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

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6 Sophisticating the net I
State responsibility for conduct

6.1 INTRODUCTION

The previous chapter has shown that the state remains the primary and arguably sole bearer of hard international human rights obligations. It is therefore to the state that this book should now turn in order to investigate to what extent the system of human rights obligations has shown resilience and veracity in the face of globalisation. This question is, however, complex in the sense that it does not concern the *widening* of the net to include potential new duty bearers in the framework of international human rights law, but rather the *sophistication* of the net in order to adapt the existing framework's logic and operation to commodified realities. This issue therefore does not revolve around *whether* an actor has become responsible, but *to what extent* existing responsibilities have been reformed or adjusted.

Analysing the existing framework is a two-step process.[1] First, we should turn to general international law to examine for which *conduct* the state can be held responsible (i.e the question of international responsibility for wrongful acts). This is the concern of the present chapter. Subsequently, we should focus on international human rights law specifically in order to establish what the *obligations* of the state precisely include (i.e. the question of the scope of application),[2] a question that is the main concern of the next chapter. This distinction between the responsibility for conduct and the scope of obligations was set out by the ICJ in the *Tehran Hostages* case. The ICJ held that it had to examine the question of state responsibility in two ways: "[f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian

1 Compare Den Heijer, 2011; Gammeltoft-Hansen, 2011.

2 It should be noted that there is no hierarchical relationship between these tests and that their order is therewith not compulsory. Both are necessary yet independent threshold criteria for international human rights responsibility to arise. However, as Milanovic rightfully remarks, in some cases establishing international responsibility for a wrongful act can be a prerequisite for the existence of human rights obligations. Indeed, various human rights obligations are conditionalized by jurisdictional clauses, which in turn are often dependent on the amount of power, authority, and/or control exercised by the state over a territory or person. In such cases, the human rights obligation thus arises when it is established that the acts of the person who exercised power, authority, and/or control in fact can be attributed to the state: Milanovic, 2011, pp. 51–52, see similarly Haijer & Ryngaert, 2015, p. 177. It therefore generally makes sense to treat the question of international responsibility for wrongful acts first. Compare Sari, 2014.

state. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable."[3] Later, this fundamental rule for establishing international state responsibility was laid down in Article 2 of the ILC's Draft Articles on State Responsibility ('Draft Articles'), which are not legally binding in and of themselves yet are understood to codify rules of customary international law.[4] According to Article 2, a state can indeed be held responsible for an internationally wrongful act if the act or omission (a) is attributable to that state and (b) constitutes a breach of an international obligation of that state.[5] To establish the former condition, the public international law doctrine of *attribution* serves to identify acts and omissions that may properly be considered acts of a state. To establish the latter condition, the concept of *jurisdiction* functions to indicate which individuals come within the purview of states' human rights obligations under respective treaty regimes.

It is important to maintain a firm conceptual distinction between both steps as they purport to establish different complementary aspects of state responsibility. At the same time, they tend to become conceptually blurred since the relevant tests for both steps frequently require an assessment of the same factual circumstances and the application of analogous legal criteria.[6] Indeed, the respective tests for establishing attribution and jurisdiction may in certain circumstances contain similar terminology, yet often such terminology reflects different criteria. For example, both tests may use the same terminology of 'effective control' to denote different criteria: as will be explored in detail, to examine whether certain conduct can be attributed to a state (i.e. the question of attribution) one generally has to establish 'effective control' of the state *over the actor* whose conduct the inquiry is concerned with, whereas to examine whether the conduct breaches an obligation of the state (i.e. the question of

3 ICJ, *United States Diplomatic and Consular Staff in Tehran*, 24 May 1980, ICJ Reports 1980, 3, para. 56.

4 International Law Commission ('ILC'), *Responsibility of States for Internationally Wrongful Acts*, annexed to UN GA Resolution 56/83 of 12 December 2001. See also Gammeltoft-Hansen, 2011; Hallo de Wolf, 2011; Mccorquodale & Simons, 2007.

5 Furthermore, States can be held responsible on the basis of derived responsibility as will be further outlined below.

6 Den Heijer, 2011, p. 67; Milanovic, 2014; Szydło, 2012, p. 277. For a clear example, see ECommHR, *X. and Y. v. Switzerland*, 14 July 1977, Application nos. 7289/75 and 7349/76, which is discussed more in-depth in this book in relation to *both* attribution and jurisdiction: see footnote 48 (attribution), footnotes 116-117 of chapter 7 (jurisdiction), and accompanying text. For another example, see ECtHR, *Drozd and Janousek v. France and Spain*, 26 June 1992, Application no. 12747/87, discussed below in footnote 126 of chapter 7. In this case, the Court held that "[t]he term *'jurisdiction'* is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory […]. The question to be decided here is whether the acts complained of by Mr Drozd and Mr Janousek can be *attributed* to France or Spain or both, even though they were not performed on the territory of those States": ECtHR, *Drozd and Janousek v. France and Spain*, para 91 (emphasis added).

jurisdiction) one generally has to establish 'effective control' of the state *over territory or victim*.[7] Given the similarities in terminology, the consecutive questions of the two-pronged test have however frequently, albeit unwarrantly, been confused by both courts and commentators.

The two steps of state responsibility will be addressed in turn in the present and next chapter. In doing so, these chapters first explore global developments before turning to the local contexts of RPC Nauru and PI Norgerhaven. Analysis specifically inquires whether the consecutive steps of establishing state responsibility provide leeway to show resilience in the face of commodification challenges. It does so by contrasting such potential space for resilience with the way in which the doctrines of state responsibility and international human rights law continue to demand veracity to the fundamental principles that states are in principle responsible for their own conduct only and that human rights obligations are in principle obligations of the territorial state.

6.2 Responsibility for conduct: attribution

As the ICJ has noted, "the fundamental principle governing the law of international responsibility [is that] a State is responsible only for its own conduct".[8] States are, however, legal fictions that cannot act in and of themselves given that they are exactly that: fictions. Since states are legal entities, not natural persons, one inevitably needs to apply one or more rules of attribution in order to determine which acts (or omissions) can be regarded as acts (or omissions) of a certain state. Indeed, to say that state X committed act Y (or omitted to do so) requires one to either explicitly or implicitly argue that person (or group of persons) Z, who *factually* acted or omitted, did so on behalf of state X. Such explicit or implicit arguments in turn need to be based on a rule of attribution, i.e. a maxim providing under which preconditions conduct Y of person(s) Z can be regarded as attributable to state X. Only when such a required link is established, one can legitimately claim that the conduct in question is actually the conduct of state X and that state X can rightfully be held responsible for it. Attribution hence provides a state's ownership over and responsibility for certain conduct (or omissions) as exercised through what can legitimately be called its intermediaries or subsidiaries.

It would in turn be little helpful if every state maintained its own maxim of attribution – this would create great disparities and would leave the state with tremendous discretion to determine which acts can, and which cannot,

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7 As will be further outlined in chapter 7, the precise tests for establishing jurisdiction differ amongst human rights regimes.

8 ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, ICJ Reports 2007, 43, para 406. See also Hallo de Wolf, 2011, p. 201.

be regarded as its own. Initiatives on the international level have henceforth attempted to provide a basic set of attribution rules relevant not only to the field of human rights law but to all domains of public international law. Rules of attribution are as such regarded as rules of secondary international law, applying to all situations where primary rules of international law – including international human rights law – provide for certain obligations.[9] Such initiatives have, however, not remained void of debate and controversy: various rules of attribution have over time been developed and these rules have subsequently been divergently interpreted and have been contested both by courts and in scholarship.[10] On a more positive note, the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* ('ILC Draft Articles') have to a large extent codified a prevailing and authoritative set of attribution rules that codify rules of customary international law.[11] Given their authoritative status and grounding in customary international law, it has become commonplace to apply these rules in order to establish whether certain acts or omissions can be attributed to a state, including in the context of international human rights obligations.[12]

Chapter II of the ILC Draft Articles contains 8 different rules of attribution.[13] As the *Commentaries to the ILC Articles on Responsibility of States for internationally wrongful acts* (hereinafter: 'ILC Commentaries') have clarified, these attribution rules are not only cumulative but also limitative: "[i]n the absence of a specific undertaking or guarantee (which would be a *lex specialis*), a state is not responsible for the conduct of persons or entities in circumstances not covered".[14] In commodified settings of confinement, various of the ILC rules might be of relevance for questions of human rights responsibility. Concretely, this concerns the rules as expressed in Articles 4, 5, 6, 7, 8, and 11, which will be discussed in turn below.

