁹ Transfield Services was the lead contractor: thus, “there can be no doubt that without Transfield the

253 DIBP, *Regional Processing Centre in Nauru*, supra n. 239; DIBP, *Submission 31*, supra n. 242.

254 DIBP, *Regional Processing Centre in Nauru*, supra n. 239; DIBP, *Submission 31*, supra n. 242, p.14.

255 DIBP, *Regional Processing Centre in Nauru*, supra n. 239.

256 Canstruct, *Nauru Regional Processing Centres*, 2015, available at: www.canstruct.com.au/project/nauru-regional-processing-centre/ (last accessed 22 December 2015).

257 Canstruct, *Nauru Regional Processing Centres*, supra n. 239.

258 DIBP, *Regional Processing Centre in Nauru*, supra n. 239; DIBP, *Submission 31*, supra n. 242; Narayanasamy et al., 2015, p. 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/ourexperience/Documents/Nauru%20and%20Manus%20Island%20Fact%20Sheet.pdf (last accessed 11 February 2016).

259 Section 5.2.2. of the Administrative Arrangements.

operation of the [RPC] would be impossible".²⁶⁰ According to Transfield Services itself, it had "methodically developed the infrastructure, systems and processes that apply at the offshore processing centre".²⁶¹ Transfield Services subcontracted security services to Wilson Security, although it remained responsible for the subcontractor's actions.²⁶² As a result, the Australian government could not deal directly with Wilson Security on a formal basis.²⁶³ In turn, in August 2013, Save the Children Australia was awarded a 1 year contract to provide education and protection services as well as welfare services to minors.²⁶⁴

In February 2014, the Salvation Army's contract ended and was not renewed.²⁶⁵ Its welfare responsibilities were transferred to Transfield Services (becoming responsible for welfare services for single adult males) and Save the Children (becoming responsible for welfare services for single adult females, families, children, and couples without children).²⁶⁶ As the introductory chapter has already outlined, in October 2014, ten staff members of Save the Children were accused of coaching asylum seekers to self-harm.²⁶⁷ Six of the ten employees, who were still on Nauru, were removed from the island and nine of the ten employees, who were still working for Save the Children, were suspended.²⁶⁸ As also specified in the introduction of this book, the staff members were later on cleared of all allegations. Still, after having won a tender, Transfield Services took over all welfare services of Save the Children in November 2015.²⁶⁹ This happened only a month after the Save the Children staff were accused of leaking information and their offices were raided multiple times by the Nauruan Police and the ABF.²⁷⁰ Around the same time, Transfield Services changed its name to Broadspectrum Ltd,

²⁶⁰ Narayanasamy et al., 2015, p. 6.

²⁶¹ 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).

²⁶² A redacted version of the contract between Transfield Services and Wilson Security is available via <https://archive.homeaffairs.gov.au/AccessandAccountability/Documents/FOI/FA140300149.PDF> (last accessed 30 May 2019).

²⁶³ DIBP, *Submission 31*, supra n 242; Narayanasamy et al., 2015, p. 21.

²⁶⁴ Whyte, 2018.

²⁶⁵ Laughland & Jabour, 2013.

²⁶⁶ DIBP, *Submission 31*, supra n 242, p. 14-39; P. Moss, 2015, p. 22.

²⁶⁷ Whyte, 2018.

²⁶⁸ Whyte, 2018.

²⁶⁹ Doherty, 2015a; 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).

²⁷⁰ Whyte, 2018.

allegedly because its parent company tried to distance itself from allegations of abuse and contract controversies.²⁷¹

Transfield's responsibilities in the RPC hence increasingly comprised a plethora of services, including transferee services, management and maintenance of assets and the processing site, transport and escort, security services, catering, personnel accommodation, governance, logistics, and welfare services.²⁷² In this sense, power and influence were gradually centralised into the hands of one private actor – Transfield Services/Broadspectrum – that already had been the lead contractor from the start and as such seemingly enjoyed a significant decision-making authority and bargaining power vis-à-vis the respective governments and other stakeholders involved. It was increasingly bearing, moreover, significant responsibilities. Indeed, remaining 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 [DIBP] for any personal injury, disease, illness or death of any person, reduced proportionately to the extent that any act or omission involved fault on the part of [DIBP]”.²⁷³

According to DIBP, the service providers discuss a variety of issues related to care and well-being with the Nauruan Operational Managers in a number of ‘stakeholder forums’, which are supported by DIBP.²⁷⁴ They also discuss how to strengthen the personal safety and privacy of transferees with both the Nauruan Government and DIBP.²⁷⁵ Additionally, DIBP facilitates information sessions, review meetings, and joint service provider forums to foster and encourage information sharing, cooperation and collaboration.²⁷⁶ In delivering services, providers have to adhere to Nauruan standards, but if such standards do not exist, contracts may require providers to adhere to Australian standards.²⁷⁷

²⁷¹ Doherty, 2015b.

²⁷² Narayanasamy et al., 2015, p. 19.

²⁷³ Narayanasamy et al., 2015, p. 22.

²⁷⁴ As outlined by 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, *Submission 31*, supra n 242, p. 14–26. See also Nauru Government Information Office, 2014.

²⁷⁵ DIBP, *Submission 31*, supra n 242, p. 25.

²⁷⁶ DIBP, *Submission 31*, supra n 242, p. 26.

²⁷⁷ DIBP, *Submission 31*, supra n 242, p. 12.

Nauruan nationals have increasingly been employed at the Centre and goods and services are as far as possible sourced from Nauruan companies.²⁷⁸ In order to foster such involvement, Transfield Services/Broadspectrum Ltd. and Wilson Security were required to employ a minimum number of local Nauruan staff and sub-contractors.²⁷⁹ In discharging this contractual obligation, Wilson Security subcontracted part of its responsibilities to the local Nauruan security providers Sterling Security and Protective Security Services.²⁸⁰ Transfield/Broadspectrum maintained subcontracts with Sterling Security (site security), Rainbow Enterprise (providing fresh fruit, vegetables, and bottled water), Capelle & Partner (providing dry goods, meat, and bulk water) One-4-One Car Rentals (car rentals), Nauru Rehabilitation Corporation (providing skip bins), Ronphos (crane/forklift services), Aiwo Town Ace Petrol Station (providing all vehicle fuel), Menen Hotel Nauru and Oden Aiwo Hotel (staff accommodation), Dei-Naoero Cleaners (weekly laundry services), Nauru Utilities Corporation (providing bulk diesel), Republic of Nauru Hospital (providing pre-employment medicals for local staff), Eigigu Holding Corporation (construction work on site and septic pumping truck), and Our Airline/Nauru Airlines (flights in and out of Nauru for all staff).²⁸¹ Some of these (for example Eigigu Holding Corporation, Ronphos, the Menen Hotel, the Nauru Utilities Corporation, the Republic of Nauru Hospital, Eigigu Holding Corporation, and Our Airline/Nauru Airlines) are owned by the Government of Nauru.²⁸² DIBP and the service providers collaborate in developing strategies to foster the capacity of Nauruan staff members, for example by expanding Transfield's/Broadspectrum's formal training opportunities to its Nauruan employees.²⁸³

Given that both public authorities and private contractors provide little clarity in relation to (the extent of) subcontracting, and given that it is largely impossible for researchers to access the RPC sites, it is seemingly impossible to definitively denote the full catalogue of subcontractors involved. This does not, however, raise significant concerns for the present research. Indeed, first,

278 As Section 10.4. of the Administrative Arrangements provides, "[w]here possible and appropriate, use of local staff and services (for example, the national airline of Nauru) will be engaged and utilised to give effect to the MOU and these Administrative Arrangements". See also DIBP, *Submission 31*, supra n 242.

279 P. Moss, 2015, p. 22. See also Wilson Security, *Nauru and Manus Island Fact Sheet*, supra n. 258.

280 P. Moss, 2015, p. 21.

281 DIAC, *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: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Activity/migration/qon/~/_media/Committees/Senate/committee/humanrights_ctte/activity/migration/qon/DIAC_QoN.ashx (last accessed 30 May 2019).

282 Nauru Government Information Office, 2013c.

283 DIBP, *Submission 31*, supra n 242, p. 26.

the obfuscating practice of subcontracting is rather illustrative of the hybridity of any typical nodal governance network and of the limited relevance of isolating individual actors for analytical purposes without due regard to their interconnectedness and networking capabilities. In this sense, the observation *that* subcontracting occurs on a large scale is already highly significant for understanding the governance network's dynamics. Second, many of the subcontractors – in particular those local companies that are merely involved in the delivery of goods and ancillary services – are not of primary importance for the human rights analysis in this research. This is only different where subcontractors providing garrison services are concerned: since their potential impact on the enjoyment of human rights is significantly higher than that of service providers providing, e.g., fuel or laundry services, it is important to understand their role and position in the governance network.

In June 2016, Broadspectrum was fully acquired by Spanish multinational Ferrovial S.A. After sustained criticism of the offshore processing centres, Ferrovial announced that it would abandon Broadspectrum's work in the RPCs, and although it intended to do so in February 2017, the Australian government unilaterally extended the contract until the end of October 2017.²⁸⁴ Wilson Security withdrew from the RPCs at the same time.²⁸⁵ In turn, it surprised many that civil engineering company Canstruct, which had worked on construction and infrastructure projects on Nauru since 2012, took over the contract for garrison and welfare services from November 2017 onwards.²⁸⁶ Canstruct, which had no previous experience in providing garrison or welfare services, accepted the six-month contract with the Australian government worth more than 8 million Australian dollars. Its responsibility therewith expanded exponentially and it henceforth attained the relatively strong bargaining position that Transfield Services/Broadspectrum Ltd. enjoyed previously. Although more and more asylum claims have been processed throughout the year, at the end of 2017 there were still 338 asylum seekers and refugees in RPC Nauru.²⁸⁷

Although so far only Australia has contracted with private actors for the provision of services in RPC Nauru, Section 16(1) of the *Nauruan Asylum Seekers (Regional Processing Centre) Act 2012* also provides for the possibility that the government of Nauru itself enters into an agreement with a service provider.²⁸⁸ In 2017, furthermore, the *Nauru (RPC) Corporation Act 2017* was

284 H. Davidson, 2017.

285 Doherty, 2016.

286 H. Davidson, 2017.

287 DIBP, *Operation Sovereign Borders monthly update: December 2017*, 9 January 2018, available at: <https://newsroom.abf.gov.au/channels/media-releases/releases/operation-sovereign-borders-monthly-update-december-2017> (last accessed 30 May 2019).

288 *Asylum Seekers (Regional Processing Centre) Act 2012*, No. 21, 21 December 2012, section 16(1).

introduced.²⁸⁹ This Act regulates the creation of the Nauru (RPC) Corporation, a body corporate, and authorises it to “administer, manage and facilitate all commercial operations to regional processing centres and settlements in the Republic”.²⁹⁰ Specifically, the Nauru (RPC) Corporation has a variety of functions, including (i) carrying out and giving effect “to any policy directions of the Minister and the Cabinet in relation to the procurement of commercial services for the regional processing centres and settlements”, (ii) promoting and assisting the Republic of Nauru “in the facilitation of the commercial spirit and intent” of the MoU, Administrative Arrangements, and *Asylum Seekers (Regional Processing Centre) Act 2012*, (iii) tendering, processing and recommending which service providers to contract, (iv) managing contracts related to service provision in the RPC between service providers and the Republic of Nauru, and (v) recommending and advising on commercial operations within the RPC.²⁹¹ In effect, Nauru has thus outsourced the execution of its responsibilities in relation to the aforementioned tasks to a corporation functioning under responsibility of the Nauruan Minister for Multicultural Affairs.²⁹² It is of particular interest from the perspective of commodification that the *Nauru (RPC) Corporation Act 2017* specifically mentions that the MoU, Administrative Arrangements, and *Asylum Seekers (Regional Processing Centre) Act 2012* have a “commercial spirit and intent”: the wording does not only confirm the commodified nature of confinement but also highlights that such commodification ought to be *promoted* and *facilitated*.

In September 2017, the *Nauru (RPC) Corporation Act 2017* was amended by the *Nauru (RPC) Corporation (Amendment) Act 2017*, substituting section 24 of the Act concerning the restriction of commercial service provision.²⁹³ As subsection 1 of this amended provision provides,

- “(1) No person shall provide or render any commercial services at the regional processing centres and settlements unless:
- (a) there is in place a contract authorised by the Cabinet;
 - (b) the authorised contract has either been executed by the Republic under section 16(1) of the *Asylum Seekers (Regional Processing Centre) Act 2012*, or where the Republic is not a party, it has been endorsed by the Secretary under this Act;
 - (c) the authorised contract has been endorsed by the Secretary under paragraph (b) and executed by a representative or nominee or agent authorised by the Commonwealth of Australia;
 - (d) a current business licence is produced; and

289 Nauru (RPC) Corporation Act 2017, No. 15, 1 August 2017.

290 Nauru (RPC) Corporation Act 2017, sections 4(c) and 6(2).

291 Nauru (RPC) Corporation Act 2017, section 7(1).

292 Nauru (RPC) Corporation Act 2017, section 9(1).

293 Nauru (RPC) Corporation (Amendment) Act 2017, No. 21, 14 September 2017, section 4.

(e) a tax identification number issued under the Revenue Administration Act 2014 is produced.”²⁹⁴

Commercial activities at the RPC can therefore only be rendered on the basis of a contract that is authorised by the Nauruan government. In turn, only two types of contracts qualify for authorisation by the Nauruan government: those contracts executed by the Republic of Nauru itself pursuant to the relevant provisions in the *Asylum Seekers (Regional Processing Centre) Act 2012*, and those contracts authorised by the Nauruan Secretary of Multicultural Affairs on behalf of the Nauruan government and executed by a representative, nominee, or agent authorised by Australia. In relation to the latter types of contracts, the Nauruan government retains the right to withdraw or revoke its authorisation.²⁹⁵ Anyone attempting, inducing, colluding, conspiring, or entering into an agreement or understanding to provide or render commercial services at the RPC commits a criminal offence punishable by a maximum fine of \$500,000, a maximum prison sentence of 5 years, or both.²⁹⁶ With the introduction of this legislation, the Nauruan government has thus clearly institutionalised its influence and oversight over the facilities, which fits with the more general account of many interviewed former workers that the Nauruan government is gradually increasing its control over the RPC.

So far, all service contracts have been concluded by the Australian government with the respective private stakeholders. As outlined above, however, ever since the implementation of the *Nauru (RPC) Corporation Act 2017* such contracts require authorisation by the Nauruan Secretary of Multicultural Affairs. This consequently applies to the contract between the Australian government and Canstruct as concluded on 31 October 2017. The *Nauru (RPC) Corporation (Canstruct International Pty Ltd Engagement) Regulations 2017* provides that the contract between the Australian government and Canstruct has indeed been authorised by the Nauruan Cabinet and was endorsed by the Secretary for Multicultural Affairs.²⁹⁷ These Regulations furthermore detail that the Nauru (RPC) Corporation will charge and recover “management and service fees for the facilitation and administration of services at the Regional Processing Centres and Settlements or in relation to protected persons”, amounting to an annual total of 20 million Australian dollars.²⁹⁸

294 Nauru (RPC) Corporation Act 2017, amended section 24(1).

295 Nauru (RPC) Corporation Act 2017, amended section 24(5).

296 Nauru (RPC) Corporation Act 2017, amended sections 24(2) and 24(3).

297 Nauru (RPC) Corporation (Canstruct International Pty Ltd Engagement) Regulations 2017, SL No. 22, 31 October 2017, section 3.

298 Nauru (RPC) Corporation (Canstruct International Pty Ltd Engagement) Regulations 2017, section 4.

2.4.1.4 Health care: IHMS and the Republic of Nauru Hospital

IHMS is the contracted health care provider in the RPC on Nauru, although it sub-contracts torture and trauma counselling to Overseas Services to Survivors of Torture and Trauma ('OSSTT').²⁹⁹ IHMS provides various health care services in the RPC, including general practitioner, nursing and mental health care clinics. The way in which such care is provided is supposed to be consistent with Australian health standards.³⁰⁰ An emergency physician and after-hours medical staffing are present in the facilities, supplemented by visiting specialists, a tele-health service, and medical transfers.³⁰¹ Medical transfers are, however, limited as far as possible as hospital services are in principle provided by the Republic of Nauru Hospital.³⁰² Mental health services are provided by mental health nurses, psychologists, and visiting consultant psychiatrists.³⁰³

IHMS reports concerns related to the safety of children to the Child Safe-guarding and Protection Manager of the welfare provider.³⁰⁴ All personnel employed in the RPC in Nauru furthermore has to sign a mandatory 'working with children code of conduct'.³⁰⁵

2.4.1.5 Policing and incidents: The Nauru Police Force and the Australian Federal Police

The Nauru Police Force ('NPF') has to undertake community policing patrols to the RPC.³⁰⁶ The NPF also has two officers permanently deployed at the RPC.³⁰⁷ The Australian Federal Police ('AFP') provides advice to the NPF on the coordination of policing at the RPC and on investigation training more generally.³⁰⁸

In handling incidents inside the RPC, DIBP cooperates with the NPF and the Nauruan Operational Managers.³⁰⁹ To this end, incident management arrangements and management protocols exist.³¹⁰ In terms of emergency management protocols, the AFP provides advice to both DIBP and the Nauruan Government.³¹¹ Service providers must report incidents to the Operational Man-

299 P. Moss, 2015, pp. 21–22.

300 DIBP, *Regional Processing Centre in Nauru*, supra n 239; DIBP, *Submission 31*, supra n 242.

301 DIBP, *Regional Processing Centre in Nauru*, supra n 239; DIBP, *Submission 31*, supra n 242.

302 DIBP, *Regional Processing Centre in Nauru*, supra n 239.

303 DIBP, *Regional Processing Centre in Nauru*, supra n 239.

304 DIBP, *Submission 31*, supra n 242, p. 16.

305 DIBP, *Submission 31*, supra n 242, p. 16.

306 DIBP, *Submission 31*, supra n 242, p. 19.

307 DIBP, *Submission 31*, supra n 242, p. 18.

308 DIBP, *Regional Processing Centre in Nauru*, supra n 239; DIBP, *Submission 31*, supra n 242.

309 DIBP, *Regional Processing Centre in Nauru*, supra n 239.

310 DIBP, *Regional Processing Centre in Nauru*, supra n 239.

311 DIBP, *Submission 31*, supra n 242, p. 25.

agers as well as to DIBP through standardised procedures.³¹² According to DIBP, any allegation of assault is referred and reported to the NPF. If appropriate, prosecution is commenced by the Nauruan authorities.³¹³ When a person under 18 is reportedly harmed, this is also reported to the Nauru Department of Youth and Community.³¹⁴ However, “[a]lleged misconduct by service provider staff, where not criminal in nature, is referred to the relevant service provider to investigate”.³¹⁵

2.4.1.6 Resettlement

Save the Children Australia provided settlement support services on Nauru between May 2014 and the beginning of January 2015.³¹⁶ On the 17th of December 2014, Connect Settlement Services – an Australian consortium of Adult Multicultural Education Service (‘AMES’) and MDA – was engaged to take over Save the Children Australia’s provision of settlement services.³¹⁷ After Connect Settlement Services decided not to retender for the contract at the end of 2016,³¹⁸ Broadspectrum took over on an interim basis,³¹⁹ after which non-profit organisation HOST International took over the refugee settlement services.³²⁰ In assisting asylum seeker and refugee children, DIBP has engaged 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 domestic education system of Nauru.³²¹

2.4.1.7 RPC Nauru: a nodal picture

The developments in the nodal network have been depicted in Figures 2, 3, 4, 5, and 6 below. Each picture shows the nodal governance situation on the 1st of December of each respective year within the scope of this study. Since there have been no significant governance changes between 1 December 2015 and 1 December 2016 in terms of the nodal governance network, no separate overview was created for the year 2016.

312 DIBP, *Submission 31*, supra n 242, p. 18.

313 DIBP, *Submission 31*, supra n 242, p. 18.

314 DIBP, *Submission 31*, supra n 242, p. 18.

315 DIBP, *Submission 31*, supra n 242, p. 18. 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’: DIBP, *Submission 31*, supra n 242, p. 9.

316 DIBP, *Submission 31*, supra n 242, p. 56.

317 DIBP, *Submission 31*, supra n 242, pp. 14 and 55.

318 H. Davidson & Doherty, 2016b.

319 H. Davidson, 2016a.

320 Government of Nauru, 2015a, 2017.

321 DIBP, *Submission 31*, supra n 242, p. 40.

Figure 2 provides a comprehensive overview of all known actors involved on the 1st of December 2012. The following Figures, however, provide a more concise overview of the nodal governance network by focussing on the core actors of relevance for present purposes. For the years 2013-2017, the Figures hence provide a simplified overview excluding a number of subcontractors, supporting actors, and specific role types.

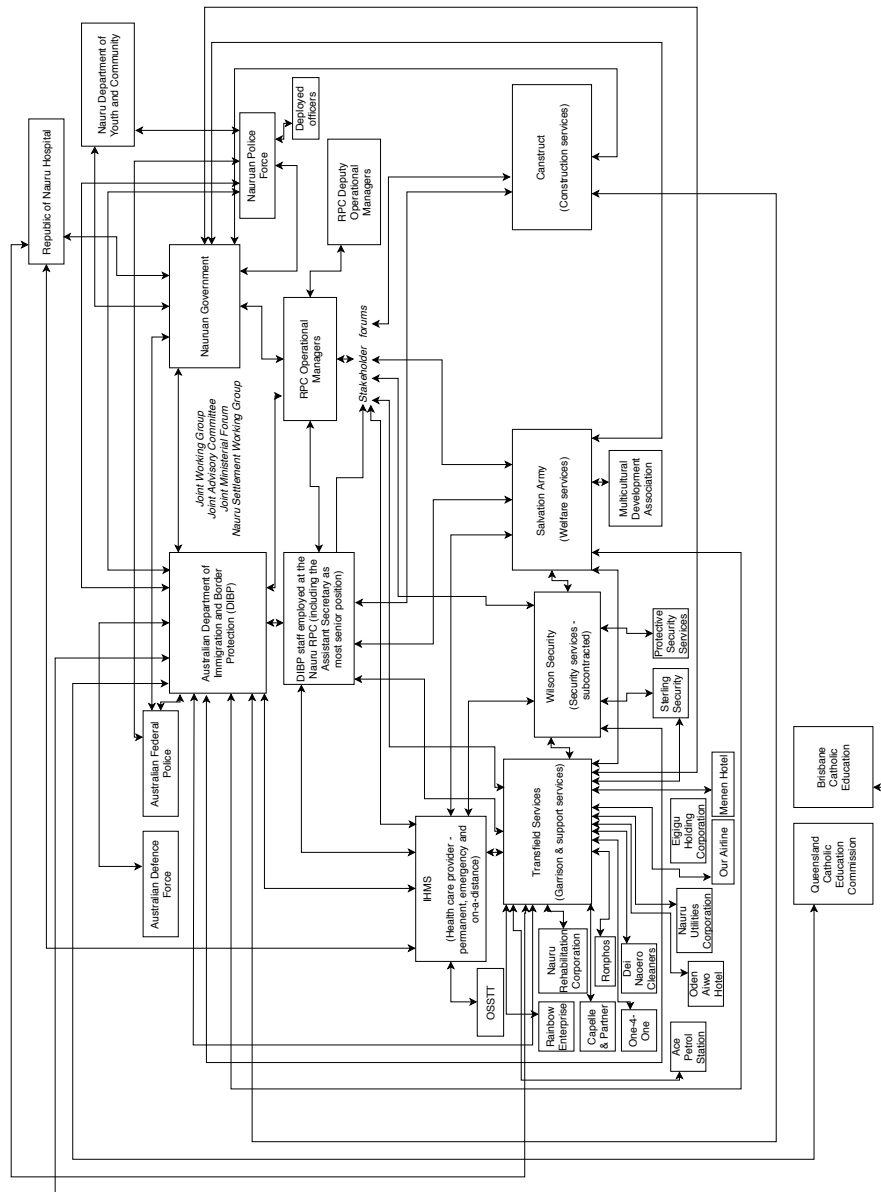
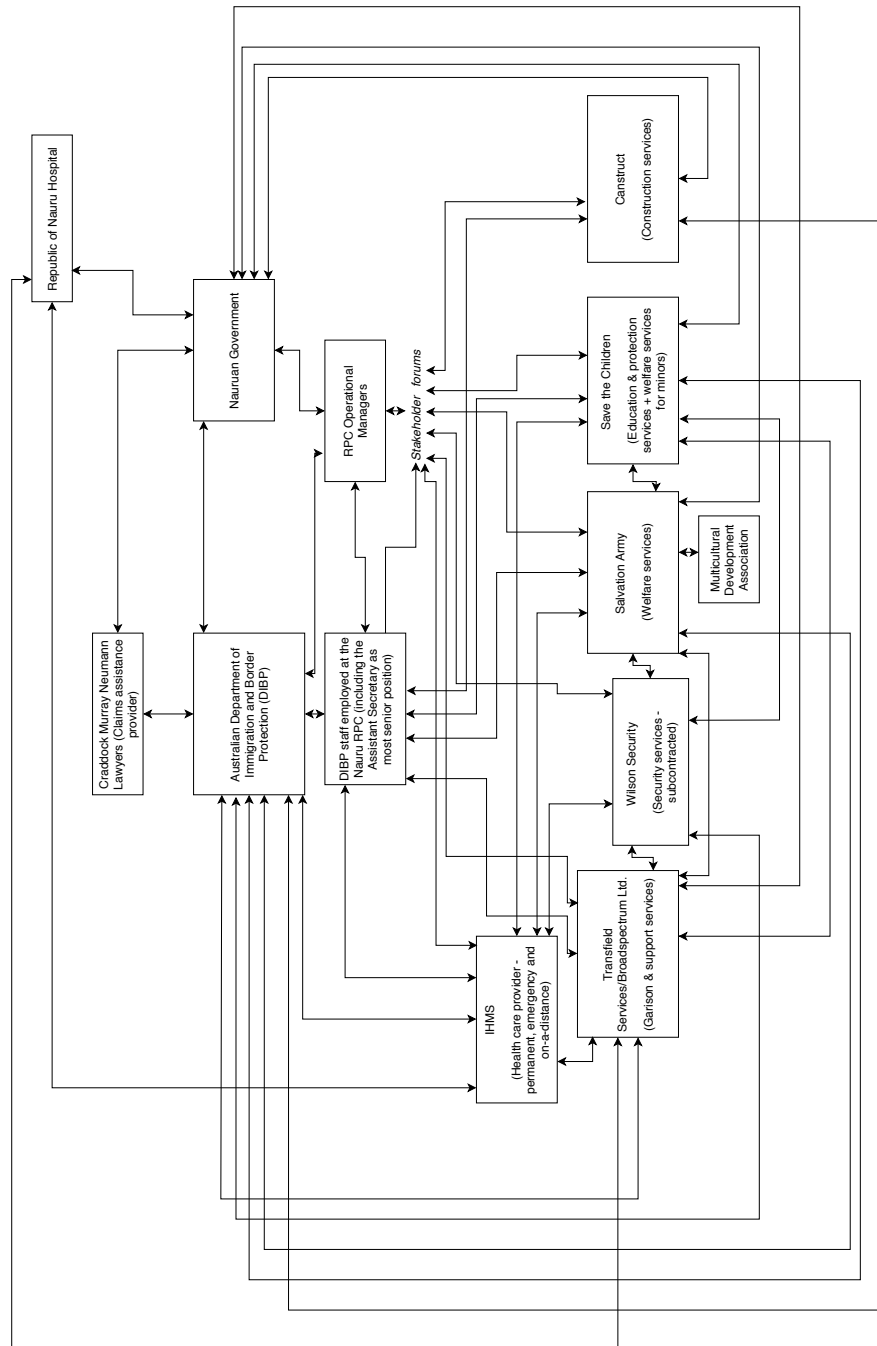


Figure 2: The nodal governance network in RPC Nauru as of 1 December 2012.



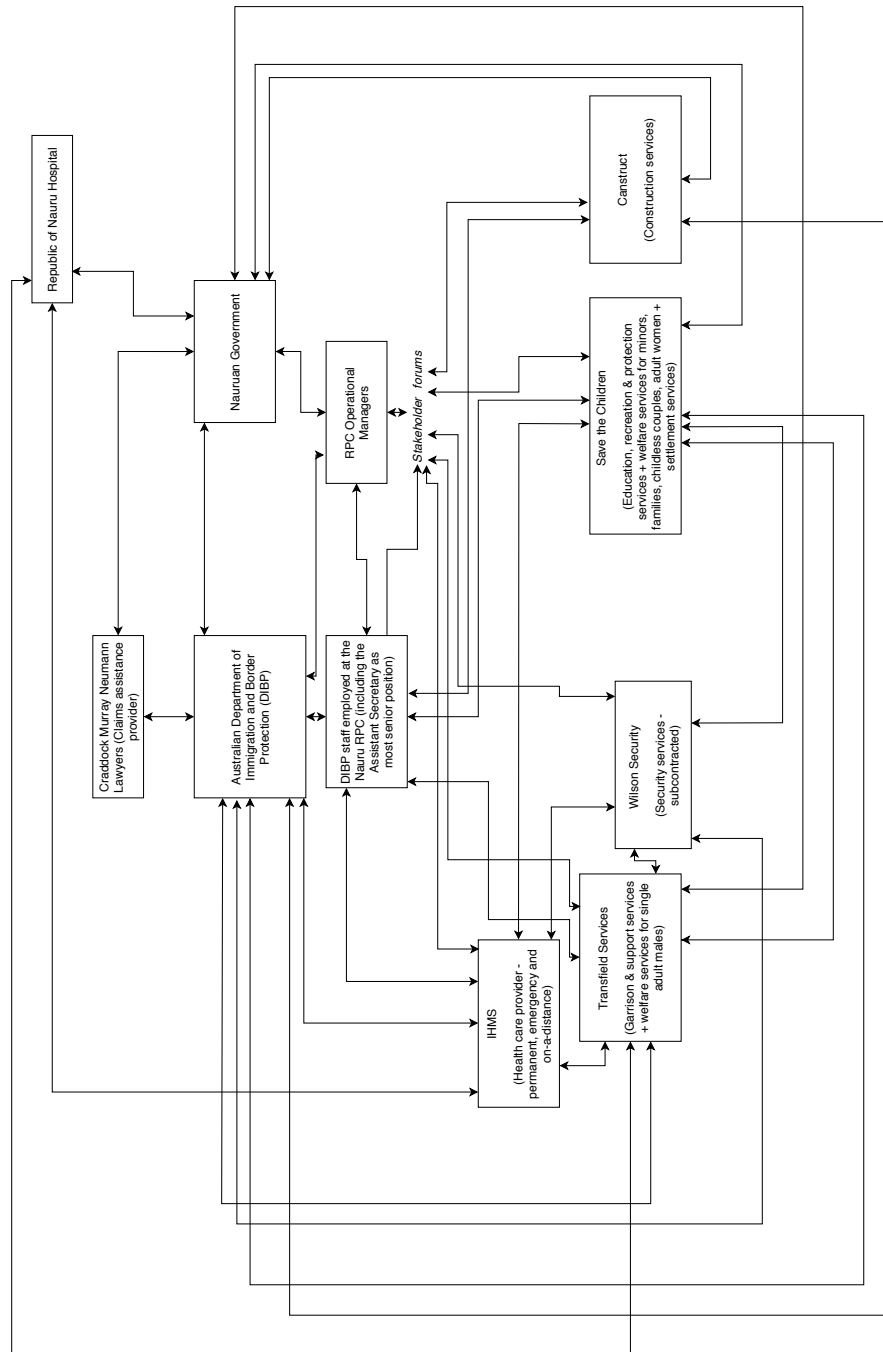


Figure 4: The nodal governance network in RPC Nauru as of 1 December 2014 (simplified version).

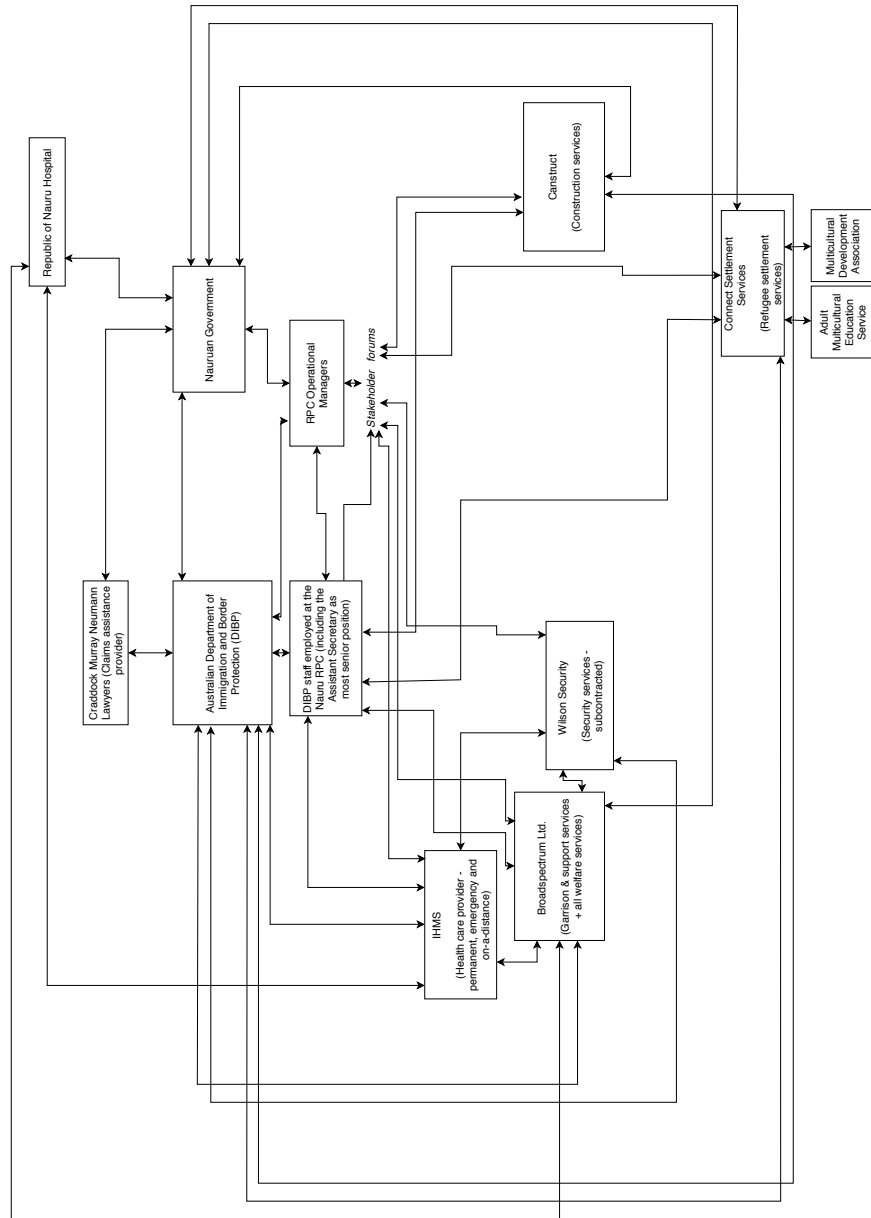


Figure 5: The nodal governance network in RPC Nauru as of 1 December 2015 and 1 December 2016 (simplified version).

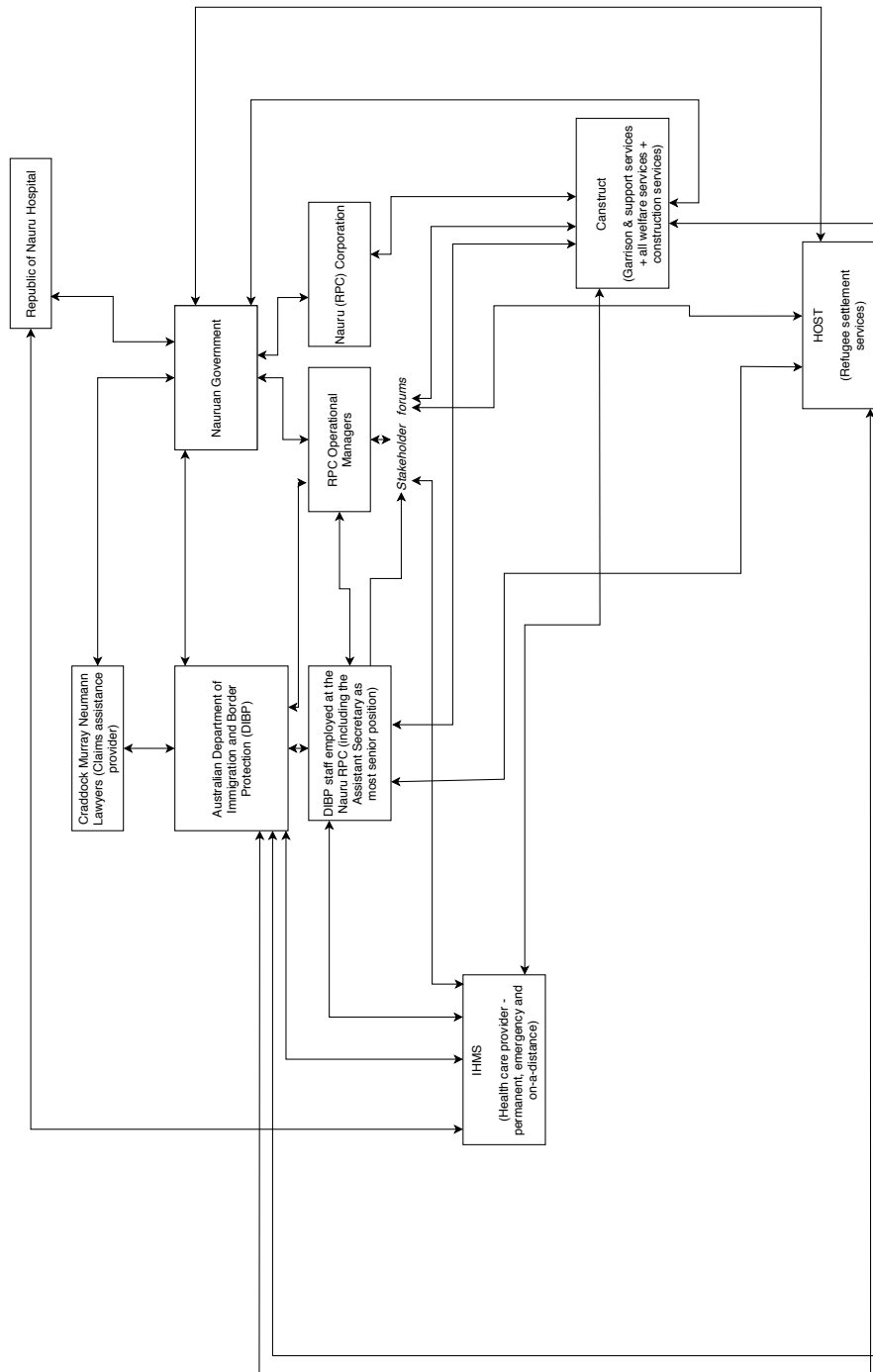


Figure 6: The nodal governance network in RPC Nauru as of 1 December 2017 (simplified version).

As the complexity of these Figures depicts, the Australian-Nauruan arrangements combine nodal governance and anchored pluralism. Through the networked interaction between a variety of cooperating, contesting, and conflicting public and private actors, governance and power ultimately 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 – what some have labelled “the unfettered ‘invisible hand’ of capitalist economies”.³²² Still, some of the private actors involved have gradually expanded their responsibilities and therewith their scope of influence by tendering for the provision of various services. Transfield Services/Broadspectrum and, later on, Canstruct, have for instance gradually won more tenders, providing them with a sense of indispensability and, consequently, with significant bargaining power.

2.4.2 PI Norgerhaven: a nodal perspective

The nodal governance structure of PI Norgerhaven is slightly less complicated than that of RPC Nauru, insofar as it does not involve private contractors. Relying primarily on the Norwegian-Dutch Treaty and the Norwegian-Dutch Cooperation Agreement (‘the Cooperation Agreement’),³²³ the governance structure will be mapped in this section.³²⁴ In doing so, to some extent the mapping exercise will also rely on the interviews conducted with the Norwegian Director and with the Dutch Staff and Facility Manager.³²⁵

The Norwegian authorities, represented by a Norwegian prison governor and two Norwegian deputy prison governors working for the Norwegian Correctional Service (*Kriminalomsorgensdirektoratet*, ‘KDI’)³²⁶ are responsible for the execution of prison sentences and are in charge of the facility, including in relation to its safety and security, the treatment of detainees, and administrative functions, including the administration of prisoners’ personal funds.³²⁷

322 Boutellier & van Steden, 2011, p. 468.

323 The Cooperation Agreement between Norway and the Netherlands is available at <http://kriminalomsorgen.custompublish.com/getfile.php/3102435.823.vwxweycabx/Cooperation+Agreement+Final+version+26+February+2015+Initialed.pdf> (last accessed 31 May 2019).

324 The nodal governance network closely resembles the network that was in place during the Belgian-Dutch cooperation in PI Tilburg: see Albregtse, 2013; Beyens & Boone, 2013, 2015; Robert, 2011.

325 These interviews have been methodologically explained in the introductory chapter.

326 Article 9 Cooperation Agreement.

327 Article 6 Norwegian-Dutch Treaty and Article 29 Cooperation Agreement.

The Norwegian governor can employ Norwegian administrative staff within the facility.³²⁸

A Dutch Staff and Facility Manager (also known as the Dutch Director) is, together with a Deputy Staff and Facility Manager, present and is charged, on behalf of the Norwegian governor, with human resources and the management of the facility.³²⁹ Indeed, the Dutch Custodial Institutions Agency DJI has to make sure that “the conditions in the prison are such that the Governor is thereby able to ensure full compliance with the [Norwegian-Dutch Treaty] and [the] Cooperation Agreement”.³³⁰ The responsibilities of the Staff and Facility Manager include the buildings and terrain, personnel, catering, office facilities, and technical equipment.³³¹ Furthermore, the Staff and Facility Manager is responsible for organising work and other activities that prisoners can engage in, a library, and confessional services.³³² The Norwegian governor ensures that sufficient prisoners participate in prison work.³³³ As the Dutch Staff and Facility Manager points out when interviewed, he frequently consults with the Dutch prison governor of the overarching facility of PI Veenhuizen.

The Norwegian governor and Dutch Staff and Facility Manager share responsibilities in a number of areas, for example where care for inmates is concerned. In terms of hygiene, for instance, this means that the Dutch Staff and Facility Manager is responsible for providing the Norwegian governor the opportunity to provide inmates with hygienic care (including a daily shower, personal care products, bed linens and towels, and cleaning solutions and materials).³³⁴ Where clothing is concerned, KDI ensures that prisoners possess suitable clothing and shoes upon arrival, whereas the Dutch Staff and Facility Manager enables prisoners to wash their clothes once a week, to buy clothes and shoes at their own expense, and to attain clothing and shoes free of charge when they have insufficient funds or when specific clothes or shoes are required for the performance of certain work or other activities.³³⁵ In consultation with the Staff and Facility Manager, the Norwegian governor moreover enables prisoners to order goods from the prison shop.³³⁶ In terms of healthcare, DJI guarantees that basic health care (provided by general practitioners, nurses, psychologists, psychiatrists, and dentists) is provided, and ensures that medication can be received daily, whereas Norway ensures close

328 Article 9 Norwegian-Dutch Cooperation Agreement.

329 Article 6(4) Norwegian-Dutch Treaty.

330 Article 7 Cooperation Agreement.

331 Articles 4-6 and Article 28 Cooperation Agreement.

332 Articles 21-24 Cooperation Agreement.

333 Article 21(2) Cooperation Agreement.

334 Article 26 Cooperation Agreement.

335 Article 27 Cooperation Agreement.

336 Article 31 Cooperation Agreement.

contact between the health services in PI Norgerhaven and the Norwegian prison health services through a health coordinator at Ullersmo prison.³³⁷

The Norwegian governor and Dutch Staff and Facility Manager also share responsibilities where prisoners' contact with the outside world is concerned. The Staff and Facility Manager facilitates that prisoners can write and receive letters,³³⁸ make phone calls, and make Skype calls,³³⁹ that they can receive visits,³⁴⁰ and that they can come into contact with the Norwegian authorities for social assistance and social services.³⁴¹ In addition, the Norwegian governor and Dutch Staff and Facility Manager have joint responsibilities in the provision of information to prisoners and the translation and interpretation of documents.³⁴² In performing their tasks, both authorities have to take into account the Dutch regulations on health, environment, and safety that continue to apply.³⁴³

The daily programme of the facility is Norwegian and is set by the Norwegian Director, although only after consultation with the Dutch Staff and Facility Manager.³⁴⁴ As the Staff and Facility Manager points out during the interview, the programme is essentially a "blend" or "mixture" of the best practices of both Norway and the Netherlands. It thus focuses both on the volition of inmates – allowing them to make choices in relation to their daily programme, which originates from Dutch penal practices – and on the normality principle – meaning that imprisonment should not *add* to the severity of punishment beyond incapacitation, which derives from the Norwegian penal system.³⁴⁵ In establishing a daily program, the governor can allow Norwegian non-governmental organisations to offer their services in PI Norgerhaven.³⁴⁶

Whilst the Treaty and Cooperation Agreement make a clear distinction in hierarchy, in practice the Norwegian governor and the Dutch Staff and Facility Manager operate closely together. When interviewed, the Dutch Staff and Facility Manager for instance highlights that he, as a former prison governor himself, has acquired a wealth of experience and know-how on running Dutch prisons and therefore frequently advises the Norwegian governor. The governor and the Staff and Facility Manager have to meet as often as necessary, but at least twice a month.³⁴⁷ KDI and DJI, furthermore, evaluate the implementation of the Cooperation Agreement at least twice a year.³⁴⁸ The ex-

337 Article 32 Cooperation Agreement.

338 Article 33(1) Cooperation Agreement.

339 Article 35(1) Cooperation Agreement.

340 Article 34(1) Cooperation Agreement.

341 Article 36 Cooperation Agreement.

342 Articles 37-38 Cooperation Agreement.

343 Article 12 Cooperation Agreement.

344 Article 20 Cooperation Agreement. See also Struyker Boudier & Verrest, 2015, p. 910.

345 Y.A. Anderson & Gröning, 2016, p. 224.

346 Article 25 Cooperation Agreement.

347 Article 9(3) Cooperation Agreement.

348 Article 10 Cooperation Agreement.

ecution of sentences is supervised in accordance with Norwegian laws and regulations, and the Norwegian governor therefore has to allow announced and unannounced visits from Norwegian supervising bodies, including the Supervisory Council (*tilsynsråd*) and the Parliamentary Ombudsman for Public Administration (*Sivilombudsmannen*).³⁴⁹

The Norwegian governor and deputy governors give direct instructions – in English and, since one of the deputy governors speaks Dutch fluently, in Dutch – to the Dutch prison staff.³⁵⁰ The Dutch staff communicates with detainees in a language that is understandable to them, primarily in English.³⁵¹ A Staff Handbook on the Norwegian penitentiary system was prepared for Dutch prison staff by the Norwegian governor in consultation with the Staff and Facility Manager.³⁵² In addition, staff members have not only been trained by the DJI Training and Education Centre, but also by the Training Institute of the Norwegian Prison System (*Krus*).³⁵³

The nodal governance field involved in the Norwegian-Dutch cooperation is similar to that involved in the Belgian-Dutch one.³⁵⁴ Still, there are some important deviations. The Norwegian-Dutch Treaty provides for more medical treatment opportunities in Dutch hospitals under supervision of DJI personnel, which is justified due to the physical distance between both countries.³⁵⁵ Thus, although normally a prisoner in need of external medical care shall be transferred to a medical centre in Norway, this rule may be derogated from when the prisoner's treatment requires admission to a medical centre for not more than three nights, or if, for medical reasons, the transfer to Norway is not possible: in these cases, the prisoner will be transferred to a medical centre in the Netherlands.³⁵⁶ This by extension means that in such cases, the execution of a Norwegian sentence may, albeit temporarily, takes place in a Dutch hospital.³⁵⁷ Furthermore, different from the former Belgian-Dutch arrangements, the Norwegian authorities – not the Dutch ones – are responsible for transporting detainees to and from the Netherlands.³⁵⁸ Transport within the Netherlands is the responsibility of the Dutch authorities and is in practice provided, per instruction of the Norwegian governor or other competent

349 Article 39 Cooperation Agreement.

350 Struyker Boudier & Verrest, 2015, p. 910.

351 Article 15 Cooperation Agreement. See also Struyker Boudier & Verrest, 2015, p. 910.

352 Article 18 Cooperation Agreement.

353 Article 14 Cooperation Agreement.

354 See for example Albregtse, 2013; Beyens & Boone, 2013, 2015; Robert, 2011.

355 See also Abels, 2016, p. 387; Struyker Boudier & Verrest, 2015, p. 912.

356 Article 12 Norwegian-Dutch Treaty.

357 Article 12(3) Norwegian-Dutch Treaty.

358 Article 19(1) of the Cooperation Agreement. In this case, Groningen Airport Eelde was chosen as port of entry given its proximity to Veenhuizen. In the context of the Belgian-Dutch cooperation, on the other hand, the Dutch authorities were commissioned by the Belgian Director to transport detainees both on Dutch and Belgian soil: see Beyens & Boone, 2013, p. 29.

Norwegian authorities, by the Transportation and Support Service (*Dienst Vervoer en Ondersteuning*, 'DV&O') of DJI.³⁵⁹ The Dutch Royal Marechaussee, a military police force, is responsible for escorting detainees from the airplane to the buses of DV&O.³⁶⁰

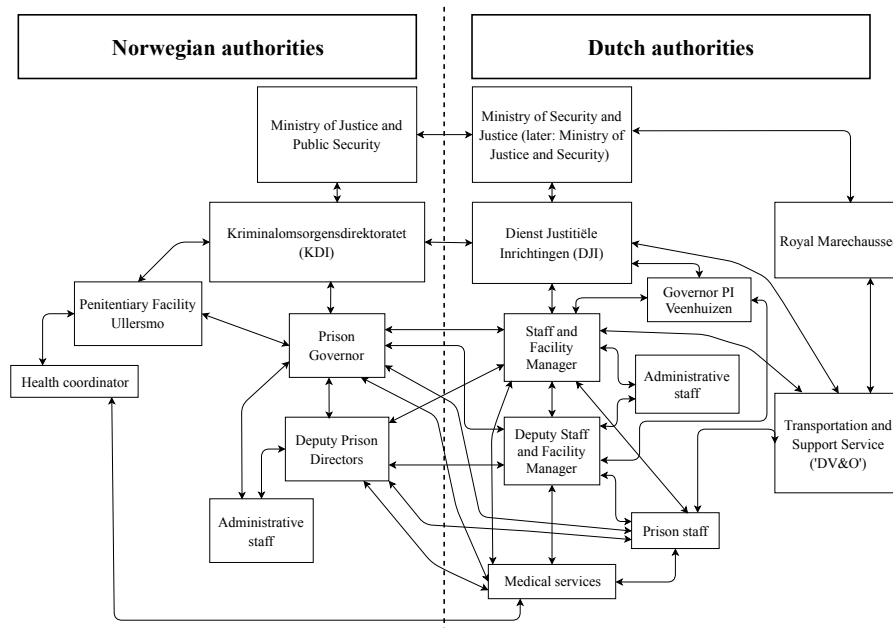


Figure 7: The nodal governance network of PI Norgerhaven.

The nodal governance field set out above is depicted in Figure 7. As this Figure illustrates, the governance field in place represents a close cooperation of two penal authorities. Governance and power indeed materialise through the cooperation of both Norwegian and Dutch authorities – and, as becomes clear from the interviews with the Norwegian governor and the Dutch Staff and Facility Manager, at times also through their contestation and conflict in relation to particular issues. As such, when interviewed, the Dutch Staff and Facility Manager rightfully highlights that the system in place generally is a fusion of two penal cultures. At the same time, the Norwegian-Dutch Treaty and the Cooperation Agreement have to significant extents anchored governance in a number of rules and regulations. In this sense, like RPC Nauru, PI Norgerhaven is a clear-cut example of a facility in which nodal governance and anchored pluralism intertwine. Whilst the arrangements are anchored

359 Article 19(2) and Article 19(3) of the Cooperation Agreement. See also Abels, 2016, p. 392; Struyker Boudier & Verrest, 2015, p. 912.

360 Abels, 2016, p. 392.

in both Norwegian and Dutch rules and regulations, in practice the various actors in the field – in particular the Norwegian governor on the one hand and the Dutch Staff and Facility Manager on the other – continue to enjoy significant bargaining power to influence the course of events. In turn, normatively, the anchored nodal governance framework in place has been commended by experts in the field: in their climate survey of PI Norgerhaven, Johnsen et al. conclude that the “mixed or negotiated model” did not only lead to improvements, but also to learning on both sides.³⁶¹

2.5 THE COMMODIFICATION CHALLENGE TO INTERNATIONAL HUMAN RIGHTS LAW FROM A ‘GLOCAL’ PERSPECTIVE

So far, this chapter has shown that the commodification of confinement is a broad development that captures the increasing involvement of a host of actors in the governance of confinement. It has denoted such a development both at a global scale, looking at macro-level trends, and in the local contexts of the central case studies. What transpires from these examinations combined is that although the shift from ‘government’ to ‘governance’ takes place at a global scale, ultimately the resulting governance framework depends on local contexts of confinement. In line with the idea of glocalisation, commodification is henceforth a bi-directional process: involving actors other than the state in local contexts of confinement has become an acceptable policy direction as a result of globalised ideas of commodification, whereas conversely the global trend is influenced and shaped by these local implementations. In other words, not only does the global development of commodification allow for local diversity, but such local diversity in turn informs the global development. As the context of RPC Nauru for instance shows, offshore processing in the Australian-Pacific realm was not simply a mere policy transfer from the US-Cuba experience, but was adjusted to the local particularities at hand, which *in turn* informed more global ideas on offshore processing, for instance heavily influencing debates and decision-making in the European realm. Likewise, globally developing ideas about neo-liberalism and cost-effectiveness in settings of confinement, and of far-reaching interstate cooperation more generally, have inspired the Belgian-Dutch and Norwegian-Dutch penal collaborations, and in turn these collaborations have informed global debates on the legitimacy and feasibility of offshore prisons and of penal cooperation, with some countries even considering direct policy transfers.

As the globalisation development of commodification progresses and henceforth increasingly covers a wide variety of countries and contexts, and as local implementations of commodification consequently become more and more

³⁶¹ Johnsen et al., 2017, p. 5.

diverse, which in turn informs the global trend, at the glocal level commodification hence increasingly provides a multitude of opportunities for accepted collaboration between a wealth of actors across the public/private and domestic/foreign divides through nodal governance networks governing confinement. This, however, is problematic as such diverse implementations of commodification potentially mount a fundamental challenge to the system of international human rights law, as will be explored in this section. Core aspect of this challenge to international human rights law is *power*. More precisely, the *dispersal* of power across nodal governance networks is particularly troublesome from a human rights law perspective.³⁶² To properly understand this, it is imperative to first elaborate upon a first fundamental tenet of international human rights law.

2.5.1 The first fundamental tenet: the ‘rights’ aspect of human rights

‘Never again’ – that was the prevailing sentiment shortly after the Second World War ended. To prevent a similar catastrophe from happening again, 50 countries established the United Nations (‘UN’) in 1945. In doing so, representatives of the various countries drew up a statement, in which the equality of all human beings, the importance of human dignity, and the unconditionality of rights pertaining to all humans were ambitiously affirmed.³⁶³ The message that such statement was supposed to convey was that human rights were now subject to international standards and did no longer constitute mere prerogatives of domestic jurisdictions or governments.³⁶⁴ On the basis of these stated ambitions, the Universal Declaration of Human Rights (UDHR) was subsequently drafted by a committee chaired by Eleanor Roosevelt, with the final version of the Declaration being approved by the General Assembly on 10 December 1948. Whilst it was not a unique process of codification,³⁶⁵ it was for the first time that the notion of human rights was propelled to the international plane in such a comprehensive fashion.

Up until today, the UDHR is considered one of the prime foundations of international human rights law, although its provisions are soft law and

³⁶² See also, more generally, Grant & Keohane, 2005, p. 29.

³⁶³ Blau & Esparza, 2016, p. 31; Davison, 2001; Gözler Çamur, 2017, p. 205.

³⁶⁴ Donnelly, 2011, pp. 3–4; Gibney, 2016, p. 1; Hannum, 2016, p. 410; Karavias, 2013, p. 19.

³⁶⁵ The Declaration drew upon and incorporated liberal rights that existed before in Western traditions, including the English Magna Carta (1215), Habeas Corpus Act (1679) and Bill of Rights (1689), the French Declaration of the Rights of Man and the Citizen (1789), and the US Bill of Rights (1791).

henceforth do not provide binding obligations.³⁶⁶ In fact, during the drafting stage the status of the UDHR was debated, with most representatives and commentators maintaining that it constituted a non-binding declaration, in particular because its purpose was to provide an accessible and generally valid document that could act as a 'springboard' for international human rights law's development.³⁶⁷ As Eleanor Roosevelt herself expressed, the Declaration "set up a common standard of achievement for all peoples and all nations" and "might well become an international Magna Carta of all mankind".³⁶⁸ The UDHR can as such be considered the genesis, but certainly not the perfection nor the end point, of international human rights law. It is, rather, the blueprint or cornerstone of the international human rights law framework and has guided the subsequent development of many hard law regimes on the international, regional, and domestic levels.³⁶⁹ It constituted the basis for amongst others the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which bindingly incorporate many of the same rights as the UDHR.³⁷⁰ On the regional plane, various organisations have furthermore developed specific regional Treaties that reflect specific political and cultural priorities.³⁷¹

The legal obligations that are contained in such international and regional human rights law instruments can be categorised in a number of ways. A classic distinction of human rights is that between civil and political rights

366 This position is not uncontested. According to one interpretation, the UDHR has attained the status of customary international law and is as such binding on all States independent of ratification processes. In practice, however, the question on whether the UDHR's provisions are binding could to a large extent be considered moot now that most of its principles have been bindingly codified in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights: Bantekas & Oette, 2013, p. 22.

367 Bantekas & Oette, 2013, p. 21; Humphrey, 1984, p. 64.

368 Humphrey, 1984, p. 63; Risse & Sikkink, 1999, p. 1.

369 Bantekas & Oette, 2013, p. 20; Doyle & Gardner, 2003, p. 2; L. Weber et al., 2014, p. 23. On the rapid development of international human rights law, see Donnelly, 2011, pp. 4–6; Doyle & Gardner, 2003, pp. 2–3; Nolan, 2016a, pp. 34–35.

370 The ICCPR was adopted by the UN in 1966 and entered into force in 1976. Together with the ICESCR, it emerged after advocates of an international bill of rights had pushed for enforceable norms that were capable of applying international pressure on human rights violating countries, complementary to and based on the non-binding provisions of the UDHR. Given the Zeitgeist at the time and the recent admissions of post-colonial states to the UN, both the ICCPR and ICESCR reflect the anti-colonialism sentiment, Western exploitation of the developing world, and anti-apartheid developments that were particularly at the forefront in the late 1960s. See Da Costa, 2013, pp. 19–20; Nickel, 1987, p. 5.

371 This concerns the African Commission on Human and Peoples' Rights (Banjul Charter on Human and People's Rights), the Inter-American Commission on Human Rights (American Convention on Human Rights), the Council of Europe (European Convention on Human Rights), the League of Arab States (Arab Charter on Human Rights) and the Association of Southeast Asian Nations (ASEAN Human Rights Declaration). The latter has no juridical monitoring body.

on the one hand and socio-economic rights on the other. Civil and political rights protect individual freedoms to participate in the civil and political life of the polity without discrimination or repression, whilst socio-economic rights protect individual rights of a socio-economic nature such as the rights to education, health, food, and housing. Civil and political rights are frequently regarded as the basis or core of international human rights law in that they precede all other human rights norms: an unfettered participation in the civil and political arena of the polity is according to such line of reasoning required to effectively claim other, socio-economic, rights. According to many Western theories of political justice and liberalism, moreover, civil and political rights are contrary to socio-economic rights often a necessary component of a liberal democracy as well as of a market economy.³⁷² At the same time, the inverse could also be argued: without adequate protection of socio-economic entitlements such as those to food, healthcare, or education, participation in civil and political life is hampered or even made nearly impossible.³⁷³ Prioritising one category of rights over the other in order to ensure the full human rights catalogue hence appears little helpful: their collective undermining may come from both ways. The different sets of human rights should therefore be regarded as hierarchically structured, but as complimentary “ingredients for basic human dignity”.³⁷⁴

Another distinction is that between ‘negative’ and ‘positive’ human rights obligations. Negative obligations are obligations to refrain from human rights infringements, whereas ‘positive obligations’ entail obligations to actively contribute to the protection and fulfilment of human rights.³⁷⁵ Civil and political rights are often deemed to be of a negative nature since they would require the state to abstain from interfering with civil and political participation. Socio-economic rights, on the other hand, are frequently considered positive in nature as they would require state action to realise socio-economic goals. Such binary categorisation falls short, however, as it ignores that civil and political rights may in specific situations require state action rather than abstention whilst socio-economic rights may in particular scenarios require the state to refrain from interference rather than to undertake action.³⁷⁶ For example, whereas the freedom of torture and other inhumane or degrading

³⁷² De Feyter, 2005, p. 28; Gavison, 2003, pp. 23–24.

³⁷³ The right to life, protecting one from arbitrary deprivation of life by the state and therewith constituting a quintessential civil and political right, for instance means little to those dying of malnutrition or an inadequate healthcare system due to a lack of protection of the socio-economic rights to food and healthcare. Likewise, the rights to freedom of speech and thought lose to significant extents their meaning for those who remain illiterate and uneducated.

³⁷⁴ Gavison, 2003, p. 24.

³⁷⁵ Orend, 2002, p. 140; Shelton & Gould, 2013.

³⁷⁶ Donnelly, 2011, p. 20, 2013, pp. 42–43; Gibney, 2016, pp. 5–6; Karavias, 2013, pp. 45–46; Langford, Coomans, & Isa, 2013, p. 52.

treatment – a core civil and political right that is at the heart of various international human rights law treaties – seems to be a negative obligation in that it requires the state to refrain from violating such freedoms and thus to refrain from action, it nevertheless also requires positive endeavours on behalf of the state to for example train and supervise police forces in order to prevent torture from happening in the first place.³⁷⁷ Conversely, the right to food, which as a socio-economic right is often considered to be positive in nature, does not only require that the state provides sufficient amounts of nutritious food but also amongst others that the state does not run unwarranted interference with agricultural initiatives.³⁷⁸ The dichotomous understanding of rights as being civil and political *and hence* negative or socio-economic *and hence* positive has therefore been duly criticised and discarded.

As an alternative, some have argued that all rights are essentially positive given that their realisation depends on the fiscal capacities of states.³⁷⁹ However, as Landman rightfully points out, by using this approach we may lose sight of the negative components of human rights obligations.³⁸⁰ Rather, we should conceive of each human rights obligation as incorporating *both* negative and positive characteristics: all human rights obligations require the state to refrain from interference in some respects and to undertake action in others, although the balance between these obligations depends on the right in question and the context concerned.³⁸¹ In some situations a particular right will be best protected where the state abstains from acting, in others significant state action is merited. It is, consequently, widely acknowledged that the character of human rights obligations is generally threefold, providing obligations for the state not only to *respect* human rights (negative obligations), but also to *protect* and *promote* – or fulfil – them through positive affirmation (positive obligations).³⁸²

In respect to positive obligations, two different types of obligations can essentially be distinguished: *substantive* and *procedural* positive obligations.³⁸³ Substantive positive obligations require the state to either protect individuals against human rights abuses by third parties or to otherwise proactively do what is required to ensure the enjoyment of human rights. In the context of confinement, this means that the state is bound by an extensive set of positive obligations to ensure the enjoyment of other rights than the right to liberty: it is the state that interferes with individual liberty, and those confined are, consequently, dependent on the state for their wellbeing and the exercise of

377 Donnelly, 2013, p. 43.

378 Donnelly, 2013, p. 43; Shue, 1996.

379 Holmes & Sunstein, 1999, p. 48.

380 Landman, 2006, pp. 10–11.

381 Donnelly, 2013, p. 43; Landman, 2006, pp. 10–11; Orend, 2002, pp. 140–141.

382 Beiter, 2006; Hallo de Wolf, 2011; Karavias, 2013; McBeth, 2004; Orend, 2002; S. Rosenberg, 2009; Ruggie, 2011; Sepúlveda, 2003; Shelton & Gould, 2013.

383 Ölçer, 2015, p. 203.

their remaining rights.³⁸⁴ In turn, two types of substantive positive obligations can be distinguished. On the one hand, the state has positive obligations to actively protect individuals against horizontal abuses of their human rights, for example by protecting a detainee from abuse of his or her rights by another detainee. States are, however, “neither omniscient nor omnipotent” and are therefore not held responsible for each horizontal infringement.³⁸⁵ Instead, they must exercise *due diligence* by taking “all measures reasonably within their power in order to prevent violations of human rights”.³⁸⁶ On the other hand, the state must fulfil the unrestricted enjoyment of human rights by proactively shaping the necessary preconditions to safeguard the well-being of detainees and their overall human rights enjoyment, including for example the right to manifest one’s religion or belief, the right to correspondence, and the right to family life.³⁸⁷ This requires the state to adopt reasonable and suitable measures.³⁸⁸ Through such measures, the state hence has to prevent “suffering that goes beyond the unavoidable level of suffering inherent in detention”, which in turn requires the state to only apply restrictions to the enjoyment of human rights when unavoidable or necessary for safety and order purposes.³⁸⁹

Procedural positive obligations, on the other hand, require the state to provide effective remedies in response to (allegations of) human rights abuses.³⁹⁰ States thus have an obligation to take procedural measures to ensure sufficient remedies for both vertical and horizontal violations occurring in their jurisdiction.³⁹¹ The extent of such effective remedies and their legal

384 Merckx & Verbruggen, 2011, pp. 6–8; Van Kempen, 2008, pp. 21–22.

385 Milanovic 2011, 210; van Berlo 2016, 30; Akandji-Kombe 2007, 14; Haeck 2005, 47–48; Seibert-Fohr 2009, 117–118.

386 Milanovic, 2011, p. 210. This includes both legal and material measures: Akandji-Kombe, 2007, p. 14. In the context of the ECHR, see e.g. ECtHR, *Osman v. United Kingdom*, 28 October 1998, Application no. 87/1997/871/1083, para 116; ECtHR, *Tanribilir v. Turkey*, 16 November 2000, Application no. 21422/93, para 71; ECtHR *Pantea v. Romania*, 3 June 2003, Application no. 33343/96, para 189. As the ECtHR held in *Mahmut Kaya v. Turkey* in relation to positive obligations arising under Article 2 ECHR, “[b]earing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. [...] For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”: ECtHR, *Mahmut Kaya v. Turkey*, 28 March 2000, Application no. 22535/93, para 86.

387 Haeck, 2005, p. 37; Van Kempen, 2008, pp. 21–22.

388 Akandji-Kombe, 2007, p. 7; Van Kempen, 2008, p. 25.

389 Van Kempen, 2008, pp. 25–26.

390 In the European context, a separate legal provision – Article 13 ECHR – reflects this obligation type: see, on the function of Article 13 ECHR, M.D. Evans, 2002, pp. 379–380.

391 Akandji-Kombe, 2007, p. 16.

nature depends on the seriousness of the complaint: for some violations, a disciplinary measure and/or an award of damages may suffice, whilst for other violations a thorough and effective investigation or even criminal proceedings are required.³⁹² This obligation is, however, one of means and not of result: as the ECHR context for instance illustrates, investigations and prosecutions do not necessarily need to be successful but should be “capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible”.³⁹³

In sum, in relation to both substantive and procedural positive obligations, whilst states can be expected to go to great lengths, they cannot be expected to go to infinite lengths in protecting and fulfilling human rights. Whereas negative obligations impose a strict standard of liability on states, for positive obligations this is not possible nor desirable: states cannot always foresee human rights infringements by third parties, nor can they always be expected to fulfil human rights standards to an absolute maximum given practical and budgetary constraints.³⁹⁴ Consequently, many monitoring bodies have referred to the notion of ‘due diligence’ in denoting the scope of positive obligations under the respective Treaties and Covenants. Due diligence is in this regard generally taken to mean that states should take the measures that could reasonably be expected from a well-administered government under similar conditions: positive obligations are, hence, obligations of *conduct* rather than of *result*.³⁹⁵ As Gammeltoft-Hansen has pointed out, it is difficult to establish what due diligence obligations specifically require from the state in an abstract sense – rather, this “depend[s] on both the actual power and possibility of the state to intervene, and the foreseeability and knowledge of any human rights violations”.³⁹⁶ Importantly, under the due diligence standard states do not become an accomplice of the individual that infringes upon the negative human rights entitlements of others, but rather is responsible for its own omission.³⁹⁷ Responsibility on the basis of positive obligations is thus connected to the individual’s harmful acts in the sense that it may arise as a result of a lack of (sufficient) preventative or remedying response to such

392 M.D. Evans, 2002, p. 379; Hagens, 2011, p. 154; D. Harris, O’Boyle, Bates, & Buckley, 2014, p. 769; Pitcher, 2016, pp. 84–88. This arguably includes inhuman detention conditions: see Haack, 2005, p. 48; Hagens, 2011, pp. 154–155; Pitcher, 2016, pp. 84–88. In the ECHR context, see, notably, ECtHR, *Kmetty v. Hungary*, 16 December 2003, Application no. 57967/00, para 38 and ECtHR, *Assenov and Others v. Bulgaria*, 28 October 1998, Application no. 90/1997/874/1086, para 102.

393 ECtHR, *Kopylov v. Russia*, 29 July 2010, Application no. 3933/04, para 132. See also Pitcher, 2016, p. 87; Seibert-Fohr, 2009, pp. 202–203.

394 Shelton & Gould, 2013.

395 Beiter, 2006; Craven, 2004, p. 255; McBeth, 2004; S. Rosenberg, 2009, pp. 453–454; Sepúlveda, 2003; Shelton & Gould, 2013, p. 577.

396 Gammeltoft-Hansen, 2011, p. 227.

397 Den Heijer, 2011, p. 84.

acts, but is disjunctive insofar as it constitutes a separate responsibility altogether.

The niceties of these distinctions between specific obligation-types need not detain us here any longer – they will recur where appropriate. For present purposes it is sufficient to highlight that under the international human rights law framework human rights are indeed codified *rights* of a legal nature with corresponding *obligations* that can further be divided into particular obligations to respect, protect, and fulfil. This point appears self-evident, maybe even plainly obvious, but nevertheless warrants emphasis. International human rights law is not just a symbolic codification of a *Zeitgeist*, nor is it a mere reflection of a dominant liberal morality – it embodies a set of positive legal norms that come with obligations, and in turn such obligations come with claims.³⁹⁸ This correspondence between rights, obligations, and claims is key, for “[g]etting countries to toe the mark is only possible when there is a mark to toe”.³⁹⁹ As such, international human rights law conveys not only the message that human rights are not matters of mere domestic policy but of international concern, but also the message that human rights are not matters of discretion but of legal obligation.⁴⁰⁰

In turn, these legal human rights obligations are conditioned by two premises that underly the classic conception of international human rights law. First, no matter how the obligations in human rights law are ultimately classified or categorised, international human rights law in principle only binds *states*. Implementing a Westphalian perspective, international human rights law indeed was particularly created and modelled to circumscribe the exercise of sovereign power and to protect against tyranny of sovereign rulers.⁴⁰¹ In addition, given the existence of both negative and positive obligations, international human rights law reflects the assumption that sovereign power is to large degrees capable both of inflicting systematic abuse *and* of promoting rights.⁴⁰² It is henceforth not uncommon for scholars to assert that state parties to human rights treaties are often both the primary violators *and* the principle guardians of human rights at the same time.⁴⁰³ Consequently, human rights law regulates primarily the interrelationship of individuals with the public rather than the private realm of power: it is the public authority that the individual is supposedly protected by and against.

398 O'Neill, 2005, p. 430.

399 Weissbrodt, 2003, p. 89.

400 Ramcharan, 2015, p. 178.

401 Arakaki, 2013, p. 297; Gibney, 2013, p. 4; Isa, 2005; Karavias, 2013, pp. 19–20; Kinley & Tadaki, 2004, p. 937; Langford, Vandenhoe, et al., 2013, p. 3; McGrew, 2011; Mégret, 2014; Ronen, 2013; Subedi, 2003; Van den Herik & Černič, 2010. On the significance of the legal obligation of public authorities to *realise* human rights, see specifically Van Sasse van IJsselt, 2018.

402 A. Buchanan, 2013, p. 23; Karavias, 2013, p. 20.

403 Smis, Janssens, Mirgaux, & Van Laethem, 2011, p. 4.

Second, human rights law binds states vis-à-vis individuals *within their jurisdiction*. Many international human rights law frameworks are indeed limited in their scope of application to the jurisdiction of a state, which in turn is associated with the territory as a state's primary realm of power.⁴⁰⁴ The view that a state should be primarily concerned with its own citizens, or at least with those individuals within its territory, was already prevalent when the UDHR was drafted and continues to dominate the human rights law framework today.⁴⁰⁵ Contemporary human rights law is indeed firmly grounded in territorial notions insofar as the division and tailoring of obligations is concerned. It has in fact become reflexive to limit human rights obligations to a state's territorial borders.⁴⁰⁶ As Subedi puts it, "[n]o matter how much the world has changed since the adoption of the [UDHR], the fact remains that the primary responsibility of protecting the rights of individuals residing within a state rests with that state".⁴⁰⁷ Conversely, human rights obligations beyond the state's territorial space have by some commentators been viewed as "either being non-existent or minimalistic at best".⁴⁰⁸ Understood in this way, human rights do hence not only apply primarily in the relationship between individuals and public (rather than private) authorities, but moreover apply primarily in domestic (rather than cross-border) variants of such power relationships. Combined, then, both of these premises constitute one of the fundamental tenets of international human rights law: that the obligations enshrined therein, however subdivided, are in principle obligations of *territorial states*.

2.5.2 The commodification challenge to international human rights law

When contrasting the fundamental tenet of human rights law as entailing obligations of territorial states with the heterogeneous realities of commodification at the glocal level, friction between commodified confinement and human rights protection becomes discernible. Whilst international human rights law is fundamentally geared towards regulating territorial states' exercise of power, commodification results in the emergence of nodal governance networks in which power rests not necessarily with the state but is exercised throughout complex networks. Recognising the problematic implications of

404 Den Heijer, 2011; Gammeltoft-Hansen, 2011; Vandenhoe & Van Genugten, 2015.

405 Blau & Esparza, 2016, p. 36. For a critical examination of the link between title to territory under public international law and the notion of jurisdiction in international human rights law, see Raible, 2018.

406 Coomans & Kamminga, 2004; Gammeltoft-Hansen, 2011; Gibney, 2016; Langford, Vandenhoe, et al., 2013; Milanovic, 2011; S. R. Ratner, 2015; Tzevelekos, 2015; Vandenhoe & Gibney, 2014.

407 Subedi, 2003, pp. 183–184.

408 Vandenhoe & Van Genugten, 2015, p. 1. For a critical reflection, see Skogly, 2017.

these developments, Vandenbogaerde rightfully emphasises that “international human rights law is out of sync with the daily realities of our globalized world”.⁴⁰⁹

More precisely, the commodification challenge to international human rights law is essentially threefold: power dispersal has the potential of undermining international human rights law as a framework of *accountability*, which consequently affects its *effectiveness* as a system of international protection. In turn, any attempt to deal with these issues runs the risk of undermining the *legitimacy* of the legal framework as a whole, no matter the delicacy of such attempts. Each of these elements will now be explained in turn.

2.5.2.1 *The commodification challenge to international human rights law accountability*

The question what ‘accountability’ exactly is and what it entails has generated significant scholarly attention, particularly in the field of public administration, and has led to the rapid inflation of the concept.⁴¹⁰ There is, consequently, no clear definition of ‘accountability’.⁴¹¹ Still, at its core it entails *at least* that actors can be called to account by some authority for the exercise of power.⁴¹² Various authors have subsequently outlined what such accountability process would or should look like. Particularly convincing and authoritative is the definition offered by Bovens in this regard: “accountability is 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”.⁴¹³ In a similar vein, Vandenbogaerde maintains that accountability is “[a] social relationship between an accountholder and power wielder, in which the power wielder is held accountable against a set of predetermined standards by having to explain his actions or inactions to the accountholder, and face negative or positive sanctions”.⁴¹⁴ Under these conceptualisations, accountability is hence three-pronged: in the legal domain, it consists of (i) the allocation of *responsibility* for certain legal obligations, thereby creating duty-bearers, (ii) the *answerability* of these duty bearers for the exercise of their power in light of the norms constituted by their legal obligations, and (iii) the *enforcement* of sanctions in relation to norm-transgressions by duty bearers.⁴¹⁵ In order to speak about

409 Vandenbogaerde, 2016, p. 1.

410 Bovens, 2007; Mulgan, 2000; Vandenbogaerde, 2016, p. 34.

411 Mulgan, 2000; Schedler, 1999; Vandenbogaerde, 2016, pp. 34–36.

412 Mulgan, 2000; Vandenbogaerde, 2016, p. 34.

413 Bovens, 2007, p. 450. See also Bovens, 2009, p. 3; Day & Klein, 1987, p. 5; Lerner & Tetlock, 1999, p. 255; McCandless, 2001, p. 22; Pollitt, 2003, p. 89; Romzek & Dubnick, 1998, p. 6; Vandenbogaerde, 2016, p. 35.

414 Vandenbogaerde, 2016, p. 35.

415 See also Kaler, 2002; Stapenhurst & O’Brien, 2000.

a genuine accountability mechanism, each of these three components should be present.⁴¹⁶

This means that accountability comprises elements of both the 'law in books' and the 'law in action'.⁴¹⁷ Its first prong – the creation of duty-bearers through the allocation of responsibility – is a clear component of the 'law in books': duty-bearers are created in international human rights law instruments in relative isolation from empirical reality. That is to say, international human rights law demarcates those considered duty-bearers through its own distinctive and internal legal mechanisms: it determines which actors are responsible in a fashion that is rather abstracted from the empirical world. Of course, such demarcations may be *inspired* by empirical reality: consider, for example, international human rights law's key focus on states as inspired by the Westphalian world-order of the twentieth century. Likewise, the *interpretation* of these demarcations takes the empirical reality into account: consider, for instance, the finding of an international monitoring body that a certain state is responsible for a certain human rights obligation. Such interpretative practices, however, do not constitute the *allocation* of responsibility but rather the ascertainment *that* a state has been allocated with responsibility. In brief, the allocation of responsibility happens in the books whereas any finding of allocated responsibility happens in action. In turn, the two subsequent prongs of accountability – i.e. the answerability of duty bearers and the enforcement of sanctions – constitute key elements of the 'law in action': whether those states responsible are held accountable in practice through processes of answerability and enforcement depends on the way in which international human rights law is used 'in action'.

In light of the above definition of accountability, it is not difficult to discern that international human rights law instruments are systems of accountability. A central aim of international human rights law regimes indeed is to keep power in check.⁴¹⁸ They allocate responsibility for human rights obligations to duty-bearers, regulate (to varying extents) the answerability of these duty bearers, and may have enforcement mechanisms (albeit to varying strengths and with varying scopes). What is problematic from a commodification point of view, however, is that the increasing presence and complexity of nodal governance networks in areas that were firmly within the purview of public authority during the heyday of international human rights law's genesis (or, more precisely, that were *considered* to be in the purview of public authority at the time) creates an ever-expanding disparity between duty-bearers under

416 Responsibility is sometimes discussed as a distinct concept and sometimes as an element of accountability. Ultimately, responsibility is of key importance for accountability as it determines *who* is to be held responsible and for *what* norms. Indeed, "[a]ccountability presupposes responsibility": Vandenbogaerde, 2016, p. 43. In turn, the answerability and enforcement components give accountability 'teeth': Rubenstein, 2007, p. 619.

417 On this distinction, see Pound, 1910.

418 Karavias, 2013, p. 19; Vandenbogaerde, 2016, pp. 22–23.

international human rights law on the one hand and power wielders in empirical reality on the other. This *prima facie* seems to lead to a potential gap between the purpose of international human rights law – to provide individual and collective protection against and by power wielders – and the result it ultimately produces – a lack of human rights responsibility for those actors beyond the territorial state wielding real power.⁴¹⁹ Commodification hence in the first place poses a significant challenge to the ‘law in books’ component of accountability: there seems to be a potential discrepancy between actual power bearers on the one hand and those bearing duties ‘in the books’ on the other.

At this point it should be recalled once again that nodal governance does not mean that the state is losing power *per se*. To the contrary, nodal governance is often state-directed: states do not so much retract from governance, but alter their own position in the proverbial boat by assuming a steering role whilst outsourcing the task of rowing to other actors.⁴²⁰ Whilst the amount of sovereign power does therefore not necessarily change, the way in which it is exercised may differ fundamentally. Power is consequently not a zero-sum game: with the progressive entrance of additional powerful private and/or foreign actors in the governance field, the state does not necessarily lose material power to these entities. Power is not lost but rather reconfigured, and is ultimately everywhere in the nodal field.⁴²¹ Consequently, the accountability problem identified here does not entail that states as duty bearers are no longer power wielders, but rather that certain power wielders are not – at least not traditionally – duty bearers under international human rights law and as such seem to escape the net of accountability.

This challenge is, furthermore, amplified by what is known as the ‘problem of many hands’.⁴²² As Eule et al. find in the migration context, “the plethora of actors involved generates in situations where nobody feels either legally or personally responsible for legal outcomes”.⁴²³ In this sense, the commodification challenge to human rights accountability does not only concern the allocation of responsibility in the books but also the implementation of accountability in action: proper accountability is obstructed not only by the fact that the involvement of ‘many hands’ in nodal governance settings obscures legal responsibility, but also by the fact that such multi-actor environments hamper processes of answerability and enforcement. Indeed, in multi-

419 Langford, Vandenhole, and Scheinin argue that the response of international law to the fragmentation and globalisation of state sovereignty and authority as instigated by globalisation has been “slow and creaking”: Langford, Vandenhole, et al., 2013, p. 4. See also Vandenhole & Benedek, 2013.

420 Doty & Wheatley, 2013, p. 435; Michael Flynn, 2014, pp. 169–170, 2017, pp. 16–17; Gammeltoft-Hansen, 2011, p. 69; Shichor, 1999, pp. 241–243.

421 J. Wood & Shearing, 2006, p. 2.

422 Thompson, 1980.

423 Eule, Borrelli, Lindberg, & Wyss, 2019, p. 188.

stakeholder environments, situations may arise where it is difficult to discern exactly which actor performed what act in the first place, which in turn hampers the process of answerability given that it is no longer *prima facie* clear which actor should be addressed in the accountability process. Furthermore, even where such attribution of conduct can be allocated, actors may still not take ownership of acts carried out in conjunction with other actors, which raises additional barriers for proper answerability and enforcement. As this relates closely to the development of crimmigration, the ‘problem of many hands’ will be returned to in the next chapter when discussing the international human rights law challenges that crimmigration mounts.

2.5.2.2 *The commodification challenge to international human rights law effectiveness*

The issue of accountability is problematic in and of itself given the intrinsic value of accountability in the field of international human rights law: providing for duty bearers’ accountability may be argued to be one of the primary objectives (if not *the* primary objective) of international human rights law. Intimately connected to this issue, however, is the lurking problem of effectiveness. Like any system that poses norms and obligations, the international human rights law regime can only function effectively if it addresses the appropriate stakeholders: “quite paradoxically, in the absence of its main violator, the human rights regime does not function”.⁴²⁴ Viewed in this light, the commodification of confinement poses a significant challenge to the effectiveness of international human rights law as it does not fit the traditional dictum of states exercising their executive powers through their own officials and within their own territories.⁴²⁵ This undermining may well be profound. By moving governance partially or wholly outside the realm of exclusive territorial jurisdiction and/or full public authority, nodal governance casts the effectiveness of international human rights law as a whole into doubt: if *de facto* power-bearers are not *de jure* duty-bearers, international human rights law constitutes little more than a paper tiger insofar as actual protection is concerned.

Commentators have in turn debated how this clash between international human rights law’s effectiveness and commodification-based networks of nodal governance should be dealt with. Such debate has focused particularly on the realm of *private* involvement in governance. Clapham on the one hand notes that applying human rights in the private sphere is crucial as it “squarely addresses the effectiveness of human rights protection [...]. This is particularly important in an era of powerful corporations, ambiguous State intervention, increasing privatization, and racial and sexual violence”.⁴²⁶ Jägers, attempting

⁴²⁴ De Feyter, 2005, p. 22.

⁴²⁵ See also Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 1.

⁴²⁶ Clapham, 1996, p. 353.

to derive corporate human rights obligations from international human rights law, likewise states that “[i]t is necessary to apply a broad interpretation of human rights provisions encompassing private action, if human rights law is to be effective in the present-day circumstances where human rights protection is frequently dependant on private action”.⁴²⁷ As Karavias puts it, “[i]f human rights law is ever to gain significant effectiveness, it arguably cannot disregard human rights abuses committed by one private person against another by excluding them from its ambit”.⁴²⁸ From this perspective, international human rights law should progressively root itself in the private sphere to maintain its effectiveness, thereby arguably stretching beyond the positive obligations of states to protect individuals against horizontal human rights violations by introducing self-standing private human rights obligations. Hannum on the other hand objects to such development and insists on an approach where governments remain responsible for human rights obligations.⁴²⁹ According to this line of reasoning, “providing support, assistance, expertise and resources to government are an essential part of ensuring human rights, and we should not expect the private sector – whether business, religious or civil society actors – to accomplish or be held accountable for what is properly within the domain of government.”⁴³⁰ This debate will be further discussed in Part II of this book when the attempts to provide for private responsibility under international human rights law are discussed.

2.5.2.3 *The commodification challenge to international human rights law legitimacy*

The identified problems of accountability and effectiveness almost inevitably result in a problem of legitimacy. To understand why, however, the somewhat enigmatic notion of ‘legitimacy’ needs to be explored first.

A large disparity seems to exist between what legitimacy *is* and what it is *taken to mean*.⁴³¹ In a narrow sense, legitimacy entails the right to rule or govern. This narrow definition, however, provides little direction as to where such right to rule or govern originates from and to whom it belongs.⁴³² Establishing the proper scope and meaning of legitimacy is, nevertheless, a precarious exercise in that there are not only different *concepts* of legitimacy but also multiple *conceptions* of legitimacy across different disciplines and fields.⁴³³

⁴²⁷ Jägers, 2002, p. 256.

⁴²⁸ Karavias, 2013, p. 20.

⁴²⁹ Hannum, 2016.

⁴³⁰ Hannum, 2016, p. 431.

⁴³¹ As Bokhorst argues, ‘legitimacy’ is often used as a *totum pro parte* or, conversely, as a *pars pro toto*, which unwarrantedly reduces the concept’s complexity: Bokhorst, 2014, pp. 22–24.

⁴³² Bokhorst, 2014, p. 20.

⁴³³ In fact, disciplines have not only developed their own paradigms of legitimacy but have also to large extents conditioned their meaning and level of concreteness in the environments of their own disciplines: Noyon, 2017, p. 149.

As pointed out by Hinsch, this distinction between concepts and conceptions is particularly helpful as it distinguishes the question *what it means* when something is legitimate (i.e. the concept of legitimacy) from the question *when* something is legitimate, that is, the question of what criteria have to be met in order for someone or something to be legitimate (i.e. the conception of legitimacy).⁴³⁴

It is commonly understood that two concepts of legitimacy exist: a normative (or prescriptive) one and an empirical (or descriptive) one.⁴³⁵ As Noyon outlines, the normative tradition is primarily geared towards a philosophical framework that is abstracted from the empirical human whereas the empirical tradition at its core is oriented towards “the human of flesh and blood”.⁴³⁶

The empirical tradition, on the one hand, focuses on approval of power by ‘real’ individuals. The work of Max Weber is prototypical for this empirical approach.⁴³⁷ Whilst it is not necessary for present purposes to discuss all particularities and niceties of his approach, it is crucial to understand that Weber views a norm or arrangement as legitimate if it is approved by the participants in a given society.⁴³⁸ This approval should be sincere: participants should comply with the expression of power because they believe that it sets the correct standard rather than because of its threatening or sanctioning potential. This legitimacy is, therefore, context-dependent and conditioned in social reality: empirical legitimacy cannot exist outside a societal context.⁴³⁹ This also means that establishing empirical legitimacy is, epistemologically, not evaluative or normative in nature: the external observer’s task is not to express approval or disapproval of norms or arrangements, but to find whether approval for such norms or arrangements exist by those who have to abide by it in a given social order.⁴⁴⁰

434 Hinsch, 2010, pp. 39–40.

435 Beetham, 2013; A. Buchanan, 2010, p. 79; Hinsch, 2010, p. 40; Noyon, 2017, pp. 149–154; Schmelzle, 2011, pp. 3–4.

436 Noyon, 2017, p. 149, original quote in Dutch.

437 M. Weber, 1922. See also Beetham, 2013; Hinsch, 2010, p. 40; Noyon, 2017, p. 150.

438 M. Weber, 1922.

439 Noyon, 2017, p. 150.

440 Hinsch, 2010, p. 41. That does not mean that objectivity has absolutely no role to play in the empirical approach, however: for example, an empirical approach does not necessarily stop with the question *whether* people approve of certain norms or arrangements, but may also try to uncover an underlying pattern in order to explain *why* people do so. Where this further explanatory question is explored, the researcher attempts to distil by means of induction a set of objectified values that inform individuals’ conceptions of legitimacy. See also Schaffer, Føllesdal, & Ulfstein, 2013, p. 13. A prime example in this regard is the work of Tom Tyler, a criminologist who approaches legitimacy purely in an empirical fashion. In his well-renowned book as originally published in 1990, he is however not only concerned with *whether* people approve norms and institutions but also *why* this is the case – in fact, the book even carries the noticeable title ‘*Why People Obey the Law*’: Tyler, 2006 (emphasis added). He looks not only for the perception on legitimacy, but also for the determinants of this perception, and therewith for the determinants of legitimacy as such.

The normative tradition of legitimacy, on the other hand, situates the locus of attention not with the empirical human but with the human abstraction. It does not focus on determining actual approval in society, but on identifying a set of normative criteria for legitimacy and on accordingly formulating a coherent framework.⁴⁴¹ Such criteria can be based on any type of morality, yet when they are identified, it has to be explained why meeting these criteria provides norms or arrangements with normative legitimacy.⁴⁴² In turn, when applied to a given context, the actual level of legitimacy depends on the extent to which norms or arrangements meet the requirements as formulated within the normative framework, “*irrespective of whether people believe that they are met or not*”.⁴⁴³ This does not mean that this approach is merely objective, however. The choice of commitment to a normative framework on behalf of the observer is indeed essentially a subjective process that expresses *a* particular conception of legitimacy, not a “uniquely correct or true criteria of legitimacy”.⁴⁴⁴

Both the empirical and the normative concept of legitimacy are ideal-types, each with their own benefits and shortcomings, that frequently inform a more hybrid approach.⁴⁴⁵ A particularly influential hybrid approach is that of Beetham, whose conceptualisation of legitimacy incorporates both empirical and normative aspects and is based on the paradigm that “[t]he key to understanding the concept of legitimacy lies in the recognition that it is multi-dimensional in character”.⁴⁴⁶ Power is, according to Beetham, legitimate “to the extent that (i) it conforms to established rules, (ii) the rules can be justified by reference to beliefs shared by both dominant and subordinate, and (iii) there is evidence of consent by the subordinate to the particular power relation”.⁴⁴⁷ These three elements are cumulative: they all contribute to legitimacy, although each is different and has a distinct characteristic form of non-legitimacy.⁴⁴⁸ The first element conveys that power is legitimate to the extent that it is

In his book, Tyler outlines how ‘procedural justice’ would enhance legitimacy in the criminal justice system. His procedural justice theory has since been widely applied and discussed in the field of criminology: see, for example, Beijersbergen, Dirkzwager, Molleman, van der Laan, & Nieuwbeerta, 2015; J. Brouwer, Van der Woude, & Van der Leun, 2017; Gau & Brunson, 2010; Hough, Jackson, Bradford, Myhill, & Quinton, 2010; N. Koster, Kuijpers, Kunst, & Van der Leun, 2016; Mazerolle, Antrobus, Bennett, & Tyler, 2013; Snacken, 2015.

441 Noyon, 2017, p. 149.

442 Hinsch, 2010, p. 42.

443 Hinsch, 2010, p. 41 (emphasis added).

444 Hinsch, 2010, p. 41. In essence, the normative observer expresses an essentially subjective belief (say, for example, a belief in democracy), distils a set of objective criteria for legitimacy from this belief (for example the existence of democratic procedures and the rule of law), and explains why these criteria confer authority to power. See also Schaffer et al., 2013, p. 13.

445 Noyon, 2017, pp. 151–154.

446 Beetham, 2013, p. 15.

447 Beetham, 2013, pp. 15–16.

448 Beetham, 2013, p. 16.

“acquired and exercised in accordance with established rules”.⁴⁴⁹ The opposite is likewise true: power is *illegitimate* if it is acquired or exercised in contravention or in excess of the rules.⁴⁵⁰ The second element expresses that power is legitimate to the extent that it is justifiable in accordance with both socially accepted beliefs about authority’s rightful source, and the proper ends and standards of government.⁴⁵¹ Where this is not the case, the exercise of power suffers from a *legitimacy deficit*.⁴⁵² The third element entails that power is legitimate to the extent that there is a “demonstrable expression of consent on the part of the subordinate to the particular power relation in which they are involved, through actions which provide evidence of consent.”⁴⁵³ Conversely, power will be *delegitimated* if subordinates (or the most significant among them) withdraw or refuse to give their consent.⁴⁵⁴ This multidimensional model of legitimacy is summarised in Figure 8.

ELEMENTS OF LEGITIMACY	CORRESPONDING FORMS OF NON-LEGITIMACY
(i) Power conforms to established rules (<i>legal validity</i>)	If power does not conform to established rules, it is <i>illegitimate</i>
(ii) The rules are justifiable by reference to shared beliefs (<i>normative justifiability</i>)	If the rules are not justifiable by reference to shared beliefs, there is a <i>legitimacy deficit</i>
(iii) There is express consent of the subordinate, or of the most significant among them, to the particular relations of power (<i>legitimation</i>)	A lack of express consent of the (most significant) subordinates to the power relations results in <i>delegitimation</i>

Figure 8: Beetham’s multidimensional model of legitimacy

Why, then, does commodification pose a nearly inevitable problem for the legitimacy of international human rights law? It is important to first draw a crucial distinction between legitimacy *of* international human rights law and legitimacy *based on* international human rights law. The former is concerned with the extent to which international human rights law as a system of norms and power as such is legitimate – this is the prime focus of this section – whereas the latter concerns the way in which international human rights law

449 Beetham, 2013, p. 16.

450 Beetham, 2013, p. 16.

451 Such justification hence depends “upon beliefs current in a given society about what is the rightful source of authority; about what qualities are appropriate to the exercise of power and how individuals come to possess them; and some conception of a common interest, reciprocal benefit, or societal need that the system of power satisfies”: Beetham, 2013, p. 17. See also Bokhorst, 2014, p. 20.

452 Beetham, 2013, pp. 17–18.

453 Beetham, 2013, p. 18.

454 Beetham, 2013, p. 19.

is used as a *conception* of legitimacy in order to argue that *other* norms or arrangements are legitimate expressions of power. The idea that ‘norm or arrangement X is to a large extent legitimate because it largely conforms to international human rights standards’ has indeed gained significant foothold in contemporary scholarship,⁴⁵⁵ yet is different from the question posed here, which essentially is a question of the legitimacy of international human rights law as an institution of power itself.⁴⁵⁶

Quite paradoxically, the existence of multiple forms of non-legitimacy means that a legitimacy problem almost inevitably arises in the face of commodification developments, *irrespective* of whether the system of international human rights law adapts itself to such developments or not. On the one hand, if the system does not adapt itself, it runs the risk of encountering a *legitimacy deficit* insofar as it fails to hold other, non-territorial state actors exercising power accountable for infringements. Indeed, where international human rights law remains focused on the territorial state as duty bearer, the rules it establishes may not be justifiable per se anymore in light of the shared beliefs underlying it, i.e. that they at least envisage to protect individuals against undue infringements of their dignity and wellbeing by those exercising power over them.⁴⁵⁷ Legitimacy is in this sense eroded to the extent that it can no longer effectively fulfil its protective capacities.⁴⁵⁸ On the other hand, if the international human rights law machinery attempts to accommodate developments of commodification by looking nearly exclusively or at least predominantly at the shared beliefs of international human rights law, it runs the risk of rendering the legal system *illegitimate* and/or *delegitimised*. International human rights law can only retain its legal validity, or legality, if it abides by the core rules by which it is established, including the tenet that territorial states are the primary bearers of human rights responsibility. Any deviation would be justified only to the extent that it is allowed for by such rules and hence fits its internal coherency. Concretely, this means that international human rights law obligations can only be imposed in a valid way on actors where this corresponds with the established rules as captured in a general sense by the fundamental tenets underlying international human rights law and more specifically by the respective international human rights treaties. If the international human rights machinery exercises power through the application of these norms in any other way, such power becomes illegitimate. Furthermore, attempts to accommodate developments of commodification run not only the risk of illegitimacy but also the risk of delegitimizing the system

455 See e.g. Beitz, 2001; Benhabib, 2008, p. 102; Bokhorst, 2014, p. 34.

456 See also Besson, 2013, pp. 32–33; Schaffer et al., 2013, pp. 18–19.

457 See e.g. Blau & Esparza, 2016, p. xi; Brysk, 2002, p. 3; Černič, 2015, p. 70; Gewirth, 1992, p. 10; Jägers, 2002, p. 256; Landman & Carvalho, 2010, p. 1; McKay, 2015, p. 620; Wallace, 2002, p. 232.

458 See also Eule et al., 2019, p. 188.

as a whole: where human rights obligations are ongoingly stretched and the domain of international human rights law becomes increasingly all-encompassing, the system runs the risk of being delegitimised by the withdrawal of consent by its subordinates, i.e. those states that are subjected to it. Concretely, this could result in the formal withdrawal of states from certain human rights treaties, the refusal of states to give their consent to further human rights frameworks by refusing to ratify, and the informal cold-shouldering of international human rights obligations, with impunity, altogether.⁴⁵⁹ Each of these actions, in turn, would render the system as a whole increasingly delegitimised.

Commodification as such poses a delicate challenge to international human rights law's legitimacy. It necessitates a fine balance between accommodating developments on the one hand and honouring its underlying tenets on the other. Where this balance is distorted, either a legitimacy deficit or the illegitimacy and/or the delegitimization of the system appear inevitable.

2.6 CONCLUSION

This chapter has argued that privatisation and offshoring in both immigration detention and prisons can be classified as forms of 'commodification' that, contrary to what is sometimes suggested, are not new phenomena and have by no means restricted themselves to Anglo-Saxon jurisdictions. They are, rather, part of an accelerating global trend: "offshoring and outsourcing practices have become a systemic feature of the late-sovereign order".⁴⁶⁰ Through privatisation developments, a number of for-profit and non-profit actors that sometimes operate across jurisdictional boundaries have become involved in confinement realities. Offshoring so far has remained a more exotic form of commodification, although the various instances of offshore confinement as discussed above show that they have far-reaching implications and that they have impacted on the global development of commodification by inspiring policy makers in various countries. In addition, we are nowadays witnessing hybrid forms of confinement that incorporate both privatisation and offshoring, ultimately resulting in complex systems of governance crossing the public-private and domestic-foreign divides.

As the focus on the 'glocal' level has shown, how the global trend of commodification plays out ultimately depends to a significant extent on local contexts, which in turn inform the further global development of commodification. The case studies at hand illustrate such complexity, hybridity, and heterogeneity of commodification processes. Both RPC Nauru and PI Norgerhaven may be squarely characterised as forms of commodified confinement, yet they differ in virtually all respects and have a great sense of distinctiveness.

⁴⁵⁹ On the cold-shouldering of obligations, see also Hathaway, 2007, p. 593.

⁴⁶⁰ Gammeltoft-Hansen, 2011, p. 261.

The commodification trend may thus be truly global, but can only be understood when looking into the particular arrangements in place in any given setting of commodification. A one-size-fits-all-approach to commodification is seemingly impossible and without merit.

As the global trend indicates, commodification of confinement is here to stay.⁴⁶¹ In order to explain how the resulting complex and heterogeneous systems of governance operate, theoretical frameworks of nodal governance and anchored pluralism have been introduced. These frameworks inform us that in nodal governance networks involving actors other than the primary confining state, power is diffused and primarily exercised not by a particular node but through the networked interactions and contestations between different institutionalised entities. Such power is, furthermore, driven not by a single purpose but by a multitude of co-existing and conflicting mentalities, is promoted by the use of different resources, and is steered through a variety of coinciding technologies. As such, “[p]ower is everywhere, not because it embraces everything, but because it comes from everywhere”.⁴⁶² As this chapter consequently has sought to illustrate, such shift from ‘government’ to ‘governance’ has the potential of undermining international human rights law accountability, as well as the effectiveness and legitimacy of international human rights law. Indeed, in order to remain effective and legitimate as a framework of accountability, international human rights law needs to be developed whilst maintaining a delicate balance between the underlying Westphalian-inspired tenet of territorial state responsibility on the one hand and present-day commodification realities on the other. The way in which international human rights law machineries have attempted to tread this fine line will be further discussed in Part II of this book.

461 This seems particularly the case in light of its rapid development: “[b]ecause the industry has expanded so much, both in quantitative and qualitative terms, its size and impact can no longer be rendered marginal”: Van Steden & De Waard, 2013, p. 306.

462 Foucault, 1984, p. 93.

3 | Locked up, locked out, locked away Crimmigration in confinement

3.1 INTRODUCTION

Comparing prisons and immigration detention facilities may appear random at first.¹ Prisons function to execute penal sentences as imposed by the criminal justice apparatus; immigration detention excludes certain immigrants from society for administrative purposes. Both are spaces of confinement as well as total institutions,² yet plenty additional of such closed environments exist – consider police cells, forensic psychiatric institutions, closed mental health units, and closed disability units.³ This raises questions as to why prisons and immigration detention facilities are compared in this research instead of, say, prisons and police cells.⁴

The answer is to be found in the notion of ‘crimmigration’, which arguably constitutes a second globalisation development that is scrutinised in this research. First introduced in the scholarly literature in 2006 by Juliet Stumpf, the contraction ‘crimmigration’ was originally intended to denote the increasing merger, or intersection, of criminal law and immigration law.⁵ Their confluence is, according to Stumpf, problematic, given that

“[i]t operates in this new area to define an ever-expanding group of immigrants and ex-offenders who are denied badges of membership in society [...]. This convergence of immigration and criminal law brings to bear only the harshest elements of each area of law, and the apparatus of the state is used to expel from

1 A modified version of part of this chapter has previously been published: Van Berlo, P. (2019). Crimmigration and Human Rights in Contexts of Confinement. In P. Billings (Ed.), *Crimmigration in Australia: Law, Politics, and Society* (pp. 353-379). Singapore: Springer.

2 As Turnbull explains, “[t]he defining feature of immigration detention [...] is the denial of liberty, which distinguishes this practice from the “open” and “voluntary” nature of “reception” or “waiting” centers for migrants”: Turnbull, 2017, p. 2.

3 Naylor et al., 2014.

4 It is not uncommon, however, to compare trends in two or more total institutions in the first place: see, for instance, the work of Raoult & Harcourt, 2017 on mental asylums and prisons in France.

5 Stumpf, 2006, p. 376. Whilst Stumpf introduced the term, the increasing merger between criminal law and immigration law had already been denoted before: see, notably, T.A. Miller, 2003. A variety of terminologies and metaphors have subsequently been used to denote this process of crimmigration: De Ridder, 2016b for example speaks about a process of “percolation”.

society those deemed criminally alien. The undesirable result is an ever-expanding population of the excluded and alienated".⁶

Ultimately, criminal law and immigration law become "doppelgangers".⁷ This holds, as various authors have subsequently pointed out, not only true for the legislative level but also for policy, discourse, and enforcement of crime and migration control.⁸ Criminal justice and immigration control as such merge simultaneously at a variety of levels "to the point of indistinction".⁹

In denoting crimmigration trends on these various levels and across nations, many scholars have scrutinised the criminalisation of immigrants and the use of immigration law and control for criminal justice purposes.¹⁰ Their work is focused, in other words, on how *immigrants* are increasingly drawn into the *penal* net. This may appear rather unsurprising given that it was Stumpf herself who in her seminal work referred more than once to the "criminalization of immigration law".¹¹ What has somewhat escaped attention, however, is that she also denoted – albeit in a footnote and with due reference to earlier work by Teresa Miller – the "immigrationization of criminal law".¹² This latter development denotes that criminal justice is increasingly employed to achieve goals of immigration law.¹³ Crimmigration is, in this sense, thus also concerned with how *criminals* are increasingly drawn into the *immigration* net. As such, crimmigration is a bi-directional trend that seeps into both immigration control and crime control.¹⁴ It operates on multiple planes simultaneously and the 'immigrationization' of criminal law is henceforth arguably not as some have contended the "inverse of crimmigration",¹⁵ but rather an under-explored branch thereof. Miller thus emphasises that "the 'criminalization' of immigration law fails to capture the dynamic process by which both systems converge at points to create a new system of social control that draws from both immigration and criminal justice, but it is purely neither".¹⁶ As Sklansky

6 Stumpf, 2006, pp. 377–378.

7 Stumpf, 2006, p. 378.

8 See amongst others J. Brouwer, van der Woude, & van der Leun, 2017; J. Brouwer, Van der Woude, & Van der Leun, 2018; Di Molfetta & Brouwer, 2019; Doty & Wheatley, 2013, p. 435; Franko Aas, 2011; Van der Woude & Van Berlo, 2015, p. 63; van der Woude & van der Leun, 2017; van der Woude et al., 2014.

9 Franko Aas, 2014, p. 525.

10 Barker, 2013, pp. 237–238; Chacon, 2009, pp. 135–136, 2012, p. 613; Gerard & Pickering, 2014. For example, see in the context of Slovenia, Bajt & Frelj, 2019; Jalušič, 2019.

11 Stumpf, 2006.

12 Stumpf, 2006, p. 376, see notably also T.A. Miller, 2003, p. 618.

13 Moyers, 2009, p. 688.

14 Franko Aas, 2011, p. 339; Zedner, 2010, p. 381.

15 Moyers, 2009, p. 688.

16 T.A. Miller, 2003, pp. 617–618.

likewise points out, “if there is colonization going on, it isn’t clear which field is colonizing which”.¹⁷

This chapter will provide attention to both crimmigration developments with an explicit focus on the crimmigration elements of private and offshore prisons and immigration detention centres. It should be noted from the start, however, that the term ‘crimmigration’ itself is both illuminating and obscuring. Illuminating, because it directly pinpoints with what it is concerned: the merger between crime and migration. Obscuring, at the same time, because it arguably covers a plethora of developments that one way or the other feature elements of both crime, criminal law, crime control, and criminal justice on the one hand, and migration, migration law, migration control, and migration surveillance on the other. It is, in this sense, little more than a catchword that says it all whilst saying hardly anything. This, in turn, has allowed a wide variety of research endeavours to employ the term, often without explicitly positioning itself in the broader field of ‘crimmigration’ scholarship. At a certain point, it may even appear as if *anything* marginally involving crime control and migration control is crimmigration. This chapter will therefore recalibrate the notion by developing an argument as to the actual meaning of the somewhat opaque notion of ‘crimmigration’. As will be argued, ‘crimmigration’ as a globalisation development is inherently linked to *membership theory*: it is to be understood, at least in the context of this research, as an umbrella term for a variety of developments by which changed and changing ideas about membership, resulting from globalisation, are implemented. Thus, the notion comprises not only the targeting of non-citizens through the expansion of criminal grounds for deportation and the regulation of migration through immigration-related criminal grounds, but also the simultaneous targeting of so-called sub-citizens whose membership entitlements are increasingly depleted through criminal justice mechanisms and who are consequently disenfranchised, alienated, and ultimately expelled from society in a fashion that closely resembles immigration control. By positioning crimmigration in membership theory, it becomes clear that whilst a wide variety of crimmigration practices may exist, they ultimately share common goals and rationales.

Subsequently, the chapter will show how crimmigration on many occasions is ingrained in settings of confinement, both at a global macro level and in the case studies’ contexts. This approach again will make clear why it is important to look at the ‘glocal’ level to study the implications of crimmigration as a globalisation development. Specific attention will be paid to the intimate connection, or nexus, between crimmigration and commodification in confinement. As will be argued, crimmigration may occur both explicitly and implicitly throughout commodified facilities.

17 Sklansky, 2012, p. 195.

In the final part of this chapter, the way in which crimmigration challenges international human rights law will be addressed. The focus here will again be on the key values of human rights accountability, effectiveness, and legitimacy. As will become clear, the presence of crimmigration in settings of commodified confinement may further aggravate the problems of accountability, effectiveness, and legitimacy that were identified in the previous chapter. Together, commodification and crimmigration therefore embody a significant potential to undermine the protection value of international human rights law.

3.2 THEORISING CRIMMIGRATION: THE MERGER OF CRIMINAL JUSTICE AND MIGRATION CONTROL

Both crime control and immigration control are, at their core, systems of inclusion and exclusion. They create insiders and outsiders, whether it be in the sense of innocent versus guilty or in the sense of admitted versus excluded.¹⁸ Before explicit crimmigration measures were proposed – for example the criminalisation of illegal stay or the introduction of criminal convictions as grounds for deportation – criminal law and immigration law thus already overlapped in function and rationale. Both systems carve out the borders of belonging to the polity.

Given that both crime control and immigration control act as gatekeepers and make determinations as to who is an eligible and worthy member of society and who is not, it is unsurprising that the underlying rationales of both systems have been located in the sphere of membership theory. Such theory is based on the idea that a social contract exists between the government and the members of a polity, which endows those with membership entitlements with particular rights and duties. Individual rights and privileges are therefore limited to the members of a social contract and, as such, of a polity.¹⁹ Membership theory, it is argued, underpins crime control and migration control in similar ways: both processes of control centre around the enforcement of the social contract as a basis of the government's legitimacy.²⁰ Indeed, whilst crime control mechanisms have the ability to deprive individuals of certain elements of membership for breaching the social contract,²¹ immigration

18 J. Brouwer, 2017, p. 34; Infantino, 2016, pp. 4–7; Stumpf, 2006, p. 380.

19 Stumpf, 2006, p. 397.

20 See e.g. Duff, 2010; Franko Aas, 2011, 2014; Stumpf, 2006; Vaughan, 2000; Zedner, 2013.

21 As Vaughan puts it, "[t]he relationship between punishment and citizenship is then conditional in two senses: the first is that one's claim to citizenship is granted only if one abides by an accepted standard of behaviour and punishment may be imposed if one does not live up to this standard; second, while undergoing this punishment, one is no longer a full citizen yet neither is one completely rejected. Instead, one occupies the purgatory of being a 'conditional citizen'": Vaughan, 2000, p. 26.

control mechanisms regulate entry to the polity – and, hence, to the social contract – in the first place. As such, it is argued that the “government plays the role of a bouncer in the crimmigration context. Upon discovering that an individual either is not a member or has broken the membership’s rules, the government has enormous discretion to use persuasion or force to remove the individual from the premises”.²²

Crimmigration and membership theory henceforth appear closely related. At the same time, one runs into conceptual difficulties when considering their interrelationship. Membership theory is argued to shape the convergence of immigration and criminal law up to the point where we can speak about ‘crimmigration’ law, yet at the same time it are exactly those domains of immigration and criminal law that have traditionally functioned as core systems of inclusion and exclusion and that have shaped the accepted categories of membership also before their alleged merger. As such, it is difficult to see how one could claim simultaneously that “at bottom, both criminal and immigration law embody choices about who should be members of society”²³ and “*introducing* membership theory into criminal law, and *especially* into the uncharted territory of crimmigration law, undermines the strength of constitutional protections for those considered excludable”.²⁴ Indeed, how can one introduce membership theory into a system that is premised on membership theory? Moreover, how can membership theory be introduced into ‘the uncharted territory of crimmigration law’ if it is that same membership theory which is offered as an explanation and a “unifying theory for this crimmigration crisis”?²⁵

Instead, the merger of crime control and migration control does not seem to miraculously ‘result’ either from or in membership theory. Rather, crimmigration and membership theory should be seen as two distinct conceptual frameworks that are closely aligned and inform one another. That is to say, the carving out of membership seems to have informed the ongoing merger of crime and migration control, whereas conversely this merger has had a significant bearing on the common understanding of who belongs to the body politic and who does not. The underlying rationale of the rise of crimmigration should accordingly not be sought in the theory of membership as such, but rather in the ongoing processes of globalisation and transnational interaction that have increasingly influenced and shaped contemporary politics of identity and that have pressured states to make creative use of existing frameworks and mechanisms in order to effectively implement advanced membership strategies.

22 Stumpf, 2006, p. 402.

23 Stumpf, 2006, p. 397.

24 Stumpf, 2006, p. 398 (emphasis added).

25 Stumpf, 2006, p. 377.

In the face of globalisation, which *inter alia* has spurred an increasing interconnectedness and rapid mobility, governments are increasingly faced with new forms of transnational connectivity, risk, and movement that have raised all sorts of questions of membership and entitlements.²⁶ Even more so, these contemporary forms of mass mobility occur “upon a scale unimaginable even in the relatively recent past”.²⁷ Aas remarks that the “progressive de-bounding of social risks and the blurring boundaries between internal and external notions of security” make it difficult if not largely impossible to “know your enemy”.²⁸ Governments henceforth have to deal with a myriad of economic and security factors that they do not directly control and that are, importantly, no longer confined to territorial or political boundaries.²⁹ We thus live in what Beck has labelled the “world risk society”, in which distinctions between the inside and the outside, the domestic and the foreign, and security abroad and security at home are increasingly challenged.³⁰

In such de-bounded realities, questions of belonging have become muddled. Criminal justice and immigration control to certain extents provide tools for governments to grapple with such muddled notions and growing insecurities. They allow the state to continuously adjust or even *re*-draw the boundaries between those who belong and those who do not in an attempt to both counter de-bounded threats to the fabric of society and account for globalisation processes more generally. Such attempts guide the rejection of the unfamiliar and the potentially dangerous both in public debate and in law and policy making.³¹ In this process, membership entitlements arguably do not neatly run along the lines of citizenship but are based on transformed social boundaries between an illegalised social underclass on the one hand and a ‘bona fide’ upper-class on the other.³² As Aas outlines, the former group includes ‘sub-citizens’, or ‘outsiders inside’, who are formally included in terms of citizenship but whose inclusion is morally questioned and increasingly depleted,³³ and ‘non-citizens’, i.e. ‘outsiders outside’, who are formally excluded from citizenship and whose exclusion is upheld on moral grounds.³⁴

26 Franko Aas, 2012; Furman et al., 2016, pp. 2–3; Van der Woude, 2017, p. 63.

27 Zedner, 2010, p. 380. Indeed, “[g]lobalization is by no means a totally new phenomena [sic]; what is new is its pace and intensification”: Sarat & Kearns, 2001, p. 13.

28 Franko Aas, 2012, p. 235.

29 Furman et al., 2016, p. 3.

30 Beck, 2006; Franko Aas, 2012, p. 236.

31 Compare Boone, 2012, p. 15.

32 Franko Aas, 2011, p. 337; M. Griffiths, 2015; Loftsdóttir, 2016. For a critical acclaim of terminology, see Castles, 2017.

33 Vaughan speaks in this sense about ‘conditional citizens’: Vaughan, 2000, p. 26.

34 Franko Aas, 2011, p. 340. See also the work of Balibar, who argues in the European context that “differences of nationality, distinguishing the national and the foreigner, which formerly applied in the same manner in each nation-state to aliens, are now creating a permanent discrimination: some foreigners (the ‘fellow Europeans’), in terms of rights and social status, have become *less than foreigners*, they are in fact no longer exactly strangers, which is not

Conversely, the latter group includes ‘citizens’, that is ‘insiders inside’, whose membership entitlements are neither questioned nor depleted, and ‘supra-citizens’, i.e. ‘insiders outside’, who – although not enjoying formal membership – enjoy high levels of mobility and privilege, such as cosmopolitans and jetsetters belonging to business, diplomatic, and cultural elites.³⁵

We are thus witnessing significant social transformations “caused by the emerging, deeply stratifying global ordering”.³⁶ New categories of membership are created in the face of globalisation and increased mobility, distinguishing citizens and supra-citizens from sub-citizens and non-citizens. In relation to the latter group, whilst differences continue to exist between sub-citizens and non-citizens, they increasingly become alike given that sub-citizens are excluded through the criminal justice system which increasingly functions as a mechanism of alienation and expulsion, whilst non-citizens are excluded through the immigration control system – sometimes operating in conjunction with the criminal justice system – which increasingly functions as a mechanism to punish and convey condemnation. Admittedly, on many occasions the criminal justice system is not *as* alienating as immigration control, and, conversely, the immigration control system is not *as* condemning as criminal justice, yet under the gaze of globalisation the two systems at least gradually tend to operate more alike.³⁷ As others have denoted, the exclusion of sub-citizens thus parallels the exclusion of non-citizens: “neither group is treated like those ‘deserving’ citizens who can enjoy the full panoply of civil, political, and economic rights”.³⁸ In the US, for example, it has been argued that, since the mid-1990s, an enhanced focus on ‘civic virtues’ has fostered the gradual inclusion of both sub-citizens and non-citizens within a unified conception of undeservingness, excluding both categories of people alike from the benefits of societal membership.³⁹ In contrast with the ‘winners of globalisation’ at both sides of the physical and symbolic borders of the nation state, the migrant is thereby unified with “another denigrated Other, [i.e.] the Criminal”⁴⁰ in

to say that they feel no difference [...]; while other foreigners, the ‘extra-communitarians’, and especially the immigrant workers and refugees from the South, are now, so to speak, *more than foreigners*, they are *the absolute aliens* subject to institutional and cultural racism”: Balibar, 2010, p. 319, original emphasis. This distinction is however not static but is dependent on the Zeitgeist: whether one is considered a foreigner or not may change over time and does not run neatly along the lines of for instance a European common heritage per se.

35 Franko Aas, 2011, pp. 340–341. For a clear example of the difference between various novel membership categories, see Loftsdóttir, 2016.

36 Franko Aas, 2007, p. 284.

37 See, on the way in which both systems increasingly deliver a symbolic message of reprobation and disapproval, Di Molfetta & Brouwer, 2019.

38 Demleitner, 1999, pp. 158–159.

39 Demleitner, 1999, p. 159.

40 M. Griffiths, 2015, p. 72.

an overarching category of non-membership. Figure 9 schematically depicts these distinctions of belonging.

		FORMAL DISTINCTIONS OF BELONGING	
		Belonging	Non-belonging
NOVEL DISTINCTIONS OF BELONGING	Belonging	Citizens (<i>insiders inside</i>)	Supra-citizens (<i>insiders outside</i>)
	Non-belonging	Sub-citizens (<i>outsiders inside</i>)	Non-citizens (<i>outsiders outside</i>)

Figure 9: traditional and novel distinctions of membership.⁴¹

Of course, these categories are archetypes rather than binary options: a sliding scale exist with certain populations not being squarely excluded, nor being squarely included in novel conceptions of belonging. Consider, for example, populations of rejected asylum seekers and unauthorised migrants who are to be deported but whose deportation is prevented by, for instance, human rights concerns such as the principle of non-refoulement or practical barriers such as non-cooperating countries of origin. In such instances, individuals are not squarely outsiders-outside, as they remain, at least physically, part of the social body until expulsion has effectively taken place, yet they cannot squarely be categorised as sub-citizens either, as they lack any type of relevant citizenship whatsoever. Whilst they thus find themselves somewhat in between both categories, what nevertheless transpires is that they are, under novel distinctions of membership, squarely on the side of non-belonging. Aas reminds us that the notions of *zoepolitics* (distinguishing between citizens and non-citizens) and *biopolitics* (distinguishing life within the social body) as developed by Agamben and Foucault are crucial in this regard: both are at play in carving out the novel categories of belonging.⁴² Indeed, where individuals cannot be excluded through zoepolitics, they still can be encountered through biopolitical approaches. The distinctions in Figure 9 thus serve primarily to explicate these novel distinctions of belonging, not to present clearly delineated categories altogether.

Plesničar and Kukavica are thus right in concluding that “foreignness is not a uniform question, but rather a continuum with non-foreignness on one side and complete foreignness on the other, and a plethora of possible interpretations in between”.⁴³ Of course, one may argue, the shift from traditional to novel distinctions of membership is somewhat artificial given that there is a long history of inclusion of certain supra-citizens – consider for example

⁴¹ Compare Franko Aas, 2011.

⁴² Franko Aas, 2011, pp. 339–340. These notions were developed *inter alia* in Agamben, 1998; Foucault, 2004. See notably also Schinkel, 2010.

⁴³ Plesničar & Kukavica, 2019, p. 45.

the rich historical background and connotations of cosmopolitanism – and the total exclusion of certain sub-citizens – consider the histories of penal banishment, denunciation, and ex-communication.⁴⁴ What seems different in contemporary crimmigration developments, however, is that the *fundamental* conception of who belongs to the polity and who does not has been radically redrawn under the gaze of rapid globalisation, the delocalisation of the border and the nation state, and the inflationary application of securitisation rationales – a development that has been labelled as the ‘crisis of the nation-state’ in times of globalisation.⁴⁵ As scholars in the field of border studies have argued, “borders and bordering in globalization may be uncoupled from the national scale and linked to identity and belonging within and beyond the state”.⁴⁶ It is in this light important to be aware of the ‘territorial trap’ when conceptualising borders: regarding the border as a simple line rather than as a dynamic interaction of which the physical border is only one component renders the border line unduly durable and the more complex border process “hazy if not superfluous”.⁴⁷ Instead, borders are, particularly under the gaze of globalisation, not only dividers of space but also expressions of social interaction and symbolic landmarks of control.⁴⁸ In this sense, they constitute constructed processes that may function to simultaneously inclusion and exclude people on both sides of the geographical line.⁴⁹

The ongoing bordering process is effectuated by more traditional Westphalian power mechanisms such as criminal law enforcement and migration control – which in turn may go to great lengths in explaining their ongoing merger. Crimmigration may well be the result of the stretching of state powers in an attempt to accommodate – or grapple with – the novel de-bounded paradigms of membership. Rubins, likewise, conceptualises ‘crimmigration’ as the result of the ‘control society’, functioning as a regime of domestic policing and population management instead of as a system dedicated solely to the deportation of undesirable migrants.⁵⁰ This, in turn, conforms to what Sklansky has labelled ‘ad hoc instrumentalism’: in order to deal with novel challenges brought about by developments of globalisation, authorities resort

44 On the historical and philosophical roots of cosmopolitanism, see generally Appiah, 2015; Kleingeld, 2012. On various aspects of histories of penal banishment, denunciation, and ex-communication, see amongst others M. De Koster, 2018; M. E. Moore, 2007; Washburn, 2013.

45 Balibar, 2010, p. 319; Bosworth, 2008. This constitutes a ‘cosmopolitan difficulty’, since ‘others’ are often “no longer confronted in absolutely separate places”: Balibar, 2010, p. 321.

46 Konrad, 2015, p. 3.

47 Konrad, 2015, p. 3.

48 Diener & Hagen, 2012, p. 2.

49 Balibar, 2002; de Haas et al., 2016; Infantino, 2016, pp. 4–7; Migdal, 2004; Newman, 2006; Van Houtum & Spierings, 2012.

50 Rubins, 2019.

to a number of instruments and branches of law whilst the formal distinctions between these instruments and branches fades to the background.⁵¹

This seems to be a two-step process: first, in drawing membership lines, non-members are identified both among citizens and non-citizens as illustrated in Figure 9. Rubins similarly concludes that crimmigration “works through the construction of dangerous classes and the categorization of populations according to the perceived threat they pose to the nation-state”.⁵² Given that membership theory is “inherently flexible”, the subjective viewpoints of – as well as the exercises of discretion by – the decision-maker are largely decisive in this process.⁵³ In light of such subjectivity, novel categories of belonging have frequently been explained along the lines of, prominently, ethnicity and race.⁵⁴ Second, identified non-members are excluded by a combined use of criminalising and alienating rationales, mechanisms, and rhetoric. Both crime and immigration control hence offer tools such as confinement to control, contain, and ultimately expulse – symbolically, physically, or both – certain potentially threatening populations from society and to consequently enforce novel understandings of membership, albeit to varying extents. In these processes, criminality is grafted onto immigrants – the criminalisation-of-immigrants – whilst criminal sanctions increasingly result in the alienation, segregation, and banishment of convicts – the immigrationisation-of-criminals.⁵⁵

Hence, as Barker puts it, “membership matters most”.⁵⁶ It should be added, however, that ‘membership’ in this regard includes both a formal and an informal aspect. That is to say, both formal membership – i.e. based on one’s formal documentation and citizenship – and informal membership – i.e. based on whether one is perceived to be a member under novel conceptions of belonging as depicted in Figure 9 – ultimately determine to what extent the criminalising and alienating features of crime control and/or immigration control are effectuated vis-à-vis the individual. Banishment of populations who have formal membership but lack informal membership under novel conceptions of belonging will, save for situations in which their citizenship is revoked altogether, indeed likely be of a different nature than banishment of populations who lack both formal and informal membership. Whereas for the former category banishment may continue to rely largely on the use of criminal justice mechanisms, for the latter category the emphasis may be on the use of immigration control mechanisms, although in both instances both censure and alienation will be conveyed. Conversely, the implications will likely be completely different as well: whilst non-citizens formally excluded in terms of membership

51 Sklansky, 2012.

52 Rubins, 2019, p. 298.

53 Stumpf, 2006, p. 379.

54 See for instance Fan, 2013; Garner, 2015; Pickett, 2016; Plesničar & Kukavica, 2019, p. 31; Vazquez, 2015.

55 Barker, 2013, p. 238; Chacon, 2009; T.A. Miller, 2003.

56 Barker, 2013.

may have other memberships, of other societies, to fall back on, sub-citizens may lack such alternatives and may consequently be relegated to the status of 'pseudo-citizens'.⁵⁷ Therefore, *who* you are in terms of your formal and informal membership determines *what* measures are applied, *how* they are applied, and *to what extent* alienation and condemnation materialise.⁵⁸

3.3 CRIMMIGRATION IN CONFINEMENT ON A GLOBAL LEVEL

The novel conceptions of belonging as depicted in Figure 9 are informal in the sense that they are based on subjective perceptions of who belongs to the polity in a globalised world. Confinement is increasingly used to carve out these novel distinctions of membership.⁵⁹ In fact, immigration detention and prisons do not only enforce novel membership entitlements but may even be conceptualised as physically representing or functioning as novel borders between the included and excluded.⁶⁰ Both types of confinement are generally regarded as ultimate expressions of sovereignty: whereas imprisonment expresses the sovereign state's power to restrict one's liberty in the execution of legitimate punishments for wrongdoings, immigration detention is a visible expression of the sovereign state's broad discretion to determine who can enter and reside on its territory and who cannot.⁶¹ This reverts to Stumpf's characterisation of the government as bouncers of the polity: when an individual is considered to either temporary or permanently not belong to the polity, whether it is because the individual is an alleged outsider or because the individual has broken the membership rules, the state can remove said individual from its premises through *inter alia* confinement.⁶²

Here, the use of confinement to carve out such novel distinctions of membership will be examined on a global scale, focussing on macro-level developments. This endeavour is significantly constrained, however, by the fact that scholarship on crimmigration in confinement remains relatively scarce, especially when compared to scholarship on commodification trends as discussed in the previous chapter. This is in particular the case for the immigrationisation of crime control (and of prisons), which, as pointed out above, has remained vastly understudied in the crimmigration literature in contrast with the criminalisation of immigration (and of immigration detention). Whilst the approach

57 Demleitner, 1999, p. 160; Stumpf, 2006, p. 409.

58 Compare Bosworth et al., 2018, p. 43.

59 See e.g. O'Nions, 2008.

60 Compare Johnson et al., 2011. In addition, a number of other mechanisms such as electronic monitoring and other surveillance systems are employed to enforce the distinction both in relation to convicted offenders and certain categories of immigrants: Feeley & Simon, 1992, p. 457; Franko Aas, 2011; McLeod, 2012, p. 153.

61 Michael Flynn, 2011; L. L. Martin & Mitchelson, 2009.

62 Stumpf, 2006, p. 402.

here is thus focused on the macro-level, it should be taken into account that analysis focuses predominantly on countries in the Global North that have been central to much of the relevant literature. Ultimately, it remains imperative that future research fleshes out the macro level trends by including a wide variety of national contexts into its analytical scope.⁶³

3.3.1 The ‘criminalisation of immigration detention’

The first leg of the crimmigration development is that of the criminalisation of immigration detention. This means that immigration detention, which is traditionally geared towards administrative purposes and is therewith preventative rather than punitive in nature,⁶⁴ increasingly incorporates elements of punishment and condemnation. When looking at immigration detention at a global level, such conflation of rationales and purposes appears to occur on multiple levels simultaneously.

In various countries, immigration detention facilities increasingly mimic penal institutions up to the point where one can speak about ‘immigration prisons’.⁶⁵ Parallel to the prison system, a vast network of immigration detention centres has indeed emerged that often use the same personnel, methods, and physical spaces as prisons.⁶⁶ Some detention facilities are in shared-use with prisons or jails,⁶⁷ others are self-standing but look, feel, and operate like prison – for example because they used to be prisons, because they were architecturally designed like prisons, or because they are managed by contractors that also operate on the prison market.⁶⁸ Hence, “[w]hilst immigration detention does not technically fall under the criminal justice umbrella, there is considerable overlap with prison ideology, practice and personnel”.⁶⁹ Many immigration detention facilities function like prisons, “only worse” given that oversight and regulations are often weaker and conditions often more inferior

63 It should be noted that recent scholarship has started to flesh out such relationships. See for instance Ma, 2019 (on crimmigration in China) and Ramachandran, 2019a, 2019b (on crimmigration in India).

64 Turnbull, 2017, p. 3.

65 Bosworth, 2012, p. 127; Bosworth & Turnbull, 2014; Dow, 2007; Furman et al., 2016, p. 2; Gerard & Pickering, 2014, pp. 598–599; Longazel, Berman, & Fleury-Steiner, 2016, p. 989; Peterie, 2018; Sinha, 2015, p. 19; Turnbull, 2017.

66 Arnold, 2018; Moran, Conlon, & Gill, 2016; Silverman & Nethery, 2015, pp. 2–3; Sinha, 2015, p. 20.

67 Dow, 2007, p. 540; Sinha, 2015, p. 20; Wong, 2015, p. 128.

68 Bosworth, 2012, p. 127, 2017; Fiske, 2016, p. 209; Hernández, 2014; Silverman & Massa, 2012; Turnbull, 2017, p. 8. Bacon strikingly summarises this intimate connection in the UK context: “private guards are regularly transferred to immigration detention centres from prisons and in 1995, nobody was capable of explaining to Her Majesty’s Inspectorate of Prisons (HMIP) what the difference was between a ‘secure hostel’ (the contractor’s description of Campsfield House immigration detention centre) and a prison”: Bacon, 2005, p. 6.

69 Liebling, 2013, pp. 221–222.

in the context of immigration detention than they are in the context of imprisonment.⁷⁰

In addition, there is “a certain fluidity” between prisons and immigration detention facilities: in various countries, prisons occasionally facilitate detention spaces when immigration facilities are full, non-citizen prisoners are regularly transferred to immigration detention centres at the end of their sentence for deportation purposes, and in some countries immigration detainees who commit criminal offences whilst in detention can be transferred directly to prison.⁷¹ Immigration detention is, furthermore, increasingly utilised as a form of incapacitation.⁷² It is occasionally based on penal logics and at times implements penal practices in order to exclude the undesirable non-citizen from society.⁷³ In many countries, administrative detention has accordingly become “the cornerstone of securitisation of migration policy”.⁷⁴ Immigration detention centres are therewith geared both towards administering immigration processes, and towards conveying censure. They are, therefore, both caring and coercive, empowering and disempowering, hospitable and hostile, and are as a result at times difficult to grapple with for staff, detainees, and the outside world alike.⁷⁵ This influences how immigration detention is experienced not only by staff and local communities in which such facilities are situated, but first and foremost also by detainees themselves who might increasingly feel like they are in prison.⁷⁶ As Golash-Boza considers in the US context,

“[u]ndocumented migrants are not criminals. Detention is not prison. Deportation is not punishment. These are truths in the legal system of the United States. Undocumented migrants are treated like criminals. Detainees feel as if they are in prison. Deportees experience their removal as punishment. These are the realities people experience”.⁷⁷

Immigration detention therefore does not only turn immigrants increasingly into outlaws, but also makes immigrants increasingly *feel* like outlaws.⁷⁸

Of course, this trend is by no means absolute and cannot be generalised across jurisdictions. Significant variations exist amongst states’ approaches to immigration detention as well as the legal frameworks in which such

70 Fiske, 2016, p. 213; Furman et al., 2016; Sinha, 2015, p. 21; Stern, 2006, p. 146; S. Ugelvik & T. Ugelvik, 2013.

71 Silverman & Nethery, 2015, p. 3; Turnbull, 2017, p. 10.

72 Kogovšek Šalamon, 2019; Turnbull, 2017, p. 8.

73 Turnbull, 2017, p. 9.

74 Gerard & Pickering, 2014, p. 598.

75 Bosworth, 2017, p. 6; Khosravi, 2009, p. 53; Turnbull, 2017, p. 7.

76 This subjective experience of immigration detention as prison has for example been clearly demonstrated in the UK context: see Bosworth, 2017; Turnbull, 2017.

77 Golash-Boza, 2010, p. 81.

78 See also Arnold, 2018.

detention facilities are set, the way in which they operate in practice, and the precise populations that are detained.⁷⁹ At the same time, the impact of crimmigration on immigration detention facilities has been denoted by scholars from different disciplines across a variety of jurisdictions, including in Australia,⁸⁰ Bosnia and Herzegovina, Kosovo, North Macedonia, Montenegro, and Serbia,⁸¹ Finland,⁸² Greece,⁸³ India,⁸⁴ Israel,⁸⁵ Malta,⁸⁶ the Netherlands and Belgium,⁸⁷ Norway,⁸⁸ Slovenia,⁸⁹ South Africa,⁹⁰ Sweden,⁹¹ the UK,⁹² and the US.⁹³

3.3.2 The ‘immigrationisation of prisons’

The second limb of crimmigration consists of what will be labelled here the ‘immigrationisation’ of prisons: whereas prisons are traditionally geared towards *inter alia* punishment and condemnation, they increasingly incorporate elements of alienation. In the literature on crimmigration, this ‘immigrationisation’ of prisons has predominantly been denoted in the context of the *non-citizen* who is increasingly drawn into the penal net through the prosecution of migration-related offences and the ‘overcriminalisation’ of migration policy.⁹⁴ Consequently, prisons – and the penal system more generally – start to fulfil functions of immigration control in the sense that the execution of penal sentences for non-citizens is increasingly met with measures that envisage the segregation and ultimately the expulsion of the alien from the polity. Thus, “[w]hen deprived of their freedom, non-citizens are increasingly placed in separate institutions, or institutional arrangements, and afforded different procedural treatment and standard of rights than citizens”.⁹⁵ In various countries, special ‘foreign national prisons’ nowadays even exist that function as

79 Compare Turnbull, 2017, p. 2. See however also Gerard & Pickering, 2014.

80 Grewcock, 2009; Groves, 2004; Peterie, 2018; Pugliese, 2008.

81 Kogovšek Šalamon, 2019.

82 Kmak, 2018.

83 Kotsioni, 2016, p. 52.

84 Ramachandran, 2019a, 2019b.

85 Rubins, 2019.

86 Mainwaring, 2016.

87 Van der Leun & De Ridder, 2013.

88 S. Ugelvik & Ugelvik, 2013; T. Ugelvik, 2016a.

89 Šalamon, 2017.

90 Alfaro-Velcamp & Shaw, 2016.

91 Khosravi, 2009; Puthooppambal, Ahlberg, & Bjerneld, 2015.

92 Bacon, 2005, p. 6; Bosworth, 2012; Bosworth & Turnbull, 2014; Bowling & Westenra, 2018.

93 Dow, 2004; Golash-Boza, 2010; Hernández, 2014; Jorjani, 2010, p. 5; Kalhan, 2010, p. 47; Longazel et al., 2016.

94 Bosworth, 2008; Bosworth et al., 2018; J. Brouwer, 2017; Chacon, 2009, 2012, p. 614; Hester, 2015, p. 141; Loyd, Burridge, & Mitchelson, 2010, p. 90; Van der Leun & De Ridder, 2013.

95 Franko Aas, 2014, pp. 525–526.

part of the penal infrastructure yet incorporate immigration control rationales and mechanisms in lieu of traditional penal principles.⁹⁶ This includes a diminished focus on rehabilitation and reintegration and an increasing emphasis on deportation of the non-citizen after – or sometimes even prior to – the conclusion of the sentence.⁹⁷ Examples include prisoner transfer agreements and measures that incentivise foreign national prisoners ('FNPs') to leave the country more or less voluntarily, for instance in exchange for a partial sentence suspension.⁹⁸ Deportation is hence, as some have argued, not only a consequence of imprisonment but on many occasions also a substitute for it.⁹⁹ Franko Aas contends that an altogether distinct penal system guided by an immigration control rationale has hence developed parallel to the traditional penal system, which she calls 'bordered penalty'.¹⁰⁰ By extension, such bordered penalty has been guided by what has been called 'bordered penal populism'.¹⁰¹ These processes are arguably geared towards the banishment and exclusion of non-citizens from society, which has been labelled as a 'ban-optic' (rather than panoptic) rationality.¹⁰² Immigration control has therewith seeped into penal practices and has arguably become a cornerstone of the contemporary carceral state.¹⁰³ It complements more traditional measures of immigration control where the latter are ineffective or incapable to expel the non-citizen from the community. Such bordered penalty practices are increasingly identified in a number of countries around the globe.¹⁰⁴

In addition to bordered penalty, a more subtle process of immigrationisation can arguably also be distinguished in the context of the traditional penal system. When crimmigration is understood as a technique to effectuate novel categories of membership as established under the gaze of globalisation, it indeed also includes a more subtle and ingrained process in the domain of criminal justice that allows states to maintain stringent control over the

96 Bosworth, 2011a; J. Brouwer, 2017; Kaufman & Bosworth, 2013; Pakes & Holt, 2017; T. Ugelvik & Damsa, 2017.

97 See in this regard for instance J. Brouwer, 2017, 2018, who discusses how in the Netherlands policy measures are being implemented that stimulate the voluntary return of FNPs in return for substantial sentence reductions. In this sense, prisons clearly fulfil a core task of immigration control, i.e. that of removal of the alien from the territory of the state. As he highlights, this policy mechanism is problematic in light of the way immigration control goals are achieved as well as in light of the general principles underlying criminal law.

98 Bosworth et al., 2018, p. 40; J. Brouwer, 2017, 2018; De Ridder, 2016b.

99 Bosworth et al., 2018, pp. 39–40.

100 Franko Aas, 2014.

101 Todd-Kvam, 2018.

102 Bosworth et al., 2018, p. 43.

103 Hester, 2015, p. 141.

104 Although scholarship on this topic remains modest in scope and the topic remains under-explored in various national contexts. See however J. Brouwer, 2017; De Ridder, 2016b; Di Molfetta & Brouwer, 2019; Fernández Bessa & Brandariz García, 2018; Franko Aas, 2013, 2014; Todd-Kvam, 2018; Turnbull & Hasselberg, 2017; T. Ugelvik & Damsa, 2017; Vazquez, 2015.

conditionality of membership.¹⁰⁵ This relates closely to the ‘punitive turn’ in crime control.¹⁰⁶ Concretely, this concerns the extent to which prisons increasingly function to banish sub-citizens, who are included in formal conceptions of membership yet excluded from novel conceptions of membership, both physically, politically, socially, and symbolically from society. Indeed, “the prison may be regarded as a site of exclusion *par excellence*, serving to erect physical and symbolic boundaries between those who play by the rules of market society and those who do not”.¹⁰⁷ Imprisonment in this sense can be used to enforce new membership boundaries by excluding – either temporary or permanently – those who are deemed to have lost their membership entitlements, a development that has been dubbed ‘banishment modern style’.¹⁰⁸ The question *who* is precisely included in the category of sub-citizens may change over time and depends, importantly, on the society in question. Examples could include both dangerous and serious offenders,¹⁰⁹ poor offenders,¹¹⁰ and offenders of particular criminal acts, having in common that they may to varying extents be villainised and that their membership status may accordingly be deduced to that of sub-citizens.¹¹¹

As a result of such banishment functionalities, certain groups of prisoners are increasingly cast as foreigners.¹¹² This banishment process is two-fold. On the one hand, through the incapacitative capacities of prisons, states have the ability to exclude certain sub-citizens during the time that they are serving their sentence. This exclusion can be physical (e.g. through remote imprisonment), but also symbolic, legal, and practical in nature.¹¹³ Bans on prisoner voting rights are, for instance, clear-cut examples of non-physical forms of exclusion.¹¹⁴ As a body of research has emphasised, such prisoner voting

¹⁰⁵ See also Reiter & Coutin, 2017.

¹⁰⁶ De Ridder, 2016a, pp. 65–66; Feeley & Simon, 1992; Garland, 2001; Simon, 2007.

¹⁰⁷ Bell, 2013, p. 46.

¹⁰⁸ Van Swaaningen, 2005, pp. 295–296. See also Infantino, 2016, pp. 4–7; Schuilenburg & Scheepmaker, 2018. Banishment can also occur through other mechanisms than the prison: see for instance, Super, 2019, who discusses the South African context.

¹⁰⁹ Reiter & Coutin, 2017.

¹¹⁰ Demleitner, 1999, p. 159.

¹¹¹ This may include, for instance, sexual offenders: see Craissati, 2019.

¹¹² Arnold, 2018.

¹¹³ Arnold, 2018; Bell, 2013, p. 49; Vaughan, 2000.

¹¹⁴ As I previously argued in the context of a ECtHR case concerning such voting bans, which will be addressed more in-depth in the next chapter of this book, “[c]riminal law indeed serves increasingly goals of exclusion and disenfranchisement, a development that could be labelled as one of ‘immigrationisation of criminals’. That does not so much concern so-called aliens in the criminal process in a literal sense, but rather the more ingrained development that certain categories of convicts are placed outside the society through physical removal and the revocation of fundamental citizenship and participation rights. Disenfranchisement through the curtailment of the right to vote as in the current case is an excellent example thereof: criminal convicts are not only punished, but also excluded of civic participation and the polity”: Van Berlo, 2017a, p. 54, original in Dutch.

bans are increasingly applied in a wide range of countries around the globe.¹¹⁵ In turn, the development of 'bifurcation' underlies this trend of exclusion whilst imprisoned. 'Bifurcation' is, as Cavadino and Dignan explain, "the strategy whereby lesser punishments are sought for less serious offenders whereas simultaneously new extra-long sentences are targeted on a sub-group of supposedly especially dangerous or serious offenders".¹¹⁶ Accordingly, sentences can be inclusive or exclusive depending on whether the goal is to eventually keep offenders within the society or to cast them out, which in turn is dependent on whether the offender in question is regarded as an insider or an outsider. Exploring the example of the Netherlands, Cavadino and Dignan conclude that "[w]hat has happened has been more like a *redrawing of the boundaries of the community* – to exclude those offenders who are seen as incorrigible lost souls, but still to include less serious and less persistent offenders".¹¹⁷ In Vaughan's words, "[p]unishment in the modern era has always been ambivalent but it is losing whatever sense of inclusiveness it has".¹¹⁸ As some have consequently argued, prisons may increasingly transform from 'big houses' embodying correctional ideals into 'warehouses' that physically and symbolically remove social rejects (or 'undesirables'), who are not expected to return to society any time soon, from the law-abiding polity.¹¹⁹ Kesby strikingly observes in relation to prisoner disenfranchisement that such stripping of rights is strikingly inconsistent with the recognition of citizenship status:

"On the one hand, prisoners are acknowledged as bearers of human rights and equal citizens. Citizenship is a status which does not depend upon 'moral worthiness'. Yet, if a prisoner is particularly morally unworthy, as evidenced by the gravity of the offence and length of sentence, then the mask of citizenship is stripped revealing the 'natural man' beneath, and the denial of the right to vote is considered a proportionate measure. By lifting the veil of the formal equality of citizenship, distinctions between citizens (in particular between deviant and law-abiding citizens) come to the fore. The disenfranchised prisoner, like the slave of the ancient *polis*, is then considered to be 'without words' because their situation (here their moral unworthiness and imprisonment) has made them incapable of speech."¹²⁰

115 Abebe, 2013; Demleitner, 1999; Dhami, 2005, p. 236; Dilts, 2014; Kesby, 2012, pp. 67–91; Macdonald, 2009, pp. 1393–1406; Penal Reform International, 2016. The report by Penal Reform International, for instance, concludes that in approximately 45% of the 66 jurisdictions studied, conviction to imprisonment automatically leads to disenfranchisement.

