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

Berlo, P. van

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 Vandenhole & 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 retuming unauthorised migrants: Scholten, 2014; Van Berlo, 2016b. At the border, private border guards increasingly perform immigration and security checks: Gammeltoft-Hansen, 2013. Moreover, deportation azvay 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) offshoring. 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, supranational 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 Søgaard, 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 Søgaard 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 Corretional 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: Cattan & 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, Friperson, & 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 Yeoju, 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 Koulish, 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, neoliberalist 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; Koulish, 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 'Guantanamo 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 reincarnated,[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 Vervaet, 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 oversees 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/ (las 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/transcript-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 Safeguarding 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.

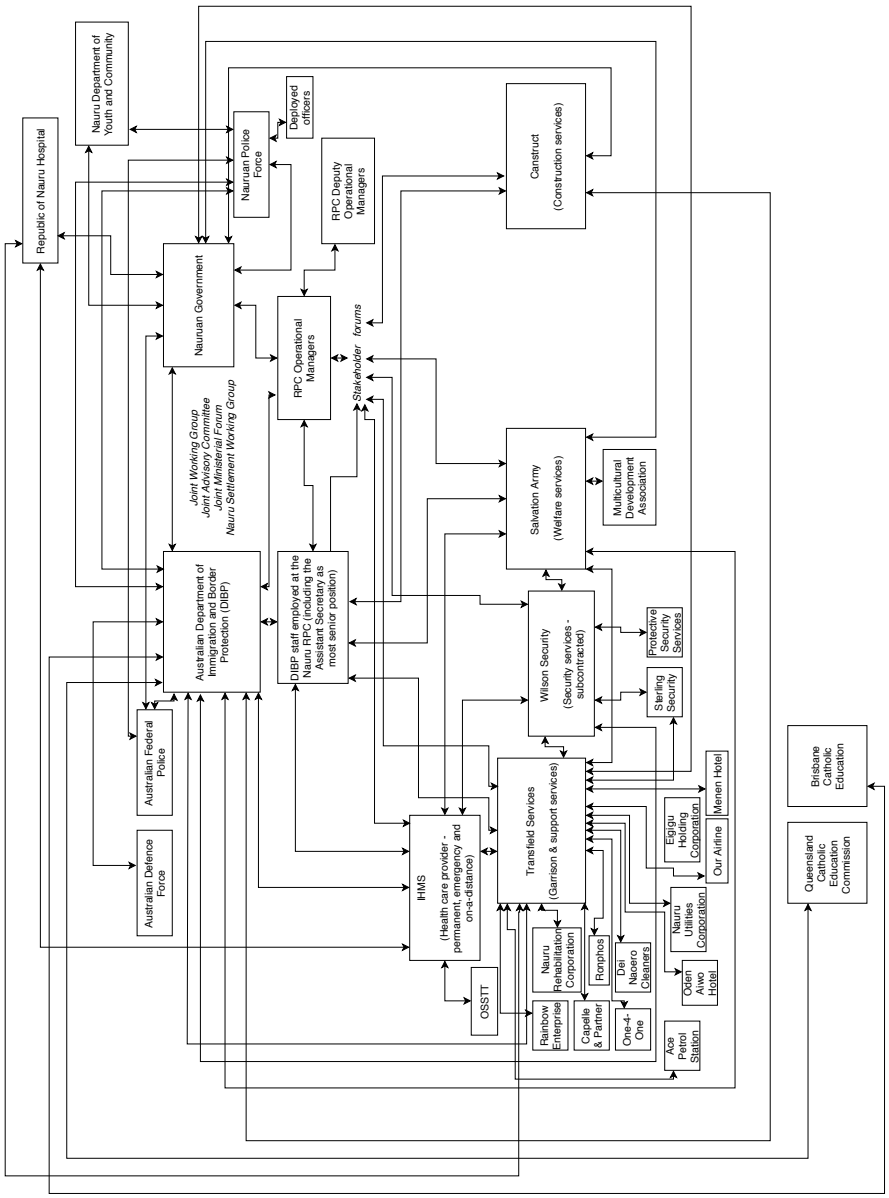

Figure 2: The nodal governance network in RPC Nauru as of 1 December 2012.