Although the ILC Draft Articles apply in a general fashion to internationally wrongful acts and are therewith not limited to the sphere of human rights

9 Griebel & Plücken, 2008, p. 603.

10 Gibney, 2016, pp. 14–15; Griebel & Plücken, 2008, p. 603.

11 Den Heijer, 2015; Gammeltoft-Hansen, 2011; Hallo de Wolf, 2011; Mccorquodale & Simons, 2007. For a more critical reflection on the level of authority of the ILC Draft Articles, see Caron, 2002.

12 Mccorquodale & Simons, 2007, pp. 601–602.

13 These rules deal with conduct of organs of a state (Article 4), conduct of persons or entities exercising elements of governmental authority (Article 5), conduct of organs placed at the disposal of a State by another State (Article 6), excess of authority or contravention of instructions (Article 7), conduct directed or controlled by a State (Article 8), conduct carried out in the absence or default of the official authorities (Article 9), conduct of an insurrectional or other movement (Article 10) and conduct acknowledged and adopted by a State as its own (Article 11).

14 *Commentaries to the ILC Articles on Responsibility of States for internationally wrongful acts*, UN Doc. A/56/10, (2001) Yearbook of the ILC, vol. 2 (part 2), at 39, para. 9.

norms,[15] the discussion below will show how they at least partially deal with the same tension between veracity and resilience in the face of globalisation developments, in particular in the face of commodification. Indeed, the fundamental tenet of international human rights law that obligations are in principle obligations of territorial states applies *mutatis mutandis* to the broader field of public international law. Even more so, it arguably is even derived from the sphere of public international law, which is, after all, firmly based in Westphalian notions of sovereignty and power. In turn, the ILC Draft Articles show how commodification can be dealt with both in a veracious and resilient manner as explored below.

6.3 The ILC Draft Articles

6.3.1 Conduct of organs of a state (Article 4)

The 'basic rule' of attribution is laid down in Article 4 of the ILC Draft Articles,[16] which also functions as a point of departure in that it both defines the core cases of attribution and informs various complementary rules of attribution.[17] It provides that

> "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

The basic rule hence reflects the idea that a state is responsible for all of its organs acting in that capacity.[18] This makes logical sense: states are responsible for the acts of their own organs. The basic rule therewith recognises the unity of the state, entailing that all acts or omissions of all organs are to be regarded as acts or omissions of the state, and henceforth that all organs are capable of committing internationally wrongful acts.[19] No distinction is made between different branches or levels of government or between levels of

15 The Articles "apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole": ILC Commentaries, at 32, para 5.
16 ILC Commentaries, at 39, para 8.
17 ILC Commentaries, at 40, para 2.
18 Such responsibility is well established in international jurisprudence and has on many occasions been (re)confirmed: see ILC Commentaries, at 40, para 3.
19 ILC Commentaries, at 40-41, paras 5-6.

superiority amongst public servants.[20] The basic rule furthermore expresses in an unequivocal manner that internationally wrongful acts are, in principle, committed by organs of sovereign states, staying veracious to the fundamental principles underlying public international law.

As clarified by the second paragraph of Article 4, internal law provides an important basis to establish whether a person or entity is a state organ – indeed, when the internal law of a state characterizes a given entity as a state organ, "no difficulty will arise".[21] That is not to say that internal law exhaustively defines state organs, which is reflected by the words "[a]n organ *includes*" in the second paragraph. As the ILC Commentaries highlight, some systems determine the status of entities as state organs not only by internal law but also by practice, in which case states cannot avoid responsibility for the conduct of such entities simply because internal law does not provide for their status as state organs.[22] Ultimately, whether such entity is a state organ depends on the facts and circumstances of the specific situation.[23] The ICJ's case law shows that relevant indicators are *inter alia* by whom a person or entity is appointed, to whom the person or entity is subordinated, who pays the salaries of the person or entity, and whether the person or entity is authorised by law to exercise public authority.[24] Whilst the ILC Commentaries ultimately refrain from providing a concrete test for *de facto* state organs, the ICJ has outlined that the conduct of persons or entities *de facto* operating as agents of the state can ultimately be attributed to the state if "in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument".[25] This is a significant threshold, yet equating an entity with a state organ has far-reaching consequences and would, if a lower threshold was applied, potentially result in a breach of the basic rule that states are in principle held responsible only for their own conduct.[26]

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20 ILC Commentaries, at 40-41, paras 6-8.

21 ILC Commentaries, at 42, para 11.

22 ILC Commentaries, at 42, para 11.

23 ILC Commentaries, at 42, para 13.

24 Den Heijer, 2011, pp. 71–72. See also ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, paras. 386-388.

25 ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, paras. 391-392. See also ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua,* 27 June 1986, ICJ Reports 1986, 14, para 109. A close reading of this test reveals that the ICJ has difficulties with classifying persons or entities as state organs if they maintain a certain degree of autonomy from the state: for an entity to be considered a *de facto* state organ, it should have no genuine autonomy and it should be controlled by the state to a similar extent as *de jure* state organs: see also Den Heijer, 2011, p. 73.

26 Den Heijer, 2011, pp. 73–74.

Further difficulties may arise in relation to the question whether a *de jure* or *de facto* state organ has in fact acted in that capacity.[27] According to the ILC Commentaries, it is irrelevant that the person or entity may have acted with ulterior or improper motives or has abused public authority.[28] A clear distinction should therefore be maintained between conduct that is *ultra vires* or in breach of rules and regulations on the one hand and purely private conduct on the other, with the former being nonetheless attributable to the state whilst the latter is not, which is also affirmed in Article 7 of the Draft Articles as outlined below. Again, this distinction makes clear why the threshold for *de facto* state organs is a significant one: once an entity is deemed to be a *de facto* state organ, *all* of its actions in that capacity – even those involving abuse of power or inappropriate motives – are attributed to the state, except for those actions constituting *purely* private conduct.

The basic rule of attribution is of course not all there is to attribution. In Articles 5 to 11, the ILC Draft Articles outline a number of additional grounds for responsibility for internationally wrongful acts. These alternative grounds should however not be regarded as deviations from the Draft Articles' veracious stance vis-à-vis the principle of sovereign responsibility: to the contrary, they reiterate the central role of sovereign nations as bearers of responsibility by outlining alternative routes to allocate responsibility for conduct to states. Nonetheless, they at the same time arguably also constitute a form of resilience to contemporary commodification developments. Indeed, these alternative grounds for state responsibility are based on the idea that the state does not *necessarily* act through its own organs, but may also act through *inter alia* private parties or third states. The Draft Articles hence recognise that the exercise of power may materialise in a nodal system of governance. Accordingly, they make sure that states are held responsible for conduct that is exercised through such nodal networks and that can be attributed to them.[29]

6.3.2 Conduct of persons or entities exercising elements of governmental authority (Article 5)

A first example of such veracity and resilience is the attribution rule as laid down in Article 5 Draft Articles:

> "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the govern-

27 ILC Commentaries, at 42, para 13.
28 ILC Commentaries, at 42, para 13.
29 See also Brown Weiss, 2002, p. 798, who positions the development of the ILC Draft Articles in the context of globalisation and the growing importance of non-state actors.

> mental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

This provision codifies a rule of attribution that relates to entities that cannot be classified as *de jure* or *de facto* state organs, but that nevertheless are authorised to exercise *some* governmental authority. As the ILC Commentaries outline, it is hence concerned with "the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions".[30] A large variety of entities may be captured by the scope of this provision: the ILC lists public corporations, semi-public entities, public agencies, and private companies as entities that could potentially fall within the ambit of Article 5 Draft Articles, "provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned".[31] Nevertheless, Article 5 is a rather narrow or even "exceptional" pathway to attribution.[32] In particular, three tests should be fulfilled for attribution under this provision: (i) the functions, tasks and services delegated to the actor must contain elements of governmental authority, (ii) they must be delegated to the actor *by law*, and (iii) the actor must be acting in that official capacity.[33]

Thus, first, state responsibility under Article 5 is only engaged insofar as governmental authority is exercised, not in the context of private or commercial activities of the same entities.[34] The scope of 'governmental authority' in turn is by design not clearly defined and the appropriate test is to a certain extent purposively vague:

> "beyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances".[35]

30 ILC Commentaries, at 43, para 1.
31 ILC Commentaries, at 43, para 2.
32 Duffy, 2005; Francioni, 2011; Gammeltoft-Hansen, 2011.
33 Hallo de Wolf, 2011, p. 210.
34 ILC Commentaries, at 43, para 2. See also Hallo de Wolf, 2011, pp. 222–223.
35 ILC Commentaries, at 43, para 6.