116 Cavadino & Dignan, 2006b, p. 82.

117 Cavadino & Dignan, 2006b, p. 120. See also Boone, 2012; Van Swaaningen, 2005, pp. 295–296.

118 Vaughan, 2000, p. 36.

119 Bell, 2013, pp. 49–53; Wacquant, 2001, pp. 95–99.

120 Kesby, 2012, pp. 78–79.

Still, as of yet such exclusion is generally not permanent: prisoners who are formally included in terms of membership are usually expected to return into society, which in turn questions the thesis that they are being subjected to any substantive alienation beyond the exclusion ingrained in utilitarian philosophies of penalty. However, the second limb of this particular process of immigrationisation is informative in this regard. Indeed, on the other hand, on many occasions the alienation and exclusion that are gradually being incorporated in traditional penal practices stretch far beyond the execution of the prison sentence and continue to carve out the novel distinctions of membership post-imprisonment. This refers back to ‘banishment modern style’: banishment continues, but in novel and innovative ways that on many occasions mediate the absolute nature of banishment whilst maintaining its rationale and far-reaching implications.¹²¹ In this sense, individuals may return to society, but their social segregation and exclusion, as a core aspect of banishment,¹²² continues as a collateral consequence of sentencing.¹²³ Examples of such ongoing segregation and exclusion include the depletion of ex-convicts’ rights,¹²⁴ their ongoing monitoring via registries and technological innovations,¹²⁵ the collateral consequences of criminal convictions for *inter alia* their position on the housing or labour market,¹²⁶ and restrictions on their political participation.¹²⁷ As Stumpf for example illustrates in the US context, “excluding ex-offenders [...] from the activities of voting, holding public office, and jury service creates a palpable distinction between member and non-member, solidifying the line between those who deserve to be included and those who have [...] shown themselves to be deserving of exclusion”.¹²⁸ Consequently, losing these essential markings of citizenship demotes, according to Stumpf, convicted individuals to the status of non-citizen.¹²⁹ Jain draws attention to the significant impact of a criminal record, by maintaining that “harm arises over time, including from spiraling criminal justice debt and ubiquitous reliance on criminal records by employers and others”.¹³⁰ In their edited volume on banishment and exclusion in the Netherlands, Schuilenburg and Scheepmaker furthermore emphasise the significant impact of spatial measures such as restraining and banning orders.¹³¹

121 Demleitner, 1999, p. 159; Van Swaaningen, 2005, pp. 295–296.

122 M. De Koster, 2018, p. 70.

123 Demleitner, 1999.

124 See e.g. Macdonald, 2009.

125 See e.g. Tewksbury, 2002.

126 See e.g. P.M. Harris & Keller, 2005; Van ’t Zand-Kurtovic, 2017, 2018.

127 See e.g. Itzkowitz & Oldak, 1973; Petersilia, 2003, p. 9.

128 Stumpf, 2006, pp. 414–415.

129 Stumpf, 2006, pp. 405–406.

130 Jain, 2018, p. 1384.

131 Schuilenburg & Scheepmaker, 2018, p. 6.

Thus, sub-citizens who are formally included in terms of membership but who are excluded under novel paradigms of belonging in many instances do not recover their *full* position of insider-inside but remain excluded to varying extents.¹³² Demleitner already noted in 1999 how this essentially led to “internal exile” and the relegation of ex-offenders to “second-class citizenship”.¹³³ Kesby likewise highlights how this may lead to “a precarious citizenship of potential internal exiles”.¹³⁴ In extreme cases, full alienation and even expulsion can be applied: consider, for example, contemporary debates and legislative action on the revocation of citizenship from ‘homegrown terrorists’.¹³⁵ Likewise, criminal convicts may not *de jure* be expelled from society but may still be excluded *de facto*. A clear example is the Julia Tuttle Causeway sex offender colony case in the US, which concerned a group of sex offenders in Miami (Florida) who took up residence in tents and shacks under a causeway as a result of the overly-strict restrictions on where former sex offenders were allowed to reside.¹³⁶ Formally they returned to a sphere of belonging after completing their prison sentences, but in practice their segregation and exclusion from society continued for years after their release.

Imprisonment as such may draw certain ex-offenders more or less permanently into a category of non-belonging.¹³⁷ This, it has been argued, may be the most far-reaching consequence of being captured by the penal net: as Karst puts it, “[t]he most heartrending deprivation of all is the inequality of status that excludes people from full membership in the community, degrading them by labeling them as outsiders, denying them their very selves”.¹³⁸ In fact, the implications for global membership entitlements may be even more far-reaching. For instance, whereas ex-offenders previously might have been considered outsiders-inside (or ‘supra-citizens’) by third states on the basis of their formal membership, on many occasions foreign authorities will now regard them as outsiders-outside (or ‘non-citizens’) on the basis of their perceived non-belonging. Many countries for example restrict visa-free travel for individuals who have previously been convicted for a criminal offence. The alienating effect of imprisonment – and of the criminal justice system more generally – thus does not only apply vis-à-vis the polity to which one formally belongs, but also applies in relation to other polities where criminal convictions are used as indicators to distinguish the outsider-inside – who is granted a

132 Still, given that this aspect of crimmigration has largely remained a blind spot in the literature, further research is needed to flesh-out these forms of exclusion in different national contexts. So far, it has primarily been denoted in the context of the US: see, e.g., Reiter & Coutin, 2017.

133 Demleitner, 1999.

134 Kesby, 2012, p. 90.

135 Macklin, 2014.

136 Rodriguez, 2010, pp. 1037–1038.

137 See also Demleitner, 1999, p. 158.

138 Karst, 1989, p. 4.

number of cosmopolitan entitlements and advantages – from the outsider-outside – who is subjected to tight control, oversight, monitoring, and potentially even to overall exclusion.

3.3.3 The shades of crimmigration

Spaces of penal and immigration confinement hence increasingly house the sum of those that were never envisaged to be part of the polity and those that have not upheld their end of the social contract, with membership either being gradually taken away or never being awarded in the first place. At the same time, this is by no means to say that these trends are global, uniform, or absolute. To the contrary, the various crimmigration processes appear fragmented and multifaceted not only when comparing different countries but also on a regional or even national level. Indeed, some jurisdictions may resort more frequently to immigration and/or criminal law measures to carve out membership than others, and the ways in which this is done may fundamentally differ. In this sense, whilst crimmigration has been denoted globally, it remains crucial to take the ‘glocal’ level into account when studying such trends.

Moreover, the merger between crime and migration control in confinement should not be regarded as absolute but rather as a sliding scale. Alienation and condemnation co-occur, but the extent to which they do so depends on the concrete context and the formal and informal membership entitlements of the individual concerned. As Bosworth, Franko, and Pickering rightfully point out, in denoting these trends we thus need to pay proper attention to competition between the systems of criminal justice and migration control as well as to “forms of resistance against the emerging hybrid rationalities”.¹³⁹

So far, the *congruence* between the punitive exclusion of non-belonging individuals through immigration detention on the one hand and through imprisonment on the other has not been traced widely, as a result of which little is known about this process overall. Still, in the literature, examples emerge that denote how immigrant detainees and prisoners are increasingly unified in an overarching category of non-members to be censured *and* expelled. Van Swaaningen, for example, finds in the context of the Netherlands that policy priorities with respect to public safety are concerned with getting ‘problem groups’ out of sight: “[t]hey are removed to places where they are less of a nuisance be it by sending them to prison, trying to deport them to the country where the authorities think they come from or indeed to areas where they can do less harm”.¹⁴⁰ In the context of the US, Reiter & Coutin denote similar developments: according to them, the US legal system “re-labels immigrants (as deportable noncitizens) and supermax prisoners (as dangerous

¹³⁹ Bosworth et al., 2018, p. 42.

¹⁴⁰ Van Swaaningen, 2005, pp. 295–296.

gang offenders). This re-labeling begins a process of othering, which ends in categorical exclusions for both immigrants and supermax prisoners".¹⁴¹ As pointed out above, however, further research is needed to flesh out such developments, including analysis of the various shades of crimmigration that can potentially be recognised in different national contexts. The examination of the crimmigration elements of the case studies below *inter alia* attempts to contribute to this research endeavour. Before turning to the case studies, however, the nexus between crimmigration and commodification will first be explored.

3.4 THE CRIMMIGRATION-COMMODIFICATION NEXUS

Crimmigration and commodification are self-standing developments that merit individual scrutiny in their own right. At the same time, a link appears to exist between both developments which should not be neglected either, in particular in light of the potential challenges to international human rights law that both developments mount. This section will reflect on how crimmigration and commodification are frequently connected in at least three ways: it sketches how crimmigration frequently constitutes the fuel, the *modus operandi*, and, occasionally, the collateral damage of commodified confinement.

In exploring this nexus, it is important to keep in mind that it is not absolute nor uniform. Crimmigration does not only occur in cases of commodification, nor does it always occur in cases of commodification. Not all commodified spaces of confinement thus incorporate elements of crimmigration, or at least not to the same extent. Also, not all commodified spaces of confinement that incorporate elements of crimmigration do so in the same way, or with the same outcome. The point here is henceforth not that crimmigration and commodification *are* linked by definition, but that they *can be* – and, in fact, frequently are – and that, where such combinations occur in practice, this likely has far-reaching consequences from a human rights perspective.¹⁴²

3.4.1 Crimmigration and the privatisation of prisons

Crimmigration is closely linked to the privatisation of prisons. First, crimmigration has inevitably fuelled the expansion of the prison-industrial complex. As a result of the crimmigration trend, the penal net has significantly widened over recent decades which has been key to the success of the private prison

¹⁴¹ Reiter & Coutin, 2017, p. 567.

¹⁴² Whereas analysis here focuses primarily on a number of countries in the Global North, further research is needed to specify these interrelationships between both trends both in the Global North and South.

industry in various countries.¹⁴³ There is an increasing demand for the punitive exclusion of those (placed) outside of the community, constituting a demand that private contractors have been willing to accommodate. In this sense, the continuing confinement of novel categories of non-members provides further impetus for the ongoing quest of private contractors to win new prison contracts in both traditional and less obvious prison markets. Not only have private actors stimulated a larger prison population, their presence has also prevented a decline in incarceration.¹⁴⁴ There is, indeed, a real concern that private contractors encourage lengthier sentences, stricter enforcement policies and more expansive exclusion “to keep bed spaces filled”.¹⁴⁵ Crimmigration thus is an important reason for the expansion of the prison-industrial complex, yet conversely, the expansion of the prison-industrial complex has arguably also fostered crimmigration in what can be regarded as a circular process.

Secondly, crimmigration provides a *modus operandi* for a number of private penal institutions. That is to say, the development by which punishment is increasingly used to segregate and exclude certain populations from society has facilitated the implementation of profitable business models by private contractors, because it allows for (i) swift physical and symbolic removal of offenders from the community and (ii) the presence of a limited set of educational, social, and rehabilitative programmes. On the one hand, symbolic detachment of the individual from the community has accommodated the logic of a liberalised market: for-profit operators build prisons in remote rural places at a relatively low cost, which is enabled by local communities with their own micro-economy incentives.¹⁴⁶ By and large, the removal of sub-citizens from conceptions of membership has indeed allowed for cost-benefit analyses – where can a prisoner be housed cheapest? – to trump considerations of rehabilitation and inmate concerns – which location would be in the best interest of the prisoner?¹⁴⁷ As a result, either deliberate or not, private incarceration does not only symbolically remove the prisoner from the community but frequently also does so in a very physical sense. Of course, this is not to say

143 Doty & Wheatley, 2013, p. 435.

144 Friedmann, 2014, pp. 566–567.

145 Austin & Coventry, 2001, p. 16; Blessett, 2012; Cummings & Lamparello, 2016, pp. 430–431; Heitzeg, 2012; Smith & Hattery, 2012. As CCA strikingly illustrated, “[t]he demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws. For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them”: CCA, as quoted in Doty & Wheatley, 2013, p. 435.

146 Moreover, as explained in the previous chapter, ‘bed brokering’ and ‘out-of-state-imprisonment’ became accepted business models in the US: N. Christie, 2000, pp. 136–138; Huling, 2002; R. S. King et al., 2003; Neill, 2012, pp. 105–106.

147 Aman, 2005, pp. 543–544.

that only private prisons are remotely located, nor that private prisons are by definition remotely located, yet the detachment of sub-citizens from membership entitlements has enabled for-profit contractors to employ remoteness as a cost-effective method of operations and as an acceptable alternative to publicly-run incarceration which can be sold to authorities in a variety of jurisdictions both in the vicinity and at a greater distance.

On the other hand, crimmigration may inform the method of operation by diverting attention away from rehabilitation and resocialisation and as such justifying that contractors provide less educational, social, and rehabilitative services to out-grouped populations in prisons. A striking example in this regard is the US context, in which these populations are often structured along racial lines: whilst ethnic minorities are overrepresented in public prisons, they are even further overrepresented in for-profit prison facilities.¹⁴⁸ As such, crimmigration allows private contractors in the US to house out-grouped individuals not only in far-away places, but also in regimes where less services are provided. Of course, not all private operators employ similar modes of operation, private facilities are not everywhere remotely located, and they do not everywhere provide less services than public correctional facilities, but they arguably *can* do so under the banner of crimmigration.

3.4.2 Crimmigration and the privatisation of immigration detention

Similar trends can be discerned in relation to private immigration detention facilities. On the one hand, criminalisation fuels the industrial complex as it continuously expands the scope of detainable people and thus requires an ever-growing detention enforcement apparatus.¹⁴⁹ In search of new profit, private contractors – often for-profit companies that are simultaneously operating on the prison market – have been eager to step into these emerging neo-liberal markets of confinement which promise to be rich sources of revenue.¹⁵⁰ Like

148 Brewer & Heitzeg, 2008b; Burkhardt, 2015; Deckert & Wood, 2011, pp. 231–232; Hallett, 2002, 2004; Heitzeg, 2012; Petrella, 2013; Petrella & Begley, 2013. As Petrella and Begley stress, “people of color are disproportionately siphoned away from public facilities, precisely the types of facilities that provide the most educational, pro-social, and rehabilitative programs. Instead, the overrepresentation of people of color in private, for-profit facilities – facilities with strikingly few rehabilitative programs relative to public corrections institutions – suggests that the containment of people of color, relative to ‘non-Hispanic, whites,’ functions primarily as a source of profit extraction”: Petrella and Begley, 2013, pp. 141–142.

149 Doty & Wheatley, 2013, p. 435; Saldivar & Price, 2015, p. 40.

150 Ackerman & Furman, 2013; Andrijasevic, 2015; Aviram, 2014, p. 424; Doty & Wheatley, 2013, p. 435; Saldivar & Price, 2015, p. 40. In the US context, Doty and Wheatley furthermore draw attention to private involvement in practices of ‘attrition through enforcement’. This notion is based on the idea that undocumented migrants can effectively be expelled through the implementation of extremely sober and discouraging measures and strict enforcement policies. Like crimmigration, it is aimed at preventing the social embedding of deemed

in the penal realm, they have arguably not only met the demand but have, on the basis of their inherent profit motive, gone to greater lengths in order to expand the immigration detention market.¹⁵¹

On the other hand, crimmigration is also a *modus operandi* in many private immigration detention facilities. Indeed, in many cases the “persistence of criminal subjectivity is deeply embedded” in the institutional operations of private immigration detention facilities, which often operate as if they are prisons.¹⁵² This is hardly surprising now that many private actors involved in the immigration detention market are simultaneously involved in the prison market and employ facilities, services, and staff interchangeably on both markets. Consider, for example, private immigration detention facilities in the UK. Of the eight designated Immigration Removal Centres (IRCs) in the UK, seven are currently being run by private contractors, many of which are also involved in the prison industry.¹⁵³ Such IRCs are used for administrative purposes but appear to incorporate punishment at their core. Indeed, “the links that exist between the state and the private sector in the management of non-citizens, as embodied in the corporations that run the removal centres, continue to intermingle punishment and capital in depressingly familiar ways”.¹⁵⁴

3.4.3 Crimmigration and the offshoring of prisons

As the previous chapter has outlined, up-to-date the only genuine offshoring of prisons has happened in the Netherlands in partnership with respectively Belgium and Norway. Since the Norwegian-Dutch cooperation in PI Norgerhaven is one of the central case studies of this research and its crimmigration aspects will be separately and more in depth discussed in section 3.5.2, it suffices here to only address some brief reflections in relation to the Belgian-Dutch cooperation.

Experiences with the Belgian-Dutch penal cooperation in PI Tilburg showcase that there is a real danger that the position of transferred prisoners is worsened. Indeed, the Flemish Community (*‘Vlaamse Gemeenschap’*), which in Belgium is responsible for providing social services such as education, reintegration, and therapeutic services, was not represented in PI Tilburg as it had no extraterritorial authority – it consequently was labelled “the main

outsiders, yet in doing so it relies primarily on ‘voluntary’ self-deportation: Doty & Wheatley, 2013, pp. 434–435. See also García, 2013, pp. 1849–1850; Kobach, 2008; Theodore, 2012, pp. 95–98.

151 Bacon, 2005, p. 4; Menjivar, Gómez Cervantes, & Alvord, 2018.

152 Welch, 2014, p. 90.

153 Silverman & Griffiths, 2018.

154 Bosworth, 2008, p. 208. There is, in addition, a certain amount of cross-fertilisation, with publicly run immigration detention centres increasingly mirroring the incorporation of penal elements: see Bosworth, 2016, p. 5.

absentee".¹⁵⁵ Whilst this does not appear to be a deliberate construction, it did leave prisoners in the facility in a more precarious – and, arguably, a more excluded and alienated – situation as their access to a range of social services was hampered. Put differently, this absence may not so much be a deliberate part of the facility's *modus operandi* – PI Tilburg remained under Belgian command and functioned as an annex of a Belgian facility – but it certainly contributed to the marginalisation and exclusion of the prisoners confined in the offshore facility.¹⁵⁶

Furthermore, whilst selection criteria had been set out in the Belgian-Dutch Treaty regulating which prisoners could be transferred, in practice PI Tilburg had become the preferred destination for the FNPs population of Belgium. Indeed, "over time, non-citizens convicted in Belgium have become the majority of inmates [in PI Tilburg]. This could be seen as [an] example of separating out foreign national prisoners, and, as such, an increasing trend".¹⁵⁷ As De Ridder rightfully points out, this overrepresentation of deportable FNPs in PI Tilburg is remarkable given that the Belgian-Dutch Agreement had explicitly ruled out the transfer of prisoners unauthorised to stay in the Netherlands.¹⁵⁸ Crimmigration therefore appears to be a real outcome of this type of commodification, although this does not mean that it is a matter of design nor that it is necessarily undesirable per se. Rather, crimmigration in this instance seems to be a collateral consequence.

3.4.4 Crimmigration and the offshoring of immigration detention

Crimmigration similarly plays an important role in a variety of offshore immigration detention facilities. It often is not only the catalyst for the creation of such facilities but also their *modus operandi*.

In extremis, Guantánamo Bay Naval Base functions simultaneously as a MOC and as a military prison used as a detention site for hundreds of aliens that face permanent exclusion from the US.¹⁵⁹ In this sense, Guantánamo Bay is characterised by an inherent crimmigration duality, with the site functioning simultaneously as prison and as immigration detention facility. In the 1990s, when Guantánamo Bay functioned as detention facility for Haitian asylum seekers and refugees, it moreover already clearly incorporated a crimmigration rationale given that offshore immigration detention was premised on the rationales of security and deterrence and operated in a prison-like fashion.¹⁶⁰

¹⁵⁵ League for Human Rights, 2011, pp. 9–13.

¹⁵⁶ League for Human Rights, 2011.

¹⁵⁷ Pakes & Holt, 2017, p. 71.

¹⁵⁸ De Ridder, 2016b, p. 128.

¹⁵⁹ See footnotes 196–214 of chapter 2 and accompanying text.

¹⁶⁰ Barta, 1998, p. 323; Dastyari & Effkeny, 2012, p. 57.

As outlined in the previous chapter, it was at times even used to exclude certain asylum seekers – those tested HIV-positive – from the US by their ongoing detention in dilapidated facilities surrounded by razor barbed wire and guarded by military personnel.¹⁶¹

As another example, Italy financed immigration detention facilities in Libya because of fears for impending “invasions” of migrants, terrorism, organised crime and criminal networks.¹⁶² The conditions and safety of these facilities as well as the availability of services have subsequently been duly criticised.¹⁶³ In enforcing these offshore detention frameworks, Italy has returned individuals to Libya since 2004¹⁶⁴ and has furthermore initiated an interdiction policy in 2009 – which was later struck down by the European Court of Human Rights (‘ECtHR’) in *Hirsi Jamaa v. Italy*.¹⁶⁵ More generally, these offshore detention measures were accompanied by European initiatives encouraging third countries, including Libya, to criminalise the irregular departure of migrants to Europe.¹⁶⁶ In this sense, it is thus not only true that “[d]etention serves to implicitly punish those seeking to get to the EU by boat”.¹⁶⁷ The focus was also very much on the incapacitation of potential threats and perceived criminal individuals in order to make sure that they would not reach the European continent.

The RPCs in PNG and on Nauru are likewise characterised by crimmigration aspects. The crimmigration elements of these facilities however closely resemble one another, and will thus be dealt with integrally in the next section, which is concerned with the crimmigration elements of the central case studies of this research.

3.5 CRIMMIGRATION ON A LOCAL LEVEL: EXAMINING THE CASE STUDIES

3.5.1 RPC Nauru: a crimmigration perspective

The existence of RPC Nauru – and, for that matter, of RPC Manus – has consistently been premised on the conflation of irregular boat migration with the idea of deviant and/or criminal ‘others’.¹⁶⁸ Indeed, such conceptions have been central to the offshore processing policy since its genesis in 2001 and

¹⁶¹ Barta, 1998, p. 332; Dastyari, 2015a, p. 97.

¹⁶² Andrijasevic, 2010, p. 7; Bialasiewicz, 2012, pp. 857–861; Michael Flynn, 2014, p. 191.

¹⁶³ Gerard & Pickering, 2014, p. 600; Hamood, 2006.

¹⁶⁴ Hamood, 2006, p. 23.

¹⁶⁵ Returning boats to Libya without a proper review of the asylum claims of those on board violated Articles 3, 4, and 13 ECHR: ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), 22 February 2012, Application no. 27765/09. See also Gerard & Pickering, 2014, p. 596.

¹⁶⁶ Carrera et al., 2018, p. 29; Gammeltoft-Hansen, 2017, p. 37.

¹⁶⁷ Gerard & Pickering, 2014, p. 601.

¹⁶⁸ This section is a modified version of part of a previously published article: Van Berlo, 2015a.

have persisted in the various offshore processing policy frameworks ever since.¹⁶⁹ With the introduction of OSB, offshore processing has become military-led and has further standardised that unauthorised maritime arrivals are fully barred from resettlement in Australia.¹⁷⁰ Hodge speaks in this regard about a “transfer of illegitimacy” and a “criminalisation of asylum seeker bodies”, thereby firmly drawing the policy in the crimmigration debate.¹⁷¹ The importance of the fact that border control has become a military affair cannot be underemphasised in this regard either: as Graham has stipulated in a broader context, we are witnessing a proliferation of militarised borders between countries all over the world “geared towards trying to separate people and circulations deemed risky or malign from those deemed risk-free or worthy of protection”.¹⁷²

On the one hand, crimmigration in this setting is thus very explicit: the use of military border patrols and prison-like, punitive facilities is a clear-cut example of crimmigration. Likewise rather explicitly, the offshore processing facilities involve private contractors that also operate in global prison markets, which runs the risk of conflated procedures, practices, and standards.¹⁷³ On the other hand, however, crimmigration is also a much more ingrained element of the policy framework as a whole. A sense of criminality and illegality is deeply entrenched in the Australian Government’s rhetorical discourse on boat migrants, which has served as a prime justification for offshore processing ever since it was introduced in 2001.¹⁷⁴ Thus, in examining the Pacific Solution, Welch has argued that offshore processing under the Pacific Solution was effectuated by the Australian government through the combined use of ‘walls of noise’ (or ‘loud panicking’) and ‘walls of governance’ (or ‘quiet manoeuvring’).¹⁷⁵ On the one hand, political discourse was used to erect a ‘wall of noise’ about the arrival of irregular (or, to use the same language as the discourse at hand, ‘illegal’) migrants and to provide a subsequent basis for the respective governments to introduce restrictive legislation and policies to counter-act such arrivals.¹⁷⁶ As such, “discursive practice has served to construct a mythic image of a deviant and criminal asylum seeking population that has enabled the justification of increasingly restrictive and draconian legislation and policy”.¹⁷⁷ On the other hand, the various governments utilised a variety of ‘governance walls’ – including offshore detention, privatisa-

169 Penovic & Dastyari, 2016, p. 143; Rajaram, 2003; Van Berlo, 2015a; Welch, 2012.

170 Grewcock, 2014; Hodge, 2015.

171 Hodge, 2015, p. 122.

172 Graham, 2011, p. 89.

173 Van Berlo, 2017d.

174 Welch, 2012.

175 Welch, 2012.

176 Welch, 2012.

177 Banks, 2008, p. 43.

tion, and media stonewalling – “behind which the state quietly manoeuvres on matters of crimmigration”.¹⁷⁸

In earlier work, I denoted similar crimmigration elements of the Pacific Solution’s policy successor, OSB.¹⁷⁹ Thus, first, the Critical Discourse Analysis (‘CDA’) that I performed provided support for the view that the Australian government justified OSB by using ‘walls of noise’ and tactics of ‘loud panicking’. The respective ideas that (i) Australia’s national sovereignty and borders are under threat, (ii) such threat is the result of boat migration, and (iii) OSB is an effective policy framework to counter such threats are indeed explicitly – and in a rather loud sense – fostered by the discourse of the Australian government. References to the importance of protecting Australia’s sovereign borders against criminal activities associated with boat migration recur frequently in the discourse, with a strict approach of deterrence (“stopping the boats”) being approved on the basis of the allegedly large-scale problem.¹⁸⁰

In this process, immigrant populations are distinguished on the basis of their mode of transportation and arrival, “creating an undesired crimmigrant group of allegedly illegal, threatening and non-deserving boat migrants who buy a place from smugglers at the black market”.¹⁸¹ Not only are boat migrants regarded as primarily “seeking upward socioeconomic mobility”, thereby underemphasising their personal backgrounds, motivations, and protection claims,¹⁸² but they are also drawn into a discourse of crime and criminality more explicitly since they are discursively linked on more than one occasion to instances of sexual assault and piracy. As a result of the discursive outlining of boat migrants as an undeserving and illegal population that ought to be deterred and expelled, their ‘crimmigrant’ imago is continuously fostered – yet in the absence of counter-narratives of asylum seekers themselves, these framings are “very difficult to refute”.¹⁸³ Fleay and Briskman speak, in this context, about “hidden men”, which seems strikingly apt in light of the discourse analysis.¹⁸⁴

At the same time, boat migrants are not only discursively connected to illegality and criminality but are likewise – in a seemingly contradictory way –

¹⁷⁸ Welch, 2012, p. 331.

¹⁷⁹ Van Berlo, 2015a.

¹⁸⁰ Van Berlo, 2015a, p. 101.

¹⁸¹ Van Berlo, 2015a, p. 101. See also Schloenhardt & Craig, 2015; Welch, 2014. A similar tendency has been identified by Rowe & O’Brien, 2014 in relation to 2011 parliamentary debates on the so-called Malaysia Deal in Australia. Indeed, in these debates, asylum-seekers arriving by boat were similarly labelled as illegal, “further delegitimizing this mode of arrival and the people who travel this way”. As such, then, the mode of arrival has arguably become an implicit indicator of an asylum-seeker’s legitimacy.

¹⁸² Van Berlo, 2015a, pp. 101–102. See generally also Bradimore & Bauder, 2011; Greenberg, 2000; Welch, 2014.

¹⁸³ Van Berlo, 2015a, p. 102. See also Kneebone, 2008, p. 131.

¹⁸⁴ Fleay & Briskman, 2013.

depicted as vulnerable persons that need to be protected from drowning at sea.¹⁸⁵ In this sense, the discourse emphasises both the agency of boat migrants (in an active sense) and their vulnerability and powerlessness (in a passive sense). The two narratives are connected with one another, in turn, by pointing towards the need to deter human smuggling specifically. As Kneebone and Missbach report, “the framing of asylum seeking within a smuggling model has been consistently used by the Australian government to ‘securitise’ the concept of asylum and to justify the introduction of discriminatory, punitive and deterrent measures against asylum seekers seeking to enter Australian territory”.¹⁸⁶ On the one hand, then, OSB is aimed at keeping out the ‘active’ migrant using agency by becoming involved in smuggling (the migrant as a threat), whilst on the other hand it is aimed at protecting the ‘passive’ migrant from the dangerous trip at sea (the migrant as a victim). Whilst the policy is thus somewhat schizophrenic in the sense that it creates, through loud claims-making, a binary imaginary of irregular boat migrants as comprising both threats and victims, it does so in order to convincingly argue that a deterrence policy is, in the face of ongoing smuggling operations, the best overall solution both from a securitisation *and* a humanitarian perspective.

In addition to the use of ‘walls of noise’, OSB uses ‘wall of governance’ behind which the government has significant space to quietly manoeuvre. As I previously argued, the use of such ‘walls of governance’, and their stonewalling effect, becomes utmost clear from the discourse used by the Australian government.¹⁸⁷ Indeed, the discourse obfuscates issues of responsibility by referring to the opaque policy constructions in place. On the one hand, the offshore processing centres are discursively considered markedly Australian: Australia is indeed considered “to fund the construction and maintenance of the centres, to plan and manage operational matters and practical arrangements, to tender private contractors, to ensure health care, safety, dignity and respect for detained migrants, to have the power to independently bring detainees from the RPCs to Australia’s mainland for investigative purposes, and to be able to restrict media access to offshore detention centres”.¹⁸⁸ On the other hand, the discourse simultaneously maintains that the RPCs are run by – and remain the responsibility of – the authorities of Nauru and PNG, and that their operation is subjected to the respective Nauruan and PNG laws. Furthermore, the discourse highlights the important role of private contractors and their respective responsibilities. Through language of ‘partnerships’ and ‘joint committees’, responsibility is further diffused.

185 Van Berlo, 2015a, p. 102.

186 Kneebone & Missbach, 2018, p. 380.

187 Van Berlo, 2015a, p. 103. See also Andrew & Eden, 2011, p. 232.

188 Van Berlo, 2015a, p. 103.

In this sense, not only the use of remote confinement, private contractors, and media stonewalling techniques, but also the use discourse *itself* has by and large become a ‘wall of governance’ that allows the Australian government to manoeuvre relatively quietly and without much scrutiny. Thus, as I concluded elsewhere, since the Australian government’s discursive practices dominate the discursive field,

“they provide suitable platforms for the authorities to control which and how discourses are distributed and consumed. They therefore allow for a particular narrative to be expressed, leaving little room for both alternative narratives and critical approaches to be outlined. This stretches further than the stonewalling mechanism as identified by Welch: indeed, media – and as such, the public – are not only stonewalled through the withholding of information, but certain narratives also remain, through the choice of discursive practice, significantly underexposed. [D]iscourse *itself* has [thus] become a form of quiet manoeuvring – not only in what it conveys, but also in what it does *not* convey and what remains at the margins – or is even left out in its entirety – of the debate.”¹⁸⁹

Dominant discursive practices hence constitute building bricks not only for ‘walls of noise’, but also for ‘walls of governance’.¹⁹⁰ Even more so, the Australian government’s discursive practices do not only foster crimmigration by simultaneously creating loud panic and walls of governance, but these two practices moreover constantly feed into – and reinforce – one another. Thus, whereas loud panicking is used to *legitimise* the use of quiet manoeuvring tactics, the use of quiet manoeuvring tactics is conversely used to *legitimise* loud panicking as it mutes alternative narratives and leaves the dominant discourse of panicking largely unaffected.¹⁹¹

3.5.2 PI Norgerhaven: a crimmigration perspective

PI Norgerhaven likewise incorporated crimmigration elements, albeit much less obviously. Indeed, the Norwegian-Dutch cooperation was not so much – or at least, not directly – *fuelled* by crimmigration, but rather established on an ad hoc basis. Still, such offshore prisons operate on the premise that there is no fundamental problem in executing one’s penal sentence in a different jurisdiction, thereby physically and symbolically removing prisoners not only far away from the community but also out of the polity altogether. Guarded by Dutch guards on Dutch territory, these populations were both physically and to some extent symbolically excluded from the territory and community in which they were charged and convicted. Compared to the Belgian-Dutch

189 Van Berlo, 2015a, pp. 103–104.

190 See similarly Tazreiter, 2017.

191 Van Berlo, 2015a, p. 104.

arrangements, this appears peculiar particularly in relation to the Norwegian-Dutch arrangements: indeed, the Norwegian penal system – like other penal systems in the Nordic countries – is based on the principle of normality, which basically entails that prisons should not *add* suffering. Thus, there should be no essential difference between prisons and other public establishments in order to keep prisoners included in society.¹⁹² In light of the aim of rehabilitation underlying this ‘Norwegian exceptionalism’, “it makes sense that prisoners during their sentence are never truly removed from society”.¹⁹³ In turn, Pakes and Holt maintain that “[i]f there is [...] a process of bifurcation underway, the move to house prisoners sentenced in Norway to serve part of their sentence in the Netherlands certainly is by far its most eye-catching manifestation”.¹⁹⁴ Put differently, central to these arrangements was the very fact that convicts can be transferred to confinement places far beyond the sovereign territorial border, therewith being physically and to some extent also symbolically removed from the community in which – and by which – they were sentenced. This removal was, furthermore, much more profound than the removal that was involved in the Belgian-Dutch arrangements, as the transfer of Norwegian prisoners was characterised by longer distances and significant differences in both language and culture.

In addition, similar to the Belgian-Dutch arrangements, in practice the inmate population at PI Norgerhaven consisted predominantly of FNPs, notwithstanding the extensive set of selection criteria in the Norwegian-Dutch Treaty. Thus, in 2016, 80% of the prison population of PI Norgerhaven did not have the Norwegian nationality.¹⁹⁵ Crimmigration thus appears to be a *collateral result* of the particular nodal arrangements in place, yet was not necessarily part of the facility’s initial design and was not necessarily without merits. For example, relocation to the Netherlands came with certain benefits for transferred prisoners, who were allowed to phone or Skype call their family more frequently and who received slightly higher allowances.¹⁹⁶ For various FNPs who lived without their families in Norway, a transfer to the Netherlands was hence argued to be less problematic and potentially even beneficial.

Although the Norwegian-Dutch cooperation appears not to be fuelled by crimmigration, and although it at times may yield even positive results for those confined, the adverse impact of crimmigration measures on those confined in PI Norgerhaven should not be underestimated. Since the vast majority of prisoners in PI Norgerhaven did not have the Norwegian nationality, the prison *de facto* became one of two Norwegian prison facilities that primarily

192 Y.A. Anderson & Gröning, 2016, p. 224; Pakes & Holt, 2015, p. 85.

193 Pakes & Holt, 2015, p. 85.

194 Pakes & Holt, 2015, p. 88.

195 Barske, 2016; Brosens, De Donder, Smetcoren, & Dury, 2019, p. 9; Hotse Smit, 2016; Johnsen et al., 2017, p. 4; Pakes & Holt, 2015.

196 Hotse Smit, 2016.

housed FNPs, the other one being Kongsvinger prison which is fully dedicated to FNPs. As Todd-Kvam points out, the Norwegian government represents the FNP populations housed in both facilities as “requiring a different prison regime”.¹⁹⁷ This bifurcation of prison regimes, amounting to bordered penalty, is justified with reference to the fact that FNPs are not to be rehabilitated in Norway, but to be deported when their sentence has been executed.¹⁹⁸ The negative impact of such bifurcated regimes for FNPs has been detailed in the literature, both in the context of Norway and elsewhere.¹⁹⁹ Ugelvik and Damsa have consequently labelled Kongsvinger prison a ‘crimmigration prison’, and such label could to a large extent also be extended to PI Norgerhaven.²⁰⁰ Even though PI Norgerhaven was under the Norwegian-Dutch cooperation not designed as a FNP facility as such, it indeed to a large extent fulfilled similar functions within the Norwegian penal infrastructure.

3.6 THE CRIMMIGRATION CHALLENGE TO INTERNATIONAL HUMAN RIGHTS LAW FROM A ‘GLOCAL’ PERSPECTIVE

So far, this chapter has problematised the notion of ‘crimmigration’ and has recalibrated it from the perspective of broader globalisation developments that ultimately reconfigure the way in which membership is understood and implemented in contemporary societies. In addition, it has contextualised such crimmigration developments in settings of confinement both at a macro level – looking at broad developments of the ‘criminalisation of immigration detention’ and the ‘immigrationisation of prisons’ – and at a micro level – by touching upon the crimmigration elements of RPC Nauru and PI Norgerhaven. As has become apparent, crimmigration can hardly be characterised as a coherent uniformity. Instead, it comprises a plethora of diverging developments affecting those straddling the criminal-immigrant divide. At their core, these developments have in common that they mark out the novel boundaries of belonging and enforce those boundaries through mechanisms of inclusion and exclusion that often are not only of a zoepolitical nature but also comprise biopolitical exclusionary elements.²⁰¹

Given that it captures such a wide breadth of processes and practices, and given that it plays out markedly differently in different contexts, crimmigration is firmly embedded in the glocal level. Indeed, when only the macro level would be emphasised, ‘crimmigration’ as a construct is hardly illuminating

197 Todd-Kvam, 2018, p. 14. See also Y.A. Anderson & Gröning, 2016, p. 227.

198 Todd-Kvam, 2018, p. 14.

199 See e.g. Bosworth, 2011a; J. Brouwer, 2017; De Ridder, 2016b; Di Molfetta & Brouwer, 2019; Turnbull & Hasselberg, 2017; T. Ugelvik & Damsa, 2017.

200 T. Ugelvik & Damsa, 2017.

201 See also Franko Aas, 2011; Schinkel, 2010.

as it captures a wide and heterogeneous variety of developments by which membership entitlements are redrawn, reaffirmed, or denied through the combined use of laws, policies, discourses, and practices belonging to the respective fields of criminal justice and migration control. When only the micro level would be emphasised, on the other hand, ‘crimmigration’ processes, and the way in which they function to effectuate novel categories of membership and belonging, cannot be structurally denoted given that such an approach does not allow for local occurrences to be embedded in more globally recognisable trends. Similar to commodification, crimmigration is hence a bi-directional process that takes place at the glocal level: global trends of increasing mobility and connectivity have spurred the merger of both domains in increasingly intricate ways at the local level, yet such experiences at the local level have in turn informed the way in which mobility and connectivity at the global level have developed. Ultimately, the entire process of membership reconceptualisation does not take place solely at the global level, nor solely at the local level, but somewhere in between at the glocal level.

The previous chapter has, with reference to a first fundamental tenet of international human rights law, already outlined why commodification as a sub-trend of globalisation might be problematic for international human rights law accountability as well as for the system’s effectiveness and legitimacy. As this section will analyse, crimmigration likewise poses a potential challenge to the very same elements of international human rights law: its progressive development at the glocal level affects possibilities to hold duty-bearers accountable and therewith potentially defies in whole or in part the effectiveness and legitimacy of international human rights law as a protection mechanism. Before providing further elucidation, however, attention should first be turned to international human rights law’s second fundamental tenet.

3.6.1 The second fundamental tenet: equal individuals

Chapter 2 highlighted that human rights gained international traction with the development of the UDHR, which as part of the post-World War II sentiment rapidly became the blueprint or cornerstone of international human rights law. The UDHR places particular emphasis on equality and dignity both in its Preamble and in Article 1, which stipulates that “[a]ll human beings are born free and equal in dignity and rights”. As broadly supported in the literature, this premise is central to human rights law.²⁰² To extend the metaphor of the previous chapter, it is the clay of which the cornerstone is made or the polyester film used to fabricate the blueprint. Consequently, human equality

202 Bantekas & Oette, 2013, p. 11; Blau & Esparza, 2016, p. 32; Carozza, 2013, p. 345; Gibney, 2016, p. 3; Hannum, 2016, p. 410; Howard & Donnelly, 1986, p. 801; Lowe, 2013, p. 523; Nolan, 2016a, p. 33; Ramcharan, 2015, p. 29.

and human dignity are according to some the most fundamental and pervasive concepts in the entire body of international human rights law.²⁰³ Perry even speaks about the “emergence, in international law, of the *morality* of human rights”.²⁰⁴

The reference to equal and autonomous individuals as beneficiaries of rights is exemplary for modern times and has often been traced to social contract theory.²⁰⁵ According to such theory, in giving up some of their autonomy in return for collectively provided safety and security, citizens run the risk that governments will misuse the powers it has acquired. Fundamental rights, in turn, are the insurance of all citizens against governmental tyranny: they mitigate the risk of misuse of power by expressing the parameters of political bargaining and by proposing limits on the government’s exercise of power.²⁰⁶ Human rights to a certain extent are the modern global translation – or even transformation – of this ‘insurance against tyranny’, applying in theory not only to citizens but to all humans. Indeed, “[i]n the areas and endeavors protected by human rights, the individual is ‘king’, or rather, an equal and autonomous person entitled to equal concern and respect”.²⁰⁷

This understanding has now become commonplace. Where human rights may once have been used as a tactic by the bourgeoisie to protect its self-interest, the logic of human rights as inalienable and universal claims protecting human dignity has “long since broken free”²⁰⁸ and is now even argued to be “a key tenet of our world”²⁰⁹ that is widely vaunted.²¹⁰ In fact, human dignity has served as a heuristic catchphrase to interconnect different categories of rights and entitlements under the generic header of human rights.²¹¹ This happens up to the point where almost every claim is translated into one of human rights: thus, “[t]he idiom of [human] rights is used to support anything that anyone thinks necessary for dignity and freedom, however defined”.²¹²

This foundation of international human rights law consists of a number of typical characteristics, notably those of universality, equality, and inalienability. At least in theory, all individuals are hence equally entitled to – and

203 Carozza, 2013, p. 345.

204 Perry, 2005, p. 31 (emphasis added).

205 See for example Donnelly, 2011, p. 15; Douzinas, 2000, p. 9; Gearty, 2006, p. 23; L. Weber et al., 2014, p. 5.

206 L. Weber et al., 2014, p. 6.

207 Howard & Donnelly, 1986, p. 804.

208 Howard & Donnelly, 1986, p. 804.

209 Ramcharan, 2015, p. 40.

210 Grear & Weston, 2015, p. 21. That is not to say that the close connection between human rights and human dignity has normatively remained undisputed: see for example Schroeder, 2012.

211 Habermas, 2010, p. 468.

212 Spickard, 1997. This in itself is problematic however given that it may ultimately render the human rights notion into an empty vessel: see Posner, 2014b, 2014c.

endowed with – universal and inalienable human rights. As outlined by Donnelly,

“[h]uman rights are typically understood [...] as the rights that one has simply because one is human. They are *universal* rights: every human being has them. They are *equal* rights: one either is a human being – and thus has these rights equally – or not. And they are *inalienable* rights: one cannot stop being a human being, and thus cannot stop having these rights. [...] Human beings are seen as equal and autonomous individuals rather than bearers of ascriptively defined social roles. [...] A human rights conception [...] insists that essential to their dignity, and to a life worthy of a human being, is the simple fact that they are human beings. This gives them an irreducible worth that entitles them to equal concern and respect from the state and the opportunity to make fundamental choices about what constitutes the good life – for them -, who they associate with, and how”.²¹³

Although apparently self-evident, it is nevertheless essential to underscore that the international human rights law framework was established on a *normative* ideal rather than an empirical truth. The idea that human rights are universal, equal, and inalienable rights for all humans simply because they are humans is a moral claim about how to organise social and political relations rather than a historical or anthropological fact – indeed, as many historical antecedents show, such a conception of social and political order has been highly unusual in societies and cultures both across time and space.²¹⁴ As Howard & Donnelly for example claim, all societies inhibit conceptions of human dignity but the conception of human dignity that underlies the international human rights law framework requires a particular liberal regime.²¹⁵ Human rights is thus a particular view of the world; a world in which all are equally worthy of esteem and each individual counts.²¹⁶ Nowadays, this view is entrenched in the legal domain, with human rights law being “law’s tallest peak”²¹⁷ and a sacred ideal in today’s world.²¹⁸ In turn, various authors have strenuously defended this universalist normative ideal and perspective, arguing that a basic set of human rights could be identified

213 Donnelly, 2011, pp. 13–14 (emphasis added).

214 Donnelly, 2011, pp. 14–15; Habermas, 2010; Schachter, 1983, p. 853; Spickard, 1997, p. 4.

215 In doing so, they refute earlier arguments by *inter alia* Khushalani that “the concept of human rights can be traced to the origin of the human race itself” and that “all the philosophies of our time” are committed to human rights: see Howard & Donnelly, 1986, p. 801; compare Khushalani, 1983.

216 Gearty, 2006, p. 4.

217 Gearty, 2006, p. 71.

218 Spickard, 1997, p. 3.

that would be claimed, affirmed, and defended by all and that such a system of basic human rights norms *should*, moreover, be “vigorously upheld”.²¹⁹

3.6.2 The crimmigration challenge to international human rights law

In light of this fundamental tenet, it *a priori* seems easily discernible why developments of crimmigration at the glocal level might structurally challenge international human rights law. Whereas international human rights law is fundamentally geared towards the protection of equal individuals on the basis of supposedly inalienable rights, through crimmigration novel categories of membership are created through complex processes of inclusion and exclusion that operate on both sides of states’ sovereign territorial borders. At the same time, however, it should also be recognised that states have *always* distinguished between different categories of membership, with the traditional distinction between citizens and non-citizens being an archetypal example. Indeed, a classic criticism of traditional human rights philosophies is that they were too often equated to sets of rights for *citizens* as opposed to non-citizens.²²⁰ This criticism for an important part has been overcome in more recent codification efforts, with entitlements in international human rights law specifically *not* being tied to citizenship status but extending to *everyone*. Viewed in this light, it is less obvious that the trend of crimmigration poses a challenge to international human rights law: whilst it may redraw the boundaries of belonging, such boundaries seemingly do not affect human rights entitlements in the books.

However, as will be explored below, structural developments of crimmigration at the glocal level *are* problematic from a human rights law perspective in present-day reality, as they potentially challenge human rights law both in the books and in action. As a result of crimmigration efforts, rights of particular populations are indeed limited on the one hand (circumscribing the allocation of entitlements in the books), whilst it becomes increasingly difficult for certain out-grouped populations to claim and effectuate their human rights law entitlements on the other hand (limiting avenues for answerability and enforcement in action). This argument in itself is not entirely novel: in relation to the rights of non-citizens, such criticism has indeed been

219 Ramcharan, 2015, pp. 62–71. Such claims are, however, not undisputed. In particular over recent decades, questions about the moral authority of human rights have attained prominence. As Gearty metaphorically maintains, “[d]espite its legal and political success, the idea of ‘human rights’ has been looking more and more like an awkward and ill-fitting old relative at the philosophical house parties of recent years, standing in the corner muttering about reality and ‘a sense of moral obligation’ while all about the young thinkers are jiving away grabbing what truth they can from the wordplay swirling about”: Gearty, 2006, p. 11.

220 See e.g. Weissbrodt, 2008.

voiced before.²²¹ What is new, however, is that it are not all, and not only, non-citizens that face such difficulties as a result of contemporary conceptions of belonging. On the contrary, it are both those considered sub-citizens, and those considered proper non-citizens (that is, excluding those considered supra-citizens), for whom such difficulties come into play. This will be further explored below by looking at how crimmigration challenges respectively *accountability* under, and the *effectiveness* and *legitimacy* of, international human rights law.

3.6.2.1 *The crimmigration challenge to international human rights law accountability*

As explained in the previous chapter, international human rights law functions as a system of accountability in the sense that it creates both duty-bearers and rightsholders. To briefly recapitulate, every genuine system of accountability comprises (i) the allocation of responsibility for certain legal obligations, thereby creating duty-bearers, (ii) the answerability of these duty bearers for the exercise of their power in light of the norms constituted by their legal obligations, and (iii) the enforcement of sanctions in relation to norm-transgressions by duty bearers.²²² The allocation of responsibility to duty-bearers happens in the books (or *de jure*) whereas their answerability and the enforcement of sanctions materialises in action (or *de facto*). In turn, chapter 2 has shown that commodification constitutes a potential challenge to the 'law in books', and, where the 'problem of many hands' arises, also to the 'law in action'. As will be argued here, crimmigration also has the potential of challenging both elements. Specifically, it may challenge the fundamental tenet of international human rights law outlined above, both by spurring the limitation of *de jure* entitlements that particular out-grouped populations enjoy, and by restricting their *de facto* opportunities to hold actors answerable and to have sanctions enforced.

On the one hand, as a result of crimmigration, an ever-changing population of 'outsiders' find themselves excluded from society, for instance through the application of confinement. This in and of itself does not mean that confined individuals are no longer ontologically of equal deservingness, nor that they are not entitled to universal and inalienable human rights. Indeed, all individuals within a state's jurisdiction are in principle rightsholders under a given treaty, irrespective of their background, and such universal and inalienable rights cannot be fundamentally revoked by the implementation of membership measures,²²³ notwithstanding the use of harsh rhetoric that at times seem

221 Including, notably, by Weissbrodt, 2008.

222 Kaler, 2002; Stapenhurst & O'Brien, 2000.

223 Although states do have options to derogate from their human rights obligations in times of emergency. Still, this is subjected to strict rules and does not apply to *all* human rights, with some being of a non-derogable nature. On this topic, see Doswald-Beck, 2011; Koji,

to imply the contrary.²²⁴ In fact, human rights law exactly promises to *fill* the gaps that exist as a result of differentiated entitlements based on citizenship or, more generally, membership categorisations.²²⁵ Human rights law is henceforth frequently considered emancipatory in the sense that it *should* be siding with the outsider, the marginalised, and the powerless, as it are those populations “who in any given culture or time are most likely to be invisible to those around them, who are most liable to find themselves pushed beyond the periphery of a community’s field of vision, or who are viewed as non- or sub-human if they are seen”.²²⁶ For these ‘underdogs’, human rights protection matters most, a principle that has been translated in human rights’ legal codification.²²⁷

However, in reality, various states have attempted to limit the rights guaranteed to certain populations, including those confined. Limits are accordingly not only placed on the right to liberty, which is obviously restricted through confinement, but also on a range of ancillary rights – such as those to privacy and family life – and at times even on rights concerning political activity such as suffrage.²²⁸ In this sense, the use of confinement as a crimmigration mechanism may ultimately lead to restrictions on individuals’ human rights entitlements. Indeed, as others have noted, this results in the treatment of non-belongers “not only as less than citizens but also as less than human beings”.²²⁹ Notwithstanding the fundamental premise of equal protection for all, therefore, some categories of individuals deemed non-belonging under novel conceptions of membership are potentially left with less protection than other populations in society.

On the other hand, crimmigration measures also seem to challenge accountability in action. Indeed, the more absolute the marginalisation and exclusion of an individual, the more difficult it arguably becomes to hold a duty-bearer answerable for the exercise of its power and to ensure that sanctions are enforced where appropriate.²³⁰ This has led some to speak about the “myth of human rights”: international human rights law may indeed promise to side with the underdog, but may remain mythical insofar as the promised standards of protection are not enforced in practice.²³¹

In order to properly understand this discrepancy between *de jure* entitlements and *de facto* enforcement, it is important to return to the notions of ‘walls of noise’ and ‘walls of governance’ as introduced in the context of RPC Nauru

2001.

224 L. Weber et al., 2014, p. 16.

225 Dembour & Kelly, 2011, p. 2.

226 Gearty, 2006, p. 5.

227 Gearty, 2006, p. 157.

228 See e.g. Dilts, 2014; Targarona Rifà, 2015; Wong, 2015, pp. 27–64.

229 Demleitner, 1999, p. 161.

230 On this topic, see also Dembour & Kelly, 2011, pp. 9–10.

231 Larking, 2014.

in section 3.5.1. above. To reiterate, as Welch proposes, we should consider the process of crimmigration in a sonic way. On the one hand, crimmigration measures are fostered by loud claims-making (or loud panic) about novel categories of non-belonging populations “whereby a barrage of sound bites and political assertions amplify an array of (putative) threats”.²³² Through these overwhelming and agitating ‘walls of noise’, an alarming image of an “infinite surplus of things to worry about” is created.²³³ On the other hand, crimmigration also operates quietly behind ‘walls of governance’: processes of exclusion frequently operate with reduced transparency.²³⁴ Both of these sides of the sonic spectrum are clearly recognisable in a variety of confinement settings that are characterised by crimmigration elements. Often, confinement of non-belonging populations straddling the criminal-immigrant divide is spurred by loud claims-making about the need to implement strict and punitive measures to protect society, or, more specifically, to protect the belonging population within society.²³⁵ At the same time, such confinement realms often operate behind walls of governance: as Welch points out, crimmigration often operates through silencing techniques including stonewalling, outsourcing, and offshoring.²³⁶ These measures make it simultaneously difficult for *outsiders* to look at what happens on the inside and for *insiders* to access legal services, representation, and publicity on the outside.²³⁷

Making duty-bearers answerable for their human rights obligations becomes a strenuous task in such situations. Indeed, on the one hand, loud claims-making fosters the felt need to restrict the rights of ‘others’. Through ‘walls of noise’, the progressive depletion of outsiders’ rights can thus be discursively justified in political and public debates. At times, states have even proposed that human rights should not apply *at all* to certain out-grouped populations.²³⁸ The focus hence becomes more and more not on the rights of ‘all’, but on the rights and security of those considered to belong.²³⁹ On the other hand, it is simultaneously difficult for those inside confinement to voice human rights issues and for those outside to hear and acknowledge such calls and

232 Welch, 2012, p. 329.

233 Welch, 2012, p. 329.

234 Welch, 2012, p. 331. See also Tazreiter, 2017.

235 See also Aiken, Lyon, & Thorburn, 2014, p. 3; Speedy, 2016; Van Berlo, 2015a; Welch, 2014, p. 81.

236 Welch, 2012, p. 331.

237 See e.g. Bosworth & Kellezi, 2016; Kalir, Achermann, & Rosset, 2019; Van Berlo, 2017d, pp. 65–67. Even more so, one could argue that many of those excluded already faced a lack of political and economic resources in the first place and that stonewalling tactics consequently only heighten their inability to struggle against their marginalised and excluded position: Dembour & Kelly, 2011, p. 9; Larking, 2014, pp. 135–136.

238 Consider, for instance, the refusal of the US government to treat prisoners of war in accordance with human rights law: see e.g. Luban, 2002; Sassòli, 2004.

239 Compare Gamal & Swanson, 2018, p. 381, who however link this to *citizenship* rights as “a marker of our times”.

to follow-up upon them, whether it be by means of litigation, research, media coverage, or otherwise. Of course, this is a matter of degrees rather than of absolutism: crimmigration does not necessarily stonewall excluded populations completely, but on many occasions their visibility and agency are at least to some extent reduced. Combined, ‘walls of noise’ and ‘walls of governance’ thus have a significant potential to undermine states’ accountability for their human rights obligations vis-à-vis excluded populations.

A complicating factor in this regard is that at times measures of crimmigration and commodification may be used conjointly. In such instances, the ‘problem of many hands’ does not simply arise due to the involvement of multiple actors, but is *intentionally* created and utilised as a ‘wall of governance’ to implement crimmigration measures without much human rights scrutiny. In this sense, crimmigration and commodification may intertwine in challenging international human rights law as a *de facto* protection mechanism. Ultimately, they seem to endlessly feed into one another: the exclusion of certain populations in commodified settings of confinement is justified by loud crimmigration measures that alienate them and make them excludable, whilst such exclusion in commodified settings consequently provides room for quiet manoeuvring that enables the process of crimmigration to continue in full swing. This once again highlights the importance of examining both trends consecutively.

In turn, the extent to which the purported challenges materialise ultimately depends on the precise context and the specific crimmigration measures at play. In particular, it should be acknowledged that those formally engaged in penal proceedings are generally much more protected by legal safeguards than those within immigration regimes.²⁴⁰ In this light it has been argued that “immigration detention has not been criminalized enough”.²⁴¹ In particular in penal settings, stonewalling will henceforth always be a matter of degree, for legal safeguards inherent to criminal and penal procedures generally mitigate such tactics. Immigration confinement contexts on the other hand provide, due to the lack of similar coherent and strong accountability mechanisms and safeguards, more room for quiet manoeuvring. Whilst states use both penal and immigration-related confinement in enforcing novel boundaries of citizenship, and whilst both domains increasingly merge and interrelate, the formal differences hence remain relevant.

240 See on this topic Bianchini, 2011, p. 390; Boone, 2003, p. 301; Bosworth, 2011b, p. 165; Chacon, 2009, p. 135; Chelgren, 2015; Hernández, 2014, p. 1346; Van Berlo, 2017d, p. 70; Wilsher, 2011; Zedner, 2007, p. 257.

241 Wilsher, 2011, p. 168.

3.6.2.2 *The crimmigration challenge to international human rights law effectiveness*

The issues of accountability identified above directly affect the effectiveness of international human rights law as a whole. This is rather self-explanatory: if the human rights entitlements of out-grouped populations are progressively limited, and if *de jure* duty-bearers cannot be held answerable *de facto* because they manoeuvre behind walls of governance that silences their actions and hides potential violations from scrutiny and public sight, international human rights law loses much of its potential as a protection mechanism. The limitation of rights and the use of the sonic spectrum discussed above thus to a large extent seem anathema to the human rights rationale, which is based on the idea that marginalised populations are provided with “a language with which to shout for attention, and then having secured it to demand an end to suffering and a better set of life-chances”.²⁴² Such language seems, rather, to be muted by the walls of noise and the walls of governance. In fact, through the use of both types of walls as crimmigration strategies, rightsholders may be left double victimised: they may suffer from a lack of effective protection against the commission of wrongs in the first place and, where such wrongs have occurred, they may lack effective ways to hold responsible duty-bearers to account.²⁴³

3.6.2.3 *The crimmigration challenge to international human rights law legitimacy*

Crimmigration developments ultimately challenge international human rights law’s legitimacy, as they seem to have significant implications for the express consent of states to the particular power relations propounded by international human rights law. Section 2.5.2.3. of the previous chapter has extensively elaborated upon the concept of ‘legitimacy’ – this will not be recounted here in full. It is of importance to stress here that crimmigration could indeed lead to a *delegitimation* of international human rights law’s hegemonic position as an expression of power or, alternatively, to a *legitimacy deficit*.

Indeed, on the one hand, crimmigration may progressively delegitimise international human rights law. That is to say, states – as the primary subordinates of international human rights law – might withdraw their consent to being bound by international human rights norms where such norms impede their possibilities to carve out the new boundaries of belonging. Indeed, where international human rights law traverses the continuously restructured categories of membership, states may consider human rights law increasingly as a delegitimised framework. In this sense it seems problematic that states are the subordinates of international human rights law, but also its masters: if states decide to pull the plug and withdraw from human rights treaties, or

²⁴² Gearty, 2006, p. 157.

²⁴³ Gibney, 2016, pp. 18–20.

if they alternatively decide to simply cold-shoulder international human rights obligations, international human rights law is comprehensively delegitimised and its power is minimised.²⁴⁴

Crimmigration in this sense constitutes a threat to the system's legitimacy, for its legitimacy may be retracted altogether where international human rights law become to be considered as too large of a stumbling block in the creation of novel boundaries of belonging. As human rights lawyers might argue, however, this is of course *always* a danger – in fact, the ever-present possibility of withdrawal or cold-shouldering of states of international human rights instruments is a demonstrative feature of the inherently precarious nature of the system. Nevertheless, from the perspective of legitimacy proper, this does not matter as a matter of principle: *if* the system is delegitimised by states, then this *consequently* is problematic – full stop. The assertion that crimmigration measures implemented by states conflict with the fundamental tenet of equal protection henceforth *is* problematic from a legitimacy perspective: where states draw novel boundaries of membership and, through walls of noise, sometimes even loudly claim that human rights should not extend to certain populations, any further push by the international human rights law machinery to nevertheless include these populations within its protection ambit may lead to the progressive delegitimation of the system as a whole, and, in turn, since delegitimation erodes legitimacy overall, this is problematic.

Of course, this does not mean that the international human rights law system should as a result cater to the needs and wants of states in order to avoid its own delegitimation: the determination that delegitimation might follow as a result of ongoing crimmigration developments indeed is not a normative call for action amounting to an accommodation thereof per se. Even more so, as to do so could entail that international human rights law increasingly faces a *legitimacy deficit* on the other hand. Allowing states to structurally extend protection only to particular categories of humans, on the basis of a mixed use of zoepolitical and biopolitical approaches, would indeed not be justifiable by reference to the shared beliefs of equal protection of dignity and wellbeing that underpin international human rights law.²⁴⁵ As Gearty eloquently emphasises,

244 This does not mean that a withdrawal by states from human rights treaties is always accepted by courts. Various human rights norms have, furthermore, transformed into *jus cogens* norms of customary international law. On the relationship between human rights and *jus cogens*, see in particular Bianchi, 2008; De Wet, 2013. See more generally also Benhabib, 2009, p. 699; D'Amato, 1995. This however does generally not solve the problem of cold-shouldering discussed above.

245 See, e.g., Blau & Esparza, 2016, p. xi; Brysk, 2002, p. 3; Černič, 2015, p. 70; Gewirth, 1992, p. 10; Jägers, 2002, p. 256; Landman & Carvalho, 2010, p. 1; McKay, 2015, p. 620; Wallace, 2002, p. 232.

"[i]n order to ensure its survival, the human rights idea needs to stand firmly against [the] distortion of its essence, [i.e. the] move to turn it into a basis for selective aggression abroad and an alibi for brutality at home. The moment the human rights discourse moves into the realm of good and evil is the moment when it has fatally compromised its integrity. For once these grand terms are deployed in the discussion, all bets are off as far as equality of esteem is concerned".²⁴⁶

The threat of progressive delegitimation should hence not be countered by creating a legitimacy deficit instead. Rather, it should inform a – rather wishful – call for action for those states that, when confronted with the legitimacy threat to international human rights law, wish to preserve the integrity of the international human rights law system either by their own volition or as a result of political, judicial, or social pressures. Indeed, in the end, whether or not crimmigration developments will structurally affect the legitimacy of the international human rights law system is a political choice that rests with states as human rights law's simultaneous subordinates and masters. Insofar as human rights law is concerned, *all* humans within a state's jurisdiction are included within its ambit on the basis of their mere humanity – it has, so to speak, done its part in preventing a legitimacy deficit from arising. Of course, as Part II of this book will address, international human rights law has *some* room to accommodate certain limitations of human rights without losing its legitimacy as such, but it is first and foremost up to states to live up to the human rights promises they have made to *all* individuals, or to alternatively disregard or abandon them. This latter approach would be a precarious path to go down, however, as it would call into question or even debunk arguments of genuine dedication to human rights norms and would structurally erode and delegitimise the international human rights law system as a whole.

3.7 CONCLUSION

In this chapter, crimmigration has been explored with a particular focus on its potential impact in settings of commodified confinement. Inspired by membership theory, the chapter has advocated a broad definition of the nomenclature 'crimmigration': it does not only refer to the importation of criminal grounds in migration control and vice versa, but covers a broad spectrum of rationales, rhetoric, and practices that ultimately serve to reshape contemporary understandings of membership and belonging. Crimmigration as such comes in many different shapes and forms: it is a multi-headed beast with only the faintest of contours. Through crimmigration processes, sub-citizens and non-citizens are increasingly excluded and expelled from society through *inter alia* the use of confinement, to the benefit of citizens and supra-

246 Gearty, 2006, p. 136.

citizens as the winners of globalisation.²⁴⁷ Whilst crimmigration is not only at play in the field of confinement, and whilst not all confinement is targeted at effectuating crimmigration, confinement assumes a prominent role in the field of crimmigration now that it enables for both the segregation and punishment of the non-member. To examine how this plays out, a glocal level analysis has been advocated here, taking into account both global developments, local occurrences, and their interlinkage.

Given that crimmigration is also at play in non-commodified facilities and that not all commodified facilities incorporate crimmigration to the same extent, one could wonder why commodification and crimmigration should be examined in conjunction. Such a focus is however warranted for at least two reasons. First, as this chapter shows, crimmigration and commodification are often intimately linked both explicitly and implicitly, with crimmigration frequently being the fuel, *modus operandi*, and/or collateral consequence of commodification, whilst commodification as a wall of governance allows crimmigration measures based on loud panicking to operate quietly. Commodified facilities are as such often quintessential examples of crimmigration in the confinement realm. Second, whilst both developments exist independently from one another, they both potentially have a significant impact on human rights protection, albeit on different grounds and for different reasons. Indeed, as this Part has pointed out, both crimmigration and commodification constitute potential challenges to international human rights accountability as well as to the effectiveness and legitimacy of international human rights law. From a human rights perspective, it is therefore particularly warranted to closely examine situations where crimmigration and commodification are combined – such as the case studies centralised in this research – as it are those situations where the largest challenge may arguably be expected from. The challenges posed by both globalisation developments to human rights in confinement, then, is the elephant in the room that will be central to the remainder of this book.

247 At the same time, as has been pointed out above, these categories are flexible: which category one belongs to depends not solely on formal citizenship status but on a range of constantly changing zoepolitical and biopolitical conditions.

PART II

The tuskless elephant

A promise under strain? The veracity and resilience
of international human rights law in the books

4 | The last among equals? Limiting human rights in confinement

4.1 INTRODUCTION

The story obviously does not end with the preliminary conclusion drawn in Part I that the international human rights law system may be challenged in settings of confinement characterised by commodification and crimmigration. To the contrary, international human rights law is not static but is ongoingly developed and shaped in accordance with present-day realities. Extending the metaphor of elephants, whilst most elephants usually die when deprived of their tusks by poachers, recent research indicates that contemporary populations of African elephants showcase an “artificial genetic drift to tusklessness” as a response to ivory harvesting, with the tusked phenotype slowly disappearing in the African landscape.¹ This may indicate that elephant populations start to adjust themselves to external forces that threaten their continued existence, and as such, that they ultimately can survive as a species even in the face of the most imminent threat. As Raubenheimer & Miniggio conclude, this could “serve as the biological change that may provide hope for the survival of this splendid animal”.² At the same time, however, these adjustments are “suboptimal, rendering the herds unable to dig for water, feed adequately, or fend for themselves”.³ The prospects, therefore, are mixed: survival may be secured through direct resilient response to outside forces, but remains precarious in the long run. Comparing these developments to the challenges posed by commodification and crimmigration to international human rights law, the question hence becomes whether international human rights law equally finds novel pathways to resiliently secure its continued existence as a protection framework – in other words, whether it is able to accommodate the commodification and crimmigration challenges to its fundamental premises – and if so, how durable these solutions are in the long run.

This chapter will begin with a brief elaboration of the way in which the two fundamental tenets of international human rights law rather paradoxically interrelate *and* are at odds with one another. Indeed, international human rights law is ultimately a Janus-faced phenomenon in the sense that it addresses moral claims in a legal framework, resulting in a certain tension between both

1 Raubenheimer & Miniggio, 2016.

2 Raubenheimer & Miniggio, 2016, p. 335.

3 Raubenheimer & Miniggio, 2016, p. 335.

tenets. In turn, the fact that international human rights law is Janus-faced simultaneously *provides for*, and *limits*, the ability to accommodate crimmigration and commodification challenges within its internal logic. That is to say, its inherent duality allows for the international human rights law system to show a certain amount of resilience in the face of globalisation challenges, whilst requiring it at the same time to remain sufficiently veracious to its underlying fundamental tenets.

The purpose of this Part is to understand the extent to which international human rights law has been able to show resilience in the face of crimmigration and commodification without losing its veracity as such. In pursuit of this endeavour, chapters 5-7 and the concluding intermezzo will discuss the way in which international human rights law has dealt both veraciously and resiliently with *commodification*. Since this is arguably a complex process, this issue will be dealt with in multiple consecutive chapters. The present chapter on the other hand will, after outlining the paradoxical interrelationship of both fundamental tenets of international human rights law, turn to the way in which international human rights law has shown both veracity and resilience in the face of *crimmigration* challenges. It will do so, particularly, by looking at the extent to which international human rights law has allowed for rights to be limited or interfered with by state governments. The focus will be on *treaties* rather than on customary international human rights law,⁴ addressing in particular two selected human rights instruments that apply to one or both of the case studies central to this research: the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). This choice is informed by the idea set out below that limiting the rights of confined populations can be based either on their confinement itself, which limits *civil* rights, or on the basis of their depleted membership status, which limits *political* rights. This chapter therefore deliberately focuses on two core instruments codifying such civil and political rights.

As previously noted, throughout this part, the focus will remain both on global developments – outlining broad developments under respective treaty regimes – and on the local contexts of RPC Nauru and PI Norgerhaven. This allows for conclusions to be drawn at the ‘glocal’ level.

4 In support of such approach, see e.g. D’Amato, 1995. In fact, establishing whether the customary law requirements of consistent state practice and *opinio juris* are fulfilled for concrete human rights remains a strenuous task: Chinkin, 2014, pp. 81–82; Dimitrijevic, 2006, pp. 4–5; Skogly, 2006, pp. 109–110.

4.2 THE FUNDAMENTAL TENETS: INTERNATIONAL HUMAN RIGHTS LAW AS A JANUS-FACED PHENOMENON

As Part I has examined, territorial states are the primary duty-bearers of international human rights law obligations, whilst the corresponding entitlements are “grounded in human dignity, which inheres in all individuals regardless of who is in a position to affect these obligations”.⁵ This, however, makes international human rights law a rather paradoxical legal domain. Whilst the rights created are supposedly universal, the obligations are markedly parochial.⁶ Some have denoted this paradoxical nature as a distinction between *lex ferenda* and *lex lata*;⁷ others denote it as a distinction between the *sollen* and the *sein* of human rights law.⁸ As Gammeltoft-Hansen indicates, “as positive law the normative ideals are awkwardly sought reconciled with an existing normative framework structured around idealised but ever strong principles of national sovereignty”.⁹

The international human rights law relationship thus incorporates simultaneously universal aspirations, based in moral conceptions of human dignity, and local responsibilities, based in positive law. As Habermas argues, this represents the ‘Janus face’ of human rights law:

“[b]ecause the *moral promise* of equal respect for everybody is supposed to be cashed out in *legal currency*, human rights exhibit a Janus face turned simultaneously to morality and to law [...]. Notwithstanding their exclusively moral *content*, they have the form of enforceable subjective rights that grant specific liberties and claims. They are designed to be *spelled out in concrete terms* through democratic legislation, to be *specified* from case to case in adjudication, and to be *enforced* in cases of violation. Thus, human rights circumscribe precisely that part (and only that part) of morality which *can* be translated into the medium of coercive law and become political reality in the robust shape of effective civil rights”.¹⁰

In denoting the ‘right to have rights’, Hannah Arendt also points to the significant discrepancy between the normative promise and the legal translation of human rights: notwithstanding the proclamation of human rights as universal and inalienable, their embedding in a binary relationship between nation states and those within its jurisdiction – typically the nation state’s citizens – leaves various individuals with no avail insofar as human rights protection is concerned.¹¹ According to Arendt, we should thus focus on what she calls

5 Ronen, 2013, p. 21.

6 See similarly Donnelly, 2011, p. 18; Gibney, 2016, p. 10; Grear & Weston, 2015; Lohmann, 2007, p. 4.

7 Ronen, 2013.

8 Gammeltoft-Hansen, 2011, pp. 276–277.

9 Gammeltoft-Hansen, 2011, p. 276.

10 Habermas, 2010, p. 470 (original emphasis).

11 Arendt, 1951.

the ‘human condition’ – or our ability to act – in order to make sure that human rights are effectively protected in practice, rather than on the ‘human’ as a fundament for the legitimacy of any human rights notion.¹²

Notwithstanding these negative connotations underlying human rights law as a Janus-faced phenomenon, both faces have obvious merits. The *human* aspect of human rights protects an important sense of dignity; it codifies a grand claim of an arguably utopian world vision that functions as a particular moral sorter. The *rights* aspect of human rights on the other hand provides a certain level of enforceability; it translates open-ended moral standards into potentially strong judicial claims and instruments to fight both repression and more subtle denials of justice for the weak. At times, however, it may appear that one face has to be preferred over the other – indeed, various scholars have argued to either scrutinise or expand human rights law’s reach on the basis of its moral underpinning, or to accept the limited reach of human rights law as opposed to the broader moral notion of human rights.

Both positions have been veraciously defended. A good example of the former is Ronen, who claims that nothing in human rights theory

“precludes the imposition of legal obligations on actors other than states. Indeed, states are hardly the only entities capable of infringing upon human dignity. Optimally, protection of human rights should therefore extend to all situations in which these rights are threatened, irrespective of who puts them in jeopardy. [...] The present international legal structure, under which human rights obligations are imposed only on states, is therefore neither self-evident nor immutable”.¹³

Identifying the contemporary legal human rights system as a “nightmare [that] has to end”, Gibney similarly calls for a reconfiguring of legal human rights protection guided by “a return to core, universal principles”.¹⁴ Thus, according to him, “the term ‘human rights’ should convey the understanding that all people have human rights and that all States have the responsibility to protect those rights – for all people”.¹⁵ Some even coin the idea that identifying human rights law as “a noble lie” may help to mobilise energy and support for establishing real justiciable rights with moral grounding.¹⁶

Hannum, on the other hand, maintains the latter position. According to him,

“the contemporary content of human rights is defined most clearly and most powerfully as law. [...] [t]he status of human rights as law needs to be protected

12 Arendt, 1951.

13 Ronen, 2013, pp. 21–22.

14 Gibney, 2016, p. 2; 20.

15 Gibney, 2013, p. 47. For Gearty, human rights law is a means to an end and should be condemned if it fails to secure this end: see Gearty, 2006, p. 4.

16 O’Neill, 2005, pp. 429–430.

and [...] the distinction between legal obligations and other obligations of a moral or political nature needs to be maintained. 'Human rights' may mean all things to all people, but 'international human rights law' cannot".¹⁷

Likewise, Buchanan argues that "[h]uman rights law, not any philosophical or 'folk' theory of moral human rights, is the authoritative lingua franca of modern human rights practice".¹⁸ He maintains that human rights "are what they are: legal rights; and legal rights need not be embodiments of corresponding moral rights. Nor need legal rights be justified by appealing to moral rights".¹⁹

In turn, others warn against the undue favouring of either of both faces over the other. Habermas, for instance, observes that "this ambivalence can lead us all too easily into the temptation either to take an idealistic, but noncommittal, stance in support of the exacting moral requirements, or to adopt the cynical pose of the so-called realists" – rather, one should "think and act realistically without betraying the utopian impulse".²⁰ Accordingly, this approach requires delicate balancing of both sides of international human rights law's Janus face.

In the end, international human rights law seems *necessarily* based both on normative ideals *and* on the body of positive law, incorporating elements of both human rights' *sollen* and human rights' *sein*.²¹ Indeed, international human rights law can only be properly understood when regarding both its normative universal aspirations and its positivist legal footing, constituting two distinct yet interconnected and interdependent sides of the same Janus-faced phenomenon.²² Both international human rights law's positivist legal footing and its telos can, after all, not be neglected nor erased, as both go to its core as a system of both legal *and* moral values. Just like elephants, international human rights law hence has essentially two tusks, consisting of a moral promise of equal protection on the one hand and of legal capacity to hold power-bearers responsible on the other.

This also means that the challenges posed by crimmigration and commodification can only be accommodated within the international human rights law system insofar as the two tenets of international human rights law are not fundamentally neglected. Put differently, the development of international human rights law should show *resilience* in the face of globalisation challenges in order to remain relevant, whilst simultaneously remaining *veracious* to its fundamental tenets in order to maintain integrity – a task that requires a delicate balance that may be difficult to strike. Indeed, accommodating global-

17 Hannum, 2016, p. 411.

18 A. Buchanan, 2013, p. vii, emphasis omitted.

19 A. Buchanan, 2013, p. 11.

20 Habermas, 2010, p. 478.

21 Gammeltoft-Hansen, 2011, pp. 276–277.

22 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 1.

isation challenges in a way that takes into account both the ultimate goals of equal and universal protection, *and* the limitations and particularities of human rights' embeddedness in positive law, is anything but a sinecure. No matter the arduousness of such endeavour, a proper balance between veracity and resilience needs to be struck for international human rights law to remain legitimate. Indeed, as Part I of this book has explored, both where international human rights law would not adjust itself to contemporary globalisation developments, and where it adjusts itself too much to such developments, it runs the risk of losing its legitimacy overall as a result of the ensuing illegitimacy, legitimacy deficit, and/or delegitimation of the system.

Concretely, in contexts of *commodified* confinement, this means that international human rights law has to accommodate commodification within its framework in order to provide unabated protection to all populations confined by a nodal network of governance actors, whilst simultaneously staying veracious to its fundamental tenet that human rights obligations are, *in principle*, obligations of territorial states. This delicate effort will be addressed in chapters 5-7 and the intermezzo that concludes this Part. In the context of *crimmigration* in confinement, on the other hand, this means that international human rights law has to account for crimmigration within its framework by closely regulating nuances in human rights protection for confined 'outsiders', yet in doing so it should continuously stay veracious to its fundamental tenet that human rights entitlements pertain, *in principle*, to all human being equally. This will be the prime concern of the remainder of this chapter. Overall, resilience consequently requires that the fundamental tenets are sufficiently bent, yet certainly not beyond their breaking point.

4.3 INTERFERING WITH HUMAN RIGHTS ENTITLEMENTS

Chapter 3 has shown how confinement can be used as a crimmigration strategy. As was also outlined in the same chapter, various states have, as part of their crimmigration arsenal, argued that particular groups of 'outsiders' should be entitled to less human rights protection. This includes certain confined populations: some states have indeed proven to be particularly reluctant to recognise their human rights entitlements.²³ At the same time, international human rights law's fundamental tenet of equal protection as based in morality does not, at least not in principle, allow for such reluctance. Wong observes in this regard that "chasmal gaps" exist between normative discourse on human rights on the one hand, and state rhetoric and practices on the other.²⁴

Informed by this apparent gap, this section discusses the extent to which international human rights law has been able to remain veracious to its funda-

²³ See e.g. Wong, 2015, p. 28.

²⁴ Wong, 2015, p. 28.

mental tenet of equal protection for all, whilst showing resilience in the face of limitations placed upon human rights entitlements by states. Specifically, it looks at the extent to which limitations have been accommodated for within the human rights law system and how this relates to the promise of equal protection. As will be shown, being a Janus-faced phenomenon, international human rights law has as a positivist doctrine of law allowed states to place certain limitations on the enjoyment of supposedly universal and equal rights. International human rights law in this sense has always recognised that at times, states may legitimately deviate from some of their human rights responsibilities, with a difference being marked between absolute rights (that cannot be deviated from) and relative rights (that can be deviated from).²⁵ For instance, international human rights law allows states to derogate from some of their obligations in times of emergency, although subjected to strict conditions.²⁶ Moreover, of particular relevance for the issue at hand, the doctrine of international human rights law has acknowledged that some of the rights of certain populations, including those of confined sub-citizens or non-citizens, may be interfered with by states as part of their sovereign prerogative. Specifically, it allows for some *civil* rights to be limited on the basis of the fact that those individuals are *confined*, and for some *political* rights to be limited on the basis of the fact that those individuals do not enjoy (full) *membership*. These two broad categories will now be discussed in turn by looking at selected rights that illustrate the complexity of veracity and resilience in the face of crimmigration challenges.

In doing so, immigration detention and prison facilities will be addressed separately. As chapter 3 has touched upon, whilst immigration detention and imprisonment increasingly function alike, the formal differences between both settings of confinement remain relevant as they may provide those confined with different forms of legal protection. As this section will show, this is also the case in relation to human rights: although those confined in immigration detention and those confined in prison are increasingly lumped together in one category of non-belonging, subtle differences continue to underpin the human rights entitlements that they enjoy.

25 See also De Schutter, 2014, p. 295. One of the most discussed absolute rights is the prohibition of torture and other cruel, inhuman, or degrading treatment: see e.g. Addo & Grief, 1998; Gewirth, 1981; Mavronicola, 2012. It should be noted, however, that the question whether this prohibition is genuinely 'absolute' continues to be debated in the literature. See in particular, in relation to ECtHR *Gäfgen v. Germany*, 1 June 2010, Application No 22978/05, Graffin, 2017; Greer, 2011, 2018; Mavronicola, 2017.

26 See also Doswald-Beck, 2011; Koji, 2001.

4.3.1 Interfering with civil rights on account of individuals' confinement

4.3.1.1 *The core right at stake: the right to liberty*

The limitation of some rights enshrined in international human rights treaties is inherent to legitimate confinement. This concerns first and foremost the right to liberty as enshrined in Article 9(1) ICCPR and Article 5(1) ECHR, which can be legitimately interfered with if certain conditions are fulfilled. The rationale behind such accepted interferences is largely self-explanatory: although the right to liberty is a fundamental right that even predates thinking on the sovereign state itself, it is not absolute as there may be outweighing public interests that warrant the deprivation of liberty as a form of state control.²⁷ The right to liberty is thus not absolute but rather safeguards against *arbitrary* or *unlawful* detention.

As the wording of Article 9(1) ICCPR highlights, “[n]o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”. Since the provision itself does not specify in which situations detention is permitted,²⁸ what it exactly encompasses has been borne out by the UN Human Rights Committee (‘HRCee’)²⁹ and the UN Working Group on Arbitrary Detention.³⁰ As these bodies have established, detention is prohibited when it is arbitrary or in violation of the legality principle. The drafting history makes clear that these conditions of non-arbitrary and lawful detention are cumulative: deprivation of liberty is only accepted to the extent that it is both in line with principles of justice, appropriateness, predictability, proportionality, and the rule of law, *and* in accordance with procedures laid down in domestic law.³¹ Whilst the latter condition can be established relatively straightforwardly, the former is less tangible. As Cornelisse points out, however, the principle of proportionality has often been used by monitoring bodies such as the Working Group on Arbitrary Detention “as a yardstick to evaluate state practice”.³²

²⁷ Cornelisse, 2010, pp. 249–250.

²⁸ The drafters could not reach an agreement on the permissible grounds for the deprivation of liberty: Cornelisse, 2010, p. 251. The remaining paragraphs of Article 9 ICCPR only set out *procedural* safeguards inherent to the right to liberty. For a more detailed view of these provisions, see Cornelisse, 2010, pp. 256–259.

²⁹ The Human Rights Committee is the UN monitoring body of the ICCPR.

³⁰ The UN Working Group on Arbitrary Detention was established by Resolution 1991/42 of the UN Commission on Human Rights, and was tasked with investigating instances of alleged arbitrary deprivation of liberty and detention otherwise inconsistent with international legal instruments.

³¹ Cornelisse, 2010, pp. 252–253, see also HRCee, *Mukong v. Cameroon*, 21 July 1994, Comm. no. 458/1991, UN Doc. CCPR/C/51/D/ 458/1991, para 9.8.

³² Cornelisse, 2010, pp. 253–254.

Likewise, Article 5(1) ECHR points out that deprivation of liberty should be “in accordance with a procedure prescribed by law”. There hence always has to be a basis for the deprivation of liberty in domestic law that is characterised by a sufficient level of accessibility and preciseness,³³ including clear time limits.³⁴ Although it does not – different from Article 9(1) ICCPR – refer to the prohibition of *arbitrary* detention, case law has borne out that the fact that Article 5 ECHR protects the right to liberty *and security* should be interpreted as encompassing protection against arbitrary deprivations of liberty as well.³⁵ The right to liberty under the ECHR can thus only be interfered with insofar as it is prescribed by law *and* compatible with the provision’s goal of preventing arbitrary detention. Furthermore, different from Article 9(1) ICCPR, Article 5(1) ECHR *does* contain an exhaustive list of cases in which the deprivation of liberty is allowed.³⁶

Under the ICCPR, it has been recognised that immigration detention is not prohibited as such by Article 9 as there may be legitimate reasons for the state to detain non-citizens, for example with the aim of regulating their entry or removal.³⁷ Given the requirements of legality and non-arbitrariness, such detention should be provided for in domestic law and should not be of an arbitrary nature, requiring that detention is proportional in light of factors particular to the detained individual.³⁸ In light of the latter principle, the Working Group has postulated that immigration detention “shall be the last resort and permissible only for the shortest period of time and that alternatives to detention should be sought whenever possible”.³⁹ Moreover, states have to make provisions to render detention unlawful if, for whatever reason, “carrying out removal from the territory does not lie within their sphere” – not to do so would effectively render detention arbitrary.⁴⁰ As part of this process, maximum periods of detention that are not excessive should be

33 See e.g. ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, Application no. 13178/03, para. 97; ECtHR, *Khlaifia and Others v. Italy*, 15 December 2016, Application no. 16483/12, para 117.

34 ECtHR, *Mathloom v. Greece*, 24 April 2012, Application no. 48883/07, paras. 68-71; ECtHR, *Abdolkhani and Karimnia v. Turkey*, 22 September 2009, Application no. 30471/08, para 135; ECtHR, *Rashed v. Czech Republic*, 27 November 2008, Application no. 298/07, paras. 75-76.

35 ECommHR, *Adler and Bivas v. the Federal Republic of Germany*, 16 July 1976, Application nos. 5573/72 and 5670/72, p. 146.

36 It furthermore provides, similar to Article 9 ICCPR, a list of procedural safeguards. For further analysis of these provisions, see Cornelisse, 2010, pp. 285–290.

37 HRCee, *A. v. Australia*, 3 April 1997, Comm. no. 560/1993, UN Doc. CCPR/C/59/D/560/1993, para. 9.4.

38 Cornelisse, 2010, pp. 253–254.

39 UN Human Rights Council (‘HRC’), Report of the Working Group of Arbitrary Detention, Tenth session, Agenda item 3, A/HRC/10/21, 16 February 2009, para. 67.

40 UN HRC, Report of the Working Group of Arbitrary Detention, Tenth session, Agenda item 3, A/HRC/10/21, 16 February 2009, para. 67.

prescribed by law.⁴¹ Using detention to deter or penalise particular populations of non-citizens, or for criminal law purposes more generally, is in any event prohibited.⁴²

The ECHR provides an exhaustive list of cases in which the deprivation of liberty is allowed. One of these cases relates directly to immigration detention: as Article 5(1)(f) ECHR outlines, deprivation of liberty can be permissible in cases of “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.” As the ECtHR has elucidated in relation to deportation procedures, all that is required under this particular provision is that action is being taken with a view to deportation: detention, as such, does not have to be reasonably considered necessary for the purpose of deportation.⁴³ Article 5(1)(f) ECHR therefore does not afford those in immigration detention the right to contest the proportionality of the detention order,⁴⁴ an approach that differs from the approach developed in the context of Article 9 ICCPR as outlined above. At the same time, deprivation of liberty under this provision “will be justified only for as long as deportation proceedings are in progress”, and, furthermore, such deportation proceedings have to be “prosecuted with due diligence”.⁴⁵ Detention should thus not continue any longer than is reasonably required for the envisaged purposes,⁴⁶ and a realistic prospect of expulsion needs to continuously exist.⁴⁷ Still, this does not mean that detention cannot continue for a prolonged period of time, as long as the authorities operate on the basis of the required level of due diligence.⁴⁸ Moreover, as the ECtHR emphasises, “detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; [and] the place and conditions of detention should be appropriate”.⁴⁹ An example of the requirement of good faith was provided in *Rahimi v. Greece*, in which the Court considered that

41 UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, para 20.

42 Cornelisse, 2010, p. 272.

43 ECtHR, *Chahal v. United Kingdom*, 15 September 1996, Application no. 22414/93, para. 112; ECtHR, *Čonka v. Belgium*, 5 February 2002, Application no. 51564/99, para. 38.

44 ECtHR, *Batalov v. Lithuania* (Admissibility Decision), 15 November 2005, Application no. 30789/04, page 7.

45 ECtHR, *Chahal v. United Kingdom*, para. 112; ECtHR, *S.K. v. Russia*, 14 February 2017, Application no. 52722/15, para. 111; ECtHR, *M. and Others v. Bulgaria*, 26 July 2011, Application no. 41416/08, para. 61; ECtHR, *Auad v. Bulgaria*, 11 October 2011, Application no. 46390/10, paras 128-135.

46 ECtHR, *Saadi v. United Kingdom* (Grand Chamber), 29 January 2008, Application no. 13229/03, paras. 72-74.

47 ECtHR, *Mikolenko v. Estonia*, 8 October 2009, Application no. 10664/05, para. 68; ECtHR, *Kim v. Russia*, 17 July 2014, Application no. 44260/13, paras. 52-57.

48 See e.g. ECtHR, *K.G. v. Belgium*, 6 November 2018, Application no. 52548/15.

49 ECtHR, *Saadi v. United Kingdom* (Grand Chamber), para. 74; ECtHR, *S.K. v. Russia*, para. 111; ECtHR, *Mathloom v. Greece*, para. 64.

in the course of detaining a minor in an adult immigration detention facility, the Greek authorities had not considered the best interests of the child and had not explored less drastic alternatives. The Court on this basis doubted the authorities' good faith in carrying out detention and therefore held that the deprivation of liberty had not been permissible.⁵⁰ In *Suso Musa v. Malta*, the Court furthermore emphasised that where the place and conditions of detention are inappropriate, and "the national system failed as a whole to protect the applicant from arbitrary detention", Article 5(1) ECHR had been violated.⁵¹ In sum, as long as there is a legal basis for detention, as long as deportation proceedings are in progress and pursued with due diligence, and as long as detention conforms with these broad parameters of good faith, close connectivity, and appropriate detention conditions, the deprivation of liberty will be considered justified under Article 5 ECtHR, even where there is reason to question for example the proportionality of such measures. By extension, the Court has by and large taken a similar approach in relation to the use of pre-admittance detention.⁵² Since there is less scope to challenge the arbitrariness of immigration detention under the ECHR, this instrument seems to provide a lower level of protection than the ICCPR.⁵³

In prison contexts, on the other hand, interferences with the right to liberty under the ICCPR and the ECHR have been structured somewhat differently. International human rights law has always recognised the sovereign powers of states to imprison individuals on the basis of a criminal conviction. Imprisonment is therefore generally considered to be a legitimate interference with the right to liberty, which is only different where it is arbitrary or unlawful. This has, for instance, been recognised by the HRCee in the context of the ICCPR.⁵⁴ The HRCee indeed clarified that imprisonment is not an unwarranted restriction of Article 9 ICCPR as long as it is based on the rule of law and does not result from a manifestly unfair trial.⁵⁵ As an example, unauthorised imprisonment beyond the length of prisoners' sentences is both arbitrary and unlawful and henceforth prohibited.⁵⁶

Likewise, the ECHR recognises that imprisonment can be a legitimate limitation of the right to liberty. In fact, Article 5(1)(a) ECHR mentions explicitly that liberty may be deprived in case of "the lawful detention of a person after

50 ECtHR, *Rahimi v. Greece*, 5 April 2011, Application no. 8687/08, paras. 109-110.

51 ECtHR, *Suso Musa v. Malta*, 23 July 2013, Application no. 42337/12, paras. 94-107.

52 ECtHR, *Saadi v. United Kingdom*, 11 July 2006, Application no. 13229/03; ECtHR, *Saadi v. United Kingdom* (Grand Chamber). For further analysis, see Cornelisse, 2010, pp. 292-296; Hailbronner, 2007, pp. 165-166; O'Nions, 2008.

53 Cornelisse argues in this regard that the marginal test applied by the ECtHR is at odds with the general principles underlying the ECHR: Cornelisse, 2012, p. 59. See also Cornelisse, 2010, p. 295.

54 HRCee, *General Comment no. 35*, 16 December 2014, UN Doc. CCPR/C/GC/35, paras 10-11.

55 HRCee, *General Comment no. 35*, paras 10-11 and 17.

56 HRCee, *General Comment no. 35*, paras 10-11.

conviction by a competent court".⁵⁷ This includes any conviction that occasions the deprivation of liberty pronounced by a competent court: no distinction is made on the basis of the legal character of the offence or on the basis of how the offence is classified in domestic law.⁵⁸ Similar to deprivation of liberty under the ICCPR, the right to liberty can thus be limited on the basis of criminal convictions by competent courts, as long as such restrictions meet the requirements of lawfulness and non-arbitrariness. For example, where the domestic criminal law provisions on which a conviction is based are not sufficiently accessible, precise, or foreseeable in their application, the ensuing deprivation of liberty may be deemed unlawful.⁵⁹ Likewise, "in circumstances where a decision not to release or to re-detain a prisoner was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court, or on an assessment that was unreasonable in terms of those objectives, a detention that was lawful at the outset could be transformed into a deprivation of liberty that was arbitrary", and therefore prohibited.⁶⁰

In relation to the right to liberty, international human rights law hence remains veracious to its fundamental tenet of equal protection for all – *everyone* is safeguarded against arbitrary and unlawful detention – whilst simultaneously resiliently accommodating that the right to liberty of certain confined populations is, at times, limited for legitimate purposes. In this sense, international human rights law forestalls to a large extent the crimmigration challenge to this particular right, as it embeds the accepted interferences in the notions of legality and non-arbitrariness.⁶¹ A creeping problem could arise, however, where states increasingly start to rely on these accepted limitations in expanding the reach of confinement. Thus, where states continue to expand the reach of both immigration detention and imprisonment, situations may arise where the right to liberty of an increasing population of 'outsiders' may

57 Furthermore, Article 5(1)(c) ECHR acknowledges that liberty may be deprived in cases of "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

58 ECHR, *Guide on Article 5 of the European Convention on Human Rights*, para 49. See also ECtHR, *Engel and Others v. the Netherlands*, 8 June 1976, Application nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, para. 68; ECtHR, *Galstyan v. Armenia*, 15 November 2007, Application no. 26986/03, para. 46.

59 See e.g. ECtHR, *Medvedyev and Others v. France*, Grand Chamber Judgment, 29 March 2010, Application no. 3394/03, para 80; ECtHR, *Del Río Prada v. Spain* (Grand Chamber), 21 October 2013, Application no. 42750/09, para 125; ECtHR, *Creangă v. Romania* (Grand Chamber), 23 February 2012, Application no. 29226/03, para 120.

60 ECtHR, *James, Wells and Lee v. the United Kingdom*, 18 September 2012, Application nos. 25119/09, 57715/09 and 57877/09, para 195.

61 See also Cornelisse, 2010, p. 273.

effectively be depleted, a situation that international human rights law is not able to counter effectively where such measures are extensively provided for in domestic law and where they are not exercised manifestly arbitrarily. For instance, through the criminalisation of migration-related offences, or even of illegal stay as such, more and more non-citizens could be captured by the penal net and could be incarcerated in prison facilities on the basis of a lawful conviction. The same holds true for penal approaches towards particular populations of sub-citizens that are deemed to have forfeited (parts of) their membership entitlements. On the other hand, as a result of the increasingly significant immigration-related implications of criminal convictions, more and more individuals could be captured by the administrative net and end up in immigration detention with the goal of expediting their expulsion. As long as these processes stay within the confines of legality and non-arbitrariness, which is likely given that both the execution of prison sentences and expulsion proceedings have been recognised as legitimate grounds for the deprivation of liberty, international human rights law may thus prove unable to fundamentally counter such trends.

4.3.1.2 The prohibition of forced or compulsory labour

The exercise of some ancillary rights can also be interfered with in confinement. One of these rights is the prohibition of forced or compulsory labour as enshrined in Article 8(3)(a) ICCPR and Article 4(2) ECHR. Both provisions read the same: “No one shall be required to perform forced or compulsory labour”. These provisions are, however, qualified by Articles 8(3)(b) and 8(3)(c) ICCPR and Article 4(3) ECHR, outlining situations that do not fall within the prohibition’s scope. In this sense, under both the ICCPR and the ECHR, it has been recognised that certain populations – including in confinement – can be expected to perform particular work activities, amounting to unfree and coercive labour, without violating the prohibition of forced or compulsory labour.

Specifically, Article 8(3)(b) ICCPR outlines that the prohibition of forced or compulsory labour “shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court”. In turn, Article 8(3)(c)(i) ICCPR provides that the term ‘forced or compulsory labour’ does not include “[a]ny work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention”. Article 4(3)(a) ECHR closely resembles this latter provision, stating that the term ‘forced or compulsory labour’ does not include “any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during

conditional release from such detention". It are these latter two provisions that this subsection focuses upon.

The limitations on the prohibition of forced or compulsory labour set out in these provisions seem to be primarily geared towards labour in prison facilities. In relation to Article 8(3)(c)(i) ICCPR, the *travaux préparatoires* of the ICCPR reveal that forced or compulsory labour in prisons was considered legitimate and was therefore not considered to violate human rights.⁶² As the British representative highlighted, "persons confined by due course of law were required to work and were therefore doing forced or compulsory labour. It was therefore necessary to make some exception for work done by such persons."⁶³ The Lebanese representative even discussed obligatory work in prison facilities as "not really exceptions to forced or compulsory labour, but merely usual forms of labour".⁶⁴ In this sense, what was considered 'ordinary prison work' remained permissible, including "routine work performed in the course of detention and work done to promote the delinquent's rehabilitation".⁶⁵

As the ECHR's *travaux préparatoires* reveal, the drafting of Article 4(3)(a) ECHR was inspired by Article 8(3)(c)(i) ICCPR.⁶⁶ Although the ECHR acknowledges that its "case-law concerning prison work is scarce", it has occasionally elaborated upon this provision.⁶⁷ It thus clarified that it is "grounded on the governing ideas of general interest, social solidarity and what is normal in the ordinary course of affairs".⁶⁸ It furthermore sets out that 'work required to be done in the ordinary course of detention' should be interpreted in light of prevailing standards in the member states.⁶⁹ The ECHR also notes, however, that Article 4(3)(a) ECHR does not serve to *limit* the exercise of the right enshrined in Article 4(2) ECHR, but rather to *delimit* the very content of this right – in this sense, it serves as an interpretation aid rather than as a proper

62 UNGA, *Agenda Item 28 (Part II), Annexes, Annotations on the text of the draft International Covenants on Human Rights*, UN Doc. A/2929 (New York, 1955), para. 22.

63 Commission on Human Rights, 6th session, *Summary Record of the Hundred and Forty-Third Meeting*, UN Doc. E/CN.4/SR.143, 10 April 1950, para. 13.

64 Commission on Human Rights, 6th session, *Summary Record of the Hundred and Forty-Third Meeting*, UN Doc. E/CN.4/SR.143, 10 April 1950, para. 34.

65 UNGA, *Agenda Item 28 (Part II), Annexes, Annotations on the text of the draft International Covenants on Human Rights*, UN Doc. A/2929 (New York, 1955), para. 22; Commission on Human Rights, 6th session, *Summary Record of the Hundred and Forty-Second Meeting*, E/CN.4/SR.142, 10 April 1950, para. 64; Commission on Human Rights, 6th session, *Summary Record of the Hundred and Forty-Third Meeting*, UN Doc. E/CN.4/SR.143, 10 April 1950, para. 32.

66 ECommHR, *Preparatory work on Article 4 of the Convention*, DH(62)10, p. 15-19; ECommHR, *Preparatory work on Article 4 of the European Convention on Human Rights*, CDH(70)5, p. 6-7.

67 ECtHR, *Stummer v. Austria* (Gand Chamber), 7 July 2011, Application no. 37452/02, para. 121.

68 ECtHR, *Stummer v. Austria* (Gand Chamber), para. 120; ECHR, *Van der Mussele v. Belgium*, 23 November 1983, Application no. 8919/80, para. 38.

69 ECtHR, *Stummer v. Austria* (Gand Chamber), para. 128; ECtHR, *Van Droogenbroeck v. Belgium*, 24 June 1982, Application no. 7906/77, para. 59.

limitation.⁷⁰ This again goes to show that penal labour has traditionally been regarded as outside the scope of protection against forced or compulsory labour: the fact that it does not violate human rights provisions has not been a matter of progressive limitation, but has rather been a matter of definitional constraints from the very beginning.

Whereas the meaning of these provisions for the exclusion of *penal* labour from the definition of forced and compulsory labour has, albeit somewhat scarcely, been elaborated upon, their meaning for non-voluntary labour in immigration detention settings has hardly been addressed. This in part may be explained on the basis of the fact that, contrary to penal labour,⁷¹ non-voluntary detainee labour in immigration detention regimes is not a traditional phenomenon that has been reckoned with. For instance, during the drafting stages of the ICCPR, questions were raised as to the proper meaning of the term ‘detention’ in Article 8(3)(c)(i) ICCPR. The term was said to cover “all forms of compulsory residence in institutions in consequence of a court order”,⁷² which, as the UK representative emphasised, could even capture “inmates of establishments other than prisons – for example, approved schools”.⁷³

However, as some authors have begun to critically examine, just like the continuing presence of penal labour,⁷⁴ non-voluntary work in immigration detention settings is a phenomenon today.⁷⁵ Scholarship is only at the very beginning of fleshing out these relationships between immigration detention and coercive labour, yet “the increased use of immigration detention on an international scale means that this practice is likely to be expanding”.⁷⁶ Bales & Mayblin, for example, speak about “a captive immigrant workforce” when discussing labour within UK immigration detention facilities.⁷⁷ As they outline, detainee labour is a key example of “state-sanctioned exploitative, coercive and unfree labour amongst a hyper-precarious group of the population”, therewith to a large extent resembling penal labour.⁷⁸ In turn, however, they simultaneously acknowledge that such labour is not necessarily *forced* labour as a matter of definition, and therefore does not by definition fall – similar

70 ECtHR, *Stummer v. Austria* (Gand Chamber), para. 120; ECHR, *Van der Mussele v. Belgium*, para. 38.

71 On the genealogy of convict labour, see the edited volume by Giuseppe de Vito & Lichtenstein, 2015, tracing penal labour back to the Roman empire.

72 UNGA, *Agenda Item 28 (Part II), Annexes, Annotations on the text of the draft International Covenants on Human Rights*, UN Doc. A/2929 (New York, 1955), para. 22 (emphasis added). See also Commission on Human Rights, 8th Session, *Summary Record of the Three Hundred and Twelfth Meeting*, UN Doc. E/CN.4/SR.312, 12 June 1952, pp. 14-15.

73 Commission on Human Rights, 6th session, *Summary Record of the Hundred and Forty-Third Meeting*, UN Doc. E/CN.4/SR.143, 10 April 1950, para. 25.

74 See e.g. N. Christie, 2000, pp. 133–136; Van Zyl Smit & Dünkel, 2018.

75 See notably Bales & Mayblin, 2018; Sinha, 2015.

76 Bales & Mayblin, 2018, p. 191.

77 Bales & Mayblin, 2018.

78 Bales & Mayblin, 2018, p. 191.

to penal labour – within the scope of human rights protection against forced or compulsory labour.⁷⁹

Both penal labour and detainee labour may thus, by definition, not constitute ‘forced or compulsory labour’ and such regimes may, consequently, continue to exist without violating the prohibitions codified in Article 8(3)(a) ICCPR and Article 4(2) ECHR. In this sense, international human rights law has, through interpretative pathways, allowed states to subject those confined to regimes that are at least mandatory, non-voluntary, and coercive in nature, without violating the prohibition of forced or compulsory labour. Put differently, international human rights law on the one hand appears resilient in the face of crimmigration developments that curtail the freedoms of sub-citizens and non-citizens through their subjection to coercive labour regimes, whether it be for rehabilitative purposes, as part of ‘routine work’, or for other reasons, whilst on the other hand, it remains veracious to its fundamental tenet of equal protection as it equally protects all against ‘forced or compulsory labour’. This approach appears somewhat schismatic, however, as in practice the material differences between forced and compulsory labour on the one hand and penal labour and detainee labour on the other may be considered to be, and may be experienced as, academic. The definitional differences instilled in international human rights law may consequently reflect a paper reality that does not necessarily align with observed or experienced coercion and exploitation. Rather, with the rising use of confinement as a crimmigration strategy, it seems that the differentiation in terms of entitlements along the novel lines of membership are, if anything, accommodated rather than contested by these particular provisions of international human rights law.

4.3.1.3 *The right to family life*

Another ancillary right that can be limited due to the nature of confinement is the right to family life as enshrined in Article 17(1) ICCPR (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”) and Article 8(1) ECHR (“Everyone has the right to respect for his private and family life, his home and his correspondence”). As the texts of these provisions show, the right to family life is often connected to rights to privacy, home, and correspondence as core civil rights protecting individuals’ private life. It should be noted that the HRCee maintains a broad reading of the term ‘family’ in Article 17(1) ICCPR, envisaging that it includes “all those comprising the family as understood in the society of the State party concerned”.⁸⁰ States therefore cannot limit the right to family life simply by deciding that certain

⁷⁹ Bales & Mayblin, 2018, pp. 191–192.

⁸⁰ HRCee, *General Comment no. 16*, 8 April 1988, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), para. 5.

persons are, contrary to hegemonic societal conceptions, no longer to be considered family of those confined.

Both the ICCPR and the ECHR acknowledge that this right can be interfered with, including in contexts of confinement. In fact, it appears inherent to the nature of confinement in prisons or immigration detention facilities that this right is, as a matter of course, limited: the invasiveness and pervasiveness of confinement necessarily involve at least some restriction on the unfettered enjoyment of family life. As the ECtHR puts it, “any detention which is lawful for the purposes of Article 5 of the Convention [...] entails by its nature various limitations on private and family life”.⁸¹ The Human Rights Council (HRC) has likewise confirmed that the right to family life in Article 17(1) ICCPR can be limited in confinement, provided that particular conditions are fulfilled.⁸²

The reference to ‘arbitrary or unlawful interference’ in Article 17(1) ICCPR serves to convey that whilst the rights enshrined therein are not absolute in nature, limitations are only permissible insofar as they are envisaged by domestic laws that comply with the provisions, aims, and objectives of the Covenant, and insofar as the limitation itself is in accordance with the provisions, aims, and objectives of the Covenant and, “in any event, reasonable in the particular circumstances”.⁸³ In this sense, the way in which Article 17(1) ICCPR can be legitimately limited resembles the way in which the right to liberty ex Article 9(1) ICCPR can be limited, and much of what was considered in relation to the appropriate standards in section 4.3.1.1. thus applies *mutatis mutandis* here. To establish whether an interference with the right to family life under the ICCPR is ‘arbitrary’, the HRCEE has established a multi-factor balancing test.⁸⁴ It thus tests arbitrariness by taking into account a wide variety of contextual factors, weighing the interests of the state against the interests of the individual(s) concerned.⁸⁵

81 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, 25 July 2013, Application nos. 11082/06 and 13772/05, para. 835.

82 HRC, *Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development*, 15 January 2016, UN Doc. A/HRC/31/37, para. 34.

83 HRCEE, *General Comment no. 16*, paras. 3-4.

84 See also Mrazik & Schoenholtz, 2010, p. 664.

85 Most cases concern deportation proceedings: see HRCEE, *A.B. v. Canada*, 16 March 2017, UN Doc. CCPR/C/117/D/2387/2014; HRCEE, *A.H.G. v. Canada*, 5 June 2015, UN Doc. CCPR/C/112/D/2091/2011; HRCEE, *Jama Warsame v. Canada*, 1 September 2011, UN Doc. CCPR/C/102/D/1959/2010; HRCEE, *Stefan Lars Nystrom v. Australia*, 1 September 2011, UN Doc. CCPR/C/102/D/1557/2007; HRCEE, *Mehrez Ben Abde Hamida v. Canada*, 11 May 2010, UN Doc. CCPR/C/98/D/1544/2007; HRCEE, *John Michaël Dauphin v. Canada*, 7 September 2009, UN Doc. CCPR/C/96/D/1792/2008; HRCEE, *Jonny Rubin Byahuranga v. Denmark*, 9 December 2004, UN Doc. CCPR/C/82/D/1222/2003; HRCEE, *Madafferi v. Australia*, 26 August 2004, UN Doc. CCPR/C/81/D/1011/2001; HRCEE, *Winata v. Australia*, 16 August 2001, UN Doc. CCPR/C/72/D/930/2000. See also Mrazik & Schoenholtz, 2010, pp. 665–666. The balancing approach has also been applied to cases concerning other types

The HRCee has occasionally dealt with arguments that the right to family life was arbitrarily interfered with in settings of confinement specifically. An example is the case of *Shikhmuradova v. Turkmenistan*, although the Committee in this case held that the claims under Article 17(1) ICCPR did not have to be considered separately now that it found a violation of Article 7 ICCPR (the prohibition of torture or cruel, inhuman or degrading treatment or punishment).⁸⁶ In *Tornel v. Spain*, the Committee dealt with a case concerning the medical treatment for HIV, and the eventual death, of Mr. Morales Tornel who had been sentenced to 28 years imprisonment.⁸⁷ Applicants claimed that both their right to family life and the right to family life of Mr. Morales Tornel ex Article 17(1) ICCPR had been violated, since (i) Mr. Morales Tornel was denied the right of contact with his family because of the distance of the prison from his family, (ii) the authorities rejected his request to be transferred to another prison, and (iii) the family was not informed of the seriousness of his medical condition.⁸⁸ The HRCee held that the claim under Article 17 ICCPR in relation to the *applicants* was insufficiently substantiated and therefore inadmissible.⁸⁹ In relation to the right to family life of Mr. Morales Tornel, it reiterated that “arbitrariness within the meaning of article 17 is not confined to procedural arbitrariness, but extends to the reasonableness of the interference with the person’s rights under article 17 and its compatibility with the purposes, aims and objectives of the Covenant”.⁹⁰ On the basis of the particular facts of this case, and given that the respondent state had not demonstrated the reasonability of the interference, the Committee consequently found a violation of Article 17(1) ICCPR.⁹¹ In reaching this decision, the HRCee thus confirmed its balancing approach on the basis of contextual particularities. This is further corroborated by the case of *Amanklychev v. Turkmenistan*, in which the Committee held that the denial of applicant to see his family and relatives while in prison or to exchange correspondence with them was, in light of the fact that the respondent state had not refuted the allegations, in violation of Article 17(1) of the Covenant.⁹²

As some have argued, the HRCee’s approach was inspired by the approach taken by the ECtHR under Article 8 of the Convention.⁹³ Mrazik and Schoen-

of interferences: see, e.g., HRCee, *A.M.H. El Hojouj Jum’a et al. v. Libya*, 25 August 2014, UN Doc. CCPR/C/111/D/1958/2010, para. 6.7.

86 HRCee, *Shikhmuradova v. Turkmenistan*, 28 April 2011, UN Doc. CCPR/C/112/D/2069/2011, para. 6.8.

87 HRCee, *Isabel Morales Tornel, Francisco Morales Tornel and Rosario Tornel Roca v. Spain*, 24 April 2009, UN Doc. CCPR/C/95/D/1473/2006.

88 HRCee, *Tornel v. Spain*, para. 3.4.

89 HRCee, *Tornel v. Spain*, para. 6.5.

90 HRCee, *Tornel v. Spain*, para. 7.3.

91 HRCee, *Tornel v. Spain*, para. 7.4.

92 HRCee, *Annakurban Amanklychev v. Turkmenistan*, 11 May 2016, UN Doc. CCPR/C/116/D/2078/2011, para 7.5.

93 Mrazik & Schoenholtz, 2010, p. 656.

holtz thus note that the ECtHR applies, as it does in relation to various rights, a multi-step analysis, including (i) whether family life exists, (ii) whether the state's action constitutes an interference with family life, and (iii) whether the interference was justified, on the basis of Article 8(2) ECHR, "as in accordance with law and necessary in a democratic society in the interests of national security, public safety, or economic well-being; the prevention of disorder or crime; or the protection of health, morals, or, the rights or freedoms of others".⁹⁴ As they likewise point out, whilst Article 8(2) of the Convention provides a range of justifications for interference, the condition that interferences have to be 'necessary in a democratic society' amounts, in practice, to a balancing test similar to that applied by the HRCee.⁹⁵ This balancing exercise takes into account whether a pressing social need exists – mere usefulness, reasonability, or desirability of an interfering measure is thus insufficient – and whether the interference is proportionate to the legitimate aim pursued.⁹⁶ Whilst national authorities enjoy a certain margin of appreciation in this regard, their decisions remain subject to review by the ECtHR.

Similar to the HRCee, various of the ECtHR's decisions revolved around expulsion cases.⁹⁷ The Court has, however, also decided upon cases involving the right to family life both in prison and in immigration detention.⁹⁸ In relation to the right to family life of prisoners, it emphasised that prisons authorities should assist prisoners in maintaining contacts with close family.⁹⁹ According to a 2017 judgment, in fact, the margin of appreciation left to states in this regard, in particular where the regulation of visiting rights is concerned, "has been narrowing".¹⁰⁰ As a result of the balancing of state interests against individual interests, the Court has consequently found violations of Article 8 ECHR *inter alia* in cases where states imposed limitations on the number of family visits, closely supervised family visits, or subjected prisoners to special visit arrangements.¹⁰¹ Where the interests of the states weighed more heavy,

94 Mrazik & Schoenholtz, 2010, p. 657.

95 Mrazik & Schoenholtz, 2010, p. 657.

96 ECtHR, *Dudgeon v. UK*, 22 October 1981, Application no. 7525/76, paras. 51-53.

97 See, for analysis, Mrazik & Schoenholtz, 2010, pp. 659–664.

98 It also dealt extensively with prisoners' right to *correspondence* with relatives, but since this section is primarily concerned with the right to family life as a separate sub-right enshrined in Article 8(1) ECHR, such case law will not be further elaborated upon here.

99 ECtHR, *Messina v. Italy* (no. 2), 28 September 2000, Application no. 25498/94, para. 61; ECtHR, *Kurkowski v. Poland*, 9 April 2013, Application no. 36228/06, para. 95; ECtHR, *Vintman v. Ukraine*, 23 October 2014, Application no. 28403/05, para. 78.

100 ECtHR, *Polyakova and Others v. Russia*, 7 March 2017, Application nos. 35090/09 and 3 others, para 89.

101 ECtHR, *Piechowicz v. Poland*, 17 April 2012, Application no. 20071/07, para. 212; ECtHR, *Van der Ven v. the Netherlands*, 4 February 2003, Application no. 50901/99, para. 69; ECtHR, *Khoroshenko v. Russia* (Grand Chamber), 30 June 2015, Application no. 41418/04, paras 106 and 146; ECtHR, *Mozer v. the Republic of Moldova and Russia* (Grand Chamber), 23 February 2016, Application no. 11138/10, paras. 193-195; ECtHR, *Vidish v. Russia*, Application no. 53120/08, 15 March 2016, para. 40.

conversely, it deemed restrictions to prisoners' rights to receive visits necessary and proportionate.¹⁰² The Court also found a violation of article 8 ECHR where the state had refused to transfer a prisoner to a prison facility closer to the home town of the prisoner's parents, as well as in cases where the state provided insufficient legal safeguards against potential abuse related to the geographical distribution of prisoners.¹⁰³ The state's discretion in the distribution of prisoners may thus generally be wide, but is not absolute, as the Court emphasised for example in *Rodzevillo v. Ukraine*:

"While the Court has accepted that the domestic authorities must enjoy a wide margin of appreciation in matters relating to the execution of sentences, the distribution of the prison population should not remain entirely at the discretion of the administrative bodies. The interests of prisoners in maintaining at least some family and social ties must somehow be taken into account".¹⁰⁴

The Court clarified elsewhere, however, that Article 8 of the Convention does not cover requests for *inter*-state prison transfers.¹⁰⁵ These cases concerning intra- and inter-state prisoner transfers will be returned to below in the case study context of PI Norgerhaven.

In relation to the right to family life in administrative detention, the Court has primarily dealt with the rights of children in detention. In its case law, the Court has emphasised that the fact that a family unit is maintained in settings of detention does not mean that the right to family life is therefore safeguarded – rather, confinement in a detention centre, subjecting families to custodial living conditions, may be considered an interference with Article 8(1) ECHR.¹⁰⁶ Such interference is only justified if it is proportionate to the aim pursued by the authorities and should, where families are concerned, take the best interests of the child into account.¹⁰⁷

Similar to the right to liberty, international human rights law hence embeds accepted interferences with the right to family life in the notions of legality and non-arbitrariness. By introducing explicit balancing exercises, however,

¹⁰² ECtHR, *Enea v. Italy* (Grand Chamber), 17 September 2009, Application no. 74912/01, para. 131.

¹⁰³ ECtHR, *Vintman v. Ukraine*; ECtHR, *Khodorkovskiy and Lebedev v. Russia*, paras. 831-851; ECtHR, *Rodzevillo v. Ukraine*, Application no. 38771/05, 14 January 2016, paras 85-87; ECtHR, *Polyakova and Others v. Russia*, para. 116.

¹⁰⁴ ECtHR, *Rodzevillo v. Ukraine*, para. 83.

¹⁰⁵ ECtHR, *Serce v. Romania*, 30 June 2015, Application no. 35049/08, paras. 55-56; ECtHR, *Palfreeman v. Bulgaria*, 8 June 2017, Application no. 59779/14, para. 36; ECtHR, *Plepi v. Albania & Greece* (Admissibility Decision), 4 May 2010, Applications nos. 11546/05, 33285/05 and 33288/05.

¹⁰⁶ ECtHR, *Popov v. France*, 19 January 2012, Application nos. 39472/07 and 39474/07, para. 134; ECtHR, *Bistieva and Others v. Poland*, 10 April 2018, Application no. 75157/14, para. 73.

¹⁰⁷ ECtHR, *Popov v. France*, para. 140.

international human rights law seemingly shows more veracity to its fundamental tenet of equal protection: different from the tests developed in relation to interferences with the right to liberty, interferences with the right to family life may indeed be deemed impermissible if the individual's interests outweigh those of the state. This, then, leaves less margin for states to pursue the effective depletion of such rights through crimmigration measures that rely on interferences. The finding of the ECtHR that states' margin of appreciation is, in certain regards, 'narrowing'¹⁰⁸ illustrates such veracity and limited susceptibility for resilient accommodation of crimmigration developments.

4.3.2 Interfering with political rights on account of membership status: disenfranchisement

A second basis for the limitation of confined individuals' human rights is that of their precarious membership status. A prime example is the right to vote, that, as chapter 3 indicated, states increasingly seek to restrict in carving out membership under the banner of crimmigration.¹⁰⁹ This right, according to Nowak "without doubt the most important political right",¹¹⁰ is enshrined in Article 25(b) ICCPR:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: [...] [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".

The right to vote has also, albeit in a somewhat more implicit fashion, been codified in Article 3 of Protocol No. 1 to the ECHR: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".¹¹¹ Like the selected civil rights analysed above, suffrage can however legitimately be interfered with: it is, as such, not an absolute right.

Logically, this revolves around the right to vote of *prisoners* with the nationality of the state that confines them, rather than on *immigrant detainees* who lack formal membership status. As the HRCee for instance notes, the right enshrined in Article 25(b) ICCPR contrasts with other rights and freedoms recog-

108 ECtHR, *Polyakova and Others v. Russia*, para 89.

109 Abebe, 2013; Demleitner, 1999; Dhami, 2005, p. 236; Dilts, 2014; Macdonald, 2009, pp. 1393–1406; Penal Reform International, 2016.

110 Nowak, 1993, p. 443

111 The only countries that have signed but not ratified Protocol No. 1 are Monaco and Switzerland.

nised by the Covenant as it protects the rights of *citizens* rather than those of all individuals within a state's territory and subject to its jurisdiction.¹¹² Consequently, for non-citizens, the right to vote does not come into question in the first place,¹¹³ at least not in relation to the jurisdiction in which they are detained, and the remainder of this section therefore exclusively deals with the way in which international human rights law has allowed for the limitation of *prisoners'* voting rights, that is, for criminal disenfranchisement.

In relation to Article 25(b) ICCPR, the HRCee has noted that suffrage "may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable".¹¹⁴ In turn, it explicitly recognised that conviction for a criminal offence may be considered a basis for suspending the right to vote: "the right to vote and to be elected is not an absolute right, and [...] restrictions may be imposed on it provided they are not discriminatory or unreasonable".¹¹⁵ Furthermore, the HRCee has held that "[i]f conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote".¹¹⁶ The HRCee thus uses 'proportionality' as a yardstick to measure the objectiveness and reasonability of limitations. In sum, the right to vote of sub-citizens who are confined on the basis of a criminal conviction may be restricted, as long as such restriction is based in law and is proportional in light of the nature of the offence and the severity of the sentence.¹¹⁷

The question whether the disenfranchisement of prisoners meets the standard of proportionality under Article 25(b) ICCPR is little straightforward. A first indication of proportionality is provided by the Covenant itself: Article 10(3) ICCPR provides that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation". Read in conjunction with this provision, Article 25(b) ICCPR should be understood as allowing limits to the right to vote for prisoners only insofar as disenfranchisement furthers the goals of reformation and rehabilitation.¹¹⁸ As Macdonald furthermore convincingly argues, the ICCPR's object

112 HRcee, *General Comment no. 25*, 12 July 1996, UN Doc. CCPR/C/21/Rev.1/Add.7, para. 3.

113 As Beckman notes, there are some exceptions to this rule but these remain marginal: Beckman, 2009, p. 63. See also, however, Hayduk, 2006.

114 HRcee, *General Comment no. 25*, para. 3.

115 See e.g. HRCee, *Denis Yevdokimov and Artiom Rezanov v Russia*, 21 March 2011, Comm. no. 1410/2005, UN Doc. CCPR/C/101/D/1410/2005, para. 7.4; HRCee, *Gabriel Crippa, Jean-Louis Masson and Marie-Joe Zimmermann v. France*, 28 October 2005, Comm. nos. 993/2001, 994/2001 and 995/2001, UN Doc. CCPR/C/85/D/993-995/2001, para. 6.13; HRCee *Marie-Hélène Gillot et al. v. France*, 15 July 2002, Comm. no. 932/2000, UN Doc. CCPR/C/75/D/932/2000, para. 12.2.

116 HRcee, *General Comment no. 25*, para. 14.

117 See also Abebe, 2013, pp. 423–425.

118 See also Macdonald, 2009, p. 1379.

and purpose necessitate an expansive interpretation of the right to vote and a narrow interpretation of the 'reasonable restrictions' standard.¹¹⁹ Likewise, the drafting history of the ICCPR makes clear that the term 'unreasonable restriction' was primarily used to refer to issues of eligibility to vote,¹²⁰ whereas the drafters maintained a strong preference for a presumption in favour of universal suffrage which was, by a majority, considered to be one of the most fundamental concepts.¹²¹ This also supports an expansive approach vis-à-vis the right to vote as enshrined in Article 25 ICCPR. Although the drafters admitted that *some* restriction of the right to vote was unavoidable, criminal disenfranchisement was not mentioned.¹²²

On the basis of these sources seemingly favouring a restrictive interpretation of the proportionality standard, the possibilities for legitimate disenfranchisement of prisoners thus seem to be severely curtailed. The requirements for legitimate interferences with the right to vote have been further elaborated upon by the HRCee. The issue came to the fore in 1993, when Luxembourg's laws mandating voting disenfranchisement were examined by the Committee.¹²³ These laws allowed for mandatory disenfranchisement for anyone convicted of a serious crime (including murder and rape) and for temporary disenfranchisement for anyone convicted of a minor crime, whilst the re-enfranchisement of individuals was dependent on a decision by the Grand Duke of Luxembourg.¹²⁴ In its suggestions and recommendations, the HRCee expressed its concern in relation to these laws and suggested their abolishment.¹²⁵ Concerns over Luxembourg's approach were reiterated in 2003.¹²⁶ The Committee made similar suggestions in relation to Hong Kong's laws allowing for disenfranchisement up to 10 years, as it "may be a disproportionate restriction on the rights protected by Article 25".¹²⁷ In 2001, the UK was urged to reconsider its laws restricting the right to vote for all convicted prisoners, as the Committee considered that there was no contemporary justification for such practice, in particular not when considered in light of the goals of reformation and rehabilitation as set out in Article 10 ICCPR.¹²⁸ In 2006, in concluding observations in relation to the US, the HRCee reiterated the importance of proportionality and considered that the US practice of disen-

119 Macdonald, 2009, p. 1384.

120 Nowak, 1993, p. 445.

121 Macdonald, 2009, p. 1385.

122 Macdonald, 2009, pp. 1385–1386.

123 UNGA, *Report of the Human Rights Committee*, 7 October 1993, UN Doc. A/48/40 (Part I).

124 UNGA, UN Doc. A/48/40 (Part I) (Oct. 7, 1993), para. 132.

125 UNGA, UN Doc. A/48/40 (Part I) (Oct. 7, 1993), para. 145.

126 HRCee, *Concluding Observations of the Human Rights Committee: Luxembourg*, 15 April 2003, UN Doc. CCPR/CO/77/LUX, para. 8.

127 HRCee, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, 9 November 1995, UN Doc. CCPR/C/79/Add.57, para. 19.

128 HRCee, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, 6 December 2001, UN Doc. CCPR/CO/73/UK, para. 10.

franchisement of individuals having committed felony offences was incompatible with the ICCPR, in particular now that it had significant racial implications and did not meet the goals of reformation and rehabilitation of Article 10 ICCPR.¹²⁹ In 2011, the HRCee held in *Yevdokimov* that Russia's automatic, blanket ban on voting for anyone sentenced to imprisonment was not reasonable and therefore violated Article 25 ICCPR.¹³⁰

Macdonald analyses which types of disenfranchisement are, in light of these considerations, likely to be permissible under the ICCPR.¹³¹ He concludes that there is a high likelihood of invalidity of disenfranchisement laws (i) where such laws affect all imprisoned individuals, (ii) where they affect particular groups of imprisoned individuals on the basis of the length of incarceration (as there is no proportionality determination for specific crimes), and (iii) where disenfranchisement continues post-incarceration insofar as they fail to take the goals of Article 10 ICCPR into account.¹³² He conversely concludes that there is a high likelihood of validity of disenfranchisement laws (i) where they affect particular groups of imprisoned individuals on the basis of the crimes that they committed, as long as a legislative proportionality determination is included that relate disenfranchisement to specific offences, such as political offences, and (ii) where disenfranchisement laws allow for disenfranchisement to be an explicit component of the sentence, as long as legislative and judicial determinations of proportionality are included, therewith for instance targeting political offences.¹³³ Key for valid interferences under Article 25 ICCPR is, henceforth, that disenfranchisement should be a proportionate part of the punishment.¹³⁴

In the ECHR context, the ECtHR has significantly substantiated the accepted interferences with prisoners' right to vote as enshrined in Article 3 of Protocol No. 1 to the ECHR, arguably providing more tangible criteria than the HRCee has done. Landmark decision in this regard is *Hirst v. UK (No. 2)*.¹³⁵ This case concerned section 3 of the UK's Representation of the People Act 1983, which stated that "[a] convicted person during the time that he is detained in a penal institution in pursuance of his sentence [...] is legally incapable of voting at any parliamentary or local election", and as such constituted a blanket voting ban for prisoners.¹³⁶ In debating this provision in UK Parliament, the UK government has maintained that disenfranchisement was considered part of

129 HRCee, *Concluding Observations of the Human Rights Committee: United States of America*, 28 July 2006, UN Doc. CCPR/C/USA/CO/3/Rev.1, para. 35.

130 HRCee, *Denis Yevdokimov and Artiom Rezanov v Russia*, para 7.5.

131 Macdonald, 2009, pp. 1393–1406. See also Abebe, 2013, p. 425.

132 Macdonald, 2009, p. 1406.

133 Macdonald, 2009, p. 1406.

134 Macdonald, 2009, p. 1407.

135 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), 6 October 2005, Application no. 74025/01.

136 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), para 21.

a convicted prisoner's punishment.¹³⁷ In assessing the complaint, the ECtHR first generally acknowledged that the rights in Article 3 of Protocol No. 1 are not absolute, that there is room for implied limitations, and that member states have a wide margin of appreciation in this regard.¹³⁸ Still, given that "[a]ny departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates", limitations are only legitimate to the extent that "the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate".¹³⁹ Subsequently, the ECtHR dealt with the restriction of voting rights for prisoners specifically. It did so, first, by reiterating that at times political rights may be removed from prisoners, for instance where persons are convicted for 'uncitizen-like conduct' such as "gross abuses in their exercise of public life during the Second World War", or where persons are convicted for specific offences involving public dishonour such as the refusal to report for military service.¹⁴⁰ Secondly, it acknowledged that the present case is different now that it is "the first time that the Court has had occasion to consider a general and automatic disenfranchisement of convicted prisoners".¹⁴¹ In turn, the Court maintained that "there [is not] any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion".¹⁴² This does not mean that democratic societies cannot protect themselves against activities that aim at destroying the rights or freedoms as codified in the Convention: to the contrary, states can for example restrict the right to vote of prisoners who have seriously abused their public office or who have threatened to undermine the rule of law or democratic foundations of the state.¹⁴³ However, disenfranchisement is a severe measure and should not be resorted to lightly: "the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned".¹⁴⁴ As such, the ECtHR's approach closely resembles the approach taken by the HRCee in relation to Article 25 ICCPR, requiring for legitimate restrictions of the voting rights of prisoners under the Convention that such restrictions are *proportionate* in light of the conduct and circumstances of the prisoner concerned. Furthermore, as pointed out above, such limitations should be based on a legitimate aim.

137 ECtHR, *Hirst v. UK* (No. 2) (Grand Chamber), para 24.

138 ECtHR, *Hirst v. UK* (No. 2) (Grand Chamber), paras 60-61.

139 ECtHR, *Hirst v. UK* (No. 2) (Grand Chamber), para 62.

140 ECtHR, *Hirst v. UK* (No. 2) (Grand Chamber), para 65.

141 ECtHR, *Hirst v. UK* (No. 2) (Grand Chamber), para 68.

142 ECtHR, *Hirst v. UK* (No. 2) (Grand Chamber), para 70.

143 ECtHR, *Hirst v. UK* (No. 2) (Grand Chamber), para 71.

144 ECtHR, *Hirst v. UK* (No. 2) (Grand Chamber), para 71.

As the application of these principles in various cases highlights, various ‘legitimate aims’ may underly limitations of prisoners’ voting rights, including the aims of preventing crime, enhancing civic responsibility, and respect for the rule of law.¹⁴⁵ In addition, case law has provided indications of when disenfranchisement of prisoners does, and when it does not, suffices the condition of proportionality. Thus, whilst states continue to enjoy a wide margin of appreciation, such disenfranchisement is not proportionate where, as in the case of *Hirst*, an automatic, blanket ban on prisoners’ voting rights applies.¹⁴⁶ This has been confirmed in various subsequent cases involving the UK,¹⁴⁷ as well as in relation to automatic and indiscriminate prisoners’ voting bans in Turkey,¹⁴⁸ Russia,¹⁴⁹ Bulgaria,¹⁵⁰ and Georgia.¹⁵¹

Whether interferences not amounting to a blanket ban are legitimate ultimately depends on the particularities at hand, as subsequent case law illustrates. For instance, in *Frodl v. Austria*, the Court noted in relation to domestic legislation disenfranchising prisoners serving a prison sentence of more than one year for offences committed with intent that disenfranchisement in this case violated Article 3 of Protocol No. 1 as disenfranchisement was not imposed by a judge taking into account all particular circumstances, and as there was no proper link between the offence committed and issues relating to elections and democratic institutions.¹⁵² In *Scoppola v. Italy (No. 3)*, on the other hand, the Grand Chamber considered that domestic legislation disenfranchising prisoners who were convicted of certain offences against the state or the judicial system, or who were sentenced to at least three years’

145 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), paras 74-75; ECtHR, *Scoppola v. Italy (No. 3)*, 22 May 2012, Application no. 126/05, para. 90; ECtHR, *Anchugov and Gladkov v. Russia*, 4 July 2013, Application nos. 11157/04 and 15162/05, para. 102; ECtHR, *Kulinski and Sabev v. Bulgaria*, 21 July 2016, Application no. 63849/09, para. 35

146 ECtHR, *Hirst v. UK (No. 2)* (Grand Chamber), para 82. As the Court notes, “[s]uch a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.”

147 ECtHR, *Greens and M.T. v. UK*, 23 November 2010, Application nos. 60041/08 and 60054/08; ECtHR, *Firth and Others v. UK*, 12 August 2014, Application nos. 47784/09, 47806/09, 47812/09, 47818/09, 47829/09, 49001/09, 49007/09, 49018/09, 49033/09 and 49036/09; ECtHR, *McHugh and Others v. UK*, 10 February 2015, Application no. 51987/08 and 1.014 others.

148 ECtHR, *Söyler v. Turkey*, 17 September 2013, Application no. 29411/07; ECtHR, *Murat Vural v. Turkey*, 21 October 2014, Application no. 9540/07. The Court even considers that “considers that the restrictions placed on convicted prisoners’ voting rights in Turkey are harsher and more far-reaching than those applicable in the United Kingdom”: see *Söyler v. Turkey*, para. 38.

149 ECtHR, *Anchugov and Gladkov v. Russia*.

150 ECtHR, *Kulinski and Sabev v. Bulgaria*. See for further analysis of the case also Van Berlo, 2017c, in which I also explicitly link the ensuing disenfranchisement in this case to the process of crimmigration.

151 ECtHR, *Ramishvili v. Georgia*, 31 May 2018, Application no. 48099/08.

152 ECtHR, *Frodl v. Austria*, 8 April 2010, Application no. 20201/04, paras. 34-35.

imprisonment, did not violate Article 3 of Protocol No. 1.¹⁵³ In this judgment, the Grand Chamber seems to refute the consideration in *Frodal* that disenfranchisement has to be decided on by a judge as a matter of principle. Rather,

“[w]hile the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners’ voting rights, such restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. Indeed, the circumstances in which the right to vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed”.¹⁵⁴

Consequently, the Italian voting ban in *Scoppola* was deemed to be in conformity with Article 3 of Protocol No. 1. It did not lead to the disenfranchisement of prisoners convicted for minor offences or offences with sentences of less than three years’ imprisonment, which satisfied the condition that the circumstances of individual cases and offenders’ personal situations have to be taken into account, and did not prevent convicted persons to recover their franchise.¹⁵⁵ On this basis, it appears that the conclusions drawn by Macdonald in relation to the ICCPR by and large also apply to the ECHR context, with disenfranchisement only being allowed in limited cases that include proportionality determinations.¹⁵⁶

At first sight the right to vote as enshrined in both the ICCPR and the ECHR thus seems to have developed with significant veracity to international human rights law’s fundamental tenets: attempts by states to restrict such rights in prisons have been met with significant resistance from the relevant monitoring bodies, which have subjected limitations *inter alia* to conditions of proportionality. At the same time, both provisions have also proven resilient, or flexible, in the face of states’ attempt to disenfranchise prisoners. The HRCee, for instance, has on various occasions *suggested* the reconsideration of disenfranchisement laws but has only occasionally demanded a country to change its laws.¹⁵⁷ Likewise, the ECtHR continues to grant states a wide margin of appreciation, as was for instance confirmed in *Scoppola*.¹⁵⁸ Whether or not classified as reluctant, such efforts have throughout allowed states to limit suffrage as a core political right, provided that such limitations are not automatic and indiscriminate but are proportionally targeted at particular offender groups either by legislation or the judiciary. This, however, does not obviate the problematic aspects of crimmigration per se: to the contrary, as

153 ECtHR, *Scoppola v. Italy* (No. 3).

154 ECtHR, *Scoppola v. Italy* (No. 3), para. 99.

155 ECtHR, *Scoppola v. Italy* (No. 3), paras. 108-109.

156 See footnotes 131-134 and accompanying text. Although the precise content of such determinations may still differ: see Abebe, 2013, p. 425.

157 See similarly Macdonald, 2009, p. 1388.

158 ECtHR, *Scoppola v. Italy* (No. 3), para. 83.

chapter 3 of this book has explicated, crimmigration endeavours are precisely *targeted* at specific populations of sub-citizens, including for example dangerous and serious offenders,¹⁵⁹ poor offenders,¹⁶⁰ and offenders of particular criminal acts.¹⁶¹ Indeed, crimmigration is not problematic because it would amount to indiscriminate and automatic exclusions of membership entitlements, but is problematic precisely because it targets particular populations in redistributing membership entitlements. Requiring states to base disenfranchisement on “a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned”, as the ECtHR puts it in *Hirst*,¹⁶² therefore does not *a priori* appear a tenable approach to prevent states from progressively segregating and excluding particular imprisoned populations of sub-citizens through their disenfranchisement. To the contrary, it even runs the risk of being used to legitimise such crimmigration developments, with the standard of proportionality becoming a tool for states to pursue crimmigration agenda’s whilst seemingly conforming with international human rights law obligations. This is even more so now that the ECtHR in *Scoppola* has retracted on its previous case law in *Frodl*, allowing states to offset the requirement of proportionality by providing for it through the general application of the law as an alternative to specific judicial decisions.¹⁶³ In this sense, the conditions imposed upon interferences seem to only marginally circumscribe the increasing and global use of prisoner voting bans as strategies of crimmigration.

4.4 THE CASE STUDY CONTEXTS

Chapter 3 has detailed the crimmigration features of RPC Nauru and PI Norgerhaven. As this chapter so far has shown, international human rights law has accepted that non-absolute rights can be interfered with where particular conditions are fulfilled. In this sense, international human rights law has showcased both resilience in the face of *inter alia* crimmigration developments by which rights of certain populations are gradually depleted – by allowing for interferences – and veracity to its fundamental tenet of equal protection – by subjecting interferences to a substantive set of stringent conditions allowing them only under exceptional circumstances. This section will apply these findings to the contexts of RPC Nauru and PI Norgerhaven, examining whether particular interferences can be justified under this binary approach. It will do

159 Reiter & Coutin, 2017.

160 Demleitner, 1999, p. 159.

161 See e.g. Craissati, 2019.

162 ECtHR, *Hirst v. UK* (No. 2) (Grand Chamber), para 71.

163 Likewise, as noted above, legislative proportionality determinations seem to suffice in the context of the ICCPR: Macdonald, 2009, p. 1406.

so by focussing on two rights that have been analysed above and that seem to be most problematic in the case study contexts: the right to liberty in the context of RPC Nauru,¹⁶⁴ and the right to family life in the context of PI Norgerhaven.

4.4.1 RPC Nauru

To examine whether the right to liberty as codified in Article 9(1) ICCPR has been interfered with in RPC Nauru, and if so, whether this interference is legitimate, a distinction has to be made between the period of time prior to the introduction of open centre arrangements in October 2015 and the period after such arrangements were introduced. Both periods of time will therefore be addressed separately.

4.4.1.1 Prior to the introduction of open centre arrangements

There is little question that detention in RPC Nauru, prior to the introduction of open centre arrangements, interfered with the right to liberty of those confined. As outlined above, the ICCPR requires that such interference complies with the requirements of legality and non-arbitrariness in order to be valid. It can readily be established that the interference *in casu* complies with the principle of legality, as detention in RPC Nauru is provided for in the *Asylum Seeker (Regional Processing Centre) Act 2012* of Nauru ('the RPC Act') and in respective Immigration Regulations being subordinate legislation under the *Immigration Act 1999* and the *Immigration Act 2014*. As the header of the RPC Act provides, one of its goals is to "regulate the operation of centres at which asylum seekers and certain other persons brought to Nauru under the *Migration Act 1958* of the Commonwealth of Australia are required to reside". Such requirement to reside in the RPC is based in the Immigration Regulations, that have, however, been amended at several times.

Thus, when offshore processing was reintroduced in 2012, the *2000 Immigration Regulations* were amended, establishing that asylum seekers transferred to Nauru were provided with 'regional processing centre visas', and that one of the conditions attached to such visas was that holders were required to reside "in premises notified to the holder by a service provider as being premises set aside for the holder", until a health and security clearance is

¹⁶⁴ Given the lack of citizenship or formal residence of those confined in RPC Nauru, the right to vote in national elections in Nauru or Australia does not arise: see also HRcee, *General Comment no. 25*, para. 3. Moreover, during the processing of their asylum claims on Nauru, those confined are not allowed to work, and the prohibition of forced or compulsory labour therefore does not raise particular issues in this context: see, e.g., Nauru's *Immigration (Amendment) Regulations 2012*, SL No. 3 of 2012, inserted section 9A(3)(d).

granted.¹⁶⁵ When such clearance was granted, asylum seekers were required to be in the RPC between 7pm and 7am, except in cases of emergency or other extraordinary circumstances, and in any event always were required to be in the company of a service provider or another person approved by a service provider when outside the premises.¹⁶⁶ The right to leave the premises could furthermore be restricted “due to the conduct of the holder or to a public health risk or public safety risk”.¹⁶⁷

New Immigration Regulations were introduced in 2013.¹⁶⁸ The 2013 *Immigration Regulations* tightened the conditions to which regional processing centre visas were subjected, including, in section 6, that the holder had to reside in the RPC, *even* where a health and security clearance certificate was granted. The only exceptions to this rule were cases of emergency or other extraordinary circumstances, or where absence was organised by a service provider and the holder was either (i) under the care and control of that service provider (where the holder has no health and security clearance), or (ii) in the company of a service provider (where the holder does have a health and security clearance). These conditions were reiterated in section 9(6) of the 2014 *Immigration Regulations*. In 2015, the Immigration Regulations were again amended several times. The condition that asylum seekers with a health and security clearance had to be in the company of a service provider when absent from the RPC was omitted in February 2015, although the requirement that absence had to be organised or permitted by a service provider continued to apply.¹⁶⁹

Nauruan law thus provided for the confinement of regional processing centre visa holders and the arrangements hence met the basic requirements of legality. Whether they also met the requirement of non-arbitrariness is somewhat more obscure, but important guidance has been provided by the Working Group on Arbitrary Detention and the HRCee. As outlined above, the Working Group has held that the requirement of non-arbitrariness requires proportionality, which in turn means that (i) immigration detention should be a last resort, (ii) it is permissible only for the shortest period of time, and (iii) alternatives to detention have to be sought where possible.¹⁷⁰ In cases concerning Australia’s mandatory detention regimes, the HRCee has likewise considered that detention for asylum processing is not *as such* arbitrary,¹⁷¹ but that mandatory detention based on general considerations, instead of on

165 *Immigration (Amendment) Regulations 2012*, inserted sections 9A(3)(a) and 9A(3)(b).

166 *Immigration (Amendment) Regulations 2012*, inserted sections 9A(3)(c).

167 *Immigration (Amendment) Regulations 2012*, inserted sections 9A(3)(c).

168 As amended by the *Immigration (Amendment) Regulations 2013*, SL No. 6 of 2013.

169 *Immigration (Amendment) Regulations 2015*, SL No 4 of 2015, amended section 9(6)(c)(ii).

170 UN Human Rights Council, *Report of the Working Group of Arbitrary Detention, Tenth session, Agenda item 3*, 16 February 2009, UN Doc. A/HRC/10/21, para. 67.

171 HRCee, *A. v. Australia*, para. 9.4.

individual justifications, is impermissible.¹⁷² In one of these cases on Australia's mandatory detention regime, the HRCee – finding a violation of Article 9 ICCPR – *inter alia* considered that

“[i]n particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions. The Committee also notes that in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant”.¹⁷³

Applied to the conditions and circumstances of detention in RPC Nauru prior to the introduction of open centre arrangements, the interference with the right to liberty of those confined seems to violate Article 9 ICCPR as it arguably does not meet the standard of non-arbitrariness. Detention was, indeed, not used as a last resort, but as a default for all transferees; individuals were subjected to prolonged detention, with status determination procedures sometimes taking multiple years to conclude; and alternatives for detention were not sought, even though the imposition of reporting obligations, sureties, or other conditions could have achieved the ends of Nauru's immigration policies, in particular given that Nauru is a relatively small island nation and asylum seekers' movements could therefore be closely monitored. Furthermore, similar to the case of *Baban v. Australia* cited above, those confined in RPC Nauru had no opportunity to challenge their continued confinement in court, as judicial review in Nauru is restricted to an assessment of the *lawfulness* of detention. Thus, Article 5(4) of the Nauruan Constitution states that

“[w]here a complaint is made to the Supreme Court that a person is unlawfully detained, the Supreme Court shall enquire into the complaint and, unless satisfied that the detention is *lawful*, shall order that person to be brought before it and shall release him” (emphasis added).

Whereas judicial review is thus possible, such review can only inquire into the lawfulness of detention, not into the compatibility of detention with the

172 HRCee, *Baban v. Australia*, 18 September 2003, Comm. no. 1014/2001, UN Doc. CCPR/C/78/D1014/2001, para. 7.2.

173 HRCee, *Baban v. Australia*, para. 7.2.

requirement of non-arbitrariness under the ICCPR. This is illustrated by the 2013 Judgment of the Supreme Court of Nauru concerning a habeas corpus challenge brought by asylum seekers on Nauru, claiming that their detention in RPC Nauru was invalid in light of the right to liberty in Article 5(1) of the Nauruan Constitution.¹⁷⁴ Judge Von Doussa dismissed the application, as applicants were deprived of their liberty on a valid ground as set out in Article 5(1)(h) of the Nauruan Constitution, which allows for the deprivation of liberty, as authorised by law, “for the purpose of preventing [a person’s] unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru.” Interestingly, however, Judge Von Doussa based such lawfulness of confinement not on the fact that detention was needed to prevent applicants unlawful entry into Nauru, but rather was needed for the purpose of effecting expulsion, extradition or other lawful removal. Indeed, on the one hand, he found that since Nauru had provided regional processing centre visas to applicants, they already had entered Nauru and therefore did not pose a risk of unlawfully entering the country.¹⁷⁵ On the other hand, he found that the detention of applicants, as a condition to the regional processing centre visas, serve the purpose of determining claims for refugee status, and for purposes “that will have to be addressed leading up to their removal from Nauru when their applications for refugee status have been finally determined”.¹⁷⁶ Indeed, as he also points out, it has never been the intention of Nauru that asylum seekers would stay permanently: after their refugee status determination has been completed, they would either be removed to a third country for resettlement, or to their home country.¹⁷⁷ On this basis, he concluded that “the provisions of the Immigration Act and the regulations which permit the detention of RPC visas are valid as the detention is for the very purpose of ultimately ‘effecting ...lawful removal from Nauru’ of the holder”.¹⁷⁸ He henceforth relied on the compatibility of detention with domestic legal requirements, and in doing so even drew a number of comparisons with the ECHR, but did not consider issues of non-arbitrariness as demanded under the ICCPR. The Supreme Court of Nauru ultimately cannot consider arguments that the individual detention was arbitrary in terms of the ICCPR, given that, as Judge Von Doussa points out, “ultimately the function of the courts in Nauru is to apply the Constitution of Nauru according to its terms”.¹⁷⁹

174 Supreme Court of Nauru, *AG & Ors v. Secretary of Justice* [2013] NRSC 10.

175 Supreme Court of Nauru, *AG & Ors v. Secretary of Justice*, paras. 60-61.

176 Supreme Court of Nauru, *AG & Ors v. Secretary of Justice*, para. 71.

177 Supreme Court of Nauru, *AG & Ors v. Secretary of Justice*, para. 72. It should be noted, though, that Nauru in 2014 agreed to provide refugees with temporary resettlement visa: see also *Immigration (Amendment) Regulations 2014*, No. 4 of 2014, inserted new Regulation 9A.

178 Supreme Court of Nauru, *AG & Ors v. Secretary of Justice*, para. 76.

179 Supreme Court of Nauru, *AG & Ors v. Secretary of Justice*, para. 64.

In light of Article 9 ICCPR, confinement in RPC Nauru until the introduction of open centre arrangements thus seems to amount to arbitrary detention. The UNHCR reached a similar conclusion in its submission to the Universal Periodic Review of Nauru in March 2015, maintaining that “[w]hen viewing the legal parameters and practical realities of the regional processing centre in their totality, [...] the mandatory detention of asylum-seekers in Nauru amounts to arbitrary detention, which is inconsistent with international law”.¹⁸⁰

4.4.1.2 After the introduction of open centre arrangements

Through amendments of the RPC Act and the Immigration Regulations in 2015, open centre arrangements were embedded in the legal framework.¹⁸¹ Only where a person poses a risk to public health, safety, security, or him- or herself or others may the Operational Manager, in consultation with a medical practitioner, require the person to remain in the RPC.¹⁸² The condition outlined in section 9 of the Immigration Regulations that those confined had to remain within the RPC except in cases of emergency or where the absence was organised by a service provider, was repealed.¹⁸³

Whether the right to liberty of individuals at RPC Nauru was still interfered with after the introduction of open centre arrangements in October 2015 is not self-evident. The novel arrangements indeed raise the question whether the ‘liberty’ of individuals was interfered with in the first place. According to the HRCee, “[l]iberty of person concerns freedom from confinement of the body, not a general freedom of action”.¹⁸⁴ Moreover, “[d]eprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12”.¹⁸⁵ As addressed in the introductory chapter, the Nauruan government claimed that with the introduction of open centre arrangements, detention had ended.¹⁸⁶ This would mean that RPC Nauru no longer constituted an interference with the right to liberty of those residing there.