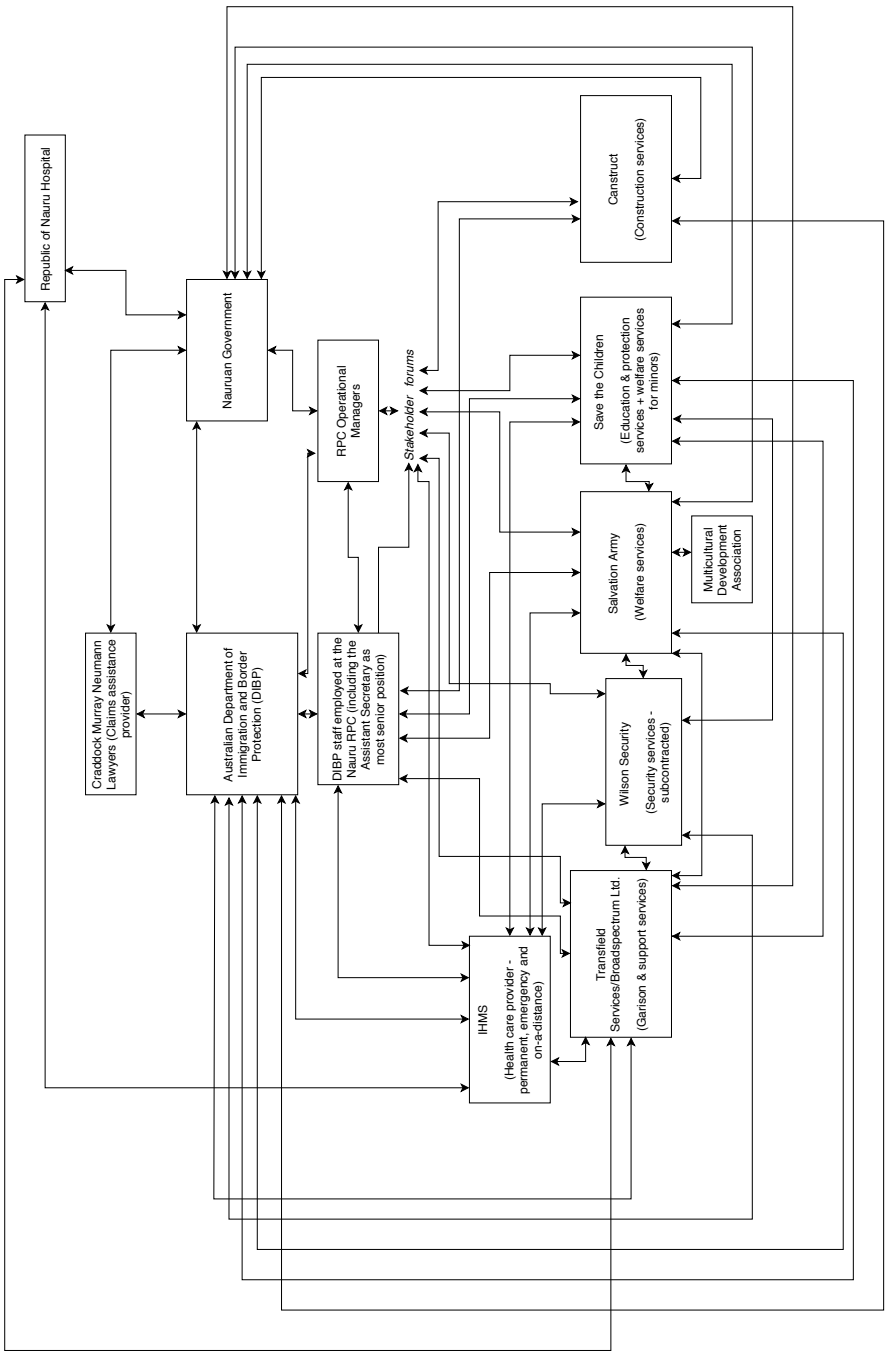

Figure 3: The nodal governance network in RPC Nauru as of 1 December 2013 (simplified version).