The Commentaries hence suggest a contextual reading.[36] Still, they mention a number of concrete examples of entities that may exercise governmental authority, of which the first one is particularly of interest for the present enquiry: that of "private security firms [that] may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations".[37] Since detention and imprisonment hence constitute 'typical' forms of governmental authority, this criterion is easily fulfilled in settings of confinement where exercises of such core activities are concerned.

Second, Article 5 is narrowly construed in the sense that it is clearly limited to entities that are empowered to exercise governmental authority *by internal law* as opposed to entities that act under the 'mere' direction or control of the state (as covered by Article 8 of the Draft Articles) and entities that seize power in the absence of state organs where the exercise of governmental authority is called for (as covered by Article 9 of the Draft Articles).[38] Domestic law should thus authorise the conduct as involving the exercise of public authority: "it is not enough that [internal law] permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category".[39] Conversely, for purposes of Article 5, no control of the state over the specific conduct as carried out needs to be established – *de jure* empowerment of the actor to exercise such public authority in internal law suffices.[40] Such empowerment may arguably be based on formal legislative acts, but also on other forms of (subordinate) legislation.[41] What does not seem to be captured by Article 5, on the other hand, are situations where actors operate on the basis of mere contractual agreement.[42] In such cases, attribution via the route of Article 8 seems more appropriate.

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36 See also Gammeltoft-Hansen, 2011; Hallo de Wolf, 2011. In the absence of consensus, various tests and definitions for establishing governmental authority have been coined over the years. In *Rendell-Baker v. Kohn*, the US Supreme Court for instance held that it suffices when a private actor fulfils a 'public function' that has "traditionally been the exclusive prerogative of the State": US Supreme Court, *Rendell-Baker v. Kohn*, 25 June 1982, 457 US 830. On this case, see also S. Kennedy, 2006, p. 72. McCorquodale and Simons propose that governmental authority includes "a wide variety of public functions, from running prisons, health and education facilities, to private airline corporations having delegated immigration or quarantine power and a corporation having a role in the identification of property to be expropriated by the state": Mccorquodale & Simons, 2007, p. 607.

37 ILC Commentaries, at 43, para 2.

38 ILC Commentaries, at 43, para 7.

39 ILC Commentaries, at 43, para 7.

40 ILC Commentaries, at 43, para 7.

41 Hallo de Wolf, 2011, pp. 221–222.

42 Hallo de Wolf, 2011, p. 222; Weigelt & Märker, 2007, p. 389. For a different perspective, see Francioni, 2011, pp. 100–101; S. Taylor, 2010, p. 345, who argue that the 'empowered by law' requirement must be interpreted broadly to also include the lawful delegation of a governmental function by contract or otherwise.

Third, the actor must act in its public or governmental capacity. When an entity's conduct is purely commercial in nature and does not further its governmental mandate, the conduct is therefore not attributable to the state.[43] In this regard, however, grey areas exist: in certain situations, conduct may serve both commercial and public interests. The exercise of governmental authority by private actors in the context of confinement serves for instance also commercial interests as it is a source of revenue. This third condition has therefore been provided with a broad application – that is to say, the actor endowed with governmental authority operates in its official capacity unless there is no reasonable doubt that it acts for purely commercial purposes.[44]

6.3.3 Conduct of organs placed at the disposal of a State by another State (Article 6)

The element of governmental authority is also central to the attribution rule as expressed in Article 6 of the Draft Articles:

> "The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed."

It is not uncommon that states put one or more of their organs at the disposal of another state so that the organ (temporarily) operates under the authority and for the exclusive benefit of the receiving state. In such situations, Article 6 provides that the conduct of the state organ concerned is attributed exclusively to the receiving state.[45] Key to this attribution rule is the condition of being 'placed at the disposal of'. According to the ILC Commentaries, the organ concerned must not only operate with the consent, under the authority, and for the purpose of the receiving state, but should act "in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State".[46] At the same time, 'ordinary' inter-state cooperation on the basis of a treaty or otherwise does not fulfil the

43 For example, "the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling-stock)": ILC Commentaries, at 43, para 5.

44 Compare Hallo de Wolf, 2011, p. 223.

45 ILC Commentaries, at 44, para 1.

46 ILC Commentaries, at 44, para 2. For example, judges of one state that are appointed to act as judicial organs of another state may thus give rise to attribution under Article 6: ILC Commentaries, at 44, para 3.

threshold set in Article 6.[47] Article 6 remains a rather narrow category: where the organ continues to function under the authority of the sending state, its conduct remains attributable to that state under Article 4 of the Draft Articles; where an organ acts under the joint instructions of two states, its conduct is attributable to both states under respectively Articles 4 and 8 of the Draft Articles.[48] The crux for the test applicable to Article 6 is henceforth that a functional link must be established between the organ in question and the receiving state's structure or authority.[49] In addition, two further conditions have to be fulfilled: the entity placed at the disposal of another state must have the status of an organ in the sending state, and the conduct of that organ must involve the exercise of elements of governmental authority on behalf of the receiving state.[50]

6.3.4 Excess of authority or contravention of instructions (Article 7)

The rule established in Article 7 Draft Articles is closely affiliated with the rules of the preceding Articles. According to the text of the provision,

> "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

Article 7 is complementary to the rules established in Articles 4, 5, and 6 of the Draft Articles in the sense that it deals with unauthorised or *ultra vires* acts of state organs or authorised entities exercising governmental authority. Whenever a state organ or an entity authorised to exercise elements of governmental authority is acting in its official capacity, such conduct is automatically

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47 ILC Commentaries, at 44, para 2. By means of an example, the ILC Commentaries draw attention to the case of *Xhavara and Others v. Italy and Albania* before the ECtHR, in which Italy's conduct in policing illegal immigration at sea in pursuance of an Italian-Albanian agreement could not be attributed to Albania: ECtHR, *Xhavara and Others* v. *Italy and Albania*, 11 January 2001, Application no. 39473/98.

48 ILC Commentaries, at 44, para 3. As illustrated by the ILC Commentaries, the ECommHR attributed the exercise of 'delegated' powers by Swiss police forces in Liechtenstein to Switzerland since the officers had not been placed at the disposal of Liechtenstein: rather, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, the officers were governed exclusively by Swiss law, and they were considered to be exercising Swiss public authority: ILC Commentaries, at 44-45, para 7. See also *ECommHR, X. and Y.* v. *Switzerland*. As will be further outlined below, however, the ECommHR in this case arguably confused rules of attribution and jurisdiction, finding extraterritorial jurisdiction by establishing that conduct can be attributed to Switzerland: see footnotes of chapter 7and accompanying text.