Some scholars have however taken issue with such conclusion. Notably, Dastyari compares the situation of RPC Nauru with the case of *Guzzardi v. Italy* before the ECtHR, which concerned the transfer of a suspect awaiting trial to

180 UN High Commissioner for Refugees (UNHCR), *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: Nauru*, March 2015, p. 6.

181 Asylum Seekers (Regional Processing Centre) (Amendment) Act 2015, Act. No. 23 of 2015, amended section 18C(1) and 18C(2).

182 Asylum Seekers (Regional Processing Centre) (Amendment) Act 2015, amended section 18C(4) and 18C(5).

183 Immigration (Amendment) Regulations No. 3 2015, SL No. 15 of 2015.

184 HRCee, *General Comment no. 35*, para. 3.

185 HRCee, *General Comment no. 35*, para. 5.

186 Government of Nauru, 2015c.

the small Italian island of Asinara.¹⁸⁷ As the ECtHR concluded, in light of the circumstances of the case, confinement on such a small island may constitute an unjustified deprivation of liberty ex Article 5(1) ECHR. Comparing the circumstances in this case to those involved in *RPC Nauru*, Dastyari concludes that there is sufficient reason to likewise consider *RPC Nauru* as a space of detention:

“[c]umulatively and in combination, the restrictions placed on asylum seekers participating in the open centre arrangement at the RPC can likewise be seen to constitute deprivation of liberty [...]. Mr Guzzardi’s situation is similar in some respects to asylum seekers participating in the open centre arrangement. However, Asinara, an Italian island of 52 square kilometres, is considerably larger than the island of Nauru, which occupies a mere 21 square kilometres. Furthermore, unlike Mr. Guzzardi, asylum seekers participating in the open centre arrangement cannot leave the island of Nauru; cannot work; are much more limited in their contact with the outside world; and cannot be visited by family members from outside Nauru”.¹⁸⁸

According to her, the introduction of open centre arrangements hence does not mean that the right to liberty is no longer interfered with.

However, the comparison seems to be flawed for a number of reasons. First, individuals are housed at *RPC Nauru* during their asylum processing *by Nauru*. The fact that Nauru is smaller than the Italian island of Asinara is irrelevant in this regard, for Nauru is, frankly, not bigger than it is and the individuals concerned are therefore not, similarly to Mr. Guzzardi, transferred to a remote island constituting only a small part of Nauru’s sovereign territory. To the contrary, different from Mr. Guzzardi, the individuals concerned are – after the introduction of open centre arrangements – free to roam around the entire sovereign territory, however small, of the country in whose territorial jurisdiction they find themselves. Second, relatedly, the fact that individuals cannot leave the island of Nauru is not comparable to the situation of Mr. Guzzardi, since – again – the territory of Nauru does not extend beyond that very same island. In this regard, it would be deeply troublesome to argue that Nauru deprives individuals of liberty where in fact it allows these individuals to move freely within its entire sovereign territory. Third, the fact that asylum seeking individuals cannot work on Nauru is not comparable to the situation of Mr. Guzzardi, who was confined awaiting *criminal* proceedings. Indeed, the fact that asylum seekers are not allowed to work before being granted refugee status is not controversial, and in any event does not imply that a state

¹⁸⁷ ECtHR, *Guzzardi v. Italy*, 6 November 1980, Application no. 7367/76.

¹⁸⁸ Dastyari, 2015b, pp. 679–680.

deprives asylum seekers of liberty.¹⁸⁹ Fourth, the fact that those on Nauru cannot be visited by family members from abroad does not appear to be an indicator of deprivation of liberty. The conclusion that the “severity of the restrictions on asylum seekers in Nauru under the open centre arrangement [...] means their situation can be characterised as detention under article 9 of the ICCPR”,¹⁹⁰ thus does not seem warranted. This is even more so now that the ECtHR in *J.R. and Others v. Greece* has held that the introduction of semi-open centre arrangements, allowing confined populations to leave during both day and night, ended the deprivation of their liberty and amounted merely to a restriction of movement.¹⁹¹

On this basis, it does not appear that the right to liberty of those confined in RPC Nauru ex Article 9 ICCPR was interfered with after the introduction of open centre arrangements, even though their rights to liberty of movement as enshrined in Article 12(1) ICCPR may to a certain extent have been interfered with. This in turn also seems to be questionable, however, particularly now that it is not within Nauru’s sole or key sovereign prerogative to extend individuals’ freedom of movement *beyond* its national territory. Indeed, as the HRCee has considered, “[e]veryone lawfully within the territory of a State enjoys, *within that territory*, the right to move freely and to choose his or her place of residence.”¹⁹² In this sense, any potential claim under Article 12(1) ICCPR would have to concern the restriction of the right to choose one’s place of residence, as the right to move freely within Nauru’s territory is no longer interfered with. No issue furthermore arises under Article 12(2) ICCPR as Nauru does not principally restrict the right to leave the country.

4.4.2 PI Norgerhaven

The Norwegian-Dutch cooperation appears to raise questions in light of the right to family life enshrined in Article 17(1) ICCPR and Article 8(1) ECHR. Indeed, as part of their negative obligation under both provisions, states have a duty to refrain from interferences in individuals’ family life that already exists in the country.¹⁹³ As has been considered above, virtually all forms

189 Even more so, the HRCee has pointed out that a ban on performing work does not provide grounds for claiming that the right to liberty has been violated: see HRCee, *Manuel Wackenheim v. France*, 15 July 2002, Comm. No. 854/1999, UN Doc. CCPR/C/75/D/854/1999, para. 6.3.

190 Dastyari, 2015c, p. 681.

191 ECtHR, *J.R. and Others v. Greece*, 28 January 2018, Application no. 22696/16, para 86.

192 HRCee, *General Comment no. 27*, 2 November 1999, UN Doc. CCPR/C/21/Rev.1/Add.9, para. 4 (emphasis added).

193 As the ECtHR has maintained, this negative duty is “the essential object of Article 8”: ECtHR, *Kroon and Others v. the Netherlands*, 27 October 1994, Application no. 18535/91, para 31.

of confinement interfere to a certain extent with the enjoyment of the right to family life,¹⁹⁴ and there is no reason to consider that this would be different in PI Norgerhaven. Even more so, in this particular context the interference with the right to family life appears more substantial than in, say, domestic Norwegian prisons, as a significant physical and practical distance is created between those confined and their families, provided that they reside in Norway. As such, there appears to be little controversy over the question *whether* the right to family life is interfered with in PI Norgerhaven,¹⁹⁵ although subsection 4.4.2.2. will further reflect upon this assertion by looking at the implications of the large percentage of FNPs that are imprisoned there.

Less obvious is the question whether such interference is permitted. To briefly recap, under both the ICCPR and the ECHR, interferences with this right are permissible only if they are based in provisions of domestic law and if they comply with the prohibition of arbitrariness. In the context of the ICCPR, this latter requirement is taken to mean that limitations should comply with the provisions, aims, and objectives of the Covenant and should, in any event, be reasonable in light of the particular circumstances. In the context of the ECHR, this requirement has been substantiated by the tests of (i) whether the interference pursues a legitimate aim and (ii) whether the interference is necessary in a democratic society. The reasonability test within the context of the ICCPR, and the test of being necessary in a democratic society under the ECHR, in turn have been interpreted as necessitating a balancing exercise between the interests of the state and the interests of the individual.

Recent case law of the ECtHR on the permissibility of imprisoning individuals in remote prison facilities, far away from their families, provides important guidance as to the permissibility of the interference with the right to family life in PI Norgerhaven. Such jurisprudence was briefly touched upon above, but will now be returned to in order to examine what such cases mean for the Norwegian-Dutch cooperation. The remainder of this section hence focuses on the ECtHR's case law.¹⁹⁶

4.4.2.1 *Identifying the relevant principles from the case law of the ECtHR*

First, it should be reiterated that the Court has essentially distinguished between the *intra*-state geographical distribution of prisoners and requests for *inter*-state prison placements. In the latter cases, the Court has held that Article 8 ECHR does not provide a right to inmates to being transferred to a

194 See also ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 835.

195 See also ECommHR, *Wakefield v. the United Kingdom*, 1 October 1990, Application no. 15817/89.

196 The ECtHR's case law on this particular right is considered highly authoritative, to such an extent that the HRCee even looks to the ECtHR for guidance: Mrazik & Schoenholtz, 2010, p. 656.

prison facility in their home country in order to be close to their family members. In *Serce v. Romania*, in which the applicant claimed that his right to family life was breached now that the Romanian authorities had refused to transfer him to Turkey to serve his prison sentence close to his wife and children, the ECtHR thus pointed out that “the Convention does not grant prisoners the right to choose their place of detention and that separation and distance from their family are an inevitable consequence of their detention following the exercise by the Romanian State of its prerogatives in the area of criminal sanctions”.¹⁹⁷ However, although confinement under the Norwegian-Dutch cooperation amounted to an inter-state transfer of prisoners, it did not concern rejected requests by prisoners for transfer to their home country. Rather, PI Norgerhaven functioned as an annex of Ullersmo prison and therefore operated as part of the Norwegian penal estate. Although technically transfers to PI Norgerhaven were of an inter-state nature, in a legal sense they closely resemble *intra*-state transfers. Therefore, not the case law on inter-state transfers, but the case law on intra-state transfers, should guide the analysis of accepted interferences with the right to family life in PI Norgerhaven.

However, close examination of the Court’s case law on intra-state transfers reveals an ambiguous approach to the way in which interferences with the right to family life should be evaluated under Article 8 of the Convention. A starting point is the decision of the ECommHR in *Wakefield v. the United Kingdom*.¹⁹⁸ In this case, applicant complained that the refusal of the British authorities to transfer him from a prison facility in Yorkshire to Scotland in order to be near his fiancée violated his rights under Articles 3 and 8 of the Convention. In relation to the claim under Article 8 of the Convention, the Commission held, after establishing that the refusal indeed constituted an interference with applicant’s rights under this provision, that in light of the serious nature of the offences for which applicants had been convicted and his high-risk classification, the restrictions furthered the legitimate aim of preventing disorder or crime. Furthermore, it considered that the authorities’ proposal to transfer applicant temporarily to a prison in Scotland, under strict security conditions, in order to facilitate visits of applicants’ fiancée was proportionate to the legitimate aim and that the interference was therefore justifiable as necessary in a democratic society. No violation of Article 8 ECHR was henceforth established.

More than two decades later, the ECtHR dealt with a similar issue in *Khodorkovskiy & Lebedev v. Russia*. In this case, applicants relied on Article 8 ECHR in complaining that they had been sent to very remote penal colonies – situated thousands of kilometers from their homes – to serve prison sentences which according to applicants “had seriously hindered their contacts with the outside

¹⁹⁷ ECtHR, *Serce v. Romania*, para. 55. See similarly ECtHR, *Palfreeman v. Bulgaria*, para. 36; ECtHR, *Plepi v. Albania & Greece* (Admissibility Decision).

¹⁹⁸ ECommHR, *Wakefield v. the United Kingdom*.

world, and, in particular, with their families and their lawyers”.¹⁹⁹ The Court established that the geographical particularities affected applicants significantly, as they probably received fewer visits than they would have received had they been located closer to their home city of Moscow, and therefore found that the measure had interfered with applicants’ rights under Article 8 of the Convention.²⁰⁰ In subsequently examining whether the interference was justified, it first considered its lawfulness. The Court briefly reflected upon the legal basis for applicants’ remote imprisonment, recalling that “the principle of subsidiarity dictates that the Court will not overrule interpretations of the domestic law given by the domestic courts, except in specific circumstances”.²⁰¹ As an apparent consequence, it maintained that it is not necessary to review the findings of the Russian judiciary as to the lawfulness of the interference, and considered that it “is prepared to accept, for the purposes of the present case, that the interference with the applicants’ family and private lives was compatible with the domestic legal provisions”.²⁰² The Court consequently assessed whether the interference pursued a legitimate aim. According to the Court, the motivations of the government – protecting applicants against vengeful convicts or other persons, and avoiding overcrowding in Moscow-based prison facilities – appeared genuine and contributed to the legitimate aims of (i) preventing disorder and crime and (ii) securing the rights and freedoms of others.²⁰³ In turn, the Court examined whether the interference was proportionate to the legitimate aims in order to be necessary in a democratic society. In relation to the legitimate aim of protecting applicants’ own safety, the Court considered that both the risk of vengeance, and the assumption that the remote penal colonies were less dangerous, had not been substantiated by the Russian government, and that therefore the interference could not be justified on this ground.²⁰⁴ In relation to the legitimate aim of preventing prison overcrowding, the Court questioned that there was no available prison capacity closer to Moscow than the penal colonies where applicants had been sent to.²⁰⁵ In deciding whether their remote imprisonment was nevertheless proportionate to the aim of avoiding prison overcrowding, it ultimately balanced the interests of the state – taking into account difficulties in managing the prison system and the historical availability of penal colonies in remote and deserted areas – against the interests of applicants – considering their interests in maintaining at least some family and social ties, as well as the lack of a measure of legal protection against their potential arbitrary geographical distribution that they could resort

199 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 822.

200 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 838.

201 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 841.

202 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 842.

203 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, paras. 843-845.

204 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 846.

205 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 849.

to.²⁰⁶ Whilst acknowledging that Russia should be granted a certain margin of appreciation, on the basis of this balancing exercise the Court found that the interference was not proportionate to the pursued aim and therefore violated Article 8 of the Convention.²⁰⁷

The Court took a similar approach in the case of *Vintman v. Ukraine*, in which applicant complained about the authorities' refusal to transfer him to a prison closer to home, even though his mother was unfit for long-distance travel.²⁰⁸ The Court held that there was an interference with applicant's rights under Article 8 of the Convention, as the authorities' refusal denied him any personal contact with his mother.²⁰⁹ In relation to the question whether the interference was in accordance with domestic law, the Court concluded that "[a]lthough the formalistic and restrictive approach followed by the authorities in their interpretation and application of the relevant legislation does raise questions [...], the Court is prepared to accept that their decisions were based on sufficiently clear and foreseeable domestic legislation".²¹⁰ The Court subsequently found that the interference generally can be regarded as pursuing a legitimate aim, such as the prevention of prison overcrowding and the ensuring of adequate discipline in prison establishments.²¹¹ The Court however concluded that the interference had not been proportionate to the pursued aims, as (i) the authorities had failed to provide details as to the prisons that had been considered for a potential transfer, (ii) no evidence was available that the authorities had in fact considered his transfer closer to his home region, (iii) applicant had been transferred even further away whilst serving his prison sentence, (iv) the authorities had not differentiated between applicants' requests for mitigation of his prison regime and his requests for transfers to prisons of the same security level closer to his home region, (v) the authorities had not disputed the physical inability of applicant's mother to visit him in the remote prison facility, and (vi) applicant's personal situation and his interests in maintaining family ties had never been assessed by the authorities.²¹² It therefore found a violation of Article 8 ECHR. In the subsequent case of *Rodzevillo v. Ukraine*, the Court upheld this approach by reaching the same conclusion on more or less the same basis.²¹³

In *Wakefield, Khodorkovskiy & Lebedev, Vintman*, and *Rodzevillo*, the Court's application of its three-pronged approach appears rather consistent. In the 2017 case of *Polyakova & Others v. Russia*, however, the Court seems to diverge significantly from this approach. In this case, applicants complained that their

206 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 850.

207 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, paras. 850-851.

208 ECtHR, *Vintman v. Ukraine*, para. 60.

209 ECtHR, *Vintman v. Ukraine*, paras. 82-83.

210 ECtHR, *Vintman v. Ukraine*, para. 92.

211 ECtHR, *Vintman v. Ukraine*, paras. 94-99.

212 ECtHR, *Vintman v. Ukraine*, paras. 100-104.

213 ECtHR, *Rodzevillo v. Ukraine*, paras. 84-87.

rights under Article 8 ECHR were violated given that their imprisonment in remote penal facilities, and their inability to obtain prison transfers, inhibited their families from visiting them.²¹⁴ In dealing with the question whether the interference was in accordance with domestic law, the Court did not rely on findings of the domestic courts as to the lawfulness of the interference (as it did in *Khodorkovskiy & Lebedev*), or on an assumption of lawfulness based on a marginal reading of the domestic provision (as it did in *Vintman*),²¹⁵ but seemingly intensified scrutiny and even expanded the appropriate test. Thus, the Court outlined that it “reiterated” that the condition of ‘in accordance with the law’ “requires the impugned measure both to have some basis in domestic law *and to be compatible with the rule of law*, which is expressly mentioned in the Preamble to the Convention and is inherent in the object and purpose of Article 8 of the Convention”.²¹⁶ According to the Court, in cases concerning the geographical allocation of prisoners, what is required of domestic law is consequently

“not that it defines a yardstick to measure the distance between a prisoner’s home and a penal facility or exhaustively lists grounds for derogation from the applicable general rules, but rather that it provides for adequate arrangements for an assessment by the executive authority of that prisoner’s and his or her relatives’ individual situation, having due regard to various factors affecting the practical possibility of visiting a prisoner in a particular facility.”²¹⁷

In casu, the Court concluded that the interference was not ‘in accordance with the law’ and therefore violated Article 8 ECHR.²¹⁸ It based such conclusion on three findings in particular: Russia’s relevant domestic law (i) contained no requirement that obliged the Russian Federal Penal Authority to consider the implications of the geographical location of a penal facility on the right to family life of prisoners and their families, (ii) provided no realistic opportunity to transfer prisoners to other penal establishments on grounds pertaining to Article 8 rights, and (iii) do not enable prisoners to obtain judicial review of the Federal Penal Authority’s decisions as to their geographical placement.²¹⁹ Since domestic law therefore did not satisfy the ‘quality of law’ requirement,

“the Russian domestic legal system did not afford adequate legal protection against possible abuses in the field of geographical distribution of prisoners. The applicants

214 ECtHR, *Polyakova & Others v. Russia*, para. 61.

215 And *mutatis mutandis* in *Rodzevillo*: see ECtHR, *Rodzevillo v. Ukraine*, para. 84.

216 ECtHR, *Polyakova & Others v. Russia*, para. 91 (emphasis added).

217 ECtHR, *Polyakova & Others v. Russia*, para. 92.

218 ECtHR, *Polyakova & Others v. Russia*, paras. 118-119.

219 ECtHR, *Polyakova & Others v. Russia*, para. 118.

were deprived of the minimum degree of protection to which they were entitled under the rule of law in a democratic society".²²⁰

Having found a violation, the Court did not consider it necessary to examine the other requirements of Article 8(2) of the Convention.

The Court hence focussed on scrutinising domestic legislation, looking not only at whether a basis exists, but also at whether such basis is of sufficient quality. This is a clear adjustment to its previous approach: in *Khodorkovskiy & Lebedev*, it for instance explicitly relied on mere residual control.²²¹ In *Vintman* (and, *mutatis mutandis*, in *Rodzevillo*) it acknowledged that the quality of law is part of the analysis of 'lawfulness', but nevertheless assumed that the interference had been lawful.²²² It continued to rely on this assumption even though significant contra-indications as to the quality of the law existed in that case.²²³ In *Polyakova*, on the other hand, the Court engages in a full-fledged analysis of the quality of domestic law, including its compliance to the rule of law. As a result, whereas in *Khodorkovskiy & Lebedev* the fact that applicant could not obtain judicial review of the relevant authorities' decision was seen an indicator that the interference had not been proportionate to the legitimate aim pursued, in *Polyakova* it was dealt with as an indicator that the interference was not in accordance with domestic law in the first place.

Accordingly, the case law of the Court has not excelled in terms of clarity. One could wonder, however, why this would be a matter of concern: one way or the other, the fact that domestic law does not afford adequate legal protection against possible abuses arising from the geographical distribution of prisoners will generally mean that an interference with Article 8 ECHR is not justified, whether it be because such interference is unlawful, or because it is not proportionate to the aim pursued. However, it should be emphasised that the Court applies different tests to establish both consecutive conditions: whereas the requirement that the interference should be 'in accordance with the law' is substantiated with a number of objective criteria, for example accessibility and foreseeability, that are conditions *sine qua non* for its fulfilment, the requirement that the interference should be proportionate to the legitimate aim pursued is examined on the basis of a balancing exercise as explained above. Therefore, whereas in *Polyakova* the availability of adequate legal protection against possible abuses was considered a condition *sine qua non* for lawfulness, in *Khodorkovskiy & Lebedev* it was one of many interests that were weighed in a balancing act. The approach in *Polyakova* thus seems

220 ECtHR, *Polyakova & Others v. Russia*, para. 118.

221 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 841.

222 ECtHR, *Vintman v. Ukraine*, paras. 84-93. See also ECtHR, *Rodzevillo v. Ukraine*, para. 84.

223 For instance, domestic law lacked any statutory ground for accepting a request for a prison transfer to a facility closer to home, which in turn was used by the authorities in maintaining a formalistic and restrictive approach to the domestic legal framework: see ECtHR, *Vintman v. Ukraine*, paras. 84-93.

to provide more extensive protection under Article 8 of the Convention, with the Court assuming a more central role in assessing the quality of domestic legal frameworks.

This ambiguous approach cannot readily be explained on the basis of legal doctrine: although the Convention is a 'living instrument' and the margin of appreciation accorded to states may change over time, when the Court issued its judgment in *Polyakova* in March 2017, hardly four years had passed since the Court's previous reliance on a 'residual' approach in *Khodorkovskiy & Lebedev*. It consequently remains to be seen to what extent the Court will maintain its new course, or whether it will revert back to a more residual approach vis-à-vis the lawfulness test. In this regard it is interesting to note that in two recent cases, both against Russia, the Court heavily relies on *Polyakova* in concluding that the interference with applicants' rights to family life were not 'in accordance with the law' within the meaning of Article 8(2) ECHR.²²⁴ This seems to imply that the newer approach prevails, although it remains to be seen how the test is applied in cases involving other respondents. Whatever the case may be, until settled, such ambiguity should be taken into account when interpreting the application of the principles to the case study of PI Norgerhaven.

4.4.2.2 Applying the principles to PI Norgerhaven

In light of the ECtHR's case law, it *a priori* seems uncontested that the imprisonment of Norwegian prisoners in the Netherlands generally amounts to an interference with their right to family life ex Article 8 ECHR. This was addressed above: the significant physical and practical distances that are created by confining Norwegian inmates in the Dutch town of Veenhuizen impedes upon the family life of those imprisoned, as well as on that of their families, as it likely hampers relatives' opportunities to visit.²²⁵

As chapter 3 has outlined, however, a 'collateral consequence' of the nodal arrangements in place is that a large majority of those that were confined in PI Norgerhaven – about 80% – did not hold the Norwegian nationality.²²⁶ In particular in relation to this population of FNPs, cases may arise where

224 ECtHR, *Abdulkadyrov & Dakhtayev v. Russia*, 10 July 2018, Application no. 35061/04, paras. 90-97; ECtHR, *Voynoy v. Russia*, 3 July 2018, Application no. 39747/10, paras. 49-52. As the Court explicitly notes, "the national authorities' approach to the interpretation of domestic law in this field has not evolved since the delivery of the *Polyakova and Others* judgment": ECtHR, *Voynoy v. Russia*, para. 51.

225 See similarly ECtHR, *Vintman v. Ukraine*, para. 79; ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 838.

226 Barske, 2016; Brosens et al., 2019, p. 9; Hotse Smit, 2016; Johnsen et al., 2017, p. 4; Pakes & Holt, 2015.

prisoners do not enjoy *de facto* family life in Norway in the first place.²²⁷ Consequently, it is not *a priori* clear that confinement in PI Norgerhaven constitutes an interference with the right to family life under Article 8 of the Convention, at least not on an individual level: where no such family life exists in Norway, imprisonment on Norwegian soil close to the (former) place of residence of convicts has no added value from the perspective of Article 8 ECHR.²²⁸ In fact, as chapter 3 addressed, relocation to the Netherlands comes with a number of benefits for transferred prisoners, such as more extensive opportunities to phone or Skype call their family members.²²⁹ In relation to prisoners with no family ties in Norway, this appears an important contra-indication for establishing an interference with the right to family life. Conversely, in such cases, imprisonment in PI Norgerhaven does not “go beyond ‘normal’ hardships and restrictions inherent to the very concept of imprisonment” in the context of Article 8 ECHR.²³⁰ It is therefore vitally important to consider individual cases on the basis of their own merits: only where a prisoner enjoys *de facto* family life in Norway, transfer will likely amount to an interference with Article 8 ECHR. At the same time, it should be noted that the large amount of FNPs in PI Norgerhaven does not mean that such prisoners generally enjoy no family life in Norway, and that the problematic aspects of offshore imprisonment as an interference with the right to family life should therefore not be marginalised. In what follows, analysis will focus on those prisoners with sufficient *de facto* family ties in Norway.

The first question that arises is whether the interference with prisoners’ right to family life is lawful. The transfer of prisoners to PI Norgerhaven is regulated in the Execution of Sentences Act (*‘Straffegjennomføringsloven’*) and the Guidelines for conducting criminal proceedings in the Netherlands (*‘Retningslinjer for straffegjennomføring i Nederland’*, hereinafter: ‘the Norwegian Guidelines’). Section 1a of the Execution of Sentences Act allows the Norwegian Correctional Service to execute prison sentences in other countries with which Norway has entered into an agreement. This provision is temporary and will be repealed on 1 September 2020. Section 14 of the Act outlines a number of situations in which the Correctional Service can transfer prisoners to another prison facility. One of these situations, and the one relied upon by the Norwegian authorities in transferring individuals to PI Norgerhaven, is where – as listed under (e) in Section 14 – building or manning conditions or shortages of prison capacity necessitate a transfer. Transfers to PI Norgerhaven are therefore in accordance with domestic law.

227 As the Court has detailed, the existence of ‘family life’ is based on an assessment of the *real* existence, in practice, of close personal ties: ECtHR, *Paradiso and Campanelli v. Italy* (Grand Chamber), 24 January 2017, Application no. 25358/12, para. 140.

228 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 836.

229 Hotse Smit, 2016.

230 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 837.

However, as the Court has noted in *Vintman* and *Polyakova*, for the condition of lawfulness to be fulfilled, interferences should not only be allowed for in domestic law, but such domestic law should also meet the conditions of the *quality* of law.²³¹ Similar to the Court's assessment in *Polyakova*, in the present case the most pressing requirement in this regard is that the domestic law should provide for "adequate arrangements for an assessment by the executive authority of that prisoner's and his or her relatives' individual situation, having due regard to various factors affecting the practical possibility of visiting a prisoner in a particular facility."²³² In casu, specific safeguards have been entrenched in the Norwegian Guidelines. As Section 2.4. outlines, when the Correctional Service decides on the transfer of prisoners, it has to take into account *inter alia* the prisoner's health conditions and, importantly, his family situation.²³³ Specifically, Section 2.4. under (g) provides that a convicted person who receives, or is to receive, regular visits from his *children* that he normally lives with or has contact with cannot be transferred to PI Norgerhaven, unless such transfer does not entail a greater restriction on the child's right to cohabitation, or unless the prisoner himself consents.²³⁴ Section 2.12. of the Norwegian Guidelines add that transferred prisoners who are to receive visits from their children are to be transferred to Norway whenever the execution of their criminal sentence in the Netherlands inhibits such visits. In this sense, decision-making incorporates concern for the right to family life, with a particular focus on the rights of the child. In addition, where transfers are non-voluntary, Section 3.4. of the Norwegian Guidelines provide that advanced notice of the decision to transfer has to be provided to the convicted person, who must be given a reasonable period of time to submit a comment. There are, furthermore, opportunities to lodge complaints in relation to transfer decisions.²³⁵

Hence, Norway's domestic legal system obliges the Correctional Service to consider the implications of the relocation to PI Norgerhaven on the right to family life of prisoners and their relatives. Domestic law moreover provides particular safeguards against transfers when the relationship between prisoners and their children is at stake. Furthermore, there are realistic opportunities

231 ECtHR, *Polyakova & Others v. Russia*, para. 91; ECtHR, *Vintman v. Ukraine*, paras. 84-93. See also ECtHR, *Rodzevillo v. Ukraine*, para. 84.

232 ECtHR, *Polyakova & Others v. Russia*, para. 92.

233 As the provision reads, "[b]eslutningen tas av kriminalomsorgen etter en individuell helsevurdering der blant annet domfeltes helse situasjon, familiesituasjon og det straffbare forholdets art må tas i betraktning".

234 "Følgende domfelte kan ikke overføres: [...] domfelte som mottar eller skal motta regelmessig besøk av egne barn de ellers bor fast sammen med eller har samvær med, med mindre overføring uansett ikke medfører en større begrensning i barnets rett til samvær enn den besøksordningen eller samværsordningen som er eller blir etablert [...]. Dersom domfelte samtykker, kan overføring gjennomføres selv om han faller inn under bokstav g og h".

235 See <https://www.regjeringen.no/no/aktuelt/kriminalomsorgen-bestemmer-hvor-fanger-skall-sone/id2429407/> (last accessed 25 February 2019).

to transfer prisoners to penal establishments in Norway when required on grounds pertaining to prisoners' rights under Article 8 ECHR, for example in order to facilitate visits of their children under Section 2.12. of the Norwegian Guidelines. Prisoners can moreover lodge a complaint in relation to the Correctional Service's decision to transfer them to PI Norgerhaven, with the same complaint mechanisms as applicable to intra-state transfers being available. As such, considered together, the safeguards implemented in the Norwegian legal framework seem to fulfil the quality threshold incapsulated in the requirement of lawfulness.²³⁶ It therefore can be concluded that the interference with Article 8 ECHR fulfils the first requirement of being 'in accordance with the law'.

The subsequent question is whether such interference serves a legitimate aim. As outlined above, the main aim of transfers is to offset the lack of prison capacity within Norway and to prevent the creation of a significant backlog.²³⁷ The ECtHR has previously decided that preventing prison overcrowding is a legitimate aim under Article 8(2) of the Convention, and it can therefore readily be established that transfers to PI Norgerhaven generally serve a legitimate aim.²³⁸

Finally, the interference has to be proportionate to the legitimate aim in order to be necessary in a democratic society. As was also clarified by the Norwegian Borgarting Court of Appeal in relation to a case concerning a forced transfer to PI Norgerhaven, the decision to relocate a prisoner involuntary to PI Norgerhaven does not *in itself* constitute a breach of the right to private and family life under the ECHR.²³⁹ Rather, all relevant factors should be taken into account in a balancing exercise establishing the proportionality of the interference. It should be reiterated in this regard that the importance of family life is taken into account when transfer decisions are made; that the prison regime in PI Norgerhaven provides more extensive allowances to phone or Skype call family members, with the facility even having a special Skype room; and that particular arrangements for a temporary re-transfer to a facility in Norway are in place for visits of prisoners' children. Furthermore, it has been reported that inmates generally felt that PI Norgerhaven made good arrangements for their visitors.²⁴⁰ Some, notably the Dutch government, have in addition argued that whilst the distance between Norway and the Netherlands is significant, the size of Norway would render imprisonment in Northern Norway as remote for a prisoner from Oslo as would his imprisonment in

236 Compare ECtHR, *Polyakova & Others v. Russia*, para. 118.

237 See also Struyker Boudier & Verrest, 2015, pp. 909–910.

238 ECtHR, *Khodorkovskiy and Lebedev v. Russia*, para. 845; ECtHR, *Vintman v. Ukraine*, para. 99; ECtHR, *Rodzevillo v. Ukraine*, para. 84.

239 Sivilombudsmannen, 2016, pp. 10–11.

240 Sivilombudsmannen, 2016, pp. 36–37.

the Netherlands.²⁴¹ However, such argument is irrelevant in the context of the proportionality test under Article 8 of the ECHR: intra-state imprisonment in remote areas of Norway could *also* be a disproportionate interference with the right to family life, and in any event such possibility is not an indicator for the proportionality of transfers to PI Norgerhaven.

On the other hand, as the Norwegian Ombudsman has emphasised, PI Norgerhaven continues to raise a number of concerns in light of the right to family life.²⁴² For instance, visitors must cover their own travel and accommodation expenses, which can be rather expensive. Furthermore, based on interviews and statistics, the Ombudsman points out that very little inmates in PI Norgerhaven received visits from family or friends, much less than if they had served their sentences in Norway. According to many prisoners, this was due to the fact that it was too far, too costly, and too much time-consuming for their relatives to travel to Veenhuizen. This, according to the Ombudsman, is problematic not only in light of the intrinsic importance of family life, but also in light of rehabilitation goals as well as in light of the disproportionate impact of these measures on low-income families.²⁴³

Whether or not the arrangements in place amount to a proportionate interference depends on a weighing of these factors. On the one hand, significant efforts have been made to alleviate, as much as possible, the interference with the enjoyment of family life. On the other hand, it remains questionable whether the significant barriers to family life can be justified in light of the aim pursued. As previously pointed out, the weighing of interests should always take *individuals*, rather than collectivities, into account. It is therefore not possible to provide, in the abstract, a conclusive assessment of the proportionality of the use of PI Norgerhaven as an interference with the right to family life of prisoners with family ties in Norway: the aforementioned conditions could be weighed differently in light of different personal circumstances, including differences in the availability of financial resources.

4.5 CONCLUSION

Chapter 3 introduced that certain groups of confined individuals find themselves increasingly subjected to measures that aim at depleting their rights in the interest of carving out novel boundaries of belonging. Taking this as its starting point, the present chapter has examined how international human rights law has been able to resiliently accommodate these challenges whilst

241 As Dutch then-Minister for Migration stated, “they are used to distances”: see, for the relevant debate in Dutch Parliament, *Handelingen II*, 2014-2015, 91, item 8, p. 5 (translated from Dutch).

242 Sivilombudsmannen, 2016, pp. 36–37.

243 Sivilombudsmannen, 2016, p. 36.

simultaneously staying veracious to its fundamental tenet of equal protection. As outlined, such exercise is crucial for the preservation of legitimacy, yet at the same time renders the development of international human rights law a delicate project.

This chapter has analysed how international human rights law has attempted to stay veracious to its fundamental tenet of equal protection whilst taking a sufficiently resilient approach vis-à-vis crimmigration developments. On the one hand, since international human rights law continues to be premised on the moral assumption that equal protection to all should be guaranteed, certain absolute norms of international human rights law have been identified that cannot be interfered with under any circumstances.²⁴⁴ On the other hand, international human rights law has, practically since its inception, acknowledged that other, non-absolute rights *can* at times be limited. This approach has been duly inspired by international human rights law's legal dimension, being geared towards enforceable subjective rights that provide specific protection. This chapter has examined interferences with a number of such non-absolute rights in settings of confinement, including rights that are limited due to the nature of detention (the right to liberty, the prohibition of forced or compulsory labour, and the right to family life), and rights that are limited due to the depleted membership status of individuals (the right to vote). As has been shown, each of these rights can legitimately be interfered with by states in settings of confinement, although such interferences have been subjected to specific conditions. Some of these conditions were explicitly instilled in international human rights law at the drafting stage, whereas others have, over the years, been clarified and expanded by the relevant monitoring bodies. Still, the conditions that have been developed generally reflect that interferences with non-absolute human rights ought to remain exceptions, and ought to remain restricted as much as possible, and it can therefore be concluded that international human rights law has, throughout its resilient efforts, attempted to remain veracious to its fundamental tenet of equal protection.

From the perspective of crimmigration, this approach nevertheless raises a number of issues. For instance, as was already pointed out in relation to interferences with the right to liberty, problems could arise where states increasingly enlarge the group of confinable people whilst providing for their confinement in domestic law and preventing arbitrariness. It is, indeed, precisely *through* crimmigration legislation – e.g. the criminalisation of migration-related offences, or the importation of criminal convictions as grounds for deportation – that states may increasingly, both lawfully and non-arbitrarily, start to rely on confinement mechanisms. This in turn also means that they may increasingly subject individuals to penal labour and detainee labour that

²⁴⁴ As previously noted, however, such absolute nature is subject to debate: Graffin, 2017; Greer, 2011, 2018; Mavronicola, 2017.

are, as a matter of definition, not included under the prohibition of forced or compulsory labour. As argued above, likewise, in the context of interferences with prisoners' voting rights, the requirements that international human rights law imposes seem *a priori* insufficient to prevent states from furthering crimmigration measures through effective disenfranchisement. Under the right to family life, on the other hand, interferences have been subjected to significant thresholds that require states to implement legal safeguards, provide objectifiable aims, and to operate proportionally to such aims. With regard to this right, arguably, international human rights law has thus struck a more adequate balance in the face of crimmigration developments.

Examining international human rights law's veracity and resilience in the face of crimmigration developments consequently leads to a mixed picture. To some extent international human rights law has remained veracious to its fundamental tenet whilst resiliently accounting for crimmigration measures, yet at times it seems that, in relation to particular rights, it has not been able to structurally secure equal protection for all. This image also arises when taking the case study contexts into account. In relation to RPC Nauru, on the one hand international human rights law has been successful in granting entitlements by subjecting interferences with the right to liberty to strict conditions: according to the strict conditions in place, the detention of those confined prior to the introduction of open centre arrangements amounted to an arbitrary and unjustified form of detention. On the other hand, however, such successes should be critically acclaimed for at least two reasons. First, as this chapter has indicated, after open centre arrangements were introduced, the right to liberty was arguably no longer interfered with, even though the *de facto* situation of those that were previously confined did not change significantly. Whilst they were free to leave the RPC at all times, they were still confined to the small territory of Nauru and continued to reside within the facility, a situation that international human rights law could however not effectively deal with under the provisions guaranteeing the right to liberty. Second, as will be further addressed in Part III of this book, whilst according to international human rights law confinement in RPC Nauru prior to the introduction of open centre arrangements was arbitrary and therefore not justified, *in practice*, Nauru and Australia continued such confinement practices unabatedly given the lack of answerability and enforcement.

In the context of PI Norgerhaven, Article 8 of the ECHR seemingly allows that Norway transferred prisoners to the Netherlands in order to prevent issues of prison overcrowding, as long as the transfers – interfering with the right to family life – are proportionate to such aim. However, as pointed out in this chapter, for the right to family life to come into play in the first place, the existence of family life in Norway is required. Where prisoners, including notably FNPs, lack such family ties in Norway, they are not protected by the right to family life, even though they may have other social or support networks in Norway. Their right to receive visits from such support groups is

not protected by the right to family life, and such prisoners can therefore not rely upon it to challenge their transfer.²⁴⁵ Whilst this technically means that such prisoners are equally protected – they have an equal claim to family life – in practice it may nevertheless lead to a disparity, as it justifies that certain groups of out-grouped prisoners are transferred to prison facilities far away from the polity in which they were sentenced.

These localised examples show how the global framework of international human rights law is, as a protection mechanism, only to a limited extent able to effectively account for crimmigration developments. Particularly at the global level, such tensions between international human rights law's framework as based on both veracity and resilience on the one hand, and state practices in particular confinement contexts on the other hand, surface. Taking into account that the way in which veracity and resilience have been incorporated in a unique sense in relation to each human rights provision, and taking into account the hybridity and heterogeneity of contemporary crimmigration developments, such tension is likely to be only amplified when more rights, or more contexts, are included in the analytical scope. As such, the challenge to international human rights law's legitimacy as posed by crimmigration appears to continue unabatedly and has, in any event, not yet been adequately or holistically accounted for.

²⁴⁵ An argument could be developed that the right to receive visits from others than family members is protected by the right to respect for *private* life as likewise enshrined in Article 8 ECHR. As the ECtHR states, "it would be too restrictive to limit the notion [of private life] to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings": ECtHR, *Niemietz v. Germany*, 16 December 1992, Application no. 13710/88, para 29. However, the ECtHR has not had the opportunity to elucidate whether opportunities for prisoners to receive visits from others than family members also fall within the ambit of this provision. So far, it has predominantly dissected the right to respect for private life into rights relating to privacy, surnames, sexual lifestyle, clothing, medical treatment, sexual integrity, and physical integrity: see also Gómez-Arostegui, 2005; Roagna, 2012. As such, the right to respect for private life primarily protects physical, psychological, and moral integrity, as well as the freedom to express one's personality: see also De Hert, 2005, pp. 180–184. A right to receive visits has, accordingly, not (yet) developed under this standard and consequently only comes into play where *family* life is concerned.

5 | Widening the net

Towards private human rights obligations?

5.1 INTRODUCTION

In the present and next chapters, attention will be shifted towards a second development of globalisation that may endanger the human rights elephant: that of commodification. Chapter 2 already outlined how commodification challenges accountability under, and the effectiveness and legitimacy of, international human rights law. Here, analysis will focus upon the extent to which, and the way in which, international human rights law has been able to remain both veracious and resilient in the face of such commodification challenges.

This analysis will be two-pronged as it focuses on two distinct yet inter-related aspects: that of private human rights responsibility on the one hand and that of international state responsibility on the other. In theory, both of these vehicles could provide ample ground to accommodate contemporary developments of commodification and to accordingly make international human rights law, at least in the books, ‘commodification-proof’. As will become apparent, however, in practice the fundamental tenet of territorial states as primary duty bearers has limited the way in which international human rights law can be, and has been, adapted to commodification realities. Private human rights obligations are addressed in the present chapter, whereas states’ human rights obligations will be addressed in chapters 6 and 7. Like the previous chapters, each of these chapters denotes macro-level trends before applying the applicable framework to the case study contexts.¹ In turn, a brief concluding intermezzo reflects on the main findings of these chapters by taking a closer look at their further implications for RPC Nauru and PI Norgerhaven.

5.2 PRIVATE OBLIGATIONS: BETWEEN RESILIENCE AND VERACITY

Chapter 2 has outlined how private parties have progressively become involved in the governance of specific confinement contexts. Such progressive importance of non-state actors in the global economy, in combination with the pervas-

¹ In the present chapter, analysis at the case study level will limit itself to RPC Nauru as no private actors are involved in the core governance framework of PI Norgerhaven.

ive privatisation of core functions traditionally regarded as belonging to the state and the significant impact of non-state actors on a range of individual freedoms and liberties, has featured as one of the main arguments amongst commentators to extend international human rights obligations horizontally to private actors.² Whilst such calls have been around since the inception of international human rights law, they have prominently come to the fore over the past decades now that the impact of non-state actors has become particularly undeniable.³ In contemporary global economy, some multinationals for instance have a far larger economic power than small sovereign states: various multinational corporations, also those operating on the confinement markets, employ more people and have larger revenues than some countries have inhabitants and gross domestic products.

Many authors have claimed that rethinking the current system and entrenching private human rights obligations is therefore a promising strategy – or even a dire necessity – in order to guarantee the protection of human rights norms in the face of ongoing neoliberalism.⁴ According to these authors, the time has come for the development and imposition of mandatory human rights obligations for private actors, in particular for transnational corporations, as a resilient effort in the face of commodification developments.⁵ As Alston for example maintained in 2005,

“[t]oday [...] at least a subset of non-state actors has suddenly become a force to be reckoned with and one which demands to be factored into the overall equation in a far more explicit and direct way than has been the case to date. As a result, the international human rights regime’s aspiration to ensure the accountability of all major actors will be severely compromised in the years ahead if it does not succeed in devising a considerably more effective framework than currently exists in order to take adequate account of the roles played by some non-state actors”.⁶

Such arguments are frequently of a normative nature: they are based on the perspective that human rights entitlements should be universal in order to protect human dignity against infringements originating from any actor, be it a public or private one. Consider, for example, the focus on the *aspiration* of the human rights regime in the quote by Alston above. Vandenhole, Türkelli and Hammonds likewise consider that “human rights (law) is about correcting power, first and foremost for the protection of the most vulnerable and

2 Alston, 2005; A. Buchanan, 2013, pp. 283–284; Gear & Weston, 2015; Karavias, 2013, p. 20; Kinley & Tadaki, 2004; Kobrin, 2009; Tomuschat, 2014; Vandenhole, 2015; Vandenhole & Van Genugten, 2015.

3 Karavias, 2013, p. 21; Knox, 2008, p. 1; Vandenhole & Van Genugten, 2015, p. 1.

4 Černič, 2015; Clapham, 2006; Gear & Weston, 2015; Jägers, 2002; Kinley & Tadaki, 2004; Kobrin, 2009; S. R. Ratner, 2001; Stinnett, 2005; Vandenhole, Türkelli, & Hammonds, 2014; Vandenhole & Van Genugten, 2015.

5 Gear & Weston, 2015, p. 24; Kobrin, 2009.

6 Alston, 2005, pp. 5–6.

marginalised [...]. [T]he decisive criterion for singling out actors as human rights duty-bearers is [thus] whether they exercise power or are in a position to do so".⁷ Kinley and Tadaki argue that there is an urgent need to rethink human rights law's concepts and structures in order to focus on the effectiveness of protection rather than the entities bound by positive law.⁸ In her book with the telling title 'Corporate Human Rights Obligations: In Search of Accountability', Jägers concludes that

"[h]uman rights aim to protect the dignity of each human being. *In order to effectively satisfy this objective* it is imperative that human rights provisions are interpreted in conformity with the present-day circumstances. [...] It is necessary to apply a broad interpretation of human rights provisions encompassing private action, *if human rights law is to be effective* in the present-day circumstances where human rights protection is frequently dependant on private action".⁹

Such scholarship applies what can be called a functional approach to human rights; it is not simply pinpointing accountability but *in search* of it. It is often focussing on the *lex ferenda*: extending human rights to private actors is outlined to be promising as it would more effectively protect the objectives of, and normative claims embedded in, international human rights law.¹⁰ As such, these authors favour a resilient approach of human rights law vis-à-vis commodification developments in order to stay veracious to its fundamental tenet of protection for all.

This is of course not to say that such scholars disregard the legal dimension of international human rights law: to the contrary, they argue that at its core there are no fundamental legal problems with conceptualising direct obligations for non-state actors, either because the human rights law system would already allow for them or because the system allows for amendments to that effect.¹¹ McBeth for example asserts that "[t]he need for private human rights obligations can be deduced both from the practical necessity [...] and by logical

⁷ Vandenhoe et al., 2014, p. 1036.

⁸ Kinley & Tadaki, 2004, p. 1021.

⁹ Jägers, 2002, p. 256 (emphasis added).

¹⁰ Vandenhoe and Van Genugten maintain, for example, that "[u]nderstanding the relative strength of human rights obligations incumbent on States may help consider how the emerging regime of human rights obligations for other actors *should* be further developed": Vandenhoe & Van Genugten, 2015, p. 3 (emphasis added). Human rights obligations for private parties would in this sense represent "the beginning of a more global and coherent response to new challenges to human dignity": S. R. Ratner, 2001, p. 545.

¹¹ See e.g. A. Buchanan, 2013, pp. 283–284; Černič, 2015; Clapham, 2006, pp. 266–270; Jägers, 2002; Kinley & Tadaki, 2004; S. R. Ratner, 2001). For an alternative perspective, see Karavias, who argues that if corporations are both obligors and right holders under international human rights law, "the structure of performance of human rights law could be fundamentally altered" and would at times require balancing acts between the rights of individuals (vis-à-vis the corporation) and the rights of corporations (vis-à-vis the State): Karavias, 2013, pp. 196–197. See also Ronen, 2013.

implication from the expression of rights as an entitlement to be respected by all".¹² Hence, for this particular strand of scholarship, the authoritativeness of the human rights law framework appears not to be at stake – although the system is in need of refinement or reinterpretation. In making such arguments, authors frequently don't shy away from assuming the moral high ground: Černič, for instance, argues that "[i]t is uncontentious that international law *should* regulate corporations given their powerful position in the global economy and countless allegations that they violate human rights".¹³

Nevertheless, such arguments *de lege ferenda* have been largely unsuccessful in effectively challenging the dominant state-centric paradigm of international human rights law *de lege lata*.¹⁴ Indeed, on the plane of positive law "little, if anything has materialised".¹⁵ The call for human rights obligations for private actors has, as Alston reports, been unable to change the majority of international lawyers' reluctance to fundamentally reconsider the central role of the state in international law.¹⁶ Of particular interest in this regard is the work of Karavias, who in a detailed account explains why international human rights law currently does not give rise to corporate obligations.¹⁷ Applying both a textual and a dynamic approach to international human rights treaties, he indeed concludes that, although the somewhat abstract formulation of international human rights law has led some scholars to argue otherwise, international human rights treaties do not directly regulate corporate conduct.¹⁸ As such, international human rights law has largely stayed veracious to its fundamental tenet that human rights obligations are in principle obligations of the (territorial) state.

The foregoing is however not to say that no development towards corporate human rights obligations, inspired by calls for resilience, can be discerned at all. To the contrary, norms have progressively been developed by international and regional organisations, civil society, and the corporate world itself in order

12 McBeth, 2004, p. 144. In his article, McBeth however appears to straddle the boundary between what is and what ought to be, therewith conflating normative considerations with aspects of positive law. On the one hand, he outlines a *need* for private human rights obligations and details how such obligations would not be incompatible with the international human rights law system per se. On the other hand, he implies that private human rights obligations already exist: he dedicates an entire section to discussing "the question of the content of the human rights obligations of private entities, particularly the private providers of social services" and he contends *inter alia* that "the conclusion that private entities have a negative obligation of non-violation of the human rights of others in the course of their ordinary activities is self-evident": McBeth, 2004, p. 146.

13 Černič, 2015, p. 75 (emphasis added).

14 Hallo de Wolf, 2011, p. 121; Karavias, 2013; Ronen, 2013.

15 Tomuschat, 2014, p. 320.

16 Alston, 2005, p. 21.

17 Karavias, 2013.

18 Karavias, 2013, p. 67. Moreover, in relation to customary international human rights law, he concludes that the notion that corporations are bound by human rights law is not supported by either state practice or *opinio juris*: Karavias, 2013, pp. 73–83.

to enhance corporate social responsibility ('CSR').¹⁹ Since the 1970s, the UN has for example attempted to regulate corporate activities in soft law instruments, although initial attempts failed due to a lack of consensus.²⁰ Finally, in 2011, the UN Human Rights Council adopted the Guiding Principles on Business and Human Rights ('UNGP') on the basis of a 2008 Report by Special Representative John Ruggie.²¹ In his report, Ruggie proposed a three-pillar framework of human rights in a business context, consisting of responsibilities to protect, respect, and remedy.²² According to the report, human rights in business contexts should thus comprise (i) the state's responsibility to protect individuals against third-party human rights abuses, (ii) the corporate responsibility to respect human rights, and (iii) effective access to remedies for victims of human rights violations.²³

As Ruggie admits, however, the second pillar is based on soft law instruments and corporate practice instead of on 'hard law'.²⁴ The UNGP are henceforth not legally binding.²⁵ Whereas corporate responsibility has indeed not yet been regulated in instruments providing legally binding obligations, various soft law human rights instruments have elaborated upon corporate human rights norms. As a prime example, the UDHR stipulates in its Preamble that

"the General Assembly proclaimed the Declaration as a common standard of achievement for all peoples and all nations, to the end that *every individual and every organ of society* [...] shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance" (emphasis added).

Article 29 of the UDHR furthermore specifies that everyone has duties to the community, whereas Article 30 of the UDHR provides that "[n]othing in this Declaration may be interpreted as implying *for any State, group or person* any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein" (emphasis added). Accord-

19 Hallo de Wolf, 2011, p. 113 ff.; Nolan, 2016b; Van den Herik & Černič, 2010, p. 734 ff.; Weissbrodt & Kruger, 2003.

20 In 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights approved the '*Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*', yet these Norms were eventually not adopted by the then UN Commission on Human Rights: Černič, 2015, p. 71; Van den Herik & Černič, 2010; Weissbrodt, 2014, p. 136.

21 Ruggie, 2008.

22 Ruggie, 2008. See also Weissbrodt, 2014.

23 Ruggie, 2008, p. 4.

24 Ruggie, 2008, p. 8.

25 A. Buchanan, 2013, p. 284; Hallo de Wolf, 2011, pp. 118–121; Weissbrodt, 2014.

ing to some, the UDHR hence also applies to corporations.²⁶ Van den Herik and Černič rightfully point out, however, that the legal significance of the UDHR in this regard is limited because, first, the private duties that might be argued to be encapsulated in the UDHR are not included in the ICCPR or ICESCR as the UDHR's binding equivalent, and, secondly, only the Preamble of the UDHR makes reference to individual duties vis-à-vis other individuals.²⁷ Consequently, "[a]t best, these provisions and references may serve as a spring board towards a new conception of human rights in which commitments of corporations are more clearly articulated".²⁸ Likewise, Kinley and Tadaki argue that "[i]n the absence of binding effects, [...] the duties that the UDHR imposes on TNCs may amount to ethical duties at best".²⁹ Therefore, at least in a legal sense, the UDHR arguably provides only a very fragile basis for developing an individual duties approach to human rights.³⁰

Other forms of soft law likewise have limited impact in terms of accountability. The voluntary guidelines, declarations, and codes aimed at regulating corporate activities as developed by amongst others the Organization of Economic Cooperation and Development (OECD) and the International Labor Organization (ILO) are not addressed to corporations directly and are not in any case binding on signatory states.³¹ As a result, the implementation mechanisms of the OECD's Guidelines for Multinational Enterprises ('OECD Guidelines') and the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy ('ILO Declaration') – which are in fact the only two soft law instruments containing implementation mechanisms that enable scrutiny of corporate conduct – do not function in a judicial or quasi-judicial way and cannot be considered to intrusively deal with either state or corporate behaviour.³² Even more so, soft law instruments with no independent monitoring and enforcement mechanisms – such as the UN Global Compact launched in 2000 ('the UN Global Compact'), which encourages corporations to adhere to nine core principles relating to respect for human rights – at the end of the day are "little more than [instruments] of rhetoric".³³ Again, such

26 As Henkin for example claims, the Preamble of the UDHR arguably makes clear that it "excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all": Henkin, 1999, p. 25. See also Kinley & Tadaki, 2004, pp. 948–949; Van den Herik & Černič, 2010, p. 734.

27 Van den Herik & Černič, 2010, p. 734.

28 Van den Herik & Černič, 2010, p. 734.

29 Kinley & Tadaki, 2004, p. 949.

30 See similarly Rodley, 1993, p. 307.

31 Kinley & Tadaki, 2004, p. 949.

32 See similarly Kinley & Tadaki, 2004, pp. 949–950. In relation to the OECD Guidelines, a complaint procedure was introduced in 2000 that enables NGOs to bring a complaint against a multinational enterprise in relation to alleged breaches of the OECD Guidelines to a National Contact Point (NCP) as set up in OECD member and adhering states: Castelo Branco & Delgado, 2012, p. 359; Nolan, 2016b, p. 39.

33 Kinley & Tadaki, 2004, p. 951.

instruments are stepping stones towards awareness about corporate responsibility – and thus pursue resilience – yet arguably do not constitute more than that – as a result of a strong veracity to the fundamental tenet that human rights obligations are presumed to be state responsibilities.³⁴ Attempting to adhere to both the legal and the moral side of the Janus-face, soft law instruments thus to a certain extent seem to be situated between a rock and a hard place in trying to simultaneously showcase veracity and resilience.

In addition to soft law norms, the corporate world itself has developed and adopted a number of voluntary human rights initiatives to strengthen CSR. This includes both private initiatives urging corporations operating in certain geographical areas or specific branches to comply with international human rights standards and the development and adaptation of internal codes of conduct by corporations themselves.³⁵ Examples of the former include the Sullivan Principles (relating to corporations operating in apartheid South Africa), the MacBride Principles (relating to Northern Ireland), the Slepak Principles (relating to the former Soviet Union), the Miller Principles (relating to China and Tibet), the Macquilladora Standards of Conduct (relating to the US-Mexico border), the Valdez Principles (relating to the environment), and the US Apparel Industry Partnership's Workplace Code of Conduct (relating to the garment industry).³⁶ In relation to corporations' internal codes of conduct, many corporations nowadays have established human rights policy statements and codes of conduct.³⁷ Already in 2004, Kinley and Tadaki pointed out that it would be difficult to find a major corporation that does not at least make *some* claim about abiding by a human rights-inspired code of conduct.³⁸ Such volitional endeavours have been explained in terms of the commercial interests of corporations and the increasing exposure of their social impact.³⁹ The instrumental value of the 'court of public opinion' that Ruggie prominently discussed in his report should hence not be underestimated in the development of internal corporate norms.⁴⁰ These developments should however again be seen as stepping stones rather than bases for

34 Kinley & Tadaki, 2004, p. 951. In his report, Ruggie recognises this weak legal standing of soft law instruments that form the basis of the corporate responsibility to respect whilst simultaneously maintaining that these instruments may nevertheless have effects in other ways: as he nuances, "[f]ailure to meet this responsibility can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and *occasionally* to charges in actual courts": Ruggie, 2008, p. 16 (emphasis added). On the role and value of these 'courts of public opinion', see in particular also Wheeler, 2015. On the role of shareholders in influencing company performance on human rights, see Coles, 2003; R. Sullivan & Seppala, 2003, pp. 110–112.

35 Hallo de Wolf, 2011, pp. 113–114; Kinley & Tadaki, 2004, p. 954; Weissbrodt, 2014, p. 136.

36 Kinley & Tadaki, 2004, p. 954; McCrudden, 1999, p. 168; Nicolet, 2016, pp. 556–557.

37 Černič, 2013, pp. 24–25; Van den Herik & Černič, 2010, p. 737.

38 Kinley & Tadaki, 2004, p. 953.

39 Coles, 2003; Kinley & Tadaki, 2004, p. 953; R. Sullivan & Seppala, 2003, pp. 110–112.

40 Ruggie, 2008, p. 16; Wheeler, 2015.

actual legal responsibility: private initiatives referencing human rights responsibility are generally not specific enough to induce legal responsibility.⁴¹ They are, moreover, voluntary and self-regulatory in nature and as a result generally have a limited capacity to genuinely pressure corporations.⁴² As such, whilst resilient efforts may attempt to rely on them in order to mitigate the impact of commodification, ultimately they do not necessarily provide the most effective pathways towards protection.

Whilst a variety of tactics of resilience to enhance corporate obligations have hence been developed over the past decades, “[t]he actual legal cover these initiatives provide is meager or non-existent. The [...] rudiments of an international legal framework may be discernable, but the legal content of the law is almost wholly absent”.⁴³ Whilst it is true that the first contours provided by soft law standards and voluntary codes of conduct may over time evolve into a solid framework of positive law through a bottom-up approach to international human rights law,⁴⁴ provided that such framework can overcome issues related to the need for veracity vis-à-vis the fundamental tenet of territorial states as primary duty-bearers, such development is still in its infancy.⁴⁵ Arguably, the UN intergovernmental working group’s *‘Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises’*, of which the ‘zero draft’ was released in July 2018, comes closest to a binding regulation of private human rights obligations yet is far from completion.⁴⁶ Moreover, fundamental debates on whether international human rights instruments *should* create legal obligations for corporations in the first place, and if so, whether initiatives should address such issue through the vehicle of existing instruments, new regimes, or mere consensus and cooperation with the corporate world itself are in full swing.⁴⁷ As previously outlined, some scholars are sceptical about current approaches and advocate for stronger regulation of corporations’ human rights impact, for “[i]n practice, if not in theory, too many of them currently escape the net cast by international human rights norms and institutional arrangements”.⁴⁸ Others, on the other hand, fundamentally disagree, arguing that incorporating private human rights obligations in many cases would not be effective and might even cause serious damage to the

41 Černič, 2013, pp. 24–25; Van den Herik & Černič, 2010, p. 737.

42 Černič, 2013, p. 25; Kamatali, 2012, pp. 149–150; Kinley & Tadaki, 2004, pp. 955–956.

43 Kinley & Tadaki, 2004, p. 948.

44 Kinley & Tadaki, 2004, pp. 958–960; Muchlinski, 2003, p. 50.

45 The initiatives so far “do not have more than moral value”: Hallo de Wolf, 2011, p. 121.

46 This zero draft was adopted four years after the UN Human Rights Council adopted Resolution A/HRC/RES/26/9 that called for the start of negotiations on a binding international treaty on businesses and human rights. The zero draft is available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> (last accessed 30 May 2019). See also Correa, 2016.

47 Kamatali, 2012; Weissbrodt, 2014, p. 136; Weissbrodt & Kruger, 2003, p. 914.

48 Alston, 2005, p. 6.

system of human rights law as a whole.⁴⁹ This debate reflects the larger paradox of showing resilience and veracity at the same time, for accommodation of commodification in the international human rights law system would require that the tenet of territorial state obligations is bent far enough without breaking it, which at times may seem like an infeasible undertaking.

It is important to mention that so far, this section has focussed primarily on *corporate* human rights obligations. This niche has been the predominant focal point of scholarship on private human rights obligations, yet one should not forget that other private actors may likewise have a significant impact on the enjoyment of human rights, including in the field of confinement. As has been outlined in chapter 2, this includes actors that are not typically associated with human rights abuse in the first place, such as NGOs, charities, and churches.⁵⁰ These actors are often framed as champions and defenders of human rights and as catalysators of change.⁵¹ They have occasionally even been described as “sources of justice and democracy”.⁵² As likewise previously elaborated upon, however, non-profits are not necessarily motivated by altruism, do not support rehabilitative ethics per se, and cannot be unconditionally trusted to do the right thing, whilst their charitable image legitimises their existence and involvement in governance networks including in realms of confinement.⁵³ Their self-standing responsibility should, hence, not be neglected in the debate on private human rights obligations, particularly where they exercise power with a significant bearing on the enjoyment of human rights. There indeed seems no reason to *a priori* distinguish for-profit organisations from not-for-profit ones when discussing the existence, scope, and desirability of private human rights obligations either *de lege lata* or *de lege ferenda*.

5.3 ‘POSITIVE OBLIGATIONS’ AND ‘HORIZONTAL APPLICATION’ AS EFFECTIVE RESILIENT EFFORTS?

Instead of relying on direct private human rights obligations, various scholars have turned to the doctrine of ‘positive obligations’ as a more effective form of resilience – at least in the short-run – to effectuate human rights protection in commodified settings involving private actors. According to some, positive obligations indeed constitute a panacea in that they would provide for an alternative and more effective pathway to achieve human rights compliance. This idea is based on the horizontal application (or *Drittwirkung*) of human

49 Knox, 2008. See also Hannum, 2016, p. 431.

50 Armstrong, 2002, p. 345.

51 See for example Guay, Doh, & Sinclair, 2004; Kobrin, 2009; Van Tuijl, 1999.

52 Van Tuijl, 1999.

53 Armstrong, 2002; Galaskiewicz, 1985, p. 297.

rights obligations: such obligations do not only protect individuals against the exercise of state power, but also require the state to provide protection against horizontal interferences.⁵⁴ In this sense, it is no longer sufficient that a state does not violate human rights norms *itself*: it should also act as a guarantor of such norms by regulating private conduct as a potential source of horizontal interference.⁵⁵ This dual role is reflected by the dichotomous notions of ‘negative’ and ‘positive’ human rights obligations that are linked to all substantive human rights norms, as the introductory chapter has already explained.

According to some, horizontal effect “constitutes a departure from the traditional approach that human rights are held by the individual exclusively against the State”.⁵⁶ In this regard it has been argued that “support for the hypothesis of the *Drittwirkung* of international human rights law can be inferred from the nature of human rights and from the general provisions of the human rights treaties”.⁵⁷ Thus, in light of the object and purpose of international human rights law, codified human rights norms could arguably be applied to private actors such as corporations.⁵⁸ If this happens to be true, a distinct set of private human rights obligations is no longer strictly necessary: private actors could be held responsible for their conduct under the existing norms. At the same time, however, such an interpretation is – except for a single exception that will be discussed below – *de lege ferenda* at best: the horizontal effect of human rights is generally understood as being indirect (or ‘*mittelbare Drittwirkung*’), meaning that human rights norms can regulate the acts of private parties but that states ultimately remain responsible for the violation.⁵⁹ In other words, the emerging doctrine of positive human rights obligations obliges states to regulate corporate conduct domestically in order to guarantee and foster the enjoyment of human rights by those within its jurisdiction, yet such positive obligations do not, as Karavias emphasises, change the nature of the system of responsibility under international human rights law given that the horizontal application of human rights through the notion of positive obligations is “not direct, in the sense that corporations do not emerge as human rights addressees”.⁶⁰ Hallo de Wolf clarifies that such

54 Karavias, 2013, pp. 57–58.

55 Karavias, 2013, p. 58; Van Berlo, 2017b, p. 9.

56 Jägers, 2002, p. 36.

57 Jägers, 2002, p. 44.

58 Jägers, 2002, p. 247.

59 Hallo de Wolf, 2011, p. 192; Jägers, 2002, p. 247; Knox, 2008, p. 47.

60 Karavias, 2013, p. 67. This finding is corroborated by General Comment 31 of the HRCee, which outlines that the obligations enshrined in the ICCPR “are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would

lack of direct *Drittwirkung* means that private parties are not recognised as direct bearers of human rights obligations either substantially or procedurally.⁶¹ It is thus true that horizontal application through positive obligations may prove to be a promising strategy in the face of commodification developments – yet *not* because it would turn corporations or other private actors into addressees of international human rights norms, but because it has the potential of indirectly affecting corporate conduct through the scope of state obligations.⁶² The system currently in place is hence not necessarily ill-placed to affect private behaviour, yet does not turn corporations into direct addressees of international human rights law. Consequently, *mittelbare Drittwirkung* of human rights via the notion of positive obligations may be regarded as a somewhat resilient effort to accommodate commodification whilst staying true to the fundamental tenet of territorial state responsibility.

An important exception to this rule is the Charter of Fundamental Rights of the European Union ('CFREU'). The CFREU became legally binding on the 1st of December 2009 when the Treaty of Lisbon entered into force and enshrines political, social, and economic rights for citizens and residents of the European Union (EU). It obliges EU institutions and member states to act and legislate in consistency with such rights. The Court of Justice of the European Union ('CJEU') has specifically dealt with the question of direct horizontal application of the CFREU. In *Association de médiation sociale v Union locale des syndicats CGT and Others* (the 'AMS' case), the CJEU explicitly questioned whether the Charter can be applicable to disputes between private individuals.⁶³ This question was not completely novel: in *Mangold and Küçükdeveci*, the Court had previously affirmed that the principle of non-discrimination based on age as enshrined in Article 21(1) CFREU is a general principle of Union law that applies to disputes between private individuals.⁶⁴ Nevertheless, various authors argued that the CFREU had no direct horizontal application given that Article 51(1) of the Charter states that the provisions of the Charter "are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are

impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities." See HRCee, *General Comment no. 31*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), 26 May 2004, para. 8.

61 Hallo de Wolf, 2011, pp. 185–195.

62 See also Van den Herik & Černič, 2010, pp. 729–733.

63 CJEU, *Association de médiation sociale v Union locale des syndicats CGT and Others*, 15 January 2014, Case C-176/12.

64 CJEU, *Mangold v. Helm*, 22 November 2005, Case C-144/04; CJEU, *Küçükdeveci v. Swedex*, 19 January 2010, Case C-555/07.

implementing Union law”.⁶⁵ Since private individuals are not mentioned in this provision, various authors concluded that no direct horizontal application is envisaged by the Charter.⁶⁶

The CJEU considered in *AMS*, however, that “the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law”.⁶⁷ Thus, the CFREU may apply directly in a horizontal dispute where such dispute is governed by EU law. In *AMS*, this was the case since the dispute concerned national legislation that was adopted to implement an EU Directive.⁶⁸ As Van der Hulle aptly analyses, the applicability of the Charter is henceforth not determined by the *nature of the legal relationship* between parties but rather by the determination whether the case falls within the *ambit of EU law*.⁶⁹ Nevertheless, the Court in *AMS* also reiterates that individuals cannot rely on all provisions of the Charter in a horizontal dispute: instead, they can only rely on those provisions that “suffice to confer on individuals a right which they may invoke as such”.⁷⁰ This has consequently become the appropriate test for horizontal effect under the CFREU.⁷¹ Ultimately, whether a provision has direct horizontal effect depends on the wording of the specific provision involved and the meaning provided to it.⁷² This seems to correlate with the distinction between *rights* and *principles* expressed in Article 51(1) of the Charter.⁷³ It indeed seems to be the case that *rights* may have direct horizontal effect whereas *principles* – that allow courts to only test the legislative and implementation acts by which such principles are applied –⁷⁴ do not.⁷⁵ To complicate the determination of direct horizontal effect, however, the charter itself does not detail which provision constitute rights and which constitute principles.⁷⁶ Frantziou therefore rightfully criticizes the lack of clear standards and criteria: the approach taken may ultimate-

65 Article 51(1) CFREU.

66 See in this regard Heerma van Voss, 2014, p. 119; Van der Hulle, 2014, pp. 563–564. See also Emaus, 2015, pp. 71–72.

67 CJEU, *AMS*, para. 42.

68 CJEU, *AMS*, para. 43.

69 Van der Hulle, 2014, p. 564.

70 CJEU, *AMS*, paras. 47–49.

71 Emaus, 2015, p. 73.

72 Van der Hulle, 2014, p. 565.

73 This provision provides *inter alia* that rights should be *respected* whereas principles should be *observed*.

74 As Article 52(5) CFREU provides, “[t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.”

75 See Emaus, 2015; Van der Hulle, 2014. In *AMS*, the Court consequently held that Article 27 CFREU – which was central to the case – does not provide a subjective right to individuals: CJEU, *AMS*, para. 49.

76 See similarly Heerma van Voss, 2014, pp. 121–122.

ly lead to “an informal and unpredictable horizontality model, which is an important legal hurdle for private parties on whom obligations are imposed, while in turn [it] offers little more than an uncertain prospect for parties seeking to have those obligations imposed on others”.⁷⁷

Leaving this debate aside for the moment, it should hence be noted that the Court in *AMS* made clear that direct horizontal effect of provisions enshrined in the CFREU is not excluded *a priori*.⁷⁸ The Charter therewith seems to be the exception to the norm insofar as private obligations are concerned: it appears to have been particularly – and exceptionally – resilient by allowing for the direct horizontal effect of a number of provisions.

5.4 THE CASE STUDY CONTEXT: RPC NAURU

What does the foregoing mean in the context of RPC Nauru?⁷⁹ In essence, the various private actors involved in the governance network of RPC Nauru have no self-standing binding human rights obligations as a matter of hard international law, which will not change until a binding instrument is adopted at the supranational level. No matter how far commodification has *in casu* progressed, no matter how much the private actors involved have nested themselves at the core of the nodal governance setting, no matter the fact that private actors continue to fulfil core tasks in the RPC that have a direct effect on human rights enjoyment: the private contractors are not legally bound by hard international human rights law obligations.

That is not to say that the private actors involved in RPC Nauru – the most important ones being, as analysed in chapter 2, Transfield/Broadspectrum, Canstruct, Wilson Security, IHMS, the Salvation Army, and Save the Children Australia – are not subjected to human rights norms at all. They fall, first, within the scope of the UNGP which applies to *all* business enterprises, both transnational and others.⁸⁰ This hence includes the Salvation Army and Save the Children: although they are non-profits, they engage in typical business activity in the context of RPC Nauru and there is therefore no compelling reason to exclude them from the UNGP’s ambit.⁸¹ Consequently, the private stakeholders involved should respect human rights by refraining from “infringing on the human rights of others” and by addressing “adverse human rights impacts with which they are involved”.⁸² The subsequent question is, however, which precise human rights should be respected. As the UNGP in turn

⁷⁷ Frantziou, 2015, p. 668.

⁷⁸ Heerma van Voss, 2014, p. 122.

⁷⁹ As mentioned above, since PI Norgerhaven does not involve private actors, the focus here is exclusively on RPC Nauru.

⁸⁰ Principle 14 of the UNGP.

⁸¹ Wynn & Navarro Blakemore, 2017, p. 14.

⁸² Principle 11 of the UNGP.

outline, this includes at a minimum the rights enshrined in the UDHR, the ICCPR, the ICESCR, and the ILO's Declaration on Fundamental Principles and Rights at Work.⁸³ What is precisely expected from the private stakeholders in RPC Nauru remains however somewhat ambiguous: as the Commentary to the UNGP outlines, "[d]epending on circumstances, business enterprises may need to consider additional standards".⁸⁴ In any event, the UNGP urge business enterprises to have policies and processes in place, including (i) a commitment to meet human rights responsibilities, (ii) a due diligence process that identifies, prevents, mitigates, and accounts for human rights impacts, and (iii) processes that allow for any adverse impact on human rights to be remedied.⁸⁵

In addition, the conduct of private stakeholders involved in RPC Nauru potentially falls within the scope of the OECD Guidelines. These Guidelines are not legally binding as such but concern "recommendations addressed by governments to multinational enterprises" operating in or from adhering countries: multinational enterprises are thus merely invited to adopt the guidelines voluntarily.⁸⁶ Since Nauru is not a member state of the OECD nor an adhering country, the private actors involved should furthermore operate from one of the adhering countries in order to be invited to do so in the first place. This happens to be the case: Transfield/Broadspectrum, Canstruct, Wilson Security, IHMS, the Salvation Army Australia, and Save the Children Australia are based in Australia which is an OECD member state. Similar to the UNGP, it is likely that the Salvation Army and Save the Children are also covered, since the OECD Guidelines provide that "[a] precise definition of multinational enterprises is not required [...] [t]hese usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways".⁸⁷ At the same time, what is exactly required from the private contractors remains opaque: in relation to the topic of human rights, the OECD Guidelines merely state that enterprises should "[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments".⁸⁸ Indeed, the UDHR "and other human rights obligations of the government concerned are of particular relevance in this regard".⁸⁹ Thus, it transpires that the private actors involved in RPC Nauru should, insofar as they have adopted the guidelines voluntarily, respect those human rights that *Nauru* – not Australia – is bound by, either on the basis of treaty or custom.

83 Principle 12 of the UNGP.

84 OHCHR, 2011, p. 14 (emphasis added).

85 Principles 15-24 of the UNGP.

86 OECD Guidelines, page 9, para 1 and page 29. See also Castelo Branco & Delgado, 2012, p. 359; Nolan, 2016b, p. 39.

87 OECD Guidelines, page 12, para 3 (emphasis added).

88 OECD Guidelines, page 14, para 2 (emphasis added).

89 OECD Guidelines, page 39-40, para 4.

The ILO Declaration also has the potential of covering the private contractors involved in RPC Nauru. Indeed, in a similar fashion as the OECD Guidelines, the Declaration arguably seeks to guide both corporate actors and non-profit organisations.⁹⁰ At the same time, Nauru is – together with six other UN member states – not a member of the ILO.⁹¹ This calls into question whether the private actors operating on its territory can be held responsible under the Declaration in the first place, since it specifically invites “governments of States Members of the ILO, the employers’ and workers’ organizations concerned *and the multinational enterprises operating in their territories* to observe the principles embodied therein”.⁹² However, it seems plausible that the ILO Declaration – in a similar vein as the OECD Guidelines – intends to at least include enterprises *domiciled* in a member state. Given that all private actors in RPC Nauru are based in Australia, and given that Australia is a member state, the private contractors thus seem to be addressed by the ILO Declaration. Nevertheless, similar to the OECD Guidelines, the ILO Declaration *guides* corporations but does not bind them: multinationals are “recommended to observe on a voluntary basis”.⁹³ Moreover, since this Declaration contains primarily guidelines related to workers – i.e. in the field of employment, training, conditions of work and life, and industrial relations – they are only partially of relevance here.⁹⁴ Although workers’ rights are inevitably also of crucial importance in the context of offshore processing, the ILO Declaration does not provide further ground for holding private actors responsible for potential violations of human rights of those confined in RPC Nauru.

The UN Global Compact is likewise voluntary in nature and thus depends on companies’ own initiatives to submit to the principles contained therein. Transfield/Broadspectrum, Canstruct, Wilson Security, IHMS, the Salvation Army, and Save the Children Australia do not participate in the framework, and the principles can thus not be applied to them.⁹⁵ Interestingly, Ferrovial S.A. – which acquired Broadspectrum in 2016 – joined the UN Global Compact in 2002.⁹⁶ Since it subsequently terminated Broadspectrum’s operations on Nauru,⁹⁷ the UN Global Compact will not further be elaborated upon here.

⁹⁰ ILO Declaration, page 3, para 6.

⁹¹ The other non-members being Andorra, Bhutan, Liechtenstein, Micronesia, Monaco, and North Korea.

⁹² ILO Declaration, page 1 (emphasis added).

⁹³ ILO Declaration, page 3, para 7.

⁹⁴ ILO Declaration, page 3, para 7.

⁹⁵ See for all current participants, <https://www.unglobalcompact.org/what-is-gc/participants/> (last accessed 23 November 2018).

⁹⁶ See <https://www.unglobalcompact.org/what-is-gc/participants/4596-Ferrovial-S-A-> (last accessed 23 November 2018).

⁹⁷ H. Davidson, 2017.

Most of the private actors involved in RPC Nauru have developed their own codes of conduct or statements on CSR.⁹⁸ Only Broadspectrum's code of conduct details human rights compliance in a separate part: a separate Human Rights Statement was published "to outline Broadspectrum's respect for human rights and how it aspires to uphold human rights in the course of operating its business".⁹⁹ The source documents are the UDHR, the UN Global Compact, the UNGP, and the ILO Declaration on Fundamental Principles and Rights at Work.¹⁰⁰ According to the code,

"even though none of the International Human Rights Standards are binding on or enforceable against it [...], Broadspectrum uses the International Human Rights Standards as a framework to guide its decision-making and constructive engagement within its sphere of influence, while respecting the responsibility of government to ensure the protection of human rights. In that sense, Broadspectrum recognises its own limitations and ability to influence change when it comes to government policy and other matters outside its control".¹⁰¹

Thus, whilst Broadspectrum recognizes the importance of human rights compliance, it also notes that "this commitment is limited to what is within its reasonable capability and requirements of law and government policy".¹⁰² Whilst potential human rights violations can be reported internally,¹⁰³ they cannot be enforced in any way.

Instruments regulating the human rights obligations of private stakeholders involved in RPC Nauru thus to a certain extent may cover their operations, although these instruments are generally not binding. This will be further addressed in chapter 9 of this book, when the 'law in action' in RPC Nauru is reflected upon. The context of RPC Nauru thus confirms and illustrates that international human rights law has attempted to show resilience in the face of progressive responsabilisation of private actors, and their consequent increase in authority and power, yet that it ultimately remains highly veracious to the

98 See the codes of conduct of Broadspectrum (<http://www.broadspectrum.com/about/code-of-business-conduct>), Wilson Security (<https://www.wilsonsecurity.com.au/aboutus/Pages/ourcommitment.aspx>), IHMS (<http://www.ihms.com.au/csr.php>), the Salvation Army (https://salvos.org.au/subscribe/sites/safesalvos/files/Code_of_Conduct_V1_Feb_2017.pdf), and Save the Children (<https://www.savethechildren.org.au/getmedia/259a95e1-65f3-41d4-83b4-665a8271acc9/SCA-Child-Safeguarding-Policy-and-Code-of-Conduct.pdf.aspx>) (all last accessed 23 November 2018). Only Canstruct's code of conduct cannot be traced online.

99 See page 1 of Broadspectrum's Human Rights Statement, available at <http://www.broadspectrum.com/pdf/TMC-0000-LE-0020-Human-Rights-Statement.pdf> (last accessed 20 September 2018). The codes of conduct and CSR statements of other contractors do not mention human rights, although some discuss values that may be identified in human rights terms.

100 Broadspectrum's Human Rights Statement, p. 2.

101 Broadspectrum's Human Rights Statement, p. 2.

102 Broadspectrum's Human Rights Statement, p. 2.

103 Broadspectrum's Human Rights Statement, p. 5.

fundamental tenet that (territorial) states are the primary bearers of binding international human rights obligations. Insofar as the private actors operating in RPC Nauru have human rights obligations, these remain of a soft-law or voluntary nature and do not provide significant prospect for holding such actors legally accountable.

5.5 CONCLUSION

Whilst commodification has to certain extents in a resilient effort adapted to the commodification development of privatisation, this has – in staying veracious to its fundamental tenet of territorial state obligations – not resulted in binding international human rights obligations for private actors as duty bearers. In this sense, the voluntary frameworks in place are often characterised by a relative lack of effectiveness. Specifically, most frameworks lack avenues to hold private actors accountable under the norms that they have subscribed to, as binding opportunities for answerability and enforcement are often not provided for. Only a limited set of frameworks such as the OECD Guidelines and the ILO Declaration contain implementation mechanisms that enable scrutiny of sorts, yet these often do not function in a judicial or quasi-judicial way.

In this sense, the expansion of instruments regulating private human rights obligations seems to be inspired first and foremost by the moral side of international human rights law's Janus-face: it is the promise of equal and universal protection for all that informs ongoing calls to expand the catalogue of duty-bearers. Legally, however, the effectiveness of such instruments has been duly circumscribed.

Ultimately, this begs the question what the precise added value of soft-law and voluntary private human rights obligations is. On the one hand, as the case study of Nauru has also shown, due to global efforts, various private actors at the local level feel the need to prescribe to human rights standards and to develop their own respective codes of conduct. They also, increasingly, are captured within the ambit of soft-law instruments of human rights. As such, at the 'glocal' level, global developments and local operations are sewn together, with the development of global regimes being translated into local promises, and with local promises *vice versa* being used to evaluate, refine, and promote the acceleration of, standards of responsibility at the global level. On the other hand, whilst it is true that in case-specific instances at the local level such norms *do* work, and whilst it may be true that they constitute stepping stones towards potential future instruments of responsibility at the global level,¹⁰⁴ the potential danger of such norms is that power-bearers may

104 Černič, 2013, p. 25; Kamatali, 2012, pp. 149–150; Kinley & Tadaki, 2004, pp. 955–956.

subscribe to them without significant accountability consequences. This, in turn, seems to allow private actors to keep up appearances and to operate behind what may turn out to be a human rights façade. Such façade *also* plays out on the 'glocal' level, as it entails that private actors rely on their formal subscription to global regimes in order to justify their operations on the local level. The use of international human rights law instruments governing private obligations in such adverse way will further be reflected upon in Part III of this book, where both legal and non-legal avenues of protection are included in the scope of theorising and analysis.

6 | Sophisticating the net I

State responsibility for conduct

6.1 INTRODUCTION

The previous chapter has shown that the state remains the primary and arguably sole bearer of hard international human rights obligations. It is therefore to the state that this book should now turn in order to investigate to what extent the system of human rights obligations has shown resilience and veracity in the face of globalisation. This question is, however, complex in the sense that it does not concern the *widening* of the net to include potential new duty bearers in the framework of international human rights law, but rather the *sophistication* of the net in order to adapt the existing framework's logic and operation to commodified realities. This issue therefore does not revolve around *whether* an actor has become responsible, but to *what extent* existing responsibilities have been reformed or adjusted.

Analysing the existing framework is a two-step process.¹ First, we should turn to general international law to examine for which *conduct* the state can be held responsible (i.e. the question of international responsibility for wrongful acts). This is the concern of the present chapter. Subsequently, we should focus on international human rights law specifically in order to establish what the *obligations* of the state precisely include (i.e. the question of the scope of application),² a question that is the main concern of the next chapter. This distinction between the responsibility for conduct and the scope of obligations was set out by the ICJ in the *Tehran Hostages* case. The ICJ held that it had to examine the question of state responsibility in two ways: “[f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian

1 Compare Den Heijer, 2011; Gammeltoft-Hansen, 2011.

2 It should be noted that there is no hierarchical relationship between these tests and that their order is therewith not compulsory. Both are necessary yet independent threshold criteria for international human rights responsibility to arise. However, as Milanovic rightfully remarks, in some cases establishing international responsibility for a wrongful act can be a prerequisite for the existence of human rights obligations. Indeed, various human rights obligations are conditionalized by jurisdictional clauses, which in turn are often dependent on the amount of power, authority, and/or control exercised by the state over a territory or person. In such cases, the human rights obligation thus arises when it is established that the acts of the person who exercised power, authority, and/or control in fact can be attributed to the state: Milanovic, 2011, pp. 51–52, see similarly Hajjer & Ryngaert, 2015, p. 177. It therefore generally makes sense to treat the question of international responsibility for wrongful acts first. Compare Sari, 2014.

state. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.”³ Later, this fundamental rule for establishing international state responsibility was laid down in Article 2 of the ILC’s Draft Articles on State Responsibility (‘Draft Articles’), which are not legally binding in and of themselves yet are understood to codify rules of customary international law.⁴ According to Article 2, a state can indeed be held responsible for an internationally wrongful act if the act or omission (a) is attributable to that state and (b) constitutes a breach of an international obligation of that state.⁵ To establish the former condition, the public international law doctrine of *attribution* serves to identify acts and omissions that may properly be considered acts of a state. To establish the latter condition, the concept of *jurisdiction* functions to indicate which individuals come within the purview of states’ human rights obligations under respective treaty regimes.

It is important to maintain a firm conceptual distinction between both steps as they purport to establish different complementary aspects of state responsibility. At the same time, they tend to become conceptually blurred since the relevant tests for both steps frequently require an assessment of the same factual circumstances and the application of analogous legal criteria.⁶ Indeed, the respective tests for establishing attribution and jurisdiction may in certain circumstances contain similar terminology, yet often such terminology reflects different criteria. For example, both tests may use the same terminology of ‘effective control’ to denote different criteria: as will be explored in detail, to examine whether certain conduct can be attributed to a state (i.e. the question of attribution) one generally has to establish ‘effective control’ of the state *over the actor* whose conduct the inquiry is concerned with, whereas to examine whether the conduct breaches an obligation of the state (i.e. the question of

3 ICJ, *United States Diplomatic and Consular Staff in Tehran*, 24 May 1980, ICJ Reports 1980, 3, para. 56.

4 International Law Commission (‘ILC’), *Responsibility of States for Internationally Wrongful Acts*, annexed to UN GA Resolution 56/83 of 12 December 2001. See also Gammeltoft-Hansen, 2011; Hallo de Wolf, 2011; Mccorquodale & Simons, 2007.

5 Furthermore, States can be held responsible on the basis of derived responsibility as will be further outlined below.

6 Den Heijer, 2011, p. 67; Milanovic, 2014; Szydło, 2012, p. 277. For a clear example, see ECommHR, *X. and Y. v. Switzerland*, 14 July 1977, Application nos. 7289/75 and 7349/76, which is discussed more in-depth in this book in relation to *both* attribution and jurisdiction: see footnote 48 (attribution), footnotes 116–117 of chapter 7 (jurisdiction), and accompanying text. For another example, see ECtHR, *Drozd and Janousek v. France and Spain*, 26 June 1992, Application no. 12747/87, discussed below in footnote 126 of chapter 7. In this case, the Court held that “[t]he term ‘jurisdiction’ is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory [...]. The question to be decided here is whether the acts complained of by Mr Drozd and Mr Janousek can be *attributed* to France or Spain or both, even though they were not performed on the territory of those States”: ECtHR, *Drozd and Janousek v. France and Spain*, para 91 (emphasis added).

jurisdiction) one generally has to establish ‘effective control’ of the state *over territory or victim*.⁷ Given the similarities in terminology, the consecutive questions of the two-pronged test have however frequently, albeit unwarrantly, been confused by both courts and commentators.

The two steps of state responsibility will be addressed in turn in the present and next chapter. In doing so, these chapters first explore global developments before turning to the local contexts of RPC Nauru and PI Norgerhaven. Analysis specifically inquires whether the consecutive steps of establishing state responsibility provide leeway to show resilience in the face of commodification challenges. It does so by contrasting such potential space for resilience with the way in which the doctrines of state responsibility and international human rights law continue to demand veracity to the fundamental principles that states are in principle responsible for their own conduct only and that human rights obligations are in principle obligations of the territorial state.

6.2 RESPONSIBILITY FOR CONDUCT: ATTRIBUTION

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”.⁸ States are, however, legal fictions that cannot act in and of themselves given that they are exactly that: fictions. Since states are legal entities, not natural persons, one inevitably needs to apply one or more rules of attribution in order to determine which acts (or omissions) can be regarded as acts (or omissions) of a certain state. Indeed, to say that state X committed act Y (or omitted to do so) requires one to either explicitly or implicitly argue that person (or group of persons) Z, who *factually* acted or omitted, did so on behalf of state X. Such explicit or implicit arguments in turn need to be based on a rule of attribution, i.e. a maxim providing under which preconditions conduct Y of person(s) Z can be regarded as attributable to state X. Only when such a required link is established, one can legitimately claim that the conduct in question is actually the conduct of state X and that state X can rightfully be held responsible for it. Attribution hence provides a state’s ownership over and responsibility for certain conduct (or omissions) as exercised through what can legitimately be called its intermediaries or subsidiaries.

It would in turn be little helpful if every state maintained its own maxim of attribution – this would create great disparities and would leave the state with tremendous discretion to determine which acts can, and which cannot,

7 As will be further outlined in chapter 7, the precise tests for establishing jurisdiction differ amongst human rights regimes.

8 ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, ICJ Reports 2007, 43, para 406. See also Hallo de Wolf, 2011, p. 201.

be regarded as its own. Initiatives on the international level have henceforth attempted to provide a basic set of attribution rules relevant not only to the field of human rights law but to all domains of public international law. Rules of attribution are as such regarded as rules of secondary international law, applying to all situations where primary rules of international law – including international human rights law – provide for certain obligations.⁹ Such initiatives have, however, not remained void of debate and controversy: various rules of attribution have over time been developed and these rules have subsequently been divergently interpreted and have been contested both by courts and in scholarship.¹⁰ On a more positive note, the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* ('ILC Draft Articles') have to a large extent codified a prevailing and authoritative set of attribution rules that codify rules of customary international law.¹¹ Given their authoritative status and grounding in customary international law, it has become commonplace to apply these rules in order to establish whether certain acts or omissions can be attributed to a state, including in the context of international human rights obligations.¹²

Chapter II of the ILC Draft Articles contains 8 different rules of attribution.¹³ As the *Commentaries to the ILC Articles on Responsibility of States for internationally wrongful acts* (hereinafter: 'ILC Commentaries') have clarified, these attribution rules are not only cumulative but also limitative: "[i]n the absence of a specific undertaking or guarantee (which would be a *lex specialis*), a state is not responsible for the conduct of persons or entities in circumstances not covered".¹⁴ In commodified settings of confinement, various of the ILC rules might be of relevance for questions of human rights responsibility. Concretely, this concerns the rules as expressed in Articles 4, 5, 6, 7, 8, and 11, which will be discussed in turn below.

Although the ILC Draft Articles apply in a general fashion to internationally wrongful acts and are therewith not limited to the sphere of human rights

9 Griebel & Plücker, 2008, p. 603.

10 Gibney, 2016, pp. 14–15; Griebel & Plücker, 2008, p. 603.

11 Den Heijer, 2015; Gammeltoft-Hansen, 2011; Hallo de Wolf, 2011; Mccorquodale & Simons, 2007. For a more critical reflection on the level of authority of the ILC Draft Articles, see Caron, 2002.

12 Mccorquodale & Simons, 2007, pp. 601–602.

13 These rules deal with conduct of organs of a state (Article 4), conduct of persons or entities exercising elements of governmental authority (Article 5), conduct of organs placed at the disposal of a State by another State (Article 6), excess of authority or contravention of instructions (Article 7), conduct directed or controlled by a State (Article 8), conduct carried out in the absence or default of the official authorities (Article 9), conduct of an insurrectional or other movement (Article 10) and conduct acknowledged and adopted by a State as its own (Article 11).

14 *Commentaries to the ILC Articles on Responsibility of States for internationally wrongful acts*, UN Doc. A/56/10, (2001) Yearbook of the ILC, vol. 2 (part 2), at 39, para. 9.

norms,¹⁵ the discussion below will show how they at least partially deal with the same tension between veracity and resilience in the face of globalisation developments, in particular in the face of commodification. Indeed, the fundamental tenet of international human rights law that obligations are in principle obligations of territorial states applies *mutatis mutandis* to the broader field of public international law. Even more so, it arguably is even derived from the sphere of public international law, which is, after all, firmly based in Westphalian notions of sovereignty and power. In turn, the ILC Draft Articles show how commodification can be dealt with both in a veracious and resilient manner as explored below.

6.3 THE ILC DRAFT ARTICLES

6.3.1 Conduct of organs of a state (Article 4)

The ‘basic rule’ of attribution is laid down in Article 4 of the ILC Draft Articles,¹⁶ which also functions as a point of departure in that it both defines the core cases of attribution and informs various complementary rules of attribution.¹⁷ It provides that

“1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

The basic rule hence reflects the idea that a state is responsible for all of its organs acting in that capacity.¹⁸ This makes logical sense: states are responsible for the acts of their own organs. The basic rule therewith recognises the unity of the state, entailing that all acts or omissions of all organs are to be regarded as acts or omissions of the state, and henceforth that all organs are capable of committing internationally wrongful acts.¹⁹ No distinction is made between different branches or levels of government or between levels of

15 The Articles “apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole”: ILC Commentaries, at 32, para 5.

16 ILC Commentaries, at 39, para 8.

17 ILC Commentaries, at 40, para 2.

18 Such responsibility is well established in international jurisprudence and has on many occasions been (re)confirmed: see ILC Commentaries, at 40, para 3.

19 ILC Commentaries, at 40-41, paras 5-6.

superiority amongst public servants.²⁰ The basic rule furthermore expresses in an unequivocal manner that internationally wrongful acts are, in principle, committed by organs of sovereign states, staying veracious to the fundamental principles underlying public international law.

As clarified by the second paragraph of Article 4, internal law provides an important basis to establish whether a person or entity is a state organ – indeed, when the internal law of a state characterizes a given entity as a state organ, “no difficulty will arise”.²¹ That is not to say that internal law exhaustively defines state organs, which is reflected by the words “[a]n organ *includes*” in the second paragraph. As the ILC Commentaries highlight, some systems determine the status of entities as state organs not only by internal law but also by practice, in which case states cannot avoid responsibility for the conduct of such entities simply because internal law does not provide for their status as state organs.²² Ultimately, whether such entity is a state organ depends on the facts and circumstances of the specific situation.²³ The ICJ’s case law shows that relevant indicators are *inter alia* by whom a person or entity is appointed, to whom the person or entity is subordinated, who pays the salaries of the person or entity, and whether the person or entity is authorised by law to exercise public authority.²⁴ Whilst the ILC Commentaries ultimately refrain from providing a concrete test for *de facto* state organs, the ICJ has outlined that the conduct of persons or entities *de facto* operating as agents of the state can ultimately be attributed to the state if “in fact the persons, groups or entities act in ‘complete dependence’ on the State, of which they are ultimately merely the instrument”.²⁵ This is a significant threshold, yet equating an entity with a state organ has far-reaching consequences and would, if a lower threshold was applied, potentially result in a breach of the basic rule that states are in principle held responsible only for their own conduct.²⁶

20 ILC Commentaries, at 40-41, paras 6-8.

21 ILC Commentaries, at 42, para 11.

22 ILC Commentaries, at 42, para 11.

23 ILC Commentaries, at 42, para 13.

24 Den Heijer, 2011, pp. 71-72. See also ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, paras. 386-388.

25 ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, paras. 391-392. See also ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, 27 June 1986, ICJ Reports 1986, 14, para 109. A close reading of this test reveals that the ICJ has difficulties with classifying persons or entities as state organs if they maintain a certain degree of autonomy from the state: for an entity to be considered a *de facto* state organ, it should have no genuine autonomy and it should be controlled by the state to a similar extent as *de jure* state organs: see also Den Heijer, 2011, p. 73.

26 Den Heijer, 2011, pp. 73-74.

Further difficulties may arise in relation to the question whether a *de jure* or *de facto* state organ has in fact acted in that capacity.²⁷ According to the ILC Commentaries, it is irrelevant that the person or entity may have acted with ulterior or improper motives or has abused public authority.²⁸ A clear distinction should therefore be maintained between conduct that is *ultra vires* or in breach of rules and regulations on the one hand and purely private conduct on the other, with the former being nonetheless attributable to the state whilst the latter is not, which is also affirmed in Article 7 of the Draft Articles as outlined below. Again, this distinction makes clear why the threshold for *de facto* state organs is a significant one: once an entity is deemed to be a *de facto* state organ, *all* of its actions in that capacity – even those involving abuse of power or inappropriate motives – are attributed to the state, except for those actions constituting *purely* private conduct.

The basic rule of attribution is of course not all there is to attribution. In Articles 5 to 11, the ILC Draft Articles outline a number of additional grounds for responsibility for internationally wrongful acts. These alternative grounds should however not be regarded as deviations from the Draft Articles' veracious stance vis-à-vis the principle of sovereign responsibility: to the contrary, they reiterate the central role of sovereign nations as bearers of responsibility by outlining alternative routes to allocate responsibility for conduct to states. Nonetheless, they at the same time arguably also constitute a form of resilience to contemporary commodification developments. Indeed, these alternative grounds for state responsibility are based on the idea that the state does not *necessarily* act through its own organs, but may also act through *inter alia* private parties or third states. The Draft Articles hence recognise that the exercise of power may materialise in a nodal system of governance. Accordingly, they make sure that states are held responsible for conduct that is exercised through such nodal networks and that can be attributed to them.²⁹

6.3.2 Conduct of persons or entities exercising elements of governmental authority (Article 5)

A first example of such veracity and resilience is the attribution rule as laid down in Article 5 Draft Articles:

"The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the govern-

²⁷ ILC Commentaries, at 42, para 13.

²⁸ ILC Commentaries, at 42, para 13.

²⁹ See also Brown Weiss, 2002, p. 798, who positions the development of the ILC Draft Articles in the context of globalisation and the growing importance of non-state actors.

mental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

This provision codifies a rule of attribution that relates to entities that cannot be classified as *de jure* or *de facto* state organs, but that nevertheless are authorised to exercise *some* governmental authority. As the ILC Commentaries outline, it is hence concerned with “the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions”.³⁰ A large variety of entities may be captured by the scope of this provision: the ILC lists public corporations, semi-public entities, public agencies, and private companies as entities that could potentially fall within the ambit of Article 5 Draft Articles, “provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned”.³¹ Nevertheless, Article 5 is a rather narrow or even “exceptional” pathway to attribution.³² In particular, three tests should be fulfilled for attribution under this provision: (i) the functions, tasks and services delegated to the actor must contain elements of governmental authority, (ii) they must be delegated to the actor *by law*, and (iii) the actor must be acting in that official capacity.³³

Thus, first, state responsibility under Article 5 is only engaged insofar as governmental authority is exercised, not in the context of private or commercial activities of the same entities.³⁴ The scope of ‘governmental authority’ in turn is by design not clearly defined and the appropriate test is to a certain extent purposively vague:

“beyond 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”.³⁵

30 ILC Commentaries, at 43, para 1.

31 ILC Commentaries, at 43, para 2.

32 Duffy, 2005; Francioni, 2011; Gammeltoft-Hansen, 2011.

33 Hallo de Wolf, 2011, p. 210.

34 ILC Commentaries, at 43, para 2. See also Hallo de Wolf, 2011, pp. 222–223.

35 ILC Commentaries, at 43, para 6.

The Commentaries hence suggest a contextual reading.³⁶ Still, they mention a number of concrete examples of entities that may exercise governmental authority, of which the first one is particularly of interest for the present enquiry: that of “private security firms [that] may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations”.³⁷ Since detention and imprisonment hence constitute ‘typical’ forms of governmental authority, this criterion is easily fulfilled in settings of confinement where exercises of such core activities are concerned.

Second, Article 5 is narrowly construed in the sense that it is clearly limited to entities that are empowered to exercise governmental authority *by internal law* as opposed to entities that act under the ‘mere’ direction or control of the state (as covered by Article 8 of the Draft Articles) and entities that seize power in the absence of state organs where the exercise of governmental authority is called for (as covered by Article 9 of the Draft Articles).³⁸ Domestic law should thus authorise the conduct as involving the exercise of public authority: “it is not enough that [internal law] permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category”.³⁹ Conversely, for purposes of Article 5, no control of the state over the specific conduct as carried out needs to be established – *de jure* empowerment of the actor to exercise such public authority in internal law suffices.⁴⁰ Such empowerment may arguably be based on formal legislative acts, but also on other forms of (subordinate) legislation.⁴¹ What does not seem to be captured by Article 5, on the other hand, are situations where actors operate on the basis of mere contractual agreement.⁴² In such cases, attribution via the route of Article 8 seems more appropriate.

36 See also Gammeltoft-Hansen, 2011; Hallo de Wolf, 2011. In the absence of consensus, various tests and definitions for establishing governmental authority have been coined over the years. In *Rendell-Baker v. Kohn*, the US Supreme Court for instance held that it suffices when a private actor fulfils a ‘public function’ that has “traditionally been the exclusive prerogative of the State”: US Supreme Court, *Rendell-Baker v. Kohn*, 25 June 1982, 457 US 830. On this case, see also S. Kennedy, 2006, p. 72. McCorquodale and Simons propose that governmental authority includes “a wide variety of public functions, from running prisons, health and education facilities, to private airline corporations having delegated immigration or quarantine power and a corporation having a role in the identification of property to be expropriated by the state”: McCorquodale & Simons, 2007, p. 607.

37 ILC Commentaries, at 43, para 2.

38 ILC Commentaries, at 43, para 7.

39 ILC Commentaries, at 43, para 7.

40 ILC Commentaries, at 43, para 7.

41 Hallo de Wolf, 2011, pp. 221–222.

42 Hallo de Wolf, 2011, p. 222; Weigelt & Märker, 2007, p. 389. For a different perspective, see Francioni, 2011, pp. 100–101; S. Taylor, 2010, p. 345, who argue that the ‘empowered by law’ requirement must be interpreted broadly to also include the lawful delegation of a governmental function by contract or otherwise.

Third, the actor must act in its public or governmental capacity. When an entity's conduct is purely commercial in nature and does not further its governmental mandate, the conduct is therefore not attributable to the state.⁴³ In this regard, however, grey areas exist: in certain situations, conduct may serve both commercial and public interests. The exercise of governmental authority by private actors in the context of confinement serves for instance also commercial interests as it is a source of revenue. This third condition has therefore been provided with a broad application – that is to say, the actor endowed with governmental authority operates in its official capacity unless there is no reasonable doubt that it acts for purely commercial purposes.⁴⁴

6.3.3 Conduct of organs placed at the disposal of a State by another State (Article 6)

The element of governmental authority is also central to the attribution rule as expressed in Article 6 of the Draft Articles:

“The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.”

It is not uncommon that states put one or more of their organs at the disposal of another state so that the organ (temporarily) operates under the authority and for the exclusive benefit of the receiving state. In such situations, Article 6 provides that the conduct of the state organ concerned is attributed exclusively to the receiving state.⁴⁵ Key to this attribution rule is the condition of being ‘placed at the disposal of’. According to the ILC Commentaries, the organ concerned must not only operate with the consent, under the authority, and for the purpose of the receiving state, but should act “in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State”.⁴⁶ At the same time, ‘ordinary’ inter-state cooperation on the basis of a treaty or otherwise does not fulfil the

43 For example, “the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling-stock)”: ILC Commentaries, at 43, para 5.

44 Compare Hallo de Wolf, 2011, p. 223.

45 ILC Commentaries, at 44, para 1.

46 ILC Commentaries, at 44, para 2. For example, judges of one state that are appointed to act as judicial organs of another state may thus give rise to attribution under Article 6: ILC Commentaries, at 44, para 3.

threshold set in Article 6.⁴⁷ Article 6 remains a rather narrow category: where the organ continues to function under the authority of the sending state, its conduct remains attributable to that state under Article 4 of the Draft Articles; where an organ acts under the joint instructions of two states, its conduct is attributable to both states under respectively Articles 4 and 8 of the Draft Articles.⁴⁸ The crux for the test applicable to Article 6 is henceforth that a functional link must be established between the organ in question and the receiving state's structure or authority.⁴⁹ In addition, two further conditions have to be fulfilled: the entity placed at the disposal of another state must have the status of an organ in the sending state, and the conduct of that organ must involve the exercise of elements of governmental authority on behalf of the receiving state.⁵⁰

6.3.4 Excess of authority or contravention of instructions (Article 7)

The rule established in Article 7 Draft Articles is closely affiliated with the rules of the preceding Articles. According to the text of the provision,

"The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

Article 7 is complementary to the rules established in Articles 4, 5, and 6 of the Draft Articles in the sense that it deals with unauthorised or *ultra vires* acts of state organs or authorised entities exercising governmental authority. Whenever a state organ or an entity authorised to exercise elements of governmental authority is acting in its official capacity, such conduct is automatically

47 ILC Commentaries, at 44, para 2. By means of an example, the ILC Commentaries draw attention to the case of *Xhavara and Others v. Italy and Albania* before the ECtHR, in which Italy's conduct in policing illegal immigration at sea in pursuance of an Italian-Albanian agreement could not be attributed to Albania: ECtHR, *Xhavara and Others v. Italy and Albania*, 11 January 2001, Application no. 39473/98.

48 ILC Commentaries, at 44, para 3. As illustrated by the ILC Commentaries, the ECommHR attributed the exercise of 'delegated' powers by Swiss police forces in Liechtenstein to Switzerland since the officers had not been placed at the disposal of Liechtenstein: rather, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, the officers were governed exclusively by Swiss law, and they were considered to be exercising Swiss public authority: ILC Commentaries, at 44-45, para 7. See also ECommHR, *X. and Y. v. Switzerland*. As will be further outlined below, however, the ECommHR in this case arguably confused rules of attribution and jurisdiction, finding extraterritorial jurisdiction by establishing that conduct can be attributed to Switzerland: see footnotes of chapter 7 and accompanying text.

49 ILC Commentaries, at 44, para 4.

50 ILC Commentaries, at 44, para 5.

attributable to the relevant state under Articles 4, 5, and 6, even if the organ or entity concerned acted in excess of authority or in contravention of instructions.⁵¹ Central question in establishing such attribution link is thus whether the organ or entity acted in its official capacity or in a personal capacity.⁵²

6.3.5 Conduct directed or controlled by a State (Article 8)

Article 8 Draft Articles is of a rather different nature than the preceding articles in that it attributes responsibility on the basis of a certain level of instructions, direction, or control of the state over a person or group of persons that are not classified as its *de jure* or *de facto* state organs and that do not exercise governmental authority through law:

“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

In general, conduct of private actors not involving the exercise of governmental authority does not give rise to state responsibility. This may be different where states issue instructions or exercise more generally a certain level of direction or control over such private conduct, in which case such conduct may under circumstances be attributed to the state on the basis of Article 8 Draft Articles.⁵³ Required in such instances is a ‘real’ or factual link – instructions, directions, or control – between the state machinery and the actor involved.⁵⁴ Furthermore, the instructions, directions, or control of the state must relate to the specific *conduct* which is alleged to amount to an internationally wrongful act: it thus does not suffice to merely establish that a state instructs, directs, or controls a private actor *as such*.⁵⁵

Where a state clearly *instructs* certain conduct, such requirement is readily fulfilled: when state organs supplement their own involvement and action by appointing or recruiting private actors who subsequently act as the state’s ‘auxiliaries’ and operate on the basis of the state’s instructions whilst remaining outside the official state structure, it is unproblematic to attribute their conduct

51 ILC Commentaries, at 45, para 1.

52 Ultimately, this question examines the extent to which the conduct is systematic or recurrent, so that the State knew or ought to have known about it and should have taken steps to prevent reoccurrence: ILC Commentaries, at 46, paras 7-8.

53 ILC Commentaries, at 47, para 1.

54 ILC Commentaries, at 47, para 1.

55 ILC Commentaries, at 48, para 7.

to the state.⁵⁶ It may be more complex to establish whether attribution of conduct is also justified under this provision in cases of more general state *directions* or *control*. In such circumstances, conduct of a private actor is attributable to the state only when the directions or control concerned a particular operation and the conduct constituted an integral part of that specific operation.⁵⁷ Importantly, this does not cover acts that are only incidentally or peripherally associated with the operation and that were not directed or controlled by the state.⁵⁸ As Gammeltoft-Hansen emphasises, “where arrangements are less tightly state-governed, it may become difficult in practice to show that states direct or control specific conduct leading to human rights violations”.⁵⁹

At the same time, there is no clear consensus on what level of control is required for establishing direction or control. The ILC Commentaries refer to the ICJ case of *Military and Paramilitary Activities in and against Nicaragua*, in which the question arose what degree of control the state must exercise in order to attribute private conduct to it.⁶⁰ The ICJ accepted that the US in this case was responsible for its involvement in the planning, directing, and supporting of the conduct of Nicaraguan operatives, but rejected that all conduct of these operatives were subsequently attributable to the United States as there was no clear evidence that the United States had exercised *effective control* over the military or paramilitary operations.⁶¹ If, on the other hand, it could be proven that state agents “participated in the planning, direction, support and execution” of certain acts, such acts could be attributed to that state.⁶² In formulating this ‘effective control’ test, the ICJ hence set a high threshold for attribution. In contrast, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) argued in *Tadić* that the degree of control may “vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international

56 ILC Commentaries, at 47, para 2. In such cases, at a minimum some form of agreement or pre-existing authorisation or instruction must be demonstrable in relation to the conduct carried out, although this does not have to amount to formal authorisation through domestic law. Similarly, in the case of state direction or control, there does not necessarily have to be a formal attachment or contract between the state and the private actor, although the direction or control over the particular conduct still has to be demonstrated. See also Gammeltoft-Hansen, 2011, p. 217.

57 ILC Commentaries, at 47, para 3.

58 ILC Commentaries, at 47, para 3.

59 Gammeltoft-Hansen, 2011, p. 219.

60 ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*. See also ILC Commentaries, at 47-48, para 4.

61 ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, paras. 86, 109, 115. See also ILC Commentaries, at 47-48, para 4.

62 ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, para 86.

law should require a high threshold for the test of control”.⁶³ By subsequently arguing that a level of ‘overall control’ is sufficient to fulfil the threshold, the majority of the Appeals Chamber criticised the approach taken and the high standard set by the ICJ.⁶⁴ The ECtHR appears to concur with the ICTY’s approach: it used the standard of overall control to attribute the conduct of private groups in amongst others *Loizidou v. Turkey*, *Cyprus v. Turkey*, and *Ilascu and Others v. Moldova and Russia*.⁶⁵ In response, the ICJ in the *Genocide* case upheld its standard set in *Nicaragua*, arguing that the test as applied by the ICTY was too broad and all-encompassing in scope and “stretches too far, almost to breaking point”.⁶⁶ As the ILC Commentaries conclude, “[i]n any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it”, therewith clearly maintaining the middle ground between the diverging approaches.⁶⁷ This is ultimately understandable, given that two fundamental values are at stake here: a solid balance is required between ensuring that a state is held responsible for those acts that it instructed, directed, or controlled on the one hand and making sure that it is not held responsible for *more* than that on the other. Nevertheless, by pointing to the individual ‘appreciation’ of a case, the ILC Commentaries hardly provide a clear or readily applicable standard and therewith leave room for uncertainty.

The difference between instruction, direction, and control may be paramount. For instance, different from the rule set out in Article 7 Draft Articles, in the context of Article 8 Draft Articles a state generally does not assume the risk that lawful instructions or directions given to private persons or entities are carried out in an internationally unlawful way – in such cases, the conduct

63 ICTY, *Prosecutor v. Duško Tadić*, 15 July 1999, Case IT-94-1-A, para 117. See also ILC Commentaries, at 48, para 5.

64 ILC Commentaries, at 48, para 5.

65 Den Heijer, 2011, pp. 78–79. See also ECtHR, *Loizidou v. Turkey* (Grand Chamber, Merits), Judgment of 18 December 1996, Application no. 15318/89; ECtHR, *Cyprus v. Turkey* (Grand Chamber), Judgment of 10 May 2001, Application no. 25781/94; and ECtHR, *Ilascu and others v. Moldova and Russia*, 8 July 2004, Application no. 48787/99, para 312. This approach of the ECtHR will be problematised in chapter 7, however, as at times the Court seems to have confused the tests of attribution and jurisdiction.

66 ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, para 403–406. The ICJ highlighted that under Article 8 Draft Articles, not *all* acts of actors receiving state instructions or being state directed or controlled can automatically be attributed to the state: rather, attribution on this basis is only possible in relation to acts resulting from state instructions or the assertion of control: ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, para. 397.

67 ILC Commentaries, at 48, para 5. Den Heijer has further analysed the debate between the ICJ on the one hand and the ICTY and ECtHR on the other, arguing that both proposed tests are problematic to certain extents: see Den Heijer, 2011, p. 82.

cannot be attributed. Decisive in this regard appears to be whether the conduct was “really incidental to the mission or clearly went beyond it”.⁶⁸ This is different when acts are carried out in an internationally unlawful way under the control of a state, in which case attribution is unproblematic even if particular instructions were ignored.⁶⁹ Whether unlawful conduct can be attributed to a state on the basis of Article 8 Draft Articles thus ultimately depends on the factual link that can be discerned.

6.3.6 Conduct acknowledged and adopted by a State as its own (Article 11)

Finally, Article 11 of the Draft Articles concerns conduct acknowledged and adopted by a state as its own:

“Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.”

All the previously mentioned bases for attribution “assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act”.⁷⁰ Article 11 on the other hand regulates attribution when conduct is acknowledged and adopted by a state as its own, even if the conduct concerned was not attributable to the state at the time of its commission.⁷¹ Article 11 clearly distinguishes between acts that are both acknowledged and adopted by the state as its own and those that are merely supported or endorsed by the state.⁷² Furthermore, the phrase ‘if and to the extent that’ indicates that a state might acknowledge and adopt only some conduct, implying that such acknowledgment and adoption must be clear and unequivocal.⁷³

6.4 ATTRIBUTING CONDUCT TO MULTIPLE STATES: JOINT RESPONSIBILITY

It is not difficult to imagine how each of the aforementioned rules of attribution may be applied in nodal governance contexts in order to determine the responsibility of involved states, therewith showing resilience in the face of novel

68 ILC Commentaries, at 48-49, para 8.

69 ILC Commentaries, at 48-49, para 8.

70 ILC Commentaries, at 52, para 1.

71 ILC Commentaries, at 52, para 1.

72 ILC Commentaries, at 53, para 6. The criteria of acknowledgment and adoption are cumulative: see ILC Commentaries, at 53-54, para 9.

73 ILC Commentaries, at 53, para 8.

constructions of commodification that complicate ownership of actions. However, whilst the rules on attribution deal with the attribution of conduct to individual states, at times, multiple states may be involved in an internationally wrongful act simultaneously. This raises the question which of these states can be held responsible for such acts and under what circumstances. In the context of the present study, this question is particularly pressing now that commodification in the confinement realm may entail that one or more additional states are drawn into the governance equation of a particular realm of confinement.

As Article 47 Draft Articles confirms, where multiple states are responsible for the same internationally wrongful act, each of these states' responsibility may be invoked. The ILC Commentaries confirm that the general assumption in international law is that in such circumstances each state remains separately responsible for conduct attributable to it.⁷⁴ Den Heijer has further dissected the scenarios in which the responsibility of multiple states may be engaged at the same time.⁷⁵ This concerns (i) where the conduct of multiple states that act independently from one another results in an injury to a third party, (ii) where a joint act of two states engages the responsibility of both states involved, and (iii) where one state participates in the internationally wrongful act of another state. The way in which responsibility for an internationally wrongful act can be established in relation to one or more states differs per scenario. What these three scenarios have in common, however, is that they – similar to the rules on attribution – strike an arguably fair balance between veracity and resilience. Indeed, they allow for flexibility in the sense that multiple states can be held responsible whilst staying veracious to the fundamental principle of sovereign state responsibility. Each scenario will now be addressed in turn.

6.4.1 Multiple states acting independently

Attribution in the first scenario is rather unproblematic: the various rules of attribution as set out in the Draft Articles are not mutually exclusive and may as such engage the responsibility of multiple states for the same event under different complementary rules of attribution. Where the independent conduct of two or more states results in a single incident, all states involved can hence be held responsible on the basis of the regular rules of attribution. Such an approach makes sense and appears little controversial: when conduct attributable to state A and conduct attributable to state B leads to an incident, both can be held responsible for their respective internationally wrongful acts, provided that their conduct breaches an international obligation. It would not

⁷⁴ ILC Commentaries, at 124, para 3.

⁷⁵ Den Heijer, 2011, pp. 94–96.

resonate with the principle of independent responsibility if one of both states would be released from responsibility merely because another independently acting state simultaneously carries responsibility or has already been held to account.

6.4.2 Joint acts

The second scenario concerns cases where states act truly in concert and where such orchestrated conduct engages the responsibility of all involved states. Two distinct types of 'joint acts' can be distinguished: (a) acts of common organs set up by multiple states, and (b) acts committed in concert on the basis of close cooperation between states. As the Draft Articles maintain in relation to the latter category, "States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation".⁷⁶ In this sense, joint acts relate to situations "where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them".⁷⁷

Like the first scenario, attribution in these scenarios is not problematic: the ILC has maintained in relation to common organs that its conduct "can, indeed, only be considered as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will have concurrently committed separate, although identical, internationally wrongful acts."⁷⁸ Thus, the conduct of the common organ can be attributed to each of the states whose common organ it is. Likewise, in situations where acts are committed in concert on the basis of close cooperation between states, each of the states involved can be held responsible for the wrongful conduct as a whole.⁷⁹

More problematic, however, is the preceding question whether an offence is truly committed 'in concert' or whether an organ should be considered 'joint'. At a minimum, to speak about 'joint' activity, it seems required that such activity 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" – indeed, such a reading accords to the underlying notion that a connection between international state responsibility and a state's own 'sphere of activity' is required.⁸⁰ Joint acts hence require at least a certain amount of influence and instructions of all states involved over *one and the*

⁷⁶ ILC Draft Articles, at 124, para 2.

⁷⁷ ILC Draft Articles, at 124, para 3.

⁷⁸ Ago, 1978, p. 54.

⁷⁹ ILC Draft Articles, at 124, para 2.

⁸⁰ Den Heijer, 2011, p. 98.

same act or course of action, which is to be “distinguished from situations where *identical offences* are committed in concert by two or more states [...] where each state acts through its own organs”.⁸¹ In the latter case, states can consequently only be held responsible for their own conduct whereas in the case of joint acts all involved states can be held responsible for the wrongful conduct in its entirety. To conclude, in order to speak about a joint act, all states hence have to significantly contribute – in the sense of influence and instruction – to a *particular act*, or a *particular series of conduct*, to such an extent that the act concerned may be considered a single course of conduct that is attributable to each of the states involved.⁸²

6.4.3 Derived responsibility

The concept of ‘derived responsibility’ is central to the third scenario, i.e. where a state takes part in an internationally wrongful act that can be attributed to another state and the participating state should be held responsible separately on account of its involvement. This scenario is different from the other two scenarios in that it diverges from the principle of independent responsibility and consequently does not rely on the framework of attribution rules set out in Articles 4 to 11 ILC Draft Articles. Indeed, in these types of cases, responsibility is – exceptionally – not self-standing but derived.⁸³ In this sense, the framework of derived responsibility seems to be most far-reaching in terms of resilience vis-à-vis commodification developments, as it diverges significantly from the fundamental principle that sovereign states are in principle only responsible for their own conduct. Rather, states are held responsible on the basis of internationally wrongful acts of *another* state which it either aided or assisted, directed or controlled, or coerced – three potential situations that fit seamlessly within a paradigm of nodal governance.

Chapter IV of the Draft Articles deals with derived responsibility, providing rules for situations where a state is involved in the commission of another state’s international wrongful act through assistance (Article 16), direction (Article 17), or coercion (Article 18).⁸⁴ Whilst each of these cases represents a breach of the acting state’s international obligations, save for particular cases of coercion in which the acting state is a mere instrument of the coercing state, the responsibility of the participating state is also implicated due to its willing

⁸¹ Den Heijer, 2011, pp. 95–96 (emphasis added).

⁸² ILC Draft Articles, at 124, para 3.

⁸³ ILC Commentaries, at 64–65, paras 5 and 8.

⁸⁴ Incitement on the other hand is generally not regarded as sufficient basis for establishing derived responsibility: ILC Commentaries, at 65, para 9.

involvement.⁸⁵ Before elaborating upon these Articles, two further remarks are due.

First, practically, derived responsibility may raise difficulties where judicial bodies are asked to decide on the participating state's responsibility without the presence and/or consent of the acting state. As the ICJ has repeatedly confirmed, the *Monetary Gold* principle prohibits it from determining the responsibility of the acting state if such a state is absent or has not given its consent, which in turn prevents it from deciding on the potential derived responsibility of the participating state.⁸⁶ However, as the ILC Commentaries clarify, whilst this may give rise to *practical* difficulties in establishing responsibility, it does not prevent the Draft Articles from ascribing derived responsibility as such.⁸⁷

Second, the fact that Chapter IV does not primarily rely on the principle of independent responsibility is not its only distinctive feature. Different from the attribution rules in Chapter II of the Draft Articles, it to a certain extent also blurs the distinction between primary and secondary rules of international law, as it specifies particular internationally wrongful acts in its provisions.⁸⁸ At the same time, the ILC Draft Articles stress that the situations covered by Chapter IV have a special character and only cover "certain cases".⁸⁹ Where a state coerces another state into conduct that constitutes an internationally wrongful act on behalf of the latter state but would not constitute an internationally wrongful act on behalf of the former state, only extreme cases of coercion would hence justify the former state to become responsible for the internationally wrongful act of the latter state.⁹⁰ Furthermore, to establish responsibility under Chapter IV, the participating state should thus be aware of the circumstances of the internationally wrongful act and a "specific causal link" should exist between the conduct and the participating state's assistance, direction, or coercion.⁹¹

6.4.3.1 Aid or assistance

Article 16 Draft Articles concerns the derived responsibility of a state that had aided or assisted another state in the commission of an internationally wrongful act:

⁸⁵ ILC Commentaries, at 64-65, para 6.

⁸⁶ ICJ, *Monetary Gold Removed from Rome in 1943*, 15 June 1943, *ICJ Reports* 1954, p. 19, at p. 32; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, *ICJ Reports* 1992, p. 240, at p. 261, para. 55.

⁸⁷ This has for example been confirmed in the context of aid and assistance in the ILC Commentaries, at 67, para 11.

⁸⁸ ILC Commentaries, at 65, para 7.

⁸⁹ ILC Commentaries, at 65, para 8.

⁹⁰ ILC Commentaries, at 65, para 8.

⁹¹ ILC Commentaries, at 65, para 8.

“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.”

Since Article 16 expresses a responsibility that is derived in nature, it should be distinguished from situations where the latter state is a co-perpetrator of the internationally wrongful act.⁹² Moreover, the derived responsibility of the participating state only covers the extent to which the state has caused or contributed to the internationally wrongful act.⁹³ Examples of cases where Article 16 may be invoked include situations where a state knowingly provides essential facilities to, or finances the conduct of, the acting state that commits an internationally wrongful act.⁹⁴

To establish derived responsibility on this basis, three criteria should be fulfilled. The assisting state (i) must be aware of the circumstances that make the acting state’s conduct an internationally wrongful act, (ii) must give aid or assist with a view to facilitating the commission of that act and must actually give the aid or assist, and (iii) the completed act of the acting state would also have constituted an internationally wrongful act if carried out by the participating state.⁹⁵ The ILC Commentaries highlight the particular importance of condition (ii): establishing derived responsibility on the basis of Article 16 requires that “the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the [human rights violation constituting an] internationally wrongful conduct”.⁹⁶ The threshold is thus particularly high: not only knowledge but also intent is required on behalf of the assisting state.

⁹² ILC Commentaries, at 66, para 1.

⁹³ ILC Commentaries, at 66, para 1.

⁹⁴ ILC Commentaries, at 66, para 1.

⁹⁵ ILC Commentaries, at 66, paras 3-6.

⁹⁶ ILC Commentaries, at 67, para 9. On the contrary, criteria (iii) seems less problematic in cases of human rights violations. As Den Heijer explains, this criteria is usually easily fulfilled due to the universal application of human rights treaties as well as the fact that Article 16 Draft Articles does not require the internationally wrongful act to be opposable to both the acting and the assisting state under the *same* international provision: it is indeed only required that the conduct would also be wrongful if committed by the assisting state: Den Heijer, 2011, pp. 104–105. Derived responsibility can hence also be established vis-à-vis a non-contracting state under a regional human rights treaty where that state has a corresponding duty under a different human rights regime.

6.4.3.2 Direction or control

Article 17 Draft Articles deals with derived responsibility where a state has directed or controlled another state in the commission of an internationally wrongful act:

- “State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:
- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
 - (b) the act would be internationally wrongful if committed by that State.”

This provision differs from responsibility under Article 16 in that the directing or controlling state has a significantly larger role in initiating the commission of the internationally wrongful act. A state can exercise such direction or control, for example, by means of a treaty or as a result of military occupation.⁹⁷ Consequently, the controlling or directing state is responsible for the entire act itself.⁹⁸ Establishing that one state controlled or directed the conduct of another state thus has significant implications and Article 17 therefore only includes cases where “a dominant State *actually* directs and controls conduct which is a breach of an international obligation of the dependent State”.⁹⁹ The mere exercise of oversight is consequently an insufficient level of control.¹⁰⁰ Likewise, mere incitement or suggestion is insufficient to establish the required level of direction.¹⁰¹ Participating states are furthermore only responsible under Article 17 if (i) they have knowledge of the circumstances that make the conduct of the acting state wrongful, and (ii) the completed act would have been wrongful if it had been committed by the dominant state itself.¹⁰² As the ILC Commentaries outline, key principle in this regard is that “a State should not be able to do through another what it could not do itself”.¹⁰³

The foregoing does not mean that the acting state is necessarily relieved of any responsibility. On the one hand, the acting state has to decline a direction if it would result in a breach of one of its international obligations. On the other hand, whilst the wrongfulness of acting states’ conduct may be precluded under the ILC Draft Articles, this is only possible in exceptional cases

⁹⁷ ILC Commentaries, at 68, para 5.

⁹⁸ ILC Commentaries, at 68, para 1.

⁹⁹ ILC Commentaries, at 68, para 6. For purposes of Article 17 it is hence insufficient if a state has the power to interfere in matters of the administration of another state but has not exercised that power in a particular situation.

¹⁰⁰ ILC Commentaries, at 69, para 7.

¹⁰¹ ILC Commentaries, at 69, para 7.

¹⁰² ILC Commentaries, at 69, para 8.

¹⁰³ ILC Commentaries, at 69, para 8.

such as those involving *force majeure*.¹⁰⁴ Conversely, where the conditions of Article 17 are met, the dominant state cannot excuse itself by referring to a certain level of willingness or enthusiasm on behalf of the acting state in performing the conduct.¹⁰⁵

6.4.3.3 Coercion

Lastly, Article 18 Draft Articles deals with situations where one state coerces another state to act in a certain way:

“A State which coerces another State to commit an act is internationally responsible for that act if:

- (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) the coercing State does so with knowledge of the circumstances of the act.”

Under this provision, the coercing state can be held responsible for the wrongful conduct that results from the actions of the coerced state.¹⁰⁶ As such, different from Articles 16 and 17, the coercing state can be held responsible for the breach of another state’s obligations even if it does not have a corresponding obligation itself.¹⁰⁷ The applicable criterium is stringent: only conduct that forces the coerced state to such an extent that it leaves no choice but to comply, suffices for purposes of derived responsibility under Article 18.¹⁰⁸ Any lesser type of involvement of the participating state is insufficient to attribute derived responsibility on the basis of coercion. Additionally, the coercion has to concern the particular conduct that would constitute an internationally wrongful act.¹⁰⁹ The coercing state should furthermore be aware of the factual situation that would have made the conduct of the coerced state wrongful if it was not for the coercion of the coercing state.¹¹⁰ Whilst coercion is usually unlawful, it could for example also take the form of far-reaching economic pressures that leave the coerced state no choice but to comply with the demands of the coercing state.¹¹¹ In turn, the coerced state will in most cases be able to rely on *force majeure* in order to preclude its own responsibility.¹¹²

104 ILC Commentaries, at 69, para 9.

105 ILC Commentaries, at 69, para 9.

106 ILC Commentaries, at 69, para 1.

107 ILC Commentaries, at 70, para 6.

108 ILC Commentaries, at 69-70, para 2.

109 ILC Commentaries, at 69-70, para 2.

110 ILC Commentaries, at 70, para 5.

111 ILC Commentaries, at 70, para 3.

112 Coercion under the Draft Articles is indeed largely equated with *force majeure* in that it has the same essential character: ILC Commentaries, at 70, para 4.

6.5 APPLYING THE FRAMEWORK: RPC NAURU

The foregoing provides a framework to test whether Australia, Nauru, or both countries simultaneously can be held responsible for particular conduct performed in RPC Nauru. As the previous has shown, this depends *inter alia* on which actor physically performed the act or omission. The focus here will be on the most important actors involved on site: representatives of DIBP, the Nauruan RPC Operational Managers, and representatives of the primary service providers (Transfield/Broadspectrum, Canstruct, IHMS, the Salvation Army, and Save the Children).

6.5.1 Articles 4 and 6 Draft Articles

The conduct of staff members of the Australian government on island – i.e. DIBP staff until 19 December 2017 and DHA staff from that date onwards – is easily attributed to Australia on the basis of the ‘basic rule’ of attribution laid down in Article 4 Draft Articles. Since “[t]he reference to a ‘State organ’ covers all the individual or collective entities which make up the organization of the State and act on its behalf”,¹¹³ the acts and omissions of DIBP staff can indeed be attributed to Australia. The deployed staff is a ‘mere instrument’ of the Australian state as a legal entity. Similarly, the conduct of the RPC Operational Managers (and, for that matter, of the Nauru Police Force) can be attributed without further ado and on the same legal basis to Nauru. Indeed, the RPC Operational Managers are appointed in accordance with the Administrative Arrangements by, are fully dependent of, and effectively function as organs – at least *de facto* – of, the Nauruan state.¹¹⁴ Consequently, their acts and omissions can and should be regarded as the conduct of Nauru. In this regard, it should be noted that the DIBP staff is not placed at the disposal of Nauru, nor that the RPC Operational Managers are placed at the disposal of Australia. Both respective state organs operate under the authority of their own state and their conduct can thus not be attributed to the other state on the basis of Article 6 Draft Articles. As the ILC Commentaries clearly explain, “[t]he notion of an organ ‘placed at the disposal’ of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status”.¹¹⁵ Acts of deployed DIBP staff can thus be attributed to Australia whereas acts of RPC Operational Managers can be attributed to Nauru, *even*, as Article 7 Draft Articles points out, when such acts are unauthorised or *ultra vires*.¹¹⁶

¹¹³ ILC Commentaries, at 40, para 1.

¹¹⁴ Section 4.1.2. of the Administrative Arrangements.

¹¹⁵ ILC Commentaries, at 44, para 4.

¹¹⁶ ILC Commentaries, at 45, para 1.

6.5.2 Article 5 Draft Articles

The question as to the attribution of conduct becomes more difficult when paying attention to the acts and omissions of the private stakeholders involved. Moreover, the question arguably becomes more interesting as well given that it are the acts and omissions of the private service providers that run the biggest risk of infringing upon human rights entitlements. Article 5 Draft Articles provides a first potential basis for attribution of the private actors' conduct, although any such determination is typically complex given the three threshold criteria: to reiterate, (i) the functions, tasks and services delegated to the actor must contain elements of *governmental authority*, (ii) they must be delegated to the actor *by law*, and (iii) the actor must be acting in that *official capacity*.

6.5.2.1 Service providers providing safety and garrison services

Whilst consensus on a definition of governmental authority is missing, it appears save to argue that the service providers providing safety and garrison services – Wilson Security, Transfield/Broadspectrum, and Canstruct insofar as their provision of safety and garrison services is concerned, and Sterling Security and Protective Security Services as subcontractors of Wilson Security – may be considered as exercising a typical and traditional core function of the sovereign state, that is, maintaining security and safekeeping in a space of confinement.¹¹⁷ At the same time, it is less obvious that Transfield/Broadspectrum respectively Canstruct as lead agencies – except for their safety and garrison services – or those service providers providing health care or welfare services – including IHMS, the Salvation Army, Save the Children Australia – exercise governmental authority.¹¹⁸

Second, the exercise of governmental authority by service providers providing safety and garrison services should be provided for by internal law. Before this condition can be examined substantially, however, it needs to be examined *whose* governmental authority the concerned actors are exercising and *which* internal law must consequently endow them with such governmental capacity.

117 Compare Gleeson, 2015. Although even this is open to debate: as outlined in chapter 2, safekeeping has not always been squarely in the State's purview. Furthermore, since the RPC's regime has shifted to an open centre arrangement, the detaining role of safety and garrison contractors has arguably decreased, which may impact on the extent to which they exercise governmental authority.

118 Even more so, it is unlikely that yet other service providers – for example those providing accommodation, goods, education, transportation or construction services – exercise governmental authority. Whilst some Nauruan sub-contractors are government-owned, this does not mean that they *therefore* exercise governmental authority and that their conduct can automatically be attributed to Nauru. Indeed, "every conduct [...] has to be independently examined. Only if [...] this conduct [is] governmental in nature can it be attributed to the state": Feit, 2010, p. 150.

As agreed upon in the MoU and Administrative Arrangements, processing happens under the auspices of Nauru and Nauru is formally in charge of operating the facilities, *inter alia* via its (Deputy) Operational Managers,¹¹⁹ whilst Australia has a supporting role and bears all costs.¹²⁰ Although Australia transfers asylum seekers to Nauru, once they arrive on Nauruan soil they are under the formal control of the Nauruan authorities, are provided with special 'Regional Processing Centre visas' by Nauru, and become subject to Nauru's migration control system. Viewed in this light it appears that the private entities providing security and garrison services are exercising part of Nauru's governmental authority: they provide services that are key to Nauru's migration control apparatus and that constitute what may be regarded a typical and traditional governmental function. Conversely, it is problematic to maintain that these contractors exercise an element of Australia's governmental authority: being involved in another country's migration system can hardly be construed as a core public function of the state. The fact that the processing facilities on Nauru and Manus simultaneously serve Australian policy goals does not alter this: the question of governmental authority is not dependent on whose *policy* is being fostered, but on whose governmental *prerogatives* are being exercised. Likewise, the fact that Australia contracts the service providers does not alter the fact that these service providers exercise Nauru's governmental authority: whilst Australia and Nauru have agreed that Australia will contract service providers and incur all related costs, processing happens fully under the auspices of the Nauruan government. Since Nauru is formally in charge over the RPC where individuals are confined for the purpose of processing their asylum claims under Nauruan migration law, such confinement constitutes an exercise of Nauru's governmental authority. This was recognised by a majority of the High Court of Australia in *M68/2015*:

"Contrary to the plaintiff's submissions, it is very much to the point that the restrictions applied to the plaintiff are to be regarded as the independent exercise of sovereign legislative and executive power by Nauru. [...] Contrary also to the plaintiff's submissions, it is very much to the point that the Commonwealth could not compel or authorise Nauru to make or enforce the laws which required that the plaintiff be detained. There was no condominium, which exists where two or more States exercise sovereignty conjointly over a territory, and *no suggestion of any other agreement between Nauru and Australia by which governmental authority is to be jointly exercised on Nauru; assuming such an agreement to be possible.* [...] Once it is understood that it was Nauru that detained the plaintiff, and that the Commonwealth did not and could not compel or authorise Nauru to make or enforce the

119 Sections 4.1.2. and 4.1.3. of the Administrative Arrangements; See also Section 7 of the Asylum Seekers (Regional Processing Centre) Act 2012, No. 21, 21 December 2012.

120 Sections 1 and 4.1.4. of the Administrative Arrangements.

laws that required that the plaintiff be detained, it is clear that the Commonwealth did not itself detain the plaintiff.”¹²¹

Consequently, Transfield Services, Wilson Security, Sterling Security, and Protective Security Services must be empowered by *Nauru’s* internal law to exercise governmental authority in order to attribute their conduct to Nauru. Even more so, their conduct as involving the exercise of governmental authority must be explicitly authorised in Nauru’s legislation and must be narrowly circumscribed.¹²² In the present case, the *Asylum Seeker (Regional Processing Centre) Act 2012* of the Republic of Nauru (‘the RPC Act’) regulates the operations of the RPC.¹²³ Ever since the enactment and certification of the Act in December 2012, it has been amended on various occasions by Amendment Acts 3/2014,¹²⁴ 25/2014,¹²⁵ 23/2015,¹²⁶ 16/2017,¹²⁷ and 29/2018.¹²⁸

In section 3 of the RPC Act (‘definitions’), ‘service provider’ is defined as “a body that has been engaged by the Republic of Nauru or the Commonwealth of Australia to provide services of any kind at a regional processing centre or in relation to protected persons”. In the same section, ‘authorised officer’ is defined as “a person appointed as an authorised officer by the Secretary under section 17(1)”. Initially, ‘Secretary’ was defined in the Act as the (Nauruan) Head of Department, which was amended by Act 3/2014 to mean the (Nauruan) Secretary for Justice and Border Control and was, later, amended again by Act 16/2017 to mean the (Nauruan) Secretary for Multicultural Affairs.

In turn, Division 1 of Part 4 of the RPC Act, consisting of sections 16 and 17, regulates service providers as well as authorised officers. Section 16 (‘agreement with service provider’) initially read:

“(1) The Secretary may enter into an agreement on behalf of the Government of Nauru with a service provider.

(2) An agreement under subsection (1) must provide for:

- (a) the procedure for the appointment as authorised officers of staff members employed by, or engaged to provide services for, the service provider;
- (b) steps to be taken by the service provider to ensure that all relevant provisions of this Act are complied with;

121 High Court of Australia, *M68/2015*, paras 34-36 (emphasis added).

122 ILC Draft Articles, at 43, para 7.

123 *Asylum Seekers (Regional Processing Centre) Act 2012*, No. 21, 21 December 2012. This Act was accompanied by an Explanatory Memorandum which can be retrieved via http://ronlaw.gov.nr/nauru_lpms/files/em/20fd308dd45962046670cd1eb039480e.pdf. It is based on the *Asylum Seekers (Regional Processing Centre) Bill 2012*, No. 23.

124 *Asylum Seekers (Regional Processing Centre) (Amendment) Act 2014*, No. 3.

125 *Asylum Seekers (Regional Processing Centre) (Amendment) Act 2014*, No. 25.

126 *Asylum Seekers (Regional Processing Centre) (Amendment) Act 2015*, No. 23.

127 *Asylum Seekers (Regional Processing Centre) (Amendment) Act 2017*, No. 16.

128 *Asylum Seekers (Regional Processing Centre) (Amendment) Act 2018*, No. 29.

- (c) the submission by the service provider to the Secretary of periodic reports in relation to the provision of services by it that are in the form, and deal with the particular matters, specified in the agreement; and
- (d) an indemnity by the service provider in favour of the Government of Nauru, the Minister and the Secretary."

Act 16/2017 substituted section 1 of this provision with the following: "*The Secretary shall enter into agreements with any service provider on behalf of the Republic*". Note how the change of wording subtly reiterates that the facilities are Nauruan-run: the Secretary no longer *may* enter into agreements with service providers on behalf of the Nauruan Government, but *shall* do so.

Section 16 hence provides a basis for the Nauruan government to conclude agreements with a service provider as well as a list of cumulative mandatory components of such agreements. Agreements between Nauru and service providers thus do not only regulate the relationship between the Nauruan government and the contractor – that is to say, agreements need to contain a clause on the reporting obligations of service providers as well as an indemnity clause – but they also regulate how the service providers will comply with the provisions of the RPC Act and, importantly, how staff members of the latter are appointed as authorised officers. In relation to the latter, section 17 ('appointment of authorised officers') is particularly relevant. In the initial 2012 Act, it read:

- "(1) The Secretary may appoint as an authorised officer for a regional processing centre a staff member who is employed by, or engaged to provide services for, a service provider who has entered into an agreement under section 16(1).
- (2) The Secretary may only appoint as an authorised officer a person whom the Secretary is satisfied:
 - (a) is competent to exercise the powers conferred on an authorised officer by this Part; and
 - (b) is a fit and proper person to exercise those powers, having regard to character, honesty and integrity; and
 - (c) has agreed in writing to exercise those powers.
- (3) The Secretary must issue an identity card to each authorised officer.
- (4) An identity card must:
 - (a) contain a photograph of the authorised officer; and
 - (b) specify a unique number by which the authorised officer may be identified; and
 - (c) be signed by the Secretary.
- (5) An authorised officer issued with an identity card must:
 - (a) at all times while on duty, wear it in such a manner that it is visible to other persons; and
 - (b) produce it on being requested to do so by a protected person in relation to whom the authorised officer is exercising, or proposing to exercise, any power under this Part."

As such, the Secretary had the power to appoint authorised officers of service providers on the basis of section 17(1), taking into account the criteria specified in section 17(2) and in accordance with the procedures agreed upon pursuant to section 16(2)(a). Section 17(1) indeed provided for a direct link with section 16(1): the Secretary could appoint staff members of service providers as authorised officers *only* if the service provider had entered into an agreement with the Secretary on behalf of the Nauruan state, *not* if the service provider had entered into an agreement with the Commonwealth of Australia. This distinction is crucial given the conferral of governmental powers to authorised officers as will be discussed further below. However, Act 3/2014 amended section 17(1) by omitting it and substituting it with:

“(1) The Secretary may appoint as an authorised officer for a regional processing centre a staff member who is employed by a service provider who has been contracted to provide services for the Centre.”

This has significantly broadened the scope of staff members eligible to be appointed as authorised officers. The wording of section 17(1) no longer specifies that only those staff members of service providers contracted *by Nauru* to provide services for the Centre are eligible for appointment as authorised officer; consequently, there is no longer an inevitable link between sections 17 and 16. To the contrary, given the definition provided to ‘service provider’ – “a body that has been engaged by the Republic of Nauru *or the Commonwealth of Australia* to provide services of any kind at a regional processing centre or in relation to protected persons” (emphasis added) – the Secretary may on the basis of the amended RPC Act also appoint staff members employed by a service provider contracted to provide services *by Australia* as authorised officers. This amended provision came into force on 21 May 2014.¹²⁹

The powers that authorised officers may exercise were provided for in the initial Act in Division 2 of Part 4 of the RPC Act. More specifically, the powers of authorised officers were provided for in section 18 whilst rules on the exercise of powers were laid down in section 19. According to section 18 (old), authorised officers may submit to frisk searches or scanning searches, empty the contents of all pockets in a person’s clothing and allow an examination of those contents, allow any bag or other receptacle carried by the person to be searched, and seize and retain prohibited items. Section 19 (old) provides that such powers must be exercised with due respect for the person in relation to whom the power is being exercised, that searches must not subject the person being searched to greater indignity than is reasonably necessary to conduct the search, and that a frisk search may only be conducted by an authorised officer of the same sex. Section 20 (old) clarifies that these powers

129 In accordance with Act’s commencement clause: see section 2 of Act 3/2014.

are not conferred on staff members who are not police officers or authorised officers.

Over time, these provisions have however been significantly amended. Act 3/2014 moved the relevant sections on the power of authorised officers to Division 3 of Part 4.¹³⁰ It also significantly expanded the scope of powers that authorised officers may exercise: it provided a legal basis for authorised officers to search persons (including to conduct frisk searches, strip searches, scanning searches, emptying the contents of all pockets, and allowing any bag or other receptacle carried by the person to be searched) (section 19), to search premises (section 19A), and to conduct a general search (of a protected person, a visitor, or staff) and seize prohibited or controlled items (section 19E). It also broadened the power of authorised officers to use reasonable force in certain circumstances (section 24). Throughout amended Division 3 of Part 4 of the RPC Act, rules and legal safeguards are provided that circumscribe the exercise of most of such powers as well as reporting obligations on behalf of authorised officers vis-à-vis the Secretary and the Operational Manager of the RPC.¹³¹ Section 20 of the RPC Act, clarifying that these powers are not conferred on staff members who are not police officers or authorised officers, remained unchanged. Furthermore, Section 24A of the amended RPC Act provides that the Secretary may – in consultation with the service provider – require that the service provider hands the Centre over to the police for any period that the Secretary considers necessary, if the Secretary believes on the basis of reasonable grounds that there exists an emergency affecting the safety of protected persons, staff, or visitors, or that there is an imminent threat of such an emergency, and that the service provider is unwilling or unable to immediately deal with that emergency or threat to the Secretary's satisfaction.¹³² Also, a provision was inserted pursuant to Amendment Act 3/2014 authorising service providers to establish a blockade that prevents the passage of vehicles and persons to or from any Centre facility after consultation with the police and if the provider concludes that there is an existing emergency or imminent threat of emergency (section 24B).

As a result of Amendment Act 23/2015, the general search provisions as enshrined in Section 19E were transferred to and merged with Section 19 on the powers of authorised officers to search persons. Furthermore, the power of service providers to establish blockades in emergencies was transferred to the Secretary under new Section 24B. All other powers as amended under Act

130 Asylum Seekers (Regional Processing Centre) (Amendment) Act 2014, No. 3, sections 3 and 9.

131 Most notably on the exercise of the power to search persons: Sections 19B, 19C and 19D of the RPC Act further regulated the exercise of this power by providing respectively further provisions related to searches of persons, rules on the preservation of privacy and dignity, and rules for conducting strip searches.

132 Once the Secretary on reasonable grounds believes that there is no longer an imminent threat, the Centre will be handed back to the service provider.

3/2014 remained unchanged. In addition, section 18C (old) on leaving the RPC without approval was replaced with section 18C (new) on the Open Centre arrangements.

In conjunction, these sections of the RPC Act fulfil the second requirement for attribution under article 5 of the Draft Articles, i.e. that the entity in question must be empowered by the internal law of Nauru to exercise their governmental authority and that their conduct as involving the exercise of governmental authority must be explicitly authorised in Nauru's legislation and must be narrowly circumscribed. The RPC Act allows for the empowerment of service providers and explicitly authorises and narrowly circumscribes the exercise of governmental authority. Authorised officers employed by service providers furthermore undergo an authorisation process, are provided with Nauruan identification cards,¹³³ and are subjected to ongoing monitoring and reporting structures. Combined, this constitutes a strong case for attribution of the exercise of governmental authority by authorised officers employed by contracted service providers to the Republic of Nauru.

This is, of course, subject to the third criterion, i.e. that authorised officers are acting in their public capacities, which ultimately depends on specific conduct under scrutiny.

The question that remains is whether staff members of service providers providing security and garrison services have been appointed as authorised officers by the Nauruan Secretary. It is important to recall that *before* 21 May 2014, the RPC Act only allowed for the appointment of staff members of service providers that *Nauru* had entered into an agreement with as authorised officers. From 21 May 2014 onwards, also staff of service providers contracted by Australia could be appointed as authorised officers.