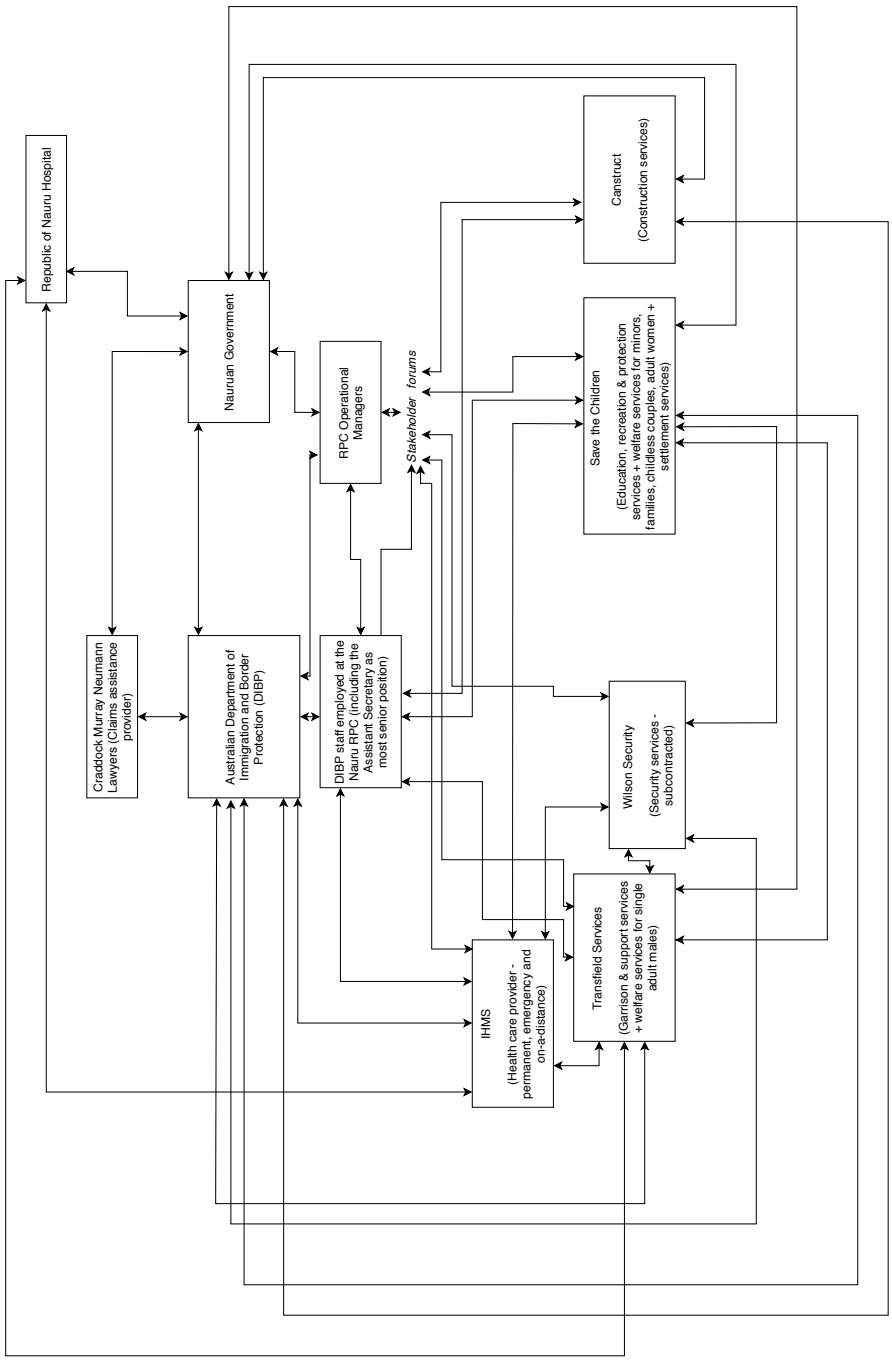

Figure 4: The nodal governance network in RPC *Nauru as of 1 December 2014 (simplified version).*