49 ILC Commentaries, at 44, para 4.

50 ILC Commentaries, at 44, para 5.

attributable to the relevant state under Articles 4, 5, and 6, even if the organ or entity concerned acted in excess of authority or in contravention of instructions.[51] Central question in establishing such attribution link is thus whether the organ or entity acted in its official capacity or in a personal capacity.[52]

6.3.5 Conduct directed or controlled by a State (Article 8)

Article 8 Draft Articles is of a rather different nature than the preceding articles in that it attributes responsibility on the basis of a certain level of instructions, direction, or control of the state over a person or group of persons that are not classified as its *de jure* or *de facto* state organs and that do not exercise governmental authority through law:

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

In general, conduct of private actors not involving the exercise of governmental authority does not give rise to state responsibility. This may be different where states issue instructions or exercise more generally a certain level of direction or control over such private conduct, in which case such conduct may under circumstances be attributed to the state on the basis of Article 8 Draft Articles.[53] Required in such instances is a 'real' or factual link – instructions, directions, or control – between the state machinery and the actor involved.[54] Furthermore, the instructions, directions, or control of the state must relate to the specific *conduct* which is alleged to amount to an internationally wrongful act: it thus does not suffice to merely establish that a state instructs, directs, or controls a private actor *as such*.[55]

Where a state clearly *instructs* certain conduct, such requirement is readily fulfilled: when state organs supplement their own involvement and action by appointing or recruiting private actors who subsequently act as the state's 'auxiliaries' and operate on the basis of the state's instructions whilst remaining outside the official state structure, it is unproblematic to attribute their conduct

51 ILC Commentaries, at 45, para 1.
52 Ultimately, this question examines the extent to which the conduct is systematic or recurrent, so that the State knew or ought to have known about it and should have taken steps to prevent reoccurrence: ILC Commentaries, at 46, paras 7-8.
53 ILC Commentaries, at 47, para 1.
54 ILC Commentaries, at 47, para 1.
55 ILC Commentaries, at 48, para 7.

to the state.[56] It may be more complex to establish whether attribution of conduct is also justified under this provision in cases of more general state *directions* or *control*. In such circumstances, conduct of a private actor is attributable to the state only when the directions or control concerned a particular operation and the conduct constituted an integral part of that specific operation.[57] Importantly, this does not cover acts that are only incidentally or peripherally associated with the operation and that were not directed or controlled by the state.[58] As Gammeltoft-Hansen emphasises, "where arrangements are less tightly state-governed, it may become difficult in practice to show that states direct or control specific conduct leading to human rights violations".[59]

At the same time, there is no clear consensus on what level of control is required for establishing direction or control. The ILC Commentaries refer to the ICJ case of *Military and Paramilitary Activities in and against Nicaragua*, in which the question arose what degree of control the state must exercise in order to attribute private conduct to it.[60] The ICJ accepted that the US in this case was responsible for its involvement in the planning, directing, and supporting of the conduct of Nicaraguan operatives, but rejected that all conduct of these operatives were subsequently attributable to the United States as there was no clear evidence that the United States had exercised *effective control* over the military or paramilitary operations.[61] If, on the other hand, it could be proven that state agents "participated in the planning, direction, support and execution" of certain acts, such acts could be attributed to that state.[62] In formulating this 'effective control' test, the ICJ hence set a high threshold for attribution. In contrast, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') argued in *Tadić* that the degree of control may "vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international

56 ILC Commentaries, at 47, para 2. In such cases, at a minimum some form of agreement or pre-existing authorisation or instruction must be demonstrable in relation to the conduct carried out, although this does not have to amount to formal authorisation through domestic law. Similarly, in the case of state direction or control, there does not necessarily have to be a formal attachment or contract between the state and the private actor, although the direction or control over the particular conduct still has to be demonstrated. See also Gammeltoft-Hansen, 2011, p. 217.

57 ILC Commentaries, at 47, para 3.

58 ILC Commentaries, at 47, para 3.

59 Gammeltoft-Hansen, 2011, p. 219.

60 ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua.* See also ILC Commentaries, at 47-48, para 4.

61 ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua,* paras. 86, 109, 115. See also ILC Commentaries, at 47-48, para 4.

62 ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua,* para 86.

law should require a high threshold for the test of control".[63] By subsequently arguing that a level of *'overall control'* is sufficient to fulfil the threshold, the majority of the Appeals Chamber criticised the approach taken and the high standard set by the ICJ.[64] The ECtHR appears to concur with the ICTY's approach: it used the standard of overall control to attribute the conduct of private groups in amongst others *Loizidou v. Turkey*, *Cyprus v. Turkey*, and *Ilascu and Others v. Moldova and Russia*.[65] In response, the ICJ in the *Genocide* case upheld its standard set in *Nicaragua*, arguing that the test as applied by the ICTY was too broad and all-encompassing in scope and "stretches too far, almost to breaking point".[66] As the ILC Commentaries conclude, "[i]n any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it", therewith clearly maintaining the middle ground between the diverging approaches.[67] This is ultimately understandable, given that two fundamental values are at stake here: a solid balance is required between ensuring that a state is held responsible for those acts that it instructed, directed, or controlled on the one hand and making sure that it is not held responsible for *more* than that on the other. Nevertheless, by pointing to the individual 'appreciation' of a case, the ILC Commentaries hardly provide a clear or readily applicable standard and therewith leave room for uncertainty.

The difference between instruction, direction, and control may be paramount. For instance, different from the rule set out in Article 7 Draft Articles, in the context of Article 8 Draft Articles a state generally does not assume the risk that lawful instructions or directions given to private persons or entities are carried out in an internationally unlawful way – in such cases, the conduct

63 ICTY, *Prosecutor* v. *Duško Tadić*, 15 July 1999, Case IT-94-1-A, para 117. See also ILC Commentaries, at 48, para 5.

64 ILC Commentaries, at 48, para 5.

65 Den Heijer, 2011, pp. 78–79. See also ECtHR, *Loizidou v. Turkey* (Grand Chamber, Merits), Judgment of 18 December 1996, Application no. 15318/89; ECtHR, *Cyprus v. Turkey* (Grand Chamber), Judgment of 10 May 2001, Application no. 25781/94; and ECtHR, *Ilascu and others v Moldova and Russia,* 8 July 2004, Application no. 48787/99, para 312. This approach of the ECtHR will be problematised in chapter 7, however, as at times the Court seems to have confused the tests of attribution and jurisdiction.

66 ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, para 403-406. The ICJ highlighted that under Article 8 Draft Articles, not *all* acts of actors receiving state instructions or being state directed or controlled can automatically be attributed to the state: rather, attribution on this basis is only possible in relation to acts resulting from state instructions or the assertion of control: ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* para. 397.

67 ILC Commentaries, at 48, para 5. Den Heijer has further analysed the debate between the ICJ on the one hand and the ICTY and ECtHR on the other, arguing that both proposed tests are problematic to certain extents: see Den Heijer, 2011, p. 82.

cannot be attributed. Decisive in this regard appears to be whether the conduct was "really incidental to the mission or clearly went beyond it".[68] This is different when acts are carried out in an internationally unlawful way under the control of a state, in which case attribution is unproblematic even if particular instructions were ignored.[69] Whether unlawful conduct can be attributed to a state on the basis of Article 8 Draft Articles thus ultimately depends on the factual link that can be discerned.

6.3.6 Conduct acknowledged and adopted by a State as its own (Article 11)

Finally, Article 11 of the Draft Articles concerns conduct acknowledged and adopted by a state as its own:

> "Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own."

All the previously mentioned bases for attribution "assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act".[70] Article 11 on the other hand regulates attribution when conduct is acknowledged and adopted by a state as its own, even if the conduct concerned was not attributable to the state at the time of its commission.[71] Article 11 clearly distinguishes between acts that are both acknowledged and adopted by the state as its own and those that are merely supported or endorsed by the state.[72] Furthermore, the phrase 'if and to the extent that' indicates that a state might acknowledge and adopt only some conduct, implying that such acknowledgment and adoption must be clear and unequivocal.[73]

6.4 Attributing conduct to multiple states: joint responsibility

It is not difficult to imagine how each of the aforementioned rules of attribution may be applied in nodal governance contexts in order to determine the responsibility of involved states, therewith showing resilience in the face of novel

68 ILC Commentaries, at 48-49, para 8.
69 ILC Commentaries, at 48-49, para 8.
70 ILC Commentaries, at 52, para 1.
71 ILC Commentaries, at 52, para 1.
72 ILC Commentaries, at 53, para 6. The criteria of acknowledgment and adoption are cumulative: see ILC Commentaries, at 53-54, para 9.
73 ILC Commentaries, at 53, para 8.

constructions of commodification that complicate ownership of actions. However, whilst the rules on attribution deal with the attribution of conduct to individual states, at times, multiple states may be involved in an internationally wrongful act simultaneously. This raises the question which of these states can be held responsible for such acts and under what circumstances. In the context of the present study, this question is particularly pressing now that commodification in the confinement realm may entail that one or more additional states are drawn into the governance equation of a particular realm of confinement.