As outlined in chapter 2, Australia contracted Transfield/Broadspectrum and, later, Canstruct as lead contractors. In turn, Transfield/Broadspectrum subcontracted Wilson Security to provide security services. The latter has furthermore subcontracted part of its responsibilities to two local enterprises, Sterling Security and Protective Security Services. Although appointments of authorised officers are not published, the case of *M68/2015* before the High Court of Australia provides further clarity. In its judgment, the High Court of Australia confirms that "[s]taff of Wilson Security were appointed by the Secretary as authorised officers and were therefore authorised by the law of Nauru to exercise powers under the RPC Act".¹³⁴ As the Submission of the First and Second Defendants (i.e. the Minister for Immigration and Border Protection and the Commonwealth of Australia) outlines, "[n]o Commonwealth

133 Once an authorised officer has been appointed, in accordance with section 17(3), (4) and (5) of the RPC Act (s)he is given a signed identity card by the Secretary that the officer is obliged to wear at all times whilst on duty and must be produced per the request of a protected person to whom the officer exercises or proposes to exercise its powers.

134 High Court of Australia, *M68/2015*, para. 33.

officers or staff of Transfield are appointed as authorised officers; the Secretary has appointed 138 staff of Wilson Security as authorised officers".¹³⁵ However, on the basis of the RPC Act and the subsequent Amendment Acts, such appointment of Wilson Security staff (including the staff of Wilson Security's local subcontractors, Sterling Security and Protective Security Services) as authorised officers was not possible before 21 May 2014 given that Wilson Security was a sub-contractor of Transfield Security, who in turn contracted with Australia. Wilson Security has, nevertheless, been operative on Nauru since late 2012. Only from 21 May 2014 onwards did the Nauruan legislation provide a basis for such appointments.

In sum, from 21 May 2014 onwards, Wilson Security's staff members that were appointed as authorised officers were exercising elements of governmental authority as provided for in Nauruan internal law, and their conduct can therefore be attributed to Nauru on the basis of Article 5 Draft Articles to the extent that they were acting in their public capacity in a particular instance.¹³⁶ This is, on the basis of Article 7 Draft Articles, even true for unauthorised or *ultra vires* acts.¹³⁷ Before 21 May 2014, their exercise of governmental authority was arguably not provided for in Nauru's internal law and does therefore not fulfil the stringent criteria of Article 5 Draft Articles. One exception in this regard applies, however: in July 2013, Wilson Security staff members were sworn in as reserve officers of the Nauru Police Force Reserve (NPFR).¹³⁸ With policing clearly falling within the scope of governmental authority and being provided for in Nauruan law, whenever these members of staff acted in their public capacity as reserve officer of the NPFR, their conduct was attributable to Nauru under Article 5 Draft Articles.

6.5.2.2 *The Nauru (RPC) Corporation*

Article 5 Draft Articles also provides a basis to attribute the conduct of the Nauru (RPC) Corporation to Nauru in cases where it exercises governmental authority. This appears much less complicated than the attribution of conduct of security and garrison service providers as outlined above. Indeed, the Nauru (RPC) Corporation seems to exercise elements of governmental authority when

¹³⁵ *Written Submissions of the First and Second Defendants to Case M68/2015*, filed 18 September 2015, para. 21, available at http://www.hcourt.gov.au/assets/cases/M68-2015/PlfM68-2015_Def1-2.pdf (last accessed 31 May 2019).

¹³⁶ Similarly, it may be assumed that security staff of Canstruct has also been appointed by the Secretary as authorised officers once the company took over as lead contractor in November 2017, although specific details are lacking. The contract between the Australian Government and Canstruct in section 3.15.2. of Part 4 of Schedule 1 mentions that Canstruct personnel members are appointed authorised officers. The contract is available at <https://www.homeaffairs.gov.au/foi/files/2018/fa171200763-document-released.pdf> (last accessed 30 May 2019).

¹³⁷ ILC Commentaries, at 45, para 1.

¹³⁸ High Court of Australia, *M68/2015*, para. 53.

procuring commercial services for the RPC and by managing contracts for the RPC. Whilst procurement and the management of contracts *as such* do not necessarily constitute the exercise of governmental authority, it seems that such activities in the sphere of immigration detention and processing – core governmental tasks – *do* involve the exercise of governmental authority to a certain extent given that only states can conclude such contracts legitimately. As outlined above, as the ILC Draft Articles provide, of particular importance for establishing governmental authority is “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”.¹³⁹ These additional elements provide further support for the assertion that the Nauru (RPC) Corporation exercises governmental authority: the powers mentioned above are conferred on the Nauru (RPC) Corporation by a specific Act, they are to be exercised for the purpose of facilitating and managing private contractors in the state-run RPC, and the Nauru (RPC) Corporation is accountable to the Nauruan Minister for Multicultural Affairs for the exercise of its powers.¹⁴⁰ In turn, the elements of governmental authority exercised by the Nauru (RPC) Corporation are expressly delegated to it by section 7(1) of the *Nauru (RPC) Corporation Act 2017*. Whenever representatives of the Nauru (RPC) Corporation are thus acting in that official capacity, their conduct can be attributed to Nauru.

At the same time, it should be noted that not *all* activities of the Nauru (RPC) Corporation involve elements of governmental authority. In such instances, as well as in cases where it is ultimately unclear whether elements of governmental authority are exercised, the conduct of the Nauru (RPC) Corporation can nevertheless be attributed to Nauru on the basis of Article 8 Draft Articles as further explicated below.

6.5.3 Article 8 Draft Articles

Whilst conduct of private actors not exercising elements of governmental authority generally does not give rise to state responsibility, this is under Article 8 Draft Articles different when there is a “specific factual relationship” between the actor and the state – more specifically, when states instruct, direct, or control such conduct.¹⁴¹ As previously explained, such instructions, directions, or control should be specifically aimed not at an actor as such but at specific *conduct*.¹⁴² It is therefore difficult to provide general comments on attribution on this basis: without focussing on specific conduct as such,

¹³⁹ ILC Commentaries, at 43, para 6.

¹⁴⁰ See, in relation to the latter aspect, section 9 of the Nauru (RPC) Corporation Act 2017.

¹⁴¹ ILC Commentaries, at 47, para 1.

¹⁴² ILC Commentaries, at 48, para 7.

it is not possible to precisely delineate what conduct of which private actors can be attributed to Australia, Nauru, or both under Article 8 Draft Articles. Even more so, this difficulty is compounded by the fact that Australia and/or Nauru may instruct, direct, and/or control *part* of private actors' conduct, and, furthermore, that they may for instance provide instructions in relation to some acts, give directions in relation to others, and exercise control in relation to yet another subset of contractors' activities. It is thus possible, at least in theory, that either of both countries, or both countries simultaneously, instruct, direct, *and* control parts of a private actor's conduct, whilst the private actor itself *in addition* engages in conduct autonomously – that is to say, on the basis of its own volition. In such cases, the private actor's conduct can only in part be attributed to Australia and/or Nauru on the basis of Article 8 Draft Articles, and only insofar as the appropriate thresholds – which, as outlined above, differ per factual link – are fulfilled. Whilst analysis here does not focus on specific conduct, some general remarks can be postulated.

Since Australia has contracted all service providers, it generally makes sense to first examine the relationship between Australia and acts of private contractors in order to establish whether conduct can be attributed ex Article 8 Draft Articles.¹⁴³ In turn, the question is whether impugned acts were instructed, directed, and/or controlled by Australia. As explained above, it is of importance to precisely delineate whether any potential involvement of Australia amounts to instruction, direction, or control, given the different implications and tests of these coexisting relationships. Whereas attribution can readily take place on the basis of specific *instructions* of particular conduct, when a state issues *directions* or *control*, the impugned act can only be attributed insofar as such directions or control concern a particular operation of which the conduct is truly an integral part instead of an incidental or peripheral occurrence. Furthermore, whereas states generally do not assume the risk that lawful *instructions* or *directions* are exercised in an internationally unlawful way, when states *control* conduct such internationally unlawful exercises can nevertheless be attributed to them.

From the contracts between Australia and the various private stakeholders, it appears that *in general* Australia's factual relationship with private stakeholders on many occasions will at least amount to that of the *direction* of conduct. As the contracts with Transfield/Broadspectrum, the Salvation Army, and Canstruct outline under 'management and governance', DIBP appoints a Contract Administrator and a Department Operations Team Leader. Transfield/Broadspectrum, the Salvation Army, Save the Children, respectively Canstruct have to liaise with these appointees and have to comply with the

143 This would be different when Nauru itself concludes contracts with service providers on the basis of the Asylum Seekers (Regional Processing Centre) Act 2012, No. 21, 21 December 2012, section 16(1).

directions of the Contract Administrator.¹⁴⁴ The IHMS contract on the other hand provides that “the Health Services must be delivered in compliance with any Guidelines issued by the Department to the Health Services Manager from time to time. The Department will not issue Guidelines that relate to the provision of Health Care by the Health Services Manager but may issue Guidelines relating to any other aspect of the delivery of the Health Services”.¹⁴⁵ Specifically, a Department Executive may give directions to IHMS in relation to how health care is accessed, interface issues, DIBP’s duty of care, and DIBP requirements for additional or expanded services.¹⁴⁶ These directions have to be recorded in writing and IHMS must comply with and implement them.¹⁴⁷ At the same time, the various service providers maintain a level of autonomy in implementing the directions.¹⁴⁸ As a consequence, it seems that the factual link between Australia and the contractors’ behaviour amounts to *direction* but generally not to *control*. This may be different in relation to specific acts, insofar as the factual complexities of a particular situation give reason to conclude that the Australian government exercised the required level of control over certain conduct. Likewise, although generally Australia’s involvement does not seem to amount to clear *instructions* of conduct, at times the case-specific facts may prove differently.

In sum, whenever private service contractors act upon the directions of the Contract Administrator or any other representative of the Australian government, such acts can *prima facie* be attributed to Australia ex Article 8 Draft Articles. However, since such directions generally do not amount to control, Australia does *not* assume responsibility for acts that were performed on the basis of *lawful* directions yet are carried out in an internationally *unlawful* way. In this sense, whenever Australia’s instructions are lawful but subsequent acts performed by private actors result in breaches of human rights, such breaches arguably do not amount to human rights violations of *Australia* since Australia does not assume responsibility for them. Consequently, whilst Article 8 Draft Articles provides ample ground for attribution, it seems questionable whether in the context of human rights it provides an equally significant ground for holding a state responsible and accountable whenever private actors breach human rights in the implementation of lawful directions. Never-

144 Transfield contract, sections 4.2. and 4.3; Salvation Army contract, sections 9.1. and 9.2.; Save the Children contract, sections 4.2. and 4.3.; Canstruct contract, sections 4.2. and 4.3.

145 IHMS contract, section 21.1(a).

146 IHMS contract, section 21.2.

147 IHMS contract, sections 21.4. and 21.5.

148 Such autonomy is either implicit or explicit. For example, the IHMS contract in section 21.3. explicitly outlines limitations on DIBP’s direction power: “[a] Department Executive must not give a Direction [...] that: (a) is clinical in nature; (b) limits or restricts the clinical independence or professional integrity of a Health Care Provider; (c) is inconsistent with the terms and conditions of this Contract; or (d) would result in the Health Services Manager (or any Health Care Provider) breaching any Law.”

theless, as will be further focused upon below, the doctrine of positive obligations goes a long way in addressing this issue.

In addition, whenever a factual connection in the form of instructions, directions, or control can be established between an act of a private contractor and the Nauruan government, conduct can be attributed to Nauru on the basis of Article 8 Draft Articles. For example, whenever the RPC Operational Managers or any other Nauruan government representatives instruct, direct, or control certain conduct, independently or in collaboration with the Australian government's representatives on island, there is nothing to prevent the attribution of such conduct (also) to Nauru. However, such links cannot be assumed *a priori*: as the Transfield/Broadspectrum contract for example provides, Transfield/Broadspectrum is required to "work closely" with the Nauruan Centre Administrator, but a consequent factual link between the Nauruan Centre Administrator and Transfield/Broadspectrum is not contractually provided for.¹⁴⁹ Similarly, the Save the Children and Canstruct contracts do not provide for such relationships but only provide that both stakeholders will have "significant stakeholder management and consultation requirements including with the Department and Nauruan government authorities", and that they "must adopt a collaborative approach to the complex stakeholder and governance issues".¹⁵⁰ The IHMS contract does not mention any cooperation between IHMS and Nauruan government representatives but merely regulates the cooperation between IHMS and the DIBP and other service providers.¹⁵¹ IHMS "must develop, implement and manage appropriate policies and procedures that foster open, co-operative, constructive and professional working relationships with the Department and Department Services Providers".¹⁵² The Salvation Army contract also does not specify working relationships with the Nauruan government, although the Salvation Army is required to "provide such reasonable assistance to the Department, *local authorities* and other service providers as the Department may reasonably request".¹⁵³ On the basis of these contractual arrangements, it thus is less likely that a relevant factual relationship between Nauru and the service providers exists, although this may be different in relation to specific conduct. This is also supported by the Administrative Arrangements, that in Section 4 clearly set out that service providers are managed by the Australian government's representatives on island, not by the Nauruan Operational Managers.

The Nauru (RPC) Corporation is however an exception. As outlined in section 6.5.2.2., acts of this private actor – which, for that matter, is not a

149 Transfield contract, section 1.6. of Part 1 of Schedule 1.

150 Save the Children contract, section 1.3.1. of Part 1 of Schedule 1; Canstruct contract, section 1.3.1. of Part 1 of Schedule 1.

151 IHMS contract, section 9.2. and 9.3, sections 7.1. and 7.2. of Schedule 2, and section 5.2. of Schedule 4.2.

152 IHMS contract, section 7.1. of Schedule 2.

153 IHMS contract, section 1(b) of Part 1 of Schedule 1 (emphasis added).

service provider – can be attributed to Nauru whenever it exercises governmental authority. Moreover, also when it is not exercising governmental authority, acts of the Nauru (RPC) Corporation can likely be attributed to Nauru on the basis of Article 8 Draft Articles. Section 9 of the *Nauru (RPC) Corporation Act 2017* provides that the Nauru (RPC) Corporation is responsible to the Nauruan Minister for Multicultural Affairs, which “may give directions to the Corporation as to the performance of its functions and powers to which the Corporation must give effect to”.¹⁵⁴ Given that the Nauru (RPC) Corporation is responsible to the Minister for Multicultural Affairs and its Board of Direction is appointed by the Nauruan Cabinet,¹⁵⁵ the factual link between the Nauru (RPC) Corporation and the Nauruan state seems to generally amount to that of *control*: the Nauruan government in general seems to fulfil the two parallel tests that have been developed in this regard as outlined above, i.e. ‘overall control’ and ‘effective control’. *Generally speaking*, the acts of the Nauru (RPC) Corporation can thus seemingly be attributed to Nauru on the basis of Article 8 Draft Articles.

6.5.4 Joint responsibility

Situations of joint responsibility may arise in the context of RPC Nauru in cases where one or more acts can be attributed to both Australia and Nauru on the basis of the aforementioned attribution maxims. In line with Article 47 Draft Articles, the responsibility of both countries can thus be invoked where they are simultaneously responsible for a human rights violation, either because they operated independently but their actions combined result in the violation, because they committed a joint act either through a common organ or through concerted operation, or because one of both states participated in the other state’s violation.

Again, whether these bases provide ground for joint responsibility depends on the particularities of specific conduct at hand. Generally, it could however be questioned whether the operations at RPC Nauru are likely to amount to *joint acts* on behalf of both Australia and Nauru, specifically since both countries concluded not only the MoU but also Administrative Arrangements. These Arrangements give, as mentioned above, effect to the MoU, setting out *inter alia* how the facilities are to be run and how responsibilities are divided. To reiterate, for alleged misconduct to be of a joint nature, the states involved must not only have had the power to prevent it, but must also have instructed it to a certain extent. *In casu*, the Administrative Arrangements *prima facie* seem to provide sufficient reason to suppose that both Australia and Nauru may *influence* particular conduct at the RPC, but not necessarily that the operation

¹⁵⁴ Nauru (RPC) Corporation Act 2017, section 9.

¹⁵⁵ Nauru (RPC) Corporation Act 2017, section 10.

of RPC Nauru occurs on the basis of the *instruction* of both nations to such an extent that one can label all governance-related conduct within the facility as 'joint acts'. Indeed, whilst it might be true that Nauru could in certain circumstances *prevent* particular conduct from happening through the Administrative Arrangements, this does not necessarily mean that the way in which the various involved stakeholders act is generally in accordance with both nations' *instructions* as well. As the Administrative Arrangements outline, the private service providers are, for instance, managed by the representative of the Australian government on island, *not* by the Nauruan Operational Managers.¹⁵⁶ It is, as a consequence of these Administrative Arrangements, solely the Australian government, not the Nauruan government, that – through its representation on site – instructs the service providers in fulfilling their tasks and obligations. Whilst the operation of the service providers may be to a certain extent influenced by the Nauruan government, it is henceforth certainly not instructed by it. Since the MoU and Administrative Arrangements as such purposively, and explicitly, set out a division of responsibilities, acts generally occur on the basis of either of both states' instructions instead of on the basis of a 'single course of conduct' to which both states significantly contribute. Accordingly, whilst Australia and Nauru cooperate closely, joint acts do not – at least not generally – appear to be systemic feature of the governance arrangements in place. For this reason, they do not appear to be the most feasible basis for attribution, although it should be reiterated that this may incidentally differ in relation to particular misconduct.

It in turn seems more likely that Australia and Nauru can be held responsible for potential human rights violations that can be attributed to them on the basis of their independent actions that, alone or combined, led to such potential violation. There is in addition reason to assume that both countries could in certain circumstances be held responsible for wrongful conduct on the basis of derived responsibility. Specifically, in certain situations it might be possible to hold Australia or Nauru responsible for aiding and assisting the other state in committing a human rights violation. Indeed, as outlined above, providing essential facilities or financial means for the commission of a wrongful act are quintessential examples of cases where article 16 Draft Articles may give rise to derived responsibility.¹⁵⁷ Where human rights violations can be attributed to either of both states on the basis of the attribution rules, the other state may hence also be held responsible if (i) that state was aware of the circumstances that made the acting state's conduct a human rights violation; (ii) that state gave aid or assistance with a view to facilitating the commission of the human rights violation; and (iii) it can be established that the violation would also have been a human rights violation had the act

¹⁵⁶ Section 4.1.4. of the Administrative Arrangements.

¹⁵⁷ ILC Commentaries, at 66, para 1.

been committed by the participating state.¹⁵⁸ The first and last requirements are generally easily fulfilled in the context of RPC Nauru. Thus, in relation to the first condition, both nations generally are aware of the circumstances in which their aid or assistance will be used: the purposes of Australia's financial aid and the facilities and soil made available by Nauru are clearly delineated in the MoU.¹⁵⁹ In relation to the latter condition, Australia and Nauru are generally bound by the same or similar human rights obligations, and any conduct leading to a human rights violation of the acting state henceforth likely also constitutes a human rights obligation of the aiding state.¹⁶⁰ The question remains, however, whether either of both states gave aid or assistance with a view to facilitating the commission of any particular human rights violation. As outlined above, both knowledge and intent are required to fulfil this condition: specifically, the assisting state must have intended to facilitate the occurrence of the human rights violation.¹⁶¹ Again, it ultimately depends on the specific act and the resulting human rights violation whether this requirement can be fulfilled. *Generally speaking*, such requirement can likely be fulfilled where arbitrary deprivation of liberty is the human rights violation in question, but is much less likely met where for example inhuman or degrading treatment, rights to privacy, rights to family life, or health-related rights are at stake. Indeed, it is difficult to prove that the assisting state *intended* for these specific human rights violations to happen. Where conduct attributable to Australia would lead to such violations, it hence cannot generally be assumed that Nauru intended these rights to be violated by providing the required facilities and soil. Likewise, where conduct attributable to Nauru results in such violations, it cannot generally be assumed that Australia intended the violation of these rights by providing financial means. As such, derived responsibility on the basis of Article 16 Draft Articles remains a narrow category. It should however be kept in mind that the doctrine of 'positive obligations' has, as will be outlined below, to a certain extent mitigated the implications of such narrow application.

In general, it is not likely that Australia or Nauru can be held responsible on the basis of direction or control (Article 17 Draft Articles). As outlined above, responsibilities in RPC Nauru are largely divided between both nations and it can therefore not *prima facie* be assumed that either of both states exercises "actual direction of an operative kind" over conduct of the other state to such an extent that it transcends the mere exercise of oversight, incitement, or suggestion.¹⁶²

158 ILC Commentaries, at 66, paras 3-6.

159 Compare ILC Commentaries, at 66, para 4.

160 ILC Commentaries, at 66, para 6.

161 ILC Commentaries, at 66, para 5.

162 Compare ILC Commentaries, at 69, para 7.

It is likewise not likely that either of both states can be held responsible on the basis of coercion (Article 18 Draft Articles). Admittedly, the argument could be pursued that Australia coerces Nauru through far-reaching economic pressures since Nauru would likely be bankrupt if it were not for the revenue resulting from the RPC, and that Australia consequently incurs derived responsibility for potential human rights violations by Nauru.¹⁶³ However, as provided above, only coercion leaving Nauru with no choice but to comply suffices in this regard. Furthermore, Nauru should be deprived “of any possibility of conforming with the [human rights] obligation breached”.¹⁶⁴ This condition is not likely to be fulfilled on the basis of Australia’s economic pressures: even when such pressures can be construed as coercion proper, they are generally not likely to deprive Nauru of any opportunity to comply with its human rights obligations in the first place.

6.6 APPLYING THE FRAMEWORK: PI NORGERHAVEN

The framework of attribution also provides ground to test whether Norway, the Netherlands, or both countries simultaneously can be held responsible for conduct in PI Norgerhaven. Given that no private contractors are involved, analysis of PI Norgerhaven is somewhat less complex than that of RPC Nauru.

6.6.1 Articles 4 and 6 Draft Articles

Figure 7 in chapter 2 of this book shows for both countries which state organs are involved in the operation of PI Norgerhaven. On the basis of the basic rule of attribution as laid down in Article 4 Draft Articles, the acts and omissions of the Norwegian state organs – primarily KDI – can be attributed to Norway whereas the acts and omissions of the Dutch state organs – primarily DJI – can be attributed to the Netherlands.

However, the application of this basic rule is further complicated by the provisions of Article 6 Draft Articles. As this provision outlines, when an organ of one state is placed at the disposal of another state, its acts shall be considered exclusively acts of the latter state when it exercises elements of the governmental authority of that state. As the ILC Commentaries clarify, a state organ should operate with the consent of a state, under its authority, and for its purposes, and should act “in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from

¹⁶³ See also ILC Commentaries, at 70, para 3.

¹⁶⁴ See also ILC Commentaries, at 70, para 3.

the sending State".¹⁶⁵ 'Ordinary' inter-state cooperation, whether or not based on a treaty, is insufficient to fulfil the threshold of Article 6.¹⁶⁶

The consequent question that arises is whether the *Dutch prison staff* working in PI Norgerhaven is being placed at the disposal of Norway. Two of the three criteria are clearly fulfilled: working for DJI, Dutch prison officers are state agents working for a state organ of the Netherlands. Moreover, they exercise governmental authority: exercises of detention and discipline pursuant to a judicial sentence or to prison regulations have, in fact, been explicitly mentioned in the ILC Draft Articles as examples of governmental authority.¹⁶⁷ The key question, then, is whether the Dutch prison staff has been placed *at the disposal* of the Norwegian state. As has been outlined above in section 6.3.3., Article 6 Draft Articles is a narrow category in that a functional link must be established between the organ in question and the receiving state's structure or authority.¹⁶⁸ Only in such cases can their conduct exclusively be attributed to Norway. If, on the other hand, the prison staff continues to function under the authority of the Netherlands, its conduct remains attributable to the Netherlands under Article 4 Draft Articles, whereas if it turns out to act under the joint instruction of Norway and the Netherlands, its conduct is attributable to both under Articles 4 and 8 Draft Articles.

¹⁶⁹ In light of the Norwegian-Dutch Treaty, it appears that the Dutch prison staff can indeed be considered to be placed at the disposal of Norway. The Treaty, in fact, says as much: "[t]he Minister of Security and Justice of the Receiving State shall put the prison, including its personnel and facilities, at the disposal of the Minister of Justice and Public Security of the Sending State for the purpose of the execution of Norwegian sentences".¹⁷⁰ The full responsibility for the execution of sentences through Dutch prison staff rests with the Norwegian authorities and the overall control of the prison rests with the Norwegian governor who instructs the Dutch personnel.¹⁷¹ Whilst the Dutch Staff and Facility Manager *manages* the staff, that is, takes care of human resources, the Norwegian governor ultimately directs and controls the prison staff's exercise of governmental authority. In exercising powers of detention, the Dutch prison staff hence operates with the consent, under the authority, for the purposes, and under the exclusive direction and control of the Norwegian state.¹⁷² There is, in other words, a functional link between the Dutch prison staff and the structure or authority of Norway.¹⁷³

¹⁶⁵ ILC Commentaries, at 44, para 2.

¹⁶⁶ ILC Commentaries, at 44, para 2.

¹⁶⁷ ILC Commentaries, at 43, para 2.

¹⁶⁸ ILC Commentaries, at 44, para 4.

¹⁶⁹ ILC Commentaries, at 44, para 3.

¹⁷⁰ Article 3 of the Norwegian-Dutch Treaty.

¹⁷¹ See also Struyker Boudier & Verrest, 2015, p. 910.

¹⁷² Compare ILC Commentaries, at 44, para 2.

¹⁷³ ILC Commentaries, at 44, para 4.

As a consequence, the conduct of Dutch prison staff – insofar as their exercise of powers of detention constituting governmental authority is concerned – can be attributed to Norway on the basis of Article 6 Draft Articles. On the basis of Article 4 Draft Articles, the conduct of the Prison governor, the Deputy Prison Directors, and the state agents at the Penitentiary Facility Ullersmo can also be attributed to Norway. On the other hand, on the basis of this same provision, the conduct of the Staff and Facility Manager, the Deputy Staff and Facility Manager, the governor of PI Veenhuizen, the Royal Marechaussee, and the Transportation and Support Service (DV&O) can be attributed to the Netherlands. The same goes for the medical staff: they are not placed at the disposal of Norway but operate under the supervision of the Dutch Staff and Facility Manager.¹⁷⁴

6.6.2 Joint responsibility

Whilst acts can be attributed to either Norway or the Netherlands on the basis of the rules of attribution set out above, it is also possible that they are jointly responsible in line with Article 47 Draft Articles. This is the case where one or more acts resulting in a human rights violation can be attributed to both Norway and the Netherlands, either because they operated independently but their actions combined resulted in a potential human rights violation, because they committed a joint act either through a common organ or through close cooperation, or because one of both states participated in the human rights violation of another state. Interestingly, the implications of Article 47 Draft Articles in the context of PI Norgerhaven are largely similar to those in the context of RPC Nauru as outlined above in section 6.5.4. above, and the discussion in that paragraph consequently applies *mutatis mutandis* here. Only the main gist will be recounted here.

First, it should be emphasised that *whether* either of the aforementioned bases provide ground for joint responsibility ultimately depends on the specific conduct at stake. In general, the nodal governance network of PI Norgerhaven does not seem to give rise to the conclusion that it involves a significant amount of joint acts. The cooperation has been detailed at length in the Norwegian-Dutch Treaty and the Cooperation Agreement, and, importantly, this includes a proper division of responsibilities between both countries. Whilst the prison operation *as such* is frequently considered to be a ‘fusion’ or ‘mixture’, specific *acts* can almost always be attributed to either of both countries on the basis of Articles 4 and 6 Draft Articles. Whilst both countries may influence particular conduct in the facility, such conduct does usually not occur on the basis of joint instructions. Similar to the Australian-Nauruan cooperation

174 Article 32 Cooperation Agreement.

in RPC Nauru, it is more likely that Norway and the Netherlands can, on the basis of their operation, be held responsible for potential human rights violations that can be attributed to them on the basis of their actions that, alone or combined, led to such potential violation.

In addition, both countries might be held responsible on the basis of derived responsibility. In particular, in certain situations, Norway or the Netherlands could potentially be held responsible for aiding and assisting the other state in committing a human rights violation ex Article 16 Draft Articles, *inter alia* by providing essential facilities or financial means for such purposes.¹⁷⁵ The threshold criteria are, however, significant: in order to allocate derived responsibility to either country, it has to be established that that country was aware of the circumstances that made the acting state's conduct a human rights violation, that it gave aid or assistance with a view to facilitating the commission of that violation, and that the human rights violation would also have been a human rights violation if the act was committed by the aiding or assisting country itself.¹⁷⁶ Similar to the context of RPC Nauru, the most difficult threshold to meet is that the country needs to give aid or assistance with a view to facilitate the commission of a particular human rights violation, requiring both knowledge and intent.¹⁷⁷

Likewise similar to the context of RPC Nauru, it is much less likely that either of the states involved can be held responsible on the basis of direction or control (Article 17 Draft Articles) or on the basis of coercion (Article 18 Draft Articles). Since the considerations in section 6.5.4. apply *mutatis mutandis*, this requires no further elaboration at this point.

6.7 POSITIVE OBLIGATIONS: A MODERN-DAY PANACEA FOR STATE RESPONSIBILITY?

As the foregoing has shown, international law on state responsibility to some extent accommodates commodification developments within its logic, although criteria are generally stringent. This, in turn, is a logical consequence of the nature of state responsibility: the notion that states can only be held responsible for their own conduct is a fundamental principle of public international law and conditions rules on state responsibility. Nevertheless, the doctrine of 'positive obligations' to some extent seems to mitigate the implications of these inherent limitations.

Specifically, the idea has been coined that positive obligations may be invoked in order to mitigate the rigid nature of the two-pronged test of international state responsibility. Den Heijer thus argues that rules of attribution

¹⁷⁵ ILC Commentaries, at 66, para 1.

¹⁷⁶ ILC Commentaries, at 66, paras 3-6.

¹⁷⁷ ILC Commentaries, at 66, para 5.

are not the only means of holding states responsible and accountable for their involvement in private conduct: the doctrine of positive obligations would also give rise to state responsibility.¹⁷⁸ As he maintains, “the rules of attribution laid down in Part I of the ILC Articles and the doctrine of positive obligations serve as separate but conjunctive avenues for delimiting the international responsibility of the state when it is involved in the activities of a private entity”.¹⁷⁹ As Gammeltoft-Hansen concurs, responsibility does henceforth not stem from the attribution of private conduct to a state, but from the positive obligations of a state to exercise due diligence in preventing, investigating, and providing remedies to (horizontal) violations.¹⁸⁰ He accordingly depicts positive obligations as an alternative to the image of the law on state responsibility as a straitjacket.¹⁸¹ Similarly, Milanovic concludes that

“once jurisdiction over an area is established, it does not imply attribution in the sense that anything that occurs within a state’s jurisdiction is attributable to it. It would still be necessary to establish that the particular act that is alleged to be a human rights violation is attributable to the state. *Or, even if the act in question is not attributable to the state, its responsibility may also arise for its failure to implement positive obligations under human rights treaties, e.g. to prevent human rights violations even by third parties*”.¹⁸²

Positive obligations would thus blur the distinction between primary and secondary rules of international law. This would be particularly the case, it has been argued, where human rights courts derive, on the basis of positive obligations, “duties in respect of conduct of other international actors from the *substantive* scope of the state’s human rights obligations, thereby *not only complementing, but also potentially displacing*, relevant rules laid down in the Articles on State Responsibility”.¹⁸³ In this sense, primary rules of international law would, by means of positive obligations, trespass into the field of secondary international law.

It is argued here, however, that such a ‘trespassing’ understanding of positive obligations is misleading in the sense that delineating responsibility for positive obligations seem to be an exercise that *conforms to* – rather than *challenges* – the two-pronged nature of state responsibility. For international state responsibility to arise as a result of positive obligations, just like any action or omission that potentially violates a negative human rights obligation, any act or omission potentially violating a positive obligation indeed both needs to be attributed to a state under the relevant rules of secondary inter-

178 Den Heijer, 2011, p. 67.

179 Den Heijer, 2011, pp. 82–83.

180 Gammeltoft-Hansen, 2011, pp. 225–226.

181 Gammeltoft-Hansen, 2011, pp. 225–226.

182 Milanovic, 2011, p. 52.

183 Den Heijer, 2011, p. 67 (emphasis added).

national law and must constitute a breach of that state's international obligations as laid down in primary rules of international law. The systematic operation of the test hence does not differ depending on whether one is dealing with negative or positive obligations: an act or omission must first be attributed to the state and must subsequently fall within that state's scope of obligations.

Admittedly, however, the question of attribution in cases concerning positive obligations may become a rather formalistic one in the sense that attribution can often *prima facie* be ascertained. That is to say, where a state is supposed to act on the basis of its positive obligations, its omission to do so can readily be attributed to it. In this regard, it should be recalled that the ILC Draft Articles confirm explicitly that an omission can – both independently and in combination with one or more actions – constitute an internationally wrongful act and that states can be held responsible for them insofar as they can be attributed to that state under secondary rules of international law.¹⁸⁴ Where a state fails to act, it is henceforth hardly problematic to attribute such omission to that state on the basis of the relevant attribution maxims. If, furthermore, such omission constitutes a breach of the state's (positive) international human rights obligations, the omission results in an internationally wrongful act for which the state can be held responsible. In extraterritorial contexts, this means that the omission must not only be attributable to the state, but also that it must be ascertained that the individual whose rights were allegedly violated was within the state's jurisdiction in the first place – a question that is the prime concern of the next chapter.

The ECtHR case of *Jaloud v. The Netherlands* provides a good illustration of the way in which the two-pronged test of international state responsibility continues to apply to context of positive obligations.¹⁸⁵ Since it will be extensively elaborated upon in the next chapter, it is only addressed succinctly here. The case concerned the death of an Iraqi citizen, who was shot at a checkpoint in Iraq which at the time was under the command of a Dutch officer.¹⁸⁶ Applicant claimed that the Netherlands had inadequately investigated the fatal shooting and had therefore breached its *positive* obligation under Article 2 of the ECHR. In examining state responsibility, the Grand Chamber first dealt with attribution: it noted that “[t]he facts giving rise to the applicant’s complaints derive from alleged acts and omissions of Netherlands military personnel and investigative and judicial authorities. As such they are capable of giving rise to the responsibility of the Netherlands under the Convention”.¹⁸⁷ This phrase indeed serves to *attribute* the impugned acts – and, more relevant in this context, the impugned omissions – of the Dutch military personnel and invest-

184 ILC Commentaries, at 31, para. 1 and at 32, para. 1.

185 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), 20 November 2014, Application no. 47708/08.

186 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber).

187 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 151-155.

igative and judicial authorities to the Netherlands. *Separately*, the Court dealt with the question of jurisdiction, which in itself however also included an attribution test. This is slightly complicating, as it is not the attribution of impugned acts and omissions that is tested here – this has already been established – but rather the attribution of acts of Dutch forces in Iraq. Indeed, as will be further explained in the next chapter, for an individual to come into a state's extraterritorial jurisdiction in the first place, it generally needs to be established that the state concerned in fact exercised control extraterritorially. This *in casu* requires a separate test of attribution that does not replace the first prong of the test of state responsibility but is rather encapsulated in the test of jurisdiction as the second prong. In this case, the Court held that the conduct of Dutch forces in Iraq was attributable to the Netherlands and that the Netherlands consequently had exercised extraterritorial jurisdiction on the basis of a personal model (i.e. "within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint").¹⁸⁸ Now that the applicant had been within the Netherlands' jurisdiction, the Dutch authorities had positive obligations vis-à-vis him, and the Netherlands was consequently held responsible as the acts and omissions of its military personnel and investigative and judicial authorities – that could be attributed to it – did not meet the relevant positive obligations.

As such, it becomes clear that the questions of attribution and jurisdiction do not operate in an isolated fashion either conceptually or practically. As the present and next chapter show, to establish jurisdiction, it is necessary to attribute acts or omissions to a state as legal entity, since a state necessarily acts – including in the exercise of jurisdiction – through human auxiliaries, whilst at the same time establishing jurisdiction may provide grounds to attribute certain omissions amounting to a violation of positive human rights obligations to a state. In the contexts of RPC Nauru and PI Norgerhaven, this means that one should not only examine whether conduct amounting to a violation of *negative* human rights obligations can be attributed to one or more of the states involved, but also whether conduct amounting to a violation of *positive* human rights obligations – in practice often being an omission – can be attributed to them. However, the responsibility of these states only stretches so far as their international human rights obligations dictate: Australia, Nauru, Norway, and the Netherlands only have negative and positive human rights obligations where they exercise *jurisdiction*, the second step of the two-pronged test of international state responsibility. As a result, even where certain acts violating negative human rights obligations cannot be attributed to either of the states, when the state in question exercises jurisdiction, it can nevertheless potentially be held responsible on the basis of its positive obligations, which in turn requires a potential omission to be attributed to that state. In sum, the

188 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 151-152.

doctrine of positive obligations is certainly helpful, but should not be mistaken for a genuine alternative to the two-pronged test of state responsibility.

6.8 CONCLUSION

This chapter has dealt with the first step of establishing state responsibility for human rights violations as internationally wrongful acts. This step consists of establishing, on the basis of relevant principles of general international law, whether *conduct*, comprising both acts and omissions, can be regarded as conduct of a particular state. Analysis inquired whether this first step provides room for resilient accommodation of commodification realities in order to effectively respond to the commodification challenges to its accountability, effectiveness, and legitimacy, and henceforth to remain relevant as a protection mechanism.

Examination of the ILC Draft Articles shows that this step in principle indeed provides such space. Indeed, states can be held responsible for acts and omissions of a wide variety of entities, both public and private in nature, and it is therefore possible that states are held internationally responsible for acts and omissions of partners in nodal governance networks that exercise power and authority in *inter alia* settings of confinement. What is required, essentially, is that the conduct of such entities can be attributed to the state, so as to make the particular act or omission a *de jure* act or omission of that state. This applies to conduct arguably violating a negative obligation of the state, but also to conduct arguably violating a positive obligation, in which case the failure to live up to positive obligations – often amounting to an *omission* of sorts – has to be attributed to the state in question. Even though carried out by for instance private contractors, whenever the criteria of one or more of the attribution rules are fulfilled, conduct can hence be considered conduct of a state. The systematics of the rules on state responsibility as developed by the ILC accordingly continue to rely heavily on a significant deference, or veracity, to the fundamental principle of general international law that states are only responsible for their *own* conduct, whilst simultaneously providing scope to deal with the operations of nodal governance networks. As has been established, the rules on state responsibility furthermore provide ample space to accommodate the exercise of authority in nodal governance networks in which two or more states are involved: both the conduct of states acting independently, and joint acts, can be effectively dealt with through the rules of attribution. This is complemented by the rules of derived responsibility, allowing for states to be held responsible for their involvement in the internationally wrongful act of another state, whether it be through aid or assist-

ance, direction, or coercion.¹⁸⁹ Again, the way in which the system of international state responsibility has been developed showcases significant veracity to the fundamental principle of states' responsibility for their *own* conduct, whilst simultaneously acknowledging – in what may be labelled a resilient stance – that contemporary globalised realities require the availability of advanced rules of attribution and derived responsibility in order to guarantee the system's effectiveness.

At a global level, the way in which the relevant principles have been developed thus seems promising for the accommodation of commodification challenges within the public international law system in general and within the logic of international human rights law in particular. Translated to the local level, the analysis above shows, however, that the ILC Draft Articles do not provide a simple cure to the often intricate and complex governance networks that are entrenched in some contemporary settings of confinement. Thus, in the context of RPC Nauru, the application of the relevant rules of attribution set out in the ILC Draft Articles to the particularities at hand showcases amongst others that holding Nauru or Australia responsible for the conduct of private contractors is not without difficulties. Likewise, establishing derived responsibility is rather complex in light of the arrangements in place in RPC Nauru. The particular impediments under each rule of attribution, and under each rule of derived responsibility, have been outlined above and do not need to be recounted here. It should rather be emphasised that, notwithstanding the fact that the rules of attribution and derived responsibility showcase a balanced approach vis-à-vis resilience and veracity, at the local level their application continues to be complicated. Various contextual factors indeed often blur clear and uncontentious assessments of responsibility.

At the same time, such results are not generalisable as illustrated by PI Norgerhaven. Indeed, in that specific context, there seem to be no particular difficulties in establishing responsibility for conduct on the basis of the ILC Draft Articles. Taking these findings into account, at the 'glocal' level it henceforth transpires that the extent to which commodification is *effectively* accommodated in the global international (human rights) law machinery ultimately depends on local particularities. Indeed, ultimately, the effectiveness of resilience is not only dependent on the development of global regimes in order to adjust international law to contemporary developments, but also depends on the way in which local networks of power and authority have been structured and embedded, and the extent to which such local structures are

189 In cases of coercion, the conduct of the coerced state technically does not amount to an internationally wrongful act where that state can rely on *force majeure* as a result of the coercion. Therefore, in these specific circumstances, the system of state responsibility allows for establishing the responsibility of a coercing state for acts of a coerced state that would, were it not for the coercion, have constituted an internationally wrongful act: see also ILC Commentaries, at 70, para 4.

transparent and accessible and operate with integrity. For instance, the nodal governance arrangements in RPC Nauru show that the effective application of rules of attribution and derived responsibility is not so much obstructed by the fact that nodal governance arrangements *as such* are in place, but rather by the fact that these arrangements have been structured, and operate, behind significant walls of secrecy and silence, which makes it difficult to assess in a general sense the division of responsibility for conduct occurring within the nodal governance network. In the context of PI Norgerhaven, on the other hand, these lines of responsibility have much more clearly and transparently been drawn and embedded in rules and regulations. Walls of secrecy and silence thus do not only hamper answerability and enforcement as will be further elaborated upon in Part III of this book, but also hamper assessments of responsibility for conduct as the first leg of establishing state responsibility.

At the glocal level, globally developed rules of attribution thus seem to be able to mitigate at least in part the commodification challenges to international human rights law, although such efforts may be significantly constrained by the way in which local contexts have been structured. Furthermore, whilst a resilient approach to attribution and derived responsibility is useful, it is only one of two steps of establishing state responsibility, the other being establishing responsibility for *an international obligation*. It is this step that the next chapter will turn to.

7 | Sophisticating the net II

The scope of state obligations

7.1 INTRODUCTION

After establishing that certain conduct is attributable to one or more states under the secondary rules of international law, the question arises whether such conduct also constitutes a violation of that state's primary international obligations – in the present inquiry, whether the conduct constitutes a violation of the state's international human rights obligations. To answer this question, the scope of the human rights obligations of the state should be established in order to assess whether particular act or omission falls within its ambit. At this point, it should be reiterated that the focus here is on *treaty*-based as opposed to customary-based obligations.¹

The scope of a state's treaty-based human rights obligations is delineated in a number of ways. Discussions have particularly ensued over the past decade in relation to the geographical delineation of international human rights obligations. At their core, these discussions focus on the tension between international human rights law's territorially-geared scope of application and contemporary realities of extraterritorial practices.²

On the one hand, the application of international human rights law is indeed typically limited by so-called jurisdictional clauses. These clauses contain threshold criteria in the sense that they determine in which instances state parties are bound to respect the human rights obligations contained in the specific instrument. They henceforth have a significant bearing on the substantive rights enshrined in the respective human rights instruments in the sense that they condition these rights and the associated obligations: the rights enshrined and the obligations owed by the state only exist, as it were, in the totality of situations where the state exercises jurisdiction; in any other situation the state has no obligations to uphold the particular rights enshrined in the particular instrument in question. Jurisdiction, in short, determines the

1 In fact, the idea that any jurisdictional condition of customary international human rights law would be more encompassing than the jurisdictional provisions in treaty regimes is not characterised by uniform, widespread state practice or *opinio juris*: Kessing, 2017, p. 85. To the contrary, "it is quite unlikely that states have assumed more extensive obligations under customary human rights law than they have done under treaty law": Milanovic, 2011, p. 3.

2 See e.g. Coomans & Kamminga, 2004; Gammeltoft-Hansen, 2011; Gibney, 2016; Milanovic, 2011; S. R. Ratner, 2015; Tzevelekos, 2015; Vandenhoe & Gibney, 2014.

scope of application of international human rights law.³ As emphasised in chapter 2 and further explored below, jurisdiction in international human rights law has frequently been reflexively associated with the state's territory 'as the primary realm of state power'.⁴ From this perspective, there is a presumption that obligations under international human rights law apply principally in the domestic sphere and do not extend beyond the state's sovereign territory.⁵

On the other hand, as chapter 2 has also highlighted, globalisation and the availability of advanced technologies provide states with ample opportunities to operate beyond their own territory in dealing with a variety of issues, including in the area of confinement.⁶ Under the gaze of globalisation state power has been reconfigured and is consequently not necessarily constrained by territorial limitations to the same extent as it used to be in the past. States can therewith exercise power with increasing ease both domestically and abroad and are more than before able to impact upon the enjoyment of human rights far beyond their own sovereign borders.⁷

The international human rights law framework has dealt with this tension through so-called 'extraterritorial human rights obligations'.⁸ Thus, the power that states exercise beyond their territorial borders has informed calls in favour of reinterpreting the territorial inclination of human rights in order to allow for extraterritorial applicability.⁹ At the same time, some powerful counter-arguments exist against a broad extraterritorial application of human rights, including the arguments that such an approach would amount to human rights imperialism and that other legal avenues could on many occasions be expected to be more effective in providing recourse and protection.¹⁰ According to some, extraterritorial jurisdiction remains the exception to the norm,¹¹ whereas others argue that it is somehow more than exceptional.¹²

Arguments for extraterritorial obligations have to certain extents been adopted by international monitoring bodies. In this section, the extraterritorial scope of selected international or regional human rights instruments with a particular relevance for the case studies central to this research will be

3 The concept of jurisdiction therewith has acquired a unique meaning and function in the domain of international human rights law, constituting an altogether different concept from jurisdiction in general public international law which purports to delineate the lawful exercise of authority by states to prescribe and enforce laws.

4 Den Heijer, 2011; Gammeltoft-Hansen, 2011; Vandenhole & Van Genugten, 2015.

5 Vandenhole & Van Genugten, 2015, p. 1.

6 Grear & Weston, 2015, p. 26.

7 Vandenhole & Gibney, 2014, pp. 1–2; Vandenhole & Van Genugten, 2015, p. 1.

8 See, for a further exploration of definitional issues in relation to the use of the terminology 'extraterritorial', Gibney, 2013.

9 Da Costa, 2013; Gammeltoft-Hansen, 2011; Liguori, 2015. See also Skogly, 2017, who maintains that extraterritorial human rights obligations have become the 'new normal'.

10 Den Heijer, 2015, pp. 358–361.

11 See for example Coomans, 2011, p. 5; S. Miller, 2009, p. 1223; S. R. Ratner, 2001, pp. 268–269.

12 Mantouvalou, 2005.

addressed.¹³ This concerns the ICCPR, ICESCR, the Convention Against Torture (CAT), and the ECHR. Furthermore, the Organization of American States Charter system (OAS Charter system) and the Inter-American Convention on Human Rights (ACHR) will be included as they provide interesting grounds for comparison.¹⁴ As will be outlined below, the tension between territorial presumptions – requiring treaty regimes to stay veracious to the fundamental tenet that international human rights obligations in principle rest upon territorial states – and extraterritorial practices – requiring treaty regimes to show resilience in order to remain of sufficient relevance as protection frameworks – has gradually guided the interpretation and development of ‘jurisdiction’ under each treaty regime, albeit to varying extents. In turn, however, this tension has also led to a number of complexities that obfuscate the way in which international human rights law has been able to adapt to commodification realities. These complexities will be illustrated by looking at the case law of the ECommHR and the ECtHR specifically, identifying six complexities that arise and that have seriously complicated the doctrine of extraterritorial jurisdiction.

7.2 STAYING VERACIOUS TO THE FUNDAMENTAL TENET OF TERRITORIAL STATE OBLIGATIONS

Most of the abovementioned human rights treaties substantiated their jurisdictional scope of application by means of the notion of territoriality. In general, the jurisdictional scope of these treaties is thus congruent with the fundamental tenet of international human rights law that obligations are, in principle, obligations of the territorial state. Some of these treaty regimes have sought

¹³ That is not to say that other treaties – such as the UN Convention on the Rights of the Child (CRC) – are not important for settings of confinement. However, for present purposes the analysis will focus on treaties that are not limited in scope in terms of their addressees.

¹⁴ The Inter-American system of human rights is distinctive in the sense that it is based on two separate yet interrelated instruments: the OAS Charter system, which comprises the OAS Charter and the American Declaration on the Rights and Duties of Man (‘American Declaration’), on the one hand, and the ACHR on the other. Both instruments contain human rights provisions and complement one another: whereas state parties to the ACHR are bound by the provisions contained therein, other member states of the OAS are bound by the American Declaration. The American Declaration thus functions as a default instrument that is of continued relevance due to the failure of some OAS member states to ratify or accede to the American Convention: see also Cerna, 2014, p. 1213. Both instruments are furthermore interrelated in the sense that they operate through a common organ: the Inter-American Commission on Human Rights (IACCommHR). Amongst others, the IACCommHR can receive communications from both individuals and groups concerning alleged violations of human rights. The IACCommHR should not be confused with the Inter-American Court of Human Rights (IACtHR), which is a judicial organ established under the ACHR and which can, under certain conditions, decide cases – referred to it by state parties or the IACCommHR – against OAS Member States that have accepted its contentious jurisdiction.

such congruence by explicitly referring to states' territories, whereas others have done so by interpreting the jurisdictional scope in territorial terms.

7.2.1 The ICCPR

Article 2(1) ICCPR constitutes the jurisdictional clause of the Covenant. It explicitly mentions the territory of the state:

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [...]" (emphasis added).

The proper meaning of this provision has been disputed, with commentators reaching opposite conclusions in relation to the scope of applicability of the Covenant.¹⁵ This controversy is reflected in the preparatory work of the ICCPR. Indeed, Da Costa concludes on the basis of an elaborate examination of the ICCPR's *travaux préparatoires* that Article 2(1) ICCPR was considered controversial and a variety of issues were consequently not clearly agreed upon by the drafters of the Covenant.¹⁶ As she likewise points out, however, three key issues emerge from the *travaux*: (i) Article 2(1) ICCPR was throughout the process regarded as a key provision; (ii) in drafting it, the drafters were primarily concerned with the protection of nationals abroad by and against the authorities of the state on whose territory they resided rather than with extra-territorial acts by states; and (iii) the US explicitly addressed its intention to exclude areas where the US exercised jurisdiction for particular purposes, such as those areas that were under its military occupation as well as leased territories, from its obligations.¹⁷

The obligations enshrined in the Covenant have been framed in territorial terms, albeit not exclusively so given that Article 2(1) ICCPR refers to the jurisdiction of the state as either a cumulative or an alternative ground for obligations to arise: indeed, it speaks about 'within its territory *and* subject to its jurisdiction'. This ambiguity is further complicated by the fact that the jurisdictional clause of the Optional Protocol to the ICCPR, which regulates the HRCee's monitoring of the ICCPR, is crucially different from the jurisdictional provision of the ICCPR itself in that it does not contain a reference to the state's territory but merely refers to the state's jurisdiction.¹⁸ The ambiguous phrasing

¹⁵ For an overview of this debate, see Da Costa, 2013, pp. 17–19.

¹⁶ Da Costa, 2013, pp. 19–20.

¹⁷ Da Costa, 2013, pp. 40–41.

¹⁸ Article 1 of the Optional Protocol to the ICCPR reads: "[a] State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals *subject to its jurisdiction* who claim

of the jurisdictional clause of the ICCPR will be further analysed below when the ICCPR is discussed from the perspective of resilience. Still, it should be noted that the ICCPR has been interpreted primarily in territorial terms: the ICJ held in relation to the ICCPR that the “the exercise of jurisdiction is primarily territorial”.¹⁹ At the same time, as will be addressed below, this has not prevented the development of exceptional bases for extraterritorial jurisdiction.

7.2.2 The ICESCR

Contrary to the ICCPR, the ICESCR does not explicitly refer to territoriality in the treaty text. In fact, it does not even have a specific jurisdictional clause delineating the Covenant’s scope of application. Article 2(1) ICESCR simply states that

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

Confusion as to the scope of applicability of the ICESCR does consequently not stem from an abundance of criteria applicable – territory *and* jurisdiction – but rather from a lack of any provision. Still, it is generally assumed that the realisation of economic, social, and cultural rights as codified in the ICESCR has a territorial scope: “it normally takes place on the territory of states”.²⁰ This in part can be derived from the nature of such rights – states simply cannot be expected to uphold all dimensions of economic, social, and cultural rights of everyone everywhere – and in part from rules of customary international law – as Article 29 of the Vienna Convention on the Law of Treaties (‘VCLT’) states, a treaty is binding upon the entire territory of a state party “[u]nless a different intention appears from the treaty or is otherwise established”.²¹ The primarily territorial reading was confirmed by the ICJ, which held that the Covenant “guarantees rights which are essentially territorial”.²²

to be victims of a violation by that State Party of any of the rights set forth in the Covenant. [...]” (emphasis added).

19 ICJ, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ Reports 2004, 136, (‘Wall Advisory Opinion’), para. 109.

20 Coomans, 2011, p. 2.

21 See also Dennis, 2010, p. 127.

22 ICJ, *Wall Advisory Opinion*, para 112.

7.2.3 The CAT

The CAT contains two jurisdictional clauses, i.e. Article 2(1) relating to the prohibition of torture and Article 16(1) relating to the prohibition of other cruel, inhuman or degrading treatment or punishment.²³ Although a legal distinction in this regard appears to be drawn between torture on the one hand and other forms of cruel, inhuman or degrading treatment or punishment on the other, the Committee against Torture (CATee)²⁴ has stated that the obligations to prevent both are “indivisible, interdependent and interrelated”.²⁵ Both jurisdictional clauses refer explicitly to territory. Article 2(1) CAT reads:

“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture *in any territory under its jurisdiction*” (emphasis added).

Article 16(1) CAT similarly refers to territories under the jurisdiction of state parties:

“Each State Party shall undertake to prevent *in any territory under its jurisdiction* other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I [...]” (emphasis added).

Although the jurisdictional clauses of the CAT thus explicitly refers to territory, the question of relevance remains how the phrase ‘in any territory under its jurisdiction’ should be understood. As Da Costa shows, the potential extraterritorial application of the Convention was not exhaustively dealt with at the

23 The CAT was adopted on 10 December 1984 and entered into force on 26 June 1987. The Convention is different in nature from both the ICCPR and ICESCR as it focuses not on an extensive catalogue of human rights protections but, unsurprisingly, on protection against torture as well as other cruel, inhuman, or degrading treatment or punishment. It is therefore limited in scope yet highly ambitious in setting a single global standard of obligations related to what is often considered to be one of the core and most fundamental human rights and one of the most significant protections of human dignity: the prohibition of torture is recognised in various international human rights treaties as well as in customary international law and is both absolute and non-derogable. For an explanation of the difference between absolute and non-derogable rights, see Nowak & McArthur, 2008, p. 119.

24 The Committee against Torture was set up by virtue of Article 17(1) CAT. It monitors the implementation of the CAT and assesses the compliance of states with the Convention. See, for a critical appraisal of the CATee and the overlap of its mandate with that of the HRCee, Ingelse, 2000.

25 Committee against Torture, *General Comment no. 2*, 24 January 2008, UN Doc. CAT/C/GC/2, para 3. As the Committee states, “[i]n practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment”.

drafting stage.²⁶ Nevertheless, during the drafting phase the argument was raised that the phrase ‘within its jurisdiction’ might be interpreted too widely so that it would cover also citizens of a state residing abroad. It was therefore proposed to change the language to that of ‘any territory under its jurisdiction’, whilst it at the same time was emphasised that “such wording would cover torture inflicted aboard ships or aircraft registered in the State concerned as well as occupied territories”.²⁷ From this perspective, at least *some* extraterritorial application of the CAT was envisaged.²⁸ The specific reference to ‘territory under its jurisdiction’ can hence not be equated to a state’s sovereign territory *per se*. The extraterritorial scope of the CAT will be returned to below.

7.2.4 The OAS Charter system

The OAS Charter System consists of two instruments: the OAS Charter and the American Declaration. On a number of occasions, the OAS Charter refers to fundamental rights and human rights.²⁹ At the same time, the OAS Charter does not specify the meaning of these fundamental and human rights – rather, this has been expanded upon in the American Declaration, which was adopted simultaneously with the OAS Charter in 1948 and which provides a catalogue of rights and, notably, duties of the individual. The legal status of the American Declaration remains somewhat ambiguous, but this has not prevented the Inter-American Commission on Human Rights (IACommHR) from applying it as a legally binding instrument for all OAS member states.³⁰

²⁶ Da Costa, 2013, p. 268.

²⁷ See Commission on Human Rights, *Report on the Thirty First Session, Economic and Social Council, Supplement no. 6*, UN Doc. E/CN.4/1347, para 178(32).

²⁸ See, similarly, Nowak & McArthur, 2008, pp. 116–117.

²⁹ Article 3(1) of the Charter, for instance, refers to the proclamation by American States of “the *fundamental rights of the individual* without distinction as to race, nationality, creed or sex” (emphasis added). Article 17 of the OAS Charter states that “[e]ach State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the *rights of the individual* and the principles of universal morality” (emphasis added).

³⁰ The American Declaration was developed around the same time as the UDHR and has largely fulfilled a similar catalyst function as the Universal Declaration. Like the UDHR, it was, moreover, intended to constitute an aspirational rather than legally binding catalogue, although the exact legal status of the American Declaration has been subjected to debate. The IACommHR, for one, has continuously maintained that the American Declaration is legally binding. More specifically, it has argued that the reference to ‘human rights’ in the 1967 amendment to the Charter necessarily refers to the American Declaration, as it had been the only catalogue of human rights in the Inter-American human rights system in existence at the time, and that the American Declaration subsequently acquired treaty status due to the ratification of these amendments to the Charter by OAS member states. For analysis of the IACommHR’s position, see Cerna, 2014, who argues that the assertion that the American Declaration is legally binding is useful as a mechanism yet ultimately a legal fiction. Furthermore, what the legal effect of the Declaration as a binding treaty would be

The subsequent question of relevance here is what the jurisdictional scope of the American Declaration is. However, since the American Declaration was at least initially not meant to function as a legally binding treaty but rather as a standard of achievement, the drafters gave no proper consideration to the question how it should be applied in practice.³¹ The American Declaration therefore does not contain an express jurisdictional clause.³² At the same time, since it was not anticipated during the drafting stage that the Declaration would function as a treaty and that it would be applied to individual states, no strong inference can be drawn from such absence. At a minimum, nothing suggests that the drafters of the American Declaration had anything else in mind than territorial application, and it was only after the IACommHR started to apply it to OAS member states that the jurisdictional question came up in the first place.

7.2.5 The ACHR

The ACHR – being the second regime of the Inter-American system of human rights – on the other hand was always envisaged to be a binding treaty and consequently *does* have a jurisdictional provision.³³ Indeed, Article 1(1) of the American Convention reads:

“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to *all persons subject to their jurisdiction* the free and full exercise of those rights and freedoms [...]” (emphasis added).³⁴

remains unclear: it could be taken to mean either that the American Declaration is legally binding for all OAS member states, or that it is binding “to the extent that it assists in interpretation of the American Convention on Human Rights, which is binding on States that have ratified it”: Balouziyeh, 2012, p. 157. Criticism in relation to the position of the IACommHR has also been raised by member states, particularly the US. Throughout, the United States has indeed maintained that the American Declaration is a “non-binding instrument that does not itself create legal rights or impose legal obligations on signatory States”: IACommHR, *Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America*, 24 July 2015, OAS/Ser.L/V/II. 155, para 33. See also IACtHR, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, 14 July 1989, Advisory Opinion OC-10/89, para 12.

³¹ Cerna, 2004, p. 141.

³² Article 2 of the American Declaration on the ‘right to equality before law’ has sometimes erroneously been referred to as the Declaration’s jurisdictional clause, yet this provision rather stipulates an autonomous substantive right.

³³ The ACHR, which is also known as the Pact of San José, was adopted in 1969 and came into force after the eleventh state party – Grenada – ratified the instrument in 1978.

³⁴ Article 1(2) of the American Convention subsequently limits the interpretation of ‘persons’ to human beings (as opposed to the broader category of legal persons).

Contrary to the provisions of the ICCPR and the CAT, no reference is thus made to states' territories. Interestingly, similarly to the ICCPR, a reference to persons "within its territory and subject to its jurisdiction" was included in earlier drafts of the ACHR, but the reference to territory was omitted in the final version.³⁵ Still, the phrase 'all persons subject to their jurisdiction' has been interpreted by the IACommHR partially along territorial lines, although case law in relation to the scope of obligations remains scarce. In *Saldaño v. Argentina*, the Commission considered that

"States Parties have undertaken to respect and ensure the substantive guarantees enshrined in the Convention in favour of persons 'subject to their jurisdiction.' As implicitly established by the case law of the Commission and the Inter-American Court, *this protection must extend to all human beings present within their national territory, irrespective of their nationality or status*".³⁶

As such, the Commission first and foremost finds that the protection of the ACHR extends to all human beings in a state's territory merely on account of the fact that they are, indeed, in that state's territory. Admittedly, as further addressed below, the Commission in turn argues that the meaning of 'jurisdiction' in Article 1(1) ACHR is not limited to such territorial reading but that states in certain circumstances may also have obligations when acting extra-territorially:

"The Commission does not believe, however, that the term 'jurisdiction' in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the *acts and omissions of its agents which produce effects or are undertaken outside that state's own territory*".³⁷

Still, as the Commission makes clear, obligations *always* apply to *all human beings* present within a state's national territory, and only occasionally – *under certain circumstances* – in extraterritorial contexts. Territorial application is hence the norm, extraterritorial application the exception.

35 This could imply that the drafters did not envisage mere territorial application when drafting the Convention. However, the *travaux préparatoires* (only available in Spanish) do not provide a conclusive answer in this regard: they only state that "*la Comisión resolvió aprobar el texto del Artículo 1 tal como aparece en el Proyecto [...], suprimiendo de su primer párrafo la cláusula que dice "que se encuentre en su territorio"*": OAS, *Conferencia Especializada Interamericana sobre Derechos Humanos – Actas y Documentos* (San José de Costa Rica, 07-22.11.1969), OEA/Ser.K/XVI/1.2, p. 295. See also Medina Quiroga, 2016, p. 15.

36 IACommHR, *Victor Saldaño v. Argentina*, 11 March 1999, Ann. Rep. IACommHR 1998, 289, paras 16-17 (emphasis added).

37 IACommHR, *Victor Saldaño v. Argentina*, paras 16-17 (emphasis added).

7.2.6 The ECHR

The debate on jurisdictional application gained particular traction in the context of the ECHR. Indeed, the jurisdictional scope of the ECHR has been extensively scrutinised by scholars who, at times, have maintained widely divergent opinions as a result of the somewhat schismatic nature of case law of the European Court of Human Rights ('ECtHR').

The human rights obligations contained in the ECHR are circumscribed by the jurisdictional provision in Article 1 ECHR:

"The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention" (emphasis added).

Given that no reference to territory is made, the scope of application of the ECHR depends on the meaning given to the phrase 'within their jurisdiction'. As Da Costa argues, the *travaux préparatoires* are hardly clarifying: they are, firstly, only a supplementary means of interpretation due to the well-established doctrine that the ECHR is a 'living instrument', and, secondly, do not consider the meaning of 'jurisdiction' as such.³⁸ As she likewise outlines, however, the drafting history has at times been referred to in order to argue that jurisdiction under the ECHR should be considered territorial in nature: notably, previous drafts of Article 1 ECHR referred to persons 'residing within [Member States'] territories' respectively persons 'living in [Member States'] territories', yet the drafters rather ironically deemed such terminology to be prone to ambiguity and the phrase 'within their jurisdiction' was accordingly adopted.³⁹ On the basis of the *travaux*, a plausible – albeit inconclusive – argument that the term 'jurisdiction' is in principle to be understood in territorial terms may hence be developed.

Case law of the ECtHR to a certain extent entertains such argument: an intrinsic link between the Convention and the territories of member states is clearly acknowledged by the Court. Thus, according to the ECtHR, "the jurisdictional competence of a state is primarily territorial" and "Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case".⁴⁰ As such, jurisdiction is "presumed to be exercised normally throughout the

³⁸ Da Costa, 2013, pp. 93–94.

³⁹ Da Costa, 2013, pp. 94–96.

⁴⁰ ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), 12 December 2001, Application no. 52207/99, paras 59 and 61. This conclusion has been repeated by the Court in subsequent case law.

State's territory".⁴¹ Similar to the ICJ's opinion in relation to the ICCPR,⁴² the ECtHR has thus clearly and unequivocally expressed that the ECHR's jurisdictional limitation is primarily territorial. As explicitly recognised by the ECtHR in *Banković*, deviance of this main rule would be exceptional and would require specific justification.⁴³ Nevertheless, this has not obstructed the ECtHR to develop extraterritorial models of jurisdiction as part of a resilient effort vis-à-vis conduct of states abroad, as examined below.

7.3 SHOWING RESILIENCE IN THE FACE OF EXTRATERRITORIAL STATE CONDUCT

Most human rights instruments discussed here hence connect their jurisdictional scope one way or the other with the notion of territory. This accords with a veracious stance to the fundamental tenet that international human rights obligations are, in principle, obligations of territorial states. Over time, however, the jurisdictional provisions of these treaties have generally been interpreted to also include, in exceptional circumstances, extraterritorial conduct of states. In this sense, the treaties showcase a certain level of resilience in the face of state conduct abroad, including in situations where states act extraterritorially in nodal governance settings involving two or more states. Such resilience under the various treaty regimes will now be analysed.

7.3.1 The ICCPR

The HRCee has clarified the jurisdictional reach of the ICCPR in individual communications, general comments, and concluding observations. It first did so in individual communications relating to the military dictatorship that was in power in Uruguay between the mid-1970s and mid-1980s.⁴⁴ Particularly relevant are those communications related to the abduction of individuals who were considered to be opposition members by Uruguayan state agents operating abroad.⁴⁵ Whereas Uruguay argued that these cases were inadmissible now that the abductions had occurred outside its territory, the HRCee held that Article 1 Optional Protocol and Article 2(1) ICCPR do not imply that state parties cannot be held responsible for human rights violations that occur

41 ECtHR, *Ilascu and others v Moldova and Russia*,; ECtHR, *Assanidze v Georgia*, 8 April 2004, Application no. 71503/01, para. 139; ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), 7 July 2011, Application no. 55721/07, para 131; ECtHR, *Hirsi Jamaa*, para. 71.

42 ICJ, *Wall Advisory Opinion*, para 109.

43 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), paras 59 and 61.

44 Da Costa, 2013, p. 43.

45 HRCee, *Lopez Burgos v. Uruguay*, 29 July 1981, Comm. no. 52/1979, UN Doc. CCPR/C/13/D/52/1979; HRCee, *Celiberti de Casariego v. Uruguay*, 29 July 1981, Comm. no. 56/1979, UN Doc. CCPR/C/13/D/56/1979.

extraterritorially.⁴⁶ Notably, in *Lopez Burgos v. Uruguay*, the HRCee considered that

“although the arrest and initial detention and mistreatment of Lopez Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol (“... individuals subject to its jurisdiction ...”) or by virtue of article 2 (1) of the Covenant (“... individuals within its territory and subject to its jurisdiction ...”) from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.”⁴⁷

More specifically, the Committee held that the wording of Article 1 Optional Protocol does not refer to the place where the alleged violation occurred but rather to “the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred”.⁴⁸ Moreover, although Article 2(1) ICCPR mentions the territory of state parties, it “does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it”.⁴⁹ It indeed “would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory”.⁵⁰ This reflects a strong resilient approach: in light of extra-territorial conduct of states, a strict territorial reading is regarded inappropriate.

The HRCee thus approached the issue by focusing not so much on the reference to territory but rather on the factual relationship between applicant and state party.⁵¹ This signifies a *personal* model of jurisdiction: due to the amount of effective power or control over a person abroad, the state’s jurisdiction is extraterritorially triggered. The HRCee confirmed such personal model of extraterritorial jurisdiction *inter alia* in its discussions of the second and third

46 HRCee, *Report of the Human Rights Committee, GA Thirty-Sixth Session, no. 40*, 29 July 1981, UN Doc. A/36/40, p. 176, para 12.3.

47 HRCee, *Lopez Burgos v. Uruguay*, para. 12.1; see similarly HRCee, *Celiberti de Casariego v. Uruguay*, para. 10.1.

48 HRCee, *Lopez Burgos v. Uruguay*, para. 12.2; see similarly HRCee, *Celiberti de Casariego v. Uruguay*, para. 10.2.

49 HRCee, *Lopez Burgos v. Uruguay*, para. 12.3; see similarly HRCee, *Celiberti de Casariego v. Uruguay*, para. 10.3.

50 HRCee, *Lopez Burgos v. Uruguay*, para. 12.3; see similarly HRCee, *Celiberti de Casariego v. Uruguay*, para. 10.3.

51 See, in support of this view, Da Costa, 2013, p. 50.

periodic reports of the USA,⁵² in its discussion of the sixth period report of the UK,⁵³ and in its General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant.⁵⁴ The HRCee unequivocally confirmed that the somewhat ambiguous wording “within its territory and subject to its jurisdiction” in Article 2(1) ICCPR should be read disjunctively: the ICCPR obligations apply both to persons within a state’s territory *and* persons subject to the state’s jurisdiction.⁵⁵ It furthermore emphasised that ‘power or effective control’ is the relevant criterion to establish whether a state exercises extraterritorial jurisdiction on the basis of this personal model.

In various Concluding Observations, the Committee has furthermore maintained that extraterritorial jurisdiction may also be established on the basis of a *spatial* model of jurisdiction, i.e. where a state party has effective control over a physical area rather than over a person. As a key example, the HRCee has indicated in various periodic reports concerning Israel that Israel’s ICCPR obligations apply in the Occupied Territories.⁵⁶ More specifically, it held that Israel’s obligations under the ICCPR apply to *anyone* within the Occupied Territories – the basis for jurisdiction here is henceforth a spatial one rather

52 It held that the USA should “acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory as well as its applicability in time of war [...]”: HRCee, *Concluding Observations regarding the United States*, 18 December 2006, UN Doc. CCPR/C/USA/CO/3/Rev.1, para 10.

53 The HRCee held in relation to those detained in facilities in Afghanistan and Iraq by the UK that “[t]he State party should state clearly that the Covenant applies to all individuals who are subject to its jurisdiction or control”: HRCee, *Concluding Observations regarding the United Kingdom of Great Britain and Northern Ireland*, 30 July 2008, UN Doc. CCPR/C/GBR/CO/6, para 14.

54 According to the HRCee, “‘States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. [...] This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained [...]’”: Human Rights Committee, *General Comment no 31* (emphasis added).

55 Although these often will coincide, i.e. where individuals find themselves both in the state’s territory and in the state’s jurisdiction. The United States in particular objected to a disjunctive reading, both on the basis of the *travaux préparatoires* and a literal interpretation of Article 2(1) ICCPR: see e.g. Human Rights Committee, *Consideration of the initial report of the USA, Summary record of the 1405th meeting*, 24 April 1995, UN Doc. CCPR/C/SR.1405, para. 20. Da Costa debunks the US argument, however, as “[t]o apply a conjunctive reading would make the reference to jurisdiction redundant, since as a general rule arising from the territoriality principle jurisdiction is normally exercised in relation to a state’s territory”: Da Costa, 2013, p. 70. For a different perspective, see Dennis, 2010, pp. 122–127. See also Oberleitner, 2015, pp. 150–152.

56 See, notably, HRCee, *Concluding Observations of the Human Rights Committee on the Second Report of Israel*, 21 August 2003, UN Doc. CCPR/CO/78/ISR. See also HRCee, *Concluding Observations of the Human Rights Committee on the Third Report of Israel*, 3 September 2010, UN Doc. CCPR/C/ISR/CO/3, para. 5.

than a personal one. The appropriate test under this spatial model is that of 'effective control' over an area: indeed, "under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bekaa *where Israel exercises effective control*".⁵⁷ Such a position has consequently been adopted by numerous UN bodies.⁵⁸

Whilst the positions and findings of the HRCee are authoritative, they are not legally binding.⁵⁹ It is therefore particularly interesting that the ICJ has on two occasions also dealt with the extraterritorial application of the ICCPR and has by and large confirmed the approach of the HRCee. First, in the *Wall Advisory Opinion*, the ICJ concluded in a similar vein that "while the exercise of jurisdiction is primarily territorial, it may sometimes be exercised outside the state territory" and consequently that the ICCPR also applies "in respect of acts done by a State in the exercise of its jurisdiction outside its territory".⁶⁰ In turn, the ICJ confirmed this position in *Case Concerning Armed Activities On The Territory Of The Congo (DRC v. Uganda)*: "international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories".⁶¹

It accordingly appears justified to conclude that a state's ICCPR obligations apply to persons in three distinct situations: to (i) those within its territory (territorial jurisdiction), (ii) those outside the state's territory yet within the power or effective control of the state (personal jurisdiction), and (iii) those within other territories under the effective control of the state (spatial jurisdiction). However, this tripartite framework has been problematised by the HRCee itself, in particular in relation to the territorial basis of jurisdiction. Indeed, in response to the second and third periodical reports of Cyprus, the HRCee considered a situation where the state did not exercise control over the entirety of its territory due to the occupation of parts of it by a foreign power. The HRCee specifically considered that "the State party, as a consequence of events that occurred in 1974 and resulted in the occupation of part of the territory of Cyprus, *is still not in a position to exercise control over all of its territory*

57 HRCee, *Concluding Observations of the Human Rights Committee on the Initial Report of Israel*, 18 August 1998, UN Doc. CCPR/C/79/Add.93, para. 10 (emphasis added).

58 See for example Report of the Secretary General, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, 13 April 2017, UN Doc. A/HRC/34/38, paras. 6-7.

59 See HRCee, *87th Session, Summary Record of the 2380th Meeting, Consideration of Reports under Article 40 of the Covenant, Second and Third periodic reports of the United States of America*, 27 July 2006, UN Doc. CCPR/C/SR.2380, para. 57. The views have also been disputed in the literature. See, notably, Dennis, 2010, pp. 122-127.

60 ICJ, *Wall Advisory Opinion*, para 109-111. In coming to this conclusion, the ICJ referred explicitly to the HRCee. For the significance of this reference to the HRCee for the latter's position, see Wilde, 2013, p. 665.

61 ICJ, *Case Concerning Armed Activities On The Territory Of The Congo*, 19 December 2005, ICJ Reports 2005, 168, para 216.

and consequently cannot ensure the application of the Covenant in areas not under its jurisdiction".⁶² This position appears to question both the basic rule of territorial jurisdiction and the disjunctive reading of Article 2(1) ICCPR by the HRCee itself. Whereas General Comment 31, which interpreted Article 2(1) ICCPR, suggested that the ICCPR obligations apply both to persons within a state's territory *and* persons subject to the state's jurisdiction, the HRCee in the Concluding Observations on Cyprus seems to suggest that the decisive condition is that of 'subject to its jurisdiction' given that it holds that the territorial ground is insufficient to raise Covenant obligations where the state is no longer in effective control over (parts of) its own territory. This approach seems to be more workable in that it does not require the state "to do the impossible",⁶³ yet it calls the ICCPR's exact scope of application into question. In essence, the HRCee appears to adhere to a pragmatic approach that takes into account the *de facto* authority, power and control exercised by the state, whether it be over a person, a foreign land, or – henceforth – its own territory. The tripartite structure of jurisdiction under the ICCPR as outlined above therefore should be adjusted accordingly: a state's ICCPR obligations apply to (i) those within its territory, *except where the state has lost effective control over (parts) of its territory* (territorial jurisdiction), (ii) those outside the state's territory yet within the power or effective control of the state (personal jurisdiction), and (iii) those within other territories under the effective control of the state (spatial jurisdiction). In each of these three legs, including the territorial one, 'effective control' appears the crucial and decisive element.

7.3.2 The ICESCR

In the context of the ICESCR, the UN Committee on Economic, Social and Cultural Rights ('CESCR') has also recognised extraterritorial obligations. It has, however, taken a different approach than the tripartite structure developed in the context of the ICCPR. Indeed, it (i) introduced the criterion of 'effective control' in the context of economic, social, and cultural rights, and (ii) interpreted the 'international component' of Article 2(1) ICESCR.

Thus, first, the CESCR has clarified that the ICESCR applies extraterritorially where a state party exercises effective control over territory, which especially came to the fore in the context of military occupation. In relation to Israel's state reports, the CESCR recognised such a spatial basis for extraterritorial jurisdiction by clarifying that ICESCR obligations "apply to all territories and

62 HRCee, *Concluding Observations of the Human Rights Committee on the Third Periodic Report of Cyprus*, 6 April 1998, UN Doc. CCPR/C/79/Add. 88, para. 3 (emphasis added).

63 Da Costa, 2013, p. 58.

populations under [the state's] effective control".⁶⁴ This position has largely been confirmed by the ICJ: with express reference to the position taken by the CESCR, the ICJ held that the ICESCR may apply extraterritorially by maintaining that "it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction."⁶⁵ As previously mentioned, in *DRC v. Uganda* the ICJ furthermore concluded more generally that "international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories".⁶⁶

Notably, in 2011, the CESCR held that "States parties have the primary obligation to respect, protect and fulfil the Covenant rights of *all persons under their jurisdiction* in the context of corporate activities undertaken by State-owned or private enterprises".⁶⁷ This should, however, not be understood as implying that a personal model of extraterritorial jurisdiction exists under the ICESCR. The statement indeed does not imply that state parties exercise jurisdiction where they have, for example, effective control over persons, but rather that state parties have obligations vis-à-vis all individuals who find themselves in the jurisdiction of that state. In other words, it says nothing about potential bases for (extraterritorial) jurisdiction but rather concerns the implications of establishing such jurisdiction.

Second, the extraterritorial application of the ICESCR has in a more general sense been derived from the reference to the international plane in Article 2(1)

64 CESCR, *Concluding Observations regarding Israel's Initial Report*, 4 December 1998, UN Doc. E/C.12/1/Add.27, at para 8. Furthermore, as the CESCR explicates at para 12, such obligations are not offset by obligations of international humanitarian law: even during armed conflict the economic, social and cultural rights enshrined in the Covenant must be respected. The extraterritorial application of the ICESCR on the basis of effective control over territory or people was later confirmed in CESCR, *Concluding Observations on the second periodic report of Israel*, 23 May 2003, UN Doc. E/C.12/1/Add. 90, para 31. See also the 1994 Concluding Observations on Morocco's state reporting in which the CESCR held that the Covenant applies to the occupied territories of Western Sahara: CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Morocco*, 30 May 1994, UN Doc. E/C.12/1994/5, para. 10.

65 ICJ, *Wall Advisory Opinion*, para 112.

66 It is evident that this also applies to the rights enshrined in the ICESCR, in particular now that the ICJ in its reasoning explicitly referred to its earlier findings on the applicability of economic, social and cultural rights in the *Wall Advisory Opinion* case: ICJ, *Case Concerning Armed Activities On The Territory Of The Congo*, para 216.

67 CESCR, *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*, 12 July 2011, UN Doc. E/C.12/2011/1, para 3 (emphasis added). In a similar vein, the Maastricht Guidelines, which were established by members of the International Commission of Jurists and elaborate upon the nature and scope of economic, social, and cultural rights, note that violations "are in principle imputable to the State *within whose jurisdiction they occur*": CESCR, *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 2 October 2000, UN Doc. E/C.12/2000/13, Guideline 16 (emphasis added). The Maastricht Guidelines are not legally binding but have acquired significant authority in guiding the implementation of ICESCR rights.

ICESCR. The CESCR clarified that “international cooperation for development and thus for the realization of economic, social and cultural rights is an *obligation of all States*. It is particularly incumbent upon those States which are in a position to assist others in this regard”.⁶⁸ In various General Comments on the protection of particular rights, the CESCR has further highlighted the international character of the ICESCR obligations.⁶⁹ As such, the ICESCR rights are framed in a context of international cooperation and assistance and apply to ‘everyone’ without any further delimitation.

Those general duties of international cooperation and assistance are not made dependent upon a jurisdictional link, yet their weakness rests in the fact that they are so broad and ill-defined that it is difficult to delineate *a priori* what is exactly expected from a state party. In essence, the provision appears to require states to *take measures* towards the progressive realisation of economic, social, and cultural rights but does not *entitle particular recipients* to assistance from state parties.⁷⁰ Nevertheless, over the years the CESCR has attempted to provide further substance to the scope of obligations both in general and in relation to particular rights. It has outlined that states’ duties of cooperation and assistance include an obligation to extraterritorially protect economic, social, and cultural rights “by preventing their own citizens and national entities from violating [rights] in other countries”.⁷¹ Thus, “States parties should also take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant”.⁷² The more general duties of international cooperation and assistance have thus been given substance by the CESCR in particular in relation to the activities of corporate actors abroad.

In fact, the CESCR even appears to unify the two distinct bases for extra-territorial application of the Covenant:

68 CESCR, *General Comment no. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, UN Doc. E/1991/23, para 13 (emphasis added). As some scholars outline, since a reference to the international plane is included in the provision, a certain extraterritorial scope was arguably intended by the drafters and therefore part of the ICESCR: see Coomans, 2011, p. 7.

69 See for example CESCR, *General Comment no. 14, The Right to the Highest Attainable Standard of Health*, 11 August 2000, UN Doc. E/C.12/2000/4, at para 39.

70 See also Langford, Coomans, et al., 2013, p. 64.

71 CESCR, *General Comment no. 19, The Right to Social Security*, 4 February 2008, UN Doc. E/C.12/GC/19, para. 54.

72 CESCR, *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*, para 5. The CESCR clarified in the context of business activities that these obligations stem *inter alia* from the phrasing of Article 2(1) ICESCR: see CESCR, *General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, UN Doc. E/C.12/GC/24, para 27.

"[t]he Covenant establishes specific obligations of States parties at three levels – to respect, to protect and to fulfil. These obligations apply both with respect to situations on the State's national territory, and outside the national territory in situations over which States parties may exercise control".⁷³

The Committee hence no longer speaks about exercising control over territory, but about exercising control over *situations*, which arguably encapsulates the spatial ground for extraterritorial jurisdiction as well as the more general duties of international cooperation and assistance.⁷⁴ As the words of the CESCR evidence:

"Extraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory."⁷⁵

In this sense, the reference to 'control over *situations*' seems to include both the previously identified spatial model of extraterritorial jurisdiction, as well as the state-corporate relationship where a state controls a situation by exercising control over activities of corporations domiciled in its territory and/or under its jurisdiction.⁷⁶ The CESCR at the same time stresses, however, that

73 CESCR, *General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, para 10 (emphasis added).

74 Given the nature of economic, social, and cultural rights, it does in general not make sense to maintain that a state has to uphold such rights vis-à-vis anyone over who it exercises effective control on the basis of a personal model. As the analysis of the ECtHR's case law below also evidences, where a state exercises effective control over territory it can be assumed to be responsible for the entire human rights catalogue, including the full range of economic, social, and cultural rights, whereas where a state exercises effective control over persons such obligations should arguably be 'divided and tailored'. In the latter type of situations, it is likely that states are primarily bound by certain civil and political rights, for example to refrain from violating the right to life or the right to be free from torture or other inhuman or degrading treatment, yet it is less likely that they are responsible for upholding most economic, social, and cultural rights. See also Altwicker, 2018, who advocates for the broader use of the 'control over situations' criterion in international human rights law.

75 CESCR, *General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, para 28 (emphasis added).

76 When considering the tripartite nature of human rights obligations, this latter type of control is, as the CESCR outlines, particularly relevant in the context of the obligation to *protect*: "a State party would be in breach of its obligations under the Covenant where the violation reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event. [...] In discharging their duty to protect, States parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence [...] respect Covenant rights": CESCR, *General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, paras 32-33. These approaches largely align with standards

the latter “does not imply the exercise of extraterritorial jurisdiction by the States concerned”.⁷⁷ As such, it remains important to distinguish the latter form of control over situations – where a territorial state to certain extents controls the conduct of domestic companies operating abroad – from the former form of control over situations – where a state exercises extraterritorial jurisdiction proper on the basis of effective control over territory.⁷⁸

The extraterritorial application of ICESCR rights along these lines has been explicitly recognised and confirmed in the Maastricht Principles.⁷⁹ They reflect states’ obligations to respect, protect, and fulfil rights where states’ conduct has effects beyond borders as well as the idea that states must proactively take measures to realise human rights universally through international cooperation and assistance.⁸⁰ Furthermore, they confirm the importance of influence over *situations* and reiterate the various applicable tests:

“A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

- a) *situations over which it exercises authority or effective control*, whether or not such control is exercised in accordance with international law;

proposed in the literature: see, in particular, Narula, 2013; Ryngaert, 2013.

77 CESCR, *General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, para 33.

78 A practical difficulty in this regard is that the duties of international cooperation and assistance appear hardly justifiable: the Optional Protocol to the ICESCR – which recognises the CESCR’s competences to receive individual communications – outlines in Article 2 that “Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party” (emphasis added). Similar to the Optional Protocol to the ICCPR, the Optional Protocol to the ICESCR hence explicitly refers to the jurisdictional link between individual(s) and the state party. This provision in and of itself does not alter the scope of the ICESCR as such, but sets out the admissibility requirements for individual communications. Given the condition that an individual or group of individuals needs to be under the jurisdiction of a state party, the Optional Protocol arguably does not accommodate situations where individuals fall within the ambit of a state’s duties of international cooperation and assistance but outside the scope of that state’s jurisdiction, for example where economic, social, and cultural rights are ostensibly curtailed by corporate actors as a result of an alleged failure of the state in which the corporate actor is domiciled to take reasonable measures that could have prevented the event. Hence, again, the obligations to *inter alia* control domestic corporate actors operating abroad require states to take measures but do not entitle particular recipients.

79 Not to be confused with the Maastricht Guidelines. The Maastricht Principles were adopted after extensive research and consultations by a group of 40 international human rights experts: *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* (adopted 28 September 2011), available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 (last accessed 31 May 2019).

80 Maastricht Principles, Principle 8. See also Khalfan & Seiderman, 2015, p. 15.

- b) *situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;*
- c) *situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law”.*⁸¹

Although the Maastricht Principles are of a soft law nature, read together with the case law of the ICJ and with the statements of the CECSR, as well as with the doctrinal discussions in scholarship, it appears that they to a large extent reflect current consensus.

7.3.3 The CAT

As previously outlined, the *travaux* of the CAT shows that at least *some* extra-territorial application of the CAT was envisaged during the drafting stage. Nevertheless, the extraterritorial application of CAT obligations has been challenged in particular by the United Kingdom and the United States.⁸² In response to the UK, the CATee maintained that the notion of jurisdiction in Article 2(1) and Article 16(1) CAT includes “all areas under the *de facto* effective control of the State party’s authorities”.⁸³ Similarly, in responding to the US’ observations, the CATee held that the notions of jurisdiction in Article 2(1) and Article 16(1) CAT include “all areas under the *de facto* effective control of the State party, by whichever military or civil authorities such control is exercised.”⁸⁴ The CATee furthermore held that state parties should ensure that Article 2(1) and Article 16(1) CAT “apply to, and are fully enjoyed, by *all persons under the effective control of its authorities*, of whichever type, wherever located in the world”.⁸⁵ From these responses it appears that the CATee recognises both the spatial and the personal model of jurisdiction. The Committee confirmed this more explicitly in its 2008 General Comment no. 2, in which it unequivocally stated that “the concept of ‘any territory under its jurisdiction’ [...] includes any territory or facilities and must be applied to protect any

⁸¹ Maastricht Principles, Principle 9 (emphasis added).

⁸² For an extensive and in-depth analysis of their positions, see Da Costa, 2013, pp. 273–299. See also Nowak & McArthur, 2008, pp. 98–99.

⁸³ CATee, *Conclusions and recommendations of the Committee against Torture, United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories*, 10 December 2004, CAT/C/CR/33/3, para 4(b).

⁸⁴ See CATee, *Conclusions and recommendations of the Committee against Torture, United States of America*, 25 July 2006, CAT/C/USA/CO/2, para 15.

⁸⁵ See CATee, *Conclusions and recommendations of the Committee against Torture, United States of America*, para 15 (emphasis added).

person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party".⁸⁶ As it subsequently confirmed,

"any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. [...] [T]he scope of "territory" under article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention."⁸⁷

The spatial and personal model of jurisdiction have therewith been firmly entrenched in the CAT's views. On the other hand, it should be recalled that extraterritorial jurisdiction is, in principle, exceptional and complements the basic rule of territorial jurisdiction. Therefore, the conclusion of some that the CAT's General Comment no. 2 "is a bold and welcome reaffirmation of the universality of the prohibition of torture"⁸⁸ should be interpreted with caution: the prohibitions enshrined in the CAT are admittedly universal yet state parties' obligations only apply extraterritorially in those exceptional situations where a particular level of control over territory or persons is exercised.

7.3.4 The OAS Charter system

In the context of the OAS Charter system, the fact that the American Declaration has no express jurisdictional clause has not prevented the IACommHR from finding extraterritorial jurisdiction.⁸⁹ The IACommHR has found extraterritorial jurisdiction in cases where OAS member states exercise 'effective control' over persons abroad as a result of military occupation, military control, or detention.⁹⁰ Such a personal model was prominently confirmed in *Coard and Others v. the United States*, which concerned US military interventions in Gre-

⁸⁶ Committee against Torture, *General Comment no. 2*, para 7.

⁸⁷ Committee against Torture, *General Comment no. 2*, para 16 (emphasis added).

⁸⁸ Kalin, 2008, p. 295.

⁸⁹ A notable example of such cases is IACommHR, *The Haitian Centre for Human Rights et al. v. United States*, 13 March 1997, Case 10.675, Report no. 51/96 ('*Haitian Interdiction case*'). As will be argued below in the context of the *Soering* case of the ECtHR, however, framing such cases as exercises of extraterritorial jurisdiction is erroneous given that the exercise of jurisdiction in such cases is remarkably territorial and the crux of such cases does not centre around the notion of extraterritorial jurisdiction but rather around the scope and content of positive obligations and substantive duties. This type of cases is therefore left out of consideration for now and will be revisited in the context of the ECtHR's *Soering* case: see section 7.4.5.6. below.

⁹⁰ See also Cerna, 2004, p. 152.

nada.⁹¹ Although the United States had not challenged the American Declaration's extraterritorial application, the Court considered *proprio motu* that

"[g]iven that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a *person subject to its authority and control*."⁹²

This personal model of extraterritorial jurisdiction was also confirmed in cases concerning detention. Most prominently, in *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, the Commission held in relation to the US' detention of 'unlawful combatants' at Guantánamo Bay that

"where persons find themselves *within the authority and control of a state* and where a circumstance of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law. Where it may be considered that the protections of international humanitarian law do not apply, however, such persons remain the beneficiaries at least of the non-derogable protections under international human rights law. *In short, no person, under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights*".⁹³

7.3.5 The ACHR

The IACommHR also detailed bases for extraterritorial jurisdiction in the context of the ACHR. In *Saldaño v. Argentina*, it maintained that the personal model

91 IACommHR, *Coard and Others v. United States*, 29 September 1999, Case 10.951, Report no. 109/99.

92 IACommHR, *Coard and Others v. United States*, para 37. See similarly IACommHR, *Armando Alejandro Jr. and Others v. Cuba*, 29 September 1999, Case 11.589, Report no. 86/99, para 23. Notably, in this case, the Commission used the requirement of 'authority and control' and the phrase 'power and authority' as interchangeable concepts: IACommHR, *Armando Alejandro Jr. and Others v. Cuba*, para 25.

93 IACommHR, *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, 13 March 2002, 41 ILM (emphasis added).

of jurisdiction also applies to the American Convention.⁹⁴ In *Ecuador v. Colombia*, the IACommHR furthermore clarified that what is decisive under the personal model is “whether there is a causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual”.⁹⁵ As the Commission continued, “the obligation does arise in the period of time that agents of a State interfere in the lives of persons who are on the territory of the other State, for those agents to respect their rights, in particular, their right to life and humane treatment”.⁹⁶ Over time, the IACommHR has frequently referred to the standard of ‘authority and control’, at times even without referring to territoriality at all, and this standard consequently seems to continuously guide the Commission in its considerations and decisions.⁹⁷ No spatial model of jurisdiction has been developed in the Inter-American human rights system: to the contrary, the approach of both principal entities has been argued to be “decidedly nonterritorial”.⁹⁸

For a long time, the authoritative status of the Commission’s case law on extraterritorial application remained open to discussion given that the Inter-American Court of Human Rights (‘IACtHR’) did not deal with the matter.⁹⁹ In 2018, however, the Court published its long-awaited *Advisory Opinion OC-23/17*, in which it dealt with the question of extraterritorial jurisdiction for the very first time.¹⁰⁰ The Court confirmed that a state’s extraterritorial jurisdiction is engaged where the state exercises authority over a person abroad

94 Although in the concrete case “the petitioner has not adduced any proof whatsoever that tends to establish that the Argentine State has in any way *exercised its authority or control* either over the person of Mr. Saldaño, prior or subsequent to his arrest in the United States, or over the local officials in the United States involved in the criminal proceeding taken against him”: IACommHR, *Victor Saldaño v. Argentina*, para 21 (emphasis added). Note, however, that the Commission’s reasoning arguably confuses questions of jurisdiction and attribution. Indeed, whereas the exercise of authority or control over the *applicant* could be used to establish (extraterritorial) jurisdiction, the exercise of authority or control over *the local officials in the United States* could be used to attribute their conduct to the respondent state. In other words, had it been established that Argentina exercised authority or control over the local officials in the United States, this would have meant that their conduct could potentially be attributed to Argentina on the basis of the international law rules of attribution, yet this would not have automatically meant that the petitioner was also within Argentina’s jurisdiction for human rights purposes. It would still have to be established that Argentina exercised authority or control over him *through* those local officials in the United States on the basis of *inter alia* the personal model of extraterritorial jurisdiction.

95 IACommHR, *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia)*, 21 October 2010, Inter-state Petition IP-02, Report no. 112/10, para 99.

96 IACommHR, *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia)*, para 100.

97 Compare Hathaway et al., 2011, pp. 414–415.

98 Cleveland, 2010, p. 251.

99 Cassel, 2004a, p. 175.

100 IACtHR, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, 15 November 2017, Advisory Opinion OC-23/17.

or when that person is under its effective control abroad, either by means of conduct undertaken outside the territory of the state (extraterritorial conduct) or conduct with effects outside of the state's sovereign territory.¹⁰¹ In this sense, the Court confirmed the personal model of extraterritorial jurisdiction, although arguably it has gone even further. In finding that jurisdiction under the American Convention covers any situation in which a state exercises effective authority or control over persons either inside or outside of its sovereign territory,¹⁰² the Court indeed also held that "states must ensure that their territory is not used in such a way that it may cause significant damage to the environment of other States or areas outside the limits of its territory" and that "[t]herefore, States have an obligation to avoid causing transboundary damage".¹⁰³ Consequently, the Court accepted an alternative jurisdictional link, i.e. "when the State of origin exercises effective control over the activities carried out that caused the harm and consequent violation of human rights".¹⁰⁴ Given that the Court has embedded this alternative model for exceptional jurisdiction in a due diligence standard, it opened the door for extraterritorial jurisdiction where a state has no effective control over territory or persons but is rather "factually linked" to extraterritorial situations, knows about the risk of wrongful acts, and is in a position to protect on the basis of its effective control over activities occurring on its own soil.¹⁰⁵ However, as Berkes aptly recognizes, "the devil is in the details: the question whether the new jurisdictional link would place a reasonable or unbearable burden on States depends on its limits."¹⁰⁶ These limits have not been clearly marked by the Court in its Advisory Opinion, and it henceforth remains to be seen how the newly invigorated standard of extraterritorial jurisdiction will be applied – and, maybe even more important, will be limited – in the future.

7.4 THE COMPLEXITY OF RESILIENCE: THE ECHR AS A SHOWCASE EXAMPLE

Extraterritorial jurisdiction has also been developed in the context of the ECHR, which can be traced back to the early decisions of the European Commission of Human Rights (ECommHR).¹⁰⁷ Nevertheless, the development of extraterrit-

101 IACtHR, *Advisory Opinion OC-23/17*, para 81.

102 IACtHR, *Advisory Opinion OC-23/17*, para 104(d).

103 IACtHR, *Advisory Opinion OC-23/17*, para 104(f) (original in Spanish).

104 IACtHR, *Advisory Opinion OC-23/17*, para 104(h) (original in Spanish).

105 Berkes, 2018.

106 Berkes, 2018.

107 Before the entry into force of Protocol 11 in 1998, individuals had to file their complaints with the ECommHR first. If the Commission found that the individual's case was well-founded, it would launch a case before the ECtHR on behalf of the individual. With the entry into force of Protocol 11, the ECommHR was abolished and individuals could take their case directly to the ECtHR.

orial jurisdiction models under the ECHR has been characterised by frequent ambiguities, inconsistencies, and controversies. This section will zoom in on the ECHR framework in order to illustrate the potential complexity and ambiguity of extraterritorial jurisdiction models.

7.4.1 The European Commission of Human Rights

First indications of extraterritorial jurisdiction were provided in *X. v. the Federal Republic of Germany*, in which the ECommHR indicated that nationals may be within a member state's jurisdiction even when domiciled or residing abroad.¹⁰⁸ The Commission acknowledged that extraterritorial jurisdiction may exist where state officials operating abroad, including diplomatic and consular representatives, perform certain functions.¹⁰⁹ At the same time, the ECommHR referred specifically to the performance of functions vis-à-vis a state's own nationals abroad, and this early case law therefore provides limited insight in the more general extraterritorial applicability of the Convention.

In *X v. UK*, the ECommHR dealt with the issue in more general terms and without reference to the applicant being a national of the member state. It held that authorised state agents "bring other persons or property within the jurisdiction of that state to the extent that they exercise authority over such persons or property. Insofar as they affect such persons or property by their acts or omissions, the responsibility of the state is engaged."¹¹⁰ This, essentially, reflects a personal model of jurisdiction, which was later confirmed in a number of cases.¹¹¹ Notably, in *Cyprus v. Turkey*, the Commission held that

"the High Contracting Parties undertake to secure the rights and freedoms defined in Section 1 to everyone 'within their jurisdiction' [...]. The Commission finds that this term is not [...] equivalent to or limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad".¹¹²

It consequently restated the rule set out in *X v. UK* that where state agents exercise effective authority abroad over persons or property, the state's juris-

108 ECommHR, *X. v. Federal Republic of Germany*, 25 September 1965, Application no. 1611/62.

109 ECommHR, *X v. Germany*, p. 168.

110 ECommHR, *X. v. United Kingdom* (Admissibility), 15 December 1977, Application no. 7547/76, p. 74 (emphasis added).

111 See, for example, ECommHR, *W.M. v. Denmark*, 14 October 1992, Application no. 17392/90.

112 ECommHR, *Cyprus v. Turkey* 26 May 1975, Application nos. 6780/74 and 6950/75, para 8 (emphasis added).

diction and responsibility may be engaged.¹¹³ A similar test was applied by the Commission in *Freda v. Italy*, where it found that claimant had been within the jurisdiction of Italy from the moment he had been handed over in Costa Rica by Costa Rican police officials to Italian police officials who transported him back to Italy, which effectively amounted to an extraterritorial exercise of authority over claimant.¹¹⁴ Similarly, in *Sanchez Ramirez v. France*, the Commission held that applicant – who had been kidnapped in Sudan by Sudanese police officers and was handed over to French police officers – was effectively under the authority of France from the moment he was handed over to French officials and deprived of his liberty in a French military plane, and therewith within France’s jurisdiction.¹¹⁵

According to the Commission in *X. and Y. v. Switzerland*, the personal model of extraterritorial jurisdiction also applies where state agents operate within their territorial borders but their actions have extraterritorial effects and individuals are therewith brought under their authority or control.¹¹⁶ In this case, the Swiss Federal Aliens’ Police prohibited German national X – who was in an extra-marital relationship with Y who lived in Liechtenstein – to enter both Switzerland and Liechtenstein for two years. The Swiss Federal Aliens’ Police was authorised to do so pursuant to a bilateral treaty between Switzerland and Liechtenstein. The Commission held that

“Switzerland is certainly responsible, under Article 1 of the Convention, for the procedure and for the effect which the prohibition of entry produced in its own territory. But it must also be held responsible insofar as the prohibition of entry produced an effect in Liechtenstein. According to the special treaty relationship existing between Switzerland and Liechtenstein Swiss authorities when acting for Liechtenstein do not act in distinction from their national competences. In fact on the basis of the treaty they act exclusively in conformity with Swiss law and it is only the effect of this act which is extended to Liechtenstein territory. That means that it was Swiss jurisdiction which was used and extended to Liechtenstein. Acts by Swiss authorities with effect in Liechtenstein bring all those to whom they apply under Swiss jurisdiction within the meaning of Article 1 of the Convention.”¹¹⁷

However, the Commission seems to have conflated matters in at least two distinct ways. On the one hand, the Commission has conflated the international law notion of enforcement jurisdiction and the international human rights law notion of jurisdiction. Thus, the Court bases its finding that Swiss jurisdiction was used and extended to Liechtenstein on the fact that Switzerland pronounced the prohibition of entry on the basis of its competences and the

113 ECommHR, *Cyprus v. Turkey*, para 8.

114 ECommHR, *Freda v. Italy* (Admissibility), 7 October 1980, Application no. 8916/ 80.

115 ECommHR, *Ramirez Sances v. France*, 24 June 1996, Application No. 28780/95, p. 161-162.

116 ECommHR *X. and Y. v. Switzerland*.

117 ECommHR *X. and Y. v. Switzerland*, para 3 (emphasis added).

Liechtenstein authorities could not exclude the enforcement thereof, yet this generally is not a relevant indicator of the existence of (extraterritorial) jurisdiction as understood in the context of international human rights law. It proves that Switzerland had the authority to exercise its enforcement jurisdiction on the basis of its lawful competences, but not that Switzerland's human rights obligations under the Convention henceforth applied vis-à-vis the applicant. The finding of jurisdiction in the sense of Article 1 ECHR in this case thus seems to be based on an erroneous interpretation of the notion and consequently on a misidentification of relevant criteria. On the other hand, the Commission has arguably conflated questions of attribution and jurisdiction.¹¹⁸ It first finds that the impugned acts are attributable to Switzerland. On the basis of this finding of attribution, the Commission consequently concludes apparently without further adue that the applicant was within Switzerland's jurisdiction, yet it does not outline why this is the case or what the conditions for such extraterritorial jurisdiction are. One could on this basis wonder "whether *any* extraterritorial effect of acts attributable to a state party will necessarily fall within a state's jurisdiction".¹¹⁹ It would have been more convincing had the Commission applied the previously established criterion of 'effective control or authority' by looking whether Switzerland exercised such effective control or authority through the acts attributable to it.

A final case of the ECommHR that should be mentioned here is the case of *Hess v. UK* – not only because it concerned a setting of detention involving multiple states, but also because of the specific conclusions reached by the Commission. The case dealt with a military prison in the British sector of Berlin jointly administered by France, the UK, the US, and the USSR, yet the complaint was brought against the UK only.¹²⁰ The Commission considered that "there is in principle, from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention".¹²¹ However, since the UK was only one of four partners in a joint quadrupartite organisation, the ECommHR held that its participation did not mean that the administration and supervision of the prison were matters within its jurisdiction.¹²² Indeed, the Commission explicated that "the joint authority cannot be divided into four separate jurisdictions and [...] therefore the United Kingdom's participation in the exercise of the joint authority and consequently in the administration and supervision of Spandau Prison is not a matter 'within the jurisdiction' of the United Kingdom, within

118 See similarly Da Costa, 2013, pp. 102–103.

119 Da Costa, 2013, p. 103 (emphasis added).

120 ECommHR, *Hess v. United Kingdom* (Admissibility), 28 May 1975, Application no. 6231-73. The USSR and USA were not parties to the ECHR and France had not accepted the individual complaints mechanism at the time.

121 ECommHR, *Hess v. UK*, p. 73.

122 ECommHR, *Hess v. UK*, p. 73-74.

the meaning of Art. 1 of the Convention.”¹²³ It therefore declared the application incompatible *ratione personae*, yet simultaneously highlighted that in future cases extraterritorial prison establishments administered jointly by multiple states could come within the purview of the ECHR if agreements to that effect are entered into after the Convention came into force vis-à-vis the state concerned.¹²⁴ Given that the Commission does not further elaborate upon the matter, it remains unclear how this relates to the finding of incompatibility *ratione personae*. This also raises a number of questions, particularly as to the exact meaning of the Commission’s *obiter dictum*. According to the Commission, the joint authority cannot be divided into four separate jurisdictions and *therefore* the administration and supervision of the detention facility is not a matter within the jurisdiction of the UK. It is difficult to see how this conclusion would have been different if the agreement had been concluded after the entry into force of the ECHR, in particular where it would have been concluded similarly with states who are not party to the Convention. Certainly, the entry into force of the ECHR prior to the conclusion of agreements would not – or not necessarily – alter the structure of the joint quadripartite organisation and would accordingly not make the joint authority all by a sudden dividable ‘into four separate jurisdictions’. Whilst the *conclusion* of such an agreement would fall within the scope of the Convention *ratione temporis*, the acts *implementing* such an agreement would still fall outside the scope of the Convention *ratione personae* because of the identified impossibility to divide joint authority into separate jurisdictions. Consequently, issues could potentially arise in relation to the conclusion of the agreement by the member state, but not in relation to the acts implementing it.¹²⁵

7.4.2 The European Court of Human Rights

The ECommHR hence developed and maintained the criterion of ‘authority and control over persons and property’ to determine the extraterritorial scope of the ECHR. It therewith focused primarily on a personal model of extraterritorial jurisdiction, which complemented the presumptive territorial application of the Convention. The ECtHR, however, dealt with the matter of extraterritorial

¹²³ ECommHR, *Hess v. UK*, p. 74.

¹²⁴ ECommHR, *Hess v. UK*, p. 74.

¹²⁵ Compare Schaub, 2011, p. 180. It might be true, however, that the *obiter dictum* reflects a different rationale. The UK *in casu* lacked the de facto power to secure the release of Hess because the USSR was explicitly against such a release. Finding jurisdiction in such a situation would have amounted to an empty vessel, since the UK in fact wanted to release the applicant but was prevented from doing so by another state in the quadripartite collaboration. According to Lawson, had the UK been the single power obstructing the release of Hess, the ECommHR might have had less difficulties in establishing jurisdiction: Lawson, 2004, pp. 91–92. See also Buyse, 2008, pp. 278–279.

jurisdiction in its own distinctive way. In *Drozd and Janousek v. France and Spain*, which concerned applicants' allegation that they had not received a fair trial by the Andorran judiciary which consisted of French and Spanish judges, it recognised for the first time that 'jurisdiction' in Article 1 ECHR is not limited to the sovereign territory of a state.¹²⁶ Subsequently, over the years, the ECtHR has developed a personal and a spatial model of extraterritorial jurisdiction – and has, arguably, even gone a step further – as will be traced below.

7.4.2.1 The European Court of Human Rights: a spatial model

A landmark decision in relation to spatial jurisdiction was the case of *Loizidou v. Turkey*, in which claimant claimed that her rights under Article 8 ECHR and Article 1 of Protocol No. 1 were violated by Turkey now that she was prevented from accessing her property due to Turkey's military occupation of part of Cyprus.¹²⁷ In its judgment on the preliminary objections, the Grand Chamber of the Court considered that

"although Article 1 [...] sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties. [...] Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises *effective control of an area outside its national territory*."¹²⁸

As such, the Court developed a spatial test of jurisdiction in *Loizidou*: wherever a state exercises effective overall control over an area, it exercises jurisdiction.¹²⁹ This spatial test of 'effective overall control' was confirmed by the

126 ECtHR, *Drozd and Janousek v. France and Spain*, para 91. In this case, the Court assessed whether applicants were within the defendant states' jurisdiction by examining whether the acts of the French and Spanish judges sitting as members of the Andorran judiciary could be attributed to France or Spain, an approach which seems to unduly confuse the tests of attribution and jurisdiction: see ECtHR, *Drozd and Janousek v. France and Spain*, para 96.

127 ECtHR, *Loizidou v. Turkey* (Grand Chamber, Preliminary Objections), Judgment of 23 March 1995, Application no. 40/1993/435/514; and ECtHR, *Loizidou v. Turkey* (Grand Chamber, Merits).

128 ECtHR, *Loizidou v. Turkey* (Grand Chamber, Preliminary Objections), para 62 (emphasis added).

129 In its judgment on the merits, the Court consequently held that applicant was under Turkey's jurisdiction for the purpose of the ECHR: "It is obvious from the large number of troops engaged in active duties in northern Cyprus [...] that [Turkey's] army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the [Turkish Republic of Northern Cyprus, 'TRNC']. Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and

Court in amongst others *Cyprus v. Turkey*, *Manitaras and Others v. Turkey*, and *Kyriacou Tsiakkourmas and Others v. Turkey*.¹³⁰ In these judgment, the Court stressed that the *full* set of substantive rights set out in the ECHR and the ratified additional Protocols apply whenever a country exercises spatial jurisdiction.¹³¹

The spatial test was subsequently applied in *Ilaşcu and Others v. Moldova and Russia* and *Chiragov and Others v. Armenia*, albeit in a rather peculiar fashion. The case of *Ilaşcu and Others v. Moldova and Russia* concerned arrests by Russian-backed authorities in the separatist enclave of Transnistria in Moldova.¹³² The Court held that the Moldovan Republic of Transnistria ('MRT') "remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation".¹³³ Given this "continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate", the Court held that Russia's jurisdiction was engaged in Transnistria.¹³⁴ Therewith, the Court arguably lowered the required standard of control under the spatial test of extraterritorial jurisdiction: it no longer refers to the requirement of 'effective overall control' over territory – which Russia seemingly did not have – but instead bases its finding of jurisdiction on Russia's 'effective authority' or at least 'decisive influence'. However, in the subsequent case of *Catan and Others v. Moldova and Russia*,¹³⁵ the Court backtracked from its reference in *Ilaşcu* to "effective authority, or at the very least [...] decisive influence" by now speaking about "effective control and decisive influence", therewith arguably reinstating its previously developed spatial standard for extraterritorial jurisdiction.¹³⁶

freedoms set out in the Convention therefore extends to the northern part of Cyprus": ECtHR, *Loizidou v. Turkey* (Grand Chamber, Merits), para 56.

130 ECtHR, *Cyprus v. Turkey* (Grand Chamber), para 77; ECtHR, *Manitaras and Others v. Turkey* (Admissibility), 3 June 2008, Application no. 54591/00, para 27; ECtHR, *Kyriacou Tsiakkourmas and Others v. Turkey*, 2 June 2015, Application no. 13320/02, paras 150-151.

131 ECtHR, *Cyprus v. Turkey* (Grand Chamber), para 77; ECtHR, *Kyriacou Tsiakkourmas and Others v. Turkey*, para 150.

132 ECtHR, *Ilaşcu and Others v. Moldova and Russia*.

133 ECtHR, *Ilaşcu and Others v. Moldova and Russia*, para 392.

134 ECtHR, *Ilaşcu and Others v. Moldova and Russia*, paras 393-394.

135 ECtHR, *Catan and Others v. Moldova and Russia* (Grand Chamber), 19 October 2012, Applications nos. 43370/04, 8252/05 and 18454/06, para 115.

136 Also in the later cases of *Mozer v. the Republic of Moldova and Russia* and *Apcov v. the Republic of Moldova and Russia*, where the Court got additional opportunities to clarify this matter, it maintained the same standard of 'effective control and decisive influence', which confirms the ongoing validity of the effective control criterion – although the added value of the 'decisive influence' criterion remains unclear. See ECtHR, *Mozer v. the Republic of Moldova and Russia* (Grand Chamber), 23 February 2016, Application no. 11138/10, para 110; ECtHR, *Apcov v. the Republic of Moldova and Russia*, 30 May 2017, Application no. 13463/07, para 23.

Furthermore, as some have suggested, the Court in *Ilaşcu* may have conflated attribution and jurisdiction, or at least may have treated both aspects in an intermingled fashion.¹³⁷ In the subsequent case of *Catan*, however, the Court explicitly denied that it had conflated these issues.¹³⁸ As outlined above, in this case, the Court again used the spatial model to establish extra-territorial jurisdiction on behalf of Russia, on the basis that “the ‘MRT’'s high level of dependency on Russian support provides a strong indication that Russia exercised effective control and decisive influence over the ‘MRT’ administration” at the material time.¹³⁹ As it consequently states, however,

“the Court has established that Russia exercised effective control over the ‘MRT’ during the period in question. In the light of this conclusion, and in accordance with the Court’s case-law, it is not necessary to determine whether or not Russia exercised detailed control over the policies and actions of the subordinate local administration [...]. By virtue of its continued military, economic and political support for the ‘MRT’, which could not otherwise survive, Russia incurs responsibility under the Convention for the violation of the applicants’ rights to education.”¹⁴⁰

Notwithstanding the fact that the Court explicitly states that it does not conflate attribution and jurisdiction, it ultimately remains unclear on the basis of this ambiguous paragraph whether the Court considers Russia to be responsible for *all* acts of the MRT administration or whether Russia is responsible for failing to fulfil its positive obligations by not protecting individuals within Transnistria against human rights infringements by the MRT authorities.¹⁴¹

In *Chiragov and Others v. Armenia*, the Court similarly held that applicants – who alleged that they could not enjoy their properties in the Azerbaijani district of Lachin which they were prevented from returning to due to the Nagorno-Karabakh conflict – were within Armenia’s jurisdiction on the basis of the spatial model.¹⁴² Indeed, in a similar vein as in *Ilaşcu* and *Catan*, the Court held that

“the Republic of Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the [Nagorno-Karabakh Republic, ‘NKR’], that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. In other words, the ‘NKR’ and its administration survives by virtue of the military, political, financial and other support

¹³⁷ See for example Milanovic, 2011, p. 139.

¹³⁸ ECtHR, *Catan and Others v. Moldova and Russia*, para 115.

¹³⁹ See ECtHR, *Catan and Others v. Moldova and Russia*, paras 122-123. In para. 114, Court explicitly mentions that it uses the spatial rather than the personal model.

¹⁴⁰ ECtHR, *Catan and Others v. Moldova and Russia*, paras 150.

¹⁴¹ See similarly Milanovic, 2012b.

¹⁴² ECtHR, *Chiragov and Others v. Armenia* (Grand Chamber), 16 June 2015, Application no. 13216/05.

given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention".¹⁴³

Similar to *Ilaşcu* and *Catan*, the Court does not make clear whether it considers Armenia to be responsible on the basis of its negative or on the basis of its positive obligations. Thus, the Court does not specify whether Armenia is responsible for the conduct of the NKR separatists (on the basis of a certain test of attribution), or whether it is responsible for failing to adequately fulfil its positive duties in areas under its jurisdiction to protect the applicants from third-party conduct (in casu conduct of the NKR separatists) that infringes upon applicants' entitlements under Protocol 1 to the Convention.¹⁴⁴ The latter explanation appears most plausible because the Court in *Catan* has explicitly rejected the idea of a conflation of attribution and jurisdiction.¹⁴⁵ This explanation on the basis of a positive obligations test is supported by amongst others Judge Ziemele in her partly concurring, party dissenting opinion.¹⁴⁶ At the same time, like its judgments in *Ilaşcu* and *Catan*, the Court's findings do not excel in clarity or comprehensibility: for purposes of transparency it

143 ECtHR, *Chiragov and Others v. Armenia*, para 186.

144 Again, some argue that the Court amalgamated the concepts of attribution and jurisdiction: see notably the dissenting opinion of Judge Gyulumyan in *Chiragov and Others v. Armenia*. See also Milanovic, 2015.

145 ECtHR, *Catan and Others v. Moldova and Russia*, para 115.

146 As she maintains, "[t]here is no question but that persons such as the applicants who cannot access or claim compensation for their property should be able to do so. To my mind, however, Armenia's responsibility lies in its positive obligations under these Articles": para 1 of the partly concurring, party dissenting opinion of Judge Ziemele in *Chiragov and Others v. Armenia*. It should be noted, however, that Judge Ziemele did not conclude that Armenia had jurisdiction over Nagorno-Karabakh, but nevertheless found that it had failed to comply with its positive obligations under the Convention and the Protocol to the Convention. Furthermore, she notes in para 5 that "even if Armenia does have jurisdiction over Nagorno-Karabakh it is necessary, in order to find violations of the Convention, to attribute those alleged violations to Armenia, so one needs to have evidence that Armenia prevents the applicants from accessing their property in Lachin". However, in relation to the latter consideration, attributing the alleged violations – i.e. the active prevention of applicants from accessing their property – is not the only way to find violations of the Convention: to the contrary, violations of *positive* obligations are as much a violation of the Convention as are violations of negative obligations. In other words, where it could be established that Armenia has failed to uphold its positive obligations under the Convention, one can readily establish that the Convention is violated as such – no further test of attribution of the impugned violation of negative obligations needs to be undertaken per se. Moreover, Judge Ziemele finds that Armenia has violated its positive obligations in relation to applicants whilst simultaneously arguing that Armenia did not have jurisdiction over the territory concerned. This appears problematic to the extent that she does not make clear on what basis Armenia had positive obligations vis-à-vis the applicants in the first place.

would have significantly helped had the Court explicitly stated that it applied either of both alternative options in establishing Armenia's responsibility.¹⁴⁷

Another interesting aspect of the *Ilaşcu* judgment is that the Court notes that

"the words 'within their jurisdiction' in Article 1 of the Convention must be understood to mean that a State's jurisdictional competence is primarily *territorial* [...], but also that *jurisdiction is presumed to be exercised normally throughout the State's territory*. This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. [...] The undertakings given by a Contracting State under Article 1 of the Convention include, in addition to the duty to refrain from interfering with the enjoyment of the rights and freedoms guaranteed, positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory [...] *Those obligations remain even where the exercise of the State's authority is limited in part of its territory*, so that it has a duty to take all the appropriate measures which it is still within its power to take."¹⁴⁸

The Court consequently held that the applicants were not only in Russia's jurisdiction but *also*, still, within the jurisdiction of Moldova, and although Moldova was limited in exercising authority in part of its territory, it could still be held responsible on account of its failure to discharge its *positive* obligations under the Convention.¹⁴⁹ The exercise of extraterritorial jurisdiction by a state through its effective overall control over part of another state's territory does hence not absolve the latter state from its obligations under the Convention: the territorial state's obligations still apply on the basis of its territorial jurisdiction, although in certain circumstances its responsibility is limited to its positive obligations only.¹⁵⁰

¹⁴⁷ Since the positive obligations approach appears most fruitful, it would have been diligent had the Court explained not only *that* Armenia's (positive) obligations apply, but also *why* it has not adequately fulfilled those obligations on the basis of an examination of the due diligence standard. The same applies *mutatis mutandis* to Court's reasoning in *Ilaşcu* and *Catan*.

¹⁴⁸ ECtHR, *Ilaşcu and Others v. Moldova and Russia*, paras 312-313 (emphasis added).

¹⁴⁹ ECtHR, *Ilaşcu and Others v. Moldova and Russia*, paras 353 and 352.

¹⁵⁰ This was confirmed in ECtHR, *Ivanpoc and Others v. Russia and Moldova*, 15 November 2011, Application no. 23687/05, and subsequently in *Catan* and *Mozar*, where the Court in each instance confirmed that the jurisdiction of both Russia and Moldova was engaged. See also ECtHR, *Assanidze v. Georgia*, para 139-140 and ECtHR, *Sargsyan v. Azerbaijan* (Grand Chamber), 16 June 2015, Application no. 40167/06, paras 129-131 and 151, which did not concern *occupied* areas but rather *disputed* areas. In both cases, the Court found jurisdiction on behalf of Georgia respectively Azerbaijan.

7.4.2.2 *The European Court of Human Rights: a personal model*

In addition to the spatial model, the ECtHR also developed a personal model of extraterritorial jurisdiction. In the case of *Öcalan v. Turkey*, applicant had been arrested by Turkish officials in Kenya and was subsequently flown to Turkey. The Court held that he had been effectively under Turkish authority from the moment he had been handed over to the Turkish officials by Kenya, and as such was within Turkey's jurisdiction.¹⁵¹ This case confirms that an extraterritorial act is capable of bringing a sole individual within the state's jurisdiction, which ultimately depends on the level of control exercised over that individual by the state concerned. In *Issa and Others v. Turkey*, the Court confirmed more generally that "a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but *who are found to be under the former State's authority and control* through its agents operating – whether lawfully or unlawfully – in the latter State".¹⁵² The Court based this consideration on the argument that "[a]ccountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".¹⁵³ This implies a rather strong resilience on behalf of the ECtHR: in light of globalisation developments that make it increasingly easy for states to operate abroad, the reach of human rights is expanded accordingly.

Whilst it seems that the personal test has developed rather organically as part of the Convention's living instrument doctrine, such characterisation would be deceiving – in particular when regarding the admissibility decision in *Banković et al. v. Belgium et al.*, which was delivered *before* the judgments of the Grand Chamber respectively the Chamber in *Öcalan* and *Issa*, but *after* the admissibility decisions in both of these cases. The applicants in *Banković* complained that the NATO bombing of the radio and television station Televizije Srbije (RTS) in Belgrade on 23 April 1999 violated the rights to life (Article 2 ECHR) and freedom of expression (Article 10 ECHR).¹⁵⁴ A lot has been written about the decision of the Grand Chamber in *Banković* and it is by no means within the purview of this research to recount this discussion in full.¹⁵⁵ What is particularly interesting to note, however, is that the Court in a much-criticised decision held that the Convention did not apply to the NATO bomb-

¹⁵¹ ECtHR, *Öcalan v Turkey*, 12 March 2003 Application no. 46221/99, para 91.

¹⁵² ECtHR, *Issa and Others v. Turkey*, 16 November 2004, Application no. 31821/96, para 71 (emphasis added).

¹⁵³ ECtHR, *Issa and Others v. Turkey*, para 71.

¹⁵⁴ ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), para 28.

¹⁵⁵ See amongst others Da Costa, 2013, pp. 125–161; Happold, 2003; Holcroft-Emmess, 2012; Lawson, 2004; Roxstrom, Gibney, & Einarsen, 2005.

ings in Belgrade as there would not be a convincing jurisdictional link between the victims and the respondent states.¹⁵⁶ The Court reached this decision on the basis of an assessment of *inter alia* the ordinary meaning of the phrase ‘within its jurisdiction’, the existence of state practice, and existing case law.¹⁵⁷ As the Court amongst others maintained, the obligation in Article 1 ECHR to secure to everyone within their jurisdiction the rights and freedoms of the Convention cannot be “divided and tailored in accordance with the particular circumstances of the extra-territorial act in question”.¹⁵⁸ In this regard, “the applicants’ approach does not explain the application of the words ‘within their jurisdiction’ in Article 1 and it even goes so far as to render those words superfluous and devoid of any purpose”.¹⁵⁹ Contrary to the findings in *Öcalan* and *Issa*, in *Banković*, the Court did not explicitly recognise that exercising control over persons abroad may be an ‘exceptional circumstance’ in which jurisdiction may be engaged extraterritorially and the Convention may apply abroad. Consequently, it did not apply – or even mention – the personal test at all. Had the Court acknowledged and applied the personal model in *Banković*, it might have reached a different conclusion altogether.¹⁶⁰

To a certain extent, the judgments in *Öcalan* and *Issa* thus moved away from the strict approach taken by the ECtHR in *Banković*. In later ‘post-*Banković*’¹⁶¹ case law, the personal model of jurisdiction was confirmed and to a certain extent expanded by the Court.¹⁶² In *Medvedyev and Others v. France*, for instance, French military personnel took control over merchant ship the *Winner* (flying under Cambodian flag) which was carrying significant quantities

156 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), para 82.

157 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), paras 59-73.

158 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), paras 75.

159 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), paras 75. A different approach than the approach taken in *Issa* can be recognised here: compare ECtHR, *Issa and Others v. Turkey*, para 71.

160 Indeed, it could be plausibly argued that the precision-targeted air strikes of the allied forces constituted an exercise of authority and control by the NATO states’ agents operating abroad: see Da Costa, 2013, p. 164. For a different perspective, see Happold, 2003, p. 90.

161 The *Banković* case seems to mark an important point in time: given that it fitted awkwardly in the Court’s existing line of case law, the decision did not only raise significant criticism but also put a spotlight on future cases in which the extraterritorial reach of the Convention had to be interpreted. There is therefore reason to distinct the Court’s jurisprudence *before* the *Banković* case from the Court’s case law *after* the *Banković* case: see, similarly, Altıparmak, 2005, pp. 298–299; Da Costa, 2013, p. 181; Den Heijer, 2011, p. 46; Holcroft-Emmess, 2012, p. 11; Lawson, 2004; Roxstrom & Gibney, 2017, p. 141, who discuss the pre-*Banković* and post-*Banković* cases almost as if they concerns different eras.

162 In some cases in which extraterritorial jurisdiction *prima facie* seemed to be of importance, the case ultimately was decided on other grounds: see, notably, ECtHR, *Behrami and Behrami against France and Saramati against France, Germany and Norway* (Grand Chamber, Admissibility), 2 May 2007, Application nos. 71412/01 and 78166/01, and the commentary by Buyse, 2008, p. 270.

of drugs off the coast of Cape Verde.¹⁶³ The crew members were confined under military guard until the boat had been towed into Brest harbour, which took 13 days.¹⁶⁴ When being brought before the judicial authorities upon their arrival, crew complained about arbitrary deprivation of liberty (Article 5(1) and 5(3) ECHR).¹⁶⁵ When the case reached the ECtHR, the Chamber noted that “the Winner and its crew were under the control of French military forces, so that even though they were outside French territory, they were within the jurisdiction of France for the purposes of Article 1 of the Convention”.¹⁶⁶ The Chamber thus confirmed the personal model of extraterritorial jurisdiction: due to the control exercised by French military forces over the applicants, they were within the jurisdiction of France at the time.¹⁶⁷ Both parties referred the case to the Grand Chamber, which in its judgment likewise held that the applicants were within France’s jurisdiction: France exercised “full and exclusive control over the Winner and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France”.¹⁶⁸ As such, in determining extraterritorial jurisdiction on the basis of the personal model, what matters is the factual control exercised by a state, although the Grand Chamber in *Medvedyev* does not spell out precise conditions in this regard.

On a slightly different basis, in *N.D. and N.T. v. Spain* the Court also confirmed the personal model by concluding that a Malian and an Ivorian national who had climbed over the border fence between Morocco and the Spanish enclave Melilla had been within Spain’s jurisdiction: irrespective of whether the border fence was located in Spain or not, from the moment that they were arrested by the *Guardia Civil*, they had been under the continuous and exclusive control of Spain and therewith within its jurisdiction.¹⁶⁹ In the words of the Court,

“[e]lle estime toutefois qu’il n’est pas nécessaire d’établir si la clôture frontalière dressée entre le Maroc et l’Espagne se situe ou non sur le territoire de ce dernier État. Elle se borne à rappeler, comme elle l’a déjà établi par le passé, que, dès lors qu’il y a contrôle sur autrui,

163 ECtHR, *Medvedyev and Others v. France*, 10 July 2008, Application no. 3394/03, para 7.

164 ECtHR, *Medvedyev and Others v. France*, paras 11 and 17.

165 ECtHR, *Medvedyev and Others v. France*, para 28.

166 ECtHR, *Medvedyev and Others v. France*, para 50 (emphasis added).

167 The finding of extraterritorial jurisdiction was not hampered by the fact that Cambodia’s jurisdiction may also be engaged on the basis of it being the flag state. This is hardly surprising: given that the territorial jurisdiction of a state does not hamper the finding that another state exercises extraterritorial jurisdiction in or over (part of) the former state’s territory on the basis of the spatial or personal model, there seems no valid reason to come to a different conclusion where a state exercises extraterritorial jurisdiction on the basis of the spatial or personal model not in or over foreign soil but in or over a ship sailing under foreign flag. See also ECtHR, *Ilascu and others v. Moldova and Russia*.

168 ECtHR, *Medvedyev and Others v. France*, para 66-67.

169 ECtHR, *N.D. and N.T. v. Spain*, 3 October 2017, Application nos. 8675/15 and 8697/15.

*il s'agit dans ces cas d'un contrôle de jure exercé par l'État en question sur les individus concernés (Hirsi Jamaa, précité, § 77), c'est-à-dire d'un contrôle effectif des autorités de cet État, que celles-ci soient à l'intérieur du territoire de l'État ou sur ses frontières terrestres. De l'avis de la Cour, à partir du moment où les requérants étaient descendus des clôtures frontalières, ils se trouvaient sous le contrôle continu et exclusif, au moins de facto, des autorités espagnoles".*¹⁷⁰

A particular discussion that ensued in the context of the personal model, in particular in the post-*Banković* era, is whether extraterritorial jurisdiction can be established beyond the *espace juridique* of the Convention. In *Pad and Others v. Turkey*, the ECtHR confirmed that extraterritorial jurisdiction on the basis of the personal model may also be found beyond the *espace juridique* of the Convention.¹⁷¹ The Court therewith confirmed its earlier case law in *Issa* and *Öcalan* whilst rebutting any potential unclarity that may exist in this regard as a result of *Banković*, in which the Court had stated that

"the Convention is a multi-lateral treaty operating [...] in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention."¹⁷²

Conversely, in *Pad*, the Court found that "a State may be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State *which does not necessarily fall within the legal space of the Contracting States*, but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State".¹⁷³ It therewith thus largely reverted its previous position in *Banković*.¹⁷⁴

¹⁷⁰ ECtHR, *N.D. and N.T. v. Spain*, para 54. The Court seems to equate the exercise of *de jure* control over individuals with effective control. In light of the particular facts of this case, which seem to involve primarily *de facto* rather than *de jure* control on behalf of Spain, it seems that the use of the term '*de jure*' is, if anything, misplaced here and does not stand in the way of establishing jurisdiction on the basis of *de facto* control over persons. See, for further analysis, Pijnenburg, 2017.

¹⁷¹ ECtHR, *Pad and Others v. Turkey* (Admissibility), 28 June 2007, Application no. 60167/00.

¹⁷² ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), para 80.

¹⁷³ ECtHR, *Pad and Others v. Turkey*, para 53 (emphasis added).

¹⁷⁴ This position was later confirmed in ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), 7 July 2011, Application no. 55721/07, para 142.

7.4.2.3 Exploring six complexities

On the basis of the examination above, with the exception of *Banković*, the spatial and personal models seem to have developed rather organically within the systematics of the ECHR. They seemingly showcase clear-cut approaches of resilience: where states exercise authority and control elsewhere, either over territory or person, they can be held responsible, provided that certain criteria are fulfilled, notwithstanding the fact that the presumption of jurisdiction remains territorial. However, as various strands of case law exemplify, these resilient approaches have been haphazard and ambiguous at times and have featured various contradictory elements that have seriously complicated the development of extraterritorial jurisdiction on a principled basis. Some key complexities will now be discussed in turn.¹⁷⁵

Complexity I: The puzzling Cyprus-cases

The first complexity concerns the Court's cases concerning the occupied areas in Cyprus. In *Isaak and Others v. Turkey*, the Court explicitly confirmed the spatial and personal tests of jurisdiction:

"a State's responsibility may be engaged where [...] that State in practice *exercises effective control of an area situated outside its national territory*. [...] Moreover, a State may also be held accountable for a violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating [...] in the latter State".¹⁷⁶

The case concerned the death of the applicant, which allegedly resulted from the fact that he was mistreated when participating in a demonstration against the Turkish occupation of part of Cyprus.¹⁷⁷ The Court noted that the events took place in the neutral UN buffer zone, that Turkish forces had allowed Turkish-Cypriot demonstrators with batons and iron bars as well as the 'Turkish Republic of Northern Cyprus' ('TRNC') police to enter the UN buffer zone, and that the police had participated in the beating of Greek-Cypriot demonstrators.¹⁷⁸ It furthermore ascertained that Turkish-Cypriot policemen had

175 An additional contradictory development that is not further discussed here is that, on various occasions, the ECtHR has found that persons residing abroad could rely on the Convention without addressing the question of jurisdiction *at all*. See in this regard Den Heijer, 2011, pp. 47–49. Since Den Heijer has elaborated upon this complexity at length, it will not be recounted here.

176 ECtHR, *Isaak and Others v. Turkey* (Admissibility), 28 September 2006, Application no. 44587/98, p. 19 (emphasis added).

177 ECtHR, *Isaak and Others v. Turkey* (Admissibility), p. 2-4.

178 ECtHR, *Isaak and Others v. Turkey* (Admissibility), p. 20-21.

actively taken part in the beating of Isaak and that Turkish armed forces and other 'TRNC' police officers in the area had done nothing to prevent or stop the attack or to help the victim.¹⁷⁹ On this basis, the Court found that applicant was under the authority and/or effective control of Turkey through its agents, therewith confirming the personal model as established in *Issa and Others*.¹⁸⁰ Notwithstanding the fact that the alleged violation occurred in the UN neutral zone, the Court hence had no problems in establishing jurisdiction on behalf of Turkey: it resorted not to the spatial model but to the personal model of extraterritorial jurisdiction.

So far, so good. The subsequent case of *Andreou v. Turkey*, however, complicates the Court's approach. This case concerned a friend of Isaak, who went near the UN buffer zone where Isaak had been killed to pay her respects, at which point she was shot down by Turkish officials standing behind the border line.¹⁸¹ In this case, the ECtHR held in relation to jurisdiction that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, *which was the direct and immediate cause of those injuries*, was such that the applicant must be regarded as within the jurisdiction of Turkey".¹⁸² Again, the Court seems to have no difficulty in establishing Turkey's extraterritorial jurisdiction, although it does not resort to the spatial test nor – at least not explicitly – to the personal test. Instead, a cause-and-effect reasoning – which strikingly had been explicitly rejected in *Banković* on the basis of a rather principled reasoning –¹⁸³ was applied in order to establish extraterritorial jurisdiction. The Court therewith seems to acknowledge an alternative personal model – or a new model of extraterritorial jurisdiction altogether – centred around the notion of cause-and-effect: where acts produce effects abroad, this may amount to an exercise of jurisdiction, but only insofar as those acts can be considered the direct and immediate causes of violations of Convention rights.¹⁸⁴ Such cause-and-effect reasoning may indeed be seen as a particular interpretation of the 'authority and control' criterion of the personal model as previously established in amongst others *Issa* and as confirmed in amongst others *Isaak*,

179 ECtHR, *Isaak and Others v. Turkey* (Admissibility), p. 21.

180 ECtHR, *Isaak and Others v. Turkey* (Admissibility), p. 21.

181 ECtHR, *Andreou v. Turkey* (Admissibility), 3 June 2008, Application no. 45653/99.

182 ECtHR, *Andreou v. Turkey* (Admissibility), p. 7 (emphasis added).

183 Compare ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), para 75. Admittedly, the Court in *Andreou* sets the case apart from *Banković* by stating that "[u]nlike the applicants in the *Bankovic and Others* case [...] [Andreou] was accordingly within territory covered by the Convention", but the Court does not clarify whether this determination that the alleged violation occurred in the ECHR's *espace juridique* is of importance for the cause-and-effect doctrine applied here. On the basis of *Andreou* it thus remains unclear whether the Court has reversed its critical considerations in *Banković* as to the cause-and-effect approach or whether it considers the cause-and-effect approach applicable only to the Convention's *espace juridique*.

184 See similarly Da Costa, 2013, p. 209.

in the sense that both express a 'direct and immediate link' between the conduct of a state and the alleged violation of an individual's Convention rights,¹⁸⁵ or may be seen as a separate model altogether that is focused not so much around extraterritorial *conduct* but around extraterritorial *effects*, which in turn would mirror the approach of extraterritorial effects taken by the ECommHR (and to a certain extent also that of the IACtHR) as previously discussed.¹⁸⁶ In the context of this particular case, in which Turkish state officials and applicants were physically in the vicinity of each other yet not in the same territory, it is however difficult if not impossible to establish how this basis for extraterritorial jurisdiction should specifically be classified: due to the particularities of this case it is arguable that both interpretations may be applied simultaneously given that the Turkish authorities caused extraterritorial effects *and* seemingly had effective authority and control over applicants.

The case of *Solomou and Others v. Turkey* might be helpful in this regard. This case concerned shots fired by Turkish officials at a man who crossed the UN neutral zone and entered occupied territory, where he attempted to climb a flag pole with Turkish flag.¹⁸⁷ In this case, notwithstanding the fact that applicant had been within occupied territory when he was being shot, the Court for some reason did not apply the spatial model of extraterritorial jurisdiction. Instead, it used the personal model to establish jurisdiction: "the bullets which had hit Mr Solomou had been fired by the members of the Turkish-Cypriot forces [...]. In view of the above, the Court considers that in any event *the deceased was under the authority and/or effective control of the respondent State through its agents*".¹⁸⁸ Thus, in this case, the fact that Turkish-Cypriot forces had fired a shot at the applicant was sufficient to establish that Turkey had authority and/or effective control over him and therewith exercised jurisdiction. As *Solomou* seems to imply, the cause-and-effect notion applied in *Andreou* is a particular variant of the personal model in that the direct firing of shots at an individual suffices the condition of authority and/or effective control over the individual concerned. The only difference between the cause-and-effect variant applied in *Andreou* and the 'regular' personal model of extraterritorial jurisdiction as applied in *Solomou* is that in the former

¹⁸⁵ See Lawson, 2004, p. 104.

¹⁸⁶ It should be reiterated, however, that in all cases discussed here (*Isaak*, *Andreou*, *Solomou* and *Panayi*), not only the effects were extraterritorial but also the conduct was extraterritorial. The main difference between the three cases is thus not so much the extraterritorial nature of Turkey's act, nor the extraterritorial nature of the effects of such conduct, but rather the fact that the acts and effects occurred in *different* extraterritorial spaces in the various cases. Thus, in *Isaak* and *Panayi*, both the extraterritorial act and the extraterritorial effect were situated in the UN buffer zone; in *Andreou*, the extraterritorial act took place in the occupied territory of the TRNC whilst the effect occurred on the Greek-Cypriot side near the Greek-Cypriot National Guard; and in *Solomou*, the extraterritorial act and the extraterritorial effect both took place in the occupied territory of the TRNC.

¹⁸⁷ ECtHR, *Solomou and Others v. Turkey*, 24 June 2008, Application no. 36832/97.

¹⁸⁸ ECtHR, *Solomou and Others v. Turkey*, paras 50-51 (emphasis added).

case, the effects of the state's conduct did not materialise in the same extra-territorial territory as where the conduct originated from. As such, it might be conceptually troublesome to speak about proper 'authority and/or effective control' over persons in the former case: the respondent state in fact had generally no authority and/or effective control over those individuals since it was, frankly, not even present in the territory concerned, but its actions nevertheless brought those individuals within its jurisdiction given the direct and immediate effect thereof, notwithstanding the fact that such effect materialised in a different territory. It might well be that for this reason, the Court prefers to maintain a conceptual distinction between authority and/or effective control over persons that are in the same territory on the one hand, and jurisdiction on the basis of a cause-and-effect reasoning where individuals whose rights are allegedly being violated are present in a different territory than the territory where the violating conduct originates from.

This is not to say, however, that the Court maintains a consistent and clear conceptual and practical distinction between these bases of extraterritorial jurisdiction. The case of *Kallis and Androulla Panayi v. Turkey* is illustrative in this regard: the case concerned the applicants' son who served in the Cyprus National Guard and had, off-duty and unarmed, entered the UN buffer zone in order to exchange his hat with one belonging to a Turkish-Cypriot soldier, after which he was shot dead by a Turkish-Cypriot soldier whom the UN Peacekeeping Force in Cyprus (UNFICYP) had allegedly observed entering the buffer zone.¹⁸⁹ The ECtHR subsequently held that the applicants' son had been within Turkey's jurisdiction at that point, but it does not make clear on what basis it comes to such conclusion:

"the Court points out that in the case of *Cyprus v. Turkey* [...] it found that since it had effective overall control over northern Cyprus, Turkey's responsibility could not be confined to the acts of its own soldiers or officials in northern Cyprus but had also to be engaged by virtue of the acts of the local administration which survived by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's jurisdiction must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified, and that violations of those rights are imputable to Turkey [...]. According to the Government's own version of the facts, Stelios Kalli Panayi died as a result of the use of lethal force by Turkish or Turkish-Cypriot soldiers. Moreover, when he was hit by the bullets, he was entering the territory of the 'TRNC'. Under these circumstances Stelios Kalli Panayi must be regarded as 'within [the] jurisdiction' of Turkey within the meaning of Article 1 (see, *mutatis mutandis*, *Solomou and Others v. Turkey*, [...]). The responsibility of the respondent State under the Convention is accordingly engaged."¹⁹⁰

189 ECtHR, *Kallis and Androulla Panayi v. Turkey*, 27 October 2009, Application no. 45388/99, para 11.

190 ECtHR, *Kallis and Androulla Panayi v. Turkey*, paras 26-27.

Whilst the Court thus finds extraterritorial jurisdiction, it remains opaque what test it has applied to come to that conclusion. Its reference to *Cyprus v. Turkey* and the effective overall control of Turkey over northern Cyprus seems to indicate a spatial approach, yet both the perpetrating Turkish-Cypriot soldier and the applicants' son had not been *in* the TRNC when the latter was shot – although the applicants' son was about to enter the occupied territory. In turn, the reference to *Solomou* seems to imply that the Court *mutatis mutandis* applied the personal test of authority and/or effective control over the applicant, which indeed seems better suited in light of the particularities of this case, but the Court does not explicitly state that the applicants' son had been within Turkey's authority and/or effective control – in fact, it does not even mention this threshold condition. Instead, the Court seems to implicitly rely on a cause-and-effect reasoning in a similar fashion as in *Andreou*, yet this is puzzling given that cause and effect took place in the same territory (i.e. the UN buffer zone) and one would thus expect on the basis of previous case law – in particular on the basis of *Isaak*, in which cause and effect also both materialised in the UN buffer zone – that the Court would simply rely on the general model of personal jurisdiction and the according test of 'authority and/or effective control'. Instead, the Court does not even refer to the *Isaak* case in relation to the issue of admissibility. Furthermore, if the Court indeed relied on a cause-and-effect approach, this does not explain why the Court refers solely to *Solomou* (and not *Andreou*, as one might expect in a case where the cause-and-effect rationale is being applied) nor why the fact that the applicants' son was about to enter the TRNC is considered a relevant circumstance for establishing jurisdiction on this basis. *Panayi* thus seems to diffuse or even confuse the various bases for extraterritorial jurisdiction, which materially seems to lead to a more protective approach but conceptually leads to further unclarity.

Complexity II: the appropriate test in cases of extraterritorial military detention

Various of the post-*Banković* cases confirming the personal model of extraterritorial jurisdiction concerned military troops operating abroad.¹⁹¹ Specifically,

191 In *Saddam Hussein v. Albania and Others*, for example, applicant complained about his arrest by US troops deployed in Iraq, with his complaint being directed against all states of the Council of Europe that were considered to have supported the coalition forces in Iraq. The ECtHR confirmed both the personal and spatial models of control, but held that in this case that applicant had failed to demonstrate that any of the respondent states had jurisdiction on the basis of their control of the territory or on the basis of their control over him as a person given that he had not demonstrated that the respondent states had any responsibility for, or any involvement or role in, his arrest and detention. The fact that the respondent states allegedly were part of a coalition with the US was considered insufficient as a basis for jurisdiction, in particular given that the impugned actions were carried out by the US, the task of providing security in the area where the actions took

various of these cases concerned contexts of extraterritorial military *detention*, which of course is of particular interest for the research at hand. The case law of the ECtHR in this regard has, however, arguably been complicated and rather haphazard.

Al-Saadoon and Mufdhi v. UK concerned the arrest of two Iraqi nationals by British military forces in Basra in 2003. They were arrested as they had allegedly orchestrated violence against the 'multi-national force' ('MNF') and were considered security threats.¹⁹² Applicants were briefly detained as 'security internees' at Camp Bucca, an American facility in Iraq, after which they were transferred to a British-operated facility in Iraq.¹⁹³ Later, applicants were classified as 'criminal detainees' in relation to the killings of two British soldiers in southern Iraq and their case was referred to the Iraqi High Tribunal, although they initially remained under British custody.¹⁹⁴ At a later stage, their transfer to Iraqi custody was requested by the Iraqi authorities, which in turn was challenged by applicants before the ECtHR *inter alia* because their eventual transfer would likely result in their execution following an allegedly unfair trial.¹⁹⁵ In its assessment of jurisdiction, the Court first reiterated that Article 1 ECHR "sets a limit, notably territorial, on the reach of the Convention".¹⁹⁶ With reference to *Hess*, the Court consequently considered in relation to the two British-run detention facilities established on Iraqi territory that "given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction".¹⁹⁷ Applicants thus were within the UK's jurisdiction until they were physically transferred into the custody of Iraq on 31 December 2008.¹⁹⁸ However, it ultimately remains unclear whether the Court applied the spatial or the personal model of extraterritorial jurisdiction in *Al-Saadoon*: it appears to apply the former test without explicitly referring to a particular geographical area but rather to the premises as such.

place was assigned to the US and the overall command of the coalition was vested in the US authorities. See ECtHR, *Saddam Hussein v. Albania and Others* (Admissibility), 14 March 2006, Application no. 23276/04.

192 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), 30 June 2009, Application no. 61498/08, paras 25-26.

193 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), paras 25-26.

194 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), paras 27-30.

195 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), para 94. The ECtHR already issued interim measures on 30 December 2008 ordering that UK should not transfer applicants into Iraqi custody, but the British authorities nevertheless transferred them into the physical custody of Iraq a day later on the basis of 'exceptional circumstances': ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, paras 55-58. See also Cross & Williams, 2009, p. 689.

196 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), paras 84-85.

197 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), paras 87-88.

198 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), para 89.

In *Al-Jedda v. the United Kingdom*, the Court was provided with a chance to shed light on this matter, which it, however, arguably did not do.¹⁹⁹ In this case, applicant – an Iraqi and British national – was detained in a British-run facility in Basrah after he had been arrested on the basis of British intelligence by US military forces.²⁰⁰ The Court briefly held that

“[t]he internment took place within a detention facility in Basra City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout ([...] see also *Al-Skeini and Others v. the United Kingdom* [...] § 136, [...] and *Al-Saadoon and Mufdhi v. the United Kingdom* [...] § 88 [...])”.²⁰¹

Thus, the fact that a detention facility site was exclusively controlled by British forces was sufficient to establish extraterritorial jurisdiction, although it again remains unclear whether the Court reaches this conclusion on the basis of a spatial model (with the detention premises being the controlled ‘area’) or a personal model (with applicants being *de facto* and *de jure* controlled by the UK). This unclarity is fostered by the fact that the Court refers to both *Al-Saadoon* – which, as outlined above, seems to apply a *spatial* model albeit in a peculiar fashion – and paragraph 136 of the *Al-Skeini* decision – which, as will be further highlighted below, deals exclusively with the *personal* model of jurisdiction.²⁰² Ambiguity about the standard used thus persists and *Al-Jedda* consequently seems to shed little light – or even seems to dim some of the existing light – on the conceptual framework of extraterritorial jurisdiction.