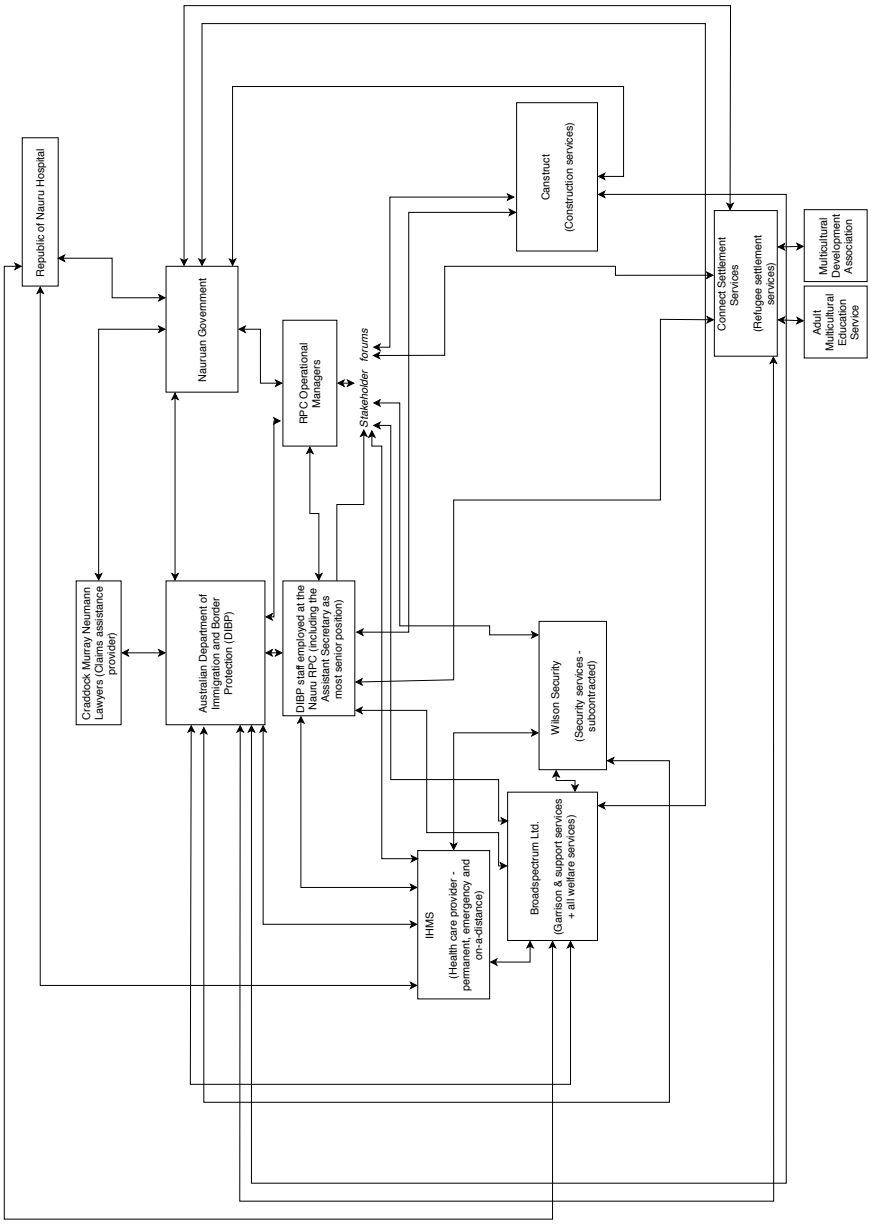

Figure 5: The nodal governance network in RPC Nauru as of 1 December 2015 and 1 December 2016 (simplified version).