As Article 47 Draft Articles confirms, where multiple states are responsible for the same internationally wrongful act, each of these states' responsibility may be invoked. The ILC Commentaries confirm that the general assumption in international law is that in such circumstances each state remains separately responsible for conduct attributable to it.[74] Den Heijer has further dissected the scenarios in which the responsibility of multiple states may be engaged at the same time.[75] This concerns (i) where the conduct of multiple states that act independently from one another results in an injury to a third party, (ii) where a joint act of two states engages the responsibility of both states involved, and (iii) where one state participates in the internationally wrongful act of another state. The way in which responsibility for an internationally wrongful act can be established in relation to one or more states differs per scenario. What these three scenarios have in common, however, is that they – similar to the rules on attribution – strike an arguably fair balance between veracity and resilience. Indeed, they allow for flexibility in the sense that multiple states can be held responsible whilst staying veracious to the fundamental principle of sovereign state responsibility. Each scenario will now be addressed in turn.

6.4.1 Multiple states acting independently

Attribution in the first scenario is rather unproblematic: the various rules of attribution as set out in the Draft Articles are not mutually exclusive and may as such engage the responsibility of multiple states for the same event under different complementary rules of attribution. Where the independent conduct of two or more states results in a single incident, all states involved can hence be held responsible on the basis of the regular rules of attribution. Such an approach makes sense and appears little controversial: when conduct attributable to state A and conduct attributable to state B leads to an incident, both can be held responsible for their respective internationally wrongful acts, provided that their conduct breaches an international obligation. It would not

74 ILC Commentaries, at 124, para 3.
75 Den Heijer, 2011, pp. 94–96.

resonate with the principle of independent responsibility if one of both states would be released from responsibility merely because another independently acting state simultaneously carries responsibility or has already been held to account.

6.4.2 Joint acts

The second scenario concerns cases where states act truly in concert and where such orchestrated conduct engages the responsibility of all involved states. Two distinct types of 'joint acts' can be distinguished: (a) acts of common organs set up by multiple states, and (b) acts committed in concert on the basis of close cooperation between states. As the Draft Articles maintain in relation to the latter category, "States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation".[76] In this sense, joint acts relate to situations "where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them".[77]

Like the first scenario, attribution in these scenarios is not problematic: the ILC has maintained in relation to common organs that its conduct "can, indeed, only be considered as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will have concurrently committed separate, although identical, internationally wrongful acts."[78] Thus, the conduct of the common organ can be attributed to each of the states whose common organ it is. Likewise, in situations where acts are committed in concert on the basis of close cooperation between states, each of the states involved can be held responsible for the wrongful conduct as a whole.[79]

More problematic, however, is the preceding question whether an offence is truly committed 'in concert' or whether an organ should be considered 'joint'. At a minimum, to speak about 'joint' activity, it seems required that such activity was carried out "in accordance with the instructions of all states involved and that all responsible states had it in their power to prevent the alleged misconduct" – indeed, such a reading accords to the underlying notion that a connection between international state responsibility and a state's own 'sphere of activity' is required.[80] Joint acts hence require at least a certain amount of influence and instructions of all states involved over *one and the*

76 ILC Draft Articles, at 124, para 2.
77 ILC Draft Articles, at 124, para 3.
78 Ago, 1978, p. 54.
79 ILC Draft Articles, at 124, para 2.
80 Den Heijer, 2011, p. 98.

same act or *course of action*, which is to be "distinguished from situations where *identical offences* are committed in concert by two or more states […] where each state acts through its own organs".[81] In the latter case, states can consequently only be held responsible for their own conduct whereas in the case of joint acts all involved states can be held responsible for the wrongful conduct in its entirety. To conclude, in order to speak about a joint act, all states hence have to significantly contribute – in the sense of influence and instruction – to *a particular act,* or a *particular series of conduct,* to such an extent that the act concerned may be considered a single course of conduct that is attributable to each of the states involved.[82]

6.4.3 Derived responsibility

The concept of 'derived responsibility' is central to the third scenario, i.e. where a state takes part in an internationally wrongful act that can be attributed to another state and the participating state should be held responsible separately on account of its involvement. This scenario is different from the other two scenarios in that it diverges from the principle of independent responsibility and consequently does not rely on the framework of attribution rules set out in Articles 4 to 11 ILC Draft Articles. Indeed, in these types of cases, responsibility is – exceptionally – not self-standing but derived.[83] In this sense, the framework of derived responsibility seems to be most far-reaching in terms of resilience vis-à-vis commodification developments, as it diverges significantly from the fundamental principle that sovereign states are in principle only responsible for their own conduct. Rather, states are held responsible on the basis of internationally wrongful acts of *another* state which it either aided or assisted, directed or controlled, or coerced – three potential situations that fit seamlessly within a paradigm of nodal governance.

Chapter IV of the Draft Articles deals with derived responsibility, providing rules for situations where a state is involved in the commission of another state's international wrongful act through assistance (Article 16), direction (Article 17), or coercion (Article 18).[84] Whilst each of these cases represents a breach of the acting state's international obligations, save for particular cases of coercion in which the acting state is a mere instrument of the coercing state, the responsibility of the participating state is also implicated due to its willing

81 Den Heijer, 2011, pp. 95–96 (emphasis added).
82 ILC Draft Articles, at 124, para 3.
83 ILC Commentaries, at 64-65, paras 5 and 8.
84 Incitement on the other hand is generally not regarded as sufficient basis for establishing derived responsibility: ILC Commentaries, at 65, para 9.

involvement.[85] Before elaborating upon these Articles, two further remarks are due.

First, practically, derived responsibility may raise difficulties where judicial bodies are asked to decide on the participating state's responsibility without the presence and/or consent of the acting state. As the ICJ has repeatedly confirmed, the *Monetary Gold* principle prohibits it from determining the responsibility of the acting state if such a state is absent or has not given its consent, which in turn prevents it from deciding on the potential derived responsibility of the participating state.[86] However, as the ILC Commentaries clarify, whilst this may give rise to *practical* difficulties in establishing responsibility, it does not prevent the Draft Articles from ascribing derived responsibility as such.[87]

Second, the fact that Chapter IV does not primarily rely on the principle of independent responsibility is not its only distinctive feature. Different from the attribution rules in Chapter II of the Draft Articles, it to a certain extent also blurs the distinction between primary and secondary rules of international law, as it specifies particular internationally wrongful acts in its provisions.[88] At the same time, the ILC Draft Articles stress that the situations covered by Chapter IV have a special character and only cover "certain cases".[89] Where a state coerces another state into conduct that constitutes an internationally wrongful act on behalf of the latter state but would not constitute an internationally wrongful act on behalf of the former state, only extreme cases of coercion would hence justify the former state to become responsible for the internationally wrongful act of the latter state.[90] Furthermore, to establish responsibility under Chapter IV, the participating state should thus be aware of the circumstances of the internationally wrongful act and a "specific causal link" should exist between the conduct and the participating state's assistance, direction, or coercion.[91]

6.4.3.1 Aid or assistance

Article 16 Draft Articles concerns the derived responsibility of a state that had aided or assisted another state in the commission of an internationally wrongful act:

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85 ILC Commentaries, at 64-65, para 6.

86 ICJ, *Monetary Gold Removed from Rome in 1943*, 15 June 1943, *ICJ Reports 1954*, p. 19, at p. 32; *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992*, p. 240, at p. 261, para. 55.

87 This has for example been confirmed in the context of aid and assistance in the ILC Commentaries, at 67, para 11.

88 ILC Commentaries, at 65, para 7.

89 ILC Commentaries, at 65, para 8.

90 ILC Commentaries, at 65, para 8.

91 ILC Commentaries, at 65, para 8.

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State."

Since Article 16 expresses a responsibility that is derived in nature, it should be distinguished from situations where the latter state is a co-perpetrator of the internationally wrongful act.[92] Moreover, the derived responsibility of the participating state only covers the extent to which the state has caused or contributed to the internationally wrongful act.[93] Examples of cases where Article 16 may be invoked include situations where a state knowingly provides essential facilities to, or finances the conduct of, the acting state that commits an internationally wrongful act.[94]

To establish derived responsibility on this basis, three criteria should be fulfilled. The assisting state (i) must be aware of the circumstances that make the acting state's conduct an internationally wrongful act, (ii) must give aid or assist with a view to facilitating the commission of that act and must actually give the aid or assist, and (iii) the completed act of the acting state would also have constituted an internationally wrongful act if carried out by the participating state.[95] The ILC Commentaries highlight the particular importance of condition (ii): establishing derived responsibility on the basis of Article 16 requires that "the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the [human rights violation constituting an] internationally wrongful conduct".[96] The threshold is thus particularly high: not only knowledge but also intent is required on behalf of the assisting state.