Later case law still seems conflicted on the matter. In *Hirsi Jamaa and Others v. Italy*, which however did not concern extraterritorial detention as such, the Court held that the spatial model does not include “instantaneous extraterritorial acts” and its application should be determined on the basis of the particular facts of the case, “for example full and exclusive control over a prison or a ship”.²⁰³ Full and exclusive control over a prison thus fulfils the spatial test of extraterritorial jurisdiction. At the same time, in the alternative it could still be argued that the Court in essence applied a personal test, in which the condition of ‘authority and control over persons’ is fulfilled by the *de facto* exclusive control of the UK over the detention facility in which those persons were detained. This alternative interpretation seems particularly plausible, in turn, in light of the Court’s later case law in *Hassan v. UK*.²⁰⁴ In this case, which did concern military detention abroad, the Court explicitly found

199 ECtHR, *Al-Jedda v. United Kingdom* (Grand Chamber), 7 July 2011, Application no. 27021/08.

200 ECtHR, *Al-Jedda v. United Kingdom* (Grand Chamber), para 10.

201 ECtHR, *Al-Jedda v. United Kingdom* (Grand Chamber), para 85.

202 ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), paras 136 and 138.

203 ECtHR, *Hirsi Jamaa and Others v. Italy*, para 73 (emphasis added).

204 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber) 16 September 2014, Application no. 29750/09.

jurisdiction on the basis of the personal model, not on the basis of the spatial model. Notwithstanding the fact that detention took place in a US-run facility, jurisdiction on behalf of the UK was indeed established because of its authority and control over the victim in question.²⁰⁵

Complexity III: Al-Skeini and 'public powers'

The case of *Al-Skeini* concerned the killing of one of the applicants – Baha Mousa – whilst in custody in a UK-run facility in Iraq and the killing of five applicants by British military troops on patrol in Basra. In its assessment of the jurisdictional threshold of Article 1 ECHR, the Grand Chamber first reiterated the principle that jurisdiction under Article 1 ECHR is primarily territorial,²⁰⁶ that it is presumed to be exercised normally throughout the state's territory,²⁰⁷ and that extraterritorial acts can only constitute an exercise of jurisdiction ex Article 1 ECHR in exceptional cases.²⁰⁸ The Court subsequently summarised the personal model and the spatial model. In relation to the personal model, the Court held that

"[f]irst, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others [...]. Secondly, the Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (*Banković*, cited above, § 71). [...] In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad. [...] The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question. [...] It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored' (compare *Banković*, cited above, §75)".²⁰⁹

205 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 78.

206 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), para 59.

207 Compare ECtHR, *Ilașcu and Others v. Moldova and Russia*. See ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), para 131.

208 ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), para 131.

209 ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), paras 134-137.

Without admitting it, the Grand Chamber contradicts its earlier findings in *Banković* on various points. First, contrary to what the Court found in *Banković*, the power to kill a person *prima facie* appears very much to amount to ‘the exercise of physical power and control over the person in question’ and should therefore arguably result in extraterritorial jurisdiction on the personal model. Second, the Court here states that the Convention rights can be ‘divided and tailored’, whereas in *Banković* it maintained the exact opposite position, i.e. that “the wording of Article 1 does not provide any support for the applicants’ suggestion that the positive obligation in Article 1 [...] can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question”.²¹⁰ The fact that the Court in *Al-Skeini* asks to ‘compare’ (instead of, for example, to ‘contrast’) its finding with the *Banković* case without admitting that it came to a completely contradictory finding in the latter case is hence, as Milanovic has argued, a “somewhat cheekily” request.²¹¹ In any event, by now pointing out that Convention rights can be divided and tailored, the Court seems to clarify that states cannot be expected to do the impossible when exercising extraterritorial jurisdiction on the basis of the personal model, i.e. to continuously secure the full range of negative and positive Convention rights wherever they exercise authority and/or effective control over a person abroad.²¹² Third, and maybe most fundamental for the judgment at hand, the Court refers to *Banković* when maintaining that it has recognised that extra-territorial jurisdiction may be based on the exercise by a state of all or some of the public powers normally to be exercised by the territorial state. However, in the *Banković* case, the reference to ‘public powers’ did not concern the personal model but the spatial model. The Court has here displaced this criterion which, as will be shown below, was ultimately decisive for its puzzling conclusions.²¹³

In relation to the spatial model, the Court in *Al-Skeini* reiterated that

“Another exception to the principle that jurisdiction under Article 1 is limited to a State’s own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State’s own armed forces, or through a subordinate local administration [...]. Where the fact of such domination over the territory is

210 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), para 75.

211 Milanovic, 2012a, p. 129.

212 This clarification was later on confirmed by the Grand Chamber in ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), para 75. States can hence no longer sustain the argument that their extraterritorial conduct does not give rise to *any* obligations under the Convention because they are not able to secure *all* rights enshrined therein in a particular situation.

213 See similarly Milanovic, 2012a, p. 128.

established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region [...]."²¹⁴

Thus, where extraterritorial jurisdiction is established on the basis of the spatial model, the Contracting State has to respect, protect, and fulfil *all* substantive Convention rights for all within the area concerned. Under this model rights can therefore not be divided and tailored to the circumstances.

Subsequently, however, the Grand Chamber uses a rather puzzling approach in determining jurisdiction in the case at hand which does not *prima facie* fit well with the principles identified. As the Grand Chamber concludes,

"following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention."²¹⁵

Instead of answering the question whether the applicants were within the jurisdiction of the UK on the basis of an exercise of effective control by the UK over the territory concerned (i.e. the spatial model) or an exercise of control and authority by the UK over an individual (i.e. the personal model), the Court comes to a bewildering mix of both tests centred around the notion of 'public powers'. In essence, the Grand Chamber finds a jurisdictional link between all applicants and the UK on the basis of the personal model, but at the same time it makes this jurisdictional link contingent on the exercise of some 'public powers' by the UK in Iraq, a concept that has previously only been applied to establish extraterritorial jurisdiction on a spatial basis and that remains ill-defined at best, "nebulous"²¹⁶ at worst. It henceforth appears that the Court has created a test of jurisdiction that incorporates elements of both models, but is squarely neither. As Milanovic criticises, this peculiar test means that

214 ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), paras 138-139.

215 ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), para 149.

216 Milanovic, 2012a, p. 139.

if the UK had *a contrario* not exercised public powers in Iraq, the personal model would seemingly not have applied, which in turn seems fundamentally at odds with the findings in amongst others *Issa*, *Öcalan*, and *Pad*.²¹⁷

The introduction of the ‘public powers’ element in *Al-Skeini* is even more peculiar given that in subsequent cases it has not been reiterated. Notable examples in this regard are the judgments in *Hassan v. the United Kingdom* and *Jaloud v. the Netherlands* of September respectively November 2014.

The case of *Hassan* concerned the arrest of the applicant’s brother, an Iraqi national, and his subsequent detention by British military forces in a British-run section of a US-operated detention facility (Camp Bucca) on the basis that he was suspected of posing a threat to security. After interrogation by both UK and US officials, he was however declared a non-combatant not posing a security threat and was allegedly released, yet he did not contact his family and his body was recovered months later far away from Camp Bucca with bullet wounds in his chest and with his hands tied with plastic wire.²¹⁸ In order to establish whether the applicant’s brother had been within the UK’s jurisdiction, the Court considered it unnecessary to decide whether the UK had effective control over the area concerned given that it found that the United Kingdom exercises jurisdiction on the basis of the personal model.²¹⁹ With explicit reference to the personal model as summarised in *Al-Skeini*, the Court indeed considered that

“[f]ollowing his capture by British troops early in the morning of 23 April 2003, until he was admitted to Camp Bucca later that afternoon, Tarek Hassan was within the physical power and control of the United Kingdom soldiers and therefore fell within United Kingdom jurisdiction”.²²⁰

The Court furthermore found that the applicant’s brother remained within the jurisdiction of the UK after his admission to Camp Bucca, irrespective of the fact that it is a US-run facility: in light of the arrangements operating at Camp Bucca at the time, the applicant’s brother continued to fall under the UK’s authority and control.²²¹ However, the Court did not refer to the condition of ‘public powers’ as applied in *Al-Skeini*, which seems rather inconsistent. The material facts in *Al-Skeini* took place when the UK had assumed

217 *Al-Skeini* as such significantly progressed the case law of the Court, but did not – as some might have expected – overturn the *Banković* decision in this crucial regard: see Milanovic, 2012a, pp. 130–131.

218 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 29.

219 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 75.

220 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 76. The Court dismisses the UK’s argument that the personal model should not apply in ‘the active hostilities phase of an international armed conflict’: ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 76–77.

221 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 78.

authority for the maintenance of security in South-East Iraq and the victims were killed in the course of security operations carried out pursuant to that assumption of authority, whereas the material facts in *Hassan* took place before that period, i.e. before the UK had declared that the active hostilities phase of the conflict had ended and before the UK had assumed responsibility for the maintenance of security in South-East Iraq.²²² Against this background, it seems peculiar that the Court in *Hassan* does not reiterate that the application of the personal model is conditioned by the notion of ‘public powers’: far more than in *Al-Skeini*, in the present case it is very questionable that the UK was in fact exercising public powers in the region at the time, and it consequently appears questionable whether the Court would have found jurisdiction on the basis of the personal model if it had factored in its previously established public powers condition. Given its complete silence in this regard, one can only wonder why the Court does not, contrary to what it is implying, apply a similar test as in *Al-Skeini*.

The case of *Jaloud v. The Netherlands* concerned the death of an Iraqi citizen, who was shot at a checkpoint in Iraq which at the time was under the command of a Dutch officer.²²³ The applicant, who was the father of the deceased, claimed that the Netherlands had inadequately investigated the fatal shooting and had therefore breached the positive limb of Article 2 of the ECHR. The Dutch government argued that the victim had not been within its jurisdiction since the United States and the United Kingdom were the ‘occupying powers’ in Iraq under UN Security Council Resolution 1483, not the Netherlands, and furthermore argued that it *had not assumed any public powers normally to be exercised by a sovereign government* – only the United States and the United Kingdom, which had set up the Coalition Provisional Authority, had done so according to the Dutch government.²²⁴ The Netherlands’ contingent in Iraq had, as the Dutch government furthermore argued, always been under the operational control of the British commander of the Multinational Division (South East).²²⁵ The Grand Chamber rejected the arguments of the Netherlands, however, on the basis of an elaborate discussion of the chain of command as applicable at the time:

“Although Netherlands troops were stationed in an area in southeastern Iraq where [Stabilization Force in Iraq, SFIR] forces were under the command of an officer from the United Kingdom, the Netherlands assumed responsibility for providing security in that area, to the exclusion of other participating States, and retained full command over its contingent there. [...] That being so, *the Court cannot find that the*

222 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 75.

223 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber).

224 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 113-114 (emphasis added). The Netherlands therewith explicitly referred to the ‘public powers’ element as developed in *Al-Skeini*.

225 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), para 115.

*Netherlands troops were placed 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were 'under the exclusive direction or control' of any other State (compare, mutatis mutandis, Article 6 of the International Law Commission's Articles on State Responsibility, [...]). [...] Mr Azhar Sabah Jaloud met his death when a vehicle in which he was a passenger was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer. The checkpoint had been set up in the execution of SFIR's mission, under United Nations Security Council Resolution 1483 (see paragraph 93 above), to restore conditions of stability and security conducive to the creation of an effective administration in the country. The Court is satisfied that the respondent Party exercised its 'jurisdiction' within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint. That being the case, the Court finds that the death of Mr Azhar Sabah Jaloud occurred within the 'jurisdiction' of the Netherlands, as that expression is to be construed within the meaning of Article 1 of the Convention."*²²⁶

At first sight, it seems that the Court is confusing the questions of attribution and jurisdiction: its considerations that the Netherlands had not placed its troops at the disposal of a foreign power and had retained full command over its contingent essentially concern the question whether the conduct of the forces concerned can be attributed to the Netherlands, not the question whether the victim was within the Netherlands' jurisdiction for the purpose of the Convention.²²⁷ As others have already argued, however, the Court has dealt with the questions of attribution and jurisdiction *simultaneously* in the quoted part above: given that the Netherlands relied heavily on the argument that the conduct of its soldiers in Iraq could not be attributed to it since they were operating under UK command, the Court *first* had to resolve this issue of attribution before it could resolve the issue of jurisdiction proper.²²⁸ Whereas

²²⁶ ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 149-152 (emphasis added).

²²⁷ This critique has for example been outlined by Den Heijer, 2015, p. 362, as well as by the two concurring opinions of Judges Spielmann and Raimondi in the *Jaloud* case.

²²⁸ Haijer & Ryngaert, 2015, p. 178; Milanovic, 2014. For a contrary perspective, see Rooney, 2015, who challenges the idea that an 'attribution test' cannot as a matter of methodology and in light of international law on state responsibility be applied as a test of jurisdiction, and argues that the Court in *Jaloud* adopted such an 'attribution test' instead of the personal or territorial models of jurisdiction. Her reasoning is, however, unpersuasive in that she seems to value attribution and jurisdiction as *alternatives* rather than as coherent prerequisites: indeed, she for example argues that "an attribution test is concerned with determining *who* should be held responsible rather than *whether* the ECHR is applicable abroad. In this way, an attribution test signals a lack of concern by the ECtHR that the actions took place abroad. The arbitrary delimitation on the extraterritorial application of the ECHR provided by the two jurisdiction tests confirmed in *Al Skeini* is no longer applicable": Rooney, 2015, p. 409. She maintains this view *inter alia* on the basis of the assertion that conflating attribution and jurisdiction would not be methodologically unsound nor in conflict with international law on state responsibility. In doing so, she relies heavily on the ILC Draft Articles, but simultaneously she for example does not refer to the *Tehran*

in many cases the question of attribution is implicitly dealt with, in this case it indeed makes sense to deal with it explicitly given the line of arguments of the respondent state: had the Court established that the conduct could not be attributed to the Netherlands, this would automatically mean that the Netherlands had not exercised jurisdiction through such conduct, as such conduct would not be its own. The Court's approach is thus accurate, although the Court could have elucidated more explicitly what it was doing under the header of 'jurisdiction' in its judgment.²²⁹ In sum, the Court *first* held that the conduct of the Dutch forces in Iraq was still attributable to the Netherlands because it could not find that those troops were placed at the disposal of, or under the exclusive direction or control, of another state, and *subsequently* found that the Netherlands had exercised jurisdiction "within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint".²³⁰ Thirdly – and this may explain some of the confusion amongst commentators as to the Court's approach – the Court *again* deals with attribution under a particular sub-heading called 'attribution', yet this time the Court did not examine whether the conduct of troops in Iraq can generally be attributed to the Netherlands but rather whether the *actual impugned conduct* can be attributed to the Netherlands, which it concludes in the affirmative: "[t]he facts giving rise to the applicant's complaints derive from alleged acts and omissions of Netherlands military personnel and investigative and judicial authorities. As such they are capable of giving rise to the responsibility of the Netherlands under the Convention".²³¹

The Court's approach in finding jurisdiction seems to be consistent with the personal model of extraterritorial jurisdiction, yet it remains unclear to what extent the criterion as formulated by the Grand Chamber here – the exercise of jurisdiction '*for the purpose of* asserting authority and control over persons' – differs from the previously established understanding that the personal model is based on the *actual* exercise of authority and control over

Hostages case in which the ICJ clearly outlined that state responsibility is a two-step process. Ultimately, Rooney does not make convincingly clear why the second step of the process could simply be circumvented by one overarching test of attribution, nor how this could be justified in light of the underlying rationales of the jurisdictional clause of the ECHR and – by extension – those of other treaties. Furthermore, her argument that attribution and jurisdiction *could* be conflated has little explanatory value of whether they *should* be conflated in the first place.

229 See similarly Haijer & Rynjaert, 2015, p. 178; Milanovic, 2014. The idea that jurisdiction cannot be established without an implicit or explicit test of attribution was also highlighted by Judge Gyulumyan in her dissenting opinion in *Chiragov* (see in particular paras 52-59 of the dissent).

230 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 151-152.

231 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 151-155. Compare Sari, 2014, who argues that the Court has confused the criteria to be applied in its two attribution inquiries, i.e. the one preceding the decision on jurisdiction and the one succeeding the decision on jurisdiction.

persons. Importantly, the Court in its considerations on jurisdiction does not refer to the element of ‘public powers’ that it had previously introduced in *Al-Skeini* as a necessary criterion under the personal model, and the judgment in *Jaloud* is therewith, similar to *Hassan*, seemingly more in line with the decisions in amongst others *Öcalan*, *Issa*, *Pad*, and *Solomou* – in which the exercise of public powers was not dealt with as an element of personal jurisdiction. It is arguable – although certainly not uncontested – that the controlling of a checkpoint amount to the exercise of public powers,²³² but it remains unclear whether the Court has either dealt with the criterion of ‘public powers’ implicitly – which would be striking given the explicit arguments made by both parties on the matter – or has intentionally or unintentionally not dealt with it at all.

Consequently, *Hassan* and *Jaloud* raise questions as to the coherence and clarity of the Court’s case law. In particular, it remains enigmatic that the exercise of ‘public powers’ was not part of the Court’s assessment, at least not explicitly, notwithstanding the fact that the Court in *Al-Skeini* relied heavily on the very same notion and notwithstanding the fact that both the Netherlands, the respondent government, and the applicant in *Jaloud* referred to the notion in their argumentation before the Court.²³³ In turn, this could be taken to mean that the Court has reversed the *Al-Skeini* decision insofar as it would no longer consider the ‘exercise of public powers’ to be a constitutive element of the personal model. More precisely, it could be taken to mean that the exercise of public powers *could* be an indicator of extraterritorial jurisdiction under the personal model but that the lack of such exercise of public powers does not *a contrario* mean that the personal model does not apply.

This latter position seems to be confirmed in *Pisari v. Moldova and Russia*.²³⁴ The facts in *Pisari* are to certain extents comparable to those in *Jaloud*: applicants’ son, a Moldovan national, was shot by a Russian soldier at a peacekeeping security checkpoint on Moldovan territory separating Moldova from Transnistria.²³⁵ The applicants, relying on Article 2 of the Convention, complained that their son had been killed by state agents and that the domestic authorities had not carried out effective investigations.²³⁶ In deciding upon the admissibility of the case, the Court noted that neither

232 This argument was explicitly made by the applicants and was explicitly rejected by the respondent state: ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 114, 128-129, and 135.

233 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 114 and 128.

234 ECtHR, *Pisari v. the Republic of Moldova and Russia*, 21 April 2015, Application no. 42139/12.

235 ECtHR, *Pisari v. the Republic of Moldova and Russia*, para 6. The checkpoint was created pursuant to a 1992 agreement between the Russian and Moldovan Presidents putting an end to the military conflict in the Transnistria region. The checkpoint was manned by personnel from Moldova, Russia, and Transnistria: ECtHR, *Pisari v. the Republic of Moldova and Russia*, para 30.

236 ECtHR, *Pisari v. the Republic of Moldova and Russia*, para 32.

Russia nor Moldova had disputed their jurisdiction and reiterated briefly, with reference to *Al-Skeini* and *Jaloud*, the personal model: the use of force by a state's agents operating abroad may under certain circumstances bring individuals under the control of the respective state and therewith within their jurisdiction.²³⁷ Such instances "may include the exercise of extra-territorial jurisdiction by a Contracting State when, in accordance with custom, treaty or other agreement, its authorities carry out executive functions on the territory of another State (see *Al-Skeini* [...] §§135 and 149)".²³⁸ Thus, referring explicitly to the relevant passage in *Al-Skeini*, the Court provides that extraterritorial jurisdiction under the personal model may be exercised when state authorities carry out executive functions abroad. As such, the concrete exercise of 'executive functions' (or 'public powers')²³⁹ could suffice to fulfil the personal test but is not a *condicio sine qua non*.

Complexity IV: Hirsi Jamaa and the confusion of jurisdiction standards

The topic of extraterritorial jurisdiction came to the fore again in 2012 in *Hirsi Jamaa and Others v. Italy*. Applicants, 11 Somali and 13 Eritrean nationals, were intercepted on the high seas together with approximately 200 individuals whilst they were crossing the Mediterranean Sea from Libya to Italy, and were subsequently returned to Libya pursuant to a bilateral agreement without the opportunity to apply for asylum.²⁴⁰ Applicants relied on Article 3 of the Convention and claimed that Italy had exposed them to the risk of ill-treatment in Libya (i.e. direct refoulement) and to the risk of being repatriated to Somalia

237 ECtHR, *Pisari v. the Republic of Moldova and Russia*, para 33.

238 ECtHR, *Pisari v. the Republic of Moldova and Russia*, para 33 (emphasis added). In relation to Russia, the Court holds that "the checkpoint in question, situated in the security zone, was manned and commanded by Russian soldiers in accordance with the agreement putting an end to the military conflict in the Transdnistrian region of Moldova [...]. Against this background, the Court considers that, in the circumstances of the present case, Vadim Pisari was under the jurisdiction of the Russian Federation": ECtHR, *Pisari v. the Republic of Moldova and Russia*, para 33. In relation to Moldova, the Court observes the applicants' statement that they did not want to pursue their application in relation to Moldova because they did not consider Moldova responsible for their son's death and because they did not consider that Moldova had insufficiently investigated the circumstances of his death. On the basis of this, "[t]he Court sees no reason not to accept the applicants' position and is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of the complaints against the Republic of Moldova": ECtHR, *Pisari v. the Republic of Moldova and Russia*, paras 34-35. Still, it would have been preferable if the Court had, at least *obiter dictum* and in general terms, reiterated that jurisdiction is presumed to be exercised normally throughout the State's territory and that the territorial state continues to have positive obligations even where the exercise of its authority is prevented or limited in part of its territory.

239 Given the reference to the relevant sections of *Al-Skeini* in *Pisari*, both criteria may be interpreted synonymously.

240 ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), paras 9-14 and 85.

respectively Eritrea (indirect refoulement), and relied furthermore on Article 4 of Protocol No. 4, which prohibits collective expulsions.²⁴¹ In assessing jurisdiction, the Court considers that the events occurred on the high seas on board of military ships flying the Italian flag.²⁴² On this basis, the Court concludes that applicants were indeed within Italy's jurisdiction given the *de jure* control that Italy exercised over them.²⁴³ This reasoning appears to be flawed, however: whereas under international law a state may exercise prescriptive jurisdiction over registered ships flying its flag, this recognition of jurisdictional authority is not connected to the jurisdiction threshold of Article 1 ECHR. The Court in *Hirsi Jamaa* confused these distinct understandings of the notion of jurisdiction.²⁴⁴ It concluded that *since* the ship concerned was flying the Italian flag, and Italy *thus* had prescriptive jurisdiction, the threshold criteria of jurisdiction in the sense of Article 1 ECHR was *therewith* also fulfilled, which ultimately appears to constitute an erroneous interpretation of both the significance of jurisdiction under public international law and the distinct jurisdictional threshold in Article 1 ECHR.²⁴⁵

This would have been highly problematic, were it not that the Court in *Hirsi Jamaa* did not stop its jurisdictional inquiry here. Although the Court initially bases its finding of extraterritorial jurisdiction simply (yet erroneously) on the principle of flag state jurisdiction, it consequently highlights that even if Italy had not been the flag state, in a similar vein as in *Medvedyev*, applicants would still have been within Italy's jurisdiction given the continuous and exclusive *de facto* control of the Italian authorities over them.²⁴⁶ In other words, the Court recognises that the personal model of jurisdiction can also be successfully applied to the case at hand in light of the *de facto* situation, therewith confirming that applicants would still have been within Italy's jurisdiction in case the ship had sailed under a third country's flag. *Hirsi Jamaa* therewith to a large extent recognises the earlier ruling in *Medvedyev* that what matters is not merely the *de jure* situation but, importantly, also the *de facto* control exercised by a state.²⁴⁷

241 ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), para 3.

242 ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), para 76.

243 ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), paras 77-78.

244 And, by extension, in the relevant considerations in *Banković* and *Medvedyev* that were reiterated by the Court in *Hirsi Jamaa*, para 537.

245 See, similarly, Milanovic, 2011, p. 167.

246 ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), paras 80-81.

247 See ECtHR, *Medvedyev and Others v. France*, para 67. Compare ECtHR, *N.D. and N.T. v. Spain*, para 54. See also S. Kim, 2017, p. 59.

Complexity V: extraterritorial detention settings

This section turns to two somewhat problematic cases that are of particular relevance here as they concern extraterritorial confinement specifically: *Stephens v. Malta* and *Vasiliciuc v. Moldova*.²⁴⁸

Stephens concerned the detention of applicant in Spain following a request for extradition by the Maltese authorities on the basis that he was suspected of having conspired in drug trafficking. Whilst awaiting extradition, the applicant challenged the lawfulness of the arrest warrant before the Maltese judicial authorities on the basis that the court that had issued the warrant was not competent to do so. On appeal, the Constitutional Court of Malta held that the arrest warrant was indeed null and void on the basis of a procedural defect. Applicant was consequently released on bail in Spain, but was later rearrested and extradited to Malta on the basis of a new extradition request, after which he was found guilty of the criminal charges against him. Before the ECtHR, applicant relied on Article 5(1) of the Convention in complaining about the unlawfulness of his detention by – and this is where it gets particularly interesting for present purposes – the *Maltese* rather than the Spanish authorities. As such, the case is remarkably extraterritorial in nature: during the entire period of his detention prior to extradition, applicant had not been on Maltese soil *at all*. The question whether applicant was within Malta's jurisdiction hence came to the fore, and although the Maltese government had not raised an objection to being held accountable for the alleged facts, the Court decided to deal *proprio motu* with the matter.²⁴⁹

The Court's approach is however far from axiomatic. The Court first remarks that "[t]he question to be decided is whether the facts complained of by the applicant can be *attributed* to Malta".²⁵⁰ It subsequently reiterates that following Article 1 ECHR "the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention".²⁵¹ Thereafter, the Court refers to a plethora of cases to reflect that the notion of jurisdiction is essentially territorial and other bases of jurisdiction remain exceptional and require special justification.²⁵² The Court hence apparently attempts to deal with questions of attribution and jurisdiction at the same time, which – as outlined

248 ECtHR, *Stephens v. Malta* (no. 1), 21 April 2009, Application no. 33740/06; ECtHR, *Vasiliciuc v. the Republic of Moldova*, 2 May 2017, Application no. 15944/11.

249 ECtHR, *Stephens v. Malta* (no. 1), para 45.

250 ECtHR, *Stephens v. Malta* (no. 1), para 45 (emphasis added).

251 ECtHR, *Stephens v. Malta* (no. 1), para 48.

252 ECtHR, *Stephens v. Malta* (no. 1), para 49.

before in the context of *Jaloud* – is not necessarily unsound.²⁵³ Similar to *Jaloud*, however, the Court could once again have been more clear in its approach. Rather than stating that the question to be decided *is* one of attribution (full stop),²⁵⁴ the Court could more clearly have expressed that it has to examine *both* the questions of attribution and jurisdiction, although it to a certain extent implies such an approach by referring to both jurisdiction and attribution when stating that “*the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it [...]*”.²⁵⁵

Although the Court does not excel in clarity, in the end it thus seems to apply a sound approach to determining the responsibility of Malta under the Convention in the present case. One would consequently expect that the Court would engage in an analysis of (a) whether the detention of the applicant can be attributed to Malta, and (b) whether applicant was within Malta’s jurisdiction, in order to determine whether Malta’s responsibility is engaged. The Court indeed seems to start off with a test of attribution, by noting that

“the applicant was *under the control and authority of the Spanish authorities* in the period between his arrest and detention in Spain on 5 August 2004 and his release on bail on 22 November 2004. In so far as the alleged unlawfulness of his arrest and detention is concerned, *it cannot be overlooked that the applicant’s deprivation of liberty had its sole origin in the measures taken exclusively by the Maltese authorities pursuant to the arrangements agreed on by both Malta and Spain under the European Convention on Extradition. [...] By setting in motion a request for the applicant’s detention pending extradition, the responsibility lay with Malta to ensure that the arrest warrant and extradition request were valid as a matter of Maltese law, both substantive and procedural. In the context of an extradition procedure, a requested State should be able to presume the validity of the legal documents issued by the requesting State and on the basis of which a deprivation of liberty is requested. It is to be noted that in the instant case the arrest warrant had been issued by a court which did not have the authority to do so, a technical irregularity which the Spanish court could not have been expected to notice when examining the request for the applicant’s arrest and detention. Accordingly, the act complained of by Mr Stephens, having been instigated by Malta on the basis of its own domestic law and followed-up by Spain in response to its treaty obligations, must be attributed to Malta notwithstanding that the act was executed in Spain. [...] The Court would also add that both the Civil Court and the Constitutional Court accepted without further inquiry that Malta has breached Article 5 of the Convention as a result of the applicant’s arrest and detention on the strength of a defective arrest warrant. [...] In the light of the above,*

253 Similar to *Jaloud*, it is not *prima facie* clear that the impugned act can be attributed to the respondent state, and the Court therefore logically first has to explicitly resolve this issue before dealing with the question of whether such act brings the applicant within the respondent state’s jurisdiction. Compare Haijer & Ryngaert, 2015, p. 178; Milanovic, 2014.

254 ECtHR, *Stephens v. Malta* (no. 1), para 45.

255 ECtHR, *Stephens v. Malta* (no. 1), para 48 (emphasis added).

the Court considers that the applicant's complaints under Article 5 engage the responsibility of Malta under the Convention."²⁵⁶

This reasoning seems to be flawed in at least two regards. First, it is unclear on what basis the Court reaches the conclusion that applicant's detention has to be attributed to Malta. Applicant was detained in Spain by Spain's *de jure* state organs which by no means were placed at the disposal of Malta and which were not acting in any way under Malta's direction or control – in fact, the Court recognises this reality in its very first sentence by outlining that applicant had continuously been under the control and authority of Spain. As such, applicant's detention was arguably attributable to Spain, not Malta.²⁵⁷ It could be that the Court considers Malta's responsible for the impugned act on the basis of derived responsibility for direction or control of conduct ex Article 17 Draft Articles, but this is not likely given that the Court refers solely to attribution of the act itself and does not even imply that derived responsibility would be in play. Secondly, the Court's reasoning is flawed in the sense that it concludes seemingly on the sole basis of its attribution determination that the applicant's complaints "engage the responsibility of Malta".²⁵⁸ It therewith seems to skip over the question of jurisdiction altogether.²⁵⁹

256 ECtHR, *Stephens v. Malta* (no. 1), paras 51-54 (emphasis added).

257 See also Den Heijer, 2012, pp. 30-31; Milanovic, 2011, p. 205.

258 ECtHR, *Stephens v. Malta* (no. 1), para 54.

259 Which is at odds with the Court's earlier reiteration that the exercise of jurisdiction is a *necessary condition* for holding a contracting state responsible under the Convention for acts or omissions imputable to it: ECtHR, *Stephens v. Malta* (no. 1), para 48. However, it seems that as a matter of policy the outcome of the case is fair: it is Malta, not Spain, that is ultimately the cause of the *unlawful* detention. It would have been a more promising strategy if the Court had either explicitly dealt with derived responsibility, or if it had not focused on the act of detention as such but on the act of issuing an arrest warrant itself. Since this arrest warrant was issued by the *de jure* Maltese (judicial) authorities, there is no problem in attributing this particular act to Malta. In turn, the personal model could be applied to argue that Malta exercised authority and control over the applicant, not on the basis of the act of detention but on the basis of issuing the arrest warrant which Spain *had* to follow up upon as a result of its treaty obligations, and that applicant was therefore within its jurisdiction insofar as the material scope of the arrest warrant is concerned. In turn, whilst the issuing of the (defect) arrest warrant as such does not constitute a violation of the negative obligation enshrined in Article 5 of the Convention, Malta nevertheless could be held responsible on account of its *positive* obligations under the same provision. On the basis of *these* obligation, then, Malta could be held responsible for not adequately preventing the unlawful detention of applicant by Spain as it had not exercised sufficient due diligence and had not taken sufficient reasonable measures to ensure that the arrest warrant would be issued by the correct authority and consequently would not be unlawful. This approach would not only have been more sound in light of the principles of state responsibility, but would also have signified the importance of positive obligations under the Convention as opposed to a fixation on negative obligations.

The case of *Vasiliciuc v. Moldova* is characterised by similar factual circumstances. In this case, applicant – who was about to return from Moldova to Greece where she lived – had been stopped by the Moldovan customs authority at Chisinau Airport because she had failed to declare jewellery. She returned to Greece two weeks later, after having signed a formal undertaking that she would appear before the prosecuting authorities and courts of Moldova when necessary. In doing so, she provided her Greek address and telephone number. Shortly after, the Moldovan authorities brought criminal proceedings against her, but applicant failed to appear before the judiciary as she was unaware of the proceedings now that the authorities had summoned her to appear before the Court via her Moldovan address. The applicant's detention was consequently ordered on the basis that she had absconded from prosecution.

In 2011, Moldova applied to Interpol for an international arrest warrant, after which applicant was arrested in Greece and detained pending her extradition. After 23 days, however, the Greek courts rejected the Moldovan extradition request since there was no relevant extradition agreement between Moldova and Greece. The applicant was thereupon released from detention. Before the ECtHR, applicant complained that contrary to Article 5(1) and 5(3) ECHR, there had been no reasonable suspicion that she had committed an offence and that the Moldovan detention order had not been based on relevant and sufficient reasons. In a similar fashion as in *Stephens*, Moldova as the respondent state had not raised an objection to its accountability under the Convention, but the Court decided to deal with the issue *proprio motu*.²⁶⁰ Again, the Court reiterated the somewhat problematic statement that “[t]he question to be decided is whether the facts complained of by the applicant can be attributed to Moldova”.²⁶¹ In turn, the Court applied the reasoning in *Stephens mutatis mutandis* to the case at hand. In fact, in *Vasiliciuc* the diffusion of attribution and jurisdiction seems to be taken a step further: in its header the Court signals that it will deal with jurisdiction, but in reality it applies a mere (and erroneous)²⁶² test of attribution whilst it does not even mention Article 1 ECHR or the term ‘jurisdiction’ *altogether*.²⁶³

260 ECtHR, *Vasiliciuc v. Moldova*, para 22; Compare ECtHR, *Stephens v. Malta* (no. 1), para 45.

261 ECtHR, *Vasiliciuc v. Moldova*, para 22 (emphasis added); Compare ECtHR, *Stephens v. Malta* (no. 1), para 45.

262 Indeed, the fact that applicant was allegedly unlawfully detained *because of* a Moldovan arrest warrant does not mean that the detention itself was carried out *by* Moldova as well: such cause-and-effect reasoning has not been accepted as a principle of attribution under the international rules of state responsibility. The suggestions for a more promising strategy as voiced in footnote 259 henceforth apply *mutatis mutandis* here.

263 Except for once, in the header of the section that consists of paras 21-25. In its considerations, however, the term ‘jurisdiction’ does not occur at all.

Complexity VI: What about Soering?

One last case warrants attention here: that of *Soering v. United Kingdom*.²⁶⁴ This case dealt not with extraterritorial conduct but with extraterritorial *effects* of decisions taken by states domestically regarding individuals within their territory. Thus, applicant claimed that he would likely experience death row in the US if he would be extradited by the UK in order to stand trial for murder in the US, which in turn would violate his rights under Article 3 of the Convention.²⁶⁵ In its judgment, the ECtHR formulated what is now known as the ‘Soering principle’, i.e. that an issue under Article 3 ECHR may indeed arise in extradition cases “where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country”.²⁶⁶ The extraterritorial aspect in this regard concerns thus not the acts of the member state but rather the adverse human rights effects of such decisive acts which ultimately occur on foreign soil.

In reaching its judgment in *Soering v. United Kingdom*, the Court only marginally referred to the jurisdictional clause of Article 1 ECHR, in relation to which it held that

“ Article 1 (art. 1) of the Convention [...] sets a limit, *notably territorial*, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to ‘securing’ (‘reconnaître’ in the French text) the listed rights and freedoms to persons within its own ‘jurisdiction’. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 (art. 1) cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 (art. 3) in particular. *These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 (art. 3) for all and any foreseeable consequences of extradition suffered outside their jurisdiction.*”²⁶⁷

The case of *Soering* is frequently considered in the context of extraterritorial jurisdiction, with several authors claiming that *Soering* establishes a particular

264 ECtHR, *Soering v. United Kingdom*, 7 July 1989, Application no. 14038/88.

265 ECtHR, *Soering v. United Kingdom*, para 76.

266 ECtHR, *Soering v. United Kingdom*, para 91.

267 ECtHR, *Soering v. United Kingdom*, para 86 (emphasis added).

rule or category of extraterritorial jurisdiction.²⁶⁸ It is maintained here, however, that this interpretation is erroneous: jurisdiction in *Soering* is indeed not extraterritorial but remarkably territorial.

Indeed, the *Soering* case does not so much establish a rule of extraterritorial jurisdiction but should rather be seen in light of the state's positive obligations to protect individuals within its (in this case territorial) jurisdiction for potential human rights infringements by third actors (in this case, a third state). What is at stake is thus *not* the UK's obligation to not apply inhuman or degrading treatment or punishment itself, nor the idea that it should actively interfere with inhuman or degrading treatment or punishment taking place elsewhere, but rather its obligation to exercise sufficient due diligence in its decision-making in order to protect individuals from inhuman or degrading treatment or punishment by *others*.²⁶⁹ Consequently, it seems more appropriate to deal with this case in the context of positive obligations than in the context of extraterritorial jurisdiction: the jurisdiction in this case is remarkably territorial as the decision to extradite – which may give rise to an issue under the Convention – is taken domestically and the individual concerned is at the material time residing within the state's territory.²⁷⁰ There is, indeed, no real question whether *Soering* was within the UK's jurisdiction when the decision complained about was made: at that point in time, he was both within the UK's territory and within its effective control and authority. The UK's Convention obligations therewith applied to him. The fact that the UK's decision may have extraterritorial effects is consequently of no further interest for establishing jurisdiction, i.e. the question *whether* the Convention rights apply, but rather for delineating the scope of the Convention's positive limb, i.e. *what* the Convention exactly requires from states in protecting individuals against human rights infringements by others and in fulfilling individuals' human rights entitlements. *Soering* was thus not 'missing' in the analysis of extraterritorial jurisdiction under the ECHR provided above, and should in any event not be interpreted as an alternative model of extraterritorial jurisdiction.²⁷¹

268 Budzianowska, 2012; Da Costa, 2013; Gammeltoft-Hansen, 2011; Miltner, 2012; Roxstrom et al., 2005.

269 See, concurring, Milanovic, 2011, pp. 8–9.

270 This is, of course, different where the extradition (or *refoulement*) occurs extraterritorially as well, as was for example the case in *Hirsi Jamaa*. On this topic, see also S. Kim, 2017.

271 The same erroneous logic has been applied in the context of the Inter-American human rights system. The *Haitian Interdiction case* as referred to in footnote 89 and accompanying text concerned the interdiction and forcible return of Haitian asylum seekers by the United States to Haiti, including the return of Haitians who had been detained in US immigration detention facilities on US territory. According to the petitioners, "many of these boat people had a reasonable fear that they would be persecuted if returned to Haiti, but were denied a proper forum and processing procedures for resolution of their claims" (para 3). The IACommHR held that the US had violated the American Declaration, maintaining – with explicit reference to amongst others *Soering* – that a member state may be in violation of a human rights obligation when subjecting an individual within its jurisdiction to risk in

7.4.2.4 ECtHR: Concluding remarks

Concludingly, although the Court's jurisprudence has been far from axiomatic and has at times been ambiguous and controversial, which arguably results from attempts to balance veracity and resilience, the ECtHR has developed two models of extraterritorial jurisdiction as exceptions to the territorial presumption that are able to capture a range of extraterritorial conduct. As becomes evident from the development of the personal model of jurisdiction, a state party can have human rights obligations vis-à-vis individuals who are not within its territory or a territory that is under its control but over who it exercises *de facto* authority or control in any territory, either within the *espace juridique* of the Convention or elsewhere.²⁷² As some have argued, from such a perspective the spatial model of extraterritorial jurisdiction may function as a backup option only, i.e. to establish in a rather indirect fashion – on the basis of control over territory – jurisdictional links between applicant and state where it is difficult to do so directly.²⁷³ As Miltner for example maintains, “in the extraterritorial context, it is the state's nexus to persons that becomes the pivotal element of Article 1 jurisdiction, whether established directly

another jurisdiction (para 167). In turn, it has been argued that this case *hence* exemplifies the application of extraterritorial jurisdiction: see Cerna, 2004, p. 147. However, as outlined here, *Soering* does not involve extraterritorial but rather a remarkably territorial jurisdiction. This is likewise the case for those who were first detained on US soil before being returned to Haiti: being on US territory, the US exercised territorial jurisdiction over them and in such capacity *potentially* violated amongst others the non-refoulement obligations as enshrined in *inter alia* Article 33 of the Refugee Convention and its positive obligations under *inter alia* the American Declaration. This has nothing to do with extraterritorial exercises of jurisdiction but rather with questions as to the substantive nature of the state's non-refoulement obligations as well as the substantive reach of its positive human rights obligations. Having said that, contrary to *Soering*, extraterritoriality nevertheless seems to play a rather marginal role in the *Haitian Interdiction* case insofar as those interdicted on the high seas, who were immediately returned without being detained on US soil first, are concerned. Indeed, in respect to these individuals, the US could not possibly have exercised territorial jurisdiction, and an extraterritorial jurisdictional basis should thus be considered *not* in respect of the persecution acts in Haiti, but in relation to the US' non-refoulement and positive human rights obligations. In dealing with the matter, the IACommHR found that the United States Government's act of interdicting Haitians on the high seas, placing them in vessels under their jurisdiction, returning them to Haiti, and leaving them exposed to acts of brutality by the Haitian military and its supporters constitutes a breach of the right to security (para 171). This reasoning is erroneous insofar as the Commission confuses – similar to the ECtHR in *Hirsi Jamaa* – prescriptive jurisdiction over registered ships flying its flag with the human rights threshold of jurisdiction. This reasoning will not be recounted here in full – see, for a more comprehensive explanation, section 7.4.5.4. above.

²⁷² ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), para 142.

²⁷³ Besson, 2012, pp. 875–876; Miltner, 2012, p. 738.

through some form of [state-agent authority] over persons, or indirectly through attenuated links to foreign territory".²⁷⁴

Whilst this perspective is not without its merits – it amongst others provides a clear framework for extraterritorial jurisdiction in which the various bases as developed by the Court can be conceptually unified – one should however remain cautious to not diminish the importance and nuances of both consecutive bases for extraterritorial jurisdiction. For example, whereas it has by now been borne out that under the spatial model of extraterritorial jurisdiction the state has to ensure the full catalogue of human rights enshrined in the Convention, under the personal model of extraterritorial jurisdiction its obligations can be tailored and divided.²⁷⁵ To say that personal jurisdictional links are to be prioritised whilst spatial jurisdictional links only function as a backup option runs the risk of diminishing the key importance of this difference and may have a blurring rather than illuminating effect on the question what is actually expected from states in extraterritorial contexts. Therefore, it is preferable to maintain a firm distinction between both bases for extraterritorial jurisdiction and to view them as self-standing albeit communicating vessels. Still, as detailed above, the Court itself has at times confused both bases, which in turn shows both the complexity and the developing nature of the topic at hand.

7.5 RULES OF DERIVED RESPONSIBILITY AS *LEX SPECIALIS*?

Before turning to the case studies, this section will address an ostensibly powerful critique of the two-pronged system of state responsibility. The criticism underlying this critique entails that "the notion of jurisdiction under human rights law, and especially a rather narrow outlook on that notion, may obstruct [the] application of the law on state responsibility".²⁷⁶ Thus, Den Heijer points out that

"the regime on state responsibility has developed specific rules for attributing, for example, conduct of joint organs to a state and for holding states responsible for aid and assistance which is used by another state in violation of international law. These rules aim to ensure that states do not divest themselves of responsibility in situations where their involvement with a violation of an international norm may be indirect but nonetheless of such a decisive or materially important nature that it is appropriate to hold the state responsible. [...] [A] state should not be allowed to do through another actor what it cannot do by itself".²⁷⁷

274 Miltner, 2012, p. 738.

275 See also Da Costa, 2013, pp. 245–246; Den Heijer, 2015, p. 362.

276 Den Heijer, 2011, pp. 111–112.

277 Den Heijer, 2011, p. 111.

He consequently argues that a narrow interpretation of jurisdiction under international human rights law may render such carefully constructed rules of attribution and derived responsibility little more than empty vessels, since

“[i]f the proposition is adhered to that the condition of ‘jurisdiction’ necessarily requires that the state is directly involved in activity affecting an individual, or that the state’s activity directly affects an individual (or simply that the individual is under the state’s control), some of the rules on state responsibility [...] may become simply inapt to be applied to extraterritorial human rights violations, because these rules see precisely to circumstances where there may only be an indirect link between the individual and the acting state”.²⁷⁸

Consequently, Den Heijer seems to support the idea that the law on state responsibility as codified in the ILC Draft Articles constitutes a *lex specialis*: the law on state responsibility would have “endeavored to provide appropriate legal solutions” in order to “leave room for accommodating the often intricate forms of international cooperation and assertions of state influence over other international actors”.²⁷⁹

It is argued here that whilst Den Heijer’s critique is essentially a valid one, it could be more precise in pinpointing when exactly rules of state responsibility function as a *lex specialis*. Indeed, the jurisdictional requirement of international human rights law does not *necessarily* restrict the law on state responsibility and is on various occasions a vital part of – rather than anathema to – its functioning. Consider, for example, the case where states act extraterritorially in concert through common organs. The jurisdictional question is not problematic at all in this regard: since the conduct of the common organ is to be considered an act of each of the participating states, it can readily be established whether this act brings – under for example the relevant personal and spatial models – an individual within the jurisdiction of the involved states. Indeed, now that the entire act can be attributed to all of the states involved in the joint act, the question of extraterritorial jurisdiction does not fundamentally differ from a situation where a single state acted extraterritorially.

Consider, furthermore, the case where a state is derived responsible on account of its own involvement in another state’s internationally wrongful act on the basis of Article 16, 17, or 18 Draft Articles. Since in these cases responsibility is exceptionally not self-standing but derived,²⁸⁰ the first relevant question is whether the *acting* state has committed an internationally wrongful act.²⁸¹ That question can only be answered through the two-pronged

278 Den Heijer, 2011, p. 112.

279 Den Heijer, 2011, p. 112.

280 ILC Commentaries, at 64-65, paras 5 and 8.

281 Or, in cases of coercion ex Article 18 Draft Articles, whether the act concerned would, but for the coercion, be an internationally wrongful act of the coerced State.

system of state responsibility: (i) the act must be attributed to the acting state, and (ii) the act must constitute a breach of the acting state's human rights obligations, i.e. it must violate the rights of someone within the acting state's jurisdiction. If both components are answered in the affirmative, the act subsequently *could* give rise to derived responsibility on behalf of the *participating* states on the basis of Articles 16-18 Draft Articles. At this point, a differentiation has to be made between Article 18 on the one hand and Articles 16 and 17 on the other. Under Article 18 Draft Articles, it does not matter whether the coercing state has a corresponding duty under international human rights law and the jurisdictional question is therefore not relevant for this test in the first place. Indeed, whether or not jurisdiction can be ascertained on behalf of the coercing state is of no relevance given that the question whether the state would have committed an internationally wrongful act if it had acted itself has no bearing on its derived responsibility ex Article 18 Draft Articles. Since it has already been established in the initial two-pronged test of state responsibility vis-à-vis the acting state that the act, but for the coercion, constitutes an internationally wrongful act of the coerced state, and since the coercing state *automatically* becomes responsible for that act as long as it has knowledge of the circumstances of the act, the jurisdictional link of the coercing state *itself* is no longer required. This fits well with the inherent logic of Article 18 Draft Articles, in particular with the fact that the coerced state will on most occasions be able to rely on *force majeure* in order to preclude its own responsibility.²⁸² In relation to Article 18 Draft Articles, the *lex specialis* conception of the law on state responsibility as proposed by Den Heijer thus seems to have merit.

This is somewhat different in relation to Articles 16 and 17 Draft Articles. The crucial difference is that these Articles require that the act would *also* have been an internationally wrongful act of the aiding or assisting state respectively the directing or controlling state. This, then, requires one to perform an additional test of jurisdiction, albeit one based on a fictional rather than factual situation: *if* the act could have been directly attributed to the aiding or assisting state respectively the directing or controlling state, would it then constitute an internationally wrongful act? To answer this question, one necessarily needs to assess whether such an act would have brought an individual within the jurisdiction of the cooperating state concerned on the basis of *inter alia* the personal or spatial models of jurisdiction.²⁸³ This makes perfect sense: in

282 ILC Commentaries, at 70, para 4.

283 Viewed in this light, some ambiguity continues to exist however in relation to the question whether Articles 16 and 17 Draft Articles require the act to be opposable to both states under the *very same* international human rights obligations. Referencing the ILC Commentaries, Den Heijer argues that this is not the case since this "corresponds to the rationale of Article 16 that a state should not be allowed to do by another what it cannot do by itself": Den Heijer, 2011, p. 104-105. The ILC Commentaries are, however, less clear about this: they maintain in relation to Article 16 that "[a]n aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State

cases where a state has aided or assisted respectively directed or controlled the acts of another state extraterritorially – that is to say, not on the territory of the cooperating state – it is only congruent with the logic of international state responsibility and with the exceptional nature of extraterritorial jurisdiction to hold the cooperating state responsible for acts that would also have been internationally wrongful if it had performed these acts itself. Otherwise, the odd situation could arise where, for instance, a state that is assisting another state becomes responsible for an internationally wrongful act of the acting state even though it would not have been responsible for the very same act if it had performed such an act through its own agents. Requiring this hypothetical jurisdictional link is thus a logical aspect of derived responsibility on the basis of Articles 16 and 17 Draft Articles. By extension, this logic fits the underlying rationale of the system that Den Heijer aptly pointed out, i.e. that “a state should not be allowed to do through another actor what it cannot do by itself”.²⁸⁴ Indeed, the inverse seems to be largely true as well: a state should be allowed to do through another actor what it can do by itself, *unless* full coercion is concerned – which, again, is appropriately dealt with in Article 18 Draft Articles.²⁸⁵

In light of these considerations, the proposition that the law on state responsibility functions as a *lex specialis* should be duly nuanced. Different from what Den Heijer implies, it seems to function as such only in situations of derived responsibility, *not* in relation to for example acts through common organs, which also makes sense in light of the fact that Chapter IV of the ILC

cannot do by another what it cannot do by itself”: ILC Commentaries, at 66, para 6 (emphasis added). Likewise, in relation to Article 17, the Commentaries state that “it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of *bilateral obligations, which are not opposable to the directing State*. In cases of multilateral obligations and especially of obligations to the international community, it is of much less significance”: ILC Commentaries, at 69, para 8 (emphasis added). This seems to provide support to the claim that the act should be opposable to both states under the very same international obligation: the responsibility of the directing state is largely excluded by the Commentaries in cases where bilateral obligations are concerned, seemingly irrespective of the question whether the directing state may have had similar bilateral obligations vis-à-vis the third state involved.

²⁸⁴ Den Heijer, 2011, p. 111.

²⁸⁵ One should not forget that in the scenarios of aiding/assisting and directing/controlling, the acting state remains independently responsible for its internationally wrongful act as well. Requiring a jurisdictional link for these bases of derived responsibility does thus not necessarily frustrate the proper functioning of international state responsibility or the international human rights system as such in the first place, since the responsibility of acting states can be ascertained independently from any further derived responsibilities. Instead, requiring a jurisdictional link between the participating state and the affected individual safeguards that states are not – safe for cases of coercion – unduly held responsible for internationally wrongful acts that would not have been internationally wrongful if they had performed them themselves, *simply* on account of the fact that they aided, assisted, controlled, or directed.

Draft Articles – covering derived responsibility – blurs the distinction between primary and secondary rules of international law.²⁸⁶ Furthermore, different from derived responsibility ex Article 18 Draft Articles, in the context of Articles 16 and 17 Draft Articles, the law on state responsibility arguably changes the *nature* of the jurisdictional test – i.e. it mandates a test of fictional jurisdiction rather than factual jurisdiction – but does not replace the jurisdictional test altogether. The jurisdictional thresholds that conditionalize the respective human rights treaties thus apply unabatedly, save for coercion ex Article 18 Draft Articles, but the way in which these thresholds are tested differs.

7.6 APPLYING THE FRAMEWORK: RPC NAURU

7.6.1 Nauru's human rights obligations

Nauru became member of the United Nations in September 1999 and has since become party to four of the nine core UN human rights treaties: the UN Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),²⁸⁷ and the Convention on the Rights of Persons with Disabilities (CRPD).²⁸⁸ Nauru signed the ICCPR and the First Optional Protocol in 2001 but has not yet ratified them; it has likewise signed but not ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Nauru is not bound by any regional human rights mechanism – in fact, the Asia-Pacific region currently has no regional human rights legal instrument,²⁸⁹ court, or monitoring body.²⁹⁰ Although some progressive human rights movements have been denoted, there moreover does not appear to be a clear roadmap to achieving comprehensive regional protection in the Asia-Pacific region any time soon.²⁹¹

²⁸⁶ It indeed specifies particular internationally wrongful acts: ILC Commentaries, at 65, para 7.

²⁸⁷ Nauru is also member to the Optional Protocol to the CAT.

²⁸⁸ The remaining core treaties are the ICCPR, the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).

²⁸⁹ Except for the ASEAN Human Rights Declaration. Both Australia and Nauru are, however, not members of the ASEAN.

²⁹⁰ Durbach, Renshaw, & Byrnes, 2009; Katsumata, 2009.

²⁹¹ European Parliament Directorate-General for External Policies Policy Department, 2010, p. 13. It is therefore little surprising that the seminal handbook edited by Moeckli, Shah, and Sivakumaran includes specific chapters on the protection of human rights in the UN, the Americas, Europe, Africa, and on the domestic level, but has no separate entry on

The fact that Nauru has not signed the ICESCR or ratified the ICCPR may appear to be a significant challenge to the scope of Nauru's treaty obligations in the RPC. Indeed, the basis of responsibility under human rights treaty regimes is that states "have willingly, knowingly, and purposely agreed to be bound by the provisions in various human rights treaties".²⁹² At the same time, this does not mean that Nauru is relieved of human rights obligations beyond the treaties it ratified. On the one hand, whilst the mere signing of a Treaty without subsequent ratification does not bind the state to the respective Treaty's terms, the state should still refrain from defeating the object and purposes of the Treaty in accordance with Article 18 VCLT, a provision that itself is part of customary international law.²⁹³ On the other hand, Nauru is bound by international customary human rights law independent of whether it has signed human rights treaties, yet such customary obligations are, as previously stipulated, not part of the present inquiry.

In sum, treaty-wise, Nauru is bound by the obligations of the treaties it ratified and must in addition refrain from defeating the object and purpose of the treaties it has signed but not (yet) ratified. The jurisdictional scopes of these respective sources consequently determine the responsibility of Nauru in the RPC under international human rights law. For present purposes, analysis will focus on those treaties that have been discussed in this chapter and that Nauru is a party to or has signed, i.e. the CAT and the ICCPR.

As explained above, the jurisdictional clauses of the CAT and the ICCPR refer to the territory of states, therewith staying veracious to the fundamental tenet of territorial state responsibility, although some resilience vis-à-vis commodification developments can also be detected. Establishing Nauru's human rights responsibilities in the RPC under these treaties is henceforth little problematic: given that Nauru exercises territorial jurisdiction, its responsibility is engaged. In relation to the CAT, this means that Nauru's negative and positive obligations apply in relation to the RPC: Nauru should not only respect the rights enshrined in the CAT by refraining from infringements, but should also proactively protect and fulfil them. In relation to the ICCPR, this is slightly different since Nauru is merely a signatory state. Since Nauru does exercise territorial jurisdiction, however, it must generally refrain from defeating the ICCPR's object and/or purpose congruent with article 18 VCLT.²⁹⁴ This primarily requires Nauru to *refrain* from certain conduct, but may occasionally also entail a call for active engagement in order to ensure that the object and purpose of the treaty are not defeated.²⁹⁵ *In casu*, the object and purpose of the ICCPR is, according to the HRCee,

protection in the Asian-Pacific region: Moeckli, Shah, & Sivakumaran, 2014.

292 See Gibney, 2016, pp. 10–17.

293 Guzman, 2008, pp. 177–178; Villiger, 2009, p. 247.

294 Guzman, 2008, pp. 177–178; Villiger, 2009, pp. 242–253.

295 Villiger, 2009, pp. 249–250.

“to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken”.²⁹⁶

Whilst Nauru’s obligations on this basis are not clearly circumscribed, it at least should henceforth refrain from defeating this particular purpose.

Nauru’s responsibility is thus engaged. The consequent question is how absolute such responsibility is: as problematised above, within the ICCPR framework the HRCee has considered that states may be precluded from exercising control over all of its territory “and consequently cannot ensure the application of the Covenant in areas not under its jurisdiction”.²⁹⁷ On this basis, it was concluded above that territorial jurisdiction may exceptionally be limited in cases where the state has lost effective control over (parts) of its territory. In the case of the RPC on Nauru, such exceptional circumstances are nevertheless not present. As I assessed elsewhere,

“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 by a foreign power and Nauru exercises a certain degree of sovereign control over the asylum seekers processed in the RPC”.²⁹⁸

Nauru’s responsibility on the basis of its territorial jurisdiction is, consequently, not limited but applies in full force in the context of the RPC.

7.6.2 Australia’s human rights obligations

Australia is party to all core UN human rights treaties except for the ICRMW and the CPED. Of the treaties scrutinised here, Australia is thus party to the ICCPR, the ICESCR, and the CAT. Since, as pointed out above, the Asia-Pacific region has no region-wide human rights treaty,²⁹⁹ the analysis here will limit itself to these three instruments.

²⁹⁶ HRCee, *General Comment no. 24*, 4 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, para 7.

²⁹⁷ HRCee, *Concluding Observations of the Human Rights Committee on the Third Periodic Report of Cyprus*, para. 3.

²⁹⁸ Van Berlo, 2017d, p. 50.

²⁹⁹ Durbach et al., 2009; Katsumata, 2009. As pointed out above, whilst there is an ASEAN Human Rights Declaration, both Australia and Nauru are not members of the ASEAN.

Since Australia acts extraterritorially in relation to RPC Nauru, its human rights obligations under these various treaties only apply if exceptional circumstances are met. The analysis above has shown that under the ICCPR, what is required in this regard is either power or effective control over one or more individuals abroad or effective control over a physical area. Likewise, under the CAT, extraterritorial jurisdiction arises when a person is under the effective control of a state's authorities or when a state exercises effective control over territory. Under the ICESCR, in addition to the more general yet ill-defined obligations to cooperation and assistance that do "not imply the exercise of extraterritorial jurisdiction by the States concerned",³⁰⁰ extraterritorial obligations arise if a state exercises effective control over 'situations', which at least includes effective control over territory.³⁰¹

The relevant question is hence whether Australia exercises effective control over (part of) Nauru's territory or over individuals in RPC Nauru as a result of its involvement in the facility. Consensus is lacking in relation to this issue: views on whether Australia exercises extraterritorial jurisdiction in RPC Nauru differ. Some commentators conclude that Australia exercises extraterritorial jurisdiction either because it exercises effective control over *persons* in the RPC, or because it has a significant amount of influence over the stakeholders involved and therefore exercises effective control over the RPC as an *area*.³⁰² According to some of these authors, however, the lack of transparency in relation to RPC Nauru makes it difficult to establish the precise scope of Australia's effective control.³⁰³ On the other hand, some commentators consider establishing Australia's effective control over offshore processing facilities more problematic. In discussing the comparable facility on Manus Island, Taylor for example argues that Australia does not have effective control over (part of) PNG's territory and hence does not exercise spatial jurisdiction, whilst it also does not fulfil the personal test of extraterritorial jurisdiction because it is PNG that detains.³⁰⁴ Indeed, generally, personal jurisdiction requires *full* physical control.³⁰⁵

The lack of consensus is not only the result of limited transparency, but also of the nodal nature of governance. The 'effective control over territory' and 'effective control over persons' tests by all means are grounded in a *de facto* examination of the given situation as opposed to a mere finding of *de*

300 CESCR, *General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, para 33.

301 It is less likely to include a personal model of extraterritorial jurisdiction: see footnote 74. above.

302 See e.g. Dastyari, 2015b; Foster, 2014; Gleeson, 2015. See also CATee, *Concluding Observations on the Fourth and Fifth Periodic Reports of Australia*, 26 November 2014, UN Doc. CAT/C/AUS/4-5/18888, p. 6. Furthermore, see Van Berlo, 2017d, p. 53.

303 Gleeson, 2015.

304 S. Taylor, 2010, p. 350.

305 Gammeltoft-Hansen, 2011, p. 167.

jure empowerment. It is, in other words, the *factual* situation of power that by and large determines whether a state exercises effective control over either territory or person. As a consequence, the nodal set-up of governance in RPC Nauru significantly hampers a proper assessment in this regard for the factual balance of power continuously shifts and at times is reconfigured altogether. For example, Nauru's influence and power over the arrangements have seemingly grown steadily over the years, amongst others due to the introduction of Nauruan Operational Managers in the RPC in 2014, the fact that Nauru gradually has taken control over the asylum processing system, and the establishment of the Nauru (RPC) Corporation with far-reaching competencies vis-à-vis private contractors. As I previously observed,

“[w]hilst 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”.³⁰⁶

Consequently, whether or not the threshold for extraterritorial jurisdiction – whether it be on the spatial or on the personal model – is *in casu* met “depends on the specific complaint and the particular involvement of the various actors”.³⁰⁷ Examining the Pacific Solution Mark I, Den Heijer comes to a similar conclusion:

“[g]iven the plurality of actors involved and the complexity of the legal arrangements, it will depend on the precise complaint at issue and the involvement of the respective parties [...] on what account individuals should be considered to fall within the jurisdiction of Nauru or Australia for the purposes of human rights protection”.³⁰⁸

Generally speaking, however, some observations can be made. First, the introduction of open centre arrangements in 2015 seems to be a significant turning point in terms of effective control. Up until that point, it could be argued that Australia exercised effective control over the individuals detained in the facility on the basis of a personal model: crucially, individuals were detained in the facility by private actors that were contracted, paid, and directed by Australia and whose conduct can, as the previous chapter has analysed, generally be attributed to Australia. More generally, Australia controlled vital aspects of detainees' lives whilst confined, including their healthcare and welfare. At the same time, it should be mentioned that, as likewise analysed in the previous chapter, from the 21st of May 2014 onwards

306 Van Berlo, 2017d, p. 54.

307 Van Berlo, 2017d, p. 55.

308 Den Heijer, 2011, p. 294.

security and garrison personnel of Wilson Security were exercising – as authorised officers – elements of governmental authority as provided for in Nauruan internal law. Since their detention-related conduct can, from that date onwards, as a consequence also be attributed to Nauru, Australia and Nauru jointly had effective control over the confined individuals between that date and October 2015, when open centre arrangements were implemented.³⁰⁹ Indeed, now that acts of security and garrison providers from that date onwards can generally be attributed to both nations, their consequent effective control – by means of full, physical control – appears given.³¹⁰ Contrary to what the ECtHR considered in *Hess*, it is not problematic to divide such exercise of joint control into separate jurisdictions,³¹¹ and Australia thus continues to exercise jurisdiction even though another sovereign nation simultaneously exercises effective control over individuals. Whereas for Nauru this does not change the outcome of the jurisdictional test – it exercises territorial jurisdiction and continues to be responsible on that base – for Australia’s responsibilities this finding is of prime importance: Australia’s human rights obligations under the ICCPR and CAT apply to those confined in RPC Nauru ever since the implementation of OSB (and, arguably, also before that under the Pacific Solution Mark II), up until the moment that the facilities were changed into open centres.

Indeed, as chapter 4 has already detailed in the context of justified interferences with the right to liberty, from that moment onwards, individuals were no longer – at least not formally – *detained*, which seems to be a defining condition for the exercise of personal jurisdiction on the basis of full physical control. With individuals no longer being detained, and with Nauru being in charge of their asylum claims processing, it is difficult to maintain that Australia still exercised effective control over individuals on the basis of full physical control. To the contrary, from October 2015 onwards Australia provided, on the basis of the MoU and Administrative Arrangements, services to accommodate the processing of asylum claims by Nauru, which in general does not amount to any concrete physical control over individuals. Likewise, there is generally no basis to conclude that Australia exercised at any time extraterritorial jurisdiction on the basis of the spatial model, whether it be before or after the facility turned into an open centre. Australia indeed by no means seems to have exercised, at least not *in abstracto*, effective control over the physical territory on which the RPC was located. Rather, it were the Nauruan authorities – including the RPC Operational Managers and the Nauru Police Force – that remained in charge of the premises and that retained the

309 The same goes for the specific period of time in July 2013 when Wilson Security staff was sworn in as reserve officers of the Nauru Police Force Reserve (NPFR).

310 This goes to show how attribution and jurisdiction at times may be mutually informing.

311 The reasoning of the ECtHR in *Hess* has already been nuanced and partially discarded above: see footnotes 120-125 and accompanying text.

right to enter the facility at any time, and that consequently continuously have exercised effective control over their sovereign territory.

As such, *in general*, there is no basis to assume that Australia's obligations under the ICCPR and CAT apply to the RPC after the RPC turned into an open centre.³¹² In addition, the observation that Australia at no point exercised extraterritorial jurisdiction under the spatial model also seriously challenges the applicability of Australia's ICESCR obligations to the situation at hand. Since, as outlined above, ICESCR obligations apply where states exercise effective control over 'situations', which in turn is not very likely to include effective control over persons, Australia's obligations under the ICESCR may not arise at all.

The applicability of Australia's self-standing human rights obligations in RPC Nauru seems to have been seriously circumscribed by the introduction of open centre arrangements. Two developments might nevertheless have a mitigating effect in this regard. First, since Australia's involvement in RPC Nauru potentially amounts to aid and assistance to Nauru as explicated in chapter 6, it *could* be argued that Australia's human rights obligations apply on the basis of derived responsibility which could, as outlined above, function as a *lex specialis* of sorts. However, as also explicated above, three conditions need to be fulfilled in this regard: (i) Australia must be aware of the circumstances that make Nauru's conduct an internationally wrongful act, (ii) Australia must give aid or assist with a view to facilitating the commission of that act and must actually give the aid or assist, and (iii) the completed act of Nauru would also have constituted an internationally wrongful act if conducted by Australia. The second criterion has already been problematised in chapter 6: in a general sense it cannot be assumed that Australia intended its aid or assistance to result in human rights violations on the hands of Nauru. In addition, the third criterion is problematic as well since it requires that a jurisdictional test based on a fictional situation is fulfilled. Thus, what is required is that the impugned act by Nauru would, if it could have been directly attributed to Australia, have constituted an internationally wrongful act of Australia, which in turn requires one to establish whether such directly attributable act would have amounted to the exercise of extraterritorial jurisdiction on the basis of the spatial or personal model. Whilst this ultimately depends on the concrete conduct involved, it generally seems unlikely that – after the introduction of open centre arrangements – such test on the basis of a fictional situation will *in casu* be answered in the affirmative. Since detention ended in October 2015, it is unlikely that any of the subsequent acts of Nauru to which Australia provided aid or assistance would have amounted to effective control over territory or over person if they would have been performed by Australia itself. Indeed, if Australia had performed such acts

312 Although specific contextual circumstances related to specific events may prove differently.

itself, this still would, *generally*, not have meant that it either exercised effective control over a certain demarcated territory to the exclusion of the Nauruan authorities, or that it exercised effective control over individuals on the basis of full, physical control. Consequently, whereas Australia's self-standing human rights obligations can generally not be presumed to apply to RPC Nauru post October 2015 given the factual overall lack of effective control over territory or persons, its derived human rights obligations on the basis of its aid and assistance can likewise not be presumed to apply to RPC Nauru after the introduction of open centre arrangements. It should be reiterated that concrete factual situations may lead to different conclusions, for instance when relating to specific conduct amounting to inhuman or degrading treatment that could ultimately result in the exercise of effective control over persons, yet as a matter of general principle the potential of derived responsibility *in casu* thus seems to be significantly circumscribed.

Second, Australia's human rights obligations may still apply to RPC Nauru insofar as positive obligations are concerned. Such positive obligations may indeed arise as a result of Australia's exercise of control over intercepted individuals during their transfer to Nauru. Similar to extradition, states' obligations may indeed arise when an individual is transferred to a country where his or rights are likely to be violated.³¹³ Such cases generally concern, however, situations in which extradited individuals face a real risk of being tortured or inhumanely or degradingly treated – two unequivocal human rights violations. In the context of RPC Nauru, this is different, in particular after open centre arrangements were introduced: given the assurances sought and monitoring of the facility by Australia, it is difficult to establish *a priori* whether and to what extent the rights of a transferred individual will be violated at RPC Nauru. Before the implementation of open centre arrangements, detention at RPC Nauru could potentially be argued to amount to a foreseeable violation of the human right to liberty and the prohibition of arbitrary detention, yet such objections do generally no longer apply from October 2015 onwards.³¹⁴ Consequently, other grounds will have to be provided in order to show that transferred individuals run the risk of having their rights violated, which ultimately depends on a factual assessment of the situation on the ground. This, on the other hand, is obstructed by the non-transparent nature of the facilities. Australia frequently voices that the monitoring mechanisms in place sufficiently safeguard against future violations. Such claims can, in turn, only be refuted by concrete evidence to the contrary. In this regard, the many critical acclaims of amongst others the health situation in RPC Nauru are crucial: expert evidence could indeed raise a powerful counterclaim that transferred indi-

313 See for example HRCee, *Chitat Ng v. Canada*, 7 January 1994, Comm. no. 469/1991, UN Doc. CCPR/C/49/D/469/1991, para 14. See, in the European context, ECtHR, *Soering v. United Kingdom*.

314 Compare ECtHR, *J.R. and Others v. Greece*, para. 86.

viduals run the risk of having amongst others their rights to health, as well as their rights not to be tortured or subjected to other inhuman or degrading treatment, violated.³¹⁵ Hence, when individuals are within Australia's jurisdiction from the moment of interception up until their arrival on Nauru, Australia's positive obligations may prohibit it to transfer those individuals to Nauru, which ultimately is an obligation of due diligence. Australia thus needs to offset the potential risk to individuals' human rights by any viable means available to them, for example by seeking sufficient assurances from the government of Nauru and by closely monitoring the situation through its organs on island.

7.7 APPLYING THE FRAMEWORK: PI NORGERHAVEN

7.7.1 The Netherlands' human rights obligations

The Netherlands is party to all core UN human rights treaties except the ICRMW. Of the treaties discussed here, it is hence party to the ICCPR, the ICESCR, and the CAT. In addition, the Netherlands is party to the ECHR.

As analysis above has shown, the applicability of each of these treaties includes *at least* the territory of the member state concerned. As a consequence, establishing the Netherlands' human rights responsibilities in PI Norgerhaven is hardly problematic: given that the facility is located on its soil, the Netherlands in principle exercises territorial jurisdiction and its responsibilities under the various treaty regimes are therewith engaged. The Netherlands' negative and positive obligations vis-à-vis those confined in the prison facility hence apply.

This presumption of territorial jurisdiction can only be limited in exceptional circumstances. As mentioned above, the HRCee has considered that states that have lost effective control over (parts) of their territory may be precluded from exercising control over all of its territory "and consequently cannot ensure the application of the Covenant in areas not under its jurisdiction".³¹⁶ Likewise, the ECtHR has considered that whilst jurisdiction is presumed to be exercised normally throughout the state's territory, this presumption can only be limited "in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory".³¹⁷ In the context of PI Norgerhaven, however, such exceptional circumstances

315 See, for example, the 2018 call for an immediate evacuation by NGO Médecins Sans Frontières on the basis of the mental health situation that is "beyond desperate": Médecins sans Frontières, 2018.

316 HRCee, *Concluding Observations of the Human Rights Committee on the Third Periodic Report of Cyprus*, para. 3.

317 ECtHR, *Ilașcu and Others v. Moldova and Russia*, para 312.

do not exist. The Netherlands entered into a bilateral treaty with Norway, which was considered beneficial for both countries for different reasons, and has facilitated the arrangements throughout the period of time in which the Treaty was in force. In fact, the daily operation of the facility was fully within the responsibility of a Dutch Staff and Facility Manager. The Netherlands thus by no means was unwillingly prevented from exercising its authority in the prison facility and the full range of its obligations under the various human rights treaties continues to apply.

7.7.2 Norway's human rights obligations

Norway is party to all core UN human rights treaties except for the ICRMW and the CPED.³¹⁸ It is hence party to the ICCPR, the ICESCR, and the CAT. Regionally, Norway is furthermore party to the ECHR.

Similar to Australia's position in relation to RPC Nauru, Norway's human rights obligations only apply in PI Norgerhaven when certain conditions are met. To reiterate, under the ICCPR and CAT, it is required that Norway exercises either power or effective control over individuals abroad or effective control over a physical area. In relation to the ICESCR, Norway would have to exercise effective control over 'situations', which at least includes effective control over territory but is less likely to include effective control over persons. In addition, under the ECHR, in a similar vein as under the ICCPR and CAT, it is required that Norway exercises effective control over persons or effective overall control over territory.

The relevant question here is therefore whether Norway exercised, as a result of its involvement in PI Norgerhaven, effective control over (part of) the Netherlands territory, or, alternatively, over individuals. Different from Australia's involvement in RPC Nauru, the answer to this question in the context of Norway's involvement in PI Norgerhaven seems to be much more straightforward. Indeed, it is uncontested that Norway exercised control over those confined in PI Norgerhaven: prison sentences were executed in accordance with Norwegian law, prison staff was instructed by a Norwegian prison governor, and the facility administrative-wise functioned as an annex of Ullersmo prison in Norway. Such involvement clearly suffices the threshold of full physical control required for establishing personal jurisdiction.³¹⁹

On this basis, the extraterritorial application of Norway's obligations under the ICCPR, the CAT, and the ECHR can readily be established. As pointed out above, however, the personal model of jurisdiction seems to be insufficient

318 Norway has signed the CPED but has not ratified it as of yet.

319 It in fact can be argued to amount to the exercise of 'public powers': compare ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber) and the discussion in section 7.4.5.3. above.

to trigger the extraterritorial application of ICESCR rights. Therefore, we should also briefly turn to the question whether Norway's involvement in PI Norgerhaven amounts to the required amount of 'control over *situations*'. Whilst this threshold encapsulates a territorial model of extraterritorial jurisdiction, it is arguably broader in that control over 'situations' does not necessarily require effective control over territory as such. In the context of PI Norgerhaven, the involvement of Norway arguably amounts to the required amount of control: Norway enjoys an exclusive decision-making prerogative vis-à-vis the prisoners and henceforth has full effective control over the situation in which they are confined. In fact, Norway has a central position in the enjoyment of economic, social, and cultural rights of prisoners in PI Norgerhaven – who remain subjected to the Norwegian penal system in full – and it therefore also teleologically makes sense that Norway's ICESCR obligations apply in full.

Both the human rights obligations of the Netherlands and Norway hence apply in the prison facility. This means that both their negative and their positive obligations apply. These rights are not mutually exclusive but exist concurrently.

7.8 CONCLUSION

In this chapter, the second leg of establishing state responsibility for a human rights violation as an internationally wrongful act has been analysed in light of contemporary commodification developments. Specifically, this chapter has questioned the extent to which international human rights law has showcased veracity to its fundamental tenet of territorial state obligations on the one hand, and resilience in the light of commodified realities on the other.

Analysis of the various treaty regimes shows that each instrument has been developed in accordance with both a veracious and a resilient stance, although the balance between both attitudes differs from instrument to instrument. Most of the examined human rights treaties stay veracious to the fundamental tenet in the sense that they connect their jurisdictional scope to the notion of sovereign territory. In the contexts of some treaty regimes, territory is explicitly mentioned in the jurisdictional clause, whereas in the contexts of other treaties territoriality is inferred from, for instance, teleological interpretation (inquiring into the object and purpose of the treaty) or subjective interpretation (looking at the intentions of the state parties as for instance expressed in the *travaux préparatoires*).³²⁰ Human rights obligations thus apply *at least* – and presumed-ly – in a state's territory. At the same time, all treaty regimes also show particular resilience in the face of commodification realities, as they all have, in their own ways, developed exceptions to the norm of territorial applicability.

³²⁰ Such interpretation is in accordance with Article 33 VCLT. See generally also Jacobs, 1969.

Thus, even where states operate abroad, for instance in nodal governance networks of confinement involving two or more states, their human rights responsibilities can still be established on the basis of exceptional bases for extraterritorial jurisdiction. Whilst each human rights instrument has developed its distinct bases for such extraterritorial jurisdiction, what transpires is that most of these bases have been developed along the lines of either a personal, or a spatial, model. Often, this entails that the human rights obligations of states under the various treaty regimes still apply whenever these states exercise authority and control elsewhere, either over a particular territory or over a particular person, provided that particular criteria are met as outlined above.

As such, the various treaty regimes seem to have struck a balance between veracity – territorial state responsibility being the norm – and resilience – extraterritorial jurisdiction being exceptional. At the same time, as has been illustrated in the context of the ECHR, in practice monitoring bodies have not always been able to maintain such balance axiomatically. At least six complexities, identified above, show how a resilient approach through the application of exceptional models of extraterritorial jurisdiction can be, at times, a haphazard, contradictory, confusing, and contested endeavour. The ECtHR has indeed seemingly struggled with striking a fair balance between veracity and resilience in the face of the increasing, at times highly resourceful, involvement of states in extraterritorial settings. As the identified complexities showcase, the fact that each case of extraterritorial conduct involves unique contextual particularities has, at times, constituted a serious impediment for the ECtHR to effectively bring such cases under the umbrella of either the personal or the spatial model. In such instances, the Court has frequently exhibited a high level of resilience in order to nevertheless provide for human rights protection. Conversely, the Court has at times – for instance in the much criticised *Banković* decision – relied heavily on veracity, leaving applicants without protection that could have been provided through a more resilient approach. Ultimately, the Court's case law indicates the significant struggle that monitoring bodies encounter when dealing with the paradoxical need to be both veracious and resilient.

The complexity of striking a balance has been illustrated in this chapter in the context of RPC Nauru. As has been detailed in section 7.6.2., there are indeed difficulties associated with holding Australia as the non-territorial state responsible for human rights obligations. Thus, as a result of the lack of transparency, the nature of the nodal governance network involved, and the ingenuity and tactics employed by both states involved, the determination of extraterritorial jurisdiction on behalf of Australia is, at least in a general sense, problematic. An important turning point seems to be the transformation of RPC Nauru into an open centre, which has further complicated the matter and arguably means that Australia's extraterritorial jurisdiction does, *generally*, not arise. Whilst positive obligations of non-refoulement may to a certain extent offset these difficulties – indeed, such obligations arise whenever Australian

officials take IMAs into custody and transfer them to Nauru – their potential to do so is, as detailed above, ultimately constrained given the nature of positive obligations.

The case study context of PI Norgerhaven, on the other hand, paints a different picture. Section 7.7.2. has shown that holding Norway responsible for its obligations under the various human rights instruments is hardly problematic. Several reasons underly this marked difference with the context of RPC Nauru. First and foremost, the fact that PI Norgerhaven involves confinement in the sphere of criminal justice clearly indicates Norway's extraterritorial responsibility. Indeed, with prison sentences being executed in accordance with Norwegian law, prison staff being instructed by a Norwegian governor, and the facility administratively functioning as an annex of Ullersmo prison in Norway, there is no difficulty in establishing that Norway exercised extraterritorial jurisdiction on the basis of the personal model. Moreover, under the ICESCR, extraterritorial jurisdiction likewise arises given Norway's effective control over the situation in PI Norgerhaven. Second, the arrangements have been clearly documented, responsibilities have been transparently divided, and Norway has never disputed that it exercises jurisdiction in PI Norgerhaven. It ensured, in fact, effective oversight over the facility, even though the level of oversight that could be exercised has been criticised as insufficient.³²¹

What this shows is, again, the crucial importance of the 'glocal level' in interpreting resilient and veracious efforts. Indeed, such endeavours may take place most visibly on a macro level, that is, through monitoring bodies' interpretations, but ultimately play out in domestic contexts. Simultaneously, such local contexts continue to inform developments at the global level: in fact, many adjustments to the systematics of international human rights law are not based on observations of macro-level trends of commodification, but on the local contextualised appearances of commodification with which monitoring bodies are faced in applying human rights instruments and in developing their case law. Local occurrences indeed do not only follow models of extraterritorial jurisdiction – they also *shape* them. Consequently, the interaction between the global and the local at the 'glocal' level is dynamic and may, as the case study contexts illustrate, yield nearly opposite results on the basis of *both* the particularities of macro-level instruments and those of localised environments.

Combining the conclusions of the past three chapters, some overarching observations can be made. Private human rights responsibility has largely remained *de lege ferenda* whilst the system of international state responsibility has maintained a presumptive focus on the territorial state. The state's responsibility for private conduct (through means of attribution) or for extraterritorial conduct (through means of extraterritorial jurisdiction) has hence remained exceptional whilst private human rights obligations have remained the nearly

321 See, notably, Sivilombudsmannen, 2016.

sole concern of soft law and voluntary initiatives. The picture that has been painted in these chapters is thus two-fold: international human rights law has been adjusted to a certain extent to commodification in a resilient effort, yet this has continuously been pursued with veracity to the fundamental tenet of territorial states as duty bearers. In other words, developments towards private responsibility and the evolution of extraterritorial (spatial and personal) models of jurisdiction are quintessential expressions of resilience, but such endeavours remain nevertheless confined by the need to stay veracious to the fundamental tenet of territorial state responsibility. This has not seldomly resulted in puzzling and perplexing case law that has not been fully developed or exhaustively dealt with yet. Indeed, present commodification realities continue to pose significant dilemmas for international human rights law and its monitoring bodies. The doctrine of positive obligations has seemingly helped in this regard as it broadens the scope of obligations and allows for new avenues to induce responsibility, yet it has not been a panacea to the limitations of international human rights law's legal technicalities. If anything, positive obligations operate on the same basis – i.e. on the basis of the territorial state as primary duty bearer – and within the same system – i.e. within the two-pronged test of international state responsibility – as the arguably more traditional limb of negative human rights obligations.

A final remark is in order here. At various points, this book has warned against an undue conflation of similar terminologies in different contexts. For example, it has warned against the conflation of 'jurisdiction' in public international law and 'jurisdiction' in international human rights law. Similarly, it has warned against the conflation of 'effective control' as a standard for attribution and 'effective control' as a standard for extraterritorial jurisdiction. At this point, it should be added that one should not unduly conflate the notions of 'jurisdiction' in different human rights law regimes. Admittedly, it is true that the tests for extraterritorial jurisdiction under various human rights instruments show a "remarkable degree of coherence and consistency".³²² Various monitoring bodies have indeed developed spatial and/or personal models of extraterritorial jurisdiction that are comparable – albeit not identical – in terms of their nature and scope. A closer look of the various systems, however, reveals that extraterritorial jurisdiction has developed differently under each of these instruments. The various approaches are indeed highly contextualised and by no means support a theory of convergence.³²³ In the context of the ICESCR, for example, the notion of 'control over *situations*' has acquired a particular expansive meaning and has to a large extent replaced the notions of 'control over persons' and/or 'control over territories' that continue to guide the scope of extraterritorial jurisdiction in various other treaty regimes. In the context of the Inter-American system, furthermore,

322 Hathaway et al., 2011, p. 390.

323 Miltner, 2012, pp. 746–747.

extraterritorial jurisdiction for a long time has developed along the lines of a personal model only. Recently, the IACtHR has furthermore inquired into effective control over domestic activities with extraterritorial effect, which also goes to show how the development of extraterritorial jurisdiction under the Inter-American system remains a unique exercise that at times resembles those developments under other treaty regimes but nevertheless follows a distinct trajectory. Consequently, one should be wary of endeavours establishing an overarching set of criteria for extraterritorial jurisdiction under the various treaty regimes: reducing extraterritorial jurisdiction under the various treaty regimes to two generalised models of ‘personal’ and ‘spatial’ jurisdiction is not only unwarranted in light of the marked differences between treaty regimes, but also risks losing the richness and nuances of the debates on – and tests of – extraterritoriality under each respective regime. In essence, the scope of extraterritorial jurisdiction under each instrument is the result of a nuanced balancing exercise between human rights’ territorial presumption and contemporary extraterritorial realities, and this scope can consequently only be properly understood when viewed in the context of the respective treaty regimes. This furthermore allows for debate and reflection, as it allows for a comparison of the extraterritorial reach of various human rights treaties and therewith raises questions about the appropriate scope of extraterritorial obligations and the extent to which treaty bodies could and should adopt rules developed in the contexts of other regimes. Whereas some have denoted 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”,³²⁴ such holism is arguably not favourable insofar as the scope of extraterritorial jurisdiction is concerned. In this sense, calls for a “normative synergy amongst human rights treaties”, entailing that normative boundaries between human rights treaties collapse and that the various human rights monitoring bodies “consider their six treaties as interconnected parts of a single human rights ‘constitution’ and thereby consider themselves as partner chambers within a consolidating supervisory institution”,³²⁵ are not shared without further reservation here. Such synergy would not only reduce the importance of context-specific differences between treaty regimes, but would also diminish opportunities for inter-institutional reflection and debate on the proper development of extraterritorial jurisdiction.³²⁶

324 Petersmann, 2003, p. 381.

325 Petersmann, 2003, p. 381; Scott, 2001, pp. 8–11.

326 The existing opportunities of ‘tacit citing’ may be preferential in this regard: see Buyse, 2015.

INTERMEZZO

Ambiguity and abundance of control

The contextualised challenge for international human rights law in Nauru and Norgerhaven

Introduction

Before turning to Part III of this book, this intermezzo concisely draws together the findings of this Part in relation to the human rights implications of commodification for the case study contexts of RPC Nauru and PI Norgerhaven. The previous chapters have already made clear that both case studies differ significantly in terms of their complexity. Whereas the governance network of RPC Nauru is constituted by public, private, domestic, and foreign nodes simultaneously, the nodal governance network of PI Norgerhaven is less complex as it only involves the public authorities of two states. In turn, this means that analysis of international human rights law in RPC Nauru has to take into account the full breadth and depth of international human rights responsibility, including developments in the field of private human rights obligations (as discussed in chapter 5) and complex rules of attribution relating to the attribution of private conduct to states (as discussed in chapter 6). In addition, the effective control of either of both governments over those confined is much less clear in the context of RPC Nauru than it is in the context of PI Norgerhaven, which *inter alia* troubles establishing extraterritorial jurisdiction on behalf of Australia (as discussed in chapter 7). In the context of PI Norgerhaven, on the other hand, questions of attribution and jurisdiction have been quite straightforwardly answered as section 6.6. and section 7.7. have shown.

However, the foregoing should not be mistaken to mean that the division of responsibility in international human rights law, based on the rules set out in this Part, is problematic only in the context of RPC Nauru. To the contrary, as this intermezzo will illuminate, the way in which international human rights law has shown resilience whilst staying veracious in the face of commodification developments may ultimately lead to human rights complexities for both case studies. Thus, as argued below, whilst in the context of RPC Nauru such complexities arise from the *ambiguity* of control, in the context of PI Norgerhaven such complexities arise, quite paradoxically, from the *abundance* of control.

RPC Nauru: the ambiguity of control

The essential problem of international human rights law that arises in the context of RPC Nauru is quite straightforward: it entails that the exercise of control in the nodal governance network is too ambiguous to clearly establish international human rights law responsibility. This difficulty focuses primarily on the responsibility of states, for, as chapter 5 has shown, the private actors involved in RPC Nauru have no self-standing binding human rights obligations as a matter of international law. To the contrary, their conduct is subjected to a number of soft-law norms and principles established by corporate actors themselves. The effectiveness of these instruments in the context of RPC Nauru will be scrutinised in chapter 9. Here, the focus will be on Australia and Nauru as the only two potential duty-bearers with binding obligations under international human rights law.

Chapters 6 and 7 have shown that delineating responsibility in the context of RPC Nauru is indeed an ambiguous endeavour. This is the result of both the ambiguity involved in attributing conduct, and the ambiguity involved in establishing jurisdiction. Thus, on the one hand, the conduct of private contractors, which is generally considered highly human rights sensitive, cannot easily be attributed to either Australia or Nauru. As section 6.5. of chapter 6 has elaborated upon, such conduct – including that of garrison personnel – on many occasions can only be potentially attributed to either state on the basis of Article 8 Draft Articles, i.e. where either state instructs, directs, or controls specific *conduct* of private actors. However, since this maxim of attribution deals with the relationship between states and particular *conduct*, not particular *actors*, it cannot be delineated in the abstract how conduct can be precisely attributed to either state. Conduct can even be instructed, directed, or controlled only in part by one state: in such cases, attribution is limited to the conduct that was indeed instructed, directed, or controlled. Furthermore, when an act was lawfully instructed or directed by a state, it can in principle only be attributed to that state if the instructions or directions were likewise carried out in an internationally lawful way.

By extension, in relation to acts that violate human rights obligations, this would mean that the attribution of such conduct to either Australia or Nauru can only take place in two situations: where the state issued unlawful instructions or directions, for example instructions or directions to violate human rights, or where the state controlled the conduct of private contractors. *Lawful* instruction or direction by the state in this regard would be insufficient to attribute the impugned conduct, since, as pointed out above, such conduct can only be attributed when the instructions or directions were carried out in an internationally lawful way, which includes that human rights are not violated over the course of their execution. In relation to each impugned act, it should thus be established either that the private actor whose conduct is

concerned was instructed or directed to violate human rights law, or that the state exercised control over particular conduct.

What is problematic in the context of RPC Nauru, however, is that the governance arrangements in place showcase a high degree of ambiguity, fluidity, complexity, and secrecy, that make it difficult to establish a link between private conduct and the state on the basis of either unlawful instructions or directions on the one hand or control on the other. The highly complex governance system in place, combined with the 'walls of governance' that have been erected in the implementation of offshore processing, indeed make it largely impossible to establish the extent to which either of both states instructs, directs, or controls conduct of private contractors, and if so, whether precise instructions or directions are indeed lawfully given or not. Analysis in section 6.5.3. indicates that *in general*, Australia's factual relationship with private contractors seems to amount to direction, but not to control. The key question, then, is whether Australia's directions are lawful or not, which due to the secrecy with which the facility is being run can however not be answered in the abstract and will, arguably, also be difficult to answer in relation to specific instances.

On the other hand, establishing jurisdiction also is an ambiguous venture insofar as Australia's jurisdiction is concerned. Whereas Nauru's jurisdiction can readily be established on the basis of the territorial presumption, establishing Australia's jurisdiction is particularly more cumbersome as a result of the nodal governance arrangements in place. Indeed, as section 7.6.2. has detailed, whether Australia's human rights obligations apply in RPC Nauru depends on the question whether Australia exercises effective control over (part of) Nauru's territory or over individuals in RPC Nauru as a result of its involvement in the facility. However, establishing whether the threshold of 'effective control' over territory or persons is met is a highly ambiguous endeavour given that control over RPC Nauru and over those confined is diffused in a complex nodal governance network in which the exercise of control is not *prima facie* clear. This is also illustrated by the scholarly debate that has ensued in relation to this particular question.¹ Since this point has been extensively illustrated in section 7.6.2., it does not need to be reiterated in full here. It should however be emphasised that assessing the existence of extraterritorial jurisdiction on behalf of Australia is difficult both due to the lack of transparency and due to the nodal nature of governance involved. Both factors hamper a factual assessment of the level of effective control.² Whereas the nodal governance network's dynamic and interacting nature blurs factual levels of control, the secrecy and lack of transparency obscures control of and in the nodal governance field altogether. As section 7.6.2. provided, this is particularly true since 'open centre arrangements' were introduced in RPC Nauru, as a result of which

1 See footnotes 302-305 of chapter 7 and accompanying text.

2 Van Berlo, 2017d, p. 54.

it is difficult to maintain that Australia generally exercised the required level of effective control over individuals on the basis of full physical control.

The ambiguity of control present in the nodal governance network of RPC Nauru hence obstructs both the attribution of conduct and the assessment of human rights law instruments' applicability.³ The challenge to international human rights law, then, is that it has been resilient in the face of commodification, but that it has not been resilient enough to deal with highly complex and diffused nodal governance networks such as the network erected in the context of RPC Nauru. This can be explained from the fact that international human rights law simultaneously has stayed veracious to its fundamental tenet of territorial state responsibility, as a result of which conduct taking place in complex and largely obscured governance systems through private actions abroad cannot be adequately captured by the scope of international human rights law. In Part III of this book, the case study of RPC Nauru will be returned to in order to examine whether this *henceforth* means that human rights have lost their relevance as a protection framework altogether in contexts where control is ambiguous, or whether they can nevertheless continue to provide effective protection in such settings.

PI Norgerhaven: the abundance of control

The challenge of responsibility in international human rights law that arises in the context of PI Norgerhaven is less evident. As this Part of the book has shown, attributing conduct to Norway or the Netherlands, and establishing their respective jurisdictions, is a rather straightforward exercise. Conduct of the various actors involved can be neatly attributed to either of both states as shown in section 6.6., whereas the jurisdiction of both countries can be established on the basis of the territorial presumption (the Netherlands) and on the basis of personal control respectively control over the situation in PI Norgerhaven (Norway) as pointed out in section 7.7. Instead of ambiguity, in the context of PI Norgerhaven, there henceforth seems to be an *abundance* of actors exercising control and bearing human rights responsibility. From this perspective, it is not immediately self-evident why the commodified context of PI Norgerhaven would be challenging from the perspective of international human rights law.

As will be argued here, the answer to this question is to be found in the doctrine of positive obligations. It has already been outlined *inter alia* in section 2.5.1. that states do not only have negative obligations, that is, obligations to refrain from certain conduct, but also positive obligations. As has also been elaborated upon in that section, the latter category comprises both substantive and procedural positive obligations. In the context of PI Norgerhaven, on the

3 See also Gerard & Kerr, 2016.

basis of their exercise of jurisdiction, not only the negative obligations but also the positive obligations of Norway and the Netherlands are henceforth triggered. These positive obligations are concurrent: both Norway *and* the Netherlands have to take all suitable legal, practical, and procedural measures reasonably within their power in order to (a) prevent horizontal violations and (b) secure the enjoyment of human rights in prison, as well as to (c) ensure sufficient remedies. In relation to the first two of these components, assurances have been sought by the Norwegian and Dutch governments that confinement will be in conformity with fundamental human rights standards and that detainees will be unrestricted in the exercise of their human rights.⁴ To effectuate this, the Dutch authorities have an effort-based obligation to do what is reasonably required for the Norwegian authorities to guarantee the rights of detainees in accordance with their national legislation on the internal legal position of detainees.⁵ The focus in the remainder of this section will, however, be on the procedural positive obligation to ensure sufficient remedies. As will become clear, this obligation is problematic in the context of PI Norgerhaven because the framework is based on a system of mutual trust which is, in essence, too extensive and difficult to rebut. In explaining why this is the case, the focus will be primarily on the ECHR context, which is the instrument with arguably the most direct impact and bearing in the context of PI Norgerhaven.

The remedies available

Dependent on the seriousness of rights violations, three types of remedies are available: (i) complaint procedures, (ii) civil proceedings, and (iii) criminal proceedings.

First, on the basis of Article 10(1) of the Norwegian-Dutch Treaty, detainees have access to Norwegian complaint mechanisms in relation to any complaints concerning the execution of their Norwegian sentences, as well as any complaint related to their placement in Norgerhaven. This results from the fact that not Dutch but Norwegian penitentiary law applies to PI Norgerhaven. The only exception to this rule is when the complaint concerns the medical treatment of a Norwegian detainee by an individual medical caretaker, to which Dutch law applies and for which access to Dutch complaint mechanisms is accordingly available.⁶ In turn, the Norwegian authorities that are competent to deal with complaints are permitted to conduct inquiries in PI Norgerhaven in accordance with Norwegian law.⁷

⁴ Abels, 2016, pp. 394–395.

⁵ Abels, 2016, pp. 394–395.

⁶ *Kamerstukken II* 2014/15, 34178, 5, p. 18.

⁷ Article 10(3) Norwegian-Dutch Treaty.

Second, detainees have access to Norwegian courts in relation to “complaints or legal actions [...] concerning the execution of Norwegian sentences”.⁸ Again, the only exception is legal actions related to medical treatment by an individual medical caretaker, for which complainants have access to Dutch courts. Similar to the national complaint bodies, Norwegian courts are, if they so require, permitted to conduct inquiries in the prison facility in accordance with Norwegian law.⁹ Norwegian lawyers providing legal services to prisoners are permitted to do so in PI Norgerhaven.¹⁰

Third, on the basis of Article 17 of the Norwegian-Dutch Treaty, the Dutch authorities can commence criminal proceedings against horizontal violations constituting criminal offences, which the Norwegian governor has to report to the relevant Dutch authorities. Alternatively, the case can be transferred to the Norwegian prosecutorial authorities.¹¹

The trust issue: the non-rebuttable nature of mutual trust

The right to an effective remedy requires that remedies are available for violations of human rights that are effective “in practice as well as in law” in providing adequate redress.¹² As has been outlined in section 2.5.1., what is precisely required under procedural positive obligations depends on the seriousness of the complaint: whereas for some violations a disciplinary measure and/or an award of damages may be sufficient, for other violations – such as claims of violations of Article 2 ECHR (the right to life) or of Article 3 ECHR (the prohibition of torture and other inhuman or degrading treatment or punishment) by state entities – an effective criminal investigation or even criminal proceedings may be required.¹³ When these rights are at stake, it is likely that a “cumulation of procedures” is required which together may suffice the requirement of providing an effective remedy.¹⁴ Indeed, in *Aksoy v. Turkey*, the court held in relation to Article 3 ECHR that

“[g]iven the fundamental importance of the prohibition of torture [...] and the especially vulnerable position of torture victims, Article 13 imposes, *without prejudice to any other remedy available under the domestic system*, an obligation on States to carry out a thorough and effective investigation of incidents of torture. Accordingly, [...] where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an ‘effective remedy’ entails, *in addition to the payment of compensation*

8 Article 10(1) Norwegian-Dutch Treaty.

9 Article 10(3) Norwegian-Dutch Treaty.

10 Article 10(4) Norwegian-Dutch Treaty.

11 *Kamerstukken II* 2014/15, 34178, 3, p. 3.

12 ECtHR *Aksoy v. Turkey*, 18 December 1996, Application no. 21987/93, para 95.

13 M.D. Evans, 2002, p. 379; Hagens, 2011, p. 154; D. Harris et al., 2014, p. 769; Pitcher, 2016, pp. 84–88.

14 D. Harris et al., 2014, pp. 772–773.

*where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure”.*¹⁵

Hence, in such cases, criminal law must not only exist but must also be enforced by the state in “[securing] the effective implementation of domestic laws safeguarding the right to life and the accountability of offenders”.¹⁶ The ECtHR thus held that an investigation capable of leading to the identification and punishment of those responsible was required *inter alia* in cases relating to the right to life and allegations of torture.¹⁷ Ultimately, this constitutes an obligation of means and not of results: punishment is not per definition required.¹⁸

Some differences can be denoted in relation to horizontal violations. Indeed, the duty to investigate harmful acts by other individuals is not necessarily as stringent, yet Article 13 still requires “a domestic mechanism that is effectively accessible to an applicant and by which it may be established where responsibility for the harm [...] lay”.¹⁹ In any event, “in the case of a breach of Articles 2 and 3 of the Convention, [...] compensation for the non-pecuniary damage flowing from the breach should in principle be part of the range of available remedies”.²⁰ However, the ECtHR progressively seems to denote that the protection of fundamental values requires criminalisation and prosecution for the general positive protection of human rights “as a shared interest of society”.²¹ As such, it increasingly seems to be the case that criminalisation – and criminal proceedings – are required for horizontal harms resulting in infringements of the fundamental values as enshrined in amongst others Articles 2 and 3 ECHR.²²

Both Norway and the Netherlands have such self-standing procedural positive human rights obligations vis-à-vis those confined. They *both* carry, in other words, responsibility for ensuring that the remedial system in place is sufficient and effective to remedy potential human rights violations, including in particular those serious human rights violations that require far-reaching remedies. Whilst the obligations of Norway are consequently not limited by the fact that the Netherlands has concurrent jurisdiction in the prison facility

¹⁵ ECtHR, *Aksoy v. Turkey*, para 98 (emphasis added).

¹⁶ Seibert-Fohr, 2009, p. 114. See also ECtHR, *Öneryildiz v. Turkey*, 30 November 2004, Application no. 48939/99, para. 94; ECtHR, *Anguelova v. Bulgaria*, 13 June 2002, Application no. 38361/97, para. 137.

¹⁷ ECtHR, *Kaya v. Turkey*, 19 February 1998, Application no. 158/1996/777/978, para. 107; ECtHR, *Aksoy v. Turkey*, para. 98.

¹⁸ Pitcher, 2016, p. 87; Seibert-Fohr, 2009, pp. 202–203.

¹⁹ D. Harris et al., 2014, p. 781.

²⁰ ECtHR, *Z and Others v. UK*, 10 May 2001, Application no. 29392/95, para. 109.

²¹ Seibert-Fohr, 2009, pp. 118–119.

²² Seibert-Fohr, 2009, pp. 118–119.

and *vice versa*, they can certainly be interpreted in light of the associated responsibilities of these partner states – in particular when positive obligations are concerned. Indeed, given that the scope of positive obligations is not absolute but is limited to the implementation of reasonable and suitable measures, cooperation between the sending state and the host state may sufficiently fulfil the positive obligations of both states if it results in a cumulation of procedures providing proper protection, safeguards for the enjoyment of entitlements, and effective remedies. The applicable remedial framework set out above may, thus, suffice for purposes of both states' procedural positive obligations.

This is, in particular within Europe, no novel practice. To understand this, we need to touch upon the context of the EU, in which much of the cooperation between Member States is based on *mutual trust*. This mutual trust entails that Member States have a reciprocal trust in the legality and quality of each other's legal systems, which initially served the free movement of goods, persons, services, and capital within the EU's internal market but has nowadays also attained key importance in relation to cooperation in criminal law, civil law, and immigration law affairs. This development has gone hand in hand with a certain harmonization of laws and policies across the Member States, which is often seen as a prerequisite for mutual trust. As such, cooperation on the basis of mutual trust suggests at least a minimum level of harmonisation of the protection of fundamental rights.²³

At the same time, a certain tension exists between mutual trust and the positive obligations of states. For a topical example of this tension, we briefly need to turn to the EU immigration context. In this context, an EU-wide system has been set up under EU's Regulation 343/2003 ('the Dublin Regulation') that regulates which Member State is responsible for examining asylum claims of arriving asylum seekers. In this way, it prevents asylum claims from being lodged simultaneously or consecutively in multiple Member States. The system is premised on mutual trust: it assumes that all Member States adhere to the international and European standards applicable to asylum seekers, including the ECHR. On this basis, Member States who are not responsible for an asylum claim under the Dublin Regulation are allowed to transfer asylum seekers back to the state that is responsible, trusting that the applicant will receive similar protection there.²⁴

Such mutual trust appears, to a certain extent, absolute: as long as certain criteria are fulfilled, other Member States are trusted to provide equal protection to applicants. At the same time, the self-standing positive obligations of transferring states are at odds with such an absolute conception of mutual trust. In the Dublin context, this tension came to the fore when the ECtHR was faced with an applicant who claimed that his transfer back to Germany by

23 Asp, 2005, pp. 31–33; E. Brouwer, 2013, pp. 136–137.

24 E. Brouwer, 2013, p. 138.

the UK authorities would entail a risk for his Article 3 ECHR rights.²⁵ Indeed, the applicant argued that as Germany did not consider persecution by non-state agents a ground for refugee status, his transfer back to Germany would effectively amount to a violation of Article 3 ECHR by the UK. The ECtHR in turn emphasised that transferring states are not absolved of their own human rights responsibilities simply because other EU Member States are deemed 'safe third states' under the Dublin Regulation. Indeed,

"indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution".²⁶

As such, Member States cannot have an unconditional and absolute trust in other Member States not to violate the human rights of asylum seekers, as they continue to have a positive obligation to verify the fate of asylum seekers in order to prevent indirect refoulement.²⁷ Mutual trust, therefore, must be rebuttable.

This need for a rebuttable presumption was later reiterated and extended by the ECtHR beyond the context of indirect refoulement, most notably in *M.S.S. v. Belgium and Greece* which concerned an Afghan asylum seeker who had been transferred by Belgium to Greece under the Dublin system.²⁸ In relation to Greece, the Court found a violation of Article 3 ECHR on the basis of poor living conditions and detention conditions, as well as a violation of Article 3 in conjunction with Article 13 ECHR on the basis of the deficient asylum procedures and the risk of refoulement. In relation to Belgium, a violation of Article 3 was found *both* for direct refoulement (i.e. to Greece) and indirect refoulement (i.e. the risk of refoulement to Afghanistan). Indeed, Belgium failed to verify how asylum law was applied in practice in Greece.²⁹ Again, the rebuttable nature of mutual trust was thus emphasised, which was later also confirmed

25 ECtHR, *T.I. v. UK* (Admissibility), 7 March 2000, Application no. 43844/98.

26 ECtHR, *T.I. v. UK* (Admissibility), p. 15.

27 E. Brouwer, 2013, p. 139.

28 ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2011, Application no. 30696/09.

29 ECtHR, *M.S.S. v. Belgium and Greece*, para. 359.

by the CJEU.³⁰ According to these judgments, the primary responsibility for submitting evidence that a transfer may result in a violation of a human rights rests with applicants, yet they do not bear the entire burden of proof and there should be adequate procedures available in order for them to submit evidence supporting their claim.³¹

The situation of asylum seekers who may face direct or indirect refoulement differs, of course, significantly from the situation of Norwegian prisoners in Norgerhaven. Nevertheless, the development of a rebuttable notion of mutual trust in the realm of EU asylum law is *mutatis mutandis* relevant for offshore detention practices. On the basis of the case law outlined above, it indeed seems to be the case that international agreements such as those between Norway and the Netherlands may be established for cooperation in criminal matters, but that this does not in itself affect the responsibility of these states to ensure that prisoners in this construction are not exposed to violations of their human rights. These states may trust one another, but only if such trust remains somehow rebuttable. In the context of cooperation in criminal affairs specifically, this was also confirmed by the CJEU in *Aranyosi and Căldăraru*, in which it dealt with mutual trust in relation to the execution of European Arrest Warrants.³² In this case, the CJEU indeed held that in the execution of arrest warrants, EU Member States cannot unconditionally presume on the basis of mutual trust that other Member States provide an effective and equivalent level of fundamental rights protection. Instead, judicial authorities have to assess the general circumstances of detention in the issuing Member State, and have to regard the situation of the individual to be surrendered. This is, as Bovend'Eerd analyses, "a significant break with the CJEU's previous case law on the subject" and leads to further congruence of the approaches of the CJEU and the ECtHR.³³

When looking at the context of PI Norgerhaven, mutual trust seemed not to be sufficiently rebuttable. Indeed, the division of remedies as outlined above did not incorporate mechanisms to verify the extent to which redress was effectively provided in the partner states, whether it be criminal redress, civil redress, or redress in relation to complaints filed. Even more so, there was no mechanism to rebut trust in case the partner state did not provide sufficient redress, and no system to submit evidence for such claims. It was, for example, not possible for the Norwegian authorities to rebut trust in specific criminal cases under the authority of the Dutch prosecutor, *even* if their own positive obligation required that effective criminal investigations were being launched. Conversely, it was not possible for the Dutch authorities to rebut trust in the way in which Norway provided remedies by means of complaint procedures.

30 CJEU, *NS v SSHD*, 21 December 2011, Case C-411/10.

31 E. Brouwer, 2013, pp. 142–145.

32 CJEU, *Aranyosi and Căldăraru*, 5 April 2016, Joined Cases C-404/15 and C-659/15.

33 Bovend'Eerd, 2016, p. 117. See for further reflection also Ouwerkerk, 2018.

The Dutch authorities did not even have official monitoring bodies in place that monitored the detention regime, the detention conditions, or the (number of) complaints being filed at PI Norgerhaven.³⁴ As such, in both the Netherlands and Norway, mechanisms were not in place for the respective authorities to *ex officio* verify, in discharging their own respective procedural positive obligations, the extent to which the other state provided effective remedies, and potential complainants simultaneously could not avail themselves of adequate procedures to submit evidence for the rebuttal of mutual trust. In light of the aforementioned case law, this seems incompatible with both Norway's and the Netherlands' self-standing procedural positive obligations.

Of course, these examples may appear rather academic or theoretical in light of the justice systems in Norway and the Netherlands, which are generally regarded as robust, as well as in light of their prison conditions and human rights records.³⁵ Nevertheless, in individual cases where the remedial system of a state fails to provide the required level of redress, a need may nevertheless arise for the partner state's authorities to step in and commence proceedings in order to satisfy their own procedural positive obligations that apply vis-à-vis those confined in PI Norgerhaven. The Norwegian Ombudsman thus expresses, in a report on PI Norgerhaven, the concern that

"[i]n line with Norway's commitments under the UN Convention against Torture, it is particularly problematic that the Norwegian authorities will not be able to initiate investigations of any suspected violations of the prohibition against torture and ill-treatment. The duties to investigate, prosecute and punish breaches of the Convention constitute core provisions of the Convention and follow from customary international law".³⁶

Similarly, the Dutch NHRI, the *College voor de Rechten van de Mens*, has urged the involved authorities to create a dual Norwegian-Dutch monitoring system that maintains direct contacts with detainees and allows them to file complaints.³⁷ Whilst such a system would likely provide a mechanism to rebut mutual trust in the complaint procedures of partner states where appropriate, the advice of the College was not adopted by the respective governments and the proposed monitoring mechanism was never implemented. This appears to be a lost opportunity: as Abels argues, the College's advice "deserves to be considered more seriously [...] [i]n light of the vulnerable position of

34 In fact, the Dutch Inspection Safety and Justice does not even have authority within the PI: see also Abels, 2016, p. 396.

35 Levin, 2014, p. 102; Pakes & Holt, 2015, p. 12. On Dutch prison conditions, see e.g. Beijersbergen, Dirkzwager, van der Laan, & Nieuwbeerta, 2016; Molleman & Van Ginneken, 2015; Van Berlo, 2018; Van Ginneken, Palmen, Bosma, Nieuwbeerta, & Berghuis, 2018.

36 Sivilombudsmannen, 2016, p. 6.

37 See Abels, 2016, p. 395.

persons who are detained abroad and the residual obligations under human rights Treaties of the Netherlands as host and receiving State".³⁸

Conclusion

This brief intermezzo has explained why commodification both in relation to RPC Nauru and in relation to PI Norgerhaven may, albeit for completely different reasons, be challenging from the perspective of international human rights law responsibility. In the context of RPC Nauru, the ambiguity that governs the exercise of control obscures legal responsibility and therefore may create gaps of protection. In the context of PI Norgerhaven, conversely, the presence of two concurring states that clearly exercised control over those confined created an abundance of duty bearers, which at times – rather paradoxically – resulted in gaps of protection as both states relied on frameworks of mutual trust. Commodification thus essentially has had different impacts: in one case study, responsibility became ambiguous, in the other, it became abundant. In both cases, however, effective protection of human rights may be challenged by these developments, as responsibility can be denied or defined away either by reference to ambiguous exercises of control, or by reference to systems of mutual trust that divide responsibilities amongst duty-bearers but do not sufficiently allow for the rebuttal of such trust. Again, the 'glocal' level thus proves vital in denoting the different impacts of commodification on the protection of human rights in settings of confinement.

38 Abels, 2016, pp. 396–397, original in Dutch.

PART III

Elephants' desire paths

Reconceptualising human rights protection:
Towards holistic assessments

8 | From Janus to Brahma

A holistic reconceptualisation of human rights

8.1 INTRODUCTION

Part II of this book has shown that international human rights law in the books is only to a limited extent able to accommodate crimmigration and commodification as contemporary challenges of globalisation. On the one hand, international human rights law has showcased a certain resilience, although at times in a haphazard and little axiomatic fashion. On the other hand, it has largely stayed veracious to its fundamental tenets, an attitude that on many occasions clashed with its resilient efforts.

This relates to what Gammeltoft-Hansen and Vedsted-Hansen call the ‘cat-and-mouse game’ as a particular expression of the “dark side of globalisation”.¹ As they argue in relation to commodified contexts specifically, many policies involving forms of nodal governance are characterised by an instrumental form of “creative legal thinking” on behalf of state authorities as well as by the activation of competing duty holders.² In doing so, states either look for loopholes to circumvent or marginalise human rights obligations, or are largely oblivious of the impact of nodal types of governance on human rights protection. This ultimately results in a cat-and-mouse game between states’ policy practices and international human rights law, with international human rights law continuously adapting to policy practices and vice versa.³ Thus,

“states exhibit a degree of ‘creative legal thinking’ to act at the fringes of international human rights law. Such policies tend to work in between the normative structures established by international human rights treaties, exploiting interpretative uncertainties, overlapping legal regimes, reverting on soft law standards or establishing novel categories and concepts on the basis of domestic or other parts of international law.”⁴

Consequently, the cat-and-mouse game may also be relabelled as a detrimental ‘rat race’ between states and international human rights law. The latter on many occasions tries, in a resilient effort, to adapt to the conduct of the former

1 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 3. See also Van Berlo, 2017b, pp. 10–11.

2 Gammeltoft-Hansen & Vedsted-Hansen, 2017, pp. 2–5.

3 Gammeltoft-Hansen, 2018, p. 391; Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 3.

4 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 6. See also Gammeltoft-Hansen, 2018, p. 391.

by capturing fluctuations in state behaviour within its logic, whereas the former may respond to such adaptations by further creative thinking and an ongoing exploration of the re-established legal boundaries. Given that international human rights law cannot bend beyond its breaking point, it seems inevitable that it is bound to lose the rat race in the long run: it can never regulate *all* social interaction without abolishing the fundamental tenet of territorial state responsibility on which it is premised, yet derogating from its veracity in this regard would entail the *de jure* and eventually the *de facto* collapse of the international human rights law system as a whole due to an ensuing lack of legitimacy.

From the perspective of human rights law, crimmigration and commodification developments thus potentially foreshadow a rather bleak future for settings of confinement. Juxtaposed, both globalisation developments challenge the Janus-face of international human rights law to its core as they seemingly unsettle both the 'human' and the 'rights' aspects of the legal doctrine. As previously detailed, both crimmigration and commodification challenges *de jure* international human rights norms as codified in the books, which has been analysed in Part II of this book. Crimmigration furthermore challenges international human rights law in action by negatively affecting the *de facto* equal entitlement of humans to protection – or at least their access thereof – through *inter alia* walls of noise and walls of governance – a trend that will be further addressed in the next chapter in the context of the Australian-Nauruan case study. To complicate matters even further, commodification may, as detailed in Part I, also be a particular crimmigration strategy as it may be utilised as a wall of governance behind which governments and other stakeholders can quietly manoeuvre: in this sense, commodification does not, akin to crimmigration, only challenge *de jure* international human rights law but also has the potential of impacting negatively on *de facto* protection. In situations where commodification and crimmigration are tightly interwoven, the viability of human rights law is thus challenged on multiple fronts simultaneously.

The question is, however, whether such a bleak perspective on the future of human rights is warranted. This chapter will reflect on this question by taking a step back in order to reconsider the conceptualisation of human rights as a legal Janus-faced phenomenon altogether. It will be argued that a paradigm shift – or reconceptualisation – is needed, shifting away from any predominant focus on legal theories towards a more holistic understanding of human rights. In developing such argument, the chapter first elaborates upon two mainstream responses from predominantly legal scholars to the clash between resilience and veracity, ultimately resulting in a legal impasse, as explored in Part II. Whereas some have argued in favour of *more* human rights law instruments and human rights interpretation, others have questioned such approach and seem to hint at the *downfall* of human rights. Both responses, it will be argued here, are however ultimately unsatisfactory and an alternative approach is henceforth due.

In exploring such alternative response, this chapter first draws on socio-legal notions of ‘legal pluralism’, ‘legal consciousness’, and ‘legal alienation’. Whilst these notions are important fundamentals for an alternative response, it is argued that they can only be *part* of the answer. The reason for this is that human rights have *four* instead of two faces and therefore resemble more of a Brahma than a Janus head.⁵ Different from the Janus-faced characterisation of international human rights law in chapter 4, Brahma indeed aptly conceptualises the holistic notion of human rights set out in this chapter. He is usually described and depicted as having four faces turned in each direction, “symbolic of his omniscience” and showing that he sees everything that is happening, as having four arms, and as holding four different ritual objects.⁶ These omniscient characteristics provide a suitable basis for an analogy with the reconceptualised notion of human rights proposed here. On this basis, a modified variant of existing socio-legal frameworks of ‘legal pluralism’, ‘legal consciousness’, and ‘legal alienation’ is proposed. As is argued, we should turn not to *legal* pluralism, consciousness, and alienation, but to *human rights* pluralism, consciousness, and alienation, in order to properly grasp the holistic role and value of human rights. Such an approach based on ‘human rights pluralism’ allows for a holistic understanding of human rights and opens new pathways towards exploring protection. That is to say, the existence of four human rights dimensions does not only mean that different understandings of human rights exist, but also that different ways of achieving them exist. This is highlighted by addressing the various human rights dimensions both as bases for human rights *consciousness* (or, alternatively, for human rights *alienation*), as *tools* to achieve human rights protection, and as mechanisms for *vernacularisation*, and by outlining how the dimensions in their various roles may operate both independently and in synergy.⁷ To return to the metaphor of ‘human rights elephants’, this chapter will dissect how the human rights elephant is able to circumvent obstacles posed by globalisation developments by following various desire paths, or ‘*elephant paths*’ as freely translated from Dutch.⁸ These pathways, often of an informal nature, provide shortcuts or alternative routes to achieve protection, although not all informal routes are typically as effective as will be highlighted in this chapter. In the chapter’s final part, the methodological framework that can be used to analytically

5 As Bianchi has pointed out, references to mythological figures of different provenance might lead one to think that “such references are but the affection of erudition by not too humble an author”, yet – as he also acknowledges – such myths spring “naturally to mind” when thinking about a topic like human rights: Bianchi, 2008, p. 507.

6 Hazen, 2003, p. 14; B.M. Sullivan, 1999, p. 86.

7 In this sense, it is argued that human rights protection is not merely situated in the *legal* domain, nor squarely in the *socio-legal* domain, but should be understood on the basis of ideas that have previously been developed within the context of the so-called *sociology of human rights* as briefly introduced in section 1.7.: see also Clément, 2015; Frezzo, 2015.

8 See footnote 276 of chapter 1.

traverse the novel pathways of inquiry arising from the reconceptualised understanding of human rights will be addressed.

8.2 RESPONSES TO THE COMMODIFICATION IMPASSE

Globalisation challenges and the lack of effective avenues to account for them provoke various arguments as to the way forward. Many scholars, predominantly those with a positivist legal inclination, have responded to the impasse in line with either of two strands of reasoning: they advocate either the refinement of human rights law in line with an advanced functional approach, or warn for the end-times of human rights. Both will now be addressed in turn.

On the one hand, some scholars continue to base their claims against perceived wrongs and injustices firmly on the doctrine of (international) human rights law, representing a nearly unconditional faith in its protection value and its hegemony as framework of humanity and justice. These scholars agree that human rights law is simply too fundamental and too important to give up on, although they frequently disagree as to the amendments needed to achieve true justice and protection for all. Their reasoning is widespread in scholarship: “[i]f the human rights regime appears to fail in its purpose, the usual response is to clarify legal rules by drafting more international law, rather than to question the efficacy of the dominant legal approach or the norms and principles that international law is said to enshrine”.⁹ An example would be where the failure of human rights law to provide effective protection to particular populations as examined in chapter 4 would lead to calls for further conditionalization of accepted interferences with particular human rights provisions. Similarly, as illustrated in chapters 2 and 5 in relation to the ongoing debate about private human rights obligations, various scholars maintain on a *normative* plane that such obligations are crucial and necessary, yet have not questioned the appropriateness of human rights law as an applicable framework in the first place.¹⁰ Likewise, in the context of offshoring, various authors have taken for granted that international human rights law *should* be further developed in order to hold states responsible for extraterritorial wrongs and injustices that are not, at least not *prima facie* or evidently, covered by human rights law’s scope as distilled in case-law. Pijnenburg, examining Italy’s involvement in Libyan pullback operations in the Mediterranean Sea, for example concludes that “holding Italy responsible would require the Court to move beyond established precedent in its case-law”, yet she *still* argues in favour of such far-reaching reinterpretation: “[a]lthough this is a move which can be difficult to make given the political tide in Europe, it would not be the first time that the Court takes its case-law, and thereby

9 T. Evans, 2005, p. 1047.

10 Clapham, 1996; Jägers, 2002, p. 256; Karavias, 2013, p. 20.

human rights protection, a step further".¹¹ In this sense, authors adhering to such reasoning continue to find answers to perceived wrongs and injustices by reference to international human rights law, even though they simultaneously recognise that this requires substantial legal reinterpretation and significant deviation from standing case law. Even more so, in abstaining from a critical reflection on the efficacy of international human rights law as the dominant approach, many authors do not only not only explore, but also *encourage* judicial monitoring bodies to explore, bold options on the fringes of existing legal human rights frameworks. Pijnenburg thus points out

"the bolder the Court is in terms of treading uncharted territories, both in terms of establishing that Italy exercised jurisdiction and applying the provisions on derived responsibility in the [ILC Draft Articles], the more likely it is to find that Italy is responsible. While the facts of this case may thus prompt the ECtHR to engage with broader international law norms, it may also choose to 'play it safe' both legally and politically by staying within the boundaries of its existing case-law".¹²

In this sense, various scholars ongoingly argue for legal refinement of international human rights law, often by proposing alternatives at – or just outside of – the margins to be explored. Faced with the legal impasse, for these authors, the response is *more*, not *less*, international human rights law.

Other scholars, on the other hand, ascertain the diminishing adequacy of human rights law to deal with contemporary developments of globalisation. Human rights law, in this sense, would do more harm than good.¹³ As a result, albeit on varying grounds, some authors even appear to lose faith in human rights law altogether, promulgating "the case against human rights"¹⁴ or warning for "the end(times) of human rights".¹⁵ From this perspective, commodification and crimmigration fit within a more generally framed critique of human rights law as either being inapt to deal with contemporary developments of globalisation and neo-liberal capitalism, or as being usurped and consequently compromised by these developments. The logical conclusion is, according to these authors, that we are facing – or soon will face – the end of human rights. As Hopgood for example argues, "[a] disconnect is opening up between global humanism with its law, courts, fund-raising, and campaigns on the one hand, and local lived realities on the other. It is a disconnect between Human Rights and human rights [...]. The way in which this claim

11 Pijnenburg, 2018, p. 396.

12 Pijnenburg, 2018, p. 426. See similarly Oudejans et al., 2018, p. 25.

13 See also D. Kennedy, 2002, pp. 118–119.

14 Posner, 2014c.

15 Douzinas, 2000; Hopgood, 2013; Wacks, 1994.

to moral authority carries the day is vanishing fast".¹⁶ From a slightly different perspective, Douzinas argues that human rights have a

"tradition of resistance and dissent from exploitation and degradation and a concern with a political and ethical utopia, the epiphany of which will never occur but whose principle can stand in judgment of the present law. When human rights lose that element, they remain an instrument for reform and, occasionally, a sophisticated tool for analysis but they stop being the tribunal of history. [...] The end of human rights comes when they lose their utopian end".¹⁷

For these scholars, the answer is thus not necessarily *more* international human rights law. Pointing to the disconnect between human rights as legal norms and human rights as lived experiences, or utopian ends, they warn that further refinement and expansion of the system may in fact be human rights' nemesis as it will only further highlight the legal domain's inability to effectively grasp contemporary realities of globalisation. That is, sovereign states are ultimately overseeing any refinement or expansion process and are thus able to frustrate any true utopian endeavour in favour of self-serving purposes. As Douzinas points out, the paradox at the heart of human rights law is that it operates to justify resistance or to request protection from a state whilst states are simultaneously the ultimate guarantors of human rights.¹⁸ States can thus obstruct the refinement of international human rights law on beforehand, for example by negating refinement efforts at the drafting stage,¹⁹ or afterwards, for example by modifying their policy practices in order to circumvent any novel requirements set by case law. This refers back to the 'dark side of globalisation' that was denoted above: since international human rights law is nearly inevitably going to lose the 'rat race' with states' policy practices, any further participation in such rat race – for example by advocating further refinement or expansion – would only emphasise how impeded human rights law actually is in the pursuit of resilience.²⁰ If anything, *less*, not *more*, international human rights law would henceforth be needed insofar as these authors are concerned.

Both lines of reasoning are however little satisfactory. On the one hand, calls for more expansive interpretation and a more expansive reach of human rights law are generally well-intentioned but may harm the human rights project altogether, as scholars of the second strand of reasoning point out. As Posner explains, the expansion of human rights law has led to a catalogue

16 Hopgood, 2013, pp. 14–16. Hopgood makes a distinction between Human Rights (uppercase) and human rights (lowercase), the former mainly resembling human rights as law whereas the latter primarily concerns a natural law account of human rights.

17 Douzinas, 2000, p. 380.

18 Douzinas, 2000, p. 21.

19 See e.g. Hopgood, 2013, p. 20.

20 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 3.

of as many as 400 rights that includes nearly everything one may find worth protecting, offering governments opportunities to pick and choose from these rights in order to justify their policies.²¹ Consequently, such expansion “runs the risk of turning the notion of human rights into little more than an empty vessel – having a significant size but carrying little substance”.²² For international human rights law, the rat race is henceforth not only untenable but may in fact also be counterproductive: the continuous adaptation and expansion of international human rights law increases opportunities for political manoeuvring, with duty bearers cherry-picking across different legal regimes and interpretations.²³ Even more so, as Koskeniemi argues, expansionism ultimately accommodates “the banal administrative recourse to rights language in order to buttress one’s political priorities”.²⁴ As Hafner-Burton and Tsutsui add on the basis of their quantitative analysis into the effectiveness of international human rights law, repressive governments become members of human rights regimes *inter alia* because “they gain certain political advantages from membership but all the while can get away with murder”.²⁵ The ever-increasing number and ever-expanding scopes of human rights catalogues thus do not only provide justifications for states to hide behind in explaining why they do not live up to particular rights, but also provide a language of legitimization in which political decisions – even those resulting in repression – can be couched.

Furthermore, as already touched upon above, initiatives expanding the reach of human rights law need to be aware of the fact that human rights law cannot bend beyond its breaking point. To bring all harmful conduct – either in confinement or elsewhere – within its ambit is to let go of the fundamental premises of human rights law as being grounded in territorial state power, which is both legally and practically unfeasible and would require a new legal and conceptual framework altogether in order to prevent the system’s illegitimacy and/or delegitimation. Without such an improbable novel framework, however, there is always a certain leeway or grey area where power can be exercised in a way that is at odds with the utopian values of human rights law whilst simultaneously not violating human rights obligations in a legal sense as such; and, consequently, it is this grey area that accommodates the deflection of *de jure* human rights responsibilities. For instance, as detailed in Part II, private conduct and extraterritorially exercised power only exceptionally trigger a state’s human rights responsibility. This by extension means that a state’s jurisdiction is presumed *not* to be triggered in extraterritorial situations and that a state’s responsibility is presumed *not* to be engaged

21 Posner, 2014a, 2014c.

22 Van Berlo, 2015d.

23 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 6.

24 Koskeniemi, 2011, p. 134.

25 Hafner-Burton & Tsutsui, 2007, p. 414.

in relation to private conduct, *unless* the relevant criteria as previously set forth are fulfilled. By not fulfilling these criteria – either on purpose or otherwise – states consequently can deflect their legal human rights responsibilities. To prevent this from happening, the exceptional cases of extraterritorial jurisdiction and private responsibility would have to be transformed into what might be labelled the ‘new normal’, yet this is not feasible nor desirable *per se* given the difficulties related to such an expansionist approach explained above.

On the other hand, proclaiming the ‘end’ of human rights law is hardly desirable either, not in the least because on many occasions it is by and large the *only* legal framework of protection against non-curtailed state power. Indeed, human rights are most important for those who cannot claim entitlements on the basis of, for example, citizenship status – and, it can be added here, for those whose citizenship rights are gradually taken away on account of their progressive removal from society. For confined non-citizens and sub-citizens, as well as for others, human rights law thus provides – or at least is supposed to provide – a legal and symbolic bottom line of protection of dignity and well-being. One should thus remain cautious in relation to any claim that such a protection mechanism – even when seriously flawed – should be abolished altogether, unless there is reason to believe that no good can come from it and that the framework operates in a way that is completely and structurally anathema to what it is supposed to achieve, and, in addition, such claim should only be made insofar as a more emancipatory project is tangibly visualised.²⁶ In addition, talk about the ‘endtimes’ of human rights *law* may too easily be confused with the end of ‘human rights’ as such. In fact, various scholars dealing with the supposed end of ‘human rights’ – full stop – often base their conclusions on a human rights *law* conception. Some influential writers have indeed authored work with the telling titles “the end of human rights” (Douzinas),²⁷ “the end of human rights?” (Wacks),²⁸ “the endtimes of human rights” (Hopgood), and “the case against human rights” (Posner),²⁹ whereas in reality they primarily deal with human rights *law*, that is, human rights understood from a legal perspective.³⁰ We should thus be careful not to throw human rights out altogether simply because they, in their contemporary legal form, may be considered “parochial, timid, ultimately self-serving, and worst of all, terribly ineffective”.³¹ As Gibney argues, “we have never really ‘done’ human rights in the first place. This is of course not to say that

26 Although it should be noted that the dominance of the human rights project itself may in part have caused the lack of more emancipatory alternatives: see D. Kennedy, 2002, p. 108.

27 Douzinas, 2000.

28 Wacks, 1994.

29 Posner, 2014c.

30 Hopgood, 2013.

31 Gibney, 2016, p. 154.

we have not done anything. International human rights law is now all around us and policy makers of all political persuasions are forever invoking human rights. However, all we have had is a facsimile of human rights, but nothing approaching the real thing".³²

8.3 IN SEARCH OF A SOCIO-LEGAL ALTERNATIVE: LEGAL PLURALISM, LEGAL CONSCIOUSNESS, & LEGAL ALIENATION

Since both answers to the human rights impasse discussed above are not feasible nor desirable, another approach is due. It is argued here that in exploring other options, we should shift away from the doctrinal legal focus that has dominated the formulation of responses so far. Thus, whilst both of the responses outlined above ultimately fail to be compelling for different reasons, the underlying problem is that they both essentially reason from the perspective of *de jure* human rights law. Such calls specifically focus on black-letter law realities by trying to amend international human rights law in the books in order to match the empirical world, or by pointing out why black-letter law will always lag behind given that in light of the empirical world it is ineffective, usurped, or both. The opposite trend – i.e. the way in which human rights may play a part in, and be effectuated through, social interaction in everyday life – remains however largely underexplored. This topic will now be turned to in order to lay the groundwork for an alternative response to the human rights impasse.

Scholarship on legal pluralism constitutes a natural starting point in this regard. The idea of legal pluralism essentially addresses the coexistence of normative frameworks within one socio-political space.³³ Early work on legal pluralism often considers the nation state as the main socio-political space of relevance, yet over time focus has shifted more and more towards transnational spheres within which law-making capacities are present, such as the platforms on which regional or international human rights instruments are created.³⁴ Interest in legal pluralism has, furthermore, grown significantly, up to the point where nowadays "legal pluralism is everywhere".³⁵ It developed as an answer to positivist (or doctrinal) legal theory in order to challenge the idea that national or transnational authorities are the only entities that issue and enforce norms and in order to pose a framework to ascertain whether and why centrally issued norms are effective in practice.³⁶ In the context of international

³² Gibney, 2016, p. 154.

³³ J. Griffiths, 1986; Merry, 1988, p. 870; Oomen, 2014, p. 474; Praet, 2018, p. 29; Seinecke, 2018, p. 14.

³⁴ Oomen, 2014, p. 475. See, for example, the edited volume by Luts-Sootak, Kull, Sein, & Siimets-Gross, 2018.

³⁵ Seinecke, 2018, p. 13.

³⁶ Oomen, 2014, p. 474. See also S.F. Moore, 1973, pp. 720–721.

human rights law, legal pluralism may thus be used *not* to examine the internal normative coherency of international human rights law regimes – which is a question central to positivist or doctrinal legal theory – but rather to examine the empirical impact of international human rights law in specific contexts. By extension, whereas doctrinal legal theory may focus on normatively criticising legal instruments or on improving them in such a way that they most optimally reflect and accommodate the traits and particularities of the empirical world, legal pluralists may focus on explaining why human rights law, with all its (im)perfections, is, or is not, effective or relevant in the empirical world. Both are thus about implementation, yet in completely different ways: the former is concerned with implementation of the empirical world into legal frameworks – making law ‘reality-proof’ – whereas the latter is concerned with the implementation of legal frameworks in the empirical world – questioning law’s salience in actual society.³⁷

Seminal work in the latter regard includes Barbara Oomen’s work on the implementation and integration of international human rights law in local contexts.³⁸ As she points out, legal pluralism provides an excellent paradigm to approach the effectiveness of human rights law: whilst human rights are “one of the most dominant normative fields in the current world order”, they at the same time are never the *only* normative order applicable to a certain case study.³⁹ International human rights law thus almost always applies, yet it also almost always has to compete with other normative orders. This makes it a particularly interesting locus of study for legal pluralists. Accordingly, a plethora of case studies have focused on the impact of human rights law in settings where simultaneous normative orders apply, varying widely from witchcraft in South Africa,⁴⁰ to ‘tribal women fora’ in India’s South Rajasthan,⁴¹ post-conflict customary justice in Sierra Leone,⁴² indigenous justice systems in Latin America,⁴³ and – in Oomen’s work – passive voting rights of orthodox-protestant women in the Netherlands.⁴⁴ What this body of work shows is that legal human rights norms are most effectively implemented in local contexts through their integration into co-existing normative frameworks that otherwise might compete with the human rights law system. Sezgin, for

37 In this sense, the distinction between the ‘law in books’ and the ‘law in action’ should be nuanced: the fact that some scholars focus on the law in books does not mean that they have no regard for the law in action, and *vice versa*. Rather, it is the *interplay* between the law in books and the law in action that is studied differently by different scholars and within different sub-disciplines.

38 Oomen, 2009, 2010, 2014.

39 Oomen, 2014, p. 479.

40 Kallinen, 2013.

41 Tschalaer, 2010.

42 Corradi, 2010.

43 Inksater, 2010.

44 Oomen, 2014.

example, emphasises that “human rights activists, donors and members of programmatic communities [...] need to design intervention mechanisms and tools to integrate universal human rights standards into customary and religious systems around the world.”⁴⁵ The key to success would thus reside in *other* normative frameworks than those constituted by international human rights instruments, since such frameworks would ‘translate’ human rights standards into viable aspects of local norms, cultures, practices, and traditions and therewith into tangible standards for ordinary social interaction – a process that is denoted as a process of *vernacularisation*.⁴⁶ Such a process brings, as Levitt & Merry conclude, “human rights as a justice ideology into a wide range of communities”.⁴⁷ Benhabib likewise points out that “even the most cosmopolitan norms, such as human rights, require local contextualization, interpretation, and vernacularization by self-governing peoples.”⁴⁸ Oomen in her study of Dutch orthodox-protestant women for example finds that “aligning human rights with religious and cultural beliefs, and drawing arguments for their implementation from such beliefs, can often be much more effective than framing discussions merely in terms of rights violations”.⁴⁹ In order to study the role of human rights law in actual society, an alternative response to the human rights impasse should henceforth take the process of vernacularisation into account. In doing so, it can identify concurring norm systems that may appropriate and adopt norms of international human rights law and that may, subsequently, translate them into everyday-life vernaculars, therewith creating new pathways for their effective utilisation.

Closely related to such processes of vernacularisation are the notions of *legal consciousness* and *legal alienation*, which provide useful conceptual tools to imagine the basis on which, in a legal pluralist world, the vernacularisation of central human rights law norms in local contexts takes place. The term ‘legal consciousness’ emerged within the field of socio-legal studies as an alternative to both traditional legal research and typical socio-legal studies into the causal and instrumental relationships between law and society.⁵⁰ Instead, the concept of legal consciousness “refers to what people do as well as say about law” and is thus “understood to be part of a reciprocal process in which the meanings given by individuals to their world become patterned, stabilized, and objectified”.⁵¹ In this sense, the notion of legal consciousness places law right at the heart of social interaction: it studies law not as it is on paper, nor its direct effects on society, but rather examines what role is accorded to law in

45 Sezgin, 2010, p. 7. See also Provost & Sheppard, 2013, p. 3.

46 Benhabib, 2009, p. 692; Cheng, 2011; Levitt & Merry, 2009; Merry, 1993, 2006, Oomen, 2010, p. 14, 2014, p. 483; Provost & Sheppard, 2013, p. 1.

47 Levitt & Merry, 2009, p. 458.

48 Benhabib, 2009, p. 692.

49 Oomen, 2014, p. 485.

50 Cowan, 2004, pp. 928–929; Hertogh, 2018, p. 7.

51 Silbey, 2008. See also Fritsvold, 2009, pp. 803–804.

social relations and practices. “[L]egal consciousness, as participation in the production of legal meanings, cannot be understood independent of its role in the collective construction of legality”, as Silbey notes.⁵²

The notion therewith neatly ties in with ideas of legal pluralism and vernacularisation. Those examining legal consciousness primarily deal with the way in which hegemonic legal interpretations are (re)produced, sustained, or amended through participation and interpretation – in this sense, legal consciousness can indeed be regarded as a crucial element of effective vernacularisation. These processes of participation and interpretation are ultimately inherently subjective as they seek to clarify the experiences and perceptions that people routinely have with law in their everyday life.⁵³ They also are heterogeneous as people have different perspectives on legal frameworks, discuss them in different terms, and employ different and often competing legal strategies.⁵⁴ In turn, this branch of scholarship henceforth emphasises the importance of approaching enquiries as to the role of law not simply by looking at black-letter law, nor by merely addressing the impact of law on society, but by delving into the manifold subjective experiences and social constructions of legal phenomena. The concept of legal consciousness therefore provides fertile ground to advance an alternative response to the legal impasse of human rights. It breaks free from the impasse by focussing not on the implications of globalisation for international human rights law in the books but rather by rooting its locus of knowledge in processes of vernacularisation in the social context:

“it opens up a whole new arena of subjective experiences of law which is missed by scholarship which puts formally legal phenomena at the heart of its methodology. The insight of the legal consciousness literature is that law is experienced in everyday life outwith the terrain marked by formal legality (however generously defined). Legal consciousness research consciously de-centres law as a social phenomenon.”⁵⁵

The concept of legal consciousness henceforth allows one to examine the role of law *beyond* the impasse identified above, since such impasse ultimately relates to legal instruments and their operation rather than to lived experiences. For example, in studying the US wage equality movement of the 1970s and 1980s, McCann uses the concept of rights consciousness to explore “the diverse, often defiant forms of practical legal knowledge shared among citizens *in* society that are not reducible to official legal texts.”⁵⁶ Transposed to the context of the present research, commodification and crimmigration in the

⁵² Silbey, 2008.

⁵³ Cowan, 2004, p. 929; Engel, 1998.

⁵⁴ McCann, 1994, p. 283.

⁵⁵ Cowan, 2004, p. 929.

⁵⁶ McCann, 1994, pp. 227–228.

realm of confinement may lead to a legal human rights impasse insofar as legislative and jurisprudential developments on the one hand and policy changes on the other revolve around the ongoing rat-race, or cat-and-mouse game,⁵⁷ yet this does not mean that such impasse obstructs human rights law from having an effect through processes of legal consciousness and vernacularisation. Conversely, by approaching human rights from a socio-legal rather than a positivist doctrinal perspective, the beginning of a more holistic approach towards assessing their role becomes tangible. This requires not, as the previously explored approaches have promulgated, *more* human rights law, nor *less* human rights law per se, but rather demands the inquiry itself to be shifted from the level of normative legal parameters towards the level of empirical subjective experiences and social relations.

Nevertheless, one shortcoming of the bulk of research into legal consciousness is, as Hertogh points out, that it focuses primarily on the *salience* of law in society without questioning *whether* and *how* law matters in the first place.⁵⁸ As legal pluralism teaches us, it is also very well possible that law is *not* at the core of social relations or subjective experiences but is, rather, absent from everyday life.⁵⁹ In this sense, vernacularisation of legal norms may thus also purposively *not* take place. The famous study by Sally Falk Moore into so-called 'semi-autonomous social fields' is a clear example in this regard: in legal pluralist environments, centrally issued legal norms are on various occasions less effective in regulating and constraining social interaction than local norms.⁶⁰ Members of the general public frequently consider central laws as alien, distant, and threatening and accordingly at times want such norms to only play very restricted roles in their social interaction.⁶¹ Such attitudes show a significant lack of vernacularisation, as local normative orders in such instances do not only lack alignment, but also significantly conflict, with central norms. Hertogh calls these processes '*legal alienation*', as opposed to legal consciousness, to denote public discontent with law and the justice system and the consequent subjective non-experience and non-perception of law as a vital part of everyday life and social relations.⁶² As legal pluralism informs us, since a multitude of normative orders exist consecutively, such discontented members of the public can easily go on a "normative-order shopping spree" in minimising the impact of legal norms that constitute, at least for them, but one policy option.⁶³ Similar to legal consciousness, the notion of legal alienation in turn also allows us to go beyond the legal human rights impasse in

57 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 3. See also Van Berlo, 2017b, pp. 10–11.

58 Hertogh, 2018, p. 12.

59 Hertogh, 2018, p. 13.

60 S.F. Moore, 197.

61 Engel & Engel, 2010, p. 76; Hertogh, 2018, p. 14.

62 Hertogh, 2018, p. 14.

63 Klabbers & Piiparinen, 2013, pp. 27–28.

order to examine the role of law in society *beyond* such impasse, or, more precisely, to examine the extent to which such role is absent. Combined, then, legal consciousness and legal alienation can be used to measure the lie of the land in relation to the role of human rights law in society: it provides a lens to examine both how human rights law does, and how it does not, play a role in everyday interactions beyond its black-letter capacity.

So far, so good: the notions of legal pluralism, legal consciousness, and legal alienation seem to provide a basis for an alternative response to the identified human rights impasse. Even where globalisation developments do not align with black-letter international human rights law, this does not *a priori* mean that human rights necessarily lose their impact and value as they may still play a role in empirical reality, which can be examined by looking at processes of vernacularisation through legal pluralism, legal consciousness, and legal alienation. However, whilst these key concepts may provide a *beginning* of an alternative answer, it will be argued in the remainder of this chapter that they provide, in the context of human rights specifically, insufficient basis for a novel approach altogether. The reason for this is to be found in the conceptual difference between *law* on the one hand and *human rights* on the other. To properly understand this, it is however necessary to first tap into literature on different ‘schools’ of human rights before returning to these socio-legal notions in further developing an alternative response.

8.4 FROM LAW TO HUMAN RIGHTS

So far, this book has focused on human rights *law* as the hegemonic articulation of human rights. This holds not only true for the positivist doctrinal analysis in Part II of this book, but also for the first consideration of an alternative, socio-legal response to the legal impasse in this chapter. As the work of Oomen illustrates, legal pluralists working on issues of human rights may have particular *regard* for society yet often continue to view human rights as a *legal* type of normative order, that is, human rights are frequently considered to be “those fundamental rights laid down in international treaties”.⁶⁴ Whilst such legal grounding is not surprising – these scholars are, indeed, *legal* pluralists – it nevertheless fails to capture the full dynamic and potential of human rights.

Law is, indeed, not all there is. Human rights are not necessarily restricted to a legal reading but may also play a role in other, extra-legal, ways.⁶⁵ As Nussbaum reports, “[t]here are many different ways of thinking about what a right is, and many different definitions of ‘human rights’”.⁶⁶ Consequently, lawyers cannot – and arguably should not be able to – “claim exclusive domin-

⁶⁴ Oomen, 2009, p. 3.

⁶⁵ See also Ife, 2009, p. 112.

⁶⁶ Nussbaum, 1997, p. 273.

ance of the field", even though they obviously have an important role to play in human rights theorising and human rights work.⁶⁷ In fact, consensus on what human rights are, how they should be regarded, and to what extent they contain a potential for reform is lacking amongst both scholars and lay people.⁶⁸ In turn, in exploring the role of human rights, it is not sufficient to only look at international human rights *law*: one should also have due regard to the other viable conceptualisations of human rights and the ways in which such conceptualisations may have an impact on the situation at hand – in this book, on settings of confinement characterised by commodification and/or crimmigration developments. Even more so, as Koskeniemi argues, legal codifications of human rights have at times even unnecessarily constrained and limited the true potential of human rights:

"[W]hile the rhetoric of human rights has historically had a positive and liberating effect on societies, once rights become institutionalized as a central part of political and administrative culture, they lose their transformative effect and are petrified into a legalistic paradigm that marginalises values and interests that resist translation into rights-language".⁶⁹

This refers back to the arguments of scholars warning for the end of human rights, who, all on their own terms, point to the disconnect between human rights law on the one hand and the allegedly 'true' notion of human rights – whether grounded in utopian ideals, lived realities, or other sources – on the other, with the former in various accounts being represented as a semblance or travesty of the latter.⁷⁰ It is therefore not only possible but also appropriate to shift attention from the Janus-faced nature of human rights as a legal construct towards the multi-faced – and multi-faceted – nature of human rights as a broader concept. In order to do so, four archetypal 'schools of thought' about the nature, function, and merit of human rights as identified by Dembour will now be addressed.⁷¹

8.4.1 Four schools of human rights

Dembour developed the thesis that human rights scholarship can roughly be divided into four separate schools or domains. Some regard human rights as natural entitlements ('natural school'), others regard them as deliberative principles ('deliberative school'), protest claims ('protest school'), and/or discursive expressions ('discourse school').⁷²

67 Ife, 2009, pp. 111–112.

68 Dembour, 2006, 2010; Stenner, 2011; L. Weber et al., 2014, p. 17.

69 Koskeniemi, 2011, p. 133.

70 Douzinas, 2000; Hopgood, 2013; Posner, 2014c; Wacks, 1994.

71 Dembour, 2006, 2010.

72 Dembour, 2006, 2010.

The natural school of human rights thinking considers human rights as a *given*, resulting from a higher source such as Nature, God, Reason or Humanity: people possess human rights simply because they are human beings.⁷³ Natural scholars argue that human rights are, at their core, negative in character, absolute and universal, and that they exist independent of social recognition, although they only materialise through individual enjoyment.⁷⁴ Human rights norms exist on the transcendent plane, although their codification in national and international legislation is welcomed and celebrated.⁷⁵ This perspective dominates the field of human rights thinking and has been labelled the human rights 'orthodoxy'.⁷⁶

According to the deliberative school, human rights are values of liberal societies that are *agreed upon* through genuine deliberative processes.⁷⁷ They can only govern the polity within which they were agreed upon (in positive law) to the extent to which they were agreed upon.⁷⁸ In this sense, human rights are to be understood as legal obligations that were created through legitimate law-making processes.⁷⁹ They consequently constitute no universal values until global consensus broadens.⁸⁰ On the domestic plane, constitutional law is often referred to as the deliberative standard of human rights.⁸¹ At the international level, international human rights law could be argued to constitute a similar standard on the basis of which at least *some* universality of human rights can be discerned from a deliberative perspective – that is to say, to the extent that countries agreed upon the human rights provisions through ratification.⁸² In any event, for deliberative scholars, "there are no human rights beyond human rights law"⁸³ and they thus can be branded human rights 'atheists'.⁸⁴

The primary aim of the protest school is to redress injustice: human rights are *fought for*.⁸⁵ Human rights thus provide claims and aspirations that allow the poor, underprivileged, and oppressed to contest the status quo.⁸⁶ From

73 Dembour, 2010, pp. 2–3; Stenner, 2011, p. 1217; L. Weber et al., 2014, p. 17.

74 Dembour, 2006, p. 254, 2010, pp. 2–7.

75 Dembour, 2010, p. 5.

76 Dembour, 2006, p. 255, 2010, p. 3.

77 Dembour, 2006, p. 254, 2010, p. 3; Stenner, 2011, p. 1217; L. Weber et al., 2014, p. 17.

78 Dembour, 2006, p. 254, 2010, p. 3.

79 Breakey, 2018, p. 8.

80 Dembour, 2006, p. 254, 2010, p. 3.

81 Dembour, 2010, p. 3.

82 See also Breakey, 2018, pp. 7–9. In this regard, it is interesting to note the position of customary international human rights law. Customary international law becomes part of the binding body of international human rights law on the basis of both consistent state practices and *opinion juris*, which – albeit somewhat more implicitly – also hints at a deliberative understanding of human rights. On this, see also D'Amato, 199.