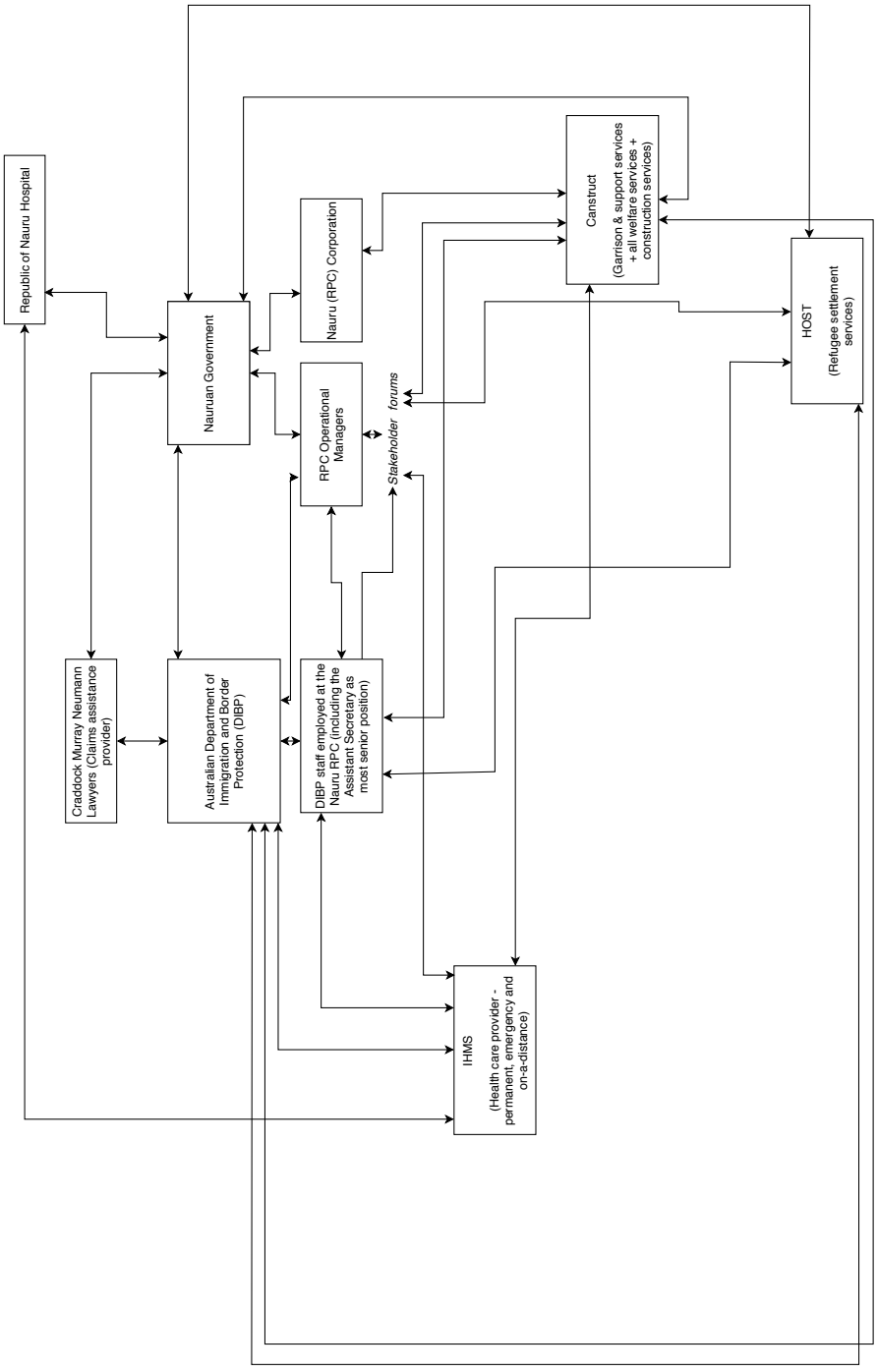

Figure 6: The nodal governance network in RPC *Nauru as of 1 December 2017 (simplified version).*

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]

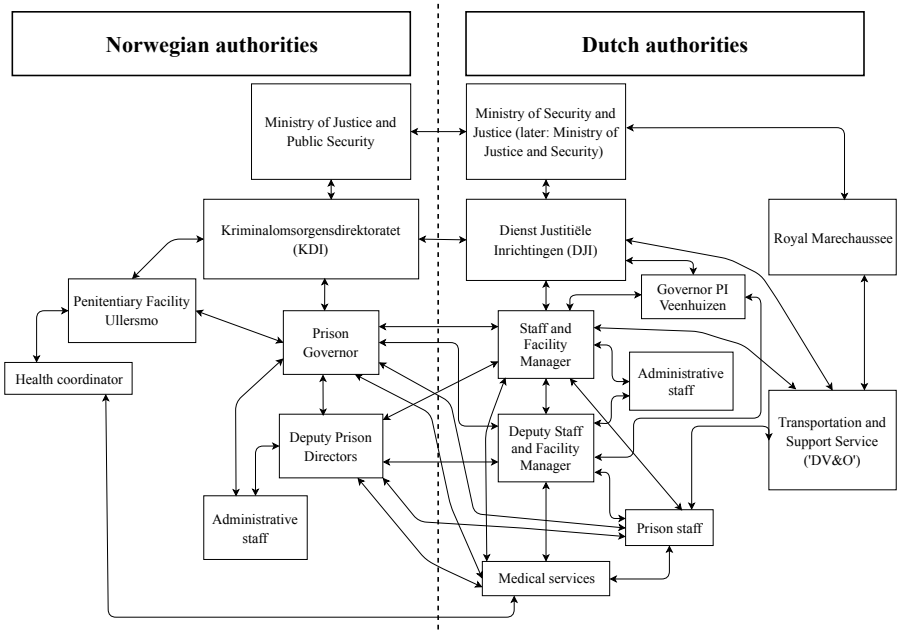

Figure 7: The nodal governance network of PI Norgerhaven.

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 confliction 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 Haeck, 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, Vandenhole, 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; Vandenhole & 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, Vandenhole, et al., 2013; Milanovic, 2011; S. R. Ratner, 2015; Tzevelekos, 2015; Vandenhole & Gibney, 2014.

407 Subedi, 2003, pp. 183–184.

408 Vandenhole & 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

409Vandenbogaerde, 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 elements 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 *(legal validity)*	If power does not confirm to established rules, it is *illegitimate*
(ii) The rules are justifiable by reference to shared beliefs *(normative justifiability)*	If the rules are not justifiable by reference to shared beliefs, there is a *legitimacy deficit*
(iii) There is express consent of the subordinate, or of the most significant among them, to the particular relations of power *(legitimation)*	A lack of express consent of the (most significant) subordinates to the power relations results in *delegitimation*

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.