92 ILC Commentaries, at 66, para 1.
93 ILC Commentaries, at 66, para 1.
94 ILC Commentaries, at 66, para 1.
95 ILC Commentaries, at 66, paras 3-6.
96 ILC Commentaries, at 67, para 9. On the contrary, criteria (iii) seems less problematic in cases of human rights violations. As Den Heijer explains, this criteria is usually easily fulfilled due to the universal application of human rights treaties as well as the fact that Article 16 Draft Articles does not require the internationally wrongful act to be opposable to both the acting and the assisting state under the *same* international provision: it is indeed only required that the conduct would also be wrongful if committed by the assisting state: Den Heijer, 2011, pp. 104–105. Derived responsibility can hence also be established vis-à-vis a non-contracting state under a regional human rights treaty where that state has a corresponding duty under a different human rights regime.

6.4.3.2 Direction or control

Article 17 Draft Articles deals with derived responsibility where a state has directed or controlled another state in the commission of an internationally wrongful act:

> "State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State."

This provision differs from responsibility under Article 16 in that the directing or controlling state has a significantly larger role in initiating the commission of the internationally wrongful act. A state can exercise such direction or control, for example, by means of a treaty or as a result of military occupation.[97] Consequently, the controlling or directing state is responsible for the entire act itself.[98] Establishing that one state controlled or directed the conduct of another state thus has significant implications and Article 17 therefore only includes cases where "a dominant State *actually* directs and controls conduct which is a breach of an international obligation of the dependent State".[99] The mere exercise of oversight is consequently an insufficient level of control.[100] Likewise, mere incitement or suggestion is insufficient to establish the required level of direction.[101] Participating states are furthermore only responsible under Article 17 if (i) they have knowledge of the circumstances that make the conduct of the acting state wrongful, and (ii) the completed act would have been wrongful if it had been committed by the dominant state itself.[102] As the ILC Commentaries outline, key principle in this regard is that "a State should not be able to do through another what it could not do itself".[103]

The foregoing does not mean that the acting state is necessarily resolved of any responsibility. On the one hand, the acting state has to decline a direction if it would result in a breach of one of its international obligations. On the other hand, whilst the wrongfulness of acting states' conduct may be precluded under the ILC Draft Articles, this is only possible in exceptional cases

97 ILC Commentaries, at 68, para 5.
98 ILC Commentaries, at 68, para 1.
99 ILC Commentaries, at 68, para 6. For purposes of Article 17 it is hence insufficient if a state has the power to interfere in matters of the administration of another state but has not exercised that power in a particular situation.
100 ILC Commentaries, at 69, para 7.
101 ILC Commentaries, at 69, para 7.
102 ILC Commentaries, at 69, para 8.
103 ILC Commentaries, at 69, para 8.

such as those involving *force majeure*.[104] Conversely, where the conditions of Article 17 are met, the dominant state cannot excuse itself by referring to a certain level of willingness or enthusiasm on behalf of the acting state in performing the conduct.[105]

6.4.3.3 Coercion

Lastly, Article 18 Draft Articles deals with situations where one state coerces another state to act in a certain way:

> "A State which coerces another State to commit an act is internationally responsible for that act if:
> (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and
> (b) the coercing State does so with knowledge of the circumstances of the act."

Under this provision, the coercing state can be held responsible for the wrongful conduct that results from the actions of the coerced state.[106] As such, different from Articles 16 and 17, the coercing state can be held responsible for the breach of another state's obligations even if it does not have a corresponding obligation itself.[107] The applicable criterium is stringent: only conduct that forces the coerced state to such an extent that it leaves no choice but to comply, suffices for purposes of derived responsibility under Article 18.[108] Any lesser type of involvement of the participating state is insufficient to attribute derived responsibility on the basis of coercion. Additionally, the coercion has to concern the particular conduct that would constitute an internationally wrongful act.[109] The coercing state should furthermore be aware of the factual situation that would have made the conduct of the coerced state wrongful if it was not for the coercion of the coercing state.[110] Whilst coercion is usually unlawful, it could for example also take the form of far-reaching economic pressures that leave the coerced state no choice but to comply with the demands of the coercing state.[111] In turn, the coerced state will in most cases be able to rely on *force majeure* in order to preclude its own responsibility.[112]

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104 ILC Commentaries, at 69, para 9.
105 ILC Commentaries, at 69, para 9.
106 ILC Commentaries, at 69, para 1.
107 ILC Commentaries, at 70, para 6.
108 ILC Commentaries, at 69-70, para 2.
109 ILC Commentaries, at 69-70, para 2.
110 ILC Commentaries, at 70, para 5.
111 ILC Commentaries, at 70, para 3.
112 Coercion under the Draft Articles is indeed largely equated with *force majeure* in that it has the same essential character: ILC Commentaries, at 70, para 4.

6.5 APPLYING THE FRAMEWORK: RPC NAURU

The foregoing provides a framework to test whether Australia, Nauru, or both countries simultaneously can be held responsible for particular conduct performed in RPC Nauru. As the previous has shown, this depends *inter alia* on which actor physically performed the act or omission. The focus here will be on the most important actors involved on site: representatives of DIBP, the Nauruan RPC Operational Managers, and representatives of the primary service providers (Transfield/Broadspectrum, Canstruct, IHMS, the Salvation Army, and Save the Children).

6.5.1 Articles 4 and 6 Draft Articles

The conduct of staff members of the Australian government on island – i.e. DIBP staff until 19 December 2017 and DHA staff from that date onwards – is easily attributed to Australia on the basis of the 'basic rule' of attribution laid down in Article 4 Draft Articles. Since "[t]he reference to a 'State organ' covers all the individual or collective entities which make up the organization of the State and act on its behalf",[113] the acts and omissions of DIBP staff can indeed be attributed to Australia. The deployed staff is a 'mere instrument' of the Australian state as a legal entity. Similarly, the conduct of the RPC Operational Managers (and, for that matter, of the Nauru Police Force) can be attributed without further ado and on the same legal basis to Nauru. Indeed, the RPC Operational Managers are appointed in accordance with the Administrative Arrangements by, are fully dependent of, and effectively function as organs – at least *de facto* – of, the Nauruan state.[114] Consequently, their acts and omissions can and should be regarded as the conduct of Nauru. In this regard, it should be noted that the DIBP staff is not placed at the disposal of Nauru, nor that the RPC Operational Managers are placed at the disposal of Australia. Both respective state organs operate under the authority of their own state and their conduct can thus not be attributed to the other state on the basis of Article 6 Draft Articles. As the ILC Commentaries clearly explain, "[t]he notion of an organ 'placed at the disposal' of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status".[115] Acts of deployed DIBP staff can thus be attributed to Australia whereas acts of RPC Operational Managers can be attributed to Nauru, *even*, as Article 7 Draft Articles points out, when such acts are unauthorised or *ultra vires*.[116]

113 ILC Commentaries, at 40, para 1.
114 Section 4.1.2. of the Administrative Arrangements.
115 ILC Commentaries, at 44, para 4.
116 ILC Commentaries, at 45, para 1.

6.5.2 Article 5 Draft Articles

The question as to the attribution of conduct becomes more difficult when paying attention to the acts and omissions of the private stakeholders involved. Moreover, the question arguably becomes more interesting as well given that it are the acts and omissions of the private service providers that run the biggest risk of infringing upon human rights entitlements. Article 5 Draft Articles provides a first potential basis for attribution of the private actors' conduct, although any such determination is typically complex given the three threshold criteria: to reiterate, (i) the functions, tasks and services delegated to the actor must contain elements of *governmental authority*, (ii) they must be delegated to the actor *by law*, and (iii) the actor must be acting in that *official capacity*.

6.5.2.1 Service providers providing safety and garrison services

Whilst consensus on a definition of governmental authority is missing, it appears save to argue that the service providers providing safety and garrison services – Wilson Security, Transfield/Broadspectrum, and Canstruct insofar as their provision of safety and garrison services is concerned, and Sterling Security and Protective Security Services as subcontractors of Wilson Security – may be considered as exercising a typical and traditional core function of the sovereign state, that is, maintaining security and safekeeping in a space of confinement.[117] At the same time, it is less obvious that Transfield/Broadspectrum respectively Canstruct as lead agencies – except for their safety and garrison services – or those service providers providing health care or welfare services – including IHMS, the Salvation Army, Save the Children Australia – exercise governmental authority.[118]

Second, the exercise of governmental authority by service providers providing safety and garrison services should be provided for by internal law. Before this condition can be examined substantially, however, it needs to be examined *whose* governmental authority the concerned actors are exercising and *which* internal law must consequently endow them with such governmental capacity.