83 Dembour, 2010, p. 6.

84 Dembour, 2006, p. 255.

85 Dembour, 2006, p. 254, 2010, p. 3; Stenner, 2011, p. 1217; L. Weber et al., 2014, p. 17.

86 Dembour, 2006, p. 254, 2010, p. 3.

the perspective of the protest school, viewing human rights as simple entitlements obscures the fact that they are grounded in continuous social struggle: human rights victories are in this sense short-lived since they “never signal the end of all injustice”.⁸⁷ Protest scholars consequently regard human rights as moral at their core, yet they view human rights law and institutions with suspicion as they are the arguable result of a ‘hijacked’ process that generally favours the elite and that leads to bureaucratization.⁸⁸ Indeed, given the structural disadvantage of some groups of people – including ‘crimmigrant others’ as explored in chapter 3 – in the deliberative processes and the distribution of human rights, protest movements may be expected to continuously challenge human rights understood as deliberative principles given that these institutionalise, as it were, disparity. According to this school, true human rights meaning is to be found in the needs of any struggling underclass. The protest school is thus one of ‘asceticism’ and ‘evangelism’, operating at the forefront by preaching and fighting for the application of the allegedly genuine doctrine of human rights to situations of injustice.⁸⁹

Finally, for scholars within the discourse school, human rights exist only because they are *talked about*: they lack reverence towards the human rights concept and point towards its shortcomings in relation to the realisation of human equality.⁹⁰ According to this strand of thinking, human rights are not given, nor are they the inevitable solution to the world’s ills, although they do constitute a powerful language through which political claims can be expressed.⁹¹ Human rights revolve, thus, around ‘rights talk’: they are what one *says* they are, not more and not less.⁹² Human rights are therefore not to be believed in – although they can, occasionally, yield positive (yet also negative) results.⁹³ Many discourse scholars, who can be defined as human rights ‘nihilists’, accordingly argue that a more promising emancipatory project is needed to achieve justice and equality for all.⁹⁴

Importantly, these four schools do not necessarily span the full range of human rights thinking, nor are they mutually exclusive. Additional schools may be distinguished in the future and individuals may self-identify as belonging to more than one school simultaneously.⁹⁵ As Dembour states, “I have

87 Dembour, 2010, p. 3.

88 Dembour, 2006, p. 254, 2010, pp. 3, 6.

89 Dembour, 2006, p. 255.

90 Dembour, 2006, p. 254, 2010, pp. 4–8; Stenner, 2011, p. 1217; L. Weber et al., 2014, p. 17.

91 Dembour, 2010, p. 4.

92 Ritter, 1996, p. 266.

93 Dembour, 2010, p. 4. Rights talk can indeed also yield negative results. See for example Glendon, 1991, who asserts in the US context how public debate turned into a battlefield between stakeholders with varying interests that are continuously couching their positions in terms of *rights* and, in turn, how this paralyses political discourse and heightens social conflict.

94 Dembour, 2006, p. 255, 2010, p. 8.

95 Dembour & Kelly, 2011, pp. 20–21.

always found it possible, so far, to classify a particular human rights scholar in one of 'my' four schools, though not always squarely".⁹⁶ Of particular importance here is that the classification into four schools of thinking clearly shows that human rights can be understood as legal (deliberative) standards, but not necessarily so: they can *also*, simultaneously, be understood as natural entitlements, protest claims, and/or discursive expressions that exist independent of legal recognition.

8.4.2 From Janus to Brahma

Any inquiry into the protection mechanism of human rights arguably needs to take all aforementioned understandings of human rights into account in order to draw a genuinely holistic conclusion. Once this is accepted, it becomes clear that one has to analytically move from studying human rights as a Janus-faced legal phenomenon towards studying human rights as a more encompassing Brahma-faced notion.



Figure 10: Depiction of Brahma.

⁹⁶ Dembour, 2006, p. 232.

Being omniscient in the sense that he has four faces turned in each direction as depicted in Figure 10,⁹⁷ Brahma indeed perfectly symbolises the four dimensions of human rights. Each of his four heads looks at human rights differently and therewith *conceives* of human rights in a different way.

Furthermore, Brahma is frequently depicted as having four arms and as holding four ritual objects that may be understood as further metaphors for the relevance of each of the different dimensions of human rights.⁹⁸ He holds (i) water, which as one of the four elements may be regarded as referring to the understanding of human rights as natural entitlements; (ii) a manuscript, which can be seen as representing the deliberative school relying on codified law; (iii) a sling or catapult, which may be regarded as symbolising the protest tools of the protest school; and (iv) a spoon, which may be understood as representing the idea that human rights are mere discursive constructs that come about in accordance with how we conceive of them, or, to extend the spoon metaphor, how they have been fed to us.

In sticking with this metaphor, the remainder of this chapter will frequently refer to the combination of Brahma's four heads, four arms, and his four ritual objects in discussing the protection potential of human rights.

8.5 A HOLISTIC APPROACH TO UNDERSTANDING THE ROLE OF HUMAN RIGHTS

8.5.1 From legal pluralism, consciousness, & alienation to human rights pluralism, consciousness, & alienation

By now it becomes apparent that even in situations where human rights *law* is insufficiently able to deal with challenges of commodification and/or crim-migration, this does not mean that the human rights concept as a whole has become redundant per se. Due to their multi-dimensional nature, human rights are indeed not necessarily to be understood as legal constructs. They are a Brahma-faced phenomenon that faces four directions simultaneously, with only one face maintaining a clear legal perspective. In similarly identifying multiple approaches to the understanding of human rights,⁹⁹ Breakey likewise argues that “each approach captures a unique, common-sense – and, in principle, compatible – insight into why human rights warrant respect. *Acknowledging this compatibility illuminates the myriad different avenues for legitimacy human rights enjoy [...]*”.¹⁰⁰ As he simultaneously warns, however, this also means

⁹⁷ Hazen, 2003, p. 14; B.M. Sullivan, 1999, p. 86.

⁹⁸ See also Hazen, 2003, p. 7.

⁹⁹ In fact, Breakey identifies seven instead of four approaches to human rights. See Breakey, 2018.

¹⁰⁰ Breakey, 2018, p. 1 (emphasis added).

that human rights “are thereby opened for normative challenge” on all of these distinct fronts simultaneously.¹⁰¹

The concepts of legal pluralism, legal consciousness, and legal alienation are consequently aspects of, but cannot be the exhaustive fundament for, any holistic examination of human rights. These notions explore *law*, whereas, as the foregoing points out, human rights are not necessarily law. They therewith do not provide sufficient conceptual space to study the role and value of human rights in a holistic sense, as they do not allow for the inclusion of legitimate understandings of human rights *differently* than the understanding of human rights *qua* law. They thus do not allow for the conceptual inclusion of legitimate understandings of human rights as natural entitlements, protest values, or discursive constructs that do not have to, although may, relate to legal articulations of human rights.

In light of human rights’ Brahma-face, any alternative response thus necessary needs to rely on broader conceptual notions that may, nevertheless, be modelled in accordance with legal pluralism, legal consciousness, and legal alienation. Such response, it is argued here, needs to be based on notions that can be best described as *human rights pluralism*, *human rights consciousness*, and *human rights alienation*. They concern not the existence of multiple *legal* orders or “what people do as well as say about *law*”,¹⁰² but rather the existence of multiple *human rights* orders and what people do as well as say about *human rights*. Based on a pluralist understanding of human rights, ‘human rights consciousness’ and ‘human rights alienation’ should be understood as much broader concepts in the sense that they concern not just the legal paradigm of human rights but also other, concurring paradigms that determine the way in which human rights play (or do not play) a role in practice. This means that they are able to conceptually grasp the influence of both ‘human rights’ understood as grounded in legal norms, as well as ‘human rights’ understood as grounded in morality, in social struggle, or in discourse. As a consequence, the examination of *legal* pluralism and of peoples’ use (or non-use) of human rights *law* is but one aspect of the broader inquiry into the impact of *human rights* pluralism and of people’s use (or non-use) of *human rights*. Fiske eloquently sums up this distinction between human rights and human rights law:

“Human rights [...] is likely to lead one to think about human rights law – the bodies of jurisprudence at national, regional and international levels [...]. Human rights [however] also exist beyond legal positivism; they have power as an idea, a set of values and ethics, and provide a language with which to articulate wrongs and legitimise opposition to lawfully enacted injustices. While human rights in

101 Breakey, 2018, pp. 1–2.

102 Silbey, 2008 (emphasis added).

this sense do not carry the same enforceability as legally based rights, they can be powerful nonetheless.”¹⁰³

The quest therefore should be about human rights pluralism, consciousness, and alienation. The point of departure, then, is linked to what has occasionally been explored as the ‘sociology of human rights’: rather than a doctrinal legal focus on international law, this branch of scholarship situates human rights claims firmly in society.¹⁰⁴ It puts aside any idealistic perspectives in favour of an understanding of human rights rooted in social practice and manifest outside the law.¹⁰⁵ The approach taken here is consequently an alternative not only to the conventional model of positivist doctrinal human rights theory but also to socio-legal approaches. It indeed recognises (i) that human rights are not only legitimately grounded in legal instruments, but also in morality, social struggles, and discourse, (ii) that they are not only to be achieved through traditional legal practice including advocacy, litigation, and treaty monitoring, but can also be achieved through practices that are based on frameworks of morality, social struggle, or discourse instead, and (iii) that in any attempt to achieve them, human rights may instrumentally be used as a deliberative, moral, protest, or discursive tool.

This distinction between human rights as legitimately *grounded* in either of the four dimensions (i.e. in deliberations, morality, social struggle, or discourse), human rights as *accomplished through* either of the four dimensions (i.e. through deliberations, morality, social struggle, or discourse), and human rights as instrumentally *used* in either of four ways (i.e. as deliberative, moral, protest, or discursive instruments) is crucial. Indeed, as a further complication, in interpreting the model of human rights promulgated here it is important to realise that the four-dimensional conceptualisation of human rights essentially addresses these three issues simultaneously. To refer back to the conceptualisation of human rights as a Brahma, human rights can thus be *understood* from four perspectives (i.e. Brahma’s four heads being turned into four different directions), can be *vernacularised* through four mechanisms (i.e. the four arms of Brahma, each pointing in a different direction), and can be *used* for such vernacularisation in four ways (i.e. the ritual objects that Brahma is holding, each representing a different praxis). Each dimension hence comprises respectively a *constitutive*, a *directional*, and an *instrumental* component.¹⁰⁶ These will now be explicated in turn.

103 Fiske, 2016, p. 8.

104 Frezzo, 2015.

105 Clément, 2015, p. 564.

106 Compare Garth & Sarat, 1998, who identify a dual functionality in relation to legal frameworks. They thus explain how ‘law’ can be both a constitutive that shapes our understanding of the world, *and* an instrument to accomplish particular purposes. Here, in a similar vein, it is argued that such dual functionality can be identified in relation to the four-

8.5.2 The dimensions' constitutive function: four human rights consciousnesses

On the basis of the foregoing, it becomes apparent that “[i]ndividuals develop a consciousness about myriad social and structural entities, including the law”¹⁰⁷ and, it may be added here, human rights. In turn, all four dimensions of the model of human rights have a constitutive function in that each dimension promulgates a respective legitimate *human rights consciousness*. The model thus informs us that human rights can be *grounded* in either of the four dimensions, and that whilst legal articulations are often hegemonic, they are not the only option available. Put differently, the production of human rights meaning can be based on either law, morality, social struggle, or discourse: each of these four sources can be the basis for human rights interpretations that are (re)produced, sustained, or amended through social participation and interpretation.¹⁰⁸ Similar to legal consciousness, human rights consciousness is thus inherently subjective and heterogeneous.¹⁰⁹

8.5.2.1 The four bases for human rights consciousness

First, human rights may be identified on the basis of (international) human rights law as codified ‘in the books’ and as developed through jurisprudence. In this sense, they are *deliberative principles*: they are based, in other words, on the deliberative efforts that have taken place in codifying, consolidating, and developing human rights on the legal plane. Given the ongoing hegemony of legal human rights articulations, more often than not people rely at least in part on the deliberative dimension in their human rights understanding. From this perspective, human rights consciousness is based on the codification of norms: human rights are understood, at least in part, in the way that they have been codified and developed through deliberative processes.

The second human rights consciousness may be based on a moral paradigm of human rights: thus, human rights may be identified on the basis of moral principles of justice and fairness. This consciousness, then, revolves around human rights as *natural entitlements*. According to a quintessential natural consciousness, human rights entitlements derive from a transcendent plane,

dimensional human rights notion. What is added here, however, is the directional function of each dimension.

¹⁰⁷ Fritsvold, 2009, p. 803.

¹⁰⁸ Compare Silbey, 2008.

¹⁰⁹ Compare McCann, 1994, p. 283. See, for a powerful appraisal of the existence of different human rights consciousnesses that do not always neatly coincide with international human rights law, the work of Van der Kroon on Panamese indigenous Ngäbe-Buglé children who migrate from Panama and work on Costa Rican coffee fields: Van der Kroon, 2015.

whether it be a divine entity or an abstraction such as 'humanity' or 'reason'.¹¹⁰ Any understanding premised on this dimension is thus ultimately based on faith, that is, on the identification of norms of morality that are dictated by a higher, transcendent source.

Third, human rights consciousness can result from human rights understood as *protest values*. Human rights in this sense may be identified on the basis of the needs of the underclass and their according social struggles. As Levitt and Merry point out, "the idea of human rights becomes broader, escaping the original parameters of the legal documents. [...] As social movements seize these ideas and wrestle with them, they make them something new."¹¹¹ From such a perspective, human rights claims thus may arise as a response to structural inequalities and injustices and do not, necessarily, align with those rights that are protected through the domain of human rights law that is, as previously mentioned, viewed with suspicion.¹¹²

Finally, human rights may be identified on the basis of dominant discourses. In this sense human rights consciousness is modelled in accordance with human rights understood as *discursive constructs*. The way in which human rights are authoritatively discussed, debated, framed, talked about, promulgated, and ignored thus shapes one's human rights consciousness based on this dimension. In other words, depending on the most dominant and/or appealing discourses available, a particular consciousness of human rights may arise. Still, the embedding of such understanding in rights talk makes it difficult to define with sufficient authority what human rights are and how they can objectively be recognised.¹¹³ Nussbaum, elaborating upon the limitations of rights talk, points out that the language of rights therefore is not particularly informative "unless its users link their reference to rights to a theory".¹¹⁴

The latter three bases for human rights consciousness do not require a corresponding legal duty in order to enjoy legitimacy, and even if such a corresponding legal obligation exists, it does not have to be as broad and encompassing in scope. In other words, it is very well possible for collectivities and individuals to consider that a person is entitled to a certain 'human right' as legitimately grounded in morality, social struggle, or discourse, even if such right does not have a corresponding legal obligation. Conversely, these four dimensions may, in their constitutive capacity, also inform human rights alienation. Thus, depending on situational context, each of the particular human rights consciousnesses may be regarded by members of the public as

110 On occasion, some natural scholars resort to legal consensus as proof and proxy of universal and transcendental human rights entitlements: Dembour, 2006, pp. 5–6.

111 Levitt & Merry, 2009, p. 460.

112 Dembour, 2006, p. 254, 2010, pp. 3, 6.

113 Ritter, 1996, p. 266.

114 Nussbaum, 1997, p. 275.

alien, distant, and threatening to their own customs and belief systems.¹¹⁵ On this basis, collectivities and individuals may be alienated from such norms and may, consequently, not experience and not perceive them as vital parts of their everyday lives. In fact, the availability of multiple consciousnesses of human rights allows them to go on what Klabbers and Piiparinen call a “normative-order shopping spree”:¹¹⁶ they may purposively alienate *particular* human rights consciousnesses yet may adhere to others, which allows them to frustrate the effective vernacularisation of specific human rights consciousnesses whilst at the same time unabatedly valuing the importance of human rights conceived of in alternative ways. This relates to what de Tocqueville already pointed out in *Democracy in America* when discussing the potential despotism in democratic nations: as he envisages, enlightenment and equality based on centrally provided entitlements do not necessarily spur individuals’ concern for humanity as a whole, but may rather result in self-serving attitudes. Thus,

“I see an innumerable crowd of like and equal men who revolve on themselves without repose, procuring the small and vulgar pleasures with which they fill their souls. Each of them, withdrawn and apart, is like a stranger to the destiny of all others: his children and his particular friends form the whole human species for him; as for dwelling with his fellow citizens, he is beside them, but he does not see them; he touches them and does not feel them; he exists only in himself and for himself alone”.¹¹⁷

In this sense, modern conceptions of equality and freedom may foster strong alienation of grand equality ideals amongst a citizenry that is primarily concerned with a very narrow-minded, self-serving idea of human rights.

8.5.2.2 *The construction of ‘unique’ human rights consciousnesses: norm internalisation and norm socialisation*

The foregoing makes clear that the construction of human rights meaning is highly context-specific and subjective. Given the heterogeneity of the construction process, human rights consciousnesses may indeed vary widely as to their substance from community to community and even from individual to individual. Arguably, this will be least the case in relation to the consciousness of human rights as deliberative principles, as these can be deduced from available sources including legal instruments, statutes, and case law.¹¹⁸ The

115 Compare Engel & Engel, 2010, p. 76; Hertogh, 2018, p. 14.

116 Klabbers & Piiparinen, 2013, pp. 27–28.

117 De Tocqueville, 2000, p. 663.

118 At the same time, however, it should be appreciated that the substance of human rights law may differ from region to region, depending on domestic constitutional differences, the existence of regional treaties, and ratification of international instruments. In this sense, the meaning of human rights understood as deliberative principles may still depend

domain of morality, on the other hand, will – due to its metaphysical nature – on many occasions lead to the identification of different sets of human rights by different groups and different individuals: concepts of justice and fairness may, indeed, be substantiated in completely different ways depending on one's social context and belief systems. Likewise, in constructing the understanding of human rights as protest values, any precise delineation will depend on one's identification of an alleged 'underclass' as well as on one's experiences with, and perspectives on, the proper needs of those involved in social struggle.¹¹⁹ In a similar vein, the identification of human rights on the basis of dominant discourse ultimately depends on contextual specifics as distinct discourses may dominate different sociocultural environments and the idea of discursively constructed rights may thus be substantiated in multiple, context-specific manners.

To complicate matters further, since the formation process through which human rights consciousnesses are formed is highly heterogeneous and subjective, people do not necessarily rely, nor necessarily primarily rely, on only one of the four dimensions. To the contrary, whilst consciousnesses may be shaped in light of the law in the books, moral frameworks, social struggle, or discursive statements, it is also possible that individuals' formation processes are influenced by various of these sources simultaneously. Given the dynamic nature of producing consciousness, it is even very unlikely that the consciousness of an individual is solely based on one source.¹²⁰ Human rights consciousnesses thus on many occasions will be highly unique (and sometimes even contradictory), in that they combine elements of various of these sources to arrive at highly individualised understandings of human rights. In this process, the various sources may have a mutually strengthening effect – where human rights identified on the basis of one source corroborate with human rights identified on the basis of another source, therewith being reciprocally legitimising – but may also have a mutually weakening effect – where human rights identified on the basis of one source conflict with human rights identified on the basis of another source, therewith questioning one another's legitimacy. An example of the former would be where a certain deliberative understanding of human rights as deduced from the codified law is corrobor-

significantly on contextual specifics. Furthermore, significant ambiguity continues to exist concerning the material scope of specific human rights instruments as well as concerning the proper addressees and beneficiaries of obligations respectively rights. Such ambiguities can be exploited to arrive, based on one's belief system and agenda, at context-specific understandings that represent not necessarily the sole potential interpretation. Even in relation to a deliberative consciousness, based on the existence of consultable sources such as codified norms and jurisprudence, no singular set of rights can thus categorically be identified and debate about the question what these human rights precisely entail continues to exist.

119 See also Ambrosini & Van der Leun, 2015, p. 111.

120 Compare Fritsvold, 2009, p. 804.

ated by a moral understanding of human rights as premised on a metaphysical conviction. Conversely, an example of the latter would be where dominant discourse marginalises the human rights entitlements of certain 'underclasses' and therewith detracts from notions of human rights as based on protest and social struggle.

The question, then, is how individuals arrive at particularly constructed human rights consciousnesses. To grasp this process, the concepts of 'norm internalisation' and 'norm socialisation' should be introduced here. 'Norm internalisation' refers to the process by which an individual (or, for that matter, any actor) first learns about certain norms that potentially apply, consequently learns why such norms are important or sensible, and on the basis of such information ultimately accepts the norm as his or her own viewpoint.¹²¹ The way in which individuals learn about such norms may differ widely: they may, for instance, derive from the legal plane, from religious doctrine, from particular philosophies, from reason, or from life experience. Likewise, the normative importance or sensibility of such norms may be based on a wide variety of authorities, including, again, the law, religion, reason, experience, and so on.

Such internalisation processes are frequently denoted as being part of a broader process of norm socialisation, that is, not only the *internalisation* of norms through learning processes but also the subsequent *confirmation* of such norms through behaviour, attitude, and, ultimately, the transmittal of such norms to new generations.¹²² In this sense, norm internalisation is a circular process in that individuals are not only "socialised into internalising norms",¹²³ but also in turn socialise others into internalising norms. Through norm socialisation the internalised norms hence become part of one's personal culture.¹²⁴ Fritsvold reports in this regard that the formation of a personal culture is, however, not static as consciousnesses may develop on the basis of professional and personal experiences and evolving socialisation processes.¹²⁵ In turn, Finnemore and Sikkink point out that, quite paradoxically, norm internalisation may gain influence where its visibility fades:

"At the extreme of a norm cascade, norms may become so widely accepted that they are internalized by actors and achieve a 'taken-for-granted' quality that makes conformance with the norm almost automatic. For this reason, internalized norms can be both extremely powerful (because behavior according to the norm is not questioned) and hard to discern (because actors do not seriously consider or discuss whether to conform)."¹²⁶

121 Jinks & Goodman, 2003, p. 1752; Koh, 1997, p. 2646.

122 Maccoby, 2015, p. 3. See more generally, on the distinction between internalization and behaviour, Olkinuora, 1972, p. 228.

123 Tepe, 2012, p. 17.

124 Maccoby, 2015, p. 3. See also E.A. Ross, 1919.

125 Fritsvold, 2009, p. 803.

126 Finnemore & Sikkink, 1998, p. 904.

In sum, through norm internalisation and socialisation, human rights understandings may become proper – albeit non-static – human rights *consciousnesses* of individuals or collectivities. In turn, such consciousnesses guide the positions, mentalities, and behaviours of those individuals or collectivities concerned, therewith opening up scope for effective vernacularisation of such consciousnesses (an, on the other hand, for effective alienation of other consciousnesses). By extension, whilst *any* human rights consciousness can be translated into actual protection through vernacularisation mechanisms as will be discussed below, widely shared and accepted consciousnesses may be particularly influential given that they may operate, almost invisibly, as powerful and ingrained elements of social interaction.¹²⁷

8.5.3 The dimensions' directional function: four human rights vernacularisation mechanisms

The second aspect of the four-dimensional model of human rights is that each dimension fulfils a *directional* function. That is to say, each of the four arms of Brahma points in a different direction, marking different routes for the effective vernacularisation of human rights consciousnesses. Thus, deliberations, morality, social struggle, and discourse do not only provide fertile bases for distinct human rights consciousnesses, but also provide processes through which these different human rights consciousnesses can be *vernacularised*. Whenever individuals or collectivities are conscious about the salience of a set of human rights as identified on the basis of one or more of the four dimensions, they in turn can vernacularise these standards by translating them, through one or more of the mechanisms offered by the respective dimensions, into their local norms, cultures, practices, and traditions. Conversely, whenever individuals or collectivities are alienated from a set of human rights as identified on the basis of one or more of the four dimensions, they in turn can prevent vernacularisation of these standards by purposively inhibiting their local translation. It should hence constantly be kept in mind that the various dimensions may not only be used to *increase* protection of human rights, but also to achieve the complete opposite. Again, the four-faced approach concerns not only human rights protection, but reflects in a more encompassing fashion

¹²⁷ Notwithstanding their importance for human rights protection, norm internalisation and norm socialisation remain, however, largely underexplored in the context of human rights. Whilst Risse & Sikkink did previously raise the question what the conditions are “under which international human rights norms are internalized in domestic practices”, they approached this question by looking at norm internalisation and socialisation by *states*: Risse & Sikkink, 1999, p. 1. Occasionally, the role of human rights activists in human rights internalisation has also been considered: see González, 2016, p. 383.

on the impact – be it positive or negative – of human rights in a particular context.

Human rights protection may thus flow from various, largely incomparable vehicles. It accordingly becomes clear that the pursuit of effective human rights protection may be constrained by varying preconditions, depending on which vernacularisation mechanisms are employed. For instance, mechanisms belonging to the natural, protest, or discourse dimension are not *a priori* bound by the same constraints that are imposed on deliberative processes, and therefore can move *beyond* these constraints in pursuing the effective materialisation of human rights protection. This, then, provides ample ground to move beyond the legal impasse identified in Part II of this book. The different ways in which the dimensions can function as vernacularisation mechanisms will now be addressed in turn.

8.5.3.1 Human rights through deliberative processes

The first way in which human rights can be vernacularised is through deliberative processes. This is pretty straightforward in that it is commonplace to consider that human rights can be effectuated through the workings of the law. It is, henceforth, through the mechanisms of allocating responsibility, inducing answerability, and effectuating enforcement that human rights may be vernacularised and accomplished in a deliberative manner.

Importantly, this may include processes within the square domain of international human rights law, but may also include processes within domains that are merely affiliated, such as domestic criminal or tort law. Human rights consciousnesses may therefore be vernacularised through deliberative processes, even where these processes do not concern square international human rights law, that is, where international human rights law is not used as a *tool* – to be discussed later in this chapter – as such. In this sense deliberative processes do not provide one but multiple routes to vernacularisation: different legal domains including international human rights law may, or may not, provide leeway for the vernacularisation of human rights consciousnesses. In turn, human rights consciousnesses may be vernacularised through various specific deliberative processes that are related to the creation and enforcement of legal norms, including not only legal proceedings but also, for instance, the drafting of legislation.

Ultimately, *whether* one turns to deliberative processes in order to vernacularise a human rights consciousness depends on one's perspective of such processes and of law more generally. A brief return to the notion of legal consciousness illuminates this point further. Work by Ewick & Silbey as well as Fritsvold shows that people's understanding and use of the law can be classified as belonging primarily to either of four categories, although such legal consciousnesses may, at times even in a contradictory fashion, draw on

various categories simultaneously.¹²⁸ Thus, people may conceive of the law as an abstract, neutral, and static entity (they consider themselves to be '*before the law*'), as a game that requires resource mobilisation and strategy for victory (they consider themselves to play '*with the law*'), as a commodity of power that cannot genuinely resolve disputes, recognise truth, or respond to injustice as it does not produce equitable outcomes for others than those in power (they consider themselves to act '*against the law*'), or as a vitally corrupt legal system that veils the illegitimate nature of the corrupt social order and that represses any dissent movement (they consider themselves to be '*under the law*').¹²⁹ Whilst the latter two categories seem to somewhat overlap, their difference rests in the fact that an 'against the law' perspective "observes that the law often fails as an asset to achieve justice" whereas an 'under the law' perspective "views this failing as intentional and perceives law as an active agent of injustice".¹³⁰

Transposed to the context of the vernacularisation of human rights consciousnesses through deliberative processes, this means that one's perception of law and legal processes will influence (i) *whether* one engages in processes belonging to the deliberative dimension, and, if so, (ii) *how* one engages in such processes.

Thus, first, where deliberative processes are for instance viewed from an 'against the law' perspective, people may deem such processes as ineffective to vernacularise their human rights consciousnesses and may consequently decide to turn to other mechanisms instead. Second, where individuals *do* decide to engage in deliberative processes, they may do so depending on whether they view themselves as 'before', 'with', 'against', or 'under' the law. Those considering themselves to be 'before the law' may have no difficulties in relying on deliberative processes' authoritativeness as an autonomous, objective, hierarchical, and rational system and in this sense may consider the legal system a proper mechanism for vernacularisation insofar as their own human rights consciousness aligns with the values fostered through deliberative processes. Alternatively, those considering themselves to be playing 'with the law' may likewise consider deliberative processes to be appropriate vernacularisation mechanisms insofar as sufficient resource mobilisation and proficient strategies are available. Third, those considering themselves to act 'against the law' may, instead of relying on other vernacularisation mechanisms, still turn to deliberative processes in an attempt to "appropriate part of the law's power".¹³¹ Finally, those considering themselves to be 'under the law' are unlikely to turn to deliberative processes altogether, as they call for a revolution in overturning the entire legal system and the corrupt social

128 Ewick & Silbey, 1998; Fritsvold, 2009.

129 Ewick & Silbey, 1998; Fritsvold, 2009, pp. 804–805.

130 Fritsvold, 2009, p. 806.

131 Ewick & Silbey, 1998, p. 28; Fritsvold, 2009, p. 805.

order that is purportedly serves. Rather, they may “engage in flamboyant acts of instrumental lawbreaking for the purpose of symbolic or actual subversion”.¹³²

8.5.3.2 Human rights through implemented frameworks of morality

The second way in which human rights consciousnesses can be vernacularised is through mechanisms that are based on, or that are closely affiliated with, frameworks of morality. Such processes differ fundamentally from deliberative vernacularisation mechanisms in that they are largely non-institutionalised. That is to say, whereas deliberative processes occur in highly institutionalised environments, i.e. through legislative bodies, intergovernmental fora, diplomatic exchanges, courts, arbitrators, and so on, processes of morality largely lack institutionally embedding but operate through dynamic processes of decision-making that will be further explored below. Processes of morality are therewith not collectively identifiable on the basis of their institutional characteristics, but rather on the basis of their socialisation capacities: they are categorically unified in the sense that they concern subjective processes through which the alleged distinction between ‘good’ and ‘bad’ is enforced. This, in turn, essentially revolves around the notion of *choice*: these processes operate on the basis of discretionary *choices* in favour of a particular morality, or consciousness.

Such processes therefore can operate on the basis of any of the four human rights consciousnesses: human rights understandings grounded in either of the four sources can be assigned with moral capacities through the processes of internalisation and socialisation and can, subsequently, be effectuated through decision-making practices of individuals and collectivities along ostensibly moral lines. By extension, they can be based on the *alienation* of any of the four human rights consciousnesses: where particular understandings of human rights are *not* conceived of as morally justified, processes of morality can prevent their effective vernacularisation in practice by the vernacularisation of other, competing norm systems instead.

Morality as a vernacularisation mechanism thus revolves around the extent to which individuals or collectivities effectively have a *choice* to act in accordance with their own unique human rights consciousnesses in order to accomplish them in practice. In this sense, the mechanism of morality taps into people’s everyday encounters, lived experiences, and practical efforts.¹³³ In turn, its impact may be considered particularly significant in actual contexts that are considered human rights-sensitive. That is to say, the vernacularisation of human rights consciousnesses through practices of decision-making in which sufficient room for moral choice is embedded may be deemed particularly

¹³² Fritsvold, 2009, p. 807.

¹³³ See also Ife, 2009, p. 112.

powerful where, for instance, professionals working in settings of confinement are concerned. Their decision-making, indeed, may matter significantly for the effectuation of human rights, however defined, as through their activities notions of human rights may become “grounded in day-to-day lived experience”.¹³⁴ Whilst largely underexplored, support for such claim in the context of confinement can *inter alia* be deduced from the work by Bosworth on immigration detention in the UK.¹³⁵ She found that “staff members frequently express considerable concern over the detainees’ well-being and happiness and are worried by those whose stay is lengthy”, indicating a self-standing concern for inmates’ dignity, worth and wellbeing amongst employees and hinting at the importance of such considerations for the decision-making practices of these individuals.¹³⁶ There is henceforth particular reason to look at human rights internalisation by the ‘boots on the ground’: it are those individuals that, at the micro-level, may make a practical difference through moral processes on the basis of internalised human rights consciousnesses.¹³⁷

To study such mechanisms, we should turn to the topic of ‘discretion’, or, more specifically, that of ‘discretionary decision-making’. This term can be defined as relating to “the freedom, power, authority, decision or leeway of an official, organization or individual to decide, discern or determine to make a judgment, choice or decision, about alternative courses of action or inaction”.¹³⁸ Van der Woude emphasises that discretion in this sense revolves around choice: an individual endowed with power and authority should, for discretion to come into play, be able to choose either the end to be pursued or the appropriate means or standards to achieve a predetermined goal.¹³⁹ The exercise of power is thus not only shaped by rules created in frameworks of legislation or policy, but also by the way in which individuals operating within such systems give, through their human agency, substance to the leeway that the applicable rules allow.

Importantly, this does not necessarily mean that “discretionary decision-making refers to deciding to act or not when the circumstances legally allow for it”,¹⁴⁰ since exercises of discretionary power can also amount to endeavours that either implicitly or explicitly *challenge* the standards set by law and policy. Discretion is thus legally and policy-wise embedded yet is not necessarily congruent with such embedding at all times.¹⁴¹ This process is, for example, very visible at what has been labelled the ‘street level’, where broad

134 Ife, 2009, p. 140.

135 Bosworth, 2011b.

136 Bosworth, 2011b, p. 166.

137 Compare Beijersbergen et al., 2015; Molleman & Van Ginneken, 2013, 2015; T. Ugelvik, 2016b.

138 Gelsthorpe & Padfield, 2004, p. 3.

139 Van der Woude, 2016, p. 10; van der Woude & van der Leun, 2017, p. 30.

140 Van der Woude, 2016, p. 9.

141 See for a different perspective on the definition of discretion, Hawkins, 2014, p. 188.

legislative and policy frameworks interact with, and are translated to, on-the-ground realities. It is at this level “where discretionary power not only permits the realization of the law’s broad purposes, but where officials sometimes are allowed or even encouraged to distort the word or spirit of the law or policy, or to ignore them”.¹⁴² Such decision-making may be based on the preconceptions and motivations of street-level bureaucrats: “[w]hile not all powerful, they tinker with law and cases until they find an (in their view) acceptable and often pragmatic solution”.¹⁴³ Street-level bureaucrats are on many occasions therefore the ‘real policy-makers’, since their actions effectively determine what is going to happen with specific individuals or situations as a matter of course.¹⁴⁴ That is not to say, of course, that individuals can unboundedly engage in decision-making practices that are at odds with circumscribing legal and policy frameworks: to the contrary, individual decision-makers may at times experience adverse consequences of non-compliant choices in the exercise of their discretion. Whilst this does not make the exercise of such non-compliant discretion less real or powerful, it does to a certain extent conditionalize the rational decision-making process that precedes the exercise of power.

The exercise of discretionary power is, from this point of view, inherently flexible and may be shaped both by legal contours, lacking or inefficient institutional oversight, and personal motives.¹⁴⁵ The way in which individuals precisely exercise their discretion through their human agency is therefore often determined on the basis of a complicated mix of motives, experiences, and applicable norms. In this sense, “a connection needs to be forged between forces in the decision-making environment, and the interpretive processes that individuals engage in when deciding a particular case”.¹⁴⁶ Legislation, policy, alternative or even competitive applicable norms such as those of the organisation within which an individual operates, his or her previous professional and/or personal experiences, existing personal relationships with other individual stakeholders, and pre-existing or developing individual attitudes and perceptions related to more abstract concepts such as justice and fairness all may play a role in this process.¹⁴⁷ Van der Woude points out that any study of discretionary decision-making thus should incorporate three levels: (i) the broad social and political contexts within which discretion is applied (or the ‘social surround’), (ii) the legal and organisational frameworks

142 Van der Woude, 2016, p. 11 (emphasis added). See also Lipsky, 2010.

143 Eule et al., 2019, p. 81.

144 Discretionary power thus has a significant influence on the structure and continuity of other individuals’ lives and opportunities and on their relationship with ‘the state’ as a more abstract entity: see Lipsky, 2010, p. 4. See also J. Brouwer et al., 2018, p. 450.

145 Discretionary decision-making henceforth does not take place in a vacuum but is constrained both by external power relations and by internal moralities. See also Eule et al., 2019, pp. 81–83.

146 Hawkins, 2014, p. 189.

147 See also Van der Woude, 2016, pp. 14–15.

that are supposed to circumscribe the exercise of discretion (or the 'decision field'), and (iii) the individual's frame of decision-making which ultimately is modelled in accordance with personal beliefs, attitudes, and a "moral blueprint" (or the 'decision frame').¹⁴⁸

Any internalisation of human rights consciousness can be presumed to at least partially determine an individual's decision frame, as it are these norms that ultimately give substance to one's 'moral blueprint'. The internalisation of human rights consciousnesses by individuals working in human rights-sensitive environments, including settings of confinement, therefore has a significant potential of materialising into effective *de facto* protection through the exercise of discretionary power.¹⁴⁹ Even where their operations are circumscribed by legal provisions, they may "interpret, construct, and ignore the law in daily practice" on the basis of their moral convictions.¹⁵⁰ As Eule et al. contemplate in the migration context,

"[t]he discretionary spaces of law enforcement also enable state officials and others exercising power over migrants' prospects to retain the possibility of actively asserting their personal moral and political agency and aligning law enforcement with their values."¹⁵¹

Of course, it may be argued, this may lead to a certain level of arbitrariness given that human rights consciousnesses are unique and therewith may differ from person to person. Whilst this is true, it still is not a reason to exclude these processes when analysing the holistic vernacularisation of human rights norms: the fact that such arbitrariness may raise questions from a *normative* point of view does not detract from these processes' *empirical* significance. In addition, a modest level of arbitrariness could be normatively justified: the idea that human rights need to be constantly defined, negotiated, and enacted in different contexts has in fact been argued to be central to community development-based understandings of human rights.¹⁵² Even more so, in line with the work of Ife, this conceptual 'openness' of the vernacularisation process is ultimately beneficial for proper human rights 'from below': it allows, right at the forefront, for the effectuation of human rights consciousnesses that are grounded in specific realities and that move beyond static, abstracted, and/or generalised conceptions.¹⁵³

Discretionary decision-making in this regard should not be mistaken to necessarily be of grand character simply because it is instigated by what is considered as a morally superior and utopian framework: to the contrary,

148 Van der Woude, 2016, p. 16. See also J. Brouwer et al., 2018, p. 450; Hawkins, 2014, p. 189.

149 See, on discretionary power in contexts of confinement, also Liebling, Price, & Shefer, 2011.

150 Chiarello, 2013, p. 429.

151 Eule et al., 2019, p. 219.

152 Ife, 2009, pp. 139–140.

153 Ife, 2009, pp. 139–143.

many discretionary decisions based on a human rights compass may appear insignificant or even banal at times but one way or the other may have a “tremendous impact” on those with precarious status.¹⁵⁴ For example, discretion can vernacularise particular human rights consciousnesses by interpreting individual job-related tasks from a human rights perspective, by taking human rights norms into account in formal and informal decision-making practices, by countering harmful impacts of law and policy, and by minimising their harmful effects.

Likewise, the *alienation* of certain human rights consciousnesses can be presumed to have a similar impact on one’s decision frame, albeit with the opposite result. Discretion can, indeed, also be appropriated to counter human rights consciousnesses, for example by minimising or neglecting the importance of human rights norms and by accordingly diminishing any potential for effective vernacularisation. Even more so, competing norms may, through the same processes, be promulgated instead. Actors operating through morality mechanisms thus do not necessarily assign human rights with moral superiority; other frameworks of justice, or even frameworks that are blatantly unjust such as that of racism and inequality, may continue to guide individuals in their work. In this sense, both from a human rights perspective and more generally, discretionary decision-making can overall not be normatively acclaimed or denounced: the normative nature of discretion depends on its empirical appropriation and application.¹⁵⁵

8.5.3.3 Human rights through protest activities

A third way to vernacularise human rights consciousnesses is through mechanisms that are connected to protest and social struggle. Vernacularisation through such mechanisms somewhat resembles vernacularisation through deliberative mechanisms as it frequently is embedded in an institutionalised or semi-institutionalised setting as will be further elaborated upon below. It also, however, closely relates to vernacularisation through morality mechanisms, since it relies on a normative strive to accomplish the ‘good’, however defined. Nevertheless, vernacularisation through protest and social struggle differs from vernacularisation through morality as the latter is based on what may be labelled an ‘interpretive’ approach whereas the former derives from a ‘critical’ source.¹⁵⁶ Vernacularisation flowing from the ‘morality’ dimension thus can be identified by looking at the way in which people translate a human rights consciousness into their everyday (working) life. Protection, then, flows from implicit or explicit internal *choices* made on the basis of cultural under-

¹⁵⁴ Eule et al., 2019, p. 83.

¹⁵⁵ See also T. Evans & Harris, 2004, p. 871; Van der Woude, 2016, p. 13; Van der Woude & Van der Leun, 2017, p. 30.

¹⁵⁶ For this distinction, see also Ife, 2009, pp. 142–143.

standings: individuals interpret their social surround on the basis of their cultural preconceptions – of which human rights consciousnesses may be an important component – and act accordingly as this appears, upon interpretation, the right course of action in the given situation. Protection flowing from the ‘protest’ dimension, on the other hand, can be uncovered by looking at the way in which people, on the basis of their human rights consciousness, try to “address structures and discourses of inequality and oppression”.¹⁵⁷ As such, this approach is much more critical and outwards looking in that it does not primarily address why people make certain *choices* in relation to their own behaviour, but rather how people proactively operate in order to create *change* in the *body politic*. Whereas vernacularisation-through-morality thus primarily relies on people *doing* good on the basis of internalised norms, vernacularisation-through-protest arises where people are oriented towards *achieving* change, focusing primarily on the impact of peoples’ efforts in the broader political and social matrix rather than on their own behaviour in its own right.¹⁵⁸

Change, then, assumes the presence of some form of movement, or, more precisely, *social* movement. Indeed, protest will often be shaped in accordance with the practices and endeavours of formal or informal social collectivities.¹⁵⁹ In his work on what he calls the ‘rights revolution’, Epp sketches this importance of social movements in shaping rights protection.¹⁶⁰ He develops the thesis that support structures of a more or less institutionalised kind are crucial to the development of rights protection regimes: the absence of social movements such as institutionalised NGOs, semi-institutionalised groups including supportive bar associations, and grassroots support groups would hamper the development of effective rights protection.

Social movements closely align to the ‘protest’ school given that they are “collective forms of protest or activism that aim to affect some kind of transformation in existing structures of power that have created inequality, injustice, disadvantage, and so on”.¹⁶¹ As such, social movements are “collective enterprises seeking to establish a new order of life”.¹⁶² However, as with the other four dimensions, social movement does not always result in more or better protection: in the context of human rights, this means that social movements are not necessarily progressive in nature but could also act on the basis of more conservative, reactionary, or regressive motivations and consciousnesses.¹⁶³ Whatever ‘new order of life’ is pursued thus depends on the nature of the

¹⁵⁷ Ife, 2009, p. 143.

¹⁵⁸ See also Ife, 2009, p. 143.

¹⁵⁹ See also Ambrosini & Van der Leun, 2015.

¹⁶⁰ Epp, 1998.

¹⁶¹ G. Martin, 2015, p. 1.

¹⁶² Blumer, 1969, p. 60.

¹⁶³ G. Martin, 2015, p. 1.

social movement concerned, with each movement acting on the basis of what it considers to be 'the good' in terms of an utopian society. The "injustice frame" on which collective action is based accordingly may differ from social movement to social movement.¹⁶⁴ Notwithstanding these differences, overall, the field of human rights can be identified as a key area of contemporary and future concern for social movements – or, as one "where we might observe global civil society in action".¹⁶⁵

All social movements, whether progressive or conservative in nature, have in common that they attempt to achieve change vis-à-vis the status quo – in terms of human rights, this means that they attempt to change the distribution and enjoyment of human rights. This is where vernacularisation within protest mechanisms takes place: human rights consciousnesses are translated into specific courses of action through which their effective implementation in the *body politic* is envisaged. The way social movements attempt to do so, however, may fundamentally differ. Some social movements take place within conventional political fora whereas others operate relatively autonomously.¹⁶⁶ In relation to both traditions, some general remarks can be made in relation to how they may vernacularise human rights through what has been labelled their 'repertoires of contention'.¹⁶⁷

The repertoire of the former tradition, which operates within political confines, is constrained by the rules, customs, and conventions of such political arena: the options for contention are structured within the political realm along cultural and historic lines and are, therewith, limitative, although there is still room for strategic decision-making and social movement agency.¹⁶⁸ Tilly, likening social movements to *commedia dell'arte* and jazz rather than a quintessential classical ensemble, strikingly summarises that "people know the general rules or performance more or less well and vary the performance to meet the purpose at hand".¹⁶⁹ Examples of mobilisation strategies – as specific forms of vernacularisation processes – belonging to this tradition of social movement could include, depending on the situation, mechanisms of patronage, grievances, public meetings, marches, strikes, demonstrations, boycotts, and the use of new media technologies.¹⁷⁰ As Tarrow shows, the employment of such repertoires of contention can be intensified in periods when "opening windows for contentious politics" allow for "spirals of political opportunities and threats", a development that he calls the 'cycles of contention'.¹⁷¹ Hence,

164 Benford & Snow, 2000, p. 615.

165 G. Martin, 2015, p. 242.

166 In scholarship, this has led to different normative perspectives on the role of social movements: see G. Martin, 2015, p. 5.

167 Biggs, 2013; G. Martin, 2015, p. 46; Tilly, 1986, p. 4.

168 G. Martin, 2015, p. 46; Tilly, 1986, p. 390; Williams, 2004, p. 96.

169 Williams, 2004, p. 96.

170 See also G. Martin, 2015, pp. 47–50.

171 Tarrow, 2011, p. 5. See also G. Martin, 2015, pp. 50–52.

whenever a politically opportune window for reform arises, social movements' application of their repertoire of contention may transform social and cultural matrixes and may ultimately result in major protest cycles and, simultaneously, sustained conflict with opposing actors including state authorities, private entities, and, last but not least, other social movements.¹⁷² As such, the notion of 'cycles of contention' emphasises that social movements' mobilisation efforts within this tradition may constantly come and go depending on the existence and prospects of political windows of opportunity.

The employment of a repertoire of contention by the second tradition of social movements, i.e. those principally operating outside the confines and conventions of the political spectrum, is fundamentally different. Social movements operating outside political confines in fact gained prominence at a later stage, from the 1960s onwards, and they are therefore frequently labelled as 'new' movements.¹⁷³ These movements differ from those movements operating within political confines as their repertoire of contention is not limited to "institutionally imminent possibilities" but rather can be employed in relative autonomy from established political actors.¹⁷⁴ This is possible because these types of social movements do not actively pursue political mobilisation as part of a means-end oriented approach, but are rather geared towards revealing and exposing power that is "increasingly hidden or masked by operational codes, formal rules, and bureaucratic procedures and decision-making processes".¹⁷⁵ Thus, whereas the former type of social movements is largely defined by their *interaction* within the *body politic*, this type of social movements resides in the 'pre-political' dimension of collective action, that is, in everyday life, where it *challenges* the *body politic* by embodying an ostensibly genuine alternative.¹⁷⁶ The main goal is to symbolically confront the system and to provide an alternative way of 'naming the world' in order to reverse dominant codes, that is, to offer "another experience of time, space, interpersonal relations, which opposes operational rationality of apparatuses".¹⁷⁷ They hence redefine what it means to socially interact by showing how things could be different; as such, they practice what they preach by living the reality they are struggling to realise for the broader community. Whereas social movements operating within conventional political confines thus attempt to create change by affecting the existing political system and structures, social movements operating outside such confines attempt to create change by,

172 Thus, "changes in public political opportunities and constraints [...] create the most important incentives for triggering new phases of contention for people with collective claims. These actions in turn create new opportunities both for the original insurgents and for late-comers, and eventually for opponents and power holders": Tarrow, 2011, p. 12.

173 Lichterman, 1998, p. 414; G. Martin, 2015, p. 61.

174 G. Martin, 2015, p. 68.

175 G. Martin, 2015, p. 67.

176 G. Martin, 2015, p. 67.

177 Melucci, 1984, p. 830.

frankly, *being* the change. Vernacularisation, in this sense, is a highly deontological endeavour. Nevertheless, this does not mean that social movements belonging to this category operate completely independently from political actors. As Melucci explains, they

“by their very nature are ineffectual unless they work through the mediation of political actors. Constantly exposed to the twin risk of fading into folklore or terrorist desperation, they can only exist if their demands are interpreted by political actors capable of mediating them and rendering them effective vis-a-vis political decision-making. *The demands themselves, however, at the same time continue to exist beyond political mediation and independently of its results, and thus to generate innovative energies.*”¹⁷⁸

One way or the other, social movements thus ultimately need their claims to be heard in institutionalised political settings, although in this second tradition the social movement itself remains autonomous and largely outside the political domain. Such movements’ aim is not to participate in social change as an institutionalised actor on the political plane, but rather to “make society hear their message and translate these messages into political decision making”.¹⁷⁹ In this sense, this second tradition of social movements is all about *showing difference*, which only then may inform political processes: by diverging from standardised experiences, social movements embodied by organised collectives can autonomously challenge dominant cultural codes by raising the question as to the appropriateness of such codes – which, in turn, may or may not inform discussions at the political level depending on the extent to which such showcasing of difference is acknowledged.¹⁸⁰ Consequently, within this tradition, the formation of a collective identity is not simply a means to an end but is of intrinsic value, as such collective identities are not only instrumental mediums to convey a message but are also, crucially, the message itself.

The consequent question is what the repertoire of contention of this latter type of social movements precisely includes, or, in other words, through which mechanisms it can vernacularise particular human rights consciousnesses. Whereas the former tradition may rely on a range of instruments that are institutionalised within the *body politic*, this tradition’s toolbox is less evident. Paradoxically, the main instrument that this type of social movements can use is that of mere existence: in this sense, this movement type’s repertoire of contention is highly flexible (as it does not prescribe the techniques that should be used in the praxis of ‘existing’) *and* particularly constrained at the same time (as social movements are by and large limited in their contention efforts to that praxis of ‘existing’). Indeed, the only tool that can really be

178 Melucci, 1996, p. 216 (emphasis added).

179 Melucci, 1985, p. 815.

180 See also G. Martin, 2015, p. 69.

utilised is that of deontology: social movements need to *be* (or *exist* and *behave*) in certain justified ways as to inform social change by proxy.

In turn, to bridge the gap between social movements' deontological practices and political change, conceptual frameworks such as 'bearing witness' may prove useful as mediating techniques. Thus, social movements may, through their endeavours, bear witness to specific injustices and inequalities in broader society precisely by embodying an alternative, which in turn may inspire observers to become involved in for example activism, anger, and/or compassion.¹⁸¹ 'Bearing witness' is therefore a process that occurs on two distinct stages. First, social movements through divergent practices expose atrocities in society, a practice that can be labelled the 'indirect' bearing of witness. The precise practices involved may differ from situation to situation, but in the human rights context techniques such as *voicing* claims may be considered.¹⁸² Second, when confronted with such anomalies, observers in turn may become cognisant of latent injustices in society and may accordingly bear witness in a more 'direct' sense, as the differences become painfully tangible through social movements' deontological endeavours. In fact, bearing witness in an indirect sense does not only unmask abominations but also makes it difficult for observers to close their eyes for such truths, even where inconvenient: the 'direct' bearing of witness occurs, henceforth, not always entirely on the basis of the observer's own volition. Observers are all of a sudden cloaked with responsibility, as denying or cold-shouldering injustices is no longer an option: "their awareness of the issue means that they may choose to act or not, but that they cannot turn away in ignorance".¹⁸³ This responsabilisation can trigger a variety of responses, including a blatantly apologetic stance or, conversely, a form of invigorated defiance.

8.5.3.4 Human rights through discourse

Finally, human rights can be vernacularised through discursive mechanisms. Such discursive processes can be defined as "an interrelated set of texts, and the practices of their production, dissemination, and reception, which brings an object into being".¹⁸⁴ In this sense, human rights consciousnesses may be vernacularised through the creation and communication of language and text: such processes have the potential of couching human rights in powerful terms and therewith may, through perception, impact upon empirical reality. Discourse has, in other words, the capacity to translate certain human rights consciousnesses into norms that impact upon everyday life by allocating such consciousnesses with discursive significance, therewith potentially securing

181 G. Martin, 2015, p. 129. See also Fleay & Briskman, 2013, pp. 114–115.

182 On the importance of voicing claims, see also Welzel, 2013, pp. 215–217.

183 Moser, 2003, p. 188.

184 Lindekilde, 2014, p. 198.

that such consciousnesses are, as it were, 'on the table' in relation to specific social relationships.

In fact, through discourse, a variety of ideologies and belief systems can be reproduced – in this sense, "language is not a neutral reflection of the world, nor of social relations or personal identities, but rather plays an active role in creating, maintaining and altering them".¹⁸⁵ As a result, the reproduction of ideologies and belief systems in discourse can under certain conditions be used to change empirical reality – *in casu*, it can be used to either vernacularise particular human rights consciousnesses or, conversely, to have a detrimental impact on such vernacularisation on the basis of alienation strategies. Indeed, again, discourse is flexible in that it can be used to pursue different ends, which ultimately depends on the motives, interests, and authority of the discourse-producing actors involved. In relation to alienation through discursive mechanisms, two strategies seem to exist: discourse may either refer to human rights in order to legitimise for instance policies or behaviours and preclude any subsequent human rights-inspired criticism, or it may *not* refer to human rights in order to marginalise their importance as an applicable framework altogether. The first of these strategies relies on an effective framing of 'human rights' and on the subsequent argument that the policy or behaviour at hand fulfils all criteria ('we comply with all human rights *identified in this particular way* and therefore any further criticism based on human rights is no longer valid'). Similar to deliberative processes, discursive practices in this sense may turn human rights into a thin layer of veneer that largely covers – and legitimises – policy practices. The latter of these strategies, on the other hand, relies on the purposeful omission of the human rights framework as an applicable normative order altogether ('a range of issues are important in this context [of which human rights is not primarily one], by focusing our language around these issues, they become the key matters at hand'). Discourse can, in this way, be used to alienate and silence human rights claims either by redefining what human rights purport to or by redefining the benchmarks altogether.

Ultimately, vernacularisation of human rights through discourse thus revolves around discursive dominance, as it is the dominant discourse that may induce, or reduce, compliance with particular human rights consciousnesses. Discursive endeavours therefore should be understood as being part of a constant battle over the question how social reality should be defined and understood.¹⁸⁶

¹⁸⁵ Van Berlo, 2015a, p. 82. See also Lupton, 1992; L. Phillips & Jørgensen, 2002.

¹⁸⁶ Lindekilde, 2014, p. 206.

8.5.4 The dimensions' instrumental function: four human rights instruments

Finally, on the basis of the four-dimensional model, human rights may fulfil four different *instrumental* functions. That is to say, a particular human rights consciousness can potentially be vernacularised – or, conversely, be alienated – through either of the four dimension-specific vernacularisation mechanisms, *and in doing so human rights in either of four ways may constitute useful instruments for effective vernacularisation – or for effective alienation*. In vernacularising or alienating consciousness, one henceforth may – but does not necessarily have to – rely on the instrumental value of human rights as law, natural entitlements, protest, and/or discourse. To refer back to the Brahma conceptualisation of human rights, the perspective of one of the four Brahma faces (or a combination of perspectives) may be vernacularised through one or more of the four directions that Brahma points towards by using one or more of the four ritual objects that he is holding. These various instrumental values of human rights will now be discussed.

8.5.4.1 Human rights as deliberative principles

First, human rights may be used as deliberative instruments – that is, by *relying* on human rights as law. Such *use* of human rights law can be expected to take place first and foremost in the application of deliberative vernacularisation mechanisms. Thus, in the pursuit of a particular human rights consciousness, one may employ human rights law through legal processes. Here, the difference between the 'law in books' and the 'law in action' is of primary relevance.¹⁸⁷ This distinction has already been addressed in Part I of this book and purports to conceptually explain that for human rights law to be effective, power bearers should not only bear responsible *de jure* ('law in books') but should also be held accountable *de facto* ('law in action'). From the perspective of human rights effectiveness and accountability, it is therefore not sufficient that international human rights law determines which actors are responsible under what conditions, but such legal allocation of responsibility should also be met with sufficient answerability and enforcement in practice.

The various specific processes of each of these mechanisms have extensively been discussed in the literature, including human rights treaty drafting,¹⁸⁸ the creation and operation of soft-law norms,¹⁸⁹ domestic, regional, and inter-

¹⁸⁷ Pound, 1910.

¹⁸⁸ See e.g. A. Buchanan, 2013, pp. 204–209; McGreal, 2012; Morsink, 1999. See more generally also Seidman, Seidman, & Abeyesekere, 2001.

¹⁸⁹ See e.g. the edited volume by Lagoutte, Gammeltoft-Hansen, & Cerone, 2014. See more generally also Chinkin, 1989.

national treaty monitoring,¹⁹⁰ human rights litigation,¹⁹¹ opportunities – albeit limited in scope and mainly focused on domestic legal pathways in the US – for class actions,¹⁹² and the role of human rights in dispute settlement mechanisms.¹⁹³ Such accounts do not need to be revisited here. Instead, it should be emphasised that legal processes in which human rights law is used as a tool provide, at least in theory, ample space for human rights vernacularisation, that is, for the translation of a particular conception of human rights into practical applicability through legal norms, legal answerability, and legal enforcement.

Notwithstanding this emphasis on practical applicability, it would be a mistake to consider that the use of human rights law as an instrument to vernacularise human rights consciousnesses through legal mechanisms only involves processes that belong to the operation of the ‘law in action’. To the contrary, processes by which the ‘law in the books’ is created and amended are equally important to take into account: the instrumental role of human rights as deliberative standards stretches, insofar as their use in deliberative processes is concerned, from the very beginning of the process of codification where ideas for human rights law are sparked, up until the end of the process of enforcement where human rights norms are applied. A particular understanding of human rights can, through deliberative processes, thus not only be translated to the empirical plane through the *operation* of human rights law, but also through the *creation* thereof. At first sight this may look like a paradox, however, as this could be taken to mean that human rights that do not yet exist can still be vernacularised through their very creation – a preposition that will not resonate well in particular with legal scholars who rely on the effectuation of codified norms. Consider, for instance, treaty drafting: how could such a drafting process be seen as vernacularizing human rights by using human rights if it is that same drafting process by which human rights are, indeed, drafted? From an entirely legal perspective, such position appears untenable. However, the differences between distinct human rights consciousnesses as well as between dimensions-as-vernacularisation-mechanisms, dimensions-as-tools, and dimensions-as-consciousnesses are crucial in this regard. Thus, vernacularisation through deliberative mechanisms and the use of human rights law as a deliberative instrument do not necessarily require the use of a deliberative consciousness and *vice versa*. Instead, any particular consciousness of human rights – not necessarily being a legal one – can be vernacularised, that is, allocated with prominence in social interaction, by embedding it within legal standards through deliberative processes, and in doing so

190 See e.g. Alfredsson, Grimheden, Ramcharan, & Zayas, 2009; Alston & Crawford, 2000; Keller & Ulfstein, 2012.

191 See e.g. Duffy, 2017, 2018; Prada, 2011.

192 See e.g. Dubinsky, 2004; Silvestri, 2018; Van Schaack, 2003.

193 See e.g. Marceau, 2002.

human rights law may, or may not, be relied upon as an instrument. Deliberation, then, may be a platform and/or an instrument for those seeking to foster the role and significance of a particular human rights conception in regulating social interaction in everyday life, and, importantly, such conception can be completely detached from human rights law in the books *as it currently stands*. The constitutive function, instrumental function, and directional function of each dimension thus can operate in a relatively autonomous fashion, although they are at the same time not inhibited from operating conjointly. In this latter regard, consider, for example, the development – as a result of a reinvigorated belief in justiciable norms – of a new regional treaty based on the provisions and structures of other regional and international treaty regimes: in such case, the deliberative dimension seems to fulfil both a constitutive, a directional, and an instrumental role as human rights understood in a deliberative sense are vernacularised by their insertion into novel regimes through deliberative processes.

At the same time, the instrumental role of human rights as deliberative principles discussed here does not only provide room for the accomplishment of particular human rights consciousnesses, but also for their respective alienation from everyday life. Just as human rights law can be used to vernacularise human rights consciousnesses, it can also be used to minimise and marginalise them. It should in this light be reiterated that, as section 8.5.5. below will deal with in greater detail, the Brahma-like model promulgated here constitutes not a normative framework that merely encapsulates human rights *protection*, but rather an empirical framework that may be utilised to measure both protection – through vernacularisation and instrumentalization – and diminishment – through alienation. This relates back to the ‘cat-and-mouse game’,¹⁹⁴ or ‘rat-race’, in particular where the use of human rights law in deliberative processes is concerned: actors can for example decide to *use* human rights law in an attempt to limit their human rights obligations, either pre-codification (through diplomatic means and lobbying efforts at the drafting stage) or post-codification (through litigative argumentation denying responsibility for either certain acts or certain legal norms). In addition, actors can purposively employ strategies of cold-shouldering international human rights obligations and their enforcement.¹⁹⁵ Since various human rights instruments have no noteworthy monitoring mechanism, and since most of the existing monitoring mechanisms generally have no means to bindingly enforce sanctions for norm transgressions, actors can relatively autonomously decide to ignore the implications of monitoring, answerability, and enforcement whilst at the same time relying on the legal frameworks that continue to bind them

194 Gammeltoft-Hansen & Vedsted-Hansen, 2017, p. 3. See also Van Berlo, 2017b, pp. 10–11.

195 See also Hathaway, 2007, p. 593.

in legitimising particular exercises of power.¹⁹⁶ In such instances, power operates under a thin layer of veneer, constituted by codified human rights, that cannot be sufficiently scratched by monitoring bodies in order to command change. The exercise of power therewith continues to derive its alleged legitimacy from this thin layer, with being bound to legal human rights obligations unjustifiably becoming a near synonym for ethical, legitimate, and justified exercise of power. This in turn relates back to what those writing about the looming ‘end of human rights’ warn for: the ultimate instrumental usurpation of human rights and the resulting transformation of human rights into a legal travesty.¹⁹⁷ The extent to which human rights consciousnesses can ultimately be effectuated and accomplished through the use of human rights law in deliberative processes thus does not necessarily depend on more – or more intense – uses of deliberative mechanisms, nor necessarily on less – or less intense – uses, but rather depends on how deliberative mechanisms are utilised both in fostering, and in limiting, the vernacularisation of varying human rights consciousnesses.

So far, this sub-section has focussed on the instrumental uses of human rights law in deliberative mechanisms such as treaty drafting and legal proceedings. Whilst this makes sense – the directional and the instrumental roles of the human rights dimensions are often closely related – it should be emphasised that human rights as deliberative principles may also fulfil an instrumental role in the vernacularisation mechanisms of the other dimensions. That is to say, also when different routes are being followed, human rights law may prove to be a valuable instrument in achieving change. One could consider, for example, the use of human rights law in circumscribing discretionary decision-making (as a morality mechanism) by means of policy, the use of human rights law in mobilising protest (as a protest mechanism),¹⁹⁸ and the use of human rights law in framing debates (as a discourse mechanism). In turn, like the use of human rights law in deliberative mechanisms, human rights law may in each of these processes also be instrumentally used to alienate human rights consciousnesses. Where states or other actors operate under the thin layer of veneer constituted by human rights law as explained above, human rights law may henceforth potentially also be used to legitimise power and to consequently mute human rights endeavours through discretionary decision-making, human rights-based protest, and human rights claims in public debate. For example, claims that the minimum standards prescribed by international human rights law are attained in any given situation allow actors to impose far-reaching limits on more ambitious endeavours of discre-

196 This includes most prominently states but also private actors in relation to soft law norms that apply to them.

197 Douzinas, 2000; Hopgood, 2013; Posner, 2014c; Wacks, 1994.

198 As Buchanan likewise emphasises in the context of soft law instruments, legal frameworks “may become a focal point for effective political action”: A. Buchanan, 2013, p. 25.

tionary decision-making, to silence protest for more extensive rights, and to dominate the public debate not by shunning, but by extensively using, arguments of human rights law.

8.5.4.2 Human rights as natural entitlements

Second, human rights may be relied upon in their quality as natural entitlements. That is to say, any attempt to vernacularise particular human rights consciousnesses through either of the four dimension-specific mechanisms may use human rights as natural entitlements. These processes are, however, often highly obfuscated as reliance on such natural entitlements is hardly tangible: contrary to for example the use of human rights *law*, human rights as natural entitlements largely lack ontological grounding and are therefore difficult to grasp.

Still, whenever they are used for vernacularisation purposes, more often than not their use through either of the four dimensions is unmistakable. First and foremost, any particular set of human rights as natural entitlements – as purported by for example certain philosophical or religious belief systems – may be used in vernacularisation efforts through the moral dimension. Individuals may, in other words, *use* natural entitlements to externally justify their specific use of discretionary decision-making space. In this sense, whereas the constitutive value of the moral dimension of human rights may be used to determine one's decision frame, the instrumental function of the moral dimension can be used to justify – outwards – the application of such decision frame. The same goes, in fact, for each of the other three dimensions: their constitutive value may determine the course of action, whilst their instrumental value may justify reliance on the utilised pathways. Even more so, different combinations may exist in this regard: one's decision frame can, for example, be determined by a human rights consciousness that is largely based in protest understandings of human rights, but can simultaneously be justified by relying on, for instance, the instrumental notion of human rights as natural entitlements.

Likewise, human rights as natural entitlements may be used in vernacularisation endeavours through either of the other three dimensions' mechanisms. Consider, for example, the frequent reliance on moral notions of human rights in the development of international human rights law, both at the drafting stage and in the proceedings of monitoring bodies. In fact, the second fundamental tenet of international human rights law explicated in Part I of this book – that they are, indeed, *human* rights – signals the prime importance of the role of human rights as natural entitlements for the operation of deliberative mechanisms. Likewise, human rights as natural entitlements may be used in vernacularising human rights consciousnesses through protest activities: more often than not, calls for mobilisation and sustained efforts of protest are implicitly or explicitly justified with reference to the importance of the natural

entitlements that arguably pertain to all. Moreover, in discursive vernacularisation mechanisms, human rights as natural entitlements can amongst others be used to steer and frame political and public debates.

Similar to the other dimensions, human rights as natural entitlements may also be used to *alienate* human rights consciousnesses. Specific conceptions of human rights as natural entitlements may, for instance, only include a highly selective catalogue of rights or a specific group of beneficiaries. Relying on such restricted understandings, human rights as natural entitlements may henceforth be used to for example provide human rights law with a restricted interpretation, to discredit protest for more extensive protection, or to curb discourse on human rights.

8.5.4.3 Human rights as protest tools

Third, human rights can be used as protest tools. That is to say, human rights protest – as a *specialis* of protest in general – may be used in either of the four dimension-specific mechanisms in order to achieve vernacularisation goals. Of course, the link with vernacularisation through protest mechanisms is most self-evident: the instrumental value of human rights protest will, on many occasions, indeed be firmly embedded in the context of the employment of repertoires of contention by social movements. In other words, in attempting to vernacularise their human rights consciousness, human rights protest may be used as a particular form of contention within protest mechanisms. Interestingly, human rights protest that is largely based on a protest-inspired consciousness of human rights may be geared *against* human rights understood in a deliberative sense since, as also previously denoted, deliberative notions of human rights may be regarded as ‘hijacked’ principles that favour the elite and lead to bureaucratization.¹⁹⁹ The use of human rights as protest tools to counter deliberative consciousnesses of human rights may thus ultimately result in what may be denoted as ‘fighting fire with fire’, although the two components *a priori* seem to have barely anything in common but their name.

In addition, human rights protest can be used to foster the vernacularisation of human rights consciousnesses through the other three dimensions’ mechanisms. By relying on protest, individuals for example may enlarge their discretionary decision-making space. Likewise, human rights protest may spur the progressive development of human rights law. It may also notably put human rights (back) on the political and public agenda, therewith creating space for vernacularisation through discursive mechanisms.

At the same time, the same tools can be used for the progressive alienation of human rights. This very much aligns to the alienation strategies that may be employed as part of the instrumental value of human rights as natural

¹⁹⁹ Dembour, 2006, p. 254, 2010, pp. 3, 6.

entitlements: where human rights protest is used to focus on a highly selective catalogue of rights or restricted group of beneficiaries, protest starts to revolve around only a sub-set of rights which ultimately may diminish the importance of, and influence the interpretation of, human rights law, may delegitimise divergent discretionary decision-making practices, may compete with concurrent protest activities, and may shift discursive attention from the broader human rights debate to only a sub-set of rights.

8.5.4.4 *Human rights as discursive expressions*

Fourth, human rights can be instrumentally utilised in their capacity as discursive expressions. As Cassel points out, human rights discourse has attained a prominent position: due to a growing global awareness of human rights, “the language of rights is spoken by diplomatic, governing, policy and academic elites, activist NGOs, the press and, in many countries, sectors of growing middle classes”, creating significant scope for discursive conflict and hierarchies.²⁰⁰

Thus, on the one hand, human rights discourse can be used to vernacularise particular human rights consciousnesses through the various dimensions’ mechanisms. Again, the most obvious connection in this regard is that between the instrumental role of human rights as discursive expressions and the directional role of the discourse dimension. Indeed, in vernacularising human rights consciousnesses through discursive mechanisms, one may expect individuals and collectivities to rely on human rights discourse – although this is not necessarily the case. In some situations, it indeed may be more fruitful to purposively frame the debate in other terms. Human rights as discursive expressions can also be used to vernacularise human rights consciousnesses through other dimensions: little imagination is needed, for instance, to contemplate the importance of human rights discourse for the development of law and for the mobilisation of protest. Human rights discourse may in addition be used in vernacularisation mechanisms that are based on the morality dimension: individuals may, for example, rely on human rights discourse to increase and justify their discretionary decision-making space. In this sense, by framing issues in terms of human rights, vernacularisation through the various mechanisms may effectively be fostered.

On the other hand, human rights discourse can also be used for alienation purposes. As mentioned above, human rights discourse may for instance be used as a tool to alienate human rights consciousnesses through discursive mechanisms, for example by relying on discursive arguments that all human rights criteria have been fulfilled in a given case. In this sense, any substantial lack of rights protection may discursively be erased by relying, precisely, on

200 Cassel, 2004b, p. 3.

human rights discourse. Likewise, specific human rights discourse may be used to counteract the development of law through deliberative mechanisms, for instance by arguing that contemporary human rights law is sufficiently encompassing. It may also be used to mute protest or alternative, concurring discourses that are based on more extensive notions of human rights. In addition, the use of human rights discourses conjoined with other discourses – such as those of risk and penal populism – may be used to alienate human rights consciousnesses through discursive mechanisms.²⁰¹ Like the instrumental values of the other three dimensions, human rights as discursive expressions may thus play a role both in the vernacularisation, and in the alienation, of human rights consciousnesses.

8.5.5 A synergistic complexity: dimensional crossovers

The foregoing has shown at various points that there is not necessarily an inseparable link between the dimensions-as-vernacularisation-mechanisms (through which human rights can be accomplished), the dimensions-as-tools (that can be used in such vernacularisation processes), and the dimension-as-consciousnesses (in which human rights are grounded). Rather, *each* of the four consciousnesses of human rights can ultimately be accomplished through *each* of the four vernacularisation mechanisms using *each* of the four tools, although in the latter regard human rights are not necessarily always used as a tool. On the basis of any of the four human rights consciousnesses, one may thus “seek to find methods of practice that can turn those ideas into reality”,²⁰² and these methods of practice can in turn be derived from either of the four dimensions. Relating back to the conceptualisation of human rights as a Brahma, each of the four heads may hence embark on a journey towards vernacularisation of the set of human rights to which it is turned following either of the directions to which its four arms point, and in doing so it may use each of the four ritual objects that Brahma is holding. Dimension-specific consciousnesses, dimension-specific tools, and dimension-specific vernacularisation mechanisms are in this sense detached and do not necessarily operate conjointly within the confines of each dimension. Rather, a plurality of cross-dimensional affiliations can be envisaged. By extension, those pursuing vernacularisation through a particular dimension’s mechanisms, or those using a particular dimension’s human rights tool, do not need to agree upon the human rights consciousness of that dimension: pursuing the realisation of a human rights consciousness based on one dimension through the vernacularisation mechanisms of another dimension, or by using another dimension’s tools,

²⁰¹ See e.g. Karamalidou, 2017, pp. 189–190.

²⁰² Ife, 2009, p. 212.

is perfectly valid, *even when* in doing so the consciousnesses belonging to the latter dimensions are condemned, minimised, or disapproved of.

From the foregoing, two points become particularly clear. First, that different human rights consciousnesses may be vernacularised through different mechanisms. Second, that in doing so, human rights as instruments may, or may not, play a role. In relation to the former point, protest movements may for example attempt to accomplish human rights as grounded in social struggle not only through protest mechanisms, but also through deliberative processes (e.g. through strategic litigation),²⁰³ discourse (e.g. by changing the dominant discourse or by mobilising the base by putting an issue prominently on the public agenda through public debate),²⁰⁴ and/or implemented frameworks of morality (e.g. by targeting professionals in the field).²⁰⁵ Over the past decades, various studies have focused on the vernacularisation of *protest* through *deliberative* processes specifically, albeit often in the US context and usually not specifically in relation to human rights consciousness. Such research describes amongst others how “social movements [may] demand particular changes in the law or legal system [...] [and] may invoke international law or direct their grievances at international institutions”.²⁰⁶ In fact, the four categories of legal consciousness explained above – with actors operating *before*, *with*, *against*, or *under* the law – have specifically been developed in the context of social movement action.²⁰⁷ As Fritsvold’s research shows, social movements can rely on various of these categories in their (non-)use of deliberative processes to foster protest goals.²⁰⁸ Another example is the work of McCann, who points to the importance of litigation for pay equity movements in the US in the 1970s and 1980s.²⁰⁹ As he finds, even though social movement litigation often fails to produce public policy changes of a large-scale or top-down nature, litigation is still crucial for the empowerment of individuals and for the reformation of their social relationships and identities.²¹⁰ Even though law may represent privileged power and structural inequalities, it can, according to McCann, at the same time be a foundation for empowerment, entitlement, and inclusion since it provides a basis for couching the needs of the underprivileged and consequently creates opportunities for collective

203 See also Hilson, 2002, who suggests that there is a need to study social movements’ strategies such as lobbying, litigation and protest in conjunction.

204 Lindekilde, 2014, pp. 198–202. Whitty has labelled these abilities as ‘legal risk+’, as human rights protest in this sense has the capacity “to propel an issue to centre stage, damaging an organisation’s operation and reputation, irrespective of actual legal liability”: see Whitty, 2011, p. 124.

205 Chiarello, 2013, p. 429.

206 G. Martin, 2015, p. 244.

207 Fritsvold, 2009.

208 Fritsvold, 2009.

209 McCann, 1994.

210 McCann, 1994, p. 291.

action.²¹¹ Thus, “[p]eople at the ‘bottom’ are used to seeing law in two ways at once. From an ‘outsider’ perspective, they view law critically as an unprincipled source of privileged power. From an ‘insider’ perspective, they adopt an ‘aspirational’ view of law as a potential source of entitlement, inclusion, and empowerment”.²¹² Others, however, are less optimistic when it comes to the potential of deliberative processes for reform based on social struggle: Rosenberg, for example, develops the thesis that US courts have essentially not been engines of social change.²¹³ Most change has, as he argues, been brought about not through judicial intervention but through political efforts instead.²¹⁴ From this perspective, vernacularisation of protest consciousnesses is deemed less successful through deliberative mechanisms than it is through protest mechanisms operating within the proper domain of politics where, indeed, actual *change* can be achieved in the *body politic*. The work of others, in turn, nuances this point: Scheingold, for example, admits that courts are very restricted in effecting social change directly, yet simultaneously points out that they may nevertheless function as a catalyst for social change by placing social issues prominently on the public agenda.²¹⁵ This, then, points to the potential use of multiple vernacularisation mechanisms in order to effectively vernacularise a certain human rights consciousness: deliberative processes may table social issues, through a powerful discourse of ‘rights’, on the public agenda, which in turn may spur protest efforts at the conventional political plane or, alternatively, at the level of deontological movements operating outside of the political arena.²¹⁶ Duffy, discussing the role of strategic human rights litigation in her inaugural lecture, points out in this regard that

“Change happens gradually and cumulatively, often not from an isolated case but from a series of cases, in conjunction with other processes. Whether litigation meets its potential to influence legal, social, cultural change for example, may depend less on what courts say and do, or what people say and do *in court*, than on the work of a much broader range of actors – civil society, media, legislatures. Years of civil society engagement often precedes, and lays the groundwork, for litigation. In turn, it is only through the follow-up of multiple actors that what happens in the dark room of the court can be projected back out, seen, heard and felt, in the real world.”²¹⁷

211 McCann, 1994, p. 233. See also McCann, 1998.

212 McCann, 1994, p. 233.

213 G.N. Rosenberg, 1991. For a critique of Rosenberg’s work, see particularly Feeley, 1992.

214 G.N. Rosenberg, 1991.

215 Scheingold, 1974.

216 See also Feeley, 1992, pp. 751–752.

217 Duffy, 2017, p. 13.

The idea that a particular consciousness may be vernacularised through all four dimensions also applies to human rights consciousnesses that are based on other dimensions than the protest one. Thus, for instance, human rights as deliberative principles may not only be accomplished through the operation of the legal system, but also through protest (e.g. lawyers or monitoring bodies becoming involved in public action, rallies, demonstrations), discourse (e.g. lawyers or monitoring bodies speaking out in the public debate), or the implementation of morality frameworks (e.g. training in legal norms for professionals in the field). Moral conceptions of human rights as grounded in justice and fairness may, similarly, be accomplished not only through mechanisms based in morality, but also through deliberative processes (e.g. by lobbying for the codification or amendment of legal norms based on moral frameworks and argumentation),²¹⁸ protest (e.g. church groups becoming involved in social action), or discourse (e.g. religious leaders speaking out in their congregations or in the broader public debate, or the ‘naming and shaming’ of governments or corporations on the basis of their alleged violations of moral norms).²¹⁹ Discourse conceptions of human rights, finally, may be accomplished not only through discursive practices, but also through protest (e.g. by organising rallies or demonstrations centred around human rights notions that featured prominently in recent public debate, such as children’s rights), implemented frameworks of morality (e.g. by calling upon professionals in the field to not act against the spirit of particular human rights notions that featured prominently in recent public debate), or deliberative processes (e.g. by codifying or amending human rights law on the basis of human rights notions that dominated political or public debates).

In turn, in each of these processes, those seeking vernacularisation may, or may not, rely on the instrumental role of each human rights dimension. Thus, each dimension makes distinct human rights instruments available for potential usage: human rights law, human rights as natural entitlements, human rights protest, and human rights discourse. Whether or not these instruments are used – or, alternatively, whether other instruments are used, such as different fields of law, different moral conceptions, different forms of protest, or different discourses – depends on the individuals involved, the pervasiveness of the various human rights dimensions, and the context at hand. Such three-layered role of the Brahma conceptualisation of human rights is schematically depicted in Figure 11, which sketches the multitude of potential interactions between human rights consciousnesses, vernacularisation mechanisms, and instruments.

218 It is sometimes even argued that the International Bill of Rights signified the “emergence of morality in international law”: Perry, 2005, p. 32.

219 See, in relation to ‘naming and shaming’ techniques and the recourse to human rights in discourse, Scheper, 2015.

Human rights vernacularisation mechanisms						
	Deliberative processes	Morality frameworks	Protest activities	Discourse		
Grounding of human rights consciousness	Deliberation	Deliberative principles	Protest tools	Deliberative principles	Protest tools	Protest tools
		Natural entitlements	Discursive expressions	Natural entitlements	Discursive expressions	Discursive expressions
		Deliberative principles	Protest tools	Deliberative principles	Protest tools	Protest tools
	Morality	Natural entitlements	Discursive expressions	Natural entitlements	Discursive expressions	Discursive expressions
		Deliberative principles	Protest tools	Deliberative principles	Protest tools	Protest tools
		Natural entitlements	Discursive expressions	Natural entitlements	Discursive expressions	Discursive expressions
	Social struggle	Deliberative principles	Protest tools	Deliberative principles	Protest tools	Protest tools
		Natural entitlements	Discursive expressions	Natural entitlements	Discursive expressions	Discursive expressions
		Deliberative principles	Protest tools	Deliberative principles	Protest tools	Protest tools
	Discourse	Natural entitlements	Discursive expressions	Natural entitlements	Discursive expressions	Discursive expressions
		Deliberative principles	Protest tools	Deliberative principles	Protest tools	Protest tools
		Natural entitlements	Discursive expressions	Natural entitlements	Discursive expressions	Discursive expressions

Each of the 16 squares in Figure 11 divided by a bold dashed line thus depicts a unique pathway for the vernacularisation of a particular consciousness of human rights, although in practice there will often be a certain overlap and fluidity given that (i) individuals and collectivities will frequently have unique human rights consciousnesses that draw upon various of the four distinct human rights consciousnesses identified above, and (ii) they will frequently attempt to vernacularise their human rights consciousness by using different mechanisms simultaneously. Both points have been illustrated above extensively. To represent such fluidities, Figure 11 separates the sixteen possibilities with a *dashed* line. In addition, each of these squares is further divided into four smaller squares, pointing out that in the context of each of these distinct pathways human rights may be instrumentally used in either of four ways. Again, the four sub-squares in each larger square are divided by a dashed line, which likewise indicates that individuals may rely on the instrumental value of multiple human rights dimensions simultaneously. At the same time, each instrumental value remains facultative: those seeking vernacularisation may, depending on the circumstances, opt to *not* use human rights as instruments at all as outlined above.

Ultimately, in analysing the role and value of human rights as a protection mechanism, looking at the three layers of all four dimensions simultaneously is warranted. Any holistic assessment should furthermore take into account not only the *delineation* of different dimensions, but also immediately the *relativity* of such delineations. That is to say, the existence of distinct dimensions should simultaneously be acknowledged and epistemologically questioned. This may result in an analysis of what may be labelled the ‘synergy’ of human rights. Such synergy consists of the interaction and cooperation between different human rights dimensions to produce a combined effect that is greater than the sum of their separate effects. The proposed approach henceforth allows for the assessment of human rights’ durability to transcend the insulated appraisal of the various separated dimensions, by approaching *each* of these dimensions from a holistic human rights perspective and by nuancing the analyses of each of these dimensions by regarding them, in light of one another, as autonomous yet co-dependent entities.²²⁰ Somewhat paradoxically, the holistic study of human rights requires one to first place the different dimensions of human rights in stark contrast with one another – along the lines of the examination above – and to subsequently place such sharp distinctions into perspective by regarding the way in which the dimensions operate synergistically.

The proposed approach consequently offers an analytical grid – as illustrated by Figure 11 – that does not only provide insight into, but may also foster, the mutual understanding, close cooperation, and continuous debate

220 See also Breakey, 2018, p. 19, who describes these processes as ‘cross-pollination’.

between different strands of human rights thinking and theorizing. Whereas authors belonging to different schools of human rights have frequently claimed that “the alternatives are mistaken, divisive, irrelevant, unreal or unhelpful” and should consequently be rejected,²²¹ in reality the various human rights schools indeed seem to be complementary, mutually informing, and compatible in a more holistic perspective on human rights. In principle, the schools thus can accord with one another: “[n]one of the grounds proves so strong that, once accepted, it must colonize the moral landscape, and obviate the others’ significance”.²²² As Dembour and Kelly likewise emphasise, we should understand that

“human rights not only are made, but also *must* be made of different aspects. [...] [O]ne approach, one way of fighting for human rights, will never be sufficient. To realise human rights, the concerns of all four schools need to be properly addressed. [...] If the concerns of one school are neglected, then something of crucial importance will be missing”.²²³

Adherents of different schools are therewith called upon to agree to disagree but to nevertheless deploy their respective perspectives in an attempt to holistically establish the durability of human rights in specific situations, including in instances of confinement. This is even more important given that, as outlined above, different consciousnesses of human rights can be achieved through the vernacularisation mechanisms and instrumental values of each of the four dimensions. Even where scholars maintain different perceptions of what human rights *are*, they can and arguably should thus still collaborate to examine how each conception of human rights can be best accomplished through the variety of mechanisms and instruments available.

As a consequence, the approach proposed here concerns both ontological and epistemological aspects of human rights protection: it does not only conceptually connect the different ontological appearances of human rights, but also provides a basis to epistemologically examine them in order to uncover their true nature and, importantly, their value (or lack thereof) as (part of) a protection mechanism in specific contexts. This, in turn, makes clear that the framework postulated here does not normatively regard either of the four human rights dimensions as ‘right’ or ‘the best’. In line with the approach taken by amongst others Koskenniemi, the purpose here is thus not to normatively *claim*.²²⁴ Rather, the framework embraces that the human rights notion is pluralist in nature and may manifest itself simultaneously in different forms, and furthermore that the various human rights dimensions may be mutually

221 Breakey, 2018, p. 12.

222 Breakey, 2018, pp. 16–17.

223 Dembour & Kelly, 2011, pp. 21–22.

224 Koskenniemi, 2011, p. 134.

informing and strengthening. Moreover, by studying both human rights consciousness *and* human rights alienation, it recognises that people may (choose to) not use human rights in one or more of its particular capacities *at all* in their daily life. The normative value of each dimension is, therefore, never *prima facie* given. Instead, one can only begin to answer the question as to the normative superiority of either of the four dimensions – either as a breeding ground for consciousness, as a context for vernacularisation, or as an instrumental toolbox – when the empirical context is taken into account, and as a consequence any answer in this regard is conditionalized by such empirical specificities and cannot be abstracted into a general rule of normative preference.

Constituting an alternative answer to the human rights impasse, this approach ultimately prevents both human rights' premature nullification – through warnings or even calls for the alleged 'end' of human rights – and their ongoing hyperbolic glorification – through functionalist and expansionist approaches. Contexts of confinement perfectly illustrate this point. Deliberative scholars considered purist in their approach, in particular those with a positivist doctrinal inclination, believe that human rights law established through appropriate deliberative channels is all there is in terms of human rights and may accordingly have a difficult time to reconcile effective human rights protection in confinement with globalisation developments. Indeed, as Part II has shown and as the next chapter will further illustrate, international human rights law has in relation to specific instances of commodification and criminalisation simply been unable to fulfil its protective role in full. In other words, in such contexts, its *instrumental* value – and, to a certain extent, its *directional* potential – is significantly challenged. However, this by no means signifies that human rights are by definition losing their significance or meaning in such confinement settings as human rights do not – and this cannot be stressed enough – necessarily *need* to be, nor *should* be, understood as mere deliberative principles. In fact, those identifying as quintessential human rights orthodox believers, ascetics/evangelicals, or nihilists would strongly disagree with such an exclusive classification. For these schools of thought, arguments that human rights require novel interpretations or are to a certain extent outdated in contemporary globalised realities do not make sense. Typical orthodox believers would respond that human rights exist independent of contemporary reality and cannot possibly be outdated by it, ascetics/evangelicals would argue that human rights have never been more crucial and should be fought for more than ever before, and nihilists would suggest that human rights are futile devices anyway in the sense that they primarily carry value in the eye of the beholder. The argument that human rights are out-dated may thus be convincing from a deliberative perspective in a positivist doctrinal sense but is incomplete insofar as it fundamentally neglects the other dimensions of human rights. Furthermore, where such deliberative scholars have a difficult time to reconcile effective human rights protection with globalisation develop-

ments, they may fail to appreciate not only that human rights have multiple simultaneous manifestations, but also that human rights can be accomplished through multiple mechanisms simultaneously *and* offer a diverse toolbox that extends beyond the instrumental value of the deliberative dimension. Vernacularisation of human rights consciousnesses that are heavily influenced by deliberative notions may thus still take place through each of the four dimensions – *including*, indeed, the deliberative dimension, as alternative deliberative mechanisms such as criminal or tort law at times provide alternative grounds to vernacularise human rights other than through international human rights law itself – and in doing so the human rights tools provided by other dimensions could be, but do not necessarily need to be, relied upon.

8.5.6 From conceptual synergy to methodology: a few notes

Finally, this section will touch upon the way in which vernacularisation through each dimension can be scrutinised. The focus is thus *not* on the four human rights consciousnesses, nor on the dimensions' instrumental values, but on the way in which the four vernacularisation mechanisms can be methodologically approached. Although the framework is proposed in the context of confinement and thus will focus on the way in which each dimension's vernacularisation process may operate in confinement settings, the four-dimensional model can also be utilised to holistically assess human rights consciousness and alienation in other specific contexts, although this will – depending on the concrete alternative setting at hand – require specific modifications to the way in which these dimensions are methodologically approached.

From the start, it should be stressed that there is not *one* definite holistic methodological framework within which all complexities of the human rights synergy can be encapsulated for all research into the meaning and role of human rights in contexts of confinement. Whilst a myriad of methods can be applied to understand such meaning and role, the choice for certain methods will ultimately depend on a variety of factors.

Thus, first, the four-dimensional human rights framework allows for various strands of research based on varying aims and pursuing different research questions. In turn, the specific question asked in a given research project will largely determine the methodological framework to be applied. Some research projects may be geared towards uncovering the protection of human rights flowing from one particular human rights consciousness. Others may be geared towards analysing the way in which a particular vernacularisation mechanism is utilised to accomplish varying goals. Yet others may look specifically into a particular instrumental use of human rights. Alternative research projects may be aimed at analytically indicating the role of a particular actor or collectivity in pursuing specific human rights goals. Still others may, intrepidly and comprehensively, pursue to indicate the overall role and rel-

evance of human rights in a particular context by tapping into each of the combinations of consciousness and vernacularisation outlined above. Given the distinct nature of each of these potential projects, they will all rely on different methods and techniques in pursuing the research questions that they centralise.

Furthermore, context-specific factors are highly relevant for the choice of methodology. In some contexts, certain vernacularisation mechanisms will for example be much more prominent than others. For instance, in some contexts judicial oversight may be strong, in others it may be weak or even non-existent; in some contexts significant room for discretionary decision-making may exist, in others it may not; in some contexts a significant presence of social movements may be denoted, in others such movements may be weak or absent; in some contexts human rights discourse may feature prominent, in others it may be largely inexistent. Such particularities may to certain extents dictate a project's methodological focus. Additionally, the specifics of a given case study can also warrant the use of *additional* methods that are tied not to a specific dimension but rather to the type of case study concerned. In contexts of commodified confinement, it could for example be warranted to combine the various methods of the individual dimensions with an overarching analysis of the nodal network – such as that purported in chapter 2 – in order to identify, for instance, relevant actors to focus upon.²²⁵

Methodological choices may moreover be curbed by practical limitations. For example, the choice of methods depends on whether or not access to particular research sites or to relevant actors can be secured. More generally, the overall availability of data significantly conditionalizes the methodological framework. Such practical limitations generally apply more in relation to some dimensions than they do in relation to others: access to discourse or legal documents can, for example, on many occasions be more easily secured than access to, for instance, sites of confinement, professionals, or specific protest movements, which all depend on external approval.

For these reasons, there is no exhaustive or required selection of methods nor a set ratio of qualitative, quantitative, and/or dogmatic components that ought to be pursued as a matter of principle. It consequently does not make sense to postulate a purportedly comprehensive research framework that would, when applied, provide an exhaustive basis for conclusions as to the meaning and role of human rights in a particular context. Such 'methodological utopia' should not, and cannot, be promised. Instead, the subsections below will provide a few notes that should be taken into account whenever a research project attempts to analyse vernacularisation through either of the four dimensions' mechanisms in contexts of confinement.

225 See also Caiani, 2014.

8.5.6.1 Assessing deliberative processes

First, to examine vernacularisation of human rights through the deliberative dimension, legal analysis may focus on international human rights law or on related legal fields such as criminal or tort law. Whenever the focus is on international human rights law – examining the instrumental use of human rights as deliberative principles through deliberative vernacularisation mechanisms – analysis should include both human rights law *in the books* – setting *de jure* standards of responsibility – and human rights law *in action* – leading to *de facto* legal accountability – is needed. Analysis should ideally focus on the way in which human rights consciousnesses can be produced and reproduced through deliberative processes, ranging from the drafting stage to the stage of judicial enforcement. This thus includes processes of responsabilisation (in the books) as well as of answerability and enforcement (in action).

To perform such dimension-specific analysis, research should henceforth study the division of responsibility in ‘black-letter law’ in comparison with actual levels of accountability in practice, *inter alia* by elaborating upon factors that either hamper or induce actors to be held accountable for their human rights obligations. This, ultimately, will show the true vernacularisation potential of deliberative processes. One therefore needs to resort not only to legal research – including in-depth analysis of jurisprudential trends – but also to socio-legal research inquiring into the *de facto* accountability implications of human rights responsibilities.

8.5.6.2 Assessing frameworks of morality

The vernacularisation of human rights through morality frameworks is arguably somewhat difficult to assess as it concerns processes that for an important part take place within an individual’s psyche, that is, insofar as the meaning assigned to internalised human rights consciousnesses for decision-making purposes is concerned. That does not mean, however, that vernacularisation through morality frameworks cannot be assessed. To the contrary, discretionary decision-making can be empirically scrutinised, which in turn also – at least by proxy – indicates underlying processes of norm internalisation and norm socialisation. In contexts of confinement, generally, this requires analysis of the extent to which discretionary decision-making space is substantiated with particular human rights conceptions. Research should hence typically focus on each relevant level of discretionary decision-making, that is, on the ‘social surround’, the ‘decision field’, and the ‘decision frame’. In addition to desk research, this requires – in particular in relation to the ‘decision frame’ – the application of empirical research methods in order to unveil the moral blueprints that guide discretionary decision-making in specific case studies. Qualitative interviews are generally suitable in this regard, which could be supple-

mented by observations, surveys, and focus groups where possible and appropriate.

8.5.6.3 Assessing protest activities

As outlined above, social movements can broadly be divided into two categories: those taking place within the confines of the traditional political arena and those operating outside of it. Methodologically, any full-scale inquiry into the role of the protest dimension in vernacularising human rights should take both traditions into account. Thus, whenever research attempts to deal exhaustively with vernacularisation through this dimension, analysis should include the extent to which social movements are able to command change either within or outside of the conventional political realm.

Such research should always be firmly embedded in the respective contexts in which it takes place.²²⁶ Core potential methods in this regard are in-depth interviewing, participant observations, focus groups, surveying, frame and discourse analysis,²²⁷ and document analysis.²²⁸ Staggenborg emphasises that such qualitative methods are particularly helpful for social movement research, given that the experiences, perceptions, and emotions of the researchers involved can be important sources of data.²²⁹ Thus, “[b]oth participant-observation and in-depth interviews produce interactional and observational data that are critical to understanding social movement dynamics”.²³⁰ Also, through such rich qualitative data gathering techniques and thick analysis, the “illusion of homogeneity” of social movements can effectively be broken down.²³¹ Concrete research designs implementing such an approach may, moreover, do so in accordance with grounded theory, which is very

226 Caren, 2013, p. 364.

227 Frame analysis and discourse analysis are closely related in that they are both “preoccupied with how ideas, culture, and ideology are used, interpreted, and spliced together with certain situations or phenomena in order to construct particular ideative patterns through which the world is understood by audiences”: Lindekilde, 2014, p. 199. However, they differ in the sense that frame analysis in the context of social movements focuses on the question how ideas or ideologies are deliberately utilised to “mobilize supporters and demobilize adversaries” in relation to a specific goal, whereas discourse analysis looks at the question how text at various stages bring an object into being and how it gives a particular meaning to such object. Discourse analysis is thus focused on uncovering social construction of reality, whereas frame analysis aims at explaining the impact of framing exercises on mobilisation and participation: see Lindekilde, 2014, pp. 200–201.

228 Staggenborg, 1998, p. 353. See also Andretta & Della Porta, 2014; Balsiger & Lambelet, 2014; Della Porta, 2014b, 2014a; Lindekilde, 2014.

229 Staggenborg, 1998, p. 353. See also Balsiger & Lambelet, 2014, p. 151. At the same time, such research may involve large amounts of ‘emotional labour’ which could be experienced by researchers as a type of “violence to the self”: see Creek, 2012.

230 Staggenborg, 1998, p. 355.

231 Balsiger & Lambelet, 2014, p. 148.

suited to deal with questions of *how* social movements may bring about change in human rights realities.²³²

Triangulation of different methods is widely vaunted and practiced in social movement research, which seems not so much to be the result of a conscious ‘methodological war’ but rather of a natural epistemological favouring of pragmatism under the banner of what has been labelled the “absence of methodological dogmatism”.²³³ Social movement research should thus, as Della Porta explains, be regarded as incorporating a primarily pluralist attitude.²³⁴ This does not only suit the overall problem-oriented (rather than method-oriented) approach of social movement studies, but also aligns with the fact that social movement research often encounters a relative lack of reliable and accessible databases, which in turn compels the importation and adaptation of research methods from other fields and the invention of new methods altogether.²³⁵ Through triangulation one can furthermore overcome biases and limitations inherent in studies employing a single method or data source.²³⁶

8.5.6.4 Assessing discourse

To analyse human rights vernacularisation through discourse mechanisms, discourse analysis should be introduced as an appropriate domain of study in the context of human rights. Discourse analysis at its core attempts to uncover the meaning of text, not by looking at particular texts in isolation but rather by connecting the plain and ordinary meaning of words at textual level to the way in which text production, dissemination, and reception have a shaping influence on the meaning of such texts.²³⁷ Language is therewith understood as a social practice.²³⁸ Whilst various types of discourse analysis have been developed, a particularly influential one – and one that is of specific relevance for the type of inquiry pursued here – is *critical* discourse analysis

232 Mattoni, 2014, p. 38.

233 Della Porta, 2014c, p. 2; Klandermans & Staggenborg, 2002, p. xii. See also Ayoub, Wallace, & Zepeda-Millán, 2014.

234 Della Porta, 2014c, pp. 1–4.

235 Della Porta, 2014c, pp. 2–3.

236 Ayoub et al., 2014, pp. 67–68. The holistic study of human rights proposed in this chapter – taking into account each of the four dimensions involved as well as their crossovers – *in itself* also constitutes triangulation of sorts given that it uses multiple research methods and data sources in order to construe a holistic picture of human rights as a complex phenomenon. Still, it can be important to apply triangulation in relation to one or more of the particular dimensions at hand in order to provide for a more holistic account *of that particular dimension*.

237 Lindekilde, 2014, p. 198.

238 Davis, 2015, p. 280.

(‘CDA’) as developed by Fairclough.²³⁹ Given that CDA focuses on the way in which inequality and power relationships are embedded in discursive practices, it provides an appropriate framework of analysis to examine how language, human rights ideology, and material human rights protection inter-relate.²⁴⁰ One of the most striking features of CDA is, in fact, that it is concerned primarily with responsibility and is endowed with a commitment to social justice – it is, as some have argued, “linguistics with a conscience and a cause”.²⁴¹ CDA accordingly attempts not only to uncover the meaning of texts, but also the way in which they express and foster particular ideological perspectives “delicately and covertly”.²⁴² CDA therewith is particularly useful in analysing the vernacularisation of particular human rights consciousnesses through discourse.

Concretely, Fairclough has set out a three-dimensional analytical model to perform CDA in any given setting.²⁴³ In essence, these three dimensions of CDA reflect different *levels* of analysis: the micro, the meso, and the macro level. Thus, any CDA should include “(i) an examination of a text’s linguistic features (the ‘level of the text’, or micro level), (ii) an exploration of processes related to the text’s production and consumption (the ‘level of the discursive practice’, or meso level), and (iii) consideration of the text’s wider cultural and social context, of which the text is a ‘communicative event’ (the ‘level of the sociocultural practice’, or macro level)”.²⁴⁴

Under the banner of CDA, the object of analysis is hence not mere plain text, but social interaction through discourse.²⁴⁵ As I outlined elsewhere, the (micro) level of the text and the (macro) level of the sociocultural practice are essentially bi-directional and operate through the (meso) level of the discursive practice: “the way language is used is not only shaped and influenced by the socio-cultural framework in which it is positioned, but this socio-cultural framework is simultaneously shaped and influenced by the way language is used. Text and context thus continuously model each other.”²⁴⁶ In other words, whilst text is produced in accordance with socially embedded discourses, the social context is simultaneously reproduced and/or challenged by text through its distribution and consumption in what may be labelled a circular process. In the context of human rights vernacularisation through

239 Chouliaraki & Fairclough, 1999; Fairclough, 1993, 2003, 2013b, 2013a. This type of discourse analysis has in fact been applied by scholars from a wide variety of disciplines other than that of linguistics, including in the fields of law, criminal justice, political science, health science, and even archaeology: see e.g. Macquoy, 2015, p. 18.

240 Campos Pinto, 2011; Van Berlo, 2015a, p. 82.

241 Widdowson, 1998, p. 136.

242 Batstone, 1995, pp. 198–199; Van Berlo, 2015a, p. 82.

243 Fairclough, 1993, 2013b, 2013a; Van Berlo, 2015a, p. 83.

244 Van Berlo, 2015a, p. 83.

245 Fairclough, 2013b; Van Berlo, 2015a, p. 83; Wodak & Meyer, 2009.

246 Van Berlo, 2015a, p. 83. See also Lindekilde, 2014, p. 204.

discourse mechanisms, CDA is thus ideally placed to reveal the extent to which, through the effective use of discursive practices, language is not only shaped by the macro-level social context but also *alters* such context by either inducing or reducing compliance with particular human rights consciousnesses. Where multiple discourses exist, CDA is able to analyse which of these discourses is 'dominant' or 'hegemonic' in shaping sociocultural practice at a particular point in time and therewith is of compelling value.²⁴⁷

8.6 CONCLUSION

The holistic reconceptualisation of human rights developed above gives cause for optimism in relation to the 'bleak picture' painted at the beginning of this chapter. Rather than a Janus-faced phenomenon, human rights should be regarded as a *Brahma*, both in terms of how human rights can be *conceived of*, in terms of how they can be *achieved*, and in terms of how they can be *utilised*. By drawing on notions of human rights pluralism, consciousness, and vernacularisation, this chapter has shown that human rights can be based on respectively deliberation, morality, social struggle, and discourse, that they can potentially be achieved through mechanisms of respectively deliberation, morality, social struggle, and discourse, and that they may be instrumentally used as deliberative principles, natural entitlements, protest tools, and discursive expressions. In this sense, the 'human rights elephant' may use one or more of these 'desire paths' to arrive at its destination of effective protection. Even more so, people's human rights consciousnesses will on many occasions be highly unique given that they can be grounded in one or more dimensions simultaneously. Human rights vernacularisation mechanisms also operate in a rather unique fashion, given that their effectiveness in translating human rights consciousnesses into actual protection ultimately depends on the specifics of any context in which such effectuation is sought. In these processes, human rights may, or may not, be used as instruments in accordance with the specificities of the context at hand.

The various dimensions can, in particular as contexts for vernacularisation and as instrumental tools, thus not be assigned with moral status in the abstract: the effect that they have on the empirical world, or the 'good' or 'bad' that they do, is always conditionalized by contextual factors. This is all the more so given that each of the vernacularisation mechanisms and instruments may, based on the concept of alienation, also be used to *alienate* certain human rights understandings: ultimately, processes of deliberation, morality, social struggle, and discourse may thus not only *foster* the vernacularisation of particular human rights consciousnesses but may also do the exact opposite.

²⁴⁷ See also Lindekilde, 2014, p. 206 and Cassel, 2004b, p. 3.

The same applies to the instrumental use of deliberative principles, natural entitlements, protest tools, and discursive expressions: from the perspective of human rights protection, they may be employed for the better but may also be employed to the detriment of such protection. Ultimately, we should therefore acknowledge the need to further develop sociological accounts of human rights,²⁴⁸ as it is the social rooting of human rights that is key to all of these processes. In this light, the importance of understanding that the framework presented in this chapter is *empirical*, not normative, in nature cannot be overstated: what is envisaged is not to show how human rights protection would increase on the basis of the promulgated approach, but rather to show the real (positive and negative) impact of human rights promises and practices in a particular setting. Put differently, the presented framework does not *direct* human rights implementation but rather *tracks* it on the basis of a multidimensional and interdisciplinary approach.

Research on the holistic value of human rights as a protection framework henceforth ideally has to take into account the consciousnesses, tools, and vernacularisation mechanisms flowing from each of the four dimensions of the human rights notion. As pointed out above, the different dimensions are complementary, mutually informing, and compatible and therefore *should* indeed be addressed in light of one another.²⁴⁹ Each of the perspectives provided by the various dimensions is useful, and each helps us in understanding what human rights *are*, in their constitutive, directional, and instrumental capacities, yet each of the perspectives also has its blind spots. It is, therefore, required not to focus solely on one dimension, as to do so would entail that the strengths and weaknesses of the various dimensions would not be able to complement and correct one another.²⁵⁰ Of course, whilst much research is delimited in accordance with practical and conventional constraints, at a minimum it should continuously acknowledge the existence and relevance of concurring human rights dimensions, even where such paradigms remain outside the scope of a particular study. Holistic human rights analysis, then, requires one to embrace that human rights are, essentially, cohesive in diversity, and that they provide a wide variety of desire paths that may, or may not, lead to effective protection, or that may decrease protection, depending on the contextual particularities at hand.

248 See also Clément, 2015; Frezzo, 2015.

249 See also Breakey, 2018, pp. 16–17; Dembour & Kelly, 2011, pp. 21–22.

250 Van der Burg made a similar argument in the context of various dimensions or models of ‘culture’: Van der Burg, 2008, p. 13.

9 Human rights as a holistic protection mechanism in RPC Nauru

9.1 INTRODUCTION

This final chapter prior to the conclusion will analyse the role of human rights as a holistic protection mechanism in the context of RPC Nauru.¹ As the previous chapter has illuminated, such holistic assessment can, depending on one's specific research interest, take a number of forms, *inter alia* by focusing on a particular human rights consciousness, a particular human rights vernacularisation mechanism, a particular human rights instrument, or a particular actor. Alternatively, it can focus on examining the vernacularisation of human rights consciousnesses by a wide variety of actors through all respective vernacularisation mechanisms and by taking into account all instrumental uses of human rights, yet given the breadth and intensity of such a venture this could easily be the sole endeavour of an entirely separate book altogether.

In this chapter, an actor-specific inquiry will be pursued. This choice for a focus on actors, rather than on specific consciousnesses, vernacularisation mechanisms, or instruments, makes particular sense in light of the commodification perspective that the present research has utilised. Indeed, the chapter will show – albeit frequently implicitly – how the mentalities, technologies, resources, and institutional structures of various actors impact on the role that human rights play as a protection framework. An actor-specific focus, as such, addresses the interplay between commodification developments and the holistic protection value of human rights.

The chapter focuses particularly on the use of human rights instruments and vernacularisation mechanisms by three different groups of actors involved in the context of RPC Nauru. Specifically, in light of the central question of this book – revolving around the extent to which human rights *as a protection framework* can remain of relevance – the focus will be on three actors that, at least in theory, are expected both to have internalised particular human rights consciousnesses and to strive for their effective vernacularisation, as opposed

1 In light of the fact that issues concerning human rights protection have been more pervasive in the context of RPC Nauru than they have been in the context of PI Norgerhaven, as has also been emphasised in the intermezzo concluding Part II, and for practical reasons set out in chapter 1, the focus here is on RPC Nauru. In the conclusion of this chapter, however, some brief notes in relation to the potential use of the multidimensional model of human rights in the context of PI Norgerhaven will be provided.

to actors that may be presumed to pursue alienation strategies. In this sense, the use of human rights alienation strategies is left out of consideration in the present analysis, although it should be kept in mind that the possible use of such strategies will impact upon the overall effect of human rights as a protection framework.

It is consequently important to underscore that this chapter is an *illustration* of how human rights protection could holistically be approached: it is not a comprehensive and complete assessment of human rights protection in RPC Nauru. Indeed, by focussing upon particular ‘human rights-friendly’ actors, it leaves both human rights alienation and a number of vernacularisation attempts underexplored. The purpose of this chapter is, accordingly, not to assess whether human rights add, overall, to the plight of asylum seekers and refugees confined in RPC Nauru, but rather to illustrate a few ways in which the analytical model as developed in the previous chapter may be employed on the basis of a commodification perspective. As such the present illustration is not exhaustive and uses a very particular perspective that functions as an invitation for further elaboration in future research.

The central actors in this chapter are (i) Australian lawyers and (quasi-judicial) monitoring bodies, (ii) welfare workers working (or having worked) in RPC Nauru, and (iii) institutionalised NGOs operating in the Australian political realm. These three actors all constitute important ‘critical masses’ which may *a priori*, on the basis of theoretical reflection, be presumed to pursue – as part of their particular strategies – the implementation of human rights protection in an implicit or explicit way, that is, either by explicitly relying on human rights instruments or by implicitly seeking vernacularisation using alternative tools.² The methodology used to perform this analysis has been detailed in chapter 1. To briefly recap, analysis in this chapter is based on a review of literature and documents, semi-structured interviews and, to a lesser extent, doctrinal legal analysis insofar as vernacularisation opportunities of lawyers and (quasi-judicial) monitoring bodies are concerned.

This chapter will henceforth provide an illustrative insight into the operation of various human rights consciousnesses, instruments, and vernacularisation mechanisms in the context of RPC Nauru. As will become clear, whereas some vernacularisation mechanisms are, for a myriad of reasons, more ideally placed to command change, in practice, all mechanisms have a role to play in the vernacularisation of human rights consciousnesses and in the consequent fostering of human rights protection. A true synergy of human rights dimensions can hence be discerned in relation to the (pursued) operation of the human rights framework as a protection mechanism in the context of RPC Nauru. As will also become clear, at some stages the three examined critical masses rely explicitly on human rights instruments in their vernacularisation

2 See, in relation to welfare workers specifically, also Maylea & Hirsch, 2018.

efforts, but frequently they also purposively do not do so. The implications of these findings will be discussed throughout this chapter.

The final part of this chapter will reflect upon the synergistic operation of human rights in RPC Nauru by once again centralising the key notions of commodification and crimmigration that underly this book. As becomes clear, commodification and crimmigration ultimately have a negative impact on various components of human rights vernacularisation, that is, on the instrumental values and vernacularisation mechanisms of all respective dimensions. Both developments, indeed, challenge or even frustrate human rights vernacularisation in a myriad of ways. As will also be explained, however, commodification at the same time opens up new pathways, or specific vernacularisation mechanisms, towards human rights protection. In this sense, whereas crimmigration generally has a constraining effect on effective vernacularisation, commodification has both a restricting and an enabling impact. This sets the stage for a somewhat optimistic conclusion about the relevance of human rights in an era of globalisation, as human rights understood in a holistic fashion are not only challenged, but also can potentially be realised through novel pathways of protection, where globalisation continues to progress unabatedly.

9.2 VERNACULARISATION OPPORTUNITIES OF LAWYERS AND (QUASI-JUDICIAL) MONITORING BODIES

Of all professional actors involved in the field, lawyers and (quasi-judicial) monitoring bodies are most likely to be able to utilise human rights as deliberative principles in their vernacularisation efforts. The instrumental value of human rights as deliberative principles in this regard can, however, be questioned given the intricacies of international human rights law in the context of RPC Nauru as Part II of this book has elaborated upon. At the same time, as has indeed elucidated throughout this book, any examination of human rights as deliberative principles should take both the 'law in books' and the 'law in action' into account: for a proper understanding of the extent to which international human rights law can effectively keep duty-bearers accountable, it is required to not only look at *de jure* responsibility but also to look at *de facto* accountability. *De jure* responsibility has already been dealt with in Part II, so this section will focus primarily upon the extent to which the responsible actors as identified in Part II can be held answerable by lawyers and/or (quasi-judicial) monitoring bodies and consequences may be enforced in practice. The focus here is therefore on the instrumental uses of human rights law by lawyers and (quasi-judicial) monitoring bodies through deliberative human rights mechanisms, although occasionally references will be made to other ways in which deliberative mechanisms are employed by these actors, for example when relying on criminal law or tort law.

Demarcating *de jure* international human rights responsibilities in RPC Nauru is, as Part II of this book has elucidated, a strenuous task. As part of the ‘cat-and-mouse’ game or ‘rat-race’ previously denoted, the factual arrangements and structures of power at play in the nodal field constantly change and adapt themselves to legal, social, and political realities in what may be labelled a never-ending reconfiguration. As I noted elsewhere, this trend provides states involved “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”.³ Nevertheless, establishing human rights responsibility could, in concrete cases, still be possible: “some cases [may] entail clear-cut breaches of human rights that fall within the jurisdiction of, and are attributable to, Australia and/or Nauru”.⁴ States can, in other words, not *always* manoeuvre themselves outside human rights law’s reach. Here, then, lies potential for vernacularisation that lawyers and monitoring bodies can use. However, whilst in such cases legal *responsibility* may be established along the lines set out in Part II of this book, the question remains whether the responsible actor can consequently also be held *accountable*, that is, whether they indeed can be held answerable and consequences of breaches can be enforced.

In this regard, I have elsewhere noted in the context of RPC Nauru that “optimism fades” when exploring the accountability mechanisms in place.⁵ Various reasons seem to underly this fading optimism. Some of these reasons are *external* to RPC Nauru: they relate to the broader specific embedding of human rights law in the Australian-Pacific context or to the particularities of various international human rights law regimes. Other reasons are *internal* to RPC Nauru: they relate to the nodal structure, ‘many hands’, non-transparent nature, and crimmigration features of the facilities. The most pervasive reasons will now be addressed in turn, examining respectively (i) the accountability of private actors under human rights instruments, (ii) the overall position of human rights accountability in the Australian-Pacific region, and (iii) the particularities of RPC Nauru’s governance structure and design.

9.2.1 The limited potential of private human rights obligations in action

At first sight, the potential for legal professionals to hold private actors accountable on the basis of human rights law appears to be weak at best: in light of the voluntary and non-binding nature of obligations as outlined in chapter 5, the question as to the impact of these frameworks in practice seems largely redundant. To a large extent, this holds true: the existing soft-law frameworks

3 Van Berlo, 2017d, p. 64.

4 Van Berlo, 2017d, p. 64.

5 Van Berlo, 2017d, p. 64.

and self-initiated codes of conduct have seemingly provided those confined in RPC Nauru with hardly any enforceable human rights protection vis-à-vis private stakeholders. Effective ways to induce compliance or to remedy potential breaches are lacking and compliance with these norms is fully dependent on the private contractors' own volition and initiative. Whilst in some countries so-called 'non-judicial grievance mechanisms' are being set up with the aim of allowing victims to seek redress, these mechanisms operate through judgments that are not legally binding.⁶ As Zadek concludes in this regard, "[i]n sum, none of the current avenues that are available to victims seeking to right corporate wrongs provide consistent, reliable or effective remedies".⁷

Some remarks in this regard are due. First, whilst limited, there is *some* scope for judicial redress in domestic law. Whilst proper accountability on the international plane is largely inexistent, domestic criminal prosecutions and civil litigation could indeed to certain extents be considered remedial tools that allow for private actors to be held responsible on the basis of human rights standards.⁸ Such remedial pathways effectively are part of the state's endeavour to discharge its positive obligation to provide for an effective remedy whenever horizontal violations occur.⁹ Thus, on the one hand, states may discharge their positive obligations in part by ensuring that private actors can be held criminally liable for certain infringements of human rights under domestic criminal law, both by allowing for liability in substantive criminal law and by ensuring that effective and adequate procedures are in place to enforce such liability.¹⁰ On the other hand, depending on the specifics of the domestic jurisdiction involved, individuals may be able to bring tort claims against private stakeholders concerning alleged violations of *domestic* 'human rights' provisions in the country where the violation has allegedly occurred or where the private actor is based.¹¹ The term human rights is put between inverted commas here, however, since "[n]ot all 'tort rights' are also 'human

6 Genovese, 2016; Zadek, 2016, pp. 243–244. This includes, notably, National Human Rights Institutions (NHRIs).

7 Zadek, 2016, p. 244.

8 Zadek, 2016, p. 243.

9 Kaufmann, 2016, p. 253; Van Dam, 2011, p. 243.

10 Ryngaert, 2018. See, for a problematisation of the relationship between positive human rights obligations and effective criminal procedures, however Pitcher, 2016; Seibert-Fohr, 2009. As they explain, tension may arise between fundamental principles of criminal law – including fair trial rights of the accused and, more generally, principles of due process – and of human rights law – in particular where the latter in pursuit of an effective enforcement of criminal liability would demand an obligation of *result* (i.e. a duty to punish) rather than of *effort* (i.e. a duty to *prosecute*). As they consequently argue, at least from the perspective of criminal law, positive obligations under international human rights law can thus not be interpreted to extend as far as to expect from a state that whenever a grave violation of core human rights occurs, not only prosecution but also punishment should follow – irrespective of the procedural particularities of a case.

11 Such corporate 'human rights' obligations do not derive directly from the international plane but from statutory provisions in domestic law: Vandenhoe, 2015, p. 79.

rights' and not all 'human rights' are also 'tort rights' but there is a big overlap, particularly when it comes to civil rights".¹² Thus, when speaking about domestic human rights obligations of corporate actors in this regard, what is *actually* referred to are tort obligations with a human rights overlap as part of a 'rights-oriented' or 'rights-based' system of tort law. Tort law and human rights law are thus "brothers in arms",¹³ but cannot be equated to one another. The same applies, in fact, to the overlap between criminal law and human rights law: they operate as communicating vessels yet cover different domains. In the context of RPC Nauru, these avenues are also potentially available: the domestic legal systems of Nauru and Australia may be utilised to induce corporate responsibility. As such, whilst deliberative principles in their instrumental value – i.e. as international human rights law – may lack effectiveness, this does not mean that deliberative vernacularisation mechanisms are therefore ineffective overall.¹⁴ Tort law and criminal law may provide alternative deliberative pathways towards human rights protection, albeit in a more implicit and indirect sense.

Returning to the instrumental use of human rights as deliberative principles, attention will now be turned to a particular procedure within the United States that may provide room for accountability based on private human rights obligations proper. Indeed, a well-known and unique alternative pathway for judicial redress on the basis of tort law is the US Alien Tort Statute (ATS), which has attracted significant attention in relation to private human rights obligations.¹⁵ According to the ATS, which was established as part of the Judiciary Act of 1789, the US district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". In 1980, the Court of Appeals for the Second Circuit held in *Filartiga v. Pena-Irala* that human rights claims can be brought under the ATS.¹⁶ Customary international law, including international human rights law, is indeed considered "the modern equivalent" of what the ATS labels the 'law of nations'.¹⁷ Thus, even when the domestic legal system of the country where the alleged violation occurred or where the private actor is domiciled

¹² Van Dam, 2011, p. 243.

¹³ Van Dam, 2011, p. 243.

¹⁴ It should nevertheless be noted that Australia does not have a Bill of Rights in its national constitution, which may complicate domestic human rights responsibility in the first place. Furthermore, Nauruan tort law has not been significantly developed and is not particularly clear as to its substance: Dastyari, 2008, p. 88.

¹⁵ Zadek, 2016, p. 243.

¹⁶ US Court of Appeals for the Second Circuit, *Filartiga v. Pena-Irala*, 30 June 1980, 630 F.2d 876. This case concerned allegations of torture. The Second Circuit held that District Courts have jurisdiction over such tort claims brought by aliens given that official torture violates norms of customary international law: see also Dodge, 2016, p. 245; Grear & Weston, 2015, pp. 29–30. In the following decades, approximately 60 cases were filed against corporate actors under the ATS: see for a brief overview, Dodge, 2016, pp. 245–246.

¹⁷ Dodge, 2016, p. 245.

does not offer proper avenues of judicial redress via tort law, the ATS seems to provide a genuine alternative to induce accountability on the basis of human rights norms enshrined in customary *international* law. This procedure is of particular importance here given that it potentially provides a pathway to enforcing international human rights norms vis-à-vis private actors involved in RPC Nauru.

The lack of avenues to hold private actors involved in RPC Nauru answerable as identified above accordingly has to be nuanced: it is imaginable that a tort claim against them is brought in the United States under the ATS. However, recent case law developments have significantly decreased such potential. An important turning point was the case of *Kiobel v. Royal Dutch Petroleum Co.*¹⁸ This case concerned a class action brought by Nigerian nationals against Royal Dutch Petroleum Company (incorporated in the Netherlands), Shell Transport and Trading Company (incorporated in the UK), and Shell Petroleum Development Company (A subsidiary incorporated in Nigeria), alleging that defendants had aided and abetted human rights violations by encouraging the government of Nigeria to suppress demonstrations against oil operations in the Niger Delta.¹⁹ The Court of Appeals for the Second Circuit held, however, that it is not possible to sue corporations *at all* within the framework of the ATS given that corporate liability for international crimes has continuously been rejected within customary international law.²⁰ The case eventually reached the US Supreme Court, which also dismissed the case but on a different ground.²¹ It recounted that a 'presumption against extraterritoriality' applies to US statutes: as it previously outlined, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none".²² The Supreme Court concludes that nothing in the text of the ATS clearly indicates an extraterritorial reach: the presumption against extraterritoriality is "not rebutted by the text, history, or purposes of the ATS", and therewith it is held to apply unabatedly.²³ The Supreme Court therewith severely limited the scope for judicial redress under the ATS, yet it did not close the door altogether. The final paragraph of the majority opinion holds that

"all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.

18 United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum Co.*, 17 September 2010, 621 F.3d 111.

19 See also Dodge, 2016, p. 247.

20 US Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum Co.* See, for further analysis, Grear & Weston, 2015, pp. 30–33.

21 US Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*, 17 April 2013, 569 US 108.

22 US Supreme Court, *Morrison v. National Australia Bank Ltd.*, 24 June 2010, 561 US 247.

23 US Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*

[...] Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices [...].”²⁴

As Dodge outlines, this final paragraph still provides some room for cases concerning human rights violations by corporate actors outside the US.²⁵ Thus, it is arguable that the majority decision allows for such cases where (i) part of the ‘relevant conduct’ took place in the US although the violation itself did not, (ii) the defendant is a US corporation, and/or (iii) the defendant is an individual.²⁶ However, the question what is precisely required for a claim to ‘touch and concern the territory of the United States with sufficient force’ remains unanswered: in fact, various Circuit Courts have, in applying this criterion post-*Kiobel*, reached different and contradictory outcomes.²⁷ In any event, in the context of RPC Nauru there is no reason to believe that claims concerning private actors’ conduct and involvement touch and concern US territory with sufficient force – or, for that matter, *at all*: the corporations involved operate on Nauruan soil, are generally domiciled in Australia, and operate as part of Australian and Nauruan policy frameworks.

In addition, a further hurdle was explicated in *Daimler AG v Bauman*.²⁸ In this case, which concerned a claim under the ATS for alleged human rights violations that occurred entirely outside the US and involved both non-US plaintiffs and non-US defendants, the Supreme Court held that US courts can only exercise personal jurisdiction over claims that are not related to the forum if the defendant’s affiliations with the US state in which the suit is brought are “so constant and pervasive” that the defendant is essentially “at home” there.²⁹ This, in turn, creates an additional barrier for potential tort claims brought in the context of RPC Nauru: since the private actors involved are based in Australia and consequently have no constant and pervasive ties to US territory, it seems that personal jurisdiction cannot be established in cases in which they are the defendants.

The second remark due here is that the private actors involved in RPC Nauru could, theoretically, be held responsible for human rights violations by means of *contractual* stipulations. Thus, their service contracts with the Australian government could contain stipulations concerning any contractual consequences of human rights infringements. For example, Canstruct’s service contract with the Australian government for the provision of welfare and garrison services in RPC Nauru stipulates in Schedule 1 (‘Statement of Work’), Part 4 (‘RPC Garrison Services’) that Canstruct has to ensure “that each indi-

24 US Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*

25 Dodge, 2016, pp. 247–248.

26 Dodge, 2016, pp. 247–248. See also Gear & Weston, 2015, pp. 33–34.

27 Dodge, 2016, pp. 249–250; Knoblett, 2019, p. 750; Prasad, 2018.

28 US Supreme Court, *Daimler AG v. Bauman*, 14 January 2014, No. 11-965, 571 U.S.

29 US Supreme Court, *Daimler AG v. Bauman*. See similarly US Supreme Court, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 27 June 2011, 564 U.S. 915. See also Ryngaert, 2018, pp. 19–20.

vidual's human rights, dignity and well-being are preserved".³⁰ It seems that this reference to human rights denotes all of Australia's international human rights obligations, since the contract stipulates that amongst others "Australia's international obligations, such as the United Nations Refugee Convention and Convention on the Rights of a Child" provide parameters for the operation of regional processing.³¹ Ultimately, failure to do so *could* result in the removal of service provider personnel or the termination of the contract altogether.³² However, these obligations are based on contract, not international human rights law, and answerability and enforcement therewith rest, of course, primarily with the Australian government, not with lawyers or monitoring bodies. In terms of impartial accountability, the significance of these contractual obligations can thus – at least *prima facie* – be questioned: "[t]he circularity between State and Company that these provisions represent in relation the [sic] responsibility for the human rights of asylum seekers is immaterial".³³

Third, it should be noted that even though the reach of soft law in the books is severely limited, in action this reach has at times proven to be *even more* limited. In relation to Australia's offshore processing regimes, this became particularly clear in the context of the OECD Guidelines in 2017, when specific developments called into question whether the contracted service providers involved in offshore processing could be held responsible on the basis of these Guidelines in the first place. As previously outlined in chapter 5, NGOs can bring complaints concerning alleged breaches of the OECD Guidelines against multinational enterprises to the National Contact Point (NCP) of the country concerned. In September 2014, two NGOs – the Human Rights Law Centre (HRLC) and Rights and Accountability in Development (RAID) – did exactly that in relation to Australia's offshore processing regimes: they submitted a complaint concerning G4S Australia's operations at RPC Manus to the Australian and UK National Contact Points.³⁴ In it, they alleged that G4S Australia "has been responsible for significant breaches of the OECD guidelines in relation

30 See section 3.2. of Part 4 of Schedule 1 to the contract of Canstruct, available at <https://www.homeaffairs.gov.au/foi/files/2018/fa171200763-document-released.pdf> (last accessed 30 May 2019). A similar phrase was adopted in Transfield's contract: see section 4.1.1. of Part 3 of Schedule 1, available at <http://www.aph.gov.au/DocumentStore.ashx?id=34e78a3a-685f-4695-9969-77964cd44f3c> (last accessed 30 May 2019).

31 See section 1.1.5. of Part 1 of Schedule 1 to the service contract. A similar provision is provided for in the service contract with Save the Children: see section 1.1.4. of Part 1 of Schedule 1, available at <https://www.righttoknow.org.au/request/2694/response/7582/attach/html/4/FA141000063%20Documents%20released.pdf.html> (last accessed 30 May 2019).

32 See, for example, sections 5.7. and 15.2. of the service contract.

33 Narayanasamy et al., 2015, p. 28.

34 The original complaint is available at <http://www.raid-uk.org/sites/default/files/oecd-complaint-g4s-australia.pdf> (last accessed 30 May 2019).

to conditions and alleged abuse of detainees” at RPC Manus.³⁵ The Australian NCP held, however, that the complaint could not be accepted because (i) parts of the complaint could be interpreted as commentary on government policy for which G4S was not accountable, (ii) various reviews had already scrutinised G4S’ conduct on Manus Island and any further review would be unlikely to be of additional value, and (iii) various legal proceedings were ongoing in relation to incidents at RPC Manus and it would consequently not have been appropriate for the NCP to intervene.³⁶ The HRLC and RAID appealed this decision but the Australian NCP upheld its previous decision upon review.³⁷ As such, even though the OECD Guidelines may *cover* the contracted service providers involved in offshore processing in general, they are not necessarily *held* accountable for various reasons, including that they are contracted by the state and merely would carry out government policy. Whereas the reach of such Guidelines in the books is already limited due to the voluntary and open-ended nature of such norms, their potential in action hence – at least on this occasion – proved to be even more constrained when applied to the context of Australian-Nauruan offshore processing.

9.2.2 The precarious position of human rights in the Asia-Pacific context

The second factor that significantly hampers the effective employment by lawyers and monitoring bodies of deliberative principles through deliberative mechanisms in the context of RPC Nauru is the overall precarious position that human rights law has in the Australian-Pacific region. This precarious position is essentially three-fold, as it comprises accountability gaps both on the international, the regional, and the domestic legal planes.

First, the views, comments, and decisions of the bodies that monitor the obligations arising from international treaties to which Australia and Nauru are party are, although considered authoritative by many, generally not binding and can as such not be considered as mechanisms through which answerability and enforcement can be induced *in se*. As Peers and Roman for example point out, the rulings of these monitoring bodies are frequently thrown “on the barbeque” by Australian politicians.³⁸ This significantly hampers human rights vernacularisation, as judicial or quasi-judicial processes are often not met with *de facto* enforcement. Such weak standing in itself is, however, true for all countries party to the same treaties and covenants and is, therefore, not specific

35 See <http://www.raid-uk.org/sites/default/files/oecd-complaint-g4s-australia.pdf>, p. 4 (last accessed 30 May 2019).

36 See https://cdn.tspace.gov.au/uploads/sites/112/2018/02/G4S_aus.pdf (last accessed 30 May 2019).

37 See https://cdn.tspace.gov.au/uploads/sites/112/2018/02/ANCP_Appeal_statement_G4S_final.pdf (last accessed 30 May 2019).

38 Peers & Roman, 2016.

to the legal realms of Australia and Nauru. Whilst the weak position of international instruments' monitoring bodies should be taken into account in assessing the vernacularisation potential of the deliberative dimension, we should hence look beyond this somewhat inherent feature to further denote, with greater detail, the potential for human rights vernacularisation through alternative deliberative processes in the particular case study at hand.

As chapter 7 has already outlined, no regional human rights instrument, court, or monitoring body exists in the Asia-Pacific context.³⁹ This is fundamentally different from other regional contexts, in particular the European one, where not only a strong human rights instrument exists – the ECHR – but where such instrument is also extensively and bindingly monitored by an authoritative court – the ECtHR. Here, a fundamental difference thus exists with other regional contexts: no material protection flows from the regional level and holding states accountable for their human rights obligations thus necessarily needs to occur either on the international sphere – which is, as outlined above, a weak system of binding accountability – or on the domestic plane – which is, as will be outlined below, also problematic in the particular contexts of Australia and Nauru. As likewise denoted in chapter 7, the start of some progression towards regional human rights law has been identified but has not led to a proper and concrete roadmap yet.⁴⁰ Whilst this goes to show with more specificity why human rights law accountability is particularly troublesome in the case study context, it does not provide further insight in how such accountability operates in Australia and Nauru in particular, that is, as opposed to other Asian-Pacific nations who self-evidently are faced with the same lack of regional scrutiny. This requires a closer look at the domestic level as well.

Human rights generally are considered to have a “precarious foothold” both in the Australian and the Nauruan domestic legal contexts.⁴¹ On the one hand, Australia remains one of the only democratic nations on earth without its own national bill of rights and has, as such, no federal human rights protection as a matter of constitutional law.⁴² Australia's international human rights obligations are monitored by the Australian Human Rights Commission ('AHRC'), but this commission has no power to enforce sanctions or to make binding recommendations.⁴³ In addition, the Australian government has on many occasions blocked the AHRC from visiting and investigating RPC Nauru since the AHRC's jurisdiction does not extend beyond Australia's territory.⁴⁴ Moreover, as I pointed out elsewhere,⁴⁵ domestic Australian

39 Durbach et al., 2009; Katsumata, 2009.

40 European Parliament Directorate-General for External Policies Policy Department, 2010, p. 13.

41 Byrnes, Charlesworth, & McKinnon, 2009, p. xv.

42 Byrnes et al., 2009, p. xv; Van Berlo, 2017d, p. 64.

43 Branson, 2010.

44 Gordon, 2014; Van Berlo, 2017d, p. 65.

courts often cannot and do not take (international) human rights obligations into account. This is aptly illustrated by the judgment of the High Court of Australia in *M68/2015*.⁴⁶ This case, in which the legality of RPC Nauru was challenged, was brought on behalf of a Bangladeshi woman previously confined in RPC Nauru. Her challenge was rejected, however – and, of particular importance here, it was rejected solely on the basis of the Australian Constitution and domestic law.⁴⁷ As I previously reported, “[h]uman rights obligations were not mentioned in the judgment and thus largely remain international figments in a nationally oriented juridical system”.⁴⁸ Lawyers interviewed for the present research confirm that human rights have virtually no importance in the Australian legal context and maintain that they henceforth generally do not rely on human rights arguments at all when going to court on behalf of asylum seekers and refugees confined on Nauru – they rely on administrative and/or tort law instead. As Frances,⁴⁹ an Australian lawyer who has represented offshored asylum seekers and refugees, maintains in relation to human rights,

“I try and fight for them. Tooth and nail. You know, my daily life is fighting for these rights, but these are rights that don’t really exist. [...] I encourage people to speak out. I use the law. What little there is, I use. [...] [But] I am a cynic. A lot of young people come and expect us – you know, they go to university, they learn about international conventions and human rights obligations. Don’t come to me, because I don’t use them ever.”

On the other hand, human rights also have a precarious foothold in Nauru, although slightly less so given that the Nauruan Constitution *does* contain a bill of rights.⁵⁰ At times, the Nauruan judiciary has relied upon human rights arguments, including in relation to questions pertaining to confinement in RPC Nauru.⁵¹ Nevertheless, Nauru has no domestic human rights institution that monitors Nauru’s human rights obligations. In addition, interviewed Australian lawyers indicate that whilst Nauru has domestic human rights in the books,

45 See Van Berlo, 2017d, p. 65.

46 See also footnotes 180-188 of chapter 1 and accompanying text.

47 Van Berlo, 2017d, p. 65.

48 Van Berlo, 2017d, p. 65.

49 All names in this chapter have been pseudonymised for anonymity purposes. Gender-neutral pseudonyms have been chosen to conceal the gender of respondents.

50 See in Part II of the Nauruan Constitution on ‘the protection of fundamental rights and freedoms’. On legal contestation in the context of RPC Manus in PNG, see Tan, 2018.

51 See notably Supreme Court of Nauru, *AG & Others v. Secretary of Justice* [2013] NRSC 10. This case concerned the freedom of movement of asylum seekers in RPC Nauru. Justice Von Doussa of the Nauruan Supreme Court held that the detention of applicants was lawful given that they were detained for the purpose of effecting their removal from Nauru, yet he also implied that excessive delay could make said detention unlawful, that is, if detention is no longer reasonably applied for the effectuation of removal, it might become arbitrary and therewith unlawful.

the government manipulates the judiciary to such an extent that human rights cannot effectively be relied upon. This refers back to the lack of rule of law on Nauru as discussed in the introductory chapter of this book, which hampers effective application of human rights in practice.

9.2.3 The troubling set-up and particularities of RPC Nauru

The third and final prominent factor hampering the use of human rights law through deliberative mechanisms relates to the internal structures and inherent features of RPC Nauru. In particular, this relates to the processes of commodification and of crimmigration conjointly, more specifically to the ‘walls of noise’ (or ‘loud panicking’) and ‘walls of governance’ (or ‘quiet manoeuvring’) as conceptually developed by Welch and as addressed at length in chapter 3. Due to the nodal set-up of the RPC’s governance structures as well as the facilities’ crimmigration features, RPC Nauru is characterised by a significant lack of transparency. Whilst commodification has diffused responsibility and has weakened ownership over actions, crimmigration has enabled the government to both make loud claims about asylum seekers as a group of ‘others’ and to simultaneously deal with them behind walls of governance consisting of complex webs of interaction between domestic, foreign, public, and private entities, as has been explained in chapter 3.

These developments are generally problematic for vernacularisation through the use of deliberative instruments in deliberative processes. First, it is difficult to look both *into* and *out of* the RPC, which hampers legal professionals and monitoring bodies in their work.⁵² It is, for instance, difficult for lawyers to represent those confined offshore in cases based on potential human rights breaches. As chapter 2 has outlined, asylum seekers in RPC Nauru receive assistance of Claims Assistance Providers (‘CAPs’) in order to prepare their refugee claims, but such assistance is limited in the sense that it does not extend beyond the refugee determination process. As the Law Council of Australia reports, it for example does not include “legal advice for people experiencing domestic violence in immigration facilities or for those charged with criminal offences” – two situations in which human rights appear to be at stake.⁵³ Furthermore, lawyers representing asylum seekers and refugees before the Supreme Court of Nauru point out that they were denied access to their clients in the RPC.⁵⁴ Other observers are also unable to visit RPC Nauru because they are not granted a Nauruan visa and/or because they are denied

⁵² Van Berlo, 2017d, p. 66.

⁵³ Law Council of Australia, *Q&A On Access to Legal Advice on Nauru*, available at http://lca.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/QA_on_Legal_advice_for_Asylum_Seekers_on_Nauru.pdf (last accessed 9 January 2019).

⁵⁴ Gleeson, 2016b, p. 86.

entrance to the RPC.⁵⁵ This includes UN observers, Amnesty International and other human rights organisations, researchers, and media representatives.⁵⁶ Many of the bilateral and contractual arrangements between the various stakeholders involved moreover are not in the public domain and therewith remain largely secret, whilst there is simultaneously little opportunity to scrutinise the behaviour of corporate actors in the facilities.⁵⁷ As such, given the nodal governance structures and the geographical remoteness of the facilities, there is a significant lack of transparency. This is aggravated by the fact that the media scene on Nauru is limited and press freedom is curtailed. Consequently, little information comes out of the facilities (and off the island), and when it does, for example through whistle-blowers, it is often haphazard. This hampers the work of legal professionals as it becomes difficult to distinguish both specific human rights abuses and the actors responsible for them.⁵⁸ I previously accordingly concluded that “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”.⁵⁹

Thus, even where human rights responsibilities can be adequately allocated in the books, in action human rights protection becomes increasingly less tangible because of the relative lack of transparency and the progressive silencing of human rights claims. Secondly, such claims are not only made invisible (behind walls of governance), but are also simultaneously outvoiced (by loud panicking). Crimmigration in the context of RPC Nauru thus undermines human rights accountability in action in multiple ways. It discursively distinguishes those confined as ‘non-belongers’ from the ‘belonging’ citizenry, therewith eroding the fundamental premise of human rights that they pertain to everyone as equals. It allows for those ‘non-belonging others’ to be detained out-of-sight, therewith silencing potential human rights claims and making it difficult to ascertain what happens within the facilities. It creates an ostensibly false distinction between protecting the rights of confined ‘crimmigrant others’ and protecting the rights of the ‘belonging (global) citizenry’, couched in language that underscores the importance of deterrence.⁶⁰ In turn, it

55 The fact that it is difficult to visit RPC Nauru is in part due to the policies and conditions developed by the Australian and Nauruan governments: as Section 4.4. of the Administrative Arrangements provides, “[t]he Governments of Australia and Nauru will agree to a media and visitor access policy and conditions of entry”.

56 Van Berlo, 2017d, p. 66. For journalists, the non-refundable Nauruan visa application fee was raised with 4000% in January 2014 from AUD\$200 to AUD\$8000.

57 Van Berlo, 2017d, p. 66.

58 This relates to the ‘problem of many hands’: Thompson, 1980.

59 Van Berlo, 2017d, pp. 66–67.

60 See, on the shift from ‘human’ rights to ‘(global) citizenship’ rights, Gamal & Swanson, 2018, p. 381.

legitimises, at least in popular thought and political rhetoric, that the former is traded off against the latter – in this sense, it legitimises the operation behind walls of governance that interferes with the legal safeguards of those confined, such as their access to legal advice. Crimmigration and commodification as two juxtaposed ‘walls of noise’ and ‘walls of governance’ are therefore troubling not only in their own right, but also because combined they to a significant extent have the potential to negate deliberative vernacularisation by legal professionals and monitoring bodies. They largely hide potential human rights claims by diffusing responsibility, obstructing transparency, and outvoicing the protection needs of those inside.

9.3 VERNACULARISATION OPPORTUNITIES OF WELFARE WORKERS

A second group that *a priori* may be considered key in the effectuation of human rights protection are welfare workers⁶¹ that work within RPC Nauru.⁶² ‘Welfare workers’ essentially is an umbrella category for multiple roles, including case managers, general support workers, recreational officers, cultural advisors, teachers, and teaching assistants.⁶³ Vernacularisation opportunities for these workers seem to be located primarily in the moral dimension: as the ‘boots on the ground’ they can *prima facie* be considered important street-level bureaucrats with potential discretionary decision-making room through which human rights consciousnesses can be vernacularised, possibly – as will be explored below – through the instrumental use of human rights.

Other workers – such as garrison workers – are also likely to enjoy discretionary decision-making space. The focus here, however, is on welfare workers for two particular reasons. First, ideologically, welfare work is geared towards humanitarian goals. *If* human rights protection materialises on the basis of discretionary decision-making, the accounts and experiences of welfare workers thus *a priori* can be expected to be appropriate and accurate indicators in this regard. Second, pragmatically, as chapter 1 has explained it has been difficult to recruit respondents for a variety of reasons, which turned out to be even more difficult in relation to individuals who worked for stakeholders other than those providing welfare services. It has, indeed, been particularly difficult to conduct interviews with individuals working as, for example, security guards, IHMS medical personnel, or representatives of the Australian government in either of both offshore processing facilities. The few interviews con-

61 To avoid confusion, the term ‘welfare workers’ is preferred here over ‘welfare professionals’. Indeed, various welfare workers who have worked on Nauru were not welfare professionals in a narrow sense, that is, they had prior to their appointment no specific welfare training, qualifications, or experience.

62 According to some, such workers even *have* to work actively to end abuse “[i]n order to avoid accusations of collaboration”: Maylea & Hirsch, 2018, p. 160.

63 Where relevant, this section will address these different roles specifically.

ducted with such individuals provides a too small basis for substantive conclusions and are thus only used to gain a further grasp of the contextual arrangements.

To examine these vernacularisation opportunities, this section deals, first, with norm internalisation and socialisation processes amongst welfare workers – indeed, the formation of human rights consciousness amongst welfare workers is of particular interest as it is much less streamlined than, for example, that of lawyers and monitoring bodies who rely primarily on deliberative consciousnesses. Second, this section will turn to welfare workers' discretionary decision-making experiences to analyse the extent to which they are able to vernacularise their human rights consciousnesses. In doing so, particular attention will be provided to their instrumental use of human rights. As explained in the previous chapter, examining discretionary decision-making requires one to look at both the 'social surround', the 'decision field', and the 'decision frame'. The analysis below will do so integrally, and will in doing so rely in particular on the accounts of the broader social and political context and of the organisational frameworks that have been set out previously, particularly in the first three chapters of this book.

9.3.1 Human rights consciousness: internalisation and socialisation

Many of the welfare workers who work or have worked in RPC Nauru recognise the importance of human rights as basic standards of dignity. Many of them recognise such importance, ironically, by pointing out that the way in which RPC Nauru operates amounts, in their view, to a flagrant breach of human rights. As they point out, the facilities are, at least in the way in which they have been set up, incompatible with any substantive notion of human rights protection. Drew, a teacher, describes for instance that the way in which the facilities have been set up amounts to "torture by a thousand paper cuts". Asked about the role of human rights, welfare worker Alex maintains that

"I feel like there were no human rights there. Apart from the fact that they're alive, and they have food and water, outside of that, there were not a lot of rights being protected. I feel like human rights protection was the last thing on the government's mind when they implemented that place. Like the standards are so basic. They're like an afterthought, and I honestly felt the entire time that I was there that it was an absolutely abhorrent human rights abuse."

Various welfare workers thus argue that the social surround within which the facilities are located does not constitute a context within which human rights can successfully be protected. One of the main underlying factors is, according to many, that RPC Nauru is set up to benefit the government's deterrence policy: the poor conditions in the facilities would be a crucial component of their institutional design in order to produce a deterrent effect

vis-à-vis other potential IMAs. This social surround conditionalizes any potential exercise of discretionary decision-making: the design of the facilities can, in many ways, not be characterised as one in which human rights are core values. This *a priori* seems to turn any decision-making based on a human rights consciousness into a challenging and uphill endeavour.

In denoting the human rights incompatibility of RPC Nauru, welfare workers showcase a variety of specific human rights consciousnesses that seem to draw on deliberative, moral, protest, and potentially also discursive elements. Thus, they point to a wide range of – often loosely constructed – ‘human rights’ that are arguably being breached through the operation of the facilities, including the right not to be arbitrarily detained but also, more generally, rights to privacy, decent healthcare, psychological wellbeing, food, water, hygienic sanitation, and the availability of particular services or resources for specific groups such as children or the elderly. Furthermore, the lack of information, the resulting uncertainty on behalf of asylum seekers, and the absolute lack of feeling ‘in control’ over one’s own life are frequently mentioned in the human rights context as basic needs or entitlements fundamentally lacking within the facilities. The fact that many asylum seekers did not know what would be happening to them and were not given a timeline for their asylum claim processing indeed resulted, as various welfare workers illustrate, in significant uncertainty and a total lack of control. The right to life in turn also clearly surfaces as an overarching right that is at stake given the wide-spread presence of suicidal ideation, which results from the high level of uncertainty and the lack of control. Welfare worker Rory for example explains that “the only control they have left is their body. That is what they have control over and increasingly they will harm themselves with razor blades or extreme tannings.”