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117 Compare Gleeson, 2015. Although even this is open to debate: as outlined in chapter 2, safekeeping has not always been squarely in the State's purview. Furthermore, since the RPC's regime has shifted to an open centre arrangement, the detaining role of safety and garrison contractors has arguably decreased, which may impact on the extent to which they exercise governmental authority.

118 Even more so, it is unlikely that yet other service providers – for example those providing accommodation, goods, education, transportation or construction services – exercise governmental authority. Whilst some Nauruan sub-contractors are government-owned, this does not mean that they *therefore* exercise governmental authority and that their conduct can automatically be attributed to Nauru. Indeed, "every conduct […] has to be independently examined. Only if […] this conduct [is] governmental in nature can it be attributed to the state": Feit, 2010, p. 150.

As agreed upon in the MoU and Administrative Arrangements, processing happens under the auspices of Nauru and Nauru is formally in charge of operating the facilities, *inter alia* via its (Deputy) Operational Managers,[119] whilst Australia has a supporting role and bears all costs.[120] Although Australia transfers asylum seekers to Nauru, once they arrive on Nauruan soil they are under the formal control of the Nauruan authorities, are provided with special 'Regional Processing Centre visas' by Nauru, and become subject to Nauru's migration control system. Viewed in this light it appears that the private entities providing security and garrison services are exercising part of Nauru's governmental authority: they provide services that are key to Nauru's migration control apparatus and that constitute what may be regarded a typical and traditional governmental function. Conversely, it is problematic to maintain that these contractors exercise an element of Australia's governmental authority: being involved in another country's migration system can hardly be construed as a core public function of the state. The fact that the processing facilities on Nauru and Manus simultaneously serve Australian policy goals does not alter this: the question of governmental authority is not dependent on whose *policy* is being fostered, but on whose governmental *prerogatives* are being exercised. Likewise, the fact that Australia contracts the service providers does not alter the fact that these service providers exercise Nauru's governmental authority: whilst Australia and Nauru have agreed that Australia will contract service providers and incur all related costs, processing happens fully under the auspices of the Nauruan government. Since Nauru is formally in charge over the RPC where individuals are confined for the purpose of processing their asylum claims under Nauruan migration law, such confinement constitutes an exercise of Nauru's governmental authority. This was recognised by a majority of the High Court of Australia in *M68/2015*:

> "Contrary to the plaintiff's submissions, it is very much to the point that the restrictions applied to the plaintiff are to be regarded as the independent exercise of sovereign legislative and executive power by Nauru. […] Contrary also to the plaintiff's submissions, it is very much to the point that the Commonwealth could not compel or authorise Nauru to make or enforce the laws which required that the plaintiff be detained. There was no condominium, which exists where two or more States exercise sovereignty conjointly over a territory, and *no suggestion of any other agreement between Nauru and Australia by which governmental authority is to be jointly exercised on Nauru; assuming such an agreement to be possible*. […] Once it is understood that it was Nauru that detained the plaintiff, and that the Commonwealth did not and could not compel or authorise Nauru to make or enforce the

119 Sections 4.1.2. and 4.1.3. of the Administrative Arrangements; See also Section 7 of the Asylum Seekers (Regional Processing Centre) Act 2012, No. 21, 21 December 2012.

120 Sections 1 and 4.1.4. of the Administrative Arrangements.

> laws that required that the plaintiff be detained, it is clear that the Commonwealth did not itself detain the plaintiff."[121]

Consequently, Transfield Services, Wilson Security, Sterling Security, and Protective Security Services must be empowered by *Nauru's* internal law to exercise governmental authority in order to attribute their conduct to Nauru. Even more so, their conduct as involving the exercise of governmental authority must be explicitly authorised in Nauru's legislation and must be narrowly circumscribed.[122] In the present case, the *Asylum Seeker (Regional Processing Centre) Act 2012* of the Republic of Nauru ('the RPC Act') regulates the operations of the RPC.[123] Ever since the enactment and certification of the Act in December 2012, it has been amended on various occasions by Amendment Acts 3/2014,[124] 25/2014,[125] 23/2015,[126] 16/2017,[127] and 29/2018.[128]

In section 3 of the RPC Act ('definitions'), 'service provider' is defined as "a body that has been engaged by the Republic of Nauru or the Commonwealth of Australia to provide services of any kind at a regional processing centre or in relation to protected persons". In the same section, 'authorised officer' is defined as "a person appointed as an authorised officer by the Secretary under section 17(1)". Initially, 'Secretary' was defined in the Act as the (Nauruan) Head of Department, which was amended by Act 3/2014 to mean the (Nauruan) Secretary for Justice and Border Control and was, later, amended again by Act 16/2017 to mean the (Nauruan) Secretary for Multicultural Affairs.

In turn, Division 1 of Part 4 of the RPC Act, consisting of sections 16 and 17, regulates service providers as well as authorised officers. Section 16 ('agreement with service provider') initially read:

> "(1) The Secretary may enter into an agreement on behalf of the Government of Nauru with a service provider.
> (2) An agreement under subsection (1) must provide for:
> (a) the procedure for the appointment as authorised officers of staff members employed by, or engaged to provide services for, the service provider;
> (b) steps to be taken by the service provider to ensure that all relevant provisions of this Act are complied with;

121 High Court of Australia, *M68/2015,* paras 34-36 (emphasis added).
122 ILC Draft Articles, at 43, para 7.
123 Asylum Seekers (Regional Processing Centre) Act 2012, No. 21, 21 December 2012. This Act was accompanied by an Explanatory Memorandum which can be retrieved via http://ronlaw.gov.nr/nauru_lpms/files/em/20fd308dd45962046670cd1eb039480e.pdf. It is based on the *Asylum Seekers (Regional Processing Centre) Bill 2012*, No. 23.
124 Asylum Seekers (Regional Processing Centre) (Amendment) Act 2014, No. 3.
125 Asylum Seekers (Regional Processing Centre) (Amendment) Act 2014, No. 25.
126 Asylum Seekers (Regional Processing Centre) (Amendment) Act 2015, No. 23.
127 Asylum Seekers (Regional Processing Centre) (Amendment) Act 2017, No. 16.
128 Asylum Seekers (Regional Processing Centre) (Amendment) Act 2018, No. 29.

> (c) the submission by the service provider to the Secretary of periodic reports in relation to the provision of services by it that are in the form, and deal with the particular matters, specified in the agreement; and
> (d) an indemnity by the service provider in favour of the Government of Nauru, the Minister and the Secretary."

Act 16/2017 substituted section 1 of this provision with the following: *"The Secretary shall enter into agreements with any service provider on behalf of the Republic"*. Note how the change of wording subtly reiterates that the facilities are Nauruan-run: the Secretary no longer *may* enter into agreements with service providers on behalf of the Nauruan Government, but *shall* do so.

Section 16 hence provides a basis for the Nauruan government to conclude agreements with a service provider as well as a list of cumulative mandatory components of such agreements. Agreements between Nauru and service providers thus do not only regulate the relationship between the Nauruan government and the contractor – that is to say, agreements need to contain a clause on the reporting obligations of service providers as well as an indemnity clause – but they also regulate how the service providers will comply with the provisions of the RPC Act and, importantly, how staff members of the latter are appointed as authorised officers. In relation to the latter, section 17 ('appointment of authorised officers') is particularly relevant. In the initial 2012 Act, it read:

> "(1) The Secretary may appoint as an authorised officer for a regional processing centre a staff member who is employed by, or engaged to provide services for, a service provider who has entered into an agreement under section 16(1).
> (2) The Secretary may only appoint as an authorised officer a person whom the Secretary is satisfied:
> (a) is competent to exercise the powers conferred on an authorised officer by this Part; and
> (b) is a fit and proper person to exercise those powers, having regard to character, honesty and integrity; and
> (c) has agreed in writing to exercise those powers.
> (3) The Secretary must issue an identity card to each authorised officer.
> (4) An identity card must:
> (a) contain a photograph of the authorised officer; and
> (b) specify a unique number by which the authorised officer may be identified; and
> (c) be signed by the Secretary.
> (5) An authorised officer issued with an identity card must:
> (a) at all times while on duty, wear it in such a manner that it is visible to other persons; and
> (b) produce it on being requested to do so by a protected person in relation to whom the authorised officer is exercising, or proposing to exercise, any power under this Part."

As such, the Secretary had the power to appoint authorised officers of service providers on the basis of section 17(1), taking into account the criteria specified in section 17(2) and in accordance with the procedures agreed upon pursuant to section 16(2)(a). Section 17(1) indeed provided for a direct link with section 16(1): the Secretary could appoint staff members of service providers as authorised officers *only* if the service provider had entered into an agreement with the Secretary on behalf of the Nauruan state, *not* if the service provider had entered into an agreement with the Commonwealth of Australia. This distinction is crucial given the conferral of governmental powers to authorised officers as will be discussed further below. However, Act 3/2014 amended section 17(1) by omitting it and substituting it with:

> "(1) The Secretary may appoint as an authorised officer for a regional processing centre a staff member who is employed by a service provider who has been contracted to provide services for the Centre."

This has significantly broadened the scope of staff members eligible to be appointed as authorised officers. The wording of section 17(1) no longer specifies that only those staff members of service providers contracted *by Nauru* to provide services for the Centre are eligible for appointment as authorised officer; consequently, there is no longer an inevitable link between sections 17 and 16. To the contrary, given the definition provided to 'service provider' – "a body that has been engaged by the Republic of Nauru *or the Commonwealth of Australia* to provide services of any kind at a regional processing centre or in relation to protected persons" (emphasis added) – the Secretary may on the basis of the amended RPC Act also appoint staff members employed by a service provider contracted to provide services *by Australia* as authorised officers. This amended provision came into force on 21 May 2014.[129]

The powers that authorised officers may exercise were provided for in the initial Act in Division 2 of Part 4 of the RPC Act. More specifically, the powers of authorised officers were provided for in section 18 whilst rules on the exercise of powers were laid down in section 19. According to section 18 (old), authorised officers may submit to frisk searches or scanning searches, empty the contents of all pockets in a person's clothing and allow an examination of those contents, allow any bag or other receptacle carried by the person to be searched, and seize and retain prohibited items. Section 19 (old) provides that such powers must be exercised with due respect for the person in relation to whom the power is being exercised, that searches must not subject the person being searched to greater indignity than is reasonably necessary to conduct the search, and that a frisk search may only be conducted by an authorised officer of the same sex. Section 20 (old) clarifies that these powers

129 In accordance with Act's commencement clause: see section 2 of Act 3/2014.

are not conferred on staff members who are not police officers or authorised officers.

Over time, these provisions have however been significantly amended. Act 3/2014 moved the relevant sections on the power of authorised officers to Division 3 of Part 4.[130] It also significantly expanded the scope of powers that authorised officers may exercise: it provided a legal basis for authorised officers to search persons (including to conduct frisk searches, strip searches, scanning searches, emptying the contents of all pockets, and allowing any bag or other receptacle carried by the person to be searched) (section 19), to search premises (section 19A), and to conduct a general search (of a protected person, a visitor, or staff) and seize prohibited or controlled items (section 19E). It also broadened the power of authorised officers to use reasonable force in certain circumstances (section 24). Throughout amended Division 3 of Part 4 of the RPC Act, rules and legal safeguards are provided that circumscribe the exercise of most of such powers as well as reporting obligations on behalf of authorised officers vis-à-vis the Secretary and the Operational Manager of the RPC.[131] Section 20 of the RPC Act, clarifying that these powers are not conferred on staff members who are not police officers or authorised officers, remained unchanged. Furthermore, Section 24A of the amended RPC Act provides that the Secretary may – in consultation with the service provider – require that the service provider hands the Centre over to the police for any period that the Secretary considers necessary, if the Secretary believes on the basis of reasonable grounds that there exists an emergency affecting the safety of protected persons, staff, or visitors, or that there is an imminent threat of such an emergency, and that the service provider is unwilling or unable to immediately deal with that emergency or threat to the Secretary's satisfaction.[132] Also, a provision was inserted pursuant to Amendment Act 3/2014 authorising service providers to establish a blockade that prevents the passage of vehicles and persons to or from any Centre facility after consultation with the police and if the provider concludes that there is an existing emergency or imminent threat of emergency (section 24B).

As a result of Amendment Act 23/2015, the general search provisions as enshrined in Section 19E were transferred to and merged with Section 19 on the powers of authorised officers to search persons. Furthermore, the power of service providers to establish blockades in emergencies was transferred to the Secretary under new Section 24B. All other powers as amended under Act

130 Asylum Seekers (Regional Processing Centre) (Amendment) Act 2014, No. 3, sections 3 and 9.

131 Most notably on the exercise of the power to search persons: Sections 19B, 19C and 19D of the RPC Act further regulated the exercise of this power by providing respectively further provisions related to searches of persons, rules on the preservation of privacy and dignity, and rules for conducting strip searches.

132 Once the Secretary on reasonable grounds believes that there is no longer an imminent threat, the Centre will be handed back to the service provider.

3/2014 remained unchanged. In addition, section 18C (old) on leaving the RPC without approval was replaced with section 18C (new) on the Open Centre arrangements.

In conjunction, these sections of the RPC Act fulfil the second requirement for attribution under article 5 of the Draft Articles, i.e. that the entity in question must be empowered by the internal law of Nauru to exercise their governmental authority and that their conduct as involving the exercise of governmental authority must be explicitly authorised in Nauru's legislation and must be narrowly circumscribed. The RPC Act allows for the empowerment of service providers and explicitly authorises and narrowly circumscribes the exercise of governmental authority. Authorised officers employed by service providers furthermore undergo an authorisation process, are provided with Nauruan identification cards,[133] and are subjected to ongoing monitoring and reporting structures. Combined, this constitutes a strong case for attribution of the exercise of governmental authority by authorised officers employed by contracted service providers to the Republic of Nauru.
This is, of course, subject to the third criterion, i.e. that authorised officers are acting in their public capacities, which ultimately depends on specific conduct under scrutiny.

The question that remains is whether staff members of service providers providing security and garrison services have been appointed as authorised officers by the Nauruan Secretary. It is important to recall that *before* 21 May 2014, the RPC Act only allowed for the appointment of staff members of service providers that *Nauru* had entered into an agreement with as authorised officers. From 21 May 2014 onwards, also staff of service providers contracted by Australia could be appointed as authorised officers.

As outlined in chapter 2, Australia contracted Transfield/Broadspectrum and, later, Canstruct as lead contractors. In turn, Transfield/Broadspectrum subcontracted Wilson Security to provide security services. The latter has furthermore subcontracted part of its responsibilities to two local enterprises, Sterling Security and Protective Security Services. Although appointments of authorised officers are not published, the case of *M68/2015* before the High Court of Australia provides further clarity. In its judgment, the High Court of Australia confirms that "[s]taff of Wilson Security were appointed by the Secretary as authorised officers and were therefore authorised by the law of Nauru to exercise powers under the RPC Act".[134] As the Submission of the First and Second Defendants (i.e. the Minister for Immigration and Border Protection and the Commonwealth of Australia) outlines, "[n]o Commonwealth

133 Once an authorised officer has been appointed, in accordance with section 17(3), (4) and (5) of the RPC Act (s)he is given a signed identity card by the Secretary that the officer is obliged to wear at all times whilst on duty and must be produced per the request of a protected person to whom the officer exercises or proposes to exercise its powers.

134 High Court of Australia, *M68/2015*, para. 33.

officers or staff of Transfield are appointed as authorised officers; the Secretary has appointed 138 staff of Wilson Security as authorised officers".[135] However, on the basis of the RPC Act and the subsequent Amendment Acts, such appointment of Wilson Security staff (including the staff of Wilson Security's local subcontractors, Sterling Security and Protective Security Services) as authorised officers was not possible before 21 May 2014 given that Wilson Security was a sub-contractor of Transfield Security, who in turn contracted with Australia. Wilson Security has, nevertheless, been operative on Nauru since late 2012. Only from 21 May 2014 onwards did