In explaining the dire human rights situation in RPC Nauru, welfare workers frequently refer – often implicitly – to the process of crimmigration by pointing out how the facilities operate in a prison-like fashion. Various welfare workers do not only mention the prison-like conditions to point out how the operation of the facilities results – in their eyes – in direct human rights violations such as those concerning the ostensibly undue deprivation of liberty, but also to argue how the RPC fosters a ‘criminal’ image of those confined which in turn has a further indirect negative impact on asylum seekers’ human rights. Thus, as various welfare workers argue, those confined were not only deprived of the right to liberty as a result of their confinement in RPC Nauru, but also of a wide variety of rights – such as those mentioned above – as a result of the fact that they were seen as a lesser type of human. Their ‘crimmigrant’ imago was therefore used to justify, at least in the eyes of many respondents, that those confined were accorded less human rights protection. Again, the social surround – from which this process of crimmigration originates – seems to *a priori* impede the vernacularisation of human rights, as the set-up of the facility intends to – or at least results in – the progressive ‘outgrouping’ of

those confined into a category of non-belonging. Accordingly, various welfare workers highlight that asylum seekers were generally treated without equality or human dignity by a number of stakeholders. In this sense, in the context of RPC Nauru, crimmigration seems to play out along the lines of ‘anchored pluralism’: whilst the various stakeholders involved have certain space to manoeuvre, their actions are largely constrained – and steered – by the overarching crimmigration policies in place. In relation to Wilson Security’s interactions, welfare worker Quinn for example maintains that

“Wilson’s would treat people with kind of contempt and disregard, refer to them by numbers, be quite short on patience, not understand mental health issues, not respond appropriately to peoples’ distress. And then the asylum seekers would escalate, because they felt that their human rights were being abused and they would kind of engage in behaviours that made Wilson’s even more contentious. And it became this kind of vicious cycle. So that was one of the major issues, but what that resulted in is a situation whereby people genuinely felt, and from observing I genuinely felt also, that they were being treated almost like animals. So that their human dignity was not respected. They weren’t seen as equal human beings to the rest of us. And they were treated absolutely as lesser, and that their needs were non-important.”

This in turn relates to a striking feature that almost all welfare workers point out when asked about the level of humanity in the treatment of asylum seekers and refugees: most stakeholders involved referred to those confined by their ‘boat ID number’ rather than by their name. Upon interception by the Australian coast guard, those arriving irregularly by boat are indeed given an ID number consisting of a three-letter code denoting the boat on which they arrived and a unique three-numbered code for each individual, for example LIC078 or RAM113.⁶⁴ Boat ID numbers were consistently used to identify those confined in the facility, both adults and children, which ultimately had a de-humanising effect as Cameron, a medic who visited RPC Nauru in his professional capacity, amongst others highlights:

“we had children actually introducing themselves to us by their boat number. And so, there’s been lots of reports now that the children can’t even remember their names anymore. They actually refer to themselves by a number. There’s been children born there and that’s all they know now. [...] If you’ve always been called 1234 since birth, that’s what you will know yourself as. Every time they report to Save the Children, every time they report to IHMS, every time the report to the guards, every time they do anything they have to quote that number. And so, we had children come up, put their hand out, offer to shake our hand, and quote their number. It’s astounding, isn’t it? Children.”

⁶⁴ These boat ID numbers have been made up as examples and do not relate to anyone interviewed for, or otherwise involved in, this research.

Various medical professionals likened this use of boat ID numbers to the use of numbers in concentration camps and other highly oppressive environments. The dehumanising effect of boat ID numbers was also widely recognised by welfare workers. Still, some welfare workers admit that they at times would also call asylum seekers by their boat ID numbers in order to get a security guard to respond to a certain request, which ultimately was not in line with their personal values yet constituted a way to 'get things done' within the multi-actor governance framework. Boat ID numbers were henceforth part of the interinstitutional 'grammar' within the facility, and welfare workers felt compelled to at times resort to their use even though they ultimately condemned the dehumanising effects of such *lingua franca*.

Notwithstanding the specifics of the social surround, the notion of human rights seems to be an essential part of welfare workers' own consciousness and can in this sense be denoted as constituting an internalised framework of norms. Such norm internalisation, furthermore, seems to derive from a process of norm socialisation. That is to say, welfare workers point out that human rights standards are not only part of their personal culture but also of their professional culture, and that as a professional welfare worker one is thus not only 'socialised' into internalising human rights norms but also socialises others into internalising these norms. In this sense, many welfare workers recognise that human rights norms are part of their professional ethics. As Jamie, a child protection worker, summarises, "our driving goal and our driving purpose was to minimise the violation of these people's rights". Still, a number of welfare workers found it hard to clearly discern internalised human rights consciousnesses given that they largely are 'taken-for-granted' notions underlying their work.⁶⁵ Alex illustrates this point when questioned about the role of welfare workers:

"[human rights] was definitely a driver, [but] I feel like it doesn't just come from that human rights perspective. [...] I feel like that is a really big thing for anyone who is a social worker; your job is to support these people and provide them the best care and support that you can. And I feel like that trickles down from human rights a bit, but that's also just about: this is my role. This is my job, to support these people. So to support their dignity [...] was a big part of I think any welfare worker's role [...]. Everyone is entitled to it, so you have to do the best that you can to show that person that you respect them and that they have dignity and that you're not going to just disrespect them, or – none of that all."

During interviews, concern for human dignity and human rights thus frequently surfaced as core values of welfare workers and as central aspects of their professional ethics. In making decisions, welfare workers hence generally attempted to take human rights consciousnesses into account as part of their

65 See also Finnemore & Sikkink, 1998, p. 904.

decision frame. Three observations should, however, be made in this regard. First, some welfare workers clearly disconnect the notion of 'human rights' from their own practical work and professional ethics. Two different trends can, by and large, be discerned in this regard. On the one hand, some welfare workers regard their own role and ethics as geared towards the micro-level and human rights protection as geared towards the macro-level. In other words, some welfare workers regard their individual work as being disconnected from any human rights struggle: as welfare worker Mackenzie expresses, welfare workers are in Nauru to help people to keep their heads above the water, not to "lead a campaign against offshore processing centres". For these workers, human rights are to be understood not as guiding principles for individual action, but rather as political advocacy tools to address inequalities and injustices at the macro level, most prominently on the level of policy-making. Consequently, they seem to have internalised a protest consciousness of human rights, frequently mixed with elements of a deliberative consciousness given that some of these workers refer to legal human rights instruments as representing the hegemonic articulation of human rights. In any event, they do not clearly distinguish 'human rights' as a key component of their professional work and ethics. On the other hand, other welfare workers also discern human rights from their own work and professional ethics, yet they stress that the interplay between the framework of human rights and their professional ethics causes an ethical and moral dilemma in RPC Nauru which in turn often resulted in welfare workers traversing professional boundaries in order to safeguard human dignity and wellbeing. Child protection worker Addison points out in this regard that

"initially, I felt like I was colluding with the system, and I had a real ethical and moral dilemma working there. And I many times wanted to leave, but it became increasingly difficult when you developed relationships with people that crossed the boundaries. Like, the traditional social worker-client relationship was really hard to preserve there. Because you were just so ethically compromised that you couldn't really stick to your code of ethics for your profession [...]. So I developed quite close relationships with people and them begging you not to leave and to come back, and [often] people would give me things to give to their families in Australia, which I did, and you know, that's not the role of a case manager or social worker, but again it was really hard to not just be a compassionate empathetic human. [...] They were so dehumanized, you would try to counteract that."

Likewise, welfare worker Reed recounts that the importance of professional codes began to decline when (s)he witnessed the situation at RPC Nauru. (S)he explicitly links this to the perceived violation of internationally enshrined human rights:

"I was willing to compromise my own standards of professional boundaries, because the whole situation was so wrong [...]. There's so many human rights

violations here that [...] – the same standards you have had before in a client-case worker relationship, you feel like they don't apply anymore. Because now it's just about survival. It's just about trying to support the people to the best of your ability, because it's a human created crisis. [...] It's not like, if you worked in a refugee camp in Jordan or you worked in a refugee camp in Kenia or whatever, and the situation is shit, but the situation is shit because they don't have the capacity to manage it properly, then that's something. You can kind of deal with that, and you will find the strategies to deal with that kind of situation. But considering that this is a man-made crisis and it's completely unnecessary... There is no need for these policies to be implemented whatsoever, on no level. So for me, this is much harder to deal with, because it's completely unnecessary. And then you start to change the way you think about these rules and all this, because you know that basically everyone else, they're breaking the rules. They're breaking all international conventions they've ever signed just by doing this. So they are the first to break the rules. So then why should I care about the rules that they gave me?"

Interestingly, these welfare workers henceforth *also* seem to have strong human rights consciousnesses based on the protest dimension, as they emphasise the need for change based on the social struggle of those confined. Likewise, their human rights consciousnesses showcase deliberative elements – as international human rights law is frequently referred to as a source of human rights – and moral elements – as such consciousnesses heightened their feeling of being ethically compromised. Different from the former group of welfare workers, however, this group of welfare workers does not consider that their own role and ethics are geared towards the micro-level whilst human rights protection would be an issue of the macro-level. To the contrary, for them, their human rights consciousness would be something that would even cause them to cross professional boundaries in the exceptional circumstances of RPC Nauru.

In this sense, welfare workers maintained different ideas about the extent to which human rights consciousnesses informed their individual roles. For most welfare workers, human rights were an inherent internalised part of their professional ethics. For others, human rights could be distinguished from it, although they either recognised (a) that their professional ethics serve the same purposes albeit on the micro level, or (b) that the extreme conditions in RPC Nauru gave reason to prefer the fostering of human rights protection over strict compliance with professional ethical norms. In this sense, the socialisation of human rights norms has, overall, not been a homogeneous development in RPC Nauru. Whilst all respondents recognised and internalised the importance of human rights, the way in which they adapted their behaviour and attitude differed from person to person, depending often on their particular consciousnesses, although the large majority of welfare workers considered human rights as either being part of their professional ethics or as being supreme to their professional ethics in light of the contextual arrangements of RPC Nauru.

Second, various welfare workers acknowledge that the application of work ethics could differ from colleague to colleague and that not all welfare workers showcased humanitarian motives in their daily operations.⁶⁶ As they describe, the presence of a number of individuals amongst the workforce of the Salvation Army and Save the Children at times obstructed the effectiveness of social work and overall made things worse from a human rights perspective. This includes career-minded employees of welfare providers, but also unexperienced, hastily-hired members of staff that seemingly regarded their employment as a holiday camp. As such, some welfare workers report that there was a big difference between experienced and non-experienced staff, with the latter often being naively counterproductive and unduly overstepping the ethical mark. This relates to the previous point that individual workers had different ideas about professional boundaries, as welfare worker Dakota illustrates:

“some of these young boys that were working there, the boys in their twenties, they were rough with the way they were interacting with people, jumping on people, slapping them on the back, ‘hey, how you’re going?’, and he’s, slap-slap-slap. And I’m thinking, oh my God, you’re not even looking at the cues of this man’s face as you’re slapping him, you know, this is not okay! The boundaries were really poor. People didn’t have professional boundaries, and there was friendships and all of those things, it wasn’t that professional boundary, and certainly, you know, that impacted on people trying to work professionally. Because then you were the bad guy and you wouldn’t sneak in things that I’m not supposed to have, and there was a lot of that going on. There was a lot of people – they didn’t have professional boundaries. They didn’t have work ethics. They just kind of did whatever they wanted.”

In this regard it is noteworthy that some highly-engaged welfare workers considered it necessary to overstep professional boundaries in order to foster human rights protection, whereas other motivated welfare workers conversely label such actions as counterproductive. Such contrasting opinions revolve around the overstepping of professional boundaries in a broad sense, but many respondents link it explicitly to the rise of friendships between welfare workers and those confined as well as to the unapproved smuggling of goods into the facilities – a topic that will be further explored below. Welfare workers on both sides of the argument, moreover, felt constrained in their undertakings due to the wide variety of opinions on the matter: those considering it necessary to overstep professional boundaries felt that they had to operate covertly and that they could trust nobody, whereas those considering it unethical to overstep such boundaries considered that the transgressing endeavours of others impacted negatively on their own reputation as they became seen as

66 On this theme, see also Maylea & Hirsch, 2018.

the 'bad guys' by those confined. In this sense, conflicting opinions on this particular issue caused significant suspicion amongst welfare workers, as it was difficult to know who to trust.

Third, welfare workers of the Salvation Army and Save the Children⁶⁷ judge very differently about the involvement of their employer. On the one hand, some genuinely value the involvement of these NGOs given that they operate from a human rights-based perspective and thus attempt to make the material situation for those confined better. In this sense, they reason from the perspective of the *mentalities* of those welfare providers as important actors in the nodal governance field. Mackenzie thus points out that

"it's better to have some people who are committed to human rights values working there, even with those restricted conditions and environment where we still respect the person's character, regardless of nationality or anything. [...] And in the long term we witnessed that people, refugees, they really valued those workers who were committed to human rights values."

Others, on the other hand, are more critical: as they argue, NGOs as stakeholders play a role in justifying the Australian government's use of offshore processing. Such NGOs benefit significantly from the arrangements and would thus be forced to keep silent about the worst human rights infringements. In addition, they would have hardly any room to manoeuvre in order to improve the *de facto* human rights situation anyway. In this sense, whilst NGOs' operations may be based on human rights protection mentalities, they are ultimately argued to have insufficient technologies to actually steer the course of events in the nodal governance field. In particular the involvement of the Salvation Army is frequently characterised as being too chaotic, too unprofessional, and too unorganised to have a lasting impact on human rights – or, for that matter, for human rights to become a structural part of the Salvation Army's operations in the first place. Thus, as Alex complains,

"if you think [about] the fact that they couldn't organise people's flights properly, that they were hiring people based on an application form, that they were not interviewing them... I mean, you start talking about, did they have a human rights framework in mind, you just kind of go: well, of course they didn't, they weren't even thinking about these basic things, let alone, 'well maybe these people have rights and we should be doing something about that', you know."

This is corroborated by various welfare workers working for the Salvation Army. Noor, a cultural advisor, explains that the Salvation Army's management on island was generally oblivious to a variety of cultural issues that those confined dealt with. Furthermore, the Salvation Army generally did not

67 Or those organisations that hired them from their respective employers, such as MDA.

develop job descriptions for the various welfare worker roles. Save the Children is, on the other hand, frequently endorsed by former and current employees, praising it for its encouraging, understanding, and empowering qualities, its qualitative and knowledgeable approach, and its qualified people. Still, some welfare workers maintain that although Save the Children operated more professionally than other stakeholders, it was ostensibly still significantly unprepared for the situation at hand.

9.3.2 Discretionary decision-making

On the basis of socialised and internalised human rights consciousnesses, many welfare workers tried to improve the human rights situation of those confined through individual discretionary decision-making practices. The sentiment expressed by case manager Chaitanya seems to be widespread in this regard: “I felt sorry for these guys who were in a really, really hard situation. And I thought, *if I was trapped in a place like that I would want someone to do that for me.*” Opinions differ, however, in relation to the question whether welfare workers felt that they could, indeed, effectively vernacularise their human rights consciousnesses and make a substantial impact on human rights protection. Some workers emphasise that discretionary decision-making was very constrained, whereas other focus on the scope for discretionary decision-making that was – albeit significantly circumscribed – nevertheless present.

9.3.2.1 Constrained discretionary decision-making

Some welfare workers emphasise that room to manoeuvre on human rights protection – i.e. to vernacularise their human rights consciousness through their individual work and decision making-processes – was severely limited, notwithstanding the fact that human rights were core values of their decision frame. As they point out, a number of reasons underly this significant limitation, including, importantly, reasons that relate to the unfavourable social surround and decision field.

First, the nature of the facilities – constituting, according to some, a human rights violation *in se* as pointed out above – strongly impeded or even completely obstructed proper welfare work based on human rights values. This relates to the observation above that the social surround within which decision-making takes place is geared towards deterrence rather than human rights purposes and as such does not provide a favourable context within which decisions can be couched by human rights consciousnesses or humanitarian notions. As Quinn points out,

“it is like trying to put band aids on a person who is in a house that’s on fire, and you can’t take them out of the house. That’s basically what it is. You just keep putting a band-aid on. Hope the skin doesn’t fall off in the interim.”

In fact, the reference to band-aids recurs frequently in respondents' testimonies, with many reporting that they felt that their work was about putting band-aids on open wounds rather than healing such wounds. As they in turn point out, their work in RPC Nauru in essence revolved around keeping people *alive* instead of ensuring optimal living conditions. Alex for example states that welfare workers were

"just trying to get through every day, like, hopefully no one kills himself today. That the ideal. That there's no serious incidents, that we were going home tonight fairly okay, that there's no riots – we're just trying to get through every day."

The idea that they were there to keep people alive did not only feature amongst welfare workers working with adult clients, but also amongst those working with children. Thus, as Jamie highlights, "we had five year-olds wanting to commit suicide. And when you asked them, do they know what that is, they could tell you." These worrying mental states amongst both the adult and the juvenile populations are confirmed not only in numerous reports but also by mental health professionals during interviews: doctors and nurses who visited the facilities as well as medical professionals who worked for IHMS confirm the strong deterioration of the mental health of those confined. In addition, sometimes, welfare workers' jobs would quite literally be to keep those confined alive: Noor explains, for example, how (s)he gained trust from asylum seekers and refugees "[a]fter cutting down several people who tried to hang themselves, after days and days of talking to stop sowing their lips, and cutting the thread out of their lips". According to these workers, there was henceforth hardly any room for substantive manoeuvring on issues of human rights. Welfare worker Jules points out that "there is no way to really mitigate the impact of people actually systematically harming them, forcing you to live in a place where human rights are systematically violated." In turn, seeing how the facilities impacted upon the well-being of those confined had a demotivating effect on welfare workers, as Addison details:

"despite your efforts, and the efforts of my colleagues, and we're all very skilled professionals, you couldn't do anything. You saw clients just deteriorating before your eyes. You just watched them kind of fade away into nothing. You watched them become dependent on drugs that the ill-equipped mental health service providers gave them, and you watched them lose weight and just slide into depression, and then you watched them self-harm".

Second, many welfare workers denote that the Salvation Army and Save the Children were, as Alex puts it, "absolutely at the bottom of [the] hierarchy". In this sense, welfare workers felt that they could only provide welfare within a very constrained and limited framework of rules set by DIBP and other stakeholders. Bobbie, a teacher, tells that "it was just Immigration ticking a box, and Save the Children flapping around like fish out of water". In relation

to the Salvation Army, this is particularly striking given that the Salvation Army initially was supposed to be the 'lead agency' that would oversee the day-to-day operations of the facility. However, as a former DIAC Director interviewed for this research points out, in practice the role of the Salvation Army devaluated quickly:

"In practice, what we found was that the Salvation Army's key lead personnel took more responsibility for overseeing the welfare component of immigration detainees than the responsibility for oversight of mechanics of the whole centre. So they didn't do a good job of working with other service providers and understanding what those service providers were there to do, and supporting them in the execution of those duties. [...] They were deficient, they were out-performing, to the point of being completely incapable of doing the job and losing the confidence of all of the other service providers and the government."

The decision field was, as such, very constrained: welfare workers had to operate within rules set by the Australian government and other stakeholders that often were based on rationales of deterrence rather than humanitarian concerns. This impeded welfare workers to operate and make decisions based on human rights consciousnesses. The relationships with other stakeholders – in particular with Wilson Security, DIBP, and IHMS – are accordingly described as very strained and as basically being based on an us-versus-them mentality. Indeed, many welfare workers typify the various stakeholders involved as "separate tribes" in the sense that they operated differently, maintained different mentalities, pursued different goals, and as a result guarded their own turf and frequently clashed in professional interactions. These dynamics are also confirmed at the management level: a former manager of one of the service providers in RPC Nauru indicates that "it felt very fear-based around a lot of things, and no one wanted to get their organization in trouble. And it felt like people would finger point to take the highlight off of themselves [...] or their organization". Even more so, various respondents point out that the ostensibly inferior hierarchical position of welfare workers often resulted in their requests being ignored. Addison recounts:

"maybe for the first two rotations, I thought there was a role for case managers there [...]. I thought that, if you advocated hard enough, you could make things happen. [...] The majority of the time it felt like you were just banging your head against a brick wall, and that was just so incredibly frustrating. You couldn't get anywhere, you couldn't appeal to anyone. Even if you had hard-core facts about a certain situation or about really objective evidence of the deterioration in someone's mental health, and what decline would continue to look like, you just couldn't get people quality services, you couldn't really make change. It just felt like your efforts would just evaporate. So you would write case notes and you would write emails to your manager, who would send them up the line and you would talk to Wilson staff and Transfield staff and you'd write complaints, or you'd support asylum seekers to write complaints and to write requests. And you'd just be met

with radio silence. No response to emails, no response to complaints. So that was very frustrating.”

Third, from the perspective of many welfare workers, the welfare providers by which they were employed generally failed to emphasise the importance of human rights protection. According to some, whilst the Salvation Army and Save the Children in individual cases could make a difference, on the whole they did more harm than good as they seemed to legitimise the governance arrangements. Some workers furthermore point out that these organisations were, at least on island, quite militaristically run, which troubled working effectively on the basis of a human rights consciousness. More generally, many welfare workers experienced limited organisational support for explicit human rights work. As Adison puts it,

“as the welfare organisation, I think we failed in that we didn’t try and mainstream the concept of human rights and protection and safety and dignity. We didn’t offer Wilson’s training on protection or basics [...] and we didn’t offer those trainings to medical staff. And we didn’t run the basics of child protection, even just like, what is a child, what’s the Convention on the Rights of the Child or what’s the Universal Declaration of Human Rights and what do people actually have a right to access as human beings, we never even did induction, even basic works on that. I think that was something we should have done.”

In addition, various welfare workers point out that, from their point of view, their employers were very reluctant to deal with any human rights complaint because they did not want to risk losing their contracts with the government. Bobbie recalls in this regard that

“if you were to go through Save the Children, it was very, very, very stunted, to the point where you could possibly entertain the idea that it was being neglected, sort of not to rock the boat and to stay in the pocket of Immigration perhaps. Because any case that you wanted to pick up, there were numerous human rights violations, [...] but Save the Children didn’t advocate or didn’t choose to take on the cases that they easily could have, possibly because in doing so they would have violated their position to gain the contract again.”

Fourth, welfare workers experienced a significant lack of resources to improve the lives of those confined through discretionary decision-making. Almost all interviewed welfare workers talked about the limited resources, services, and amenities available on Nauru to provide proper welfare. For example, there were long waiting lists for healthcare services including torture and trauma counselling, it proved very difficult to attain basic goods such as clothing or sanitary items for those confined, and there were hardly ever enough resources to conduct proper welfare work. In this regard, Rory characterises RPC Nauru as an “overall very, very challenging work space” for welfare workers. Charlie, a recreational officer with Save the Children, illustrates that

“we went eleven months without any restocking of our supplies and our resources. So for a good six months, we pretty much ran out of resources and we were just doing the same, same activities again and again, which was extremely boring for the young people. Large numbers disengaging – and then, combine that with the environment that we were in, we were losing positive engagement, as a worker you lose out on interaction time, you lose the chance to pick up on queues of suicidal idolisation, those sorts of things. So there was large repercussions of that.”

Likewise, respondents point out that the bureaucracies that were in place in the nodal governance framework obstructed the swift processing of requests for supplies and resources. Requests had to be escalated and required approval of various hierarchical supervisors of the welfare provider as well as of other stakeholders, primarily Transfield, which was responsible for all logistics. Welfare workers frequently felt they were ‘hitting a wall’ when making such requests since they encountered drawn-out bureaucratic processes and excessively long waiting times. Even acquiring simple supplies proved to be cumbersome: various respondents point out that it was very difficult to, for example, get proper shoes for those confined as multiple forms had to be filled in, forms were frequently lost by various stakeholders, the shipping of shoes and other pieces of clothing took weeks, and they on many occasions were shipped in the wrong size.

Fifth, many welfare workers point out that formal internal reporting mechanisms were deficient in the sense that they did generally not allow for transparent and impartial oversight. Thus, all different types of welfare workers – including case managers, general support workers, teachers, and teaching assistants – wrote ‘incident reports’ whenever they witnessed any type of alarming situation that they either had to or wanted to escalate – the Nauru Files as addressed in chapter 1 being a comprehensive example of various of such incident reports written between 2013 and 2015. These incident reports would, in turn, be classified in accordance with their perceived risk level, i.e. as either ‘minor’, ‘major’, or ‘critical’ incidents. However, almost all welfare workers point out that this system of reporting was flawed given that it was Wilson Security who handled incident reports, who classified them in accordance with their own risk assessments, who followed-up on these reports, and who liaised about them with the Australian and Nauruan governments where necessary. Welfare workers frequently felt that they were not taken seriously, often did not hear back on incidents they reported, and considered almost unanimously that Wilson Security was far from impartial given that many complaints precisely concerned behaviour of Wilson’s staff. On many occasions, complaints concerning guards were, in their eyes, met with little repercussions. As Jamie sarcastically remarks, the filing cabinet in which incident reports were logged by Wilson Security was essentially “a shredder”. Furthermore, welfare workers point out that all reporting remained strictly internal: there was no formal way to make complaints to external stakeholders. Kyle, who was involved in managing incident reporting from Save the Children staff,

sums up the problems (s)he encountered as a result of the fact that Wilson Security handled all incident reporting related to situations inside the RPC:

“we had quite a lot of problems with them consistently downgrading Save the Children incident reports. [...] we would put something as critical and they would consistently downgrade it before sending it to DIBP. That was a constant battle. [...] [Thus], everyone is reporting to Wilson’s essentially, and then Wilson’s are changing it, manipulating it, sometimes throwing them out, downgrading them often, and then sending them up the chain. And this was a particular concern for all of us, [...] because sometimes these incidents related to Wilson’s staff members, and we had a lot of challenges in trying to provide information about misbehaviour and incidents that involved guards through this mechanism that was essentially managed by the guards. [...] I can recall at least five or six occasions where we were trying to put some very important and sensitive information about the behaviour of guards through this system, just battling them really because there was very little oversight of what they were doing.”⁶⁸

Still, many welfare workers stress the importance of continuously writing and filing incident reports, both to document evidence and to make sure that the responsible governments in hindsight could not argue that they did not know, or could have known, about certain incidents in the facilities.

Finally, some welfare workers consider that their work may ultimately have made things *worse* from a human rights perspective, in the sense that social work at times seemed to lead to further disempowerment of those confined. Such disempowerment arguably flowed from welfare work in various ways. Welfare worker Brooklyn for example explains that whilst those confined generally appreciated activities being organised outside the facility, various of these individuals started to get headaches and panic attacks upon their return to the centre at the end of the day, which is ultimately why they stopped attending such day trips in the first place. Kris, a recreational officer, mentions that (s)he at times felt like a prison guard rather than a welfare worker, for instance when (s)he had to check the dormitories and belongings of asylum seekers for prohibited goods, which in turn produced conflicted feelings as (s)he felt (s)he was misusing a position as a trusted welfare worker to exercise hierarchical superiority over those confined. Charlie provides another striking example of how welfare workers may have had a negative impact by discussing how parents were gradually disempowered due to the way in which social work was set up within the facility:

68 This only applies to incident reports relating to incidents happening *inside* the RPC. Incidents reports related to occurrences outside the RPC, i.e. in relation to resettled refugees who fell under Save the Children’s refugee assistance programme, were handled by Save the Children themselves.

"The amount of contact a parent could have with their child, and have a role in the parenting of that child growing up, was extremely, extremely limited with the way the day was regimented and the way resources were controlled. The parent had no power. The parent was disempowered to the nth degree. They couldn't control when they washed their children, they couldn't control when their children ate, they couldn't give or take away toys from their children if they misbehaved, you know, they couldn't provide a birthday cake on their birthday, they couldn't even go visit their children in the school. So they were completely removed. And you'd see families come in that I would describe as functioning family units – give them six months, they're in collapse. [...] I was hyper-empowered to have a positive relationship with young people, *their* young people, but they weren't. I had toys, parents didn't. [...] The parents lost all sort of sway or say over the child, because they just don't respect them anymore, because they haven't even been part of their life for the last six months. Because they go to school, which is better than the camp, their parents aren't there, they come back, they go to recreation, I've got toys, mum and dad don't, and they see mum and dad for a few hours at night, but, because of the recreation, they often didn't even eat together."

In this sense, welfare work intended to foster human dignity and wellbeing at times resulted in the material loss of human agency in parent-child relationships, which to a large extent was a result of the way in which the facilities were set up and run.

The combination of these factors led various welfare workers to quit their jobs on Nauru. As Alex emphasises, the work at the facilities made one feel very powerless:

"basically, ultimately why I left, is just because I felt like I couldn't do anything for them practically there. Look, I understand it was helpful to have someone there who wasn't a security guard, but it just becomes redundant to walk in every day and say, '*I have no news for you, how are you sleeping, how are you feeling?*' Like it just becomes so pointless after six months. And after six months you're looking at 75% of that population with diagnosed mental health issues. So what can you do? And so ultimately I ended up leaving, because I just felt like I actually can't do anything here."

As Charlie likewise reflects,

"I think the impact that I had and other workers had, no matter how good we were, was minimal and limited in that environment. I guess to sum it up, the best outcome we could hope for was to slow the spiral down opposed to stop it, which is a very different environment compared to anywhere else you'd work in the world."

In this sense, many welfare workers consider that they ultimately lacked sufficient discretionary decision-making room to actually improve the lives of those confined on the basis of a guiding human rights consciousness.

9.3.2.2 *Scope for discretionary decision-making*

Notwithstanding the foregoing, various welfare workers emphasise that there was still room for individual discretionary decision-making based on their human rights consciousnesses. Interestingly, experiences in this regard differ significantly amongst those case workers that were involved during the early stages of the Salvation Army's contract and those that became involved later on. Thus, during the first months of the Salvation Army's involvement, there was significant room for individual workers to choose their own paths in fulfilling their tasks given that supervision was severely limited and guidelines were sparse. In fact, no job description initially existed for various roles including most notably that of 'general support worker', which did not only accommodate but rather forced individuals to work on the basis of varying levels of discretion. The decision field in these early months accordingly provided leeway to implement human rights consciousnesses in individuals' decision frames, although this changed later on. The way in which discretion was exercised on the basis of human rights consciousnesses was very much an issue of socialisation, given that it, as general support worker Finley points out, amounted to "learning by doing, learning by example". When social work later on became more institutionalised, welfare workers overall experienced somewhat less room to make individual decisions based on human rights consciousnesses, as the decision field became more detailed in terms of the applicable rules and regulations. Furthermore, those welfare workers not being general support workers – in particular teachers and case managers – felt more constrained in their decision-making processes as their work was ultimately driven by Key Performance Indicators ('KPIs') that – as part of the decision field – circumscribed their decision frames.

Overall, many respondents indicate that they felt they could make amends on the micro scale but not, as Finley calls it, "in the grand scheme of things". Thus, as Dakota phrases it, "I think that we did do good work, but I don't think we could really be constructive in providing a healing environment, because people were retraumatized every day". Welfare workers could not fundamentally change a number of critical systemic features of the wider social surround, including, most notably, the fact that those confined were held indefinitely and in great uncertainty on Nauru on the basis of deterrence rationales. Still they could, at the individual level, at times alleviate the situation by applying human rights consciousnesses in their decision frames. This started, first and foremost, with showing respect and genuine care to those confined and by acknowledging their human dignity. Chaitanya explains, "I felt I could make a small difference in just being a friendly person for them to talk to if they needed, and just being someone who cared." By extension, welfare workers considered that they had an impact in relation to acute threats to the physical and mental wellbeing of those confined: According to Addison, for example, "there was a thousand times that we all talked people out of self-

harming, and you coached them to deal with their situation in other ways. So you know, that's something."

Many further examples of ways in which welfare workers could contribute to the human rights situation on a micro scale surfaced in discussions with respondents. This includes that they could help asylum seekers and refugees to pass the time a little bit quicker, that they could let them have a rest in airconditioned interview rooms, that they could provide them with cold bottles of water whenever they had scheduled appointments with them, that they could get them basic items such as fans for their dormitory-style marquee tents, that they could push for medical counselling appointments at short notice, that they could go with them to medical appointments, that they could successfully argue for culturally appropriate dietaries, that they could post their letters in Australia, that they could bring them on recreational trips such as to the beach, that they could smuggle in a wide variety of items for those confined such as prayer books and beads, dictionaries, hair cones, hijabs, painkillers, playing cards, notebooks, sim cards, magazines, candy, and toys, that they could provide them with contact details for Australian legal and advocacy organisations, that they could give them some extra time in the computer room, and that they could arrange them a phone call when asylum seekers or refugees desperately had to call their families due to events – such as armed conflicts or natural disasters – happening in their countries of origin. In fact, many respondents refer to this latter example as a key example of how they could exercise discretion, although they simultaneously also stress that, in light of the decision field, significant efforts were required in order to arrange such phone calls, even in pressing situations. As Jules exemplifies with notable discontent,

"I couldn't stop that rape, I couldn't stop that molestation, I couldn't stop the mould from growing, or the assault from the guard with the cricket bat, but you know what? I got to give them 20 minutes on a phone call, so they can just confirm for that day that their family members hadn't been killed. Just once – it was a one off! It wasn't a weekly call to check in, because, you know, there is a war. No, no, no, no, no. [...] I actually had to choose. I had to choose. Because as you can imagine, there were a lot of places at war, and there was a lot of insecure situations, and I had families in Sri Lanka, Iraq, Somalia, Syria obviously. So all of them with the security situations could have used those extra phone calls, but I really had to be selective."

Hence, as a result of the decision field, even the smallest things had to be negotiated, which, as respondents describe, felt like continuously banging your head against a brick wall. This made some respondents operate on the basis of what they call an 'ask-forgiveness-not-permission capacity'. Many welfare workers point out that time and time again, the exercise of discretion basically came down to the resourceful use of persuasion and, occasionally, deception vis-à-vis other stakeholders. Thus, in pursuing change on the micro scale, they

would generally press very hard to gain permission from relevant stakeholders, although they were constantly aware that they had to be selective and that they had to couch their requests in specific language in order to prevent coming across as an activist or advocate. Human rights language was, as various welfare workers point out, not effective in getting other stakeholders to move on individual cases. Likewise, 'activism' and 'advocacy' were ostensibly considered to be 'dirty words' by various stakeholders. Such apathy for advocacy was even present, at times, at the management level of the welfare providers themselves. Jules illustrates this by pointing out that Save the Children's management was very reluctant when a welfare worker proposed to raise money with friends and family in Australia to buy toys and stuffed animals for children in the facility: "any other company would be like: 'wow, you want to donate 3000 dollars? Fabulous, you are employee of the year!', but not in Save, it's like: 'shhhhhh, don't tell anyone that you care that much!'"

As such, in attempting to vernacularise their human rights consciousnesses, welfare workers on many occasions had to rely on discretionary decision-making practices as key mechanisms within the moral dimension, instead of on vernacularisation mechanisms deriving from the protest or discourse dimensions. Moreover, in such endeavours, human rights could often not be relied upon as instruments: in the facility, human rights had a negative connotation with a lot of stakeholders and were therefore, as welfare workers point out, inadequate tools to properly pursue any human rights consciousness. To the contrary, the use of moral human rights notions to justify the exercise of discretionary decision-making, or references to human rights language, law, or advocacy more generally, would often merely result in suspicion and distrust vis-à-vis the welfare worker involved and, potentially, in the termination of his or her contract. Welfare workers therefore often did not turn to human rights as instruments, that is, as deliberative principles, natural entitlements, protest tools, or discursive expressions. Rather, as a result of the social surround and decision field, they were very much hiding any reliance on human rights in their work and avoided using them in any capacity in order not to raise suspicion. In fact, many welfare workers consider that they had to work largely 'undercover' in pursuing to implement their human rights consciousnesses on the micro-level through the small margins of discretion that they enjoyed. In this sense, whereas the directional (and, arguably, the constitutive) capacities of the morality dimension guided various welfare workers, the dimension's instrumental value was – similar to the other three dimensions – usually not relied upon.

In addition to persuasion, at times, welfare workers would pressure managers of various stakeholders into implementing change, for example by threatening to expose that various security guards had inappropriate relationships with confined minors if the management of Wilson Security did not pursue disciplinary action. Furthermore, a few welfare workers point out that they occasionally would resort to illegitimate means to pursue change, for

example by stealing local sim cards or by smuggling goods into the facility. They admit that this violated their professional codes of ethics but at the same time consider that, from a human rights perspective, it was required to push the boundaries in this regard and to operate under a cloak of secrecy. This refers back to the observation above that welfare workers had varying ideas about the relationship between their professional ethics and human rights concerns. Alex contemplates in this regard that

"I just felt like they're very vulnerable, and because there's no official system in place to protect them, that I had a moral obligation to be there for them. I felt like it was a moral obligation. [...] This is technically unprofessional behaviour that was against the rules, but sometimes I feel like the rules are wrong. And it's a really hard moral ethical decision, and people make different ones and that's fine. But I wanted them to know that someone cared [...]"

Overall, most welfare workers thus considered that they could exercise discretion to command change on the micro scale, thereby using various tactics including persuasion and deception. Nevertheless, this capacity to exercise discretion in order to vernacularise human rights consciousnesses was, on many occasions, constrained by what many welfare workers describe as 'fatigue syndrome' as well as by the feeling of being a 'collaborator' in a system that ultimately was precisely designated to, in the eyes of many respondents, minimise human rights protection. Various respondents thus indicated that they felt both guilty and tired given that it was, in the words of Kris, "a draining, draining experience". As Alex indicates,

"you have no room left for empathy [...]. I'm meant to be a professional who understands these clients and knows how to work in this field, and you just feel so bad about yourself because you stopped caring. [...] And it's really scary to walk through a camp and see guys with physical self-harm wounds and not even stop. Not even take that in, because you're so used to it."

In turn, fatigue syndrome had various implications for the vernacularisation of human rights through processes of discretionary decision-making. Some welfare workers point out they could not effectively take human rights concerns into account in their decision frames any longer. Whereas they generally did not rely on the instrumental function of human rights anyway, they henceforth over time also stopped relying on human rights consciousness as a driving force in their work. Quinn given an example of this process by which welfare workers become emotionally blunted:

"there was an elderly woman, over 80 years old, whose family had written a complaint about her sleeping on the floor in their tent, because she didn't have a mattress. [...] I went down there and confirmed that there was no mattress and that she was sleeping on the floor. [...] So I went back up, spoke to my coordinator, and she was like: 'yeah, well, maybe, I don't know that we can even get a mattress, so,

sorry'. And her care factor was pretty spectacularly low. [...] The lady got a mattress, but that was because I said to my manager: *'you can either get some mattress from Transfield and I don't care how you do it, or tomorrow at 3 'o clock in the afternoon, if that old lady doesn't have a mattress, I'm going to go back to RPC1 to my accommodation and I'm going to walk the mattress down on my fucking head from RPC1 to RPC3 and I'm going to give that lady my mattress, and it's going to be incredibly embarrassing for Save the Children, I'm going to get fired, you're going to look like an idiot, so get a mattress or that's happening at 3 'o clock tomorrow afternoon'*. Next morning, the lady had a mattress. But it wasn't the fact that the old lady didn't have a mattress that motivated the mattress to happen quickly, it was me threatening to embarrass my manager and the organisation. [...] So some people were so traumatised that they couldn't get out of the situation that they were in. They couldn't leave the job because they were kind of frozen in this trauma response. But they couldn't work effectively either."

Various welfare workers point out that fatigue syndrome was a reason to quit their jobs. Charlie thus states that

"I could see it in other co-workers, people that had stayed too far for themselves, that you become ineffective. And if you're not 100% present in that sort of environment, you become less useful, and I could see that I was getting to my point where I don't think I could've kept on contributing to the level which I had in the past, so I thought it was time for me to step down."

At the same time, however, (s)he became involved in whistleblowing, which connects to an alternative response to fatigue syndrome. Thus, various welfare workers who experienced fatigue syndrome felt that their discretionary decision-making practices were too ineffective to create real change and therefore started to rely on different mechanisms to pursue their human rights consciousnesses, primarily by resorting to extensive documenting and whistleblowing. Various welfare workers indeed outline how they increasingly felt that working towards human rights goals on the micro level through discretionary decision-making practices was not psychologically sustainable in the long run. As Noor explains,

"only the small things, I could influence [...]. That was only tweaking at the edges, and I got quite frustrated that I couldn't do more. And I kind of gave up, and said to myself, [...] *'well, I can go on and on and on, or make a point, try to influence somehow the exposure'*, because Australians didn't know about what's happening on Nauru. [...] And I had to decide whether I stay in the system, keep low, make these small changes, or whether I try to influence the big decision. And to influence the big decision, you had to have the support of the Australian population. [...] And I thought, that is more influencing than just doing something about the food and things like that. So it was a combination of frustration [and] of trying to influence more than what I was doing on Nauru. Realising at the same time that I ran a risk of my contract not being extended, me not being allowed to go there anymore, and not being able to change the small things."

Multiple respondents point out that they started to focus primarily on documenting incidents as well as on talking with media and leaking documents for two reasons in particular: because they did no longer want to be colluding with the system, and because they did not have the feeling of getting anywhere in their daily work. As Drew, working for Save the Children, describes, (s)he at a certain point felt (s)he could not actually *Save* the Children but could, instead, “*Document* the Children”. In turn, various respondents recount how they smuggled significant batches of information out of the facility in order to share them with Australian journalists and external oversight bodies – the Nauru Files being the most prominent example in light of the sheer volume of documents published by the Guardian Australia. Whilst some only started whistleblowing after they had quit their job, for others it became the main motivation to continuously return to RPC Nauru for new rotations. As Bobbie points out, bringing information off island and handing it over to human rights lawyers and institutions was “the sort of more effective and the more immediate sort of realm for change and opportunity”.

Whereas many welfare workers consider that vernacularisation through protest and discourse mechanisms *within* the RPC was only counterproductive, they hence increasingly started to rely on such mechanisms in an attempt to effectuate change originating from the *outside* of the facility. For many welfare workers, the focus therewith shifted from attempts to improve the lives of those confined as much as possible through daily decision-making practices, towards attempts to cause public and political indignation in Australia by smuggling and leaking documents, whistleblowing, and testifying in courts and Parliament. In this sense, reliance on morality mechanisms gradually decreased in favour of reliance on protest activities, deliberative processes, and discursive mechanisms. A prevalent idea amongst many welfare workers was that, as long as they made sure that enough information was brought off island, offshore processing would eventually be ended – whether due to public outrage, judicial rulings, or the ultimate prevalence of protest rationalities in the political realm. They therefore attempted to shape the dominant discourse, informing legal challenges, and contribute to protest movements.

In addition, when whistleblowing, welfare workers – in particular those that quit their job on Nauru and did not envisage to go back for more rotations – increasingly started to rely on the *instrumental* value of the various human rights dimensions. In their whistleblowing endeavours, they indeed started to *use* human rights as deliberative principles, as natural entitlements, as protest tools, and as discursive expressions, for example by using human rights when testifying in Senate inquiries or in court hearings, when speaking at rallies, when issuing media statements, and so on. Instead of keeping silent about human rights in an attempt to accomplish them, they now thus became more prominent instruments for vernacularisation.

However, many welfare workers engaging in such leaking and whistleblowing endeavours felt disappointed about the ultimate impact. Pat, a general support worker, explains that

“we kind of thought, ‘okay, if we tell people what’s going on, this is not gonna happen anymore’. But we did tell people what’s going on and it’s still happening [...]. So we kind of went out, like, all guns blazing kind of thing, we were recording, and trying to get all the information we possibly could. Took it to the Senate Inquiry. Nothing happened. [...] So it just makes me so mad that we told them these things and that we weren’t, like, taken seriously or it wasn’t heard. But we kind of thought, when we go there, ‘oh, if we tell them this, someone’s going to do something about it’. But they didn’t.”

Respondents furthermore point out that leaking information was a very lonely endeavour given the amount of secrecy and criminalisation around whistleblowing. As previously noted, welfare workers generally felt they could trust nobody. Addison explains that

“I felt very alone in that undertaking. And because it was so risky and they brought in the Border Force Act which criminalised sharing information and carried a two year jail sentence, nobody spoke about if they were doing that, and what they were doing and who they were talking with. [...] To be honest, I felt extremely alone. [...] I never wanted to do any of that stuff alone ever. [...] [B]ut you could never, you could never talk about it safely.”

Many whistleblowing welfare workers point out that they experienced a sense of paranoia since they could trust nobody, and felt that they were constantly monitored by various stakeholders, most prominently by the Australian government. Some whistle-blowers operated on the basis of high secrecy levels, including the use of data hiding spots, code language, and secret mail-drops with journalists. In hindsight, whistle-blowers point out that they believe their strict precautionary behaviour was justified given the way in which Australia and Nauru exercised scrutiny, for example by means of multiple on-site office raids by the Nauruan police in which all cell phones, USB sticks, and computers were seized for inspection.

The exercise of discretionary decision-making based on human rights consciousnesses was hence not only limited to the micro level, but was furthermore impaired by the fact that many welfare workers at a certain point started to experience fatigue, guilt, distress, and loneliness. As a result, whilst there still was *scope* – albeit circumscribed – to make discretionary decisions, welfare workers started to feel too exhausted to make optimal use of discretionary space. Instead, they often decided to either quit their job or to rely on other mechanisms to vernacularise their human rights consciousnesses. On many occasions both alternatives seem to have hampered proper socialisation of human rights consciousnesses amongst welfare workers: those with strong

human rights convictions either were too affected by the fact that they could not effectively make decisions in accordance with their moral blueprint and thus decided to leave, or resorted to secret and lonely advocacy endeavours that necessarily involved the hiding of one's own human rights consciousness – and the corresponding lack of reliance on human rights as instruments – as no one could ostensibly be trusted. Only after whistle-blowers had publicly spoken out, they started to rely on the instrumental value of the various human rights dimensions, but by that time their contract would have ended – or would be ended – and such endeavours therefore only may have had an indirect effect insofar as socialisation of human rights norms is concerned.

9.4 VERNACULARISATION OPPORTUNITIES OF INSTITUTIONALISED NGOS

Another group of actors that potentially plays an important role in the vernacularisation of human rights consciousnesses, and the final one to be dealt with in this chapter, is that of institutionalised NGOs, which come in many shapes and forms. They include organisations focussing on a variety of goals, including most prominently advocacy and humanitarian aid. The umbrella-term 'NGOs' covers, moreover, both community-based organisations springing from personal initiatives as well as city-wide, regional, national, and international organisations. In this regard, Lawry draws attention to the fact that many NGOs are unique: notwithstanding the fact that there are thousands of NGOs worldwide, "they vary widely in their performance, professionalism, sense of responsibility, [and] attention to standards".⁶⁹ Still, whilst their scale and outlook may differ significantly, what they have in common is that they are nongovernmental, *legally constituted entities* that are created by organisations or individuals with no participation in or representation of government.⁷⁰

Analysis here will focus on institutionalised social movements that have attempted to command change through the conventional political arena instead of outside of it.⁷¹ At the same time, it should be emphasised that most social movements inhibit elements of both conventional protest taking place within the political arena and newer forms of activism taking place through deontological practices. The distinction between protest movements operating on either side of the spectrum should therefore be nuanced in that at times they try to command change both within and outside the legal arena through a diverse repertoire of contention. As Winter, speaking on behalf of a large Australian NGO involved in refugee-related debates, for example illustrates,

⁶⁹ Lawry, 2009, p. 27.

⁷⁰ Lawry, 2009, p. 25.

⁷¹ As explained in chapter 8, NGOs can be classified on the basis of whether they operate within or outside of political fora.

“In terms of our core focuses, historically it’s really been about policy and research for the most part, and advocacy, mostly focused advocacy on the government, so historically a strong position of engagement with government, and parliament in particular. In the past few years I think that advocacy has become more public, because obviously there’s been a sort of a gap there, in terms of our ability to engage with the government and the policies.”

Representatives of various other NGOs have described their core focuses in similar ways. Whilst many NGOs thus utilise imminent possibilities at the political plane, they often simultaneously are geared towards exposing what goes on in RPC Nauru and towards symbolically confronting society with their message, which only *then* – in a somewhat subsidiary fashion – might turn into a factor that is taken into account in political decision making. Whilst the latter does arguably not constitute a pure deontological endeavour *in se*, to a certain extent social movements operating within conventional politics thus on many occasions at least showcase a sensitivity for the ways in which change might be achieved through other mechanisms than through the traditional toolbox belonging to the sphere of conventional politics.

In the context of RPC Nauru, many NGOs have frequently featured in debates on Australia’s offshore processing and border control policies and have attempted to command change through political processes. Some of these NGOs are well-established actors with a national or international focus whereas others operate primarily on the basis of grassroots activism. In this section, their role and the way in which they use human rights will be further elaborated upon, on the basis of both desk research and qualitative interviews with representatives of a number of key Australian NGOs involved. This includes interviews with representatives of relevant international NGOs, Australian NGOs,⁷² a grassroots movement, and a generic non-profit service provider. For purposes of anonymity, they are not further specified here.⁷³ Specific NGOs will only be referred to where analysis relies on publicly available information, such as reports and media statements, and where this does not lead to the identification of respondents.⁷⁴

Congruent with the conceptual and analytical framework set out in the previous chapter, many NGOs operating within the political arena consider human rights to be both an utopian goal – or a consciousness – and a means

72 Since civil society and NGOs are largely non-existent on Nauru, the focus here will be solely on social movements operating in Australia.

73 In addition, at certain points where quotations are used in the analysis below, small redactions have been applied to guarantee anonymity of respondents. For example, if a respondent would discuss activities that his or her organisation has been engaged in, identifying words (such as ‘I was engaged in’ or ‘we were engaged in’) may have been changed into (‘they were engaged in’ or ‘organisation x was engaged in’).

74 Where NGOs are mentioned, this does therefore not mean that their representatives have necessarily also been interviewed for purposes of this book.

to achieve such a utopian end – or an instrument. It is, in this sense, both what drives the activist agenda *and* a vital part of NGOs' protest toolbox. The next sections will elaborate upon this double function of human rights: it deals respectively with (i) the role of human rights consciousness, (ii) humanitarian endeavours, and (iii) advocacy endeavours, with the latter two constituting specific protest processes through which NGOs attempt to vernacularise human rights.

9.4.1 Human rights consciousness

Human rights are core parts of many relevant NGOs' mission statements. To name a few, Amnesty International Australia highlights that "we believe that together, we can create a world where our most basic human rights are enjoyed by all".⁷⁵ Human Rights Watch ('HRW') aims "to uphold human dignity and advance the cause of human rights for all".⁷⁶ The Refugee Council of Australia ('RCOA') has as its core mission "[f]or the voices of refugees to be heard, the rights of refugees to be respected, the humanity of refugees valued and the contribution of refugees celebrated".⁷⁷ The mission of ChilOut, a former NGO lobbying for an end to the detention of children, was "to promote the rights of children seeking asylum".⁷⁸ The Asylum Seekers Resource Centre's ('ASRC') central vision is that "all those seeking asylum in Australia have their human rights upheld".⁷⁹ Save the Children, an NGO that has worked on the inside of offshore processing, has as its core mission "[a] world in which every child attains the right to survival, protection, development and participation".⁸⁰ In turn, such human rights consciousnesses seem to be based primarily in protest and moral understandings of human rights: in pursuing change, NGOs generally rely on rights as identified on the basis of both natural entitlements, and social struggle, structural inequality, and injustice. Human rights are therefore understood as entitlements that everyone *has* yet still ought to be *fought for*. Winter, representing an Australian NGO, for example maintains that

"you need to fight for it. You can't just assume it's there. And you can't assume it will be protected by the state. It needs to be fought for and argued for and it

75 <https://www.amnesty.org.au/what-we-do/our-vision/> (last accessed 30 May 2019).

76 <https://www.hrw.org/about> (last accessed 30 May 2019).

77 <https://www.refugeecouncil.org.au/purpose-aims-and-goals/> (last accessed 30 May 2019).

78 <https://chilout.org/our-mission/> (last accessed 30 May 2019).

79 <https://www.asrc.org.au/about-us/> (last accessed 30 May 2019).

80 <https://www.savethechildren.net/about-us/our-vision-mission-and-values> (last accessed 30 May 2019). Slightly differently, Salvation Army Australia does not base its humanitarian operations on a human rights conception but rather on faith-based, i.e. Christian, principles "dedicated to sharing the love of Jesus": <https://salvos.org.au/about-us/mission-and-vision/> (last accessed 30 May 2019).

is by no means, you know, something that you can take for granted. So you need to go out there and use the political tools you have [...]. [I]t needs to be fought for and argued for and enacted to actually happen on the ground”.

Parker, representing a grassroots movement, also points out that human rights consciousness is a vital driver of the protest agenda. In doing so, in line with human rights consciousnesses located squarely in the realm of the protest dimension, (s)he clearly distinguishes human rights as a legal concept from human rights as a political protest value:

“there are no human rights in Australian law [...]. But I think the fight in general for human rights, and the recognition of human rights, is a political one. So the whole argument about whether offshore processing is just or reasonable or anything is really an argument about whether people have a right to seek asylum. Whether people have a right to gain protection, which is what the government is being routinely violating. So that element, I think, is being quite an important part of what we’ve had to say. People do have human rights, and the human rights of people that come by boat are no different to the human rights that we expect. [...] We have to fight for them in Australia, we have to fight for the people who arrive by boat, and that their human rights should be recognized when they arrive, when they’re dumped in Manus and Nauru and every point in between.”

At the same time, not all institutionalised NGOs maintain such a strong distinction between protest and natural understandings on the one hand and deliberative understandings on the other. Various NGOs thus point out that human rights are not only based in social struggle, but also in (international) law. As such, the human rights consciousness of many NGOs seems to consist of the following three elements: (i) everyone should, on the basis of their basic humanity, enjoy human rights; (ii) this has been codified in international law (although such translations may by some NGOs be considered travesties of genuine human rights); but (iii) the social struggle of some, including those offshored, clearly illustrates that human rights have not yet reached their full potential of protection.

Interestingly, however, in many interviews with NGO representatives, the importance of human rights only came up after respondents were being asked about them. This corroborates with previous research that was conducted as part of the ‘Words that Work’ project of the ASRC, which will also be further addressed below.⁸¹ The conclusion of this research, which was based *inter alia* on interviews with major humanitarian organisations and activists, was that ‘human rights’ are not commonly referred to by advocates in discussing their own work – they “gravitated, instead, toward the ideas of *protection, peace,*

81 See footnote 86 and accompanying text.

equality and – above all – *life*.”⁸² In this sense, the idea of human rights consciousness as driving the activist agenda should be nuanced. Whilst it clearly does drive NGOs in general, it is not always explicitly placed front and centre by individual activists and advocates as a driving agenda, although its fundamental values – such as those of protection, equality, and life – *are*.

Various human rights consciousnesses based primarily in social struggle, deliberative principles, and natural entitlements henceforth clearly drive NGOs’ work both on an organisational and on an individual level, although such protest endeavours are not always primarily and explicitly based on such consciousnesses but on its underlying values. This distinction is subtle, but crucial, as it points out that human rights are, as drivers of NGOs’ activities, not always clearly visible or tangible yet are still to a significant extent ingrained in protest work. The work of individuals operating on behalf of NGOs that are institutionally based on human rights consciousnesses can therefore occasionally be classified as being driven by a human rights consciousness even when human rights as such are not constantly or explicitly referred to as a guiding framework at the individual level. Even though individuals themselves may identify first and foremost with a fight for protection, peace, equality, and life, which they only *subsequently* may classify as values trickling down from more abstracted notions of human rights, their embeddedness in an institutional context that is explicitly premised on a human rights consciousness and their consequent activities that accord with such consciousness in a sense make that their work is, at its core, human rights-driven work.

9.4.2 Vernacularisation through humanitarian aid

One way in which NGOs attempt to vernacularise their consciousnesses is by providing humanitarian aid. Thus, some NGOs have operated *internally* in the system in order to provide aid to those confined offshore.

As chapter 2 has detailed, two NGOs in particular – the Salvation Army and Save the Children – have, as welfare providers, been essential parts of RPC Nauru’s governance structure. They have frequently justified their involvement in the facilities as a means to achieve change from within the system. The Salvation Army for instance issued a media release on its involvement in offshore processing, in which it considers:

“Although The Salvation Army remains concerned about the impact a lengthy placement on Nauru and Manus Island may potentially have on the well-being and mental health of asylum seekers – we cannot remain idle while this policy

82 ASRC, *No Place Like Home: Findings from Cognitive Elicitation Interviews ASO Communications*, available at https://www.asrc.org.au/wp-content/uploads/2015/08/Interview-Analysis_ASRC-1-Anat-S-O.pdf, page 1 (last accessed 3 April 2019).

is enacted. We are a people of action who stand with the vulnerable and oppressed, and therefore commit ourselves to give our very best to serve those who will be transferred for off-shore processing. The Salvation Army recognises the enormity of the task ahead of us, but is determined to do its best to support people who are placed there, and to help them prepare for the day when freedom finally arrives. [...] We bring over a century of experience and skill to this task, and boundless amounts of faith, hope and love. We are convinced that even in the darkest circumstances, light and good can emerge. We recognise the challenges of providing quality care in conditions that initially will not be ideal, and undertake to treat every person with respect and dignity – striving to use our contact with them to enhance their lives and futures.”⁸³

Likewise, Save the Children outlines in its 2015 Annual Report that

“[t]he services we provided to asylum seekers in the Regional Processing Centre helped to mitigate the detrimental impact of immigration detention by providing much-needed support and building normality and routine. Our primary goal was to ensure an environment that is as safe and protective for children as the conditions allow. [...] As a human rights organisation whose mission is to improve the lives of children and their families, in Nauru we played a vital humanitarian role in an environment where most service providers are ultimately driven by profit.”⁸⁴

The Annual Report subsequently continues with pointing out the legacy of Save the Children on Nauru, which would consist of numerous education projects, recreation activities, child protection, and on-site advocacy matters. In relation to the latter, the Report states that

“[w]e pursued more than 30 separate advocacy matters with decision makers in both Nauru and Canberra. While often a lone voice, we did not shy away from difficult conversations and pressed for better outcomes for children and their families, right until the very end of our time in Nauru. [...] During our time working in Nauru, we remained true to our values, including our commitment to speaking out on behalf of children. This wasn’t easy – often the target of our public advocacy was the same government that contracted us to provide services to asylum seekers and refugees. However, we never stopped lobbying for a more transparent, humane and compassionate approach to working with people seeking asylum. We provided reports, lessons learned and testimony directly to decision-makers, in an effort to make the consequences of Australia’s policies vividly real.”⁸⁵

83 The Salvation Army statement on involvement to asylum seekers in Nauru and Manus Island, Media Release, 10 September 2012, available at https://salvos.org.au/subscribe/sites/auesalvos/files/media/newsroom/pdf/20120910_TSA_statement_on_involvement_w_Nauru_and_Manus_Is.pdf (last accessed 3 April 2019).

84 Save the Children Annual Report 2015, p. 36, available at <https://www.savethechildren.org.au/getmedia/783a93c8-7cb5-4cd4-bdcd-7f84ec342217/2015-Annual-Report.pdf.aspx> (last accessed 3 April 2019).

85 Save the Children Annual Report 2015, *supra* n 84, p. 37.

Compared to external advocacy work, these NGOs maintain that a more direct impact can be achieved through humanitarian work on the inside of offshore processing. At the same time, as has been noted above, former welfare workers who worked for the Salvation Army and Save the Children have voiced substantial criticism of such decisions to become involved, pointing out that these NGOs were at the bottom of the governance hierarchy and as such had very limited technologies to actually steer the arrangements in place and to vernacularise human rights consciousnesses in any meaningful way. In addition, other NGOs have severely criticised the position taken by those NGOs that decided to work as service providers in offshore processing. Sam, the CEO of a generic service provider providing domestic services to the Australian government, points out that

“it’s a lose-lose situation. You can’t support people and keep them healthy and robust and give them hope when there’s no end, where there’s no policy that actually says: *‘this is what’s going to happen’*. And they’re a political football: the provider will always be scapegoated as well.”

Consequently, (s)he points to the human rights consciousness of the generic service provider that (s)he is running in explaining why (s)he decided not to become involved in offshore processing as a service providing stakeholder:

“within the frameworks of Australia, you have rights as an organisation. Like, legal rights, but also there is human rights, and we can stand up and own those things. Whereas there [on Nauru, red.], it’s so political, you would be totally micromanaged and you would be compromising too many things, and it’s just not worth it.”

Providing humanitarian assistance as a service provider to the government would thus legitimise the arrangements and mute any criticism of the dire circumstances in which offshore processing takes place. Understood in this way, it would, therefore, *silence* rather than contribute to any substantial protest and any human rights claim – a position that the service providers involved, however, in turn contest as the quotes above highlight. Whatever the case may be, humanitarian work within the policy framework has hence attracted substantial criticism from the social movements branch itself and has, consequently, been much more contested than external advocacy endeavours.

Given the limited sway that those NGOs arguably have had over the policy direction, and given that they left Nauru ostensibly disillusioned, the potential to vernacularise human rights consciousnesses through humanitarian aid seems limited at best. It should not be forgotten, however, that humanitarian involvement *did*, on the other hand, allow workers of NGOs to engage in morality-based processes – such as discretionary decision-making – in an attempt to vernacularise their human rights consciousnesses, although such decision-making was also highly constrained as the previous section has shown. Given

that this has already been extensively dealt with above, these processes will not be further recounted here.

9.4.3 Vernacularisation through advocacy

9.4.3.1 *Advocacy opportunities*

Another way in which institutionalised NGOs attempt to vernacularise their human rights consciousnesses is through their advocacy work, which, according to many NGO representatives, is at the heart of their repertoire of contention. At the same time, most representatives point out that their ability to command change within the political arena is highly constrained and that any policy-related work necessarily focuses on the micro rather than the macro level. Change can indeed not readily be commanded, at least not on the short-term, in the 'bigger picture': protesting in the political realm primarily concerns, as Winter points out, "finding out about particular individual cases, advocating for twigs to the policy [...], [and] continuing [the] lobbying of politicians."

Such work includes advocating on behalf of specific individuals or groups of individuals detained offshore. Indeed, rather than on a larger scale, it is often at the individual or group level that change may be commanded. A strong lobby for instance revolved around children in offshore detention, with many of the involved NGOs having campaigned intensively for the end of mandatory offshore detention for minors. Likewise, various grassroots movements have attempted to inhibit the involuntary return of asylum seekers and refugees to Nauru after they had been transferred from the RPC to Australia on medical grounds. In fact, social movements have occasionally been able to prevent the return of such individuals by orchestrating a significant community response. In this sense, advocacy work does not only involve efforts of NGOs at the institutional level to influence politicians and government officials, but also includes activities that, although often orchestrated at a centralised institutional level, are primarily generated at the grassroots level.

The fact that change cannot readily be commanded in the 'bigger picture' does not mean, however, that NGOs and other social movements do not identify with strong advocacy endeavours on the macro level at all in their vernacularisation efforts. To the contrary, whilst most interviewed NGOs acknowledge that change is most tangible on the micro level, they simultaneously underscore that they nonetheless keep advocating for structural policy changes as well. Parker thus emphasises that "we've always been an advocacy group, and have been fighting to change the government policy, to raise awareness to change the policy".

Likewise, various NGOs point out that *some* advocacy work geared towards change on the macro level can still be effectively pursued: Winter thus outlines

how NGOs for example liaises with the UNHCR by providing recommendations, conveying complaints from people who have visited the offshore facilities, and following up with them on current affairs such as in relation to the US resettlement deal. Ryan, representing the Australian branch of an international NGO, furthermore outlines how some NGOs have been able to visit both RPC Nauru and RPC Manus and how their subsequent reporting has informed both the political and public debates. Sam, CEO of a generic service provider providing domestic services to the Australian government, also points out that there are certain possibilities to achieve macro-level change through political processes. (S)he indeed illustrates that it is possible, in particular for non-governmental organisations that operate as service providers to the Australian government, to engage in quiet advocacy in order to command change guided by their own consciousnesses, although this is still more effective on the micro- or meso-level than it is on the macro-level:

“We work very hard to develop good relationships with bureaucrats and politicians. And what we do is, when we meet with them one on one, we say: *‘this is the impact of this policy on community or individuals’*. And we found that being a service provider, that’s a really effective way of not embarrassing them, but actually them saying, ‘well, alright, they’re experts, they know what they’re doing as service providers, and they’re saying to us that this is it’. So we find that if you can do that, it can shift – certainly not that broader issue, although every time we get an opportunity with the Minister, we’ll say, *‘we really would like to see this resolved’*, and talking to UNHCR [...] and with other like-minded organizations. So we are really agitated by it and we do try and find a solution with colleagues and with organizations to try and have a policy perspective that we can take to government collectively and say, *‘try this’*. Yeah, so that’s our way of trying to address it.”

These remarks feed into another interesting feature of NGOs’ advocacy work in the realm of offshore processing: many of the NGOs involved operate jointly on the advocacy level, primarily through the RCOA which is Australia’s national peak body for refugees. The RCOA hence takes on a coordinative role in developing joint policy proposals and recommendations from a wide variety of non-governmental institutions. They do so by coordinating responses to particular policies or incidents, by connecting expertise with resources, and by conducting national consultations with a range of member organisations, communities, and other relevant stakeholders. Thus, Winter – who is familiar with the coordination processes of the RCOA – points out that

“there’s basically a network of advocacy organisations who meet monthly by teleconference, encompassing pretty much everyone in this space to the extent that it’s possible to do so. [...] [The] principle kind of idea [is] that there is to be some coordination. [...] [It is called] the ‘flotilla model’, so everyone will have a different view, everyone will have a different take, but being pushed in the same direction and at least know what everyone else is doing and see if they can leverage off each other’s efforts.”

Skylar, representing an Australian-based NGO, sketches that NGOs involved in the refugee sector generally cooperate well together. As Camille, working for another Australian-based NGO, remarks, however, cooperation is not always a successful endeavour, as “there’s big egos and there’s money at stake and there’s reputations at stake”. Thus, as (s)he illustrates, many NGOs and other social movements are guarding their own turf and resources, which to a certain extent hampers effective cooperation and coordination between all social movements involved – up to the extent that some social movements even opt to not participate in the RCOA’s coordination efforts in the first place.

The fact that coordination takes place but that not all NGOs participate in such coordinated actions can also be explained by looking at the broad and diverse repertoires of contention that NGOs employ in pursuing advocacy goals, including the vernacularisation of their human rights consciousnesses. Some NGOs, primarily those with well-established reputations and a strong political network, generally focus on lobbying politicians on the basis of research-driven recommendations. They do so through established channels of contention, which can be both harmonious or conflictual. An example of harmonious contention would be where NGOs engage in quiet lobbying and advocacy work in order to persuade political representatives. Conflictual contention, on the other hand, may take place where NGOs for instance import deliberative mechanisms into their protest endeavours by commencing court cases in order to command policy change. An example of such mixed use of both deliberative and protest mechanisms has already been dealt with above in section 9.2.1., where the failed attempt of two NGOs – HRLC and RAID – to hold a private contractor operative at RPC Manus – G4S – accountable under the OECD Guidelines by submitting a complaint to the Australian and UK NCPs was discussed. Many of such channels of contention, however, ultimately inhibit both harmonious and conflictual elements: by issuing public statements or by exposing certain cases in the media, NGOs for instance seek to pressure politicians into accepting policy change in a way that is not *directly* confrontational – the confrontation takes place in the public debate rather than in an arena where NGOs and politicians are directly facing one another – yet that is not entirely harmonious either.

Other NGOs, on the other hand, focus on different repertoires of contention. In particular NGOs relying on grassroots activism focus on pressuring politicians into implementing policy changes through bottom-up grassroots action. Such grassroots action may include a variety of contention tactics, including rallies, demonstrations, public debates, petitions, and the targeting of particular stakeholders in an attempt to gain specific support from for example unions or to force the collapse of bipartisan support for offshore processing. In this sense, both types of NGOs target political actors and attempt to change public opinion, but they generally attempt to do so using different repertoires of contention and for different purposes. Whereas for some NGOs creating public *support* is key as it gives them a stronger advocacy position vis-à-vis political

representatives, for others public *action* – rather than mere backing – is crucial. In this sense, the former type of NGO pursues a form of ‘passive’ public engagement and persuasion whereas the latter type of NGO pursues ‘active’ public engagement and persuasion – it is the difference, then, between *relying* and *rallying*. Parker sketches in this regard that favourable public opinion is, for grassroots movements, indeed insufficient. Such public opinion should rather be converted into public action in order to genuinely pressure politics through a bottom-up approach:

“you’re talking to the working class, you’re talking to the unions, you’re just looking at ways of talking to the section of the community that can provide some pressure. [...] It’s [...] a question of the grassroots pressure that we can bring to bear on the politicians. It’s part and parcel of raising that political awareness, pressuring the politicians, but at the same time recognizing that the only way you pressure politicians is if you can marshal a critical mass of not just public opinion, I’d say there were times we had public opinion, but it also comes down to what that critical mass *does*.”

Notwithstanding their differences, both types of NGOs hence continuously underscore the importance of swaying public opinion for the effectiveness of their repertoires of contention and for the vernacularisation of their consciousnesses: whether it be because it gives them a stronger bargaining power in lobbying efforts, or because it creates a larger critical mass that can be used to apply pressure directly.

In attempting to do so, many NGOs in turn target their public campaigning actions, that is, they focus on individuals and particular groups in society that are more likely swayed or mobilised than others. This holds true in relation to both NGOs that focus on gaining support for their advocacy work and NGOs focussing on mobilising grassroots activism. Parker thus explains that on the grassroots activism side,

“it’s not like we spend our time just going out sticking things in letter boxes up the country with information. I mean, that’s not really the way peoples’ ideas change in any case. But it does mean that people who are active and take an interest – that’s where we see the first thing, is that you have to create a little wheel for turning a bigger wheel. But if you got someone in every union, every work place, every school, every suburb, who says ‘no, the government’s wrong, here’s why’, that’s the beginning of actually spreading that circle. [...] So if you want to influence Western Sydney, which is the stereotypical place that people think as filled with anti-refugee idea, then going to organise workers and explaining the connections between their rights and what they fight for as workers, and refugee rights, is an important way to begin to creating a political counter-weight to the government’s propaganda”.

Likewise, research of the RCOA that focussed on finding “words that work and that change the debate around people seeking asylum” (the so-called ‘Words

that Work' research) shows that it is useful for the NGO community to target specific messages at specific audiences in order to achieve advocacy goals.⁸⁶ This research will further be addressed below when discussing the instrumental role of human rights in public advocacy. On the basis of this research, Camille explains that NGOs that attempt to gain public backing should therefore use differentiated strategies and messages with different parts of society, in particular to reach the so-called 'persuadable group' in the middle that can, with the right language, potentially be persuaded to support the NGOs' causes.

In turn, in attempting to shift public opinion, NGOs of both types rely on a mix of arguments. This includes both ethical arguments – highlighting that offshore processing is an unethical policy framework that results in the suffering of both adults and children – as well as more pragmatic arguments – emphasising that offshore processing is a very expensive endeavour financed by Australian tax-payers' money. In addition, social movements attempt to highlight that other and better options are available to manage boat arrivals, therewith not only focussing upon the problem but also on potential solutions. As Ryan for example points out,

"we're looking at how we're going to highlight engagement with the region and regional governments to set up systems where people are respected in terms of their rights, to seek asylum, to seek protection, to then have work rights, health care, education, while at the same time not shifting the issue to countries that are less able to look after people than Australia."

Other NGOs, on the other hand, hesitate to engage in public-facing campaigning strategies in the first place. Sam, CEO of a non-governmental generic service provider providing services to the Australian government, points out that (s)he would never issue a media release condoning offshore processing as (s)he believes that the power of being a service provider to the government rests particularly in silent advocacy rather than public outcry. Still, as (s)he points out, the service provider supports the RCOA's advocacy role and feeds into case studies. Moreover, this particular service provider *does* engage to some extent in social movement activities that are geared towards swaying public opinion. As Sam elucidates, in pursuing the exposure of lived experiences of refugees, social media play an important role:

86 ASCR, *Words that Work*, page 1, available at: <https://www.asrc.org.au/wp-content/uploads/2016/05/ASRC-Words-that-Work-4pp.pdf>, (last accessed 30 May 2019). This document provides an overview of the research that in fact consisted of four legs: language analysis, advocate interviews, focus groups, and dial testing. The report concerning the first part of the research, i.e. a diagnosis of people's underlying reasoning about asylum, can be accessed via https://www.asrc.org.au/wp-content/uploads/2015/08/ASRC-Language-Analysis_aso-1-Anat-S-O.pdf (last accessed 30 May 2019). The report concerning the conducted interviews can be accessed via https://www.asrc.org.au/wp-content/uploads/2015/08/Interview-Analysis_ASRC-1-Anat-S-O.pdf (last accessed 30 May 2019).

“we think that refugees and asylum seekers speaking for themselves is far more powerful than us trying to articulate their stories. So their lived experience. We use our social media really effectively. [...] We use that a lot to have stories of people who’ve succeeded. [...] And that really is a very powerful tool around moving away from them being seen as a visa type, but as a human. And people say, ‘oh, wow, that’s a great story’. And feeling proud that Australia has supported someone like that to live a good life, to live the life they want to live. People’s stories are very powerful. And supporting them to speak at different things, when we go to delegations, we’ll always have people with lived experience to speak for themselves. We think that’s a very important principle”.

In turn, various NGOs engage in a mix of the aforementioned contention tactics. Thus, many of them issue press releases, create fact-sheets, organise public events, *and* expose lived experiences. This does not only allow them to reach a larger audience, but also to continuously choose which medium is most appropriate for the effective dissemination of information depending on the nature of such information, the targeted public, and the urgency of the cause. As the foregoing furthermore makes clear, in their advocacy endeavours, they sometimes mix vernacularisation mechanisms from various dimensions as well: they do not rely solely on protest mechanisms, but also, where necessary, on deliberative mechanisms (for example by instigating court cases or by filing complaints to (quasi-judicial) monitoring bodies) and on discourse mechanisms (for example by targeting specific messages at specific audiences in an attempt to convince those persuadable and to keep those already persuaded on board).

9.4.3.2 *The instrumental role of human rights as an advocacy tool*

The previous sub-section has explained how institutionalised NGOs attempt to vernacularise their human rights consciousness by using various instruments in their repertoire of contention. This in itself says little, however, about the instrumental use of human rights: whilst NGOs attempt to vernacularise human rights in their constitutive capacity, that is, as a *consciousness*, the question indeed remains what the role of human rights is as a tool of vernacularisation itself. It is this question that will now be turned to.

First, various NGO representatives point out that human rights fulfil an inherent documentation function within their advocacy work vis-à-vis the government, politicians, and the public. Louie, representing the Australian branch of a major international NGO, thus directs attention to the fact that human rights provide a normative framework to document abuses and keep a public record of what is happening to people offshore. Ryan also highlights not only that their work on offshore processing is human rights-driven in the sense that any concerns they have are based on human rights concerns, but also that they subsequently attempt to command change through advocacy by using human rights as a specific protest instrument, that is, by emphasising why particular practices in RPC Nauru do not match the requirements of

human rights protection. Their work is thus, as (s)he points out, both driven by and expressed through “concerns around the human rights situation”. As (s)he moreover points out, using human rights as a protest tool is not only convenient, but also highlights the gravity of the situation. To illustrate this point further, (s)he points to the communications of an involved NGO – Amnesty International – on the involvement of company Ferrovial in RPC Nauru, which relies heavily on the prohibition against torture.⁸⁷ Ryan points out that the fact that this prohibition is one of the most fundamental human rights norms emphasises the urgency and importance of the matter that Amnesty International raises:

“And then more recently, Amnesty has done the report on Ferrovial, because they think the way companies are engaging in propping up this policy is significant. They are now complicit in the abuses. And I think what was also different from previous Amnesty reports, was the fact that rather than saying ‘*we believe that the way people are being treated contravenes the Convention against Torture, Cruel, Inhumane and Degrading [Treatment]*’, they were quite explicit this time to say, ‘*no, this is torture. This is deliberate and it’s deliberate for a reason*’, you know. They are trying to harm people for a specific reason. And so that was, I think, a pretty significant statement for Amnesty to make. They don’t say that lightly. And I think it did bring international focus onto Australia’s policy.”

Likewise, Winter points out that human rights are a powerful normative framework that mobilises and energises their base. At the same time, however, various NGOs point out that whilst they use human rights, including to lobby with international organisations and government departments, they do not necessarily centralise them in their *public* advocacy work. Thus, although human rights are an instrument of protest for NGOs, they at the same time are often not the primary tools that many NGOs use in couching their public advocacy endeavours, that primarily take place – as the previous section has clarified – through both protest and discursive processes, including for example rallies and marches as well as attempts to shape public debate. Human rights are in fact argued to be hardly decisive in swaying public opinion which, as outlined above, is key to the advocacy work of various NGOs albeit for different reasons. Winter thus goes on to explain that human rights are, for a variety of reasons, not the strongest tools in pursuing public advocacy:

“the main difficulty is that in the Australian context, human rights is not a normative framework that’s widely accepted. [...] There’s a much stronger, I think, tradition of state control in Australia. [...] We have an incredibly safe country which is very remote from many parts of the world that experience conflict, maybe we

87 See e.g. <https://www.amnesty.org/en/latest/news/2017/04/spanish-corporate-giant-ferrovial-makes-millions-from-australias-torture-of-refugees-on-nauru/> (last accessed 30 May 2019).

just don't understand that what we have here is exceptional [...]. And the human rights sector is much less powerful, it's much weaker. Civil society generally, I would say, is not treated as a serious partner by the government in the way that in many other places it would be. It can be quite fragmented, it's horrifically underfunded in Australia, so for all of those reasons I would say that the human rights framework in Australia is more difficult for us because we can't guarantee that people accept that human rights are self-evident in Australia. And so when you're advocating for human rights of a particular people, you'll first have to advocate for the acceptance of the human rights first, and then educate the public about what they are, which is just an additional barrier in your way in some ways."

As (s)he concludes in relation to the potential for vernacularisation by relying on human rights as discursive expressions,

"unfortunately [human rights] is not, outside of our base, a very powerful political language in Australia [...]. I think it's incredibly useful for certain highly activated parts of our base, and it's a very powerful language for refugees themselves to use as to say that we have human rights. I guess what I'm saying is that for large parts of the Australian population and at the moment for the government, this is not a language that is productive".

Whilst human rights thus at times can be used to mobilise an NGO's base, it is not deemed highly effective in swaying public or political opinion at large. In fact, in sketching this situation, many respondents point to the 'Words that Work' research conducted by the ASRC that was already briefly discussed above.⁸⁸ This research particularly focussed on the question how the Australian public can be convinced of two fundamental principles: first, that seeking asylum is a fundamental human right, and, second, that all people have the right to live in peace.⁸⁹ In doing so, it distinguished between three particular opinion groups in society: (i) the 'support base', i.e. those who are already convinced of the message; (ii) the 'steadfast opponents', i.e. those who will not be persuaded by whatever argument in favour of the message; and (iii) the 'persuadables', i.e. an opinion group that consists of "the bulk of the population whose minds can be changed".⁹⁰ Interestingly, one of the findings of the research is that reference to complying with international human rights obligations does not work in swaying the opinion of the 'persuadables' and should rather be replaced by references to the importance of treating others the way we want to be treated ourselves as well as to the importance of doing the right thing. Reliance on human rights as instruments, here understood in a mixed deliberative and discursive sense, thus turns out to be ineffective to sway the opinion of those considered persuadable.

⁸⁸ See footnote 86 and accompanying text above.

⁸⁹ ASRC, *Words that Work*, supra n 86, page 1.

⁹⁰ ASRC, *Words that Work*, supra n 86, page 1.

In addition, NGOs point out that the instrumental value of human rights in protesting endeavours is further limited by the fact that human rights arguments are often understood as pertaining to *minimum* standards of protection only, whereas NGOs pursue higher standards through their advocacy work. NGOs therefore warn against the centralisation of human rights norms in advocacy, as such centralisation would unduly shift the focus towards guaranteeing minimum entitlements rather than towards achieving more substantial forms of protection. Thus, Winter underscores that

“it is an argument that can leave you exposed to minimum standards, because people can say, ‘it’s alright, we’re human rights compliant’, it doesn’t mean your best practice, [...] policy-based, it’s not necessarily the best outcome, it then becomes the lower threshold that you have to jump over.”

NGOs thus direct attention to the fact that human rights are, by many, hege- monically interpreted as legal standards as has also been explained in the previous chapter. Such a paradigm would hamper the activist agenda of advocacy given that the debate is no longer about human suffering but about abstracted legal notions of human rights entitlements. As Winter continues,

“I think the legalization worries me because it is about losing the refugee voice, because then it just becomes just about power between lawyers and judges and the state, and now everyone seems to forget that there’s a human involved in this space. And I think bureaucrats love it when you talk in abstractions, it’s much easier for them to deal with abstractions and for them human rights is a useful framework to displace the real concern. I mean, our real concern is: people are suffering [...]”

In this sense, the instrumental use of human rights in public advocacy work is hampered by the fact that the human rights consciousnesses of many citizens are primarily shaped by *deliberative* understandings of human rights, which endeavour to provide *minimum* entitlements, whereas NGOs attempt to create change on the basis of human rights consciousnesses that are primarily based in *protest* and *natural* understandings of human rights, which endeavour not to provide *minimum* entitlements but rather to continuously strive for the rights of all and for an ever-better situation for those involved in social struggle. The instrumental use of human rights understood as deliberative principles, consequently, would put a cap on NGOs’ full-fledged ideals and goals.

Still, human rights as protest tools, natural entitlements, and discursive expressions are at times instrumentally used to persuade the ‘persuadable’ part of the public, albeit on many occasions in an implicit manner. Thus, in campaigns focussed on the persuadable group, many NGOs often do not use human rights explicitly, that is, by detailing what human rights are and how they are at stake in offshore processing, but rather refer to them implicitly by focussing on the *values* that underly specific human rights provisions. As such, many NGOs couch their public advocacy in terms of the impact that

offshore processing has on specific aspects of individuals' dignity and wellbeing. Ryan points out in this regard that

"I think it depends on who your audience is. And that's what we're trying to get more sophisticated about, is maintaining the principle message and the integrity of the principles, and then putting it into a message which people will understand and will resonate with them and shift them. So what's the best message for the audience you're talking to? So if you stand up in front of the UN, you're talking about rights. But if you're standing in front of a town meeting in Newcastle, you're talking about the human pain, and what this means for that guy's family".

Winter concurs:

"certainly [...] we would use human rights standards in our advocacy, but we tend to not place it at the forefront of all that advocacy, particularly in the offshore processing area, because our focus is really about talking about the men as humans, and so to talk about their stories and experiences [...] you know, making it a more individual story in many respects [rather] than a human rights story."

Likewise, Louie, argues that individual stories are more persuasive for advocacy purposes than human rights obligations and entitlements:

"I don't think simply holding Australia's feet to the fire about international law is necessary the most compelling message [...]. We don't generally present our materials that way. We talk more about the individual stories and the human cost of these policies, and I think that's actually something that resonates more with people [...]. [I]t's quite difficult for them to engage on a conversation about the Refugee Convention, because they don't really know what the 1951 Refugees Convention is, but if you explain to someone the situation of a family who tried to get to Australia and all the problems that they have, and you ask them whether that's right or not, I think you get generally a pretty clear answer that it's not acceptable."

Maxwell, representing an Australian-based NGO, also recognises that public advocacy endeavours require abstract human rights entitlements to be translated into principles of fairness that people in the Australian public find relatable:

"it is a bit fraud I guess in the Australian setting, how the language of international obligations and human rights is not as effective as somebody believing strongly in international or in human rights might have hoped it would be. But I think then, the flip side is often language around sort of fairness or a fair go, which sort of captures some of those, you know, same principles or being treated fairly and being treated decently, having stability and the right to rebuild your life for that sort of thing that has the substance of what a lot of those human rights treaties are getting at, that that is the language that may reach and be more effective in public

advocacy, rather than framing it in an international law or in a obligations sort of sense.”

Rather than speaking about human rights as abstract norms, many NGOs thus translate such norms into tangible life experiences and situations that people in the Australian public can relate to. Camille explains that “it is about using personal stories to show the systemic problems”. Likewise, Skylar maintains that “it’s a really tough balance being strategic about the way we’re trying to persuade people, but it’s personal stories that kind of breaks through the best with them.” Such an approach based on values of dignity and wellbeing also finds support in – and in part seems to be based on – the ‘Words that Work’ research of the ASRC, in which the ‘golden rule’ for public advocacy vis-à-vis the persuadable group is formulated as follows:

“Most of us strive to treat others the way we’d want to be treated. If any one of us feared for our life or for our family we’d like to know that others would help us to safety. Throughout history, people have risked everything for the hope of a better life. We must ensure people’s basic right to live free from danger. By creating a fair and efficient asylum process we can show that, when people are in harm’s way, we’ll do the right thing. When we treat people seeking asylum with compassion and dignity, they can get on with rebuilding their lives in our communities.”⁹¹

In this sense, NGOs attempt to gain public backing for their advocacy work not by speaking about, for example, how RPC Nauru hampers the abstract right to family life, but rather by discussing how the particularities of RPC Nauru impact on specific families. They do generally not refer to the catalogue of rights of the child, but rather illustrate the detrimental impact of offshore processing on children’s physical and mental wellbeing. Advocacy hence takes place to a large extent on the basis of fundamental human rights ideals such as ‘humanity’, ‘equality’, ‘dignity’, and ‘wellbeing’, without explicitly discussing the fact that abstract norms of human rights are potentially being abused. Rather, human rights concerns are presented through the lens of local suffering and individuals’ needs – a perspective to which the persuadable part of the community can ostensibly better relate. As Winter puts it, “[w]e’re hard wired to respond to human suffering in a way that we’re not to human rights law exactly”. That is not to say, however, that communication targeted at the persuadable group should at all times be void of any reference to more abstract notions of human rights. Certain NGOs indeed consider that the human story as a frame of public advocacy should ultimately be inseparably connected with a human rights message, whether implicitly or explicitly. As Ryan argues,

91 ASRC, *Words that Work*, supra n 86, page 4.

"it is important to be able to humanise the problem, to show individuals and how it's impacting on them, but with that it has to be about their human rights. This is a small child that can't go to school because they're going to face bullying and abuse. Why would we not want that child to go to school? This is a woman with lumps on her breasts who has potentially cancer, we don't know. Why can't she access medical care? What about her rights to health? [...] I think we need to identify those breaches and then demonstrate to Australia what that looks like in practice. What are we talking about when we're talking about rights to health, rights to education, rights to be free from arbitrary detention and all those sorts of things? Because these are human beings we're talking about. They have rights that human beings have, and that's what's crucial."

The need to apply a human frame at the same time closely relates to the crimmigration features of RPC Nauru and of offshore processing more generally. As various NGO representatives point out, the dehumanisation and criminalisation of those arriving irregularly by boat through mechanisms of offshore processing, as has been explored in detail in chapter 3, necessitates NGOs to adopt counterstrategies to 're-humanise' those confined offshore in the eye of the public. In this sense, abstract notions of human rights are, as protest instruments, deemed ineffective insofar as the general public considers those confined offshore as an out-grouped collective that should not have access to the same entitlements as those belonging to the Australian community. According to Parker,

"you have to get to a point where [members of the public] [...] are willing to say 'yes, they should have those human rights'. [...] But to get to that point, you have to be able to convince people that their cause is just. That they have a right to flee, that there was no queue jumping involved. [...] [But] there's a constant demonization, and a devaluation of the refugee experience in that respect, which is reinforced with laws and mandatory detention, the fact that they're held in these camps, they look like prisoners, they're treated like prisoners, sometimes worse than prisoners. So it's a whole institutional aspect, I think, which is brought to bear on refugees to try and cast them in that particular way. [...] [A]s long as someone thinks that that person has done the wrong thing, [that] they've come here in the wrong way, then they don't even ask themselves, 'oh, they've got the human rights'."

Wherever government officials or politicians thus frame those offshore as dangerous, criminal, and illegal 'others', these individuals are not only discursively dehumanised but are also stripped of certain entitlements both as a matter of policy and on the basis of public support. By emphasising the humanity of those offshore, however, NGOs attempt to counteract such tendencies. In this sense, NGOs' focus on very concrete situations and specific persons is not only an implicit translation of human rights values, but also enhances political opportunities to raise more abstracted issues of human rights in the future. Indeed, the more those offshore are regarded in their human capacity rather than their alleged zoepolitical distinctiveness, the more oppor-

tunities there are to convince the public that these individuals are entitled to dignity and wellbeing not only in relation to specific suffering and injustices, but also as a matter of course on the basis of more abstracted notions of human rights as a guiding framework for justice and fairness in the biopolitical sphere.

In this sense, in relation to public advocacy, human rights may currently not be the most important tools in NGOs' toolboxes – in fact, they have to compete with other advocacy rationales such as economic or political arguments – but they certainly are instruments that NGOs may employ through their repertoire of contention. They are used at times explicitly, at times implicitly, depending on the particular form of advocacy used, the particular situation at hand, and the particular public towards which advocacy is geared. Whilst NGOs generally tread lightly in applying human rights as protest instruments or discursive expressions in their crucial public advocacy work aimed at the persuadable part of the population, they still use them in for instance government-geared advocacy, their lobbying efforts with international organisations, and their efforts in mobilising and energising their bases.

9.5 TOWARDS SYNERGY: COMMODIFICATION, CRIMMIGRATION, AND HUMAN RIGHTS VERNACULARISATION

The analyses above of how human rights are vernacularised by lawyers and (quasi-judicial) monitoring bodies, welfare workers, and institutionalised NGOs have already hinted at a number of ways in which multiple dimensions interact synergistically, either because multiple dimensions are combined in constituting particular consciousnesses, because particular consciousnesses based on certain dimensions are pursued through the vernacularisation mechanisms and/or instruments of other dimensions, because multiple human rights instruments are simultaneously used, or because the vernacularisation mechanisms of multiple dimensions are utilised in pursuing a certain human rights consciousness. The analysis shows, for instance, that welfare workers' human rights consciousnesses frequently draw on elements of all four dimensions. It also shows that NGOs pursuing a human rights consciousness that is primarily grounded in the protest and natural dimension do so, at times, by relying not only on protest mechanisms, but also *inter alia* on deliberative mechanisms – by becoming involved in court cases in Australia, Nauru, and PNG – as well as on discursive mechanisms – by creating a powerful discourse that is widely used by the NGO sector. Likewise, welfare workers seem to employ a number of vernacularisation mechanisms, including most notably discretionary decision-making but also mechanisms belonging to the protest, deliberative, and discourse dimensions such as whistleblowing and testifying. In pursuing such vernacularisation, both NGOs and welfare workers at times make use of human rights instruments belonging to the various dimensions.

The synergistic functioning of consciousnesses, instruments, and vernacularisation mechanisms can be further analysed from a variety of angles. One way of doing so is to once again turn to the commodification-crimmigration nexus in order to explore how these two developments impact upon human rights' synergistic operation. Whilst the analysis above has introduced a number of such implications, they will be further explicated here. As will be outlined, the commodification and crimmigration features of RPC Nauru – and of the OSB policy regime more generally – significantly constrain human rights vernacularisation, both in relation to the use of human rights instruments and in relation to the employment of vernacularisation mechanisms. At the same time, however, the role of commodification is paradoxical given that it simultaneously *enables* novel pathways for vernacularisation through the four respective dimensions.

9.5.1 The impact of crimmigration

Crimmigration frustrates the vernacularisation of human rights in various ways. Here, the focus will be on frustration of both the various vernacularisation mechanisms, and the various human rights instruments, that can be derived from the four respective dimensions.⁹²

Thus, on the one hand, crimmigration may hamper the use of deliberative, moral, protest, and discursive mechanisms for the vernacularisation of human rights. First, the use of deliberative processes is frustrated by the impact of crimmigration measures on the 'law in action'. As has been explained in chapter 3, through crimmigration measures, asylum seekers and refugees in

92 Ostensibly, crimmigration may also have a negative impact on the construction of human rights consciousness. As the previous chapter has shown, the construction of such consciousnesses is largely a matter of socialisation: what individuals and collectivities understand when they consider 'human rights' depends on the (re)production, sustaining, and amendment of accepted interpretations through social participation. Section 4.4.1. has in turn shown how pervasive the crimmigrant features of offshore processing, and of OSB more generally, are. Offshore processing is, in this sense, structurally based and rationalised through crimmigration frameworks of 'securitisation', 'deterrence', and 'non-belonging'. It is likely that this has an effect on the formation of human rights consciousnesses – from the perspective of human rights protection, a *negative* effect – given that human rights and offshore processing have structurally been detached in policy and discourse. Crimmigration therefore may have a negative impact on the vernacularisation of human rights consciousnesses, irrespective of the dimension on which they are based: influenced by crimmigration measures and rhetoric, individuals may start to see those confined offshore as non-belonging of *both* human rights as deliberative principles, as natural entitlements, as based in social struggle, and as discourse. This relationship between crimmigration and the formation of human rights consciousnesses should be fleshed out in future research; it has not been a focus of the present analysis. The focus here will be on the impact of crimmigration on two other elements of vernacularisation, i.e. the use of human rights instruments and the potential of vernacularisation mechanisms.

RPC Nauru are subjected to loud claims-making about their level of (non-) belonging and (non-)deservingness. Due to the crimmigration measures in place, those confined offshore are henceforth largely categorised into a category of undeserving and non-belonging 'outsiders' whose legal protections are gradually stripped away. At the same time, those confined offshore are subjected to quiet manoeuvring behind walls of governance. This has resulted in the facilities being simultaneously difficult to look *into* and to look *out of*, with abuses on many occasions remaining covert.⁹³ For a variety of reasons, the combined operation of these walls of noise and governance results in the material loss of agency of those confined offshore: importantly, it obscures harms that they may encounter and frustrates their access to legal advice, legal representation, and *habeas corpus* procedures.⁹⁴ This, of course, obfuscates the use of deliberative processes: even where clear responsibilities are *de jure* allocated, and even where procedures – tort, criminal, human rights, or other – are available, where mechanisms to enforce such responsibilities *de facto* are hardly attainable, their potential decreases.

Second, crimmigration frustrates the use of morality mechanisms, as becomes evident from the analysis of welfare workers' accounts above. As they point out, crimmigration has a shaping effect on the decision field in which discretionary decision-making takes place. It has already been addressed above that many welfare workers compare RPC Nauru to a prison establishment, in which those confined are treated similar to – or even worse than – prisoners. The way in which the facility operates, and the way in which asylum seekers and refugees are treated, is in turn attributed to the social surround, in which crimmigration ideas are firmly embedded. Indeed, it are the crimmigration features of OSB and of offshore processing specifically that have fostered the 'crimmigrant' imago of asylum seekers and refugees and that have subsequently informed the legal and organisational frameworks (the 'decision field') that tightly govern the confinement and treatment of those 'crimmigrant others' in RPC Nauru. The facility was set-up, first and foremost, to serve deterrence, not humanitarian purposes. From a nodal governance perspective, the ability for individual stakeholders to employ technologies is thus significantly constrained by the 'anchoring' effect of crimmigration policies. Consequently, it became significantly more difficult for welfare workers to vernacularise their human rights consciousnesses: being too much of an advocate, or siding too much with asylum seekers or refugees, is viewed with suspicion by other actors in the nodal governance field, sometimes even by the management of the welfare providers for which welfare workers work. This, in turn, goes to show how the anchoring effects of crimmigration policies even impact on the mentalities and rationales of welfare providers themselves.

93 Van Berlo, 2017d, p. 66.

94 Compare Tazreiter, 2017.

Third, crimmigration frustrates recourse to protest mechanisms. As pointed out above, those confined offshore are, through crimmigration policies, measures, and discourses, to a large extent united in a category of non-belonging. This hampers the pursuit of change through protest mechanisms, as it becomes more difficult to gain the necessary public backing for advocacy work and to create a solid critical mass. It necessitates protest movements such as NGOs to *re-humanise* those offshore, which requires considerably more effort, time, and resources. In addition, relating to the point made above about the quiet manoeuvring tactics that are part of the crimmigration policies in place, the fact that it is difficult to both look *into* and to look *out of* the facility also hampers effective protest activities: it is very difficult to protest against, or to even discuss, abuses that remain largely concealed from the public view. In this regard the whistleblowing activities of welfare workers have thus turned out to be particularly salient, as they to a certain extent counteracted the secrecy measures erected as part of the crimmigration strategy by informing protest activities about the situation within the RPC.

Fourth, discourse mechanisms are also to some extent frustrated by crimmigration. Chapter 3 has outlined the pervasiveness of crimmigration discourse in the context of OSB.⁹⁵ Given the strong position that such crimmigration discourses have in both political and public debates in Australia, it is difficult for those attempting to vernacularise human rights through discourse to find a suitable way for doing so. This, indeed, would require a strong counternarrative to the pervasive discourse of crimmigration. That is not to say that it is impossible to use strong counternarratives, as this chapter has shown: by relying on *inter alia* personal stories, crimmigration rhetoric may to a certain extent be rebutted and support of part of the 'persuadable' group of Australians may be gained. The unabated prominence of the Australian government's discourse of crimmigration and deterrence, however, constitutes a discursive stronghold that remains difficult to rebut.

On the other hand, crimmigration also frustrates the *instrumental* use of human rights as deliberative principles, natural entitlements, protest tools, and discursive expressions. Such frustration is closely related to the constraining effects of crimmigration on the four types of vernacularisation mechanisms, in that the negative impact of crimmigration on the instrumental role of each human rights dimension is essentially based on similar considerations as the negative impact on the directional role of each dimension. Various examples of such frustration become apparent from the analysis performed in this chapter.

For instance, it is difficult for those seeking vernacularisation to rely on a number of deliberative mechanisms, including civil and criminal procedures and, importantly, human rights law. One of the reasons underlying this diffi-

95 See also Van Berlo, 2015a.

culty is the acceptance of interferences with human rights law as discussed in chapter 4, which has to a certain extent allowed rights to be interfered with even when being part of crimmigration strategies. Of course, in the context of RPC Nauru, crimmigration is not the only factor contributing to this difficulty: as pointed out above, other reasons – such as the overall lack of enforceable human rights law in the Australian-Pacific context – also contribute to the decreased effectiveness of human rights as deliberative principles. Still, if those confined would have had easier access to for instance (quasi-judicial) human rights monitoring bodies, and if their confinement would not have involved such high levels of secrecy, slightly more protection could ultimately have flowed from the use of human rights law – although the acceptance of interferences by international human rights law as well as the other factors hampering deliberative vernacularisation would continue to limit such potential.

As another example, welfare workers are generally unable to rely on the instrumental value of human rights *both* as deliberative principles, natural entitlements, protest tools, and discursive expressions. As described above, given the way in which the decision field is shaped by the crimmigration-inspired social surround, it is very difficult to rely on human rights, however conceived of, in pursuing and justifying human rights vernacularisation through discretionary decision-making. In their decision-making practices, such individuals henceforth generally cannot invoke human rights law, human rights morality, human rights protest, or human rights discourse in order to foster vernacularisation. To the contrary, in light of the aims and purposes of the facility, which revolve around deterrence and securitisation, any explicit instrumental use of human rights is regarded with suspicion by various stakeholders involved in the same decision field that, after all, allows for some room to manoeuvre yet ultimately is anchored in, and modelled in accordance with, the out-grouping and ostensibly non-belonging characteristics of those confined.

Likewise, it is difficult for social movements such as institutionalised NGOs to rely on human rights instruments in seeking vernacularisation through protest mechanisms. As analysis above has pointed out, human rights law, abstracted notions of moral entitlements, and human rights discourse generally do not resonate with the Australian public and therewith are often unable to acquire public support for protest action. Whilst human rights may instrumentally be used to mobilise the own base, in pursuing the support of the ‘persuadable’ population, human rights on many occasions are henceforth often shunned rather than utilised as a source of potential. Crimmigration seems to contribute to this lack of effectiveness: given the strong framing in political and public discourse of those confined offshore as a group of outsiders, and as threats to the fabric of the Australian society, asylum seekers and refugees on Nauru are effectively dehumanised and alienated in public thought. As institutionalised NGOs point out, the way to counter such perceptions is not

by relying on human rights law, morality, protest, or discourse: given that such instruments essentially rely on the *humanity* of beneficiaries whilst those offshore are structurally *dehumanised*, they are often not useful in challenging and changing standing perceptions. Rather, such perceptions can be countered by relying on personal stories that allow, after all, for the necessary *re-humanisation* of those confined.

9.5.2 The impact of commodification

The reflections in the previous section present a rather grim picture of the impact of crimmigration on human rights protection. This section, in turn, will address the impact of commodification on human rights protection, which essentially differs from that of crimmigration in the sense that commodification does not only *frustrate*, but also *enables*, vernacularisation.

First, vernacularisation through deliberative mechanisms is frustrated given that, as pointed out previously, commodification adds a number of layers to the governance arrangements due to which the actors involved can quietly manoeuvre. For similar reasons as discussed in the previous subsection in relation to crimmigration, these walls of governance obstruct the proper operation of deliberative mechanisms as they have the potential to conceal abuses. Furthermore, given that as a result of commodification multiple public, private, domestic, and foreign stakeholders have become involved in the governance of RPC Nauru, responsibilities have been diffused amongst a number of key actors. As chapter 2 has detailed, this is problematic from the perspective of human rights law accountability in particular, given that the involvement of additional actors beyond the primary detaining state *prima facie* leads to a gap between the allocation of responsibility in the books and the exercise of power in practice. As Part II of this book has furthermore shown, whilst international human rights law has attempted to be resilient in the face of such commodification developments, its veracity to its fundamental tenets has obstructed it from effectively accounting for it in full. Confinement in RPC Nauru perfectly illustrates this point: by using private contractors, and by claiming that offshore processing happens under the authority of Nauru, Australia has progressively distanced itself from its international human rights obligations. Referring back to the cat-and-mouse game or rat-race previously denoted, the Australian government thus seems to *use* – rather than to ignore – international human rights law in order to argue, on the basis of the nodal governance structures in place, that Australia does not exercise extraterritorial jurisdiction and that it cannot be held responsible for private contractors' conduct as such. No matter the legal validity of such arguments, they are pervasive given that effective legal accountability mechanisms are largely absent and the position of the Australian government can, as such, hardly be rebutted with sufficient force.

Second, commodification has significantly complicated the decision field within which individual workers exercise their discretionary decision-making. That is to say, a myriad of actors are involved in the governance arrangements and have, on the basis of their distinct mentalities, resources, and technologies, certain preferences to promote and certain interests to protect through their operation on Nauru. This complex decision field makes it more difficult for individual workers to vernacularise human rights consciousnesses through discretionary decision-making practices, now that such exercise requires one to take a multitude of supervising and controlling actors into account in the decision frame. Instead of being part of one big bureaucratic organisation with a clear top-down hierarchy, individuals are subjected to simultaneous scrutiny from multiple actors with different interests and rationalities, which has made the exercise of discretionary power ultimately more complex. As various welfare workers point out, with the welfare provider being at the bottom of the hierarchy, discretion was very much constrained by frameworks set both by DIBP and other stakeholders that all acted as if they were separate tribes.

Third, due to commodification it has arguably become more difficult to command change through protest activities. Due to the diffusion of power and responsibilities and the consequent 'problem of many hands', with no actor clearly taking responsibility for the overall impact of governance,⁹⁶ it has become more difficult to vernacularise human rights by targeting protest action at a particular actor. Service providers, for example, have frequently pointed out that they only carry out executive tasks and that the ultimate responsibility rests with the Australian and/or Nauruan authorities. Australia and Nauru, in turn, frequently point to one another when responsibility for the well-being of those confined is concerned.⁹⁷ The effectiveness of any protest activity geared towards either of these actors is therewith decreased: at a minimum, whenever protest action targets a certain actor in the governance field, commodification provides such stakeholders involved with room to deny responsibility for the overarching impact of offshore confinement. Indeed, where combined behaviours and responsibilities are involved, it becomes difficult to hold a particular actor responsible and accountable for their overall human rights impact through targeted protest activities. In this sense, the pluralist nodal governance field may be *anchored*, but such anchoring does not prevent the diffusion of power and responsibilities and seems generally not a sufficient answer to the problem of many hands.

Fourth, commodification seems to complicate human rights vernacularisation through discursive mechanisms, since each actor involved in the governance field is able to justify its endeavours by using particular strands of discourse that may compete with discourses by which human rights are sought to be vernacularised. This seems particularly the case where certain actors –

⁹⁶ Thompson, 1980.

⁹⁷ See, for example, L. Taylor, 2016.

such as welfare providers – instrumentally use human rights as discursive expressions whereas other actors use different narratives, such as those of economic gain or deterrence, in a concurring way. Both internally in the facilities, and externally in political and public debates, these alternative discourses can ultimately overshadow human rights language as welfare providers are at the bottom of the hierarchy and their mentalities are frequently contested by other stakeholders in the field. As analysis above has shown, welfare workers in fact blame their employers for not framing the issues present in RPC Nauru *more* in terms of human rights: as they maintain, welfare providers were afraid to lose their contract and therefore on many occasions did not discursively contest the rationalities, mentalities, and practices of other stakeholders present. As a result of the multi-stakeholder environment, narratives of deterrence and economic interests thus frequently prevailed over those of human rights and human dignity.

At the same time, quite paradoxically, commodification has also *enabled* human rights vernacularisation through the four respective dimensions' mechanisms. That is to say, as a result of commodification, each of the four dimension-specific mechanisms offers novel potential pathways for vernacularisation that allow for some optimism on the human rights protection front. Consider, for example, the class action that was brought on behalf of refugees and asylum seekers in RPC Manus against the Australian government, garrison provider G4S, *and* Broadspectrum, and that has ultimately been settled.⁹⁸ As this case shows, it has now become possible to hold multiple actors simultaneously responsible through deliberative processes, therewith widening the scope for legal action. In terms of human rights, with the progressive development of private human rights obligations, it is furthermore not unimaginable that companies may be held independently responsible for certain human rights violations in the future if and when such binding private human rights obligations have emerged in international human rights law.⁹⁹ Whenever that happens, commodification thus clearly creates novel pathways for vernacularisation as it allows one not only to rely on the responsibility of states but also on that of private actors. For the moment, soft-law instruments may at times also be of value in this regard.

Second, commodification may foster vernacularisation through morality mechanisms. Since commodification has opened up scope for the involvement of other actors than public authorities in the governance field, NGOs could get involved and could in turn, through their staff, pursue human rights vernacularisation through mechanisms of discretionary decision-making. As the

⁹⁸ Doherty & Wahlquist, 2017.

⁹⁹ See also footnote 46 of chapter 5 and accompanying text, discussing the 'zero draft' of the UN *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises* which may bind private entities in the future yet remains far from completion.

analysis above has shown, welfare workers working for the Salvation Army, Save the Children, or an organisation hired by either of these two service providers such as MDA, indeed consider that they at times had scope – albeit limited – to vernacularise human rights through their work. In this sense commodification has henceforth opened up novel pathways to protection, since it allows for the involvement of the NGO sector within the facility. As previously pointed out, this does not necessarily mean that such involvement is fruitful, nor that it is morally justified *per se*, yet it does mean that the potential of vernacularisation through morality mechanisms can, at least in theory, be explored by these actors. Furthermore, the fact that multiple stakeholders simultaneously exercise agenda-setting capabilities and issue guidelines and regulations means, quite paradoxically, that discretionary decision-making may become more complex but also that there may become more scope for the effective utilisation of such discretion. Where different guidelines and regulations overlap and conflict, as well as where they do not closely align with one another, therewith leaving particular issues largely unregulated, significant potential for the exercise of discretionary decision-making thus arises. As explored above, welfare workers interviewed for this research indicate that the confusing and conflicting norms and hierarchies that existed within the governance arrangements of RPC Nauru at various occasions indeed provided for opportunities to act on a largely discretionary basis and to implement, accordingly, a concern for human rights and human dignity through their work.

Third, commodification may open up novel pathways of vernacularisation through protest mechanisms. Indeed, the ‘problem of many hands’ mentioned above should be nuanced to the extent that it also embodies an opportunity for protest on multiple fronts simultaneously. Whilst it is still true that the diffusion of authority may result in the denial of responsibility whenever actors are targeted in protest actions, commodification hence also allows protest actions to target a multitude of governance actors both individually and simultaneously.¹⁰⁰ Rather than continuously focusing on a governmental authority, protest action can thus be conducted in line with a strategic choice for a focus on certain of the actors involved. An example in this regard is the significant protest involving the acquisition by Spanish multinational Ferrovial S.A. of Broadpectrum as addressed in section 2.4.1.3. Sustained protest directed at Ferrovial, focusing on human rights abuses in RPC Nauru in which Broadpectrum had allegedly been involved, led Ferrovial to announce that it would abandon Broadpectrum’s work in the RPCs.¹⁰¹ In this sense, it proved useful to rely on protest mechanisms in order to create change, although at the same time it should be admitted that the work of Broadpectrum was consequently taken over by Canstruct and thus did not mean

¹⁰⁰ See also Sassòli, 1999, pp. 68–69.

¹⁰¹ For a clear example of such protest, see e.g. O’Brien & Ball, 2016.

the end of offshore processing. Still, with the introduction of commodification, novel pathways towards protest have undeniably become available.

Finally, commodification may also create novel discursive pathways for vernacularisation. For instance, various of the private contractors involved in RPC Nauru are covered by soft-law instruments. In addition, actors like Broadspectrum refer to human rights in their own codes of conduct, as has been described in chapter 5. As a result, it becomes possible to discursively rely on these instruments in attempting to hold these private actors accountable in public debate. In other words, given their (voluntary) submission to human rights norms, private contractors are forced to discuss and defend their policies in terms of human rights insofar as these arguments are raised publicly. This potentially enables vernacularisation through discursive mechanisms using deliberative and discursive instruments, as the importance of soft-law norms can be affirmed through discourse by translating them into meaningful values against which the performance of contractors can be measured. Whereas such soft-law norms may thus not properly be vernacularised through the *legal* processes of the deliberative dimension, they hence may still foster vernacularisation through mechanisms of the discursive dimension. As this example again shows, the synergistic operation of various dimensions may thus truly lift human rights protection towards a higher level.

9.6 CONCLUSION

This chapter has examined the role of human rights as a framework of protection in the context of RPC Nauru. In doing so, closely connected to the commodification paradigm, it has focussed on three key ‘critical masses’ that may be expected to be heavily involved in the vernacularisation of human rights: lawyers and (quasi-judicial) monitoring bodies, welfare workers, and institutionalised NGOs. As the analysis shows, each of these critical masses uses different vernacularisation mechanisms and human rights instruments at different times and in different contexts in order to pursue the effective fulfilment of their distinct human rights consciousnesses. They do so, furthermore, with varying levels of success: the effectiveness and potential of the various vernacularisation mechanisms and human rights instruments differs significantly.

Deliberative mechanisms seem to have a constrained potential in RPC Nauru insofar as effective human rights protection is concerned. The previous part of this book has already explained why international human rights law is challenged in contexts of confinement that are characterised by commodification and crimmigration – as such, the overall vernacularisation potential of international human rights law has already been weakened in the books. What further weakens its potential in the context of RPC Nauru *specifically* is that the context in which confinement takes place is particularly challenging from

an international human rights law accountability perspective. For a variety of reasons set out above, the potential of international human rights law as a deliberative vernacularisation vehicle in action is thus further limited in this particular context.

Do morality mechanisms provide more hope for effective human rights protection in the RPC? Analysis in this chapter of welfare workers' experiences with offshore processing indicates that human rights consciousnesses may to a certain extent be vernacularised through discretionary decision-making as a morality-based mechanism, although the specifics of RPC Nauru significantly limit such potential. Both the social surround within which offshore processing is embedded, and the decision field in which welfare workers operate, significantly hamper the vernacularisation of human rights consciousnesses through discretionary decision-making practices. In fact, the suppressed and marginalised position of human rights within the social surround and decision field is so pervasive that over time it begins to affect the core of welfare workers' decision frames. Feeling thwarted by the system in any human rights-inspired endeavour, many welfare workers indeed started to suffer from fatigue syndrome which largely muted their efforts to command change within the facility, although some started to rely on other vernacularisation mechanisms instead. As many welfare workers describe, discretionary decision-making based on human rights moralities could hence be used as a vernacularisation mechanism, but only on a micro scale and not 'in the grand scheme of things'. Potential for vernacularisation through this mechanism is thus present, although at the same time it is significantly circumscribed.

Protest vernacularisation mechanisms seem to provide more significant ground for optimism in the context of RPC Nauru. In fact, in pursuing human rights protection, many welfare workers who became disillusioned with discretionary decision-making as a vernacularisation mechanism started to rely extensively on protest mechanisms as elaborated upon above. Institutionalised NGOs, likewise, have through their advocacy work relied on protest mechanisms in order to vernacularise their human rights consciousnesses. Attempts to do so through the provision of humanitarian aid *within* the facilities have, on the other hand, been much more contested. Overall, however, the *instrumental* role of human rights in protest activities is regarded as much more problematic, particularly in public advocacy endeavours: human rights, whether in their capacity as deliberative principles, natural entitlements, protest tools, or discursive expressions, are indeed hardly decisive in swaying public opinion in favour of advocacy work. In particular the 'persuadable' part of the Australian population is, as the 'Words that Work' research shows, not sufficiently affected by references to human rights.¹⁰² Whilst protest activities may thus be useful mechanisms for vernacularisation, human rights are fre-

102 ASCR, *Words that Work*, supra n 86.

quently not core instruments of the repertoire of contention that are used in this regard.

These findings closely relate to the effectiveness of vernacularisation through the discourse dimension. Whilst discursive mechanisms could be useful in vernacularising human rights consciousnesses in relation to RPC Nauru, for example by holding actors publicly to account or by influencing public opinion, it seems that the instrumental value of human rights as discursive expressions is limited in this particular context. For instance, much of the effort of institutionalised NGOs to progress human rights protection through discursive mechanisms has focussed on *re*-humanising those confined offshore, by relying on personal stories of asylum seekers and refugees. Discourse is thus frequently relied upon, both to justify the existing policies and to challenge them, but human rights on many occasions do not feature prominently as explicit discursive expressions in such ventures. At best, they may become discursive strongholds in the future when attempts to discursively rehumanise those confined offshore become hegemonic and open up scope for biopolitical discussions on human entitlements.

The chapter concluded with an examination of the way in which the four human rights dimensions interrelate in the context of the commodification-crimmigration binary that has guided this book. As becomes clear, both crimmigration and commodification frustrate the vernacularisation of human rights consciousnesses, as well as the specific use of human rights as instruments in this regard. At the same time, however, commodification simultaneously may provide novel opportunities for human rights vernacularisation through the mechanisms of each of the four human rights dimensions. Further research is needed to flesh out these relationships between crimmigration and commodification on the one hand and human rights consciousnesses, instruments, and vernacularisation mechanisms on the other, both in the specific context of RPC Nauru and in relation to trends of commodification and crimmigration more generally. In particular, the extent to which novel pathways indeed materialise on 'glocal' levels on the basis of commodification developments, and the extent to which they are effective in vernacularising human rights consciousnesses through the synergistic operation of the holistic human rights concept, should be subjected to future research and reflection.

The context of PI Norgerhaven would pose an interesting case study to further reflect upon in this regard. Indeed, notwithstanding the fact that the Norwegian-Dutch arrangement has ended by now, there would be significant merit in scrutinising this novel type of criminal justice cooperation from a holistic human rights perspective. The intermezzo concluding Part II of this book has already shown that, notwithstanding the clear human rights commitment of both participating states, human rights as deliberative principles remain limited in their protection potential in the context of PI Norgerhaven. Albeit on a more nuanced level, international human rights law hence continues to face certain difficulties even where an abundance of responsible actors

is present, indicating that it would be useful to apply the multidimensional framework in order to properly understand the full-fledged protection and alienation of human rights that takes place in PI Norgerhaven. Although the scope of the present inquiry did not allow for such full-fledged analysis, it may be legitimately hypothesised that, similar to RPC Nauru, in the context of PI Norgerhaven the synergistic operation of consciousnesses, instruments, and vernacularisation mechanisms is impacted upon by the developments of crimmigration and commodification.

For instance, chapter 4 has shown the crimmigration features of the Norwegian-Dutch arrangements impact upon deliberative vernacularisation and the content of deliberative human rights instruments. Likewise, as the intermezzo of Part II has indicated, the use of deliberative and protest vernacularisation mechanisms and instruments has been significantly circumscribed by the commodification features of confinement, raising questions as to the positive legal obligations of both states involved. Based on the nodal governance arrangements of PI Norgerhaven as detailed in chapter 2, however, it could at the same time be envisaged that – in a similar vein as in RPC Nauru – commodification also may foster human rights vernacularisation. For example, due to the multiple actors involved, novel trajectories of protection through deliberative and protest mechanisms can be envisaged as multiple alternative legal challenges and protest activities can be mounted vis-à-vis different power bearers. Since the first two Parts of this book – in which PI Norgerhaven was dealt with – primarily concerned a narrow understanding of human rights as international human rights *law*, these hypothesised understandings ought to be further substantiated by future research. As of yet, in combination with the findings related to RPC Nauru, they remain important indicators that the study of human rights in settings of confinement – and, arguably, elsewhere – cannot be restricted to analyses of legal obligations but should strive to cover assessments of the synergistic operation of human rights as a multidimensional concept.

10 | Conclusion: Elephants never forget

“A community of blind men once heard of an extraordinary beast called an elephant and resolved to understand the creature. They sent a number of wise men from their group as emissaries to find the elephant and return with information. Once they found the animal, they each took a part of the animal to feel. One touched its leg, the other a tusk, the third an ear and they left believing they knew the animal. When they were questioned by their fellow blind men, they each offered different interpretations. The one who had felt the leg believed the animal was a pillar, extremely rough to the touch, and yet strangely soft. The one who had felt the tusk described the elephant as hard and smooth, with nothing soft or rough about it; furthermore, the animal was not nearly as stout as a pillar, but rather had the shape of a post. The third, who had held the ear, described it as both soft and rough, but not like a post or a pillar, but rather like a large piece of leather. Each was right in a certain sense, since each of them described the part of the elephant he had examined, but none was able to describe the entire animal.”¹

10.1 INTRODUCTION

This book has presented the human rights framework as a paradoxical construct, resembling elephants as a majestic yet endangered species. On the one hand, it is amongst the most powerful and exalted of its kind: human rights entitlements instantly appeal to the imagination and articulate a powerful claim to equal dignity and well-being that transcends everyday life and appeals to the human condition. On the other, however, it has proven to be highly vulnerable in the face of contemporary developments of globalisation such as commodification and crimmigration, in particular in its legal articulation as human rights law. The present inquiry has therefore relied upon the notion of ‘human rights elephants’ to denote the extent to which human rights have been able to remain of relevance as a protection framework in contexts of confinement that are characterised by such contemporary trends of globalisation. In pursuing a comparison with elephants, this book has attempted to show how both the majestic nature of human rights, and their inherent vulnerability, play out in contemporary contexts of confinement that are subjected to developments of commodification and crimmigration.

¹ Saxe, 2007, p. 67, recounting the parable of the Blind Men and the Elephant as attributed to the Pali Buddhist Udana.

The overarching aim of this book has been two-fold. On a local level, it has analysed how commodification and crimmigration impact upon the potential of human rights as a protection framework in the confinement contexts of RPC Nauru and PI Norgerhaven. For both case studies, this has included an identification of their commodification and crimmigration features as well as analysis of responsibility under international human rights law. For RPC Nauru, in addition, analysis has included the way in which human rights as a broader, more holistic mechanism may operate in pursuing protection. At the same time, although analysis of these case studies is intrinsically valuable, it additionally illustrates a bigger story. Thus, this book has attempted to showcase – on a global level – the strengths and vulnerabilities of human rights as a protection framework. It has done so by showing how commodification and crimmigration in confinement are global trends that challenge international human rights law, how global and regional international human rights law frameworks have dealt with such challenges, and how human rights at the macro level can be reconceptualised as a holistic notion consisting of multiple dimensions and layers resembling a ‘Brahma’ rather than a ‘Janus’ face. Both levels of analysis have ultimately been connected through the paradigm of the ‘glocal’ level, which takes into account both global developments and local particularities. As has been shown throughout this book, the reciprocity between these two levels, operating together at the ‘glocal’ level, informs the implications of commodification and crimmigration for human rights protection. On many occasions, human rights protection in RPC Nauru has for example been highly problematic as a result of the local embedding of global commodification and crimmigration developments, whereas PI Norgerhaven on the other hand may in various respects be argued to constitute a ‘best practice’ – although particular difficulties also persist in this context.

This concluding chapter will first seek to answer the research questions that have guided this book. As previously explained, each sub-question was dealt with in a separate part of this book, dealing with the human rights elephant ‘in the room’, the ‘tuskless’ human rights elephant, and human rights elephants’ ‘desire paths’. In this concluding chapter, all parts will be drawn together in answering the respective sub-questions and in consequently formulating an answer to the main research question on which this research has been premised. The final part of this chapter, in turn, will offer some reflections on the four key concepts that have guided this inquiry: commodification, crimmigration, international human rights law, and the multi-dimensional notion of human rights. In relation to the latter, particular attention will be paid to what the research conclusions *mean* for the future of the human rights elephant.

As will be proposed, whilst the triangular interplay between commodification, crimmigration, and human rights protection appears typically complex – each consists of a myriad of processes that uniquely operate conjointly on glocal levels – in the end, what transpires is a somewhat paradoxical message

of both hope and concern that arises from human rights understood as being neither squarely within the legal purview, nor a mere myth based on moral conceptions. On the one hand, based on the findings of this research, commodification and crimmigration give rise to significant concern as to the future potential of human rights. On the other hand, akin to a popular saying about elephants, it is proposed that human rights elephants never forget: they continue to hold hope for all as the core promise that they are constituted upon. In doing so they develop organically to ward off challenges – for instance by developing into tuskless entities – and use novel desire paths, or *olifantenpaadjes*, to achieve their goals. Ultimately, the future of human rights as a protection mechanism does consequently not depend solely on the progressive responsabilisation of power bearers, nor on the unbridled expansion of the human rights catalogue, but on a genuine belief that human rights *matter*.

10.2 ANSWERING THE SUB-QUESTIONS OF THIS RESEARCH

This book has been structured in accordance with three sub-questions, each being dealt with in a separate part of this book:

1. *To what extent do 'commodification' and 'crimmigration' challenge the protection value of human rights qua law?*
2. *To what extent has human rights qua law been able to accommodate these challenges within its framework?*
3. *What other protection values may human rights have in settings of confinement?*

In seeking an answer to the first sub-question, Part I has shown that both commodification and crimmigration mount a significant challenge to the protection value of human rights *qua* law. It has done so, first, by dissecting the global trends of commodification and crimmigration and by illustrating their presence and impact on the local level of the case studies' contexts.

In relation to commodification, this exercise relied on nodal governance and anchored pluralism theories: whilst the involvement of additional actors beyond the territorial state increasingly results in typically complex, fluid, and hybrid nodal governance systems, this does not mean that the state loses power *per se* as it may continue to fulfil key anchoring roles. Two particular types of commodification were distinguished: privatisation, drawing private actors with heterogeneous characteristics into the governance equation, and offshoring, engaging third states as relevant governance actors. As has been shown, both of these developments are part of contemporary globalisation trends, although privatisation has been more pervasive in its global outreach than offshoring that, both in relation to prisons and immigration detention facilities, has remained relatively modest in scope to date. Moreover, it has

been detailed how commodification is a core feature of both RPC Nauru and PI Norgerhaven: both involve complex networks of governance that significantly diverge from the idea of power and authority as exercised by territorial states. Still, important differences between both contexts have also been distinguished: for instance, the nodal governance network of RPC Nauru seems much more volatile and elusive than that of PI Norgerhaven due to the non-transparent nature of the governance structures and the additional layer of privatisation that resulted in less tangible power dynamics and continuously changing (contractual) relationships and responsibilities.

Where crimmigration is concerned, Part I has interpreted the notion of crimmigration in accordance with membership theory, developing a broad notion that includes both the criminalisation of immigration detention and immigrant populations and the immigrationisation of prisons and imprisoned populations. As argued, the notion of crimmigration denotes a wide variety of developments through which continuously developing membership categories are enforced on both sides of the physical and symbolic borders of the polity. In particular, this has been framed as a globalisation development given that the ongoing global interconnectedness has led to rapidly changing ideas about belonging to the polity. Instead of relying on classic distinctions between citizens and non-citizens on the basis of formal documentation, it has been argued that contemporary conceptions of membership traverse formal bases of belonging in seeking to in- and exclude certain populations on both sides of the sovereign border. A more complex distinction between citizens and supra-citizens on the one hand, and non-citizens and sub-citizens on the other, thus has been argued to guide contemporary regulation of the polity. Yet, in enforcing such distinctions, authorities have to make creative use – on an ad hoc instrumentalist basis – of more traditional mechanisms that intrinsically differentiate between belonging and non-belonging populations, including prominently those mechanisms native to the systems of criminal justice and migration control. In both realms, it has furthermore been argued, *confinement* may specifically be used as a key instrument to mark out such categories of belonging. Indeed, both prisons and immigration detention facilities provide mechanisms to remove non-belonging populations from the rest of society, both during confinement and afterwards, for instance through the deportation of those without formal citizenship entitlements or through the ongoing segregation of those with formal citizenship entitlements yet lacking informal membership. The employment of such crimmigration strategies as based in rapidly changing membership norms has consequently been traced both globally and has been identified in the case study contexts of RPC Nauru and PI Norgerhaven. Both contexts inhibit crimmigration features, although the specific crimmigration elements differ significantly from one another and arguably have dissimilar normative connotations.

In turn, by maintaining a glocal perspective, it has been argued that both commodification and crimmigration have the potential to challenge the pro-

tection value of international human rights law by subverting accountability under, and the effectiveness and legitimacy of, international human rights law. Indeed, combined, these developments challenge the two Janus faces of international human rights law: whereas commodification challenges the fundamental tenet of territorial state responsibility, crimmigration challenges the fundamental tenet of equal protection. This consequently entails a significant challenge to human rights law accountability, as many contexts of confinement influenced by globalisation developments significantly depart from the idea on which human rights law protection is based, i.e. the protection of equal individuals by and against territorial states as primary power bearers. This, in turn, has the potential of challenging the human rights law system's effectiveness as a whole, which in turn would require the system to be amended in order to remain of relevance as a protection mechanism. However, such endeavour necessarily needs to tread a fine line, as both doing too little, and doing too much, runs the risk of eroding the legitimacy of the international human rights law system as Part I has elaborated upon. Specifically, depending on which track they precisely follow, the system of international human rights law may become illegitimate, delegitimised, or subjected to a legitimacy deficit in accordance with Figure 8 in chapter 2.

In conclusion, commodification and crimmigration challenge the protection value of human rights *qua* law to a significant extent, being global developments that fundamentally provoke international human rights law at the levels of accountability, effectiveness, and legitimacy. This, then, is the elephant in the room: in light of such challenges, can human rights law remain of sufficient relevance as a protection framework in contexts of confinement that are influenced by globalisation developments?

Part II examined the extent to which international human rights law has been able to accommodate the commodification and crimmigration challenges within its framework to ward off challenges to its value as a framework of accountability and to its effectiveness and legitimacy altogether. This Part built upon the elephant in the room identified in Part I, questioning whether the human rights elephant – deprived of its ostensibly most fundamental asset, i.e. its protection capacity grounded in the fundamental tenets of territorial states and equal individuals as its metaphorical tusk – has been able to remain relevant as a protector in contexts of confinement influenced by commodification and crimmigration developments. It has done so by focusing on two somewhat paradoxical attitudes that are arguably indispensable for the international human rights law system to preserve its legitimacy in embarking on such an endeavour: that of *veracity* to international human rights law's fundamental tenets on the one hand, and that of *resilience* in the face of globalisation challenges on the other.

Taking these two attitudes as a starting point, analysis has shown that international human rights law has to a certain extent been able to accommodate globalisation challenges within its system by adhering to both attitudes

simultaneously. When regarding such efforts on a global level, this seems to have resulted in a rather balanced framework that takes into account both international human rights law's fundamental tenets, *and* contemporary globalisation realities. Indeed, the framework of international human rights law adheres to the fundamental premises of equal protection and territorial state obligations, whilst simultaneously allowing for exceptional deviations from these tenets in order to accommodate contemporary realities that at times require the system's dogmas to be bent, although not beyond their breaking point. For instance, crimmigration can to a certain extent be resiliently reconciled with the international human rights law system through the progressive interpretation of accepted interferences, without fundamentally breaching the underlying fundamental tenet of equal protection. Likewise, commodification can to a certain extent be reconciled with international human rights law through resilient efforts by which private human rights norms are pursued, rules of attribution are developed and clarified, and the margins of jurisdictional bounds are reassessed in light of contemporary developments, whilst at the same time remaining – or at least attempting to remain – largely veracious to the fundamental tenet of territorial states as primary duty bearers.

Application of this global framework to local contexts reveals, however, that the reality is more problematic and refractory. At the global level, it indeed becomes clear that difficulties persist, even where the bending of fundamental tenets is accommodated by the international human rights law machinery itself. The case studies of RPC Nauru and PI Norgerhaven illustrate these complexities. Thus, on the one hand, application of the globally developed approach as based in both veracity and resilience shows that the international human rights law system remains constrained by the tension that continues to exist between both attitudes. In some situations, such as PI Norgerhaven, this still results in a generally well-balanced system. Indeed, PI Norgerhaven showcases that human rights protection in contexts of confinement involving multiple actors in a nodal structure governing 'crimmigrant' populations can be modelled in accordance with both the required veracity and the required resilience. The case study could even be seen as a best practice of sorts, with many obvious frictions of responsibility being resolved through the interplay between globally developed frameworks and the local embedding of transparent relationships of authority based to an important extent on the involved states' own volition, although also in this context more subtle and advanced difficulties of international human rights law protection persist as the intermezzo at the end of Part II has shown. Indeed, even where an abundance of control is recognised, as is the case in the context of the Norwegian-Dutch cooperation, the fact that confinement is governed in a nodal fashion still raises a number of human rights issues that remain unresolved. Salient in this regard are, as the intermezzo has detailed, the scope of positive obligations on behalf of both nation states involved as well as their arguably unwarranted reliance on extensive and non-rebuttable levels of mutual trust. At least from the perspective of

positive obligations, the abundance of control in PI Norgerhaven hence is not a panacea for all human rights frictions that exist as a result of the facility's commodification features. Furthermore, as chapter 4 highlighted, whilst interferences with human rights entitlements in PI Norgerhaven might be justifiable, this ultimately is a question of proportionality that should be assessed in light of individual circumstances. Again, whilst the Norwegian-Dutch cooperation seems to be a best practice of sorts in this regard given that it is governed by transparent rules on which prisoners can be transferred from Norway to the Netherlands, ultimately human rights difficulties may persist in individual cases, i.e., when limitations of particular rights of certain individuals, for instance resulting from their relocation to the Netherlands, are deemed disproportionate.

As analysis of the case study of RPC Nauru has showcased, however, on other occasions it may prove very difficult for international human rights law to strike a proper balance at the global level. Thus, whenever it becomes involved in a so-called cat-and-mouse game, or rat race, with states' policies and practices, its ability to strike a vital balance between veracity and resilience becomes distorted. Where policies and practices continue to develop novel constructs to circumvent resilient efforts of the international human rights law machinery, international human rights law's indispensable veracity prevents it from bending the fundamental tenets beyond their breaking point. As RPC Nauru illustrates, state practices on many occasions are much more agile than the complex, embedded framework of international human rights law and therefore are anticipated to ultimately win the cat-and-mouse game or rat-race: their agile capabilities enables the state to respond with a high level of expediency to resilient efforts of the international human rights law machinery, whereas *vice versa* the international human rights law system does not possess a similar agility to deal with ingenuous state practices with a similar level of efficacy. This holds, on the one hand, true for the challenges posed by commodification: as the intermezzo in Part II highlights, the ambiguity of control and the capriciousness of the nodal governance network make it on many occasions difficult to demarcate human rights responsibilities, and, where nevertheless possible, state authorities and other involved actors may rapidly change the allocation of authority and control within the governance network. In this sense, the exercise of power and authority often is not only hardly tangible, but also frequently outdated, with governance being both obscured and continuously adapted. As chapter 4 has outlined, this on the other hand also holds true for the challenges posed by crimmigration: the state authorities involved may argue that rights are legitimately interfered with, or may amend the nature or intensity of confinement in order to argue that rights are not interfered with at all, as was the case in relation to claims that the right to liberty would be disproportionately interfered with in RPC Nauru. By doing so, states may effectively *use* – rather than evade – the workings of the law in order to argue that they meet their human rights responsibilities, whilst

constantly adapting to – and anticipating – further bending of international human rights law’s fundamental tenets.

Thus, in comparison, whereas PI Norgerhaven may be considered to be a best practice in many regards, the context of RPC Nauru appears to be nearly its complete opposite. Still, both case studies show how human rights law difficulties persist in confinement contexts characterised by commodification and crimmigration, whether or not control is ambiguous or in abundance and whether or not state authorities engage in the cat-and-mouse game or rat race. International human rights law, indeed, seems to be only partially able to adapt itself to commodification and crimmigration realities at the glocal level, raising important questions as to the future protection value of human rights in light of the impasse.

These questions in turn informed Part III of this book. This part first addressed some typical responses to the identified human rights impasse, as well as their shortcomings, and subsequently looked beyond the legal paradigm of human rights to examine what other values human rights may have in settings of confinement. It has done so by reconceptualising the notion of human rights on the basis of four schools of human rights,² substituting the Janus-faced understanding of human rights for a more nuanced Brahma-faced conceptualisation. Through this exercise, an intricate framework of multiple human rights dimensions that may operate conjointly through the implementation of human rights consciousnesses, vernacularisation mechanisms, and tools has been identified. In this sense, the final Part of this book has discerned a myriad of protection values *beyond* international human rights law’s protection value *qua* law: human rights are not necessarily legal deliberative standards, but can also be conceptualised as natural entitlements, protest tools, and discursive expressions. Each of these dimensions, furthermore, may operate separately or conjointly on multiple levels, be it as a ground for consciousness, as a vernacularisation mechanism, or as an instrumental tool. In accordance with such fragmented or hybrid conception, an interdisciplinary analytical framework has been proposed that allows for the holistic assessment of human rights’ role and relevance as a protection mechanism. Human rights protection thus does not stop at the margins of the legal doctrine: other protection values than those of human rights *qua* law – based in morality, protest, and discourse – may be discerned that are equally significant aspects, or faces, of human rights protection. Through their complex interaction, a wide variety of unique pathways towards human rights protection can consequently be envisaged. At the same time, however, each of the various human rights dimensions may also be employed to pursue alienation strategies by means of which the protection value of human rights is gradually depleted. As such, the proposed framework is essentially empirical, not normative, in nature:

2 Dembour, 2006, 2010.

it does not spur but tracks endeavours of human rights protection as well as forces that counteract these processes.

Chapter 9 has illustrated how such a holistic analytical framework may be employed in the context of RPC Nauru by synergistically exploring various human rights dimensions with an actor-specific focus. In this sense it is a genuine illustration, not an exhaustive overview of human rights protection in RPC Nauru: certain vernacularisation efforts, as well as the use of potential alienation endeavours, are left out of consideration. Specifically, the analysis shows how various of the human rights dimensions interact in critical masses' efforts to seek the effectuation of protection. Human rights in their various dimension-specific understandings may hence be employed as bases for consciousness, as mechanisms for vernacularisation, and as tools to effectuate protection, implying the existence of various pathways towards actual protection that originate in, are shaped by, and can be traversed by relying on, human rights standards. As this examination hence makes clear, the use of 'global' human rights values in local contexts can consist of unique processes that combine various human rights elements to ultimately foster protection: such protection may flow from unique combinations of dimension-specific consciousnesses, vernacularisation mechanisms, and tools.

That is not to say, however, that such processes are necessarily successful in having a significant or lasting impact: the actual use of particular combinations does not imply effective human rights protection but rather indicates which routes towards protection involved actors *attempt* to traverse. In other words, the fact that actors attempt to travel certain routes does not mean that they necessarily reach their desired end destination. For instance, in the context of RPC Nauru, the various unique combinations that the examined critical masses utilise in attempting to achieve human rights protection do not give rise to overall optimism about their ability to effectively implement firm protection in practice. Indeed, more often than not, such attempts are significantly limited as a result of varying context-specific factors that weaken human rights law, human rights-based discretionary decision making, human rights-focused protest activities, and/or human rights discourse in their capacity as vernacularisation mechanisms.

Moreover, and closely connected to this observation, as mentioned above one should be wary of the fact that the use of unique human rights pathways may also result in progressive human rights *alienation*. Indeed, Part III has at various points emphasised that the proposed holistic framework is, in essence, squarely empirical and does not imply normative content per se: it can be employed to explore both how human rights protection is fostered and how it is diminished. In fact, both of these questions are inherently related: human rights protection is not envisaged to be a zero-sum game but results from the interplay between vernacularisation and alienation efforts, with 'net protection' arising where vernacularisation efforts are hegemonic. In this sense, the promising prospect of multiple dimensions does not necessarily imply the actual

guarantee of human rights but may, in fact, have the opposite effect. That does not mean that the multi-dimensional model of human rights ultimately has no normative potential, however: by making the processes of human rights protection and human rights alienation explicit in terms of their underlying components, normative scope for debate is opened up, allowing a wide variety of individuals and entities to be held accountable for their influences on, and attitudes vis-à-vis, human rights protection.

As the case study of RPC Nauru highlights, crimmigration and commodification elements may frustrate vernacularisation through each dimension, whilst commodification at the same time may open up novel pathways for vernacularisation through each dimension. As such, the complex interplay between commodification, crimmigration, and human rights protection remains of relevance also beyond analysis of human rights *qua* law. Commodification and crimmigration do not only challenge protection based on international human rights law but also have wider implications for protection through the more holistically conceptualised, multi-faceted notion of human rights. Viewed in this light, it appears important to continue to study human rights in conjunction with globalisation developments, not only when human rights *law* is concerned but also where human rights protection based on different dimensions, or an holistic assessment of the synergistic operation of human rights dimensions, is analytically explored. Of course this applies to studies of human rights in confinement, which has been the focus of the present inquiry, but it arguably also applies *mutatis mutandis* to assessments of human rights in different settings.

10.3 ANSWERING THE MAIN RESEARCH QUESTION

The inquiry in this book has pursued the following main research question:

To what extent can human rights as a protection framework remain of relevance in contexts of confinement that are characterised by the globalisation trends of 'commodification' and 'crimmigration'?

Whilst a general answer to this question could be formulated based on global developments only, a conclusion on the prospective role of human rights as a protection framework gains particular meaning when taking into account local contextual specificities. As the various parts of this book have shown, global developments and local implementations indeed interact and mutually inform one another in what may be regarded as a circular process. To this end, the book has denoted both trends at the global level as well as local occurrences in the case study contexts of RPC Nauru and PI Norgerhaven, seeking to synthesise both at what has been labelled the glocal level.

This analysis has shown that commodification and crimmigration mount significant challenges to accountability under, and the effectiveness and legitimacy of, international human rights law. The international human rights law machinery has, as outlined above, dealt with such challenges through a mixed veracious and resilient approach, but this has not fully offset the problems associated with both globalisation developments. In particular in situations where states engage in effective contestation of resilient efforts, the international human rights law system seems inapt to deal with the mounted challenges without encroaching upon its own legitimacy. This seems to result in a nearly inevitable human rights impasse, with the international human rights law machinery at times not being able to secure its future legitimacy as a protection framework without treading, precisely, its legitimacy.

However, this book has emphasised that human rights are not necessarily legal constructs that should be understood as incorporating moral and legal aspects (the 'Janus face' conception of human rights), but that they should rather be conceptualised as incorporating a variety of dimensions that operate at multiple levels simultaneously and that may be united in an overarching, fragmented framework of protection (the 'Brahma face' conception of human rights). In developing this reconceptualisation, this book has drawn on human rights notions developed in the literature in order to come up with an intricate framework of protection that incorporates (the interplay between) various human rights consciousnesses, vernacularisation mechanisms, and tools. Regarded this way, a whole new domain of human rights protection is opened up *beyond* international human rights *qua* law. This, in turn, provides novel pathways to ensure human rights protection (but also to frustrate it through alienation strategies), including in contexts of confinement that are characterised by commodification and crimmigration. Indeed, these complex interactions between different dimensions of human rights at different levels amount to unique processes that may be employed in local contexts, allowing for those seeking human rights protection to use the most effective combinations of consciousnesses, vernacularisation mechanisms, and tools.

Ultimately, the extent to which this can be effectively done depends on the glocal level where global notions of human rights, and local particularities, intertwine. Such unique intertwined realities, in turn, inform the extent to which synergistic uses of human rights dimensions will yield the desired results. Whilst this may provide leeway in light of the commodification and crimmigration challenges to international human rights *qua* law, at the same time it should be emphasised that this does not mean that such alternative pathways remain untouched by these very same globalisation developments. To the contrary, chapter 9 has illustrated how both commodification and crimmigration may frustrate vernacularisation through *each* of the four dimensions – none of the dimension-specific vernacularisation mechanisms is,

in this sense, necessarily pristine.³ Moreover, as continuously emphasised, understanding human rights in such fragmented way does not only open up scope for novel pathways of protection, but also for the progressive alienation of human rights entitlements. Employed in pursuit of protection, the holistic framework may indeed yield significant results in the development of ingenious human rights safeguards, although not necessarily so; employed in pursuit of alienation, it may have the exact opposite effect. The framework itself is, as stipulated above, not normatively charged and therefore can, depending on the way in which it is utilised, be used for various normative ends.

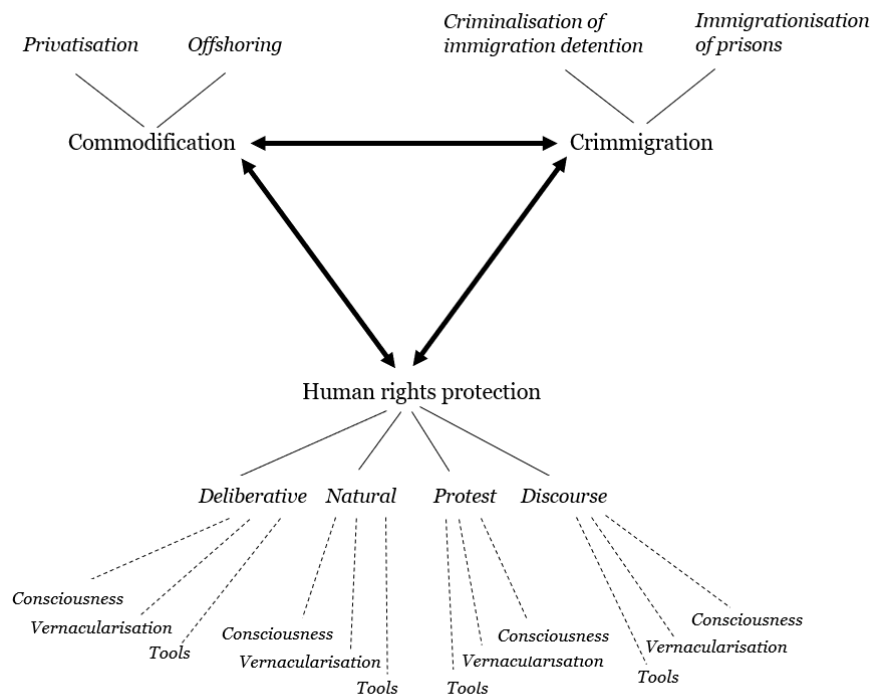


Figure 12: Complex triangular interplay.

3 As pointed out above, however, commodification at the same time may enable vernacularisation.

The analytical model presented in chapter 8 and applied to the context of RPC Nauru in chapter 9 allows for an examination of the thick processes of commodification, crimmigration, and human rights protection in all their complexities at the glocal level. Figure 12 illustrates such thick processes. Whilst a global triangular interplay can be discerned between commodification, crimmigration, and human rights, analysis of local contexts reveals not only that commodification and crimmigration are multi-faceted trends that consist of different legs, but also that holistic human rights protection may follow different trajectories on the basis of different contextual realities. Whilst it is important to recognise the triangular interplay between the three core concepts of this book in order to realise how various local occurrences are interconnected, it is at the same time imminent for analytical purposes to recognise that such triangular interplay is typically highly complex and incorporates a significant level of hybridity and heterogeneity. By analytically examining the glocality of such interplay, then, it becomes possible to take into account both what the implications of specific forms of commodification and crimmigration are for the various variants of human rights protection at the local level, and what this in turn means for the larger problematic interaction between commodification, crimmigration, and human rights protection at the macro level.

To what extent, then, can human rights as a protection framework remain of relevance in contexts of confinement that are characterised by commodification and crimmigration? On the basis of the foregoing, and in light of the comprehensive scope of holistic human rights protection as envisaged here, the short answer would be that they could do so to a large extent. Indeed, operating synergistically, human rights seem to provide a significant potential for protection, as they offer a myriad of alternative trajectories that could be relied upon. The more nuanced answer, on the other hand, would be: it depends. It depends, more specifically, on the interplay between global developments and local implementations. Whilst human rights could remain of relevance as a protection framework in contexts of confinement that are characterised by commodification and crimmigration, whether they in a particular situation are effectively able to guarantee protection indeed depends on a number of complex factors, including the progressive development of global trends, the local particularities of specific contexts of confinement, the content of prevailing human rights consciousnesses, the embedding and use of human rights vernacularisation mechanisms and tools, and the levels of human rights protection and/or alienation pursued in a multi-stakeholder field. This book has provided a framework to assess such glocal realities and, in reaching this conclusion, encourages further research in a wide variety of case studies in order to further indicate the interrelationship between commodification, crimmigration, and human rights.

As the case studies of RPC Nauru and PI Norgerhaven have made clear, not only are the combinations of commodification, crimmigration, and human

rights at the local level unique, but they also have widely varying implications for human rights protection. This book has shown, partly on the basis of continuous reflection on both case studies, that human rights can remain of relevance in contexts of confinement where these elements are combined, and that the potential protection capacity of human rights is much more encompassing than legal studies may sometimes lead to believe, but above all this book has outlined the breadth and depth of human rights protection that remains vastly underexplored. As such, the conclusion that ‘it depends’ may not be the most satisfactory, but is the most genuine answer that can be provided here and functions as a proper beginning, rather than a definite end, of inquiries into a more holistic understanding of human rights. This book, therefore, ultimately attempts to fulfil an agenda-setting function by calling for further research into the full-fledged potential of, the contemporary threats to, and the inherent limitations of, human rights as a multi-dimensional, Brahma-faced phenomenon.

10.4 REFLECTIONS

In this final part of the conclusion, a number of reflections on the core concepts of this book – commodification, crimmigration, international human rights law, and ‘human rights elephants’ – will be offered in light of the research findings propounded above.

10.4.1 Commodification

In dealing with commodification in chapter 2, this book relied predominantly on the frameworks of ‘nodal governance’ and ‘anchored pluralism’. It argued *inter alia* that both frameworks are not incompatible per se, as nodal governance is predominantly concerned with an empirical enquiry whereas anchored pluralism has a strong normative orientation. They can consequently be combined by developing concepts such as ‘state-directed nodal governance’ or ‘anchoring nodes’.⁴ The benefit of such an approach is that it allows for an examination of multi-actor environments through analysis of stakeholders’ mentalities, technologies, resources, and institutional structures, whilst simultaneously acknowledging the vitality of the anchoring capacities of the state. In this sense, combining both frameworks opens up scope to critically dissect the role and operation of the state as one of many nodes in multi-actor governance contexts whilst at the same time recognising the *primus inter pares* position of state authorities and their regulatory capacities. On this basis, analysis in

4 See also Sogaard et al., 2016, p. 136.

chapter 2 *inter alia* interpreted the role of the Australian and Nauruan state authorities in the context of RPC Nauru as being central to a complex, fluid, and opaque web of nodal governance actors.⁵

At the same time, however, one should be wary of overly simplified interpretations of nodal governance networks. Whilst it may be true that Australia and Nauru have assumed central and leading roles in RPC Nauru, this does not mean that anything that happens within the confines of these facilities can automatically be attributed to either of both countries, either in a general sense or in terms of responsibility for internationally wrongful acts as examined in chapter 6. To the contrary, nodal governance theory in particular stresses that the typical complexity of nodal governance frameworks stands in the way of making general or abstracted claims as to the question who effectively governs in a particular context. Power and authority in nodal governance settings, it should be recalled, result from networked interactions rather than from the activities of a singular leviathan: they are, consequently, everywhere.⁶ To say that those confined in RPC Nauru are completely within the control of Australia or Nauru would henceforth ignore the empirical nodal reality as was chronologically mapped in chapter 2,⁷ and would accordingly fail to address the more intricate complexities of power that govern the facility.

However, it appears that scholarship dealing with RPC Nauru frequently fails to take into account precisely these intricacies that crucially characterise the governance arrangements in place. Even more so, many commentators – both within and outside of academia – have implicitly or explicitly maintained that RPC Nauru is in effect *Australian* and that all power and authority exercised within the facility amount to governing exercises by, or on behalf of, Australia. Many commentators thus refer to notions like ‘*Australia’s* offshore detention regime’ and ‘*Australian* offshore processing’ without further emphasising or elucidating the intricate networks of governance that shape the reality of offshore processing.⁸ This is not merely an issue of narrative or grammar but amounts to a structural framing exercise with far-reaching implications for the way in which RPC Nauru is conceived of. Such narratives maintain that private actors involved in RPC Nauru function merely as Australia’s hands in exercising power and control, and that Nauru is a mere puppet state of Australia, therewith oversimplifying the complexity of nodal governance involved. Hence, by continuously emphasising that RPC Nauru is *Australian*, many commentators neglect not only the distinct position of private actors within the governance framework – having their own mentalities, resources,

5 Since the nodal governance framework of PI Norgerhaven did not involve private actors, the centrality of state actors in this context was already a given.

6 Holley & Shearing, 2017, p. 167; J. Wood & Shearing, 2006, p. 2.

7 See Figures 2-6 in chapter 2.

8 See e.g. Fleay & Hoffman, 2014; Heemsbergen & Daly, 2017; Narayanasamy et al., 2015; Neil & Peterie, 2018; Nethery & Holman, 2016.

technologies, and institutional structures – but also that of Nauru as the sovereign state within whose territory the facility is located.⁹ In framing RPC Nauru as being typically and uncomplicatedly Australian, these commentators adhere to an approach that has many similarities to the approach taken by the Australian government in arguing that RPC Nauru is *not* Australian – a position that in turn is often criticised and refuted by precisely these commentators.¹⁰ Indeed, both the Australian government’s framing of RPC Nauru as essentially non-Australian, and commentators’ framing of RPC Nauru as essentially Australian, oversimplify the complexity of the governance network and obscure the many ways in which power and authority in this network are typically negotiated, controlled, amplified, reduced, amended, and ultimately exercised. The result of both types of framing is that a proper understanding of the way in which RPC Nauru is being dynamically operated is obscured for the sake of argumentative – or at times even activist or opportunistic – purposes.

The topic of medical transfers from RPC Nauru to mainland Australia illustrates how such generalised understandings of power and authority misconstrue governance realities. Over the past years, one of the most unwaveringly contentious aspects of RPC Nauru has been the way in which medical needs that cannot be properly addressed by the local Nauruan hospital have been dealt with. For years, Australia has maintained that medical transfers to mainland Australia will only occur in exceptional circumstances, as it has been agreed upon with Nauru that hospital services are primarily provided for by the Republic of Nauru Hospital.¹¹ A special body within the Australian government consisting of DHA officials – the Transitory Person’s Committee – reviews all medical transfer requests from offshore processing facilities. Sustained criticism has been voiced in this regard, however, in particular as a result of a number of incidents relating to the Australian government’s overall reluctance to authorise medical transfers.¹² Such criticism has, however, overwhelmingly been directed at the Australian government only. On the one hand this may appear a logical result of the fact that it is the Australian government that has taken the lead in deciding upon transfer requests, but on the other hand this misapprehends the more dynamic processes that are involved in medical transfer decisions.

Thus, for one, it is important to consider the vital role of private contractor IHMS: the Australian government considers medical transfers on the basis of their assessments and recommendations, and IHMS thus fulfils an important role in initiating transfer requests. At the same time, it should be noted that IHMS operates on the basis of a service contract with the Australian government

9 See, for a notable exception, Andrew & Eden, 2011.

10 See e.g. Dastyari, 2015c, p. 692; Gerard & Kerr, 2016; Vogl, 2018.

11 DIBP, *Regional Processing Centre in Nauru*, supra n 239 of chapter 2.

12 See e.g. Aubusson, 2018; Smee, 2019.

and that Australia can thus be regarded as responsible for the way in which IHMS carries out its contractual obligations on Nauru. Moreover, the Australian government has “put extreme limitations on the type of patients” that IHMS can refer for medical transfer and it therefore seems that IHMS’ technologies and resources to effectuate such transfers are subservient to those of the Australian government.¹³ Still, it is important to take IHMS’ position into account, as it shows how some medical transfer needs do not even reach the decision-making bodies within the Australian government. For instance, IHMS doctors have been reported to not even file a request for transfer as they believe such request would be denied by the Australian authorities.¹⁴

In addition, the fact that criticism has focused almost solely on Australia misapprehends the position of the Nauruan authorities in the processing arrangements generally and in medical transfer decisions in particular. Indeed, over time, the Nauruan government started to present itself more and more as an autonomous key actor in the nodal governance system with significant technologies to steer the course of events. This is *inter alia* illustrated by the aftermath of the *Migration Amendment (Urgent Medical Treatment) Bill 2018* that was introduced by independent MP Kerry Phelps and that was passed by the Australian parliament in February 2019 in what was seen as a major defeat for the Coalition government.¹⁵ This bill sets out the conditions for medical transfers from Nauru and Manus Island and stipulates that if two or more treating doctors advise that a person should be evacuated, the person has to be evacuated, unless the responsible Australian minister vetoes such transfer on the basis of a disagreement with the clinical assessment, threats to national security, or a transferee’s substantive criminal record combined with a serious risk of criminal conduct. Whenever a medical transfer is refused on the basis of the first ground, i.e. that of disagreement with the clinical assessment, an independent Health Advice Panel will conduct a second assessment and may override the minister’s veto. These streamlined procedures only apply to asylum seekers and refugees already on Nauru and Manus Island, not to new boat arrivals. As a response to the fact that this bill was passed, the Australian government announced that it would re-open the detention facilities at Christmas Island in order to send all medical transferees there first.¹⁶ Of key importance for present purposes, however, is the fact that the *Nauruan* government introduced new legislation that likely hampers the effectiveness of the streamlined process outlined above. Nauruan parliament indeed passed a Regulation in February 2019 that outlaws non-authorised telemedicine for Nauruan

13 Doherty, 2018a.

14 Clark, 2016.

15 For the first time since 1941, a sitting Australian government lost a vote on a substantial piece of legislation in the House of Representatives.

16 H. Davidson, 2019.

residents.¹⁷ Furthermore, another Regulation passed around the same time regulates that all overseas medical transfer referrals must go through the Republic of Nauru Hospital, are to be assessed by the Overseas Medical Referrals Compliance Committee consisting of registered health practitioners and other members approved by the responsible Nauruan minister, and have to be authorised by the minister.¹⁸ In effect, this means that it becomes more difficult for those on Nauru to seek advice or counselling from doctors in Australia and that the Nauruan government assumes a more significant decision-making role in relation to transfer requests. Even where the Australian government approves medical transfers, where Australian Federal Courts order such transfers, or where – under the new Australian legislation – the Health Advice Panel overrides the Australian minister’s veto in a particular case, the Nauruan Overseas Medical Referrals Compliance Committee and the Nauruan minister thus retain control over medical transfers as a result of Nauru’s exercise of prescriptive jurisdiction.

Whilst the newly introduced Nauruan laws have been duly criticised,¹⁹ and whilst the Nauruan government has defended such legislative exercises as part of its sovereign prerogative and as being “for the betterment of its country”,²⁰ what this ultimately shows is that the dynamics within the governance network are much more complex and intricate than some appear to assume or admit. Overemphasising that RPC Nauru would be squarely Australian indeed gives rise to the idea that the power and authority to transfer individuals from RPC Nauru to Australia for medical purposes is within the sole prerogative of the Australian government, whereas in fact this obscures the technologies, mentalities, and institutional structure of the Nauruan authorities within the larger governance matrix. Especially in light of the fact that the Nauruan government has seemingly contested and conflicted with ongoing developments in Australia that impact upon the governance realm, using its legislative technologies in a determined effort, it becomes clear that properly valuing the complexity and hybridity of the nodal governance arrangements in place is of vital importance not only to understand the way in which RPC Nauru is being governed, but also how its operation may effectively be challenged.

Comparison to the case of PI Norgerhaven further elucidates why calling RPC Nauru an ‘Australian’ facility is not helpful either for analytical purposes or to command change. Contrary to the literature on RPC Nauru, authors writing about PI Norgerhaven have seldomly called this facility a fully ‘Norwegian’ prison. Rather, PI Norgerhaven has throughout been identified as the

17 Health Practitioners (Telemedicine Prohibition) Regulations 2019, 22 February 2019.

18 Health Practitioners (Overseas Medical Referrals Compliance) Regulations 2019, 15 February 2019.

19 See e.g. Conifer, Sawlani, & Dziedzic, 2019.

20 H. Davidson, 2019.

hybrid construct that it is: commentators have always emphasised that the prison facility is the result of unique penal cooperation that, as Liebling & Schmidt point out, “is neither ‘Dutch’ nor ‘Norwegian’”.²¹ This, in turn, has led various commentators to scrupulously analyse the dynamics of the governance arrangements in order to reach conclusions on the way in which power and authority are, or should be, balanced and the extent to which both states’ authorities have, or should have, ways to cooperate, conflict, and contest within the broader governance framework.²² There is hence a marked difference between PI Norgerhaven and RPC Nauru in this regard: in the context of the former it seems almost absurd to speak about a squarely Norwegian facility as this clearly obscures the importance of the Dutch authorities as governance actors, whereas in the context of the latter it is almost commonplace to speak about a squarely Australian facility without due regard for the mentalities, resources, technologies, and institutional structures of the Nauruan authorities. This is even more confusing when considering that those confined in PI Norgerhaven remain subjected to the Norwegian penal system, whereas those confined in RPC Nauru are subjected to the Nauruan asylum processing system. From this perspective it is even less clear why RPC Nauru would be considered to be markedly Australian even though it functions as part of the Nauruan asylum processing system, whereas PI Norgerhaven – functioning as part of the Norwegian penal estate – is, rightfully, considered to be a hybrid.

This discrepancy may be explained from the perspective of the salient geopolitical relationships between Norway and the Netherlands on the one hand and between Australia and Nauru on the other. Whereas Norway and the Netherlands are generally considered to be equally footed on the geopolitical stage, therewith having by and large similar leverage as equal partners, a significant power imbalance exists in the relationship between Australia and Nauru. Indeed, if it were not for the financial aid received from Australia in exchange for hosting the RPC, Nauru would likely have faced bankruptcy at the beginning of this century as has been discussed in the introductory chapter of this book.²³ The hegemonic power that Australia exercises over Nauru – and, for that matter, to a large extent also over PNG – has to an important extent shaped the existing power relations in play, and it therefore does not come as a surprise that Nauru’s volition to be involved in offshore processing is frequently questioned. However, as the above illustration of medical transfers in the context of RPC Nauru makes clear, this does not mean that Nauru consequently has no role to play in the governance network. To the contrary, whilst it may lack significant resources and as such may be con-

21 Abels, 2016; Johnsen et al., 2017; Liebling & Schmidt, 2018; Pakes & Holt, 2015, 2017; Struyker Boudier & Verrest, 2015; Todd-Kvam, 2018; Van Berlo, 2017b.

22 See e.g. Abels, 2016; Struyker Boudier & Verrest, 2015; Van Berlo, 2017b.

23 Connell, 2006; Firth, 2016, p. 297; McDaniel & Gowdy, 2000, pp. 192–193; S. Taylor, 2005; Thomas, 2014.

sidered to be a relatively ‘weak’ node in the governance equation, it at the same time possesses strong and unique technologies – such as the sovereign prerogative to exercise prescriptive jurisdiction – that enable it to have a lasting impact on the course of governance in accordance with its distinct mentality. Such mentality, in turn, may be based on a wide variety of concerns, such as moral judgment, sovereign reaffirmation, blatant opportunism, or pragmatic considerations.

The fact that inter-state cooperation is based on a significant power imbalance hence does not mean that the weaker state operates as a mere puppet of the hegemonic state. The Nauruan government in fact issued a press release with the title “Nauru is not Australia” in order to emphasise its self-standing position and prerogative.²⁴ More than once, the Nauruan government has furthermore proven to play key roles in shaping governance at RPC Nauru. This includes the introduction of regulations concerning medical transfers as illustrated above, but also broader trends by which Nauru has gradually assumed more extensive responsibilities within the facility as illustrated in chapter 2. Therefore, future analysis would benefit from a proper understanding of the facility as being an ultimate hybrid, similar to the way in which PI Norgerhaven has been understood in the literature. This does not only benefit analytical purposes by overcoming overly simplistic conceptions of the governance system of RPC Nauru, but also helps in reimagining – on a normative level – the future of RPC Nauru specifically and of broader offshore confinement developments more generally.

Likewise, the important role of private actors in a wide variety of nodal governance arrangements should be duly acknowledged. As chapter 2 has shown, the involvement of private actors in intricate frameworks of governance complicates proper assessment of responsibility, including in the realm of international human rights law. When analysing these types of governance structures, it is of key importance to distinguish the institutional structures, mentalities, technologies, and resources of private actors from the way in which the overarching governance network operates more generally. As Andrew & Eden likewise emphasise, “[t]he relative invisibility of the non-state actors [...] provides an official narrative that sees the state as the central actor in the management of illegitimate ‘others’”.²⁵ By continuously keeping in mind the interests and mentalities of private actors, their resources and technologies, and the way in which they are internally structured, a wealth of information about the way in which governance materialises can be accessed which would otherwise remain unnoticed. For instance, in the context of RPC Nauru, the roles that the Salvation Army and Save the Children have played in their attempt to contest the system ‘from the inside’ would remain obscured if their actions would simply be regarded as actions of ‘Australian welfare workers’:

24 Government of Nauru, 2015b.

25 Andrew & Eden, 2011, p. 232.

including their institutional structure, mentality, resources, and technologies within the scope of analysis opens up room for an enhanced understanding of the extent to which resistance within the governance framework may, or may not, be successful. Likewise, by explicitly looking at the specifics of garrison and support service providers, issues of corporate responsibility have been raised that otherwise would not have surfaced, and innovative pathways to steer the course of events have been elucidated that otherwise would have remained out of sight. Consider, for example, the way in which welfare workers in RPC Nauru pressured managers of garrison providers to pursue disciplinary action by threatening to expose that various security guards had inappropriate relationships with those confined, as explored in chapter 9. The availability of such technology to steer governance only becomes observable when explicitly recognising the various actors' institutional structures and mentalities. Whereas for some purposes it may be opportune to use shortcuts in order to typify governance networks, such as reference to 'Australian' facilities, proper analysis should therefore take the full range of governance actors into account and should be vigilant not to oversimplify the way in which governance arises not from the actions of one dominant actor, but from the networked interactions between various nodal stakeholders.

10.4.2 Crimmigration

The concept of 'crimmigration' seems to be both straightforward – as a contraction, it clearly identifies the fields it is concerned with – and highly opaque. The concept indeed lacks a clear, uniform definition that is consistently applied across disciplines and jurisdictional contexts.²⁶ Chapter 3 of this book therefore commenced with a reconceptualisation effort, reconceptualising 'crimmigration' as a broad notion encapsulating a wide variety of trends by which membership entitlements are (re)distributed on the basis of shifting categories of membership inspired by globalisation realities. As was argued, it makes sense to conceive of crimmigration in this broad way as it allows for a myriad of developments, both in the realms of migration control and in that of crime control, to be conceptually linked and to be empirically examined in conjunction. The way in which the notion has been subsequently used in this book illustrates the advantages of such an approach: whilst the crimmigration elements of RPC Nauru and PI Norgerhaven are fundamentally different, con-

26 This is not always clearly recognised in the academic literature. Some, for instance, have developed new contractions to denote novel fields of scholarship at the intersection of related fields, whilst referring to 'crimmigration' as a clear and useful analytical tool with a uniform definition. See for instance, on the intersection of consumer protection and criminal law ('crimsumerism'), Kornya, Rodarmel, Highsmith, Gonzalez, & Mermin, 2019, p. 112.

ceiving of crimmigration as a mechanism to distribute and enforce membership entitlements helps in getting a clear understanding of the way in which both contexts are intimately linked insofar as the carving out of membership is concerned. In other words, by understanding crimmigration as an ‘ad hoc instrumentalist’ notion that describes how authorities grapple with the enforcement of new and informal categories of membership,²⁷ it becomes possible to conceptually link distinct contexts that appear to be largely unrelated in terms of their rationalities, set-up, and operation, and to empirically assess how they enforce novel categories of belonging either through comparable or through dissimilar mechanisms and strategies.

Crimmigration is thus, contrary to what others have occasionally claimed, not a ‘theory’,²⁸ nor is it a normative construct per se. It is rather an empirical notion that opens up scope for novel analytical pathways towards exploring the role of membership conceptions and entitlements in an era of globalisation. Whilst the implications of various crimmigration trends may be worrying from a legal and sociological perspective – the ad hoc instrumentalist use of migration control and crime control as pragmatic instruments to enforce novel membership boundaries raises a lot of fundamental questions *inter alia* as to legal protection and social marginalisation – it henceforth stretches too far to denounce particular developments simply *because* they can be captured under the umbrella term of crimmigration. Put differently, simply because certain trends may be labelled ‘crimmigration developments’, this does not mean that such developments are therefore normatively flawed as an inevitable consequence – rather, it are the problematic implications of such empirical trends that need to be further dissected in order to reach solid normative verdicts.

This understanding of crimmigration as essentially denoting empirical developments has not always guided academic literature in the emerging field of ‘crimmigration scholarship’. Some, for instance, speak about the “disturbing features of ‘crimmigration’” as if crimmigration constitutes a clear-cut homogeneous phenomenon with clear normative dimensions.²⁹ Others speak about crimmigration being ‘grim’: “[t]he growing body of scholarship studying practices of crimmigration seems to paint a rather grim picture: to a greater or a lesser extent, crimmigration seems to be present in many national contexts”.³⁰ Yet others frame crimmigration as “a response that has very little regard for the principle of the rule of law and the humanistic tradition of European nations” and that “has exceeded all constitutional and international

27 See also Sklansky, 2012.

28 See e.g. Azeredo Alves, 2017; Ellis, Brooks, Lewis, & Al Hashemi, 2011; Hartry, 2012, p. 20; Hermansen, 2015, p. 11; Hudson, 2018.

29 Arriola & Raymond, 2017, p. 15.

30 Van der Woude & Van der Leun, 2017, p. 28. Likewise, Menjívar et al. argue that there is a ‘dramatic’ expansion of ‘crimmigration’: Menjívar et al., 2018, p. 8.

law limits and has led to a situation that is legally, socially and politically unbearable".³¹ Some even advocate for a more normatively charged understanding of crimmigration,³² at times proposing it to be diametrically opposed to a 'no borders' politics.³³ Menjívares, Gómez Cervantes, & Alvord for instance maintain that "crimmigration scholarship *should* take a critical stance".³⁴ Likewise, García Hernández argues that "[a]s the source of intellectual insight into crimmigration law's many tentacles, scholars are uniquely well-positioned to identify its normative commitments, demand its demise, and identify a path toward a post-crimmigration legal regime".³⁵

These types of normative injections into empirical determinations, even before regard is had to the actual implications of specific forms of crimmigration in particular contexts, should however be a cause of concern. Conflating empirical findings with normative significance indeed runs the risk of transforming crimmigration into a hollow notion, with the ad hoc use of instruments by state authorities being rendered largely insignificant in favour of normative exclamations denouncing the use of all measures that may resemble 'crimmigration' as such. Admittedly, the term 'crimmigration' itself may not be very helpful in this regard, as it seems to be normatively charged precisely by pointing out how criminal law (or crime control) and migration law (or migration control) increasingly converge: if such development were not problematic in a general sense, the term itself would most likely not have come up in the first place. As others have highlighted, "in order for something to die, it must first be named, identified and 'birthed'".³⁶ In fact, when coining the term, Stumpf even talked about a so-called 'crimmigration crisis'.³⁷ The term has moreover been provided with a number of definitions that highlight normative implications: according to some, for instance, the underlying rationale behind the process of crimmigration is "to catch dangerous individuals – i.e. immigrants as well as criminals",³⁸ which instantly draws normative aspects into the definition of crimmigration, whereas this book has advocated a more neutral understanding of the term as comprising ad hoc instrumentalist uses of migration control and crime control in carving out membership more generally. By extension, it is argued here that since crimmigration is no proper theory but a collective term to denote a plethora of developments, its normative significance – both in general and in relation to specific contexts – should not be assumed. It is the basis on which it operates, and the results that it yields, that may be normatively reflected upon, but such reflection cannot be based

31 Šalamon, 2017, pp. 252–253.

32 Garner, 2015; Menjívar et al., 2018, p. 9.

33 Aiken et al., 2014, p. xi.

34 Menjívar et al., 2018, p. 9 (emphasis added).

35 García Hernández, 2018, p. 199.

36 Kornya et al., 2019, p. 112.

37 Stumpf, 2006.

38 Van der Woude, 2016, p. 53.

simply on the determination that ‘cimmigration’ is in play. When applying such latter approach, the differences between the normative shades of the causes and implications of different cimmigration trends would indeed be unjustifiably faded in favour of one overly generalised, normative reflection of disapproval whenever the ‘cimmigration’ label is attached.

This is even more so now that cimmigration has transcended its original legal connotation and encapsulates a variety of levels, including those of policy, discourse, and enforcement.³⁹ The notion of cimmigration may offer a useful shortcut to discuss these developments, but this should not run the risk of undue conflation of the (normative) specifics of each of these levels on which cimmigration plays out. The use of cimmigration on each of these levels has, as this book has also illustrated, unique implications for *inter alia* legal protection and social (dis)enfranchisement. The merger of crime and migration as a matter of law is indeed accompanied by fundamentally different challenges than such merger as a matter of policy, discourse, or enforcement. Of course these levels may ultimately be synergistically linked – discourse may inform law and policy, law may inform enforcement, and so on – yet it is henceforth necessary to not only distinguish specific contexts of cimmigration, but also to maintain a proper distinction between the various levels on which it may operate. Ultimately these levels could, and arguably should,⁴⁰ be regarded in synergy, yet such endeavour continuously has to take into account that different levels – each with their own characteristics, challenges, and implications – are at play.

Although this book has advocated a rather broad reconceptualisation of the ‘cimmigration’ nomenclature, it has attempted to avoid falling into such trap where normative implications are *prima facie* connected to empirical observations of cimmigration. Rather, this book has used the notions of accountability, effectiveness, and legitimacy to examine the normative implications of cimmigration for the system of human rights protection. By setting such benchmarks, this book has tried to outline a nuanced picture of how cimmigration impacts upon human rights protection both generally and in relation to RPC Nauru and PI Norgerhaven. In relation to that latter case study, for instance, this book observed that cimmigration occasionally may operate rather constructively as it provided FNPs detained in PI Norgerhaven with more extensive opportunities to enjoy their right to family life. Such observations do not diminish the conclusion that cimmigration in this context also continues to significantly challenge human rights protection, yet do contribute to a more holistic and rich understanding of how specific cimmigration

39 J. Brouwer et al., 2018; J. Brouwer, van der Woude, et al., 2017; Di Molfetta & Brouwer, 2019; Doty & Wheatley, 2013, p. 435; Franko Aas, 2011; Van der Woude & Van Berlo, 2015, p. 63; van der Woude & van der Leun, 2017; van der Woude et al., 2014.

40 J. Brouwer et al., 2018, p. 448; Van der Woude & Van Berlo, 2015, p. 63; van der Woude et al., 2014.

elements in specific case studies operate, which in turn allows for evidence-based normative assessment.

Ultimately, the conflation of crimmigration's empirical and normative aspects may derive from the fact that, as pointed out above, no consensual definition of 'crimmigration' exists. The term has been employed to describe a wide variety of developments, from very narrow ones – such as particular attempts to criminalise migration in particular national contexts – to very broad ones – including the marking out of membership in contemporary globalised societies as explored in this book. As a starting point, it is important that those engaging in crimmigration debates continue to define what they are referring to when they employ this nomenclature, at least up until the point that a more consensual definition has been articulated. Otherwise, the precise object of study remains somewhat opaque whenever issues are regarded “through the lens of crimmigration”.⁴¹ The present book has proposed a particular reconceptualisation that may, or may not, gain traction and that could inform future research agendas covering both the empirical and normative implications of membership politics in globalised societies. Of course, this leaves room for different interpretations of 'crimmigration', potentially even for interpretations that have been heavily influenced by normative considerations, yet for the sake of a genuine and transparent academic debate it is important that such interpretations are continuously made explicit. Otherwise, the notion of crimmigration would amount to little more than a catchphrase with different non-explicated meanings depending on which academic dialect one speaks. This would be particularly problematic given that 'crimmigration scholarship' essentially involves an eclectic and interdisciplinary discussion conducted by scholars that speak different disciplinary languages and that analyse different geographical contexts to begin with. If, in such interdisciplinary context, common terminologies and understandings for prominent concepts such as crimmigration are lacking, dissonance or even outright misunderstanding lurk: those participating in the discussion would not so much be *lost* in translation, as they would *lack* a translation in the first place.

10.4.3 International human rights law

Although international human rights law has been a central element of this book, its importance has simultaneously been contextualised in a broader matrix of human rights protection, of which international human rights law is but one dimension. This does not mean, however, that the ongoing relevance of international human rights law as a self-standing framework, with its

41 See e.g. Dekkers, 2019, p. 22.

internally-gearred logic and systemic features, is called into question. To the contrary, the system of international human rights law remains one of the most vital and convincing articulations of human rights – in this sense, the fact that it has almost become reflexive to refer to human rights law when discussing human rights is hardly surprising and its pervasiveness should accordingly not be underestimated.⁴² Consequently, legal scholars and lawyers continue to play vital roles in the development of human rights norms, especially where such norms are endangered as a result of changing social realities and contextual circumstances.

The ambitious – and sometimes courageous – efforts by human rights law scholars in seeking to fulfil such roles are laudable and ought to be encouraged. Faced with contemporary developments of globalisation, including commodification and crimmigration, various strands of human rights scholarship have over the past decades indeed explored – either with explicit reference to these developments or on a more implicit basis – the interrelationship between such globalisation trends and the framework of international human rights law. In doing so, legal scholars focus often on the necessary changes that need to be implemented in order to secure international human rights law's ongoing relevance as a protection framework. As such, their work on many occasions focuses on particular interpretations of international human rights law that ought to make the system, as it were, 'globalisation-proof'. These contributions as such pursue a reformist agenda that stretches beyond mere descriptive analysis.

On the one hand, notable examples of reformist endeavours focusing on the intersection of international human rights law and various contemporary reconfigurations of power, which in this book have been captured by the notion of 'commodification', include the works of respectively Jägers, Milanovic, and Vandenbogaerde.⁴³ As chapter 5 highlighted, such scholarship ostensibly applies a functional approach to human rights, often not only looking at the *lex lata* but, importantly, also at the *lex ferenda*. Jägers for example examines corporate human rights obligations not simply by describing the system of international human rights law, but by actively searching for room to accommodate such private obligations. She does so by deliberately advocating a broad interpretation of human rights provisions.⁴⁴ Likewise, in the context of extraterritorial jurisdiction, Milanovic argues that the existing models for extraterritorial jurisdiction are insufficient to provide bases for the extraterritorial application of international human rights law that are "stable in the long run".⁴⁵ Therefore, on normative and reformist rather than descriptive grounds, he proposes an alternative model that would entail that "the state obligation

42 T. Evans, 2005.

43 Jägers, 2002; Milanovic, 2011; Vandenbogaerde, 2016.

44 Jägers, 2002, p. 256.

45 Milanovic, 2011, p. 263.

to respect human rights is not limited territorially; however, the obligation to secure or ensure human rights is limited to those areas that are under the state's effective overall control".⁴⁶ Whilst Milanovic makes a convincing case why such distinction on the basis of positive and negative obligations ought to be accepted as a guiding model of extraterritorial jurisdiction, it has to be recognised that this effort is by and large of a *de lege ferenda* nature in that it develops a model that is arguably clear, predictable, and balanced in light of contemporary realities, yet has no firm basis *de lege lata*. As Milanovic himself recognises, the development of such an alternative model is primarily grounded in concerns for the effectiveness of international human rights law.⁴⁷ Looking specifically at the ECHR, he even recognises that the implementation of his preferred model "would require a radical rethink of Strasbourg's approach, and to a lesser extent also that of other human rights bodies".⁴⁸ In the context of human rights accountability in multi-actor regimes, Vandenbogaerde in a similar vein sets out to develop a model of shared accountability in international human rights law, and in doing so, he likewise relies on a functionalist approach that is largely based in considerations *de lege ferenda*.⁴⁹ In introducing his quest, he thus articulates that

"from [...] observations or empirical reality, we fully concur with others that international human rights law will be marginalized even further *if it is not adapted to our independent world*. The problem statement of this book is that human rights law will lose its legitimacy as a corrective to power. This is considered worrying because already today human rights law is marginalized [...]. *The challenge is to make human rights law and its accountability mechanisms compatible with reality*. [...] The goal of this book is to [...] [explore] *the possible contours and viability of a multi-duty-bearer accountability framework in the field of ESC rights*."⁵⁰

Similar to the aforementioned contributions, his work is hence geared towards enhancing international human rights law's effectiveness as a system that corrects the exercise of power.⁵¹ By identifying 'building blocks' for a multi-duty-bearer accountability framework, it transcends mere descriptive reflection on international human rights law's state of the art in order to explore how the system of international human rights law can be adapted to contemporary realities.⁵²

46 Milanovic, 2011, p. 263.

47 Milanovic, 2011, p. 210.

48 Milanovic, 2011, p. 211.

49 Vandenbogaerde, 2016.

50 Vandenbogaerde, 2016, p. 16 (emphasis added).

51 And, arguably, towards enhancing its legitimacy, although this book has maintained a somewhat different view by arguing that simply adapting the human rights law system to contemporary realities does not necessarily solve its legitimacy problems.

52 Vandenbogaerde, 2016, p. 300.

On the other hand, examples of reformist scholarly work exploring the relationship between international human rights law and various developments that in this book have been labelled as developments of ‘crimmigration’ include the contributions of amongst others Kesby (on prisoners’ human rights) and Dembour (on migrants’ human rights).⁵³ Kesby’s work is somewhat implicit reformist in nature, in that it does not set out an agenda for reform as such but rather highlights, in the context of prisoner disenfranchisement, that international human rights law’s efficacy in questioning disenfranchisement has only been a partial victory.⁵⁴ Thus, her work incorporates clear normative reflections as to the position of international human rights law in contemporary confinement contexts:

“international human rights law and domestic human rights principles serve as a break but not a bar on exclusion from the rights of citizenship on the grounds of deviancy. The ‘political equality’ of some prisoners remains tenuous, their membership of the political community uncertain. Imprisonment may no longer automatically signify exclusion from the political community, and yet exclusion persists, resurfacing within the body of serving prisoners.”⁵⁵

As she by extension outlines, international human rights law’s approach reveals that imprisonment alone cannot justify disenfranchisement, yet “the equality of citizenship is forgone if disenfranchisement is considered to be a proportionate measure”, which is deemed normatively unjustifiable at least from an Arendtian perspective.⁵⁶

By comparison, in the context of immigration detention and of migration more generally, Dembour reflects on the human rights protection of migrants by comparing case law from the ECtHR with that of the IACtHR, based on the observation that contemporary policies and practices are at odds with the protection of migrants as individuals with inherent human rights entitlements.⁵⁷ As she observes throughout her book, “it has always been and continues to be extremely difficult – indeed too difficult – for migrants to have violations of their human rights recognized and denounced by the European Court of Human Rights”, whereas the IACtHR “seems far more inclined to push for the recognition of migrants’ rights”.⁵⁸ These considerations align with the reconceptualisation of human rights as a multi-dimensional concept as set forth in the present book, which is not surprising given that the Brahma-faced model presented in chapter 8 was heavily inspired by Dembour’s previ-

53 Dembour, 2015; Dembour & Kelly, 2011; Kesby, 2012, pp. 67–91.

54 Kesby, 2012, p. 77.

55 Kesby, 2012, p. 77.

56 Kesby, 2012, p. 90.

57 Dembour, 2015; Dembour & Kelly, 2011.

58 Dembour, 2015, p. 1.

ous work.⁵⁹ However, on the basis of these descriptive conclusions, Dembour consequently takes a strong normative turn by arguing that the approach taken by the ECtHR – which, in chapter 4 of this book, has been presented as an attempt to balance the interests of veracity and resilience – is “tamed” and that the ECtHR consequently does not locate “the tipping point in law between suffering which is considered legitimate and suffering which is considered illegitimate” early enough.⁶⁰ The ECtHR’s case law, in which a variety of legitimate interferences with human rights entitlements including those of migrants have been accepted, is thus argued to be problematic and out-of-sync with contemporary realities. As Dembour maintains, this holds not only true for the way in which the ECtHR has dealt with the substance of the Convention, but also for procedural barriers that migrants may encounter in lodging human rights proceedings. On this basis, she argues that the ECtHR has to change its case law as well as its procedures.⁶¹ Even more so, Dembour concludes that the ECtHR’s approach as it currently stands “appears comfortable with disregarding the demands of human rights ethics – so much so that it even condones rightlessness – the very antithesis to human rights”.⁶² What is particularly interesting for present purposes is that she thus presents the approach taken by the ECtHR as the antithesis of human rights protection, whilst she simultaneously continues to rely on the international human rights law system in pursuing reformist endeavours rather than on human rights protection through other, concurrent human rights dimensions. In the European context, the *lex lata* is thus combatted with the *lex ferenda*, paradoxically to a certain extent by relying on the *lex lata* as applicable in the context of the IACtHR. In other words, notwithstanding profound and pervasive criticism of the European system, answers to the identified normative problems are being sought *within* the system, relying unabatedly at the potential for internal reform, rather than on the *outside*, relying on other vernacularisation mechanisms or human rights tools to foster migrants’ human rights protection.

In addition to these examples of scholarship at the intersection of international human rights law on the one hand and commodification or crimmigration on the other, some authors have begun to explore the overlap between all three of these concepts. For instance, some have focused in their analytical work on the relationship between international human rights law on the one hand and the effectuation of crimmigration mechanisms through commodification practices on the other.⁶³

⁵⁹ Dembour, 2006, 2010. See also Van Berlo, 2017b.

⁶⁰ Dembour, 2015, p. 503.

⁶¹ Dembour, 2015, pp. 505–508.

⁶² Dembour, 2015, p. 511.

⁶³ For example, in the context of the EU, the human rights implications of effectuating crimmigration rationales through nodal governance networks have – albeit often implicitly – been examined by amongst others Gkliati, 2018; Liguori, 2019; Oudejans et al., 2018; Pijnenburg, 2018. In addition, in the US context, the way in which human rights entitlements are

Some of these efforts, regarded as hegemonic responses to the human rights impasse identified in this book, were already briefly reflected upon at the beginning of chapter 8. These strands of scholarship are based on a genuine belief that the answers to the impasse are to be found *within* the system of international human rights law itself, and that such impasse can ultimately be overcome by amending and/or expanding the system's scope, rationale, and/or operation. First, it should be reiterated that these attempts are laudable in the sense that they place human rights norms front and centre and have the system's protection value at heart. Furthermore, no criticism of such endeavours can reasonably be based on the observation that authors pursue reformist agendas as such: one of the key elements of academic scholarship is that it does not only describe existing complexities but that it also contributes to future alignment on the basis of normative choices. Still, as was also highlighted in chapter 8, these efforts are not always satisfactory as they may have a counter-effective influence on human rights protection and may jeopardise the larger human rights project. For instance, various scholars have denoted risks associated with the continuous expansion of the human rights catalogue, pointing for instance to the fact that such expansion leaves states with a wide discretion to apply cherry-picking strategies when engaging in human rights protection and to justify state policies and practices more generally.⁶⁴ More pressingly, reformist approaches do not always seem to take into account that international human rights law cannot bend beyond its breaking point. Indeed, on the basis of international human rights law's veracity to its fundamental tenets and resilience in the face of contemporary realities, even under the most innovative approaches – being tailored to present-day circumstances – a certain leeway continues to exist for state actors to deflect responsibility and to interfere with particular entitlements. Put differently, unless one is prepared to say that *all* actors have human rights obligations vis-à-vis *all* individuals, therewith doing away with the fundamental tenets of territorial states as duty bearers, and that no interferences with human rights entitlements can *ever* be justified, threshold criteria will continue to govern the system of international human rights law, allowing states to – either deliberately or accidentally – refrain from meeting the relevant criteria and to consequently evade responsibility in relation to certain individuals. Through nodal governance arrangements, for instance, states have significant opportunities to increasingly distance themselves from potential rights violations, therewith impeding effective assessment of, e.g., effective and overall control over territory or person or, for that matter, any similar criterion. Likewise, through crimmigration measures such as an enhanced reliance on confinement, a certain depletion

gradually depleted through the operation of crimmigration rationales in private prison facilities specifically has been examined by *inter alia* Brewer & Heitzeg, 2008a; Witherspoon, 2007.

64 Hafner-Burton & Tsutsui, 2007, p. 414; Koskeniemi, 2011, p. 134; Posner, 2014a, 2014c.

of rights can be justified as long as the relevant proportionality thresholds are met. Again, unless one is prepared to give up on the existence of these thresholds – which, as outlined in chapters 2 and 3, would not only distort the balance between veracity and resilience but would also run the risk of eroding the system's legitimacy as a whole – the international human rights law system cannot be modelled in such a way that it will inevitably prevail in the ongoing cat-and-mouse game in the long run.

Notwithstanding the commendable commitment of the aforementioned contributions, it is therefore important to maintain a vigilant and reserved stance in light of the international human rights law system's legitimacy that appears to be at stake. It is, indeed, of crucial importance that the system maintains its integrity by continuously keeping in mind the needs to be both resilient and veracious – being too resilient to the detriment of veracity, just like being too veracious to the detriment of resilience, runs the risk of distorting the system's legitimacy overall. International human rights law in this sense cannot be moulded, in a chameleon-like fashion, in accordance with demands arising from social reality without due regard to its fundamental tenets. It is a powerful yardstick, but one that comes with a principled basis and that has been shaped in accordance with certain key conceptions of what it is supposed to regulate. It can, and should, therefore not be used to solve all ills of this world: to do so would mean that the system's legitimacy is eroded from within. Rather, it has to tread a fine line in order to not lose its legitimacy on account of being either too veracious or too resilient.

This is, however, not always an easy task as the case law of the ECtHR as examined in chapter 7 has illustrated. Indeed, the search for protection has led the ECtHR's case law on extraterritorial jurisdiction to be characterised by a number of complexities and apparent paradoxes. Whereas the ECtHR has purportedly outlined two distinct models of extraterritorial jurisdiction, chapter 7 has addressed six complexities that have arisen as a result of the Court's case law and that cast doubt on the coherency and clarity of its approach. In fact, these complexities add to the more general criticism that, in a number of cases clearly involving questions of extraterritorial application, the ECtHR did not even raise the question of jurisdiction *at all*.⁶⁵ Whether looking at the seemingly inconsistent approach taken in the Cyprus cases, the ambiguous standards used in cases of extraterritorial military detention, the arguably obscure application of the 'public powers' criterion in notably *Banković* and *Al Skeini*, or the seemingly conflated use of tests of attribution and jurisdiction, what these complexities show is that the Court has had significant difficulties to draw a firm and consistent line delineating the Convention's scope of application in cases where states operate at the fringes of the applicable tests of effective and/or overall control as developed under the spatial and personal

65 Den Heijer, 2011, pp. 47–49.

models of extraterritorial jurisdiction. This goes to show that even the ECtHR, interpreting the Convention as a living instrument, has had significant difficulties in reconciling its case law on extraterritorial jurisdiction with a coherent, consistent, and principled approach, taking into account both the need to be veracious to the Convention's fundamental tenets and the need to be resilient in the face of contemporary challenges.

International human rights law hence allows for normative reflection and steering, but *within bounds*. These bounds, in turn, are set by the fundamental tenets underlying the international human rights law system. This means that the system allows for resilience on the basis of normative argumentation, but that such resilience can at the same time not transgress the boundaries that veracity dictates. In this sense, international human rights law ultimately allows for manoeuvring that can best be classified as 'limited resilience': it may continue to be a living doctrine, but cannot bend beyond its breaking points as set by the fundamental tenets.

Therefore, international human rights law should, in order to remain legitimate, *always* be developed in accordance with a principled, nearly organic approach – whether it concerns accepted interferences, the development of private obligations, the interpretation of attribution rules as developed under public international law, or the development of extraterritorial jurisdiction models. In relation to private human rights obligations, this for instance means that whilst endeavours to provide for such obligations are laudable, it is as a matter of principle important to maintain an appropriately reserved stance until a firm, binding legal basis for responsibility has been organically articulated. Whilst international developments towards such binding obligations are in full swing, the system is not there yet and private obligations are, consequently, as of yet not part of the catalogue of binding international human rights norms.⁶⁶ This does not mean that one cannot address private actors' social and/or corporate responsibilities and their voluntarily adopted standards of human rights, but in doing so one should be reluctant to rely on arguments that private parties should obey such standards *as a matter of binding international human rights law*. Throughout, the difference between the *lex lata* and the *lex ferenda* should hence be emphasised and should be front and centre to any substantial consideration. This also requires, for example, clear acknowledgment that *Drittwirkung*, or horizontal application of human rights norms, essentially concerns obligations of *states* rather than or private actors: the fact that states can be held responsible for failing to uphold their positive obligations should not be misinterpreted to mean that private actors suddenly have become human rights duty bearers as a matter of public international law.⁶⁷

66 See, on the zero draft of the 'Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises', footnote 46 of chapter 5 and accompanying text.

67 See, for the exception of the CFREU, section 5.3. of chapter 5.

At the same time, one may rely on the multidimensional framework of human rights as set out in chapter 8 of this book to pursue human rights protection even in areas that may not fall within the protection purview of international human rights law. In using this framework, as this book has shown, one does not necessarily have to abide by the fundamental tenets that constrain the operation of international human rights law, therewith opening up a broad potential for protection through the synergistic use of dimension-specific consciousnesses, vernacularisation mechanisms, and tools. It is this multidimensional, Brahma-faced conceptualisation of human rights, and its meaning for the 'human rights elephant', that this chapter will now turn to in providing some final reflections.

10.4.4 Final notes on the 'human rights elephant'

This chapter began with recounting the parable of the Blind Men and the Elephant. It tells a story of how different people, having explored different parts of the same phenomenon, may hold completely different and even opposing views as to its nature, structure, and substance. None of them is strictly speaking *wrong*, as they each truthfully explain the parts that they explored, yet each is ultimately *incomplete* as none grasps the bigger picture.

This parable seems to serve appropriate metaphorical purposes in the context of what this book has labelled the 'human rights elephant'. Indeed, this book has been structured in accordance with an elephant metaphor to describe various relevant aspects of human rights protection in the face of contemporary globalisation developments. Parallels have been drawn throughout this book between elephants and human rights, pointing out that both are endangered species as a result of contemporary globalisation developments, that both face significant challenges when deprived of their primary assets for protection, and that both may follow alternative 'desire paths' to ultimately reach their destinations. As Part III of this book has furthermore pointed out, the human rights elephant is necessarily a holistic entity that comprises various dimensions and allows for multiple desire paths to be followed simultaneously. This, in turn, closely connects to the parable recited above: whilst various disciplines, amongst which most prominently that of legal scholarship, have explored human rights, they often have only explored *parts* of the more holistic, multi-dimensional entity without due regard for – and on many occasions even without recognising the existence of – the larger phenomenon. Whereas lawyers may hence, for example, have focused on the human rights elephant's *tusks* as its primary protection mechanism, their focus on the problematic implications of depriving the human rights elephant of its tusks for human rights protection has neglected the fact that the human rights elephant may also act as a protector through *other* means, for instance through the use of its trunk, legs, or intelligent decision making, and therefore does not die per

se. More specifically, this means that even where international human rights law as a protection mechanism is bound to meet its limits, protection may – albeit not necessarily – still flow from other, concurrent dimensions. Furthermore, in Part III it has been argued that such protection is typically complex and may involve the combined use of dimension-specific consciousnesses, vernacularisation mechanisms, and tools.

Hence, even where human rights *law* is regarded as the tusks of the human rights elephant, being frequently regarded as its most sublime and powerful protection mechanism, it is not necessarily justified to regard the deprivation of human rights elephants' tusks as 'the end' of human rights protection as such.⁶⁸ One should not close the eyes, akin to the blind men exploring the mythical elephant, for the other parts of the human rights elephant from which protection may flow. This book therefore finishes with a call for human rights scholars from all disciplinary backgrounds, but in particular for legal scholars, not to be blind to the bigger picture that the human rights elephant constitutes. Human rights are much more majestic than legal conceptions may suggest, just like elephants are much more majestic than the individual descriptions of the blind men in the parable led to believe. Human rights protection, furthermore, may be many-fold, and it seems that we are only at the beginning of holistically exploring the full potential that can be achieved through the proper and genuine nurturing of human rights elephants.

This book has engaged with various strands of scholarship in order to explore the core of human rights protection. Whilst the triangular interplay between commodification, crimmigration, and human rights protection appears typically complex and intricate – each consists of a myriad of processes that operate synergistically in unique ways on glocal levels – in the end, what transpires is a message of hope that arises from human rights understood as being neither squarely within the legal purview, nor squarely a myth based on moral conceptions. Akin to a popular saying about elephants, it is proposed that human rights elephants *never forget*. Specifically, they never forget those that they protect: at their core they continue to hold hope for all as the core promise that they are constituted upon. They continue to be present, for those that direly need them, although they are not always as visible or as tangible as one would hope or require them to be. At times they appear to be lost, especially in the face of seemingly insurmountable challenges, yet in reality they continue to underly social interaction in a myriad of ways. They provide hope, guidance, ideals, and a way to express precisely that what is lacking in various contemporary realities. In doing so they develop organically to ward off challenges and to secure their continued existence, for instance by develop-

68 Compare Douzinas, 2000; Hopgood, 2013; Wacks, 1994. See also Lettinga & Van Troost, 2014.

ing into tuskless entities,⁶⁹ and they use innovative novel desire paths, or *olifantenpaadjies*, in attempts to achieve their goals.

Admittedly, there is always a risk that human rights are misused with improper motives, and it is therefore key to remain vigilant. Even elephants can be trained to be malevolent or submissive to improper causes. In this sense, the multidimensional understanding of human rights does not only give rise to hope but also to concern, as human rights elephants may be tamed in such a way that their vernacularisation potential and/or instrumental value is dimmed or, even, that they are used as part of alienation strategies that lead to the exact opposite of the ideals underlying the human rights idea. Observers should thus continuously remember that human rights can be instruments of protection as much as they can be instruments of repression.

Ultimately, the future of human rights as a protection mechanism does not depend solely on the progressive responsabilisation of power bearers, nor on the ongoing expansion of the human rights catalogue or on the reduction of accepted interferences, but on a genuine belief that human rights *matter*. Indeed, whenever the importance of the human rights promise grounded in human dignity and equality is accepted and internalised through strong and unwavering human rights consciousnesses, such consciousnesses may potentially be vernacularised through a variety of mechanisms and tools to the detriment of strategies pursuing human rights alienation.⁷⁰ In this sense, this conclusion slightly differs from the quote by Agatha Christie with which she finished her novel *Elephants can Remember*: “[e]lephants can remember, but we are human beings and mercifully human beings can forget.”⁷¹ Instead, humanity is called upon *not* to forget, but rather to continuously confirm and ingrain in collective consciousness, the idea that human rights as standards of human dignity and equality are a vital part of modern societies and that they, ultimately, *matter*. Whilst human rights elephants never forget their

69 Compare Raubenheimer & Miniggio, 2016.

70 As such, there is a marked difference between the distinct *empirical* relevance of the proposed multidimensional understanding of human rights, and the *normative* nature of the human rights promise. The former deals with the way in which human rights are used, or misused, whereas the latter concerns a moral pledge based in justice and human dignity. Here, the assumption is hence that the human rights ideal at its core strives towards the morally ‘good’, defined from a human dignity perspective, yet that in the empirical world human rights may be understood in different ways and may be (mis)used for a wide variety of purposes and with varying levels of success. In this sense, human rights processes may be ‘hijacked’ in practice for the benefit of particular agendas, yet this does not necessarily distract from the normative power of the human rights promise. The empirical use of human rights based on a normative understanding that human rights – as standards of human dignity – truly *matter* consequently appears to be the key to success, although such success still depends on the extent to which particular vernacularisation mechanisms and instruments can effectively be utilised. In sum, the normative promise of human rights may function as a catalyst of empirical protection where such promise, in its purest form, is able to capture one’s mind and heart.

71 A. Christie, 1973.

promise, they indeed need human support in order to be continuously re-affirmed, upheld, and fought for. That is not to say that an unwavering human rights consciousness *will* necessarily result in local change and steadfast guarantees, as analysis of RPC Nauru has illustrated, but it is a first and crucial step towards durable human rights protection.

“Legend suggests that when elephants instinctively know their time on this earth is coming to an end, they begin their final migration to a place known as an elephant’s graveyard. Here, among the dry bones, the elephants lie down, breathe their last breaths, and die”.⁷² Different from the legendary perception of elephants’ final days at so-called ‘elephant graveyards’, it seems appropriate to conclude that human rights elephants do not direct themselves to a quiet and lonely spot where they can die in solitude, away from the social group in which they once played central roles. As analysis indeed shows, human rights continue to reinvigorate themselves, through a myriad of pathways towards protection. Where they encounter difficulties, they continuously seek to find existing, or create novel, desire paths around them. Their protection constitutes, in this sense, an endeavour that continuously needs to be negotiated in the face of uphill challenges – challenges that, quite paradoxically, reinforce the ultimate existential legitimacy of the human rights cause. Yet they are, also, a *hopeful* endeavour, as even the most uphill battles allow for some room for volition based on a genuine human rights consciousness.

In the end, the human rights elephant may not be able to look everyone in need of its protection straight in the eyes, as at times its endeavours may be too little, too late. Even the strongest elephant may succumb in the face of the most volatile forces that attempt to poach its pristine assets. Still, elephants never forget: even when considered deprived of their strongest asset, their tusks, they continuously remember, hold hope for, and seek alternative ways to shelter, those that they have vouched to protect. In seeking to understand this unconditional loyalty, one at the same time cannot ignore that elephants are at times captured, conditionalized in particular social settings, and employed by others for self-centred reasons that do not only clash with, but also mute, elephants’ sense of loyalty. Indeed, as mentioned above, human rights elephants may be coached into malevolence or submission. Alas, *in extremis*, elephants can be used in the most advanced pursuit of cruelty, as historic antecedents of the use of elephants in warfare attest.⁷³ None of these illicit uses should distract, however, from the inalienable values that are entrenched in human rights elephants: faith in what is just, hope for the future, and unconditional love for those that they protect.

For human rights elephants in their natural and non-domesticated capacity, far away from potential misuse or malevolent nurturing, it is indeed always, and has always been, about these unconditional values. Whilst human rights’

⁷² Stadtmiller, 2014, p. 185.

⁷³ Kistler, 2007.

level of endurance remains to be tested, and their ultimate destiny remains unknown, their holistic and full-fledged potential has not nearly enough been scrutinised both normatively and empirically in order to herald the end of human rights. Let this book be an incentive for further empirical analysis of, and reflection on, the multidimensional power of human rights as a normative prospect. Let it, furthermore, be a clear call for a strong belief in the idea that human rights matter, or *should* matter. Indeed, in nearly biblical terms, the trumpeting of human rights elephants resembles religious litany that has a true potential of capturing people's minds and hearts – as for the human rights elephant it are faith, hope, and love that remain, but the greatest of these is love.

Summary

HUMAN RIGHTS ELEPHANTS IN AN ERA OF GLOBALISATION

Commodification, crimmigration, and human rights in confinement

This book examines the relevance of human rights as a protection framework in contexts of confinement that are characterised by the globalisation trends of 'commodification' and 'crimmigration'. It does so, *inter alia*, by metaphorically discussing human rights as elephants: like elephants, human rights are considered to be amongst the most impressive and majestic entities of their kind. Like elephants, they may be regarded as larger than life. Like elephants, however, they also may become endangered in times of globalisation. The core focus of this research is hence the viability of human rights – as a grand framework of protection – in an era of globalisation in which their relevance is seemingly challenged if not seriously endangered.

The point of departure of this research is that we live in an era of globalisation, meaning amongst others that economic and social interaction is increasingly international in character and involves an ever-expanding number of actors both at home and abroad. These actors interact in a plethora of novel ways, which can also be recognised in the shift from 'government' to governance'. Whilst globalisation consists of a variety of heterogeneous developments, and often plays out very dissimilarly in different localities as a result of highly contextualised conditions and circumstances, it generally imperils the future of human rights protection as it unsettles existing structures of social interaction and conventional governance on which human rights – at least in their capacity as law – are premised. In order to explore such implications, this book focuses on the 'glocal' level in order to recognise the heterogeneity and diversity of globalisation trends. Accordingly, the book examines globalisation trends and their impact on human rights protection both on a macro level and at the level of specific case studies. It does so pursuant to the following main research question:

To what extent can human rights as a protection framework remain of relevance in contexts of confinement that are characterised by the globalisation trends of 'commodification' and 'crimmigration'?

Two case studies have been selected for the present research. The first case study concerns the Regional Processing Centre Nauru ('RPC Nauru'), an Australian-Nauruan immigration detention centre that operates within Australia's 'Operation Sovereign Borders' ('OSB') deterrence policy framework. The framework operates under the promise that no one seeking to enter Australia irregularly by boat will ever be resettled in Australia and has been accompanied by a public campaign with the slogan '*No way, they will not make Australia home*'. As part of OSB, all irregular boat arrivals are transferred to offshore processing facilities on Nauru or in Papua New-Guinea, where asylum claims are processed by the local authorities. These practices have, as a result of various controversies, been subjected to significant criticism and concern for human rights protection.

The second case study brings the reader to the European continent. It concerns the prison facility of Norgerhaven ('PI Norgerhaven'), a former Norwegian-Dutch prison located in the Netherlands. In 2015, the Norwegian and Dutch governments concluded an agreement for the lease of PI Norgerhaven to Norway for a three-year period, allowing the Dutch government to preserve jobs in the prison system whilst providing the Norwegian authorities with additional prison capacity. This prison lease construction was based on previous experience with penal cooperation between Belgium and the Netherlands. The Norwegian-Dutch cooperation ended in August 2018. This type of far-reaching cooperation is ostensibly unique and Norway, Belgium, and the Netherlands have accordingly been applauded for their innovative and pragmatic collaboration in the area of criminal justice.

This book deals with the human rights stories of these two environments of confinement. At the same time, it tells a broader story about human rights protection in an era of globalisation, therewith attempting to inform a plethora of alternative case studies that could be pursued in the future. In essence, what it attempts to do is to deal with macro level trends *and* to examine local implementations, therewith continuously analysing what macro level trends mean for human rights protection at the local level and *vice versa*. This, in turn, allows for more general reflection on the future of human rights protection, both within and beyond the case study contexts that are central to this book. Accordingly, each chapter of this book uses a 'funnel' approach in terms of its set-up: the chapters of Part I and Part II first examine trends on a macro level and consequently study what these developments imply for the case studies, thereby continuously narrowing down the scope of study. In turn, in the conclusion of each chapter the implications at the 'glocal' level are addressed. Part III uses a similar structure, although in this particular Part analysis of the macro level (chapter 8) and micro level (chapter 9) have been separated into two different chapters.

PART I – THE ELEPHANT IN THE ROOM

Part I examines the extent to which commodification and crimmigration challenge human rights' protection value. This Part 'sets the scene' by addressing the juxtaposed globalisation developments of commodification and crimmigration and by examining the ways in which these developments may challenge accountability under, and the effectiveness and legitimacy of, international human rights law. The focus in this Part – and, for that matter, in the next Part – is on international human rights qua *law*, as opposed to other conceptualisations of human rights, given that international human rights law is generally regarded as the hegemonic articulation of human rights and accordingly dominates human rights thinking and theorising.

Chapter 2 deals with commodification, which as a term is embedded within theories of nodal governance and anchored pluralism. Although these theoretical notions are frequently presented as alternatives, chapter 2 proposes to unify them by conceptualising commodification as 'state-directed nodal governance' or 'anchoring nodes': although many actors with their own mentalities, technologies, resources, and institutional structures are involved in governance, the boundaries within which they are able to legitimately roam is, or should be, set and supervised by the state through binding regulations, guidelines, and monitoring. In turn, chapter 2 tracks macro-level trends of commodification in confinement, focusing on two trends of commodification specifically: privatisation and offshoring. As the chapter shows, privatisation is a widespread practice across the globe, with both prisons and immigration detention facilities being subjected to a variety of privatisation regimes. The practice of offshoring, which is taken to mean the relocation or 'extra-territorialisation' of those confined to the territory of a third State, has been less wide-spread, yet it has happened on a number of occasions both in the realm of penal confinement and in the sphere of immigration-related confinement. RPC Nauru and PI Norgerhaven are examples of offshore confinement, whereas RPC Nauru is, in addition, an example of privatisation. As analysis of these facilities on the basis of nodal governance theories shows, both are characterised by more or less intricate and evolving networks of governance.

The chapter subsequently discusses how commodification may challenge accountability under, as well as the effectiveness and legitimacy of, international human rights law. It does so by elaborating upon the first fundamental tenet of international human rights law: that human rights are, indeed, *rights* with legal obligations and corresponding duty bearers. These obligations are conditioned by two premises that underly the classic conception of international human rights law: that international human rights law in principle only binds *states*, and that it binds states vis-à-vis individuals *within their jurisdiction*, which in turn generally refers to states' territory as their primary realm of power. As the final part of chapter 2 consequently highlights, when contrasting this tenet with glocal realities of commodification, friction between

commodified confinement and human rights law protection becomes discernible. This challenges, first, accountability under international human rights law, as there seems to be a discrepancy between *de jure* duty bearers and *de facto* power bearers. Moreover, accountability may be obscured in situations where it is difficult to discern exactly which actor performed what act in a nodal governance network. Given that international human rights law is a system of accountability, commodification consequently automatically challenges the system's effectiveness as a whole. This, in turn, leads to a challenge to international human rights law's legitimacy: given the threat to its effectiveness as an accountability mechanism, international human rights law has to adapt itself to contemporary commodification realities, as not to do so would mean that it runs the risk of encountering a *legitimacy deficit*. At the same time, if international human rights law adapts too much to contemporary realities, it runs the risk of rendering the legal system *illegitimate* and/or *delegitimised*. A fine balance is hence needed between accommodating commodification developments on the one hand and honouring international human rights law's underlying tenets on the other.

Chapter 3 deals with crimmigration. It mirrors, in terms of its structure, the previous chapter. The chapter starts off by questioning the way in which 'crimmigration' has been defined and embedded in the literature and by reconceptualising the concept to be an encompassing notion, grounded in membership theory, by which a myriad of developments incorporating the criminalisation-of-immigration and/or the immigrationisation-of-criminality are captured. Thus, both crime control and immigration control offer tools – including confinement – to control, contain, and ultimately expulse potentially threatening populations from society and to consequently enforce novel understandings of membership, albeit to varying extents. Since, as a result of globalisation, novel conceptions of membership do not run neatly along lines of formal citizenship, states increasingly – and in an ad hoc fashion – rely on a range of such processes to effectuate these novel categories of belonging. In these processes, criminality is grafted onto immigrants – the criminalisation-of-immigrants – whilst criminal sanctions increasingly result in the alienation, segregation, and banishment of convicts – the immigrationisation-of-criminals. Indeed, the chapter shows that immigration detention increasingly incorporates elements of punishment and condemnation, whereas prisons increasingly segregate and at times are even aimed at the expulsion of alleged non-belonging populations from the polity. The latter development includes processes of 'bordered penalty', which means that an altogether distinct penal system guided by an immigration control rationale has developed parallel to the traditional penal system. It does not *only* include such 'bordered penalty' processes, however, but also involves more subtle processes of banishment and alienation. This concerns the extent to which prisons increasingly function to banish sub-citizens, who are included in formal conceptions of membership yet excluded from novel conceptions of membership, both physically, political-

ly, socially, and symbolically from society. Examples include dangerous and serious offenders, poor offenders, and offenders of particular criminal acts, having in common that they may to varying extents be villainised and that their membership status may accordingly be deduced to that of sub-citizens. Furthermore, in the realm of confinement, crimmigration is frequently intimately linked with commodification, as it in some instances constitutes commodification's fuel, *modus operandi*, and/or collateral damage. As the chapter identifies, crimmigration is at play both in RPC Nauru and in PI Norgerhaven, although in completely different ways and with different implications. Crimmigration is both an explicit feature of RPC Nauru – including the use of military border patrols and prison-like, punitive facilities – as well as an implicit feature of the facility – including the use of crimmigration discourse. In PI Norgerhaven, on the other hand, crimmigration appears to be a collateral consequence of the particular nodal arrangements in place.

In turn, chapter 3 addresses how crimmigration may challenge accountability under, as well as the effectiveness and legitimacy of, international human rights law. It first elaborates upon the second fundamental tenet of international human rights law: that human rights revolve around *humanity*, that is to say, that they purport to provide protection to all human beings as equal individuals based on a shared level of human dignity. This fundamental tenet appears to be at odds with contemporary developments of crimmigration. Crimmigration indeed challenges, first, accountability under international human rights law, as the rights of populations that are deemed non-belonging may be gradually depleted and such populations may face difficulties in holding duty-bearers accountable. In turn, where the human rights entitlements of out-grouped populations are progressively limited, and where *de jure* duty-bearers cannot be held answerable *de facto*, international human rights law loses much of its effectiveness as a protection mechanism. This also has implications for the legitimacy of international human rights law: where international human rights law traverses the continuously restructured categories of membership, international human rights law could be progressively *delegitimised*. On the other hand, allowing states to structurally extend protection only to particular categories of humans, on the basis of a mixed use of zoepolitical and biopolitical approaches, could lead to a *legitimacy deficit*. Again, international human rights law should hence be developed with great care and rigour in order to live up to its fundamental tenets whilst at the same time taking contemporary realities into account, amounting to a delicate process overall.

PART II – THE TUSKLESS ELEPHANT

Part II of the book looks at how human rights law deals with the challenges posed by globalisation. Informed by the previous Part, it elaborates upon the

legal framework by examining the 'law in books' in light of crimmigration and commodification developments. It does so, specifically, by focusing on the need for international human rights law to be both *resilient* in the face of contemporary globalisation challenges, and *veracious* to its underlying fundamental tenets. As becomes apparent, international human rights law has to some extent been able to show resilience in the face of crimmigration and commodification, but ultimately its veracity to the underlying fundamental tenets obstructs it from doing so structurally in a coherent and full-fledged manner.

Chapter 4 addresses the 'Janus face' of international human rights law: on the basis of the two fundamental tenets as addressed in chapters 2 and 3, international human rights law resembles a Janus face as it is faced towards both law and morality. It is thus both based on normative ideals of universal and inalienable human dignity, and on the characteristics of positive law, incorporating both elements of what has been labelled human rights' *'sollen'* and *'sein'*. This again highlights the significance of the legitimacy challenges that international human rights law faces in times of globalisation: accommodating challenges in a way that takes into account both the ultimate goals of equal and universal protection, *and* the limitations and particularities of human rights' embeddedness in positive law, is anything but a sinecure.

The remainder of chapter 4 addresses crimmigration specifically, looking at how selected international human rights law treaties have accounted for crimmigration. It does so, in particular, by examining the extent to which limitations to human rights protection for particular groups of individuals have been accommodated for and how this relates to the promise of equal protection. As the chapter shows, international human rights law – relying on its positivist doctrinal nature – has allowed states to place certain limitations on the enjoyment of some supposedly universal and equal rights. Of prime importance, it has acknowledged that some rights of certain populations, including those of confined sub-citizens or non-citizens, may be interfered with by states as part of their sovereign prerogative. Addressing the right to liberty, the prohibition of forced or compulsory labour, the right to family life, and the right to vote, the chapter details how certain *civil* rights have been limited on the basis of the fact that individuals are *confined*, whereas some *political* rights have been limited based on the fact that individuals do not enjoy (full) *membership*.

The chapter subsequently discusses what this implies for the case study contexts, focussing on the right to liberty in RPC Nauru, and the right to family life in PI Norgerhaven. In relation to RPC Nauru, the chapter finds that confinement in RPC Nauru seems, in light of Article 9 of the International Covenant on Civil and Political Rights ('ICCPR'), to have amounted to arbitrary detention *before* the introduction of open centre arrangements. After such arrangements were introduced, however, it does not appear that the right to liberty of those confined in RPC Nauru ex Article 9 ICCPR was interfered with. In the context

of PI Norgerhaven, the chapter furthermore finds that the interference with inmates' right to family life is in accordance with Article 8 of the European Convention on Human Rights ('ECHR') and generally serves a legitimate aim. Whether it also amounts to a proportionate interference, however, depends on the weighing of a number of factors on an individual basis. Given the importance of this individual assessment, no generalisable conclusions can be drawn in relation to this condition. In any event, generally, both factors indicating proportionality, and contraindicating factors, exist, which may lead to different proportionality assessment at the individual level.

Consequently, the chapter concludes that international human rights law has, throughout its resilient efforts in the face of crimmigration developments, attempted to remain veracious to its fundamental tenet of equal protection. Still, at the global level, tensions between international human rights law and state practices in confinement persist. Accordingly, the challenge to international human rights law's legitimacy as posed by crimmigration appears to continue unabatedly and has not yet been adequately, holistically or systemically accounted for.

The remaining chapters of Part II focus on commodification. First, *chapter 5* discusses the way in which international human rights law has attempted to accommodate the involvement of private actors in governance realms. It elaborates upon a number of private human rights obligations, including soft law norms of international law, sector-specific guidelines and declarations, and voluntary codes of conduct. As the chapter at the same time highlights, international human rights law generally does not, at least not currently, give rise to *binding* obligations for private actors. In this sense, international human rights law has largely remained veracious to its fundamental tenet that human rights obligations are in principle obligations of the (territorial) state. Nevertheless, the soft law norms that have developed either as part of international legal initiatives, or as part of voluntary initiatives of the sector itself, signal a certain resilience in the face of privatisation developments. The UN's Guiding Principles on Business and Human Rights ('UNGPR') are a clear example in this regard. Another prime example is the zero draft of the *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises*, which comes closest to a binding regulation of private human rights obligations yet is far from completion.

Various scholars in turn rely on the doctrine of positive obligations, or *Drittwirkung*, to circumvent these limitations of international human rights law: positive obligations would in this sense constitute a panacea in that they would provide for an alternative and more effective pathway to effectuate human rights compliance. Whilst in practice this may solve a number of issues related to human rights protection, the horizontal effect of human rights is generally understood as being indirect, meaning that human rights norms can regulate the acts of private parties but that states ultimately remain responsible

for the violation. An important exception to this rule is the Charter of Fundamental Rights of the European Union ('CFREU'): as case law of the Court of Justice of the European Union ('CJEU') has clarified, the CFREU may apply directly in a horizontal dispute where such dispute is governed by EU law and where a provision of the CFREU suffices to confer a *right* on individuals which they may invoke as such. The CFREU therewith seems to be the exception to the norm: it appears to have been particularly – and exceptionally – resilient by allowing for the direct horizontal effect of a number of provisions. After addressing the implications of these considerations for the case study of RPC Nauru – PI Norgerhaven does not feature private actors and is therefore left out of consideration here – chapter 5 concludes that the expansion of instruments regulating private human rights obligations seems to be inspired first and foremost by the moral side of international human rights law's Janus-face, whilst the legal effectiveness of such instruments remains duly circumscribed.

Now that it has become clear that states remain the primary duty bearers under international human rights law, chapters 6 and 7 turns to state responsibility. As *chapter 6* outlines, state responsibility can be established in accordance with a two-pronged test: first, states should be held responsible for certain *conduct* (the question of international responsibility for wrongful acts), after which states should be held responsible for certain *obligations* (the question of the scope of application of states' human rights obligations). The former step is dealt with in chapter 6, whereas the latter is elaborated upon in chapter 7.

In outlining the responsibility of states for particular conduct, chapter 6 relies on the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* ('ILC Draft Articles'), which are generally regarded as authoritative rules of attribution. The chapter first discusses the relevant rules of attribution: attribution in cases concerning (i) conduct of organs of a state, (ii) conduct of persons or entities exercising elements of governmental authority, (iii) conduct of organs placed at the disposal of a state by another state, (iv) excess of authority or contravention of instructions, (v) conduct directed or controlled by a state, and (vi) conduct acknowledged and adopted by a state as its own. In addition, joint responsibility of multiple states at the same time is discussed, differentiating between cases (i) where the conduct of multiple states that act independently from one another results in an injury to a third party, (ii) where a joint act of two states engages the responsibility of both states involved, and (iii) where one state participates in the internationally wrongful act of another state ('derived responsibility'). After discussing these bases for establishing state responsibility for conduct, the chapter applies them to the case study contexts. On the basis of these analyses, the chapter concludes that the ILC Draft Articles frequently fail to provide a simple cure to the often intricate and complex governance networks that are entrenched in contemporary settings of confinement such as RPC Nauru. Still, in certain contexts that are characterised by higher levels of

transparency, such as PI Norgerhaven, they can be applied unabatedly. At the 'glocal' level, it henceforth transpires that the effectiveness of attribution ultimately depends on local particularities. The chapter in addition addresses positive obligations to argue that – contrary to what is sometimes implied in the literature – they may not be invoked in order to mitigate the rigid nature of the two-pronged test of international state responsibility. Instead, they operate, precisely, through the same two-pronged system.

Chapter 7 deals with the second step of international state responsibility: establishing responsibility for an international (human rights) obligation. Specifically, it looks at the concept of 'jurisdiction': most human rights treaties have a jurisdictional provision that determines in which instances state parties are bound to respect the human rights obligations contained therein. Whilst there is a presumption that obligations under international human rights law apply in the domestic sphere and do not extend beyond the state's sovereign territory, contemporary realities have necessitated international human rights law to develop exceptional bases for extraterritorial jurisdiction. To examine such jurisdictional applicability, the chapter looks at selected human rights instruments that have a particular relevance for the case study central to this research: ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention Against Torture (CAT), and the ECHR. It also includes, for purposes of comparison, analysis of the Organization of American States Charter system (OAS Charter system) and the Inter-American Convention on Human Rights (ACHR).

Analysis shows how these treaties have been developed with significant veracity to the fundamental tenet of territorial state responsibility: most treaties interpret and substantiate their jurisdictional scope of application by means of the notion of territoriality. Some of these treaty regimes have done so by explicitly referring to states' territories, whereas the jurisdictional scope of others have been interpreted in territorial terms. At the same time, in a resilient effort to accommodate contemporary realities of globalisation, the jurisdictional provisions of these treaties have over time been interpreted to also include, in exceptional circumstances, extraterritorial conduct of states. Most treaty regimes have developed a spatial model of extraterritorial jurisdiction (meaning that states' human rights obligations apply where they exercise effective and/or overall control over a foreign territory), and a personal model of extraterritorial jurisdiction (meaning that obligations apply where states exercise effective and/or overall control over a person abroad), although variations exist. Extraterritorial jurisdiction has been particularly well-developed in the context of the ECHR, although in this process several complexities have surfaced. Indeed, the relevant jurisprudence has been far from axiomatic and has at times been ambiguous and controversial, which arguably results from the needs to be both resilient and veracious. In subsequently applying the framework of extraterritorial jurisdiction to the case studies at hand, these complexities are further illustrated, at least where RPC Nauru is concerned. Indeed, as a result

of the lack of transparency, the nature of the nodal governance network involved, and the ingenuity and tactics employed by both states involved, the determination of extraterritorial jurisdiction on behalf of Australia is, at least in a general sense, problematic. The case study context of PI Norgerhaven, on the other hand, shows that holding Norway responsible for its obligations under the various human rights instruments is hardly problematic. Again, this indicates the crucial importance of the 'glocal level' in interpreting resilient and veracious efforts: such endeavours may take place most visibly on a macro level, that is, through monitoring bodies' interpretations, but ultimately play out in domestic contexts, where their congruence and effectiveness is largely determined.

A concise *intermezzo* concludes Part II of this book. It draws together Part II's findings in relation to the human rights implications of commodification for the case study contexts of RPC Nauru and PI Norgerhaven. The way in which international human rights law has shown resilience whilst staying veracious in the face of commodification developments may ultimately lead to human rights complexities for both case studies. Thus, whilst in the context of RPC Nauru such complexities arise from the *ambiguity* of control, in the context of PI Norgerhaven such complexities arise, quite paradoxically, from the *abundance* of control. That is to say, in the context of RPC Nauru, the exercise of control in the nodal governance network is too ambiguous to clearly establish international human rights law responsibility, leading to obvious problems of accountability. In the context of PI Norgerhaven, on the other hand, there seems to be an abundance of actors exercising control and bearing human rights responsibility, which at times paradoxically resulted in gaps of protection as both states rely on frameworks of mutual trust without embedded safeguards to rebut such trust in concrete circumstances. Looking at case law on mutual trust between EU member states by means of a comparison, the absence of rebuttable mutual trust indeed raises, from the perspective of positive obligations, a number of human rights issues that persist even in situations where control is abundant.

PART III – ELEPHANTS' DESIRE PATHS

Part III of the book deviates from a squarely legal perspective on human rights to engage in analysis of alternative routes that can be traversed in order for human rights protection to materialise. Specifically, taking the ensuing 'legal impasse' identified in Part II as a starting point, it inquires into the role of human rights 'in action' through a socio-empirical framework. It hence relies on the 'sociology of human rights' to argue that a novel analytical framework is needed to examine the relevance of human rights 'in action', and consequently comes up with such framework to holistically examine human rights protection both in settings of confinement and elsewhere. Human rights

protection, it is argued in this Part, resembles a four-headed Brahma rather than a two-faced Janus, with each of the four heads existing of multiple dimensions that together make up a plurality of protection processes and mechanisms.

Chapter 8 introduces and develops such argument. After highlighting that globalisation often results in a cat-and-mouse game, or rat-race, between states' policy practices and the international human rights law system, it takes a step back in order to reconsider the conceptualisation of human rights as a legal Janus-faced phenomenon. A paradigm shift is advocated for, shifting away from any predominant focus on legal dogmas towards a more holistic understanding of human rights. In doing so, the chapter first elaborates upon two mainstream responses from predominantly legal scholars to the clash between resilience and veracity. As the chapter points out, this clash results however in a legal impasse, in the context of which traditional responses – be it arguing for *more* or for *less* human rights law – are not necessarily beneficial in the long run.

In exploring an alternative response, the chapter initially draws on socio-legal notions of 'legal pluralism', 'legal consciousness', and 'legal alienation'. Whilst these notions are important fundaments for an alternative response, it is argued that they can only be *part* of the answer. The reason for this is that, as a result of the existence of multiple 'schools of thought', human rights have *four* instead of two faces. A modified variant of existing socio-legal frameworks is accordingly proposed: the chapter maintains that we should turn not to *legal* pluralism, consciousness, and alienation, but to *human rights* pluralism, consciousness, and alienation. Such an approach based on 'human rights pluralism' allows for a holistic understanding of human rights and opens new pathways towards exploring protection. That is to say, the existence of four human rights dimensions does not only mean that different understandings of human rights exist, but also that different ways of achieving them exist. This is highlighted by addressing the various human rights dimensions both as bases for human rights *consciousness* (or, alternatively, for human rights *alienation*), as *tools* to achieve human rights protection, and as mechanisms for *vernacularisation*, that is to say, as mechanisms to translate human rights consciousnesses into local realities. Moreover, the chapter outlines how the dimensions in their various roles may operate both independently and in synergy. Ultimately, this results in a multi-dimensional grid of protection that indicates the myriad of opportunities for human rights protection, yet also the manifold ways in which such protection may be undermined. The framework, in turn, should be understood in a synergistic sense; that is, the existence of distinct human rights dimensions should simultaneously be acknowledged and epistemologically questioned in order to assess the interaction and co-operation between different dimensions to produce a combined effect that is greater than the sum of their separate effects. The proposed approach accordingly allows for the assessment of human rights' durability to transcend the

insulated appraisal of the various separated dimensions, by approaching *each* of these dimensions from a holistic human rights perspective and by nuancing the analyses of each of these dimensions by regarding them, in light of one another, as autonomous yet co-dependent entities. In its final part, the chapter offers some methodological notes on how such novel pathways of inquiry may be analytically traversed.

In *chapter 9*, the holistic framework of human rights protection is applied to the context of RPC Nauru. Whilst the framework can be used in a number of ways, in this chapter it is applied with an actor-specific focus: the focus is on three ‘critical masses’ that, at least in theory, are expected both to have internalised particular human rights consciousnesses and to strive for their effective vernacularisation, as opposed to actors that may be presumed to pursue alienation strategies. These critical masses are (i) Australian lawyers and (quasi-judicial) monitoring bodies, (ii) welfare workers working (or having worked) in RPC Nauru, and (iii) institutionalised NGOs operating in the Australian political realm. Analysis here is based on document analysis and semi-structured interviews with 47 respondents, including both respondents that worked *in* offshore processing facilities and respondents that have fulfilled a number of roles *outside of* offshore processing facilities.

Whereas some vernacularisation mechanisms are, for a myriad of reasons, more ideally placed to command change, in practice, all mechanisms have a role to play in the vernacularisation of human rights consciousnesses and in fostering of human rights protection. Indeed, a true synergy of human rights dimensions can be discerned in relation to the (pursued) operation of the human rights framework as a protection mechanism in the context of RPC Nauru. Whilst at some stages the three examined critical masses rely explicitly on human rights instruments in their vernacularisation efforts, at times they purposively do not do so.

First, deliberative mechanisms seem to have a constrained potential insofar as effective human rights protection is concerned. Part II has already explained why international human rights law is challenged in contexts of confinement that are characterised by commodification and crimmigration; what further weakens its potential in the context of RPC Nauru specifically is that the context in which confinement takes place is particularly challenging from an international human rights law accountability perspective. For various reasons – including the weak accountability of private actors under human rights instruments, the overall position of human rights law in the Australian-Pacific region, and the particularities of RPC Nauru’s governance structure and design – the potential of international human rights law as a deliberative vernacularisation vehicle is significantly restricted in this particular context.

Second, analysis of welfare workers’ experiences with offshore processing indicates that human rights consciousnesses may to a certain extent be vernacularised through discretionary decision-making as a morality-based mechanism, although the specifics of RPC Nauru significantly limit such potential. Both

the social surround in which offshore processing is embedded, and the decision field within which welfare workers operate, significantly hampers the vernacularisation of human rights consciousnesses through discretionary decision-making practices. In fact, the suppressed and marginalised position of human rights in the social surround and decision field is highly pervasive and over time starts to affect the core of welfare workers' decision frames. Feeling thwarted by the system in any human rights-inspired endeavour, many welfare workers start to suffer from fatigue syndrome which largely mutes their efforts to command change within the facility, although some start to rely on other vernacularisation mechanisms instead. As many welfare workers describe, discretionary decision-making based on human rights moralities could accordingly be used as a vernacularisation mechanism, but only on a micro scale and not 'in the grand scheme of things'.

Third, protest vernacularisation mechanisms provide ground for optimism in the context of RPC Nauru. In fact, in pursuing human rights protection, many welfare workers who became disillusioned with discretionary decision-making as a vernacularisation mechanism start to rely extensively on protest mechanisms. Institutionalised NGOs, likewise, have through their advocacy work relied on protest mechanisms in order to vernacularise their human rights consciousnesses. Attempts to do so through the provision of humanitarian aid *within* the facilities have, on the other hand, been much more contested. Overall, however, the *instrumental* role of human rights in protest activities is regarded as much more problematic, particularly in public advocacy endeavours: human rights, whether in their capacity as deliberative principles, natural entitlements, protest tools, or discursive expressions, are hardly decisive in swaying public opinion in favour of advocacy work. Whilst protest activities may thus be useful mechanisms for vernacularisation, human rights are frequently not core instruments of the repertoire of contention that are used in this regard.

Fourth, whilst discursive mechanisms could be useful in vernacularising human rights consciousnesses, it seems that the instrumental value of human rights as discursive expressions is limited in this particular context. For instance, much of the effort of institutionalised NGOs to progress human rights protection through discursive mechanisms has focussed on *re*-humanising those confined offshore. Discourse is therefore frequently relied upon, both to justify the existing policies and to challenge them, but human rights on many occasions do not feature prominently as explicit discursive expressions in such ventures. At best, they may become discursive strongholds in the future when attempts to discursively rehumanise those confined offshore become hegemonic and open up scope for widely supported zoepolitical and biopolitical discussions on human entitlements.

The final part of this chapter reflects upon the synergistic operation of human rights in RPC Nauru by returning to commodification and crimmigration. Both ultimately seem to have a negative impact on various components of human rights vernacularisation, that is, on the instrumental values and

vernacularisation mechanisms of all respective dimensions. They indeed embody a significant potential to challenge or even frustrate human rights vernacularisation in a myriad of ways. At the same time, however, the chapter details how commodification opens up new pathways, or specific vernacularisation mechanisms, towards human rights protection. In this sense, whereas crimmigration generally has a constraining effect on effective vernacularisation, commodification has both a restricting and an enabling impact. This sets the stage for a spark of optimism about the relevance of human rights in an era of globalisation, as human rights understood in a holistic fashion are not only challenged, but can potentially also be revitalised, where globalisation progresses.

CONCLUSION: ELEPHANTS NEVER FORGET

Finally, *chapter 10* draws together the three Parts of this book to answer the research questions and to provide a number of further reflections. In relation to the main research question that has guided this book, the chapter first elaborates upon the complex triangular interplay between the core concepts of commodification, crimmigration, and human rights protection. Thus, as the various Parts of this book show, whilst a global triangular interplay can be discerned between these three concepts, analysis of local contexts reveals not only that commodification and crimmigration are multi-faceted trends that consist of different legs, but also that holistic human rights protection may follow different trajectories on the basis of different contextual realities. Whilst it is important to recognise the triangular interplay between the three core concepts of this book in order to realise how different local occurrences are interconnected, it is at the same time imminent for analytical purposes to recognise that such triangular interplay is typically highly complex and incorporates a significant level of hybridity and heterogeneity. By analytically examining the glocality of such interplay, then, it becomes possible to take into account both what the implications of specific forms of commodification and crimmigration are for the various variants of human rights protection at the local level, and what this in turn means for the larger sphere of interaction between commodification, crimmigration, and human rights protection at the macro level.

The extent to which human rights as a protection framework can remain of relevance in contexts of confinement that are characterised by commodification and crimmigration depends on a number of complex factors located at both the global, the local, and the glocal levels. This includes the progressive development of global trends, the local particularities of specific contexts of confinement, the content of prevailing human rights consciousnesses, the use of human rights vernacularisation mechanisms and tools, and the levels of human rights protection and/or alienation pursued in a multi-stakeholder

field. As the case studies of RPC Nauru and PI Norgerhaven elucidate, not only are the combinations of commodification, crimmigration, and human rights at the local level unique, but they also have widely varying implications for human rights protection. This book shows, partly on the basis of continuous reflection on both case studies, that human rights can remain of relevance in contexts of confinement even where these elements are combined, and that the protection value of human rights is much more encompassing than legal studies may sometimes lead to believe, but above all this book has outlined the breadth, depth, and potential of human rights protection that remains vastly underexplored. Therefore, it ultimately attempts to fulfil an agenda-setting function by calling for further research into the full-fledged potential of, the contemporary threats to, and the inherent limitations of, human rights as a multi-dimensional, Brahma-faced phenomenon.

This book finishes with a number of reflections on the core concepts of commodification, crimmigration, international human rights law, and human rights elephants. It considers, *inter alia*, (i) that scholarship frequently fails to adequately take into account the intricacy and complexity of nodal governance networks, (ii) that the term 'crimmigration' generally remains ill-defined and should not be used to unduly inject normativity into empirical determinations, (iii) that reformist or functionalist scholarly work in the legal domain to make international human rights law 'globalisation-proof' is laudable but may be counter-productive and does not always take into account that international human rights law cannot bend beyond its breaking point, and (iv) that scholars from all disciplinary backgrounds should not be blind to the bigger picture that the human rights elephant constitutes. In relation to the latter reflection, it is indeed important to understand that human rights are much more majestic than any positivist understanding may suggest. Human rights protection may be many-fold, and it seems that we are only at the beginning of holistically exploring the full potential that can be achieved through the proper and genuine nurturing of human rights elephants.

In the end, what transpires from this book is a message of hope that arises from human rights understood as being neither squarely within the legal purview, nor squarely a myth based on moral conceptions. Akin to a popular saying about elephants, it is proposed that human rights elephants *never forget* those that they protect: at their core they continue to hold hope for all as the core promise that they are constituted upon. Ultimately, the future of human rights as a protection mechanism does not depend solely on the progressive responsabilisation of power bearers, nor simply on the ongoing expansion of the human rights catalogue or on the reduction of accepted interferences, but to a large extent on a genuine internalised belief that human rights *matter*. Such belief will not be sufficient to solve the world's human ills, but is a crucial first step to face what lies ahead with cautious confidence in the value of human rights.

Samenvatting (Dutch summary)

MENSENRECHTENOLIFANTEN IN EEN TIJDPERK VAN GLOBALISERING

Commodificatie, crimmigratie en mensenrechten in detentie

Dit boek onderzoekt de relevantie van mensenrechten als een beschermingskader in detentiecontexten die gekarakteriseerd worden door de globalisatieontwikkelingen van 'commodificatie' en 'crimmigratie'. Daarbij worden mensenrechten metaforisch als olifanten voorgesteld. Zo worden mensenrechten, net als olifanten, beschouwd als één van de meest indrukwekkende en majestueuze entiteiten van hun soort. Mensenrechten worden tevens net als olifanten beschouwd als ietwat 'groter dan het leven'. Net als olifanten worden mensenrechten echter ook mogelijk bedreigd in tijden van globalisering. De focus van dit boek is dan ook de toekomstige levensvatbaarheid van mensenrechten – als een kader van bescherming – in een globaliseringstijdperk, waarin hun relevantie ogenschijnlijk uitgedaagd en mogelijk zelfs ernstig bedreigd wordt.

Het vertrekpunt van dit onderzoek is dat we in een tijdperk van globalisering leven. Dit betekent onder meer dat economische en sociale interacties in toenemende mate een internationaal karakter krijgen en dat een toenemend aantal binnen- en buitenlandse actoren deelnemen aan dergelijke interacties. Deze actoren interacteren op veel verschillende, en vaak nieuwe, manieren, waarbij een verschuiving van 'government' naar 'governance' ontwaard kan worden. Hoewel globalisering bestaat uit een grote verscheidenheid aan ontwikkelingen, en hoewel het door contextuele omstandigheden vaak zeer verschillende effecten kan hebben, bedreigt globalisering in de regel de toekomst van mensenrechtenbescherming. Globalisering lijkt inderdaad geregeld bestaande structuren van sociale interactie en conventionele vormen van overheidsbestuur te ondermijnen, terwijl mensenrechten – ten minste in hun hoedanigheid als recht – juist vaak op dergelijke structuren gebaseerd zijn. Om de implicaties hiervan te bestuderen, focust dit boek zich op het 'lokaal' niveau, waarmee erkend wordt dat globalisering een heterogeen en divers fenomeen is. Om invulling te geven aan deze 'glokale' zienswijze bestudeert dit boek globaliseringsontwikkelingen en hun impact op mensenrechtenbescherming niet enkel op een macroniveau maar ook op het microniveau van specifieke gevalsstudies. Daarbij dient de volgende hoofdvraag als leidraad:

In welke mate kunnen mensenrechten als een beschermingskader relevant blijven in detentiecontexten die gekarakteriseerd worden door de globaliseringstrends van 'commodificatie' en 'crimmigratie'?

Het onderzoek heeft twee gevalsstudies geïdentificeerd voor de analyse op microniveau. De eerste gevalsstudie ziet op de zogenaamde *Regional Processing Centre Nauru* ('RPC Nauru'), een Australisch-Nauruaans immigratiedetentiecentrum dat onderdeel uitmaakt van het *Operation Sovereign Borders* ('OSB') beleidskader van Australië. Dit beleidskader opereert op basis van het idee dat niemand die irregulier per boot toegang probeert te verkrijgen, gehuisvest zal worden in Australië. Het omvat onder meer een publieke campagne met de slogan *'No way, they will not make Australia home'*. Als onderdeel van dit beleidskader wordt eenieder die irregulier per boot is aangekomen naar offshore centra op Nauru of in Papoea-Nieuw-Guinea gebracht, waar eventuele asielaanvragen worden behandeld door de lokale autoriteiten. Dergelijke praktijken zijn aldoo onderworpen aan forse kritiek, met name naar aanleiding van een reeks controverses, waarbij onder meer zorgen voor mensenrechtenbescherming zijn geuit.

De tweede gevalsstudie brengt de lezer naar het Europese continent. Het betreft de penitentiaire inrichting Norgerhaven ('PI Norgerhaven'), een voormalige Noors-Nederlandse gevangenis in Drenthe. De regeringen van Noorwegen en Nederland sloten in 2015 een overeenkomst voor een driejarige lease van PI Norgerhaven aan Noorwegen. Dit stelde Nederland in staat om banen in het gevangeniswezen te behouden en hielp Noorwegen bij het vinden van aanvullende gevangenis capaciteit gedurende grootschalige renovatiewerkzaamheden in het eigen gevangeniswezen. De leaseconstructie was gebaseerd op eerdere ervaringen met penologische samenwerking tussen België en Nederland. Aan de Noors-Nederlandse samenwerking kwam in augustus 2018 een einde. Dit type samenwerking is ogenschijnlijk uniek en heeft internationaal tot veel lof voor de innovatieve en pragmatische samenwerking tussen Noorwegen/Nederland (en België/Nederland) geleid.

Dit boek gaat in op de mensenrechtenaspecten van deze twee specifieke detentieomgevingen. Tegelijkertijd vertelt het een meer omvattend verhaal over mensenrechtenbescherming in een tijdperk van globalisering, waarbij het een grote verscheidenheid aan mogelijk toekomstige gevalsstudies probeert te informeren en inspireren. In essentie bestudeert dit boek dus zowel ontwikkelingen op macroniveau als lokale implementaties, waarbij continu duiding wordt gezocht van wat macro-ontwikkelingen betekenen voor mensenrechtenbescherming op lokaal niveau en *vice versa*. Door deze duiding te zoeken kan, vervolgens, meer algemeen gereflecteerd worden om de toekomst van mensenrechtenbescherming, zowel binnen als buiten de kaders van de gevalsstudies die dit boek bestudeert. Derhalve is dit boek opgezet aan de hand van een 'trechtermodel': de hoofdstukken van Deel I en Deel II van dit boek beginnen telkens met een analyse van ontwikkelingen op macroniveau, waarna bestu-

deerd wordt wat deze ontwikkelingen impliceren voor de gevalsstudies. Aan de hand hiervan wordt, op 'lokaal' niveau, de wisselwerking tussen globaal en lokaal verder geduid. Deel III volgt eenzelfde structuur, maar heeft de analyses van het macro- (hoofdstuk 8) en microniveau (hoofdstuk 9) uitgesplitst in twee verschillende hoofdstukken.

DEEL I – DE 'ELEPHANT IN THE ROOM'

Deel I bestudeert hoe commodificatie en crimmigratie de beschermingswaarde van mensenrechten uitdagen. Dit Deel zet de toon door commodificatie en crimmigratie naast elkaar te zetten als eigenstandige globaliseringstrends en door te bestuderen op welke wijzen deze ontwikkelingen aansprakelijkheid onder, en de effectiviteit en legitimiteit van, het juridische mensenrechtenbestel uitdagen. De focus van dit Deel – en, wat dat betreft, van het volgende Deel – ligt dus op internationale mensenrechten qua *recht*, in tegenstelling tot andere conceptualisering van mensenrechten. Deze focus is ingegeven door het feit dat internationaal mensenrechten*recht* over het algemeen wordt beschouwd als de heersende articulatie van mensenrechten en derhalve het denken over, en de theorievorming omtrent, mensenrechten domineert.

Hoofdstuk 2 richt zich op commodificatie, dat qua terminologie is ingebed in theorievorming omtrent 'nodaal bestuur' en 'verankerd pluralisme'. Hoewel deze theoretische noties doorgaans gepresenteerd worden als alternatieven van elkaar, verenigt hoofdstuk 2 ze door commodificatie te conceptualiseren als 'staatsgeleid nodaal bestuur' of 'verankerde *nodes*'. Dat wil zeggen dat meerdere actoren met hun eigen mentaliteiten, technologieën, middelen en institutionele structuren betrokken kunnen zijn in bestuur, maar dat de grenzen waarbinnen zij zich legitiem kunnen bewegen gesteld en gecontroleerd worden, of zouden moeten worden, door de centrale overheid middels bindende reguleringen, richtlijnen en monitoring. Hoofdstuk 2 brengt vervolgens commodificatie-ontwikkelingen op macroniveau in kaart, waarbij gefocust wordt op twee trends in het bijzonder: privatisering en offshoring. Het hoofdstuk toont aan dat privatisering globaal wijdverbreid is: zowel gevangenissen als immigratiedetentiecentra worden in tal van jurisdicties onderworpen aan een variëteit aan (gedeeltelijk) private regimes. Offshoring, dat de relocatie of 'extra-territorialisering' van gedetineerden naar het grondgebied van een derde staat behelst, is daarentegen minder gebruikelijk, hoewel het in een aantal gevallen heeft plaatsgevonden in zowel het gevangeniswezen als het domein van immigratiedetentie. RPC Nauru en PI Norgerhaven zijn voorbeelden van offshore detentie; daarnaast is RPC Nauru tevens een voorbeeld van privatisering. Zoals analyse van deze faciliteiten op basis van de theorievorming omtrent nodaal overheidsbestuur aantoon, worden beide detentiefaciliteiten in meer of mindere mate gekenmerkt door ingewikkelde en evoluerende netwerken van bestuur.

Het hoofdstuk bespreekt vervolgens hoe commodificatie mogelijk(er)wijs aansprakelijkheid onder, en de effectiviteit en legitimiteit van, het juridische mensenrechtenbestel uitdaagt. Daarbij gaat het in op een eerste doctrinaire uitgangspunt van internationaal mensenrechtenrecht: dat mensenrechten, als zodanig, in beginsel afdwingbare *rechten* zijn met juridische verplichtingen en overeenkomstige plichtendragers. Dergelijke verplichtingen zijn geconditioneerd door twee beginselen die ten grondslag liggen aan de conventionele opvatting van internationaal mensenrechtenrecht: dat dergelijk recht in principe enkel *staten* bindt, en dat het in beginsel staten bindt ten opzichte van individuen die zich in hun *jurisdictie* bevinden, wat doorgaans refereert aan soeverein territorium als de primaire afbakening van staatsmacht. Zoals het laatste deel van hoofdstuk 2 markeert, kan, wanneer deze doctrinaire uitgangspunten gecontrasteerd worden met globale commodificatierealiteiten, frictie tussen gecommificeerde vormen van detentie en mensenrechtenrechtelijke bescherming worden ontwaard. Deze frictie daagt ten eerste aansprakelijkheid onder internationaal mensenrechtenrecht uit, daar er een discrepantie lijkt te bestaan tussen *de jure* plichtendragers en *de facto* autoriteitsdragers. Tevens kan aan aansprakelijkheid onder internationaal mensenrechtenrecht verder afbreuk worden gedaan in situaties waar, op basis van het van kracht zijnde nodale bestuursnetwerk, het moeilijk te ontwaren is door welke actor een specifieke handeling is uitgevoerd. Daar internationaal mensenrechtenrecht in essentie een aansprakelijkheidsmechanisme is, daagt commodificatie automatisch ook de effectiviteit van het systeem als zodanig uit. Dit leidt tevens tot een uitdaging van de legitimiteit van internationaal mensenrechtenrecht. Dat wil zeggen, in het licht van de mogelijke effectiviteitsbedreiging moet internationaal mensenrechtenrecht zich aanpassen aan hedendaagse commodificatierealiteiten. Waar het dit niet of te weinig zou doen, loopt het immers het risico om een *legitimiteitstekort* te creëren. Tegelijkertijd kan het internationaal mensenrechtenrecht zich ook niet te excessief aanpassen aan dergelijke realiteiten, omdat het dan het risico loopt om *illegitiem* of *gedelegeitimeerd* te worden. Noodzakelijk is derhalve dat gekomen wordt tot een goede – doch vaak delicate – balans tussen het accommoderen van commodificatie-ontwikkelingen en het honoreren van de doctrinaire uitgangspunten van het internationaal mensenrechtenrecht.

Hoofdstuk 3 ziet op de ontwikkeling van crimmigratie en spiegelt, qua structuur, het vorige hoofdstuk. Het begint met een kritische reflectie op de definitie en wetenschappelijke inbedding van de term ‘crimmigratie’, waarbij het voorstelt de term opnieuw te conceptualiseren als een notie die gegrond is in *membership theory*. Specifiek wordt beargumenteerd dat ‘crimmigratie’ een veelheid aan ontwikkelingen omvat die leiden tot de criminalisering van immigratie en/of de ‘immigrationisering’ van criminaliteit. Dat wil zeggen, zowel criminaliteitsbeleid als immigratiebeleid bieden mogelijkheden aan de staat om veronderstelde bedreigende populaties te controleren, beperken en uit te sluiten – te denken valt aan het gebruik van detentiefaciliteiten – en om

op basis daarvan nieuwe opvattingen over wie er daadwerkelijk tot de samenleving behoort in meer of mindere mate af te dwingen. In een globaliserende wereld lopen ideeën over 'behoren' inderdaad niet meer parallel aan formele burgerschapskenmerken en vertrouwen overheden in toenemende mate, hoewel vaak ad hoc, op verschillende processen om nieuwe categorieën van 'behoren' af te dwingen. In degelijke ontwikkelingen wordt bijvoorbeeld het immigratieproces van een individu dat als niet-behorend wordt beschouwd in het domein van het strafrecht getrokken, of resulteren strafrechtelijke sancties jegens individuen die hun positie in de samenleving min of meer geacht worden te hebben verspeeld in toenemende mate in uitsluiting, segregatie en verbanning. Het hoofdstuk illustreert dat specifieke vormen van immigratiedetentie in verschillende landen in toenemende mate elementen van bestraffing en afkeuring omvatten en dat specifieke gevangenissen steeds meer gericht zijn op de segregatie en soms zelfs op de verbanning van niet-behorende populaties. Deze laatste ontwikkeling omvat zowel processen van *bordered penalty*, waarbij een parallel strafrechtssysteem ingegeven door migratiecontrolebelangen ontwikkeld wordt naast het reguliere strafrechtelijke bestel, als ook meer subtiele processen van uitsluiting en vervreemding, waarbij zogenaamde 'sub-burgers' – die formeel behoren tot de samenleving maar informeel geacht worden hun lidmaatschap te hebben verspeeld – fysiek, politiek, sociaal en symbolisch kunnen worden uitgesloten. Bij deze laatste categorie kan het bijvoorbeeld gaan om gevaarlijke en ernstige daders, daders zonder financiële onafhankelijkheid en daders van specifieke criminele feiten, waarbij de gemene deler aldoor is dat dergelijke daders tot op zekere hoogte als zondebok worden weggezet. Het hoofdstuk laat daarnaast zien hoe, in detentiecontexten, crimmigratie vaak nauw verbonden is met commodificatie: het is geregeld de brandstof, *modus operandi* en/of het neveneffect van commodificatie. In zowel RPC Nauru als PI Norgerhaven kunnen crimmigratieaspecten ontwaard worden, hoewel crimmigratie in beide contexten een compleet verschillende rol speelt en totaal uiteenlopende implicaties heeft. Crimmigratie is zowel een expliciet aspect van RPC Nauru – bijvoorbeeld in de vorm van gemilitariseerde vormen van grenscontrole en gevangenisachtige, bestraffende faciliteiten – als een impliciet kenmerk van de faciliteit – bijvoorbeeld in de vorm van het gebruik van crimmigratie-geïnspireerd discours. In PI Norgerhaven daarentegen lijkt crimmigratie met name een neveneffect van de specifieke nodale vorm van bestuur te zijn.

Het hoofdstuk adresseert vervolgens hoe crimmigratie mogelijkerwijs aansprakelijkheid onder, en de effectiviteit en legitimiteit van, internationaal mensenrechtenrecht ondermijnt. Het gaat eerst in op een tweede doctrinaire uitgangspunt van internationaal mensenrechtenrecht, namelijk dat mensenrechten zien op *menselijkheid*, dat wil zeggen, dat ze, gebaseerd op een begrip van menselijke waardigheid, zijn bedoeld ter bescherming van eenieder als gelijkwaardige individuen. Dit dogma staat ogenschijnlijk op gespannen voet met hedendaagse crimmigratie-ontwikkelingen. Crimmigratie daagt inderdaad,

allereerst, aansprakelijkheid onder internationaal mensenrechtenrecht uit, daar de rechten van populaties die als niet-behorend worden beschouwd in toenemende mate worden gemarginaliseerd en daar dergelijke populaties tegen moeilijkheden aanlopen bij het aansprakelijk houden van plichtsdragers. Waar dat het geval is, verliest het internationaal mensenrechtenrecht een groot gedeelte van zijn effectiviteit als beschermingsmechanisme. Dit heeft verdere implicaties voor de legitimiteit van het systeem: waar internationaal mensenrechtenrecht de continu ontwikkelende en veranderende categorieën van 'behoren' doorkruist, is er een risico van voortschrijdende *delegitimatie*. Tegelijkertijd bestaat het risico dat het systeem tegen een *legitimitiestekort* aanloopt wanneer het staten toestaat om, op basis van een gemengde zoepolitieke en biopolitieke benadering, onverminderde bescherming enkel structureel aan bepaalde populaties aan te bieden. Opnieuw is het dus van cruciaal belang dat internationaal mensenrechtenrecht met de grootste zorg en voorzichtigheid ontwikkeld wordt om de doctrinaire uitgangspunten van het juridische systeem te eerbiedigen *en* hedendaagse realiteiten in ogenschouw te nemen. Dit is, wederom, een delicaat proces.

DEEL II – DE SLACHTTANDLOZE OLIFANT

Deel II van dit boek kijkt naar de vraag hoe het mensenrechtenrecht omgaat met de globaliseringsuitdagingen zoals beschreven in het vorige Deel. Daarbij gaat het dieper in op de structuur en systematiek van juridische mensenrechtenkaders in het licht van crimmigratie- en commodificatie-ontwikkelingen. De focus ligt in het bijzonder op de noodzaak voor internationaal mensenrechtenrecht om zowel *veerkrachtig* te zijn in het licht van hedendaagse globaliseringsontwikkelingen, als *trouw* te blijven aan de doctrinaire uitgangspunten van het mensenrechtenrechtelijke kader. Zoals uit dit Deel zal blijken, is internationaal mensenrechtenrecht ontwikkeld met een bepaalde veerkrachtigheid waarbij tegemoet gekomen wordt aan hedendaagse crimmigratie- en commodificatierealiteiten, maar weerhoudt de noodzaak om tegelijkertijd trouw te blijven aan de onderliggende doctrinaire uitgangspunten het systeem ervan om dergelijke veerkrachtigheid structureel, coherent en volwaardig door te voeren.

Hoofdstuk 4 begint met een uiteenzetting van het 'Janusgezicht' van internationaal mensenrechtenrecht: op basis van de twee doctrinaire uitgangspunten zoals in hoofdstukken 2 en 3 behandeld, kan internationaal mensenrechtenrecht getypeerd worden als een Janusgezicht dat zowel op positief recht als op moraliteit is geënt. Internationaal mensenrechtenrecht is dus gericht op zowel normatieve idealen over universele en onvervreembare menselijke waardigheid als op de bijzonderheden van positiefrechtelijke kaders. Hierbij blijkt een duidelijke poging om elementen van zowel het '*sollen*' als het '*sein*' van mensenrechten te verenigen in het juridische domein. Deze duale enting markeert

opnieuw het kritieke belang van de legitimeitsuitdagingen waarmee internationaal mensenrechtenrecht in tijden van globalisering geconfronteerd wordt: het accommoderen van dergelijke uitdagingen op een manier waarbij zowel de uiteindelijke doelstellingen van gelijkwaardige en universele bescherming, als de limiteringen en bijzonderheden van het internationaal mensenrechtenrechtelijke kader, op afdoende wijze in ogenschouw worden genomen, is geen sinecure.

Vervolgens bestudeert hoofdstuk 4 het internationaal mensenrechtenrecht nader vanuit crimmigratie-oogpunt, waarbij de vraag wordt gesteld hoe geselecteerde mensenrechtenrechtelijke kaders omgaan met crimmigratie-ontwikkelingen. Daarbij wordt in het bijzonder gekeken naar de mate waarin het internationaal mensenrechtenrecht beperkingen van mensenrechtenbescherming voor bepaalde groepen heeft geaccommodeerd en hoe dit zich verhoudt tot de belofte van gelijkwaardige bescherming. Het hoofdstuk laat zien hoe het internationale mensenrechtenrecht staten toestaat om op basis van een positivistische grondslag het genot van bepaalde rechten te begrenzen. Daarbij is het van belang te onderstrepen dat internationaal mensenrechtenrecht erkent dat sommige rechten van bepaalde populaties, zoals gedetineerden, gerechtvaardigd beperkt mogen worden als onderdeel van het soevereine prerogatief van de staat. Door te kijken naar een aantal specifieke rechten – het recht op vrijheid, het verbod op gedwongen of verplichte arbeid, het recht op familielevens en het stemrecht – zet het hoofdstuk uiteen hoe bepaalde *burgerrechten* gelimiteerd kunnen worden op basis van het feit dat een individu *gedetineerd* is, terwijl bepaalde *politieke* rechten gelimiteerd kunnen worden op basis van het feit dat individuen *niet langer als volwaardig onderdeel* van de samenleving gezien worden.

Het hoofdstuk bediscussieert vervolgens wat deze bevindingen impliceren voor de gevalsstudies. Daarbij wordt met betrekking tot RPC Nauru gefocust op het recht op vrijheid terwijl met betrekking tot PI Norgerhaven wordt gefocust op het recht op familielevens. In de context van RPC Nauru betoogt het hoofdstuk dat detentie in het licht van Artikel 9 van het Internationaal Verdrag inzake Burgerrechten en Politieke Rechten ('IVBPR') arbitrair geacht kon worden *tot* het moment dat het detentieregime veranderde in een opencentrumregeling. Nadat een dergelijk regime was ingevoerd, is er daarentegen ogenschijnlijk geen sprake meer van een ongerechtvaardigde beperking – of, wat dat betreft, van enige beperking – van het recht op vrijheid vervat in Artikel 9 IVBPR. In de context van PI Norgerhaven concludeert het hoofdstuk dat de inbreuk op het recht op familielevens in overeenstemming is met Artikel 8 van het Europees Verdrag voor de Rechten van de Mens ('EVRM') en over het algemeen een legitiem doel nastreeft. Of een dergelijke inbreuk tevens een *proportionele* inbreuk is, hangt echter af van de weging van een aantal factoren op individuele basis. Vanwege deze individuele toetsing kan met betrekking tot dit criterium geen generaliseerbare conclusie getrokken worden. In abstracto kan wel worden opgemerkt dat zowel indicaties van proportionaliteit als

contra-indicaties lijken te bestaan, op basis waarvan in het individuele geval tot verschillende oordelen over de toelaatbaarheid van bepaalde inbreuken op het recht op familieleven kan worden gekomen.

Hoofdstuk 4 concludeert dat internationaal mensenrechtenrecht heeft gepoogd om zowel veerkrachtig te zijn in het licht van hedendaagse crimigratierealiteiten, als trouw te blijven aan het doctrinaire uitgangspunt van gelijkwaardige bescherming. Tegelijkertijd blijft op globaal niveau een zekere spanning bestaan tussen internationaal mensenrechtenrecht enerzijds en de uitoefening van macht door de staat anderzijds. Derhalve blijft de legitimiteit van het internationaal mensenrechtenrecht onder druk staan tot het moment dat dit spanningsveld adequaat, holistisch en systemisch wordt geadresseerd.

De rest van Deel II focust op commodificatie. *Hoofdstuk 5* stelt daarbij allereerst ter discussie hoe internationaal mensenrechtenrecht heeft gepoogd om de betrokkenheid van private actoren in bestuursstructuren te accommoderen. Het gaat in op een aantal private mensenrechtenverplichtingen, waaronder normen van *soft law*, sector-specifieke richtlijnen en verklaringen en vrijwillige gedragscodes. Tegelijkertijd markeert hoofdstuk 5 dat internationaal mensenrechtenrecht over het algemeen geen *bindende* verplichtingen voor private partijen omvat. In die zin blijft internationaal mensenrechtenrecht trouw aan het doctrinaire uitgangspunt dat mensenrechtenverplichtingen in beginsel verplichtingen van (territoriale) staten zijn. Tegelijkertijd signaleren ontwikkelingen van *soft law* en van private initiatieven dat internationaal mensenrechtenrecht een zekere – doch beperkte – veerkrachtigheid kan tonen in het aangezicht van privatiseringstrends. De *Guiding Principles on Businesses and Human Rights* van de VN ('UNGP') en de *zero draft* van de *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises* zijn duidelijke voorbeelden van deze veerkrachtigheid. Deze instrumenten komen het dichtst bij een bindende regulering van private mensenrechtenrechtelijke verplichtingen, maar zijn tot op heden verre van voltooiing.

In het licht hiervan vertrouwen veel commentatoren op de doctrine van positieve verplichtingen, of *Drittwirkung*, om de limiteringen van het internationale mensenrechtenrecht te omzeilen. Positieve verplichtingen zouden in deze zin een soort wondermiddel zijn daar ze een alternatieve en meer effectieve route naar de effectuering van mensenrechtelijke naleving zouden vormen. Waar dit in de praktijk inderdaad een aantal mensenrechtenbeschermingsknelpunten kan oplossen, dient het horizontale effect van mensenrechtenrecht in de vorm van positieve verplichtingen echter nog altijd begrepen te worden als indirect. Dat wil zeggen, mensenrechtenrechtelijke normen kunnen het gedrag van private partijen reguleren, maar het zijn soevereine staten die verantwoordelijk blijven voor een schending van deze normen. Een belangrijke uitzondering is het Handvest van de Grondrechten van de Europese Unie ('het Handvest'): in de jurisprudentie van het Hof van Justitie van de Europese Unie (HvJ-EU) is uiteengezet dat het Handvest directe horizontale werking kan hebben waar

een geschil onderworpen is aan EU-regelgeving en een bepaling uit het Handvest als zodanig aan een particulier een subjectief *recht* verleent. Daarmee lijkt het Handvest de uitzondering op de regel te zijn: het Handvest is ogenschijnlijk uitzonderlijk veerkrachtig door te voorzien in de directe horizontale werking van een aantal grondrechten. Nadat de implicaties van de verschillende bevindingen in dit hoofdstuk voor de gevalsstudie van RPC Nauru zijn behandeld – in de gevalsstudie van PI Norgerhaven zijn geen private partijen betrokken en deze casus behoeft dus in dit kader niet nader te worden uitgewerkt – concludeert hoofdstuk 5 dat de uitbreiding van mensenrechteninstrumenten die private verplichtingen reguleren geïnspireerd lijkt te zijn op het morele aanzicht van het internationale mensenrechtenrecht, terwijl de effectiviteit van juridische aansprakelijkheid sterk beperkt blijft.

Nu naar voren komt dat de staat de primaire plichtsdrager blijft onder internationaal mensenrechtenrecht, gaan hoofdstukken 6 en 7 nader in op het systeem van staatsverantwoordelijkheid. *Hoofdstuk 6* zet allereerst uiteen dat staatsverantwoordelijkheid vastgesteld kan worden aan de hand van een tweeledige test: eerst dient een staat verantwoordelijk te zijn voor bepaald *gedrag* (de vraag van internationale verantwoordelijkheid voor onrechtmatig gedrag) en ten tweede dient de staat verantwoordelijk te zijn voor bepaalde *verplichtingen* (de vraag van de reikwijdte van mensenrechtenrechtelijke verplichtingen). Hoofdstuk 6 ziet op de vraag van verantwoordelijkheid voor onrechtmatig gedrag, terwijl hoofdstuk 7 nader ingaat op de reikwijdte van mensenrechtenrechtelijke verplichtingen.

Bij het uiteenzetten van de regels omtrent de verantwoordelijkheid van staten voor bepaald gedrag maakt hoofdstuk 6 gebruik van de *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* van de International Law Commission ('ILC Draft Articles'). Deze artikelen worden beschouwd als gezaghebbende attributieregels. De relevante attributieregels voor de huidige studie worden in het hoofdstuk uiteengezet: het betreft attributie van (i) gedrag van staatsorganen, (ii) gedrag van personen of entiteiten die elementen van overheidsautoriteit uitoefenen, (iii) gedrag van organen die door de ene staat ter beschikking worden gesteld aan de andere staat, (iv) buitensporige gebruikmaking van autoriteit of overtreding van instructies, (v) gedrag dat gedirigeerd of gecontroleerd wordt door een staat en (vi) gedrag dat erkend en geadopteerd wordt door een staat als ware het zijn eigen gedrag. Daarnaast worden regels omtrent de gezamenlijke verantwoordelijkheid van meerdere staten uiteengezet, waarbij onderscheid wordt gemaakt tussen zaken (i) waar gedragingen van meerdere staten die onafhankelijk van elkaar opereren resulteren in een onrechtmatige inbreuk, (ii) waar een gemeenschappelijke daad van meerdere staten de verantwoordelijkheid van alle betrokken staten betreft en (iii) waar de ene staat deelneemt aan het onrechtmatige gedrag van een andere staat (de zogenaamde 'afgeleide verantwoordelijkheid'). Nadat deze bases voor staatsverantwoordelijkheid zijn uitgewerkt, worden ze in het hoofdstuk toegepast op de gevalsstudies. Op basis hiervan concludeert het

hoofdstuk dat de ILC Draft Articles er niet altijd in slagen om een eenvoudige remedie te bieden voor de vaak ingewikkelde en complexe bestuursstructuren die in verschillende hedendaagse detentiestructuren zitten ingebakken, zoals onder meer de gevalstudie van RPC Nauru aantoon. Desalniettemin kunnen in andere gevallen, in het bijzonder in contexten die gekarakteriseerd worden door een hoge mate van transparantie zoals PI Norgerhaven, de regels zoals vastgelegd in de ILC Draft Articles onverminderd worden toegepast. Wat op globaal niveau naar voren komt, is dat de effectiviteit van geldende attributieregels aldoor afhangt van lokale bijzonderheden. Het hoofdstuk gaat tevens nader in op positieve verplichtingen om te beargumenteren dat – anders dan wat soms geïmpliceerd wordt in de literatuur – op dergelijke verplichtingen geen beroep kan worden gedaan om de rigide systematiek van de tweeledige test van staatsverantwoordelijkheid te omzeilen. Net als negatieve verplichtingen opereren positieve verplichtingen binnen de kaders van, in plaats van als alternatief voor, het tweeledige toetsingskader.

Hoofdstuk 7 is gewijd aan de tweede stap van internationale staatsverantwoordelijkheid: het vaststellen van verantwoordelijkheid voor een internationale (mensenrechtenrechtelijke) verplichting. Het kijkt daarbij specifiek naar het concept ‘jurisdictie’: de meeste mensenrechtenverdragen bevatten een jurisdictieclausule die bepaalt in welke situaties staten gebonden zijn aan de verplichting om de in het verdrag vervatte rechten te respecteren. Hoewel er een presumptie is dat verplichtingen onder internationaal mensenrechtenrecht van toepassing zijn op het grondgebied van een staat en niet daarbuiten, hebben hedendaagse werkelijkheden het internationaal mensenrechtenrechtelijke systeem genoodzaakt om exceptionele grondslagen voor zogenaamde ‘extraterritoriale jurisdictie’ te ontwikkelen. Om dat nader te duiden, analyseert het hoofdstuk de jurisdictiereikwijdte van geselecteerde verdragen die van bijzonder belang zijn voor de gevalstudies: het IVBPR, het Internationaal Verdrag inzake Economische, Sociale en Culturele Rechten (IVESCR), het VN-antifolterverdrag en het EVRM. Ter vergelijking omvat de analyse tevens de jurisdictiereikwijdte van de Charter van de Organisatie van Amerikaanse Staten (OAS Charter) en het Amerikaans Verdrag voor de Mensenrechten (AVM).

Analyse toont aan dat de meeste geselecteerde verdragen ontwikkeld zijn met een significante getrouwheid aan het doctrinaire uitgangspunt van territoriale staatsverantwoordelijkheid: de jurisdictiebepalingen van deze verdragen worden geïnterpreteerd en gesubstantieerd middels de notie van territorialiteit. Sommige verdragen verwijzen daarbij expliciet naar het territorium van staten, terwijl in de systematiek van andere verdragen de jurisdictiereikwijdte op meer impliciete wijze territoriaal wordt geïnterpreteerd. Tegelijkertijd kan ook een zekere veerkrachtigheid in het licht van hedendaagse globaliseringsrealiteiten worden ontwaard: in toenemende mate wordt binnen de systematiek van mensenrechtenverdragen erkend dat ook extraterritoriaal gedrag van staten, zij het in uitzonderlijke gevallen, onder de verdragsreikwijdte kan vallen. De meeste verdragen hebben een ruimtelijk model van extraterritoriale jurisdictie

ontwikkeld (wat betekent dat mensenrechtenrechtelijke verplichtingen gelden waar staten effectieve en/of algehele controle uitoefenen over een buitenlands grondgebied) als ook een persoonlijk model van extraterritoriale jurisdictie (wat betekent dat verplichtingen gelden waar staten in het buitenland effectieve en/of algehele controle uitoefenen over een persoon), hoewel variaties tussen de verschillende regimes bestaan. Extraterritoriale jurisdictie is met name uitvoerig ontwikkeld in de context van het EVRM, waarbij verschillende complexiteiten aan de oppervlakte zijn gekomen. De relevante jurisprudentie van het Europees Hof voor de Rechten van de Mens (EHRM) is dan ook verre van axiomatisch en wordt regelmatig gekenmerkt door dubbelzinnigheid en controverse, wat ogenschijnlijk het resultaat is van de noodzaak om zowel veerkrachtig als getrouw te zijn. Door het kader van extraterritoriale jurisdictie toe te passen op de gevalsstudies die in dit boek centraal staan, wordt deze complexiteit verder geïllustreerd. In de gevalsstudie van Nauru is de vaststelling van extraterritoriale jurisdictie van Australië in algemene zin problematisch als gevolg van het gebrek aan transparantie, de aard van de nodale bestuursstructuren en de vindingrijkheid en gebruikte tactieken van de betrokken staten. Anderzijds toont de gevalsstudie van PI Norgerhaven dat het verre van problematisch is om Noorwegen verantwoordelijk te houden voor zijn mensenrechtenrechtelijke verplichtingen onder de verschillende instrumenten. Dit duidt wederom op het cruciale belang van het lokale niveau in het interpreteren van veerkrachtige en doctrinegetrouwe inspanningen: dergelijke inspanningen zijn wellicht het meest zichtbaar in de interpretaties van verdragen op macroniveau, maar het effect en de congruentie van dergelijke globale inspanningen worden grotendeels bepaald op lokaal niveau.

Een beknopt *intermezzo* vormt het sluitstuk van Deel II van dit boek. Het brengt de verschillende bevindingen van dit Deel met betrekking tot de mensenrechtenrechtelijke implicaties van commodificatie voor de gevalsstudies samen. Het betoogt daarbij in het bijzonder dat de manier waarop internationaal mensenrechtenrecht zowel veerkrachtigheid als doctrinaire getrouwheid toont per saldo kan leiden tot mensenrechtenrechtelijke complexiteiten in zowel RPC Nauru als PI Norgerhaven. Dat wil zeggen, terwijl in het geval van RPC Nauru dergelijke complexiteiten naar voren komen als een gevolg van de *ambigüiteit* van controle, komen in het geval van PI Norgerhaven dergelijke complexiteiten, ietwat paradoxaal, voort uit de *overvloed* van controle. Enerzijds is de uitoefening van controle in de nodale bestuursstructuur van RPC Nauru dus te ambigu om eenduidige internationale mensenrechtenrechtelijke verantwoordelijkheid vast te stellen, wat leidt tot evidente aansprakelijkheidsproblemen. Anderzijds kan in de context van PI Norgerhaven een overvloed van controle-uitoefenende en mensenrechtenrechtelijke plichtsdragers worden ontwaard, wat geregeld resulteert in paradoxale beschermingshiaten waar de betrokken staten vertrouwen op kaders van wederzijds vertrouwen zonder ingebedde waarborgen om dergelijk vertrouwen te weerleggen in het concrete geval. Door ter vergelijking te kijken naar relevante jurisprudentie van het

EHRM en het HvJ-EU over wederzijds vertrouwen tussen EU-lidstaten, toont het intermezzo aan dat het gebrek aan weerlegbaar wederzijds vertrouwen, in het bijzonder in het licht van positieve verplichtingen, tot een aantal mensenrechtenrechtelijke complexiteiten leidt die ook voortduren in situaties waar een duidelijke overvloed van controle-uitoefenende actoren te ontwaren valt.

DEEL III – OLIFANTENPAADJES

Het derde Deel van dit boek wijkt af van het lineaire juridische perspectief op mensenrechten om nader onderzoek te doen naar alternatieve routes naar mensenrechtenbescherming. Door de juridische impasse die volgt uit Deel II als een vertrekpunt te nemen, bestudeert Deel III door gebruikmaking van een sociaal-empirisch kader specifiek wat de rol van mensenrechten 'in actie' is. Dergelijke analyse berust dus op de 'sociologie van mensenrechten' en is gebaseerd op het idee dat een nieuw analytisch kader noodzakelijk is om de relevantie van mensenrechten 'in actie' te duiden. Deel III presenteert een dergelijk kader dat het mogelijk moet maken om mensenrechtenbescherming op holistische wijze in zowel detentieomgevingen als elders te analyseren. Zoals dit Deel beargumenteert, lijkt mensenrechtenbescherming meer op een vierhoofdige Brahma dan op een tweeledig Janusgezicht, waarbij ieder van de vier hoofden bestaat uit meerdere dimensies die gezamenlijk een veelheid aan beschermingsprocessen en -mechanismen omvatten.

Hoofdstuk 8 introduceert en ontwikkelt deze argumentatielijn. Daarbij markeert het allereerst dat globalisering vaak resulteert in een kat-en-muis-spel, of een rattenloop, tussen beleid en uitvoering enerzijds en het systeem van internationaal mensenrechtenrecht anderzijds. Vervolgens zoomt het hoofdstuk uit van deze problematiek om de conceptualisering van mensenrechten als een juridisch Janus-gezicht te heroverwegen. Specifiek wordt een paradigma-verschuiving voorgesteld, weg van een predominante focus op juridische dogmatiek richting een meer holistische mensenrechtenbenadering. Daarbij gaat het hoofdstuk eerst nader in op twee reguliere juridisch-ingestoken antwoorden op de botsing tussen veerkrachtigheid en doctrinaire getrouwheid. Zoals het hoofdstuk aangeeft resulteert deze botsing echter in een juridische impasse waarbij dergelijke traditionele responses – pleitend voor *meer* dan wel *minder* mensenrechtenrecht – op lange termijn niet noodzakelijkerwijs bevorderlijk zijn.

Om een alternatief antwoord te verkennen, gaat het hoofdstuk nader in op de sociaaljuridische noties van 'rechtspluralisme' (*'legal pluralism'*), 'juridisch bewustzijn' (*'legal consciousness'*) en 'juridische vervreemding' (*'legal alienation'*). Hoewel deze concepten belangrijke fundamenteen zijn voor een alternatieve respons, wordt beargumenteerd dat ze slechts een *deel* van het antwoord kunnen zijn daar meerdere 'gedachtenscholen' omtrent mensenrechten bestaan die nopen tot een mensenrechtenbegrip dat bestaat uit vier, niet twee, aange-

zichten. Een aangepaste variant van deze sociaaljuridische kaders wordt dus voorgesteld: in plaats van *rechtspluralisme*, *juridisch* bewustzijn en *juridische* vervreemding dienen we ons te wenden tot *mensenrechtenpluralisme*, *mensenrechten*bewustzijn en *mensenrechten*vervreemding. Een dergelijke benadering staat een holistisch begrip van mensenrechten toe en maakt nieuwe onderzoekspaden om mensenrechtenbescherming te onderzoeken toegankelijk. Dat wil zeggen, het bestaan van vier mensenrechtendimensies betekent niet enkel dat mensenrechten op verschillende wijzen kunnen worden begrepen, maar ook dat verschillende manieren om bescherming ervan te bereiken, bestaan. Dit wordt gemarkeerd door de verschillende mensenrechtendimensies te behandelen als zowel grondslagen voor mensenrechten*bewustzijn* (of voor mensenrechten*vervreemding*), als *instrumenten* om mensenrechtenbescherming te bereiken en als mechanismen voor *vernacularisatie*, dat wil zeggen, als processen om mensenrechtenbewustzijn om te zetten naar lokale werkelijkheden. Tevens zet het hoofdstuk uiteen hoe de verschillende dimensies, in hun verschillende rollen, zowel onafhankelijk van elkaar als in synergie kunnen opereren. Dit resulteert in een multidimensionaal beschermingsraster dat de veelheid aan mogelijkheden voor mensenrechtenbescherming kadert, maar dat tegelijkertijd ook de vele mogelijkheden voor mensenrechtenondermijning indiceert. Dit raster moet op synergistische wijze begrepen worden; dat wil zeggen, het bestaan van verschillende mensenrechtendimensies moet tegelijkertijd erkend en epistemologisch bevraagd worden om de interactie en samenwerking tussen verschillende dimensies te beoordelen. De voorgestelde benaderingswijze maakt het mogelijk om tot een beoordeling van de duurzaamheid van mensenrechten te komen waarbij de geïsoleerde taxatie van afzonderlijke dimensies wordt ontstegen, door *iedere* dimensie te benaderen vanuit een holistisch mensenrechtenperspectief en door de analyse van iedere dimensie te nuanceren middels een beschouwing van de dimensies als autonome doch wederzijds-afhankelijke entiteiten. In het laatste deel van het hoofdstuk worden enkele methodologische kanttekeningen geplaatst met betrekking tot de vraag hoe dergelijke nieuwe onderzoekspaden analytisch verkend kunnen worden.

Hoofdstuk 9 past het in het vorige hoofdstuk ontwikkelde mensenrechtenbeschermingskader toe op de gevalsstudie van RPC Nauru. Hoewel het holistische kader op verschillende manieren gebruikt kan worden, wordt het in dit hoofdstuk toegepast met een actor-specifieke focus: de nadruk ligt dus op drie 'kritische massa's' waarvan, in ieder geval in theorie, verwacht mag worden dat een bepaald mensenrechtenbewustzijn geïnternaliseerd wordt en dat gestreefd wordt naar effectieve vernacularisatie, in tegenstelling tot actoren waarvan verwacht kan worden dat mensenrechtenvervreemdingsstrategieën worden nagestreefd. Deze kritische massa's betreffen (i) Australische juristen en (quasi-gerechtelijke) toezichthoudende instanties, (ii) welzijnswerker die in RPC Nauru werken (of gewerkt hebben) en (iii) geïstitutionaliseerde ngo's die opereren in de Australische context. De analyse in dit hoofdstuk is gebaseerd op documentanalyse en semigestructureerde interviews met 47 respon-

denten, waaronder zowel respondenten die gewerkt hebben *in* offshore faciliteiten als respondenten die *extern* relevante rollen hebben vervuld.

Hoewel een aantal vernacularisatiemechanismen om een aantal redenen beter geplaatst zijn om verandering te gebieden, spelen alle mechanismen in de praktijk een rol in het vernaculariseren van mensenrechtenbewustzijn en in het bevorderen van mensenrechtenbescherming. Een ware synergie van mensenrechtendimensies kan dus worden ontwaard met betrekking tot de (nagestreefde) werking van het mensenrechtenkader als een beschermingsmechanisme in de context van RPC Nauru. Terwijl gedurende sommige fases de drie bestudeerde kritische massa's daarbij expliciet gebruik maken van mensenrechten als instrumenten in hun vernacularisatie-inspanningen, wordt er gedurende andere fases juist doelbewust voor gekozen om geen instrumenteel gebruik van mensenrechten te maken.

Allereerst lijken deliberatieve mechanismen in RPC Nauru een beperkt potentieel voor effectieve mensenrechtenbescherming te hebben. Deel II heeft reeds uitgelegd waarom internationaal mensenrechtenrecht uitgedaagd wordt in detentiecontexten die gekarakteriseerd worden door commodificatie- en crimmigratieontwikkelingen; wat het potentieel van deze dimensie verder verzwakt in de specifieke gevalsstudie van RPC Nauru is dat de context waarin detentie plaatsvindt bijzonder uitdagend is vanuit mensenrechtenrechtelijk aansprakelijkheidsperspectief. Om verschillende redenen – waaronder de zwakke verantwoordelijkheid van private actoren onder mensenrechtenrechtelijke instrumenten, de algeheel betwiste positie van mensenrechtenrecht in Oceanië en de bijzondere bestuursstructuren van RPC Nauru – wordt het potentiaal van internationaal mensenrechtenrecht als een deliberatief vernaculariseringsmechanisme in deze specifieke context significant beknot.

Ten tweede komt uit interviews met welzijnswerkers naar voren dat het weliswaar mogelijk is om mensenrechtenbewustzijn in zekere mate te vernaculariseren via discretionaire besluitvorming als moraliteit-gebaseerd mechanisme, maar dat de contextuele bijzonderheden van RPC Nauru een dergelijk potentieel tot op grote hoogte begrenzen. Zowel de sociale omgeving waarin RPC is ingebed, als het beslissingsveld waarbinnen welzijnswerkers opereren, hinderen op significante wijze de vernacularisatie van mensenrechtenbewustzijn middels discretionaire besluitvormingspraktijken. Veel welzijnswerkers geven zelfs aan dat de onderdrukte en gemarginaliseerde positie van mensenrechten in de sociale omgeving en in het beslissingsveld na verloop van tijd de kern van hun beslissingskaders aantast. Menig welzijnswerker voelt zich bij het nastreven van mensenrechtengeoriënteerd werk gedwarsboemd door het (nodale) systeem waarin RPC Nauru is ingebed en begint daardoor naar eigen zeggen symptomen van vermoeidheidssyndromen te ervaren. Dit dempt hun pogingen om verandering in de faciliteit te gebieden, hoewel sommige welzijnswerkers zich in plaats daarvan wenden tot andere mechanismen om mensenrechten te vernaculariseren. Veel welzijnswerkers geven aan dat discretionaire besluitvorming gebaseerd op mensenrechtenmoraliteit derhalve gebruikt kan worden

als vernacularisatiemechanisme, maar enkel op microniveau en niet 'in het grote geheel der dingen'.

Ten derde biedt protest als vernacularisatiemechanisme meer reden voor optimisme in het geval van RPC Nauru. Het is zelfs zo dat menig welzijnswerker, gedesillustioneerd door de gebrekkige invloed van discretionaire besluitvorming, zich bij het nastreven van mensenrechtenbescherming na verloop van tijd wendt tot dergelijke protestmechanismen. Geïstitutionaliseerde ngo's vertrouwen in hun lobbywerk insgelijks op protestmechanismen om hun mensenrechtenbewustzijn te vernaculariseren. Inspanningen daartoe via het aanbieden van humanitaire hulp *in* de faciliteiten kunnen, aan de andere kant, rekenen op veel meer betwisting. Door de bank genomen wordt de *instrumentele* rol van mensenrechten in protestactiviteiten als aanmerkelijk problematisch aangemerkt, in het bijzonder in publiek lobbywerk: mensenrechten, zij het in hun hoedanigheid als deliberatieve beginselen, natuurlijke aanspraken, protestinstrumenten of discursieve uitdrukkingen zijn nauwelijks doorslaggevend bij het veranderen van publieke opinie. Hoewel protestactiviteiten dus bruikbare mechanismen kunnen zijn voor vernacularisatie, worden mensenrechten geregeld niet op instrumentele wijze gebruikt als onderdeel van zogenaamde 'repertoires van betwisting'.

Ten vierde blijken discursieve mechanismen nuttig te kunnen zijn om een bepaald mensenrechtenbewustzijn te vernaculariseren, hoewel de instrumentele waarde van mensenrechten als discursieve uitdrukkingen gelimiteerd blijft in de context van RPC Nauru. Zo maken geïstitutionaliseerde ngo's bij veel van hun inspanningen om mensenrechtenbescherming te bevorderen gebruik van discursieve mechanismen die erop gericht zijn om offshore gedetineerden te *re-humaniseren*. Discours wordt dus regelmatig gebruikt, zowel om bestaand beleid te rechtvaardigen en om daartegen verzet aan te tekenen, maar mensenrechten spelen daarbij vaak geen prominente rol als expliciete discursieve uitdrukkingen. Hoogstens kan geanticipeerd worden dat mensenrechten-discours in de toekomst mogelijkterwijs van groter instrumenteel belang wordt, wanneer discursieve pogingen om offshore gedetineerden te *re-humaniseren* voet aan de grond krijgen en ruimte creëren voor een breed gedragen zoepolitieke en biopolitieke discussie over mensenrechtenaanspraken.

Het laatste deel van hoofdstuk 9 reflecteert op de synergistische operatie van mensenrechten in RPC Nauru door terug te grijpen op de ontwikkelingen van commodificatie en crimmigratie. Beide trends lijken een negatieve impact op verschillende componenten van mensenrechtenvernacularisatie te hebben, dat wil zeggen, op de instrumentele waarde en het vernacularisatiemechanisme van de verschillende mensenrechtendimensies. Ze belichamen inderdaad een groot potentieel om mensenrechtenvernacularisatie op vele manieren te betwisten en zelfs te frustreren. Tegelijkertijd laat het hoofdstuk echter zien hoe commodificatie ruimte biedt voor nieuwe paden, of specifieke vernacularisatiemechanismen, om mensenrechtenbescherming te bereiken. Waar crimmigratie over het algemeen een beknopt effect heeft op effectieve vernacularisatie,

heeft commodificatie derhalve zowel een beknottende als een bevorderende impact. Dit geeft aanleiding voor enige hoop en optimisme met betrekking tot de relevantie van mensenrechten in een globaliseringstijdperk: mensenrechten begrepen op holistische wijze worden niet enkel uitgedaagd en ondermijnd, maar kunnen mogelijk ook worden gerevitaliseerd, waar globalisering voortschrijdt.

CONCLUSIE: OLIFANTEN VERGETEN NOOIT

In een poging de onderzoeksvragen te beantwoorden en verdere reflecties te bieden, gaat *Hoofdstuk 10* in op de samenhang tussen de drie Delen van dit boek. Met betrekking tot de hoofdvraag wordt eerst het complexe triangulaire samenspel tussen de kernconcepten van commodificatie, crimmigratie en mensenrechtenbescherming uiteengezet. Dus, zoals de verschillende Delen van dit boek tonen, hoewel een globaal triangulair samenspel tussen deze drie noties kan worden ontwaard, toont analyse van lokale contexten niet enkel aan dat commodificatie en crimmigratie veelzijdige ontwikkelingen zijn die uit verschillende deelvormen bestaan, maar ook dat holistische mensenrechtenbescherming verschillende trajecten kan afleggen op basis van uiteenlopende contextuele realiteiten. Hoewel het belangrijk is om het triangulaire samenspel tussen de drie kernconcepten te onderkennen om te realiseren hoe verschillende lokale situaties samenhangen, is het voor analytische doeleinden tegelijkertijd noodzakelijk om te onderkennen dat dergelijk triangulair samenspel typisch complex, hybride en heterogeen is. Door analytisch te focussen op de globaliteit van dergelijk samenspel wordt het mogelijk om te bestuderen wat de implicaties van specifieke vormen van commodificatie en crimmigratie zijn voor de verschillende varianten van mensenrechtenbescherming op lokaal niveau, *en* wat dit vervolgens betekent voor de meer algehele interactie tussen commodificatie, crimmigratie en mensenrechtenbescherming op macroniveau.

De mate waarin mensenrechten als een beschermingskader relevant kunnen blijven in detentiecontexten die gekarakteriseerd worden door commodificatie en crimmigratie hangt af van een aantal complexe factoren op globaal, lokaal en globaal niveau. Dit omvat de progressieve ontwikkeling van globale trends, de lokale bijzonderheden van specifieke detentiecontexten, de inhoud van het heersende mensenrechtenbewustzijn, het daadwerkelijke gebruik van vernacularisatiemechanismen en -instrumenten en de nagestreefde mate van mensenrechtenbescherming en/of -vervreemding in een nodaal veld. De gevalsstudies van RPC Nauru en PI Norgerhaven verduidelijken dat de combinaties van commodificatie, crimmigratie en mensenrechten op lokaal niveau niet alleen uniek zijn, maar ook wijduiteenlopende implicaties hebben voor mensenrechtenbescherming. Dit boek toont aan, gedeeltelijk op basis van continue reflectie op de gevalsstudies, dat mensenrechten ook relevant kunnen blijven in detentiecontexten waar dergelijke elementen gecombineerd worden en dat de

beschermingswaarde van mensenrechten meer omvattend is dan de beperkte lezing die vaak in juridische verhandelingen aangehangen wordt. Bovenal toont het aan dat de breedte, diepgang en het potentiaal van mensenrechtenbescherming tot op heden sterk onderbelicht is gebleven. Derhalve roept dit boek op tot nader onderzoek naar de volle potentie, de hedendaagse bedreigingen en de inherente limiteringen van mensenrechten als een multidimensionaal Brahmagelijkend fenomeen.

Het boek sluit af met een aantal reflecties op de kernconcepten van commodificatie, crimmigratie, internationaal mensenrechtenrecht en mensenrechtenolifanten. Daarbij overweegt het onder meer dat (i) wetenschappelijke verhandelingen er geregeld niet voldoende in slagen om de complexiteit van nodale bestuursstructuren te verdisconteren, (ii) de term 'crimmigratie' over het algemeen slecht gedefinieerd blijft en niet gebruikt zou moeten worden om normativiteit in empirische vaststellingen te injecteren, (iii) rechtswetenschappelijk werk met een hervormende of functionele inborst gericht op het 'toekomstbestendig' maken van internationaal mensenrechtenrecht prijzenswaardig is maar ook contraproductief kan zijn en niet altijd voldoende rekening houdt met het feit dat internationaal mensenrechtenrecht niet voorbij zijn breekpunt kan buigen en (iv) het van belang is dat wetenschappers met verschillende disciplinaire achtergronden niet blind zijn voor het grotere geheel dat de mensenrechtenolifant vormt. Met betrekking tot deze laatste reflectie is het inderdaad belangrijk om te begrijpen dat mensenrechten veel majestueuzer zijn dan een positivistische opvatting suggereert. Mensenrechtenbescherming zal in veel gevallen meerledig zijn en het lijkt erop dat we pas aan het begin staan van het holistisch verkennen van het volle potentieel dat bereikt kan worden door de duurzame en oprechte verzorging van mensenrechtenolifanten.

Uiteindelijk komt uit dit boek een boodschap van hoop naar voren. Deze boodschap komt voort vanuit een mensenrechtenbegrip dat niet volledig binnen de grenzen van het juridische domein valt, maar dat ook niet enkel een mythe gebaseerd op puur morele overwegingen behelst. Aansluiting zoekende bij een populair gezegde over olifanten, houdt de laatste overweging van de conclusie de lezer voor dat mensenrechtenolifanten degenen die ze beschermen *nooit vergeten*: in hun kern blijven ze hoop houden voor eenieder, zijnde de kernbelofte waarop ze zijn gegrondvest. Uiteindelijk hangt de toekomst van mensenrechten als beschermingsmechanisme niet enkel af van de progressieve responsabilisering van machtsdragers, noch van louter de aanhoudende uitbreiding van de mensenrechtencatalogus of de terugdringing van gerechtvaardigde beperkingen, maar voor een belangrijk gedeelte van een oprechte geïnternaliseerde overtuiging dat mensenrechten *er toe doen*. Een dergelijke overtuiging zal onvoldoende blijken om menselijk kwaad in de wereld te beslechten, maar is een cruciale eerste stap om de toekomst tegemoet te treden met behoedzaam vertrouwen in de waarde van mensenrechten.

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Annex I

Topic list RPC Nauru

** Asterisked topics were specifically discussed with those who worked in or have been to offshore processing facilities.*

1. General information interviewee

- o Background of interviewee (education, experience)
- o When was interviewee on Nauru/Manus? For how long?*
- o Role and position interviewee in RPC?*

*2. General information Regional Processing Centre**

- o Who was detained at the moment interviewee was on Nauru?*
- o How were these detainees divided over the different compounds?*
- o What did the facilities look like?*
- o How were the conditions in the facility?*
- o What and how was the relationship between the facilities and the Nauruan community?*

3. Governance system of the Regional Processing Centre

- o Actors involved
- o Interrelationships of these actors
- o Division public/private
- o Division domestic/foreign
- o Who was in charge? Who had leverage?
- o How did these actors exercise their leverage?
- o Why were these actors involved in the arrangements?
- o Continuity involvement actors

*4. Self-reflection of interviewee on his/her own role in the Regional Processing Centre**

- o Did the facilities match their expectations? Did the job match their expectations?*
- o Did interviewee remain involved in the offshore processing debate/policy after return?*

5. *Human rights*

- o *Human rights – general:*
- o What are human rights?
- o What are the core rights of detainees?
- o *Harm/wrongdoing and protection:*
- o How are detainees protected against harm or wrongdoing?
- o What did the interviewee consider his/her role in protecting detainees' entitlements?
- o Was there (discretionary) room for individuals to make a difference in relation to the position of detainees? Concrete examples?*
- o How adequate is the reporting structure?
- o Is there sufficient transparency (i) between the actors involved and (ii) to the outside world?
- o *Discourse:*
- o Was human rights a useful terminology for the interviewee to express concerns?
- o *Protest:*
- o What does the interviewee think about the protest movements involved in the debate?
- o *Legal:*
- o Human rights compliance
- o What does the interviewee think about the argument that Nauru/PNG is responsible?

Annex II

Topic list PI Norgerhaven

This topic list has been translated from Dutch.

1. Detention population

- o Current detention capacity and current detention population
- o Average stay in PI Norgerhaven
- o Percentage of non-Norwegian prisoners
- o Decisions based on Art. 8(4) Norwegian-Dutch Treaty

2. Services

- o Experiences with available services in PI Norgerhaven
- o Skype facilities
- o Family visits
- o Resocialisation services

3. Cooperation with Norway

- o Division of responsibilities
- o Cooperation agreement
- o Cooperation between Prison Governor and Staff and Facility Manager

4. Position Staff and Facility Manager

- o Experiences
- o Discretionary decision-making
- o Enhancing prison social climate

5. Staff

- o Training Dutch staff
- o Supervision and orders
- o Disciplinary action

6. Monitoring & Oversight

- o Visits of supervisory authorities
- o Norwegian supervision
- o Dutch supervision
- o Inspection of the facilities (esp. in light of Art. 21 Norwegian-Dutch Treaty)

7. *Complaint system*

- o Complaint bodies
- o Application of the *Nederlandse geweldsinstructie penitente inrichtingen*
- o Complaints concerning medical treatment detainees (esp. in light of Art. 10(2) Norwegian-Dutch Treaty)
- o Lawyers (esp. in light of Art. 10(4) Norwegian-Dutch Treaty).
- o Complaints by staff

8. *Criminal prosecution*

- o Application Dutch criminal law in practice (esp. in light of Art. 17 Norwegian-Dutch Treaty)
- o Involvement Norwegian prosecutorial authorities

9. *Miscellaneous*

- o Difference with Belgian-Dutch cooperation in PI Tilburg
- o Overall experiences/future of penal cooperation

Curriculum vitae

Patrick van Berlo (Deurne, 1990) holds a bachelor's degree in International and European Law from the University of Tilburg (2011, cum laude), a master's degree in Law from Cambridge University (2012, first class), and a master's degree in Crime and Criminal Justice from Leiden University (2014, cum laude). During his studies at Tilburg University, he completed the Top Class Law honours programme. He furthermore studied a semester abroad at the Faculty of Law of the University of Oslo (Norway) and represented Tilburg Law School at the John W. Adams Summer School in Socio-legal Studies at the Centre for Socio-Legal Studies of Oxford University (UK). At Leiden University, Patrick was a student-assistant at the Institute of Criminal Law & Criminology, a visiting student at the Kaldor Centre for International Refugee Law (UNSW, Sydney, Australia), and a visiting student at the Border Crossing Observatory (Monash University, Melbourne, Australia). In 2012-13, he completed an internship at the Trial Chamber of the International Criminal Court and a traineeship at the Case Analysis Unit of Eurojust. In 2014, he started working as a PhD candidate for the Institute of Criminal Law & Criminology at Leiden University. During his research, he again visited the Kaldor Centre for International Refugee Law and the Border Crossing Observatory in Australia. He furthermore was a guest lecturer at the Van Vollenhoven Institute for Law, Governance and Development of Leiden University.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2018, 2019 and 2020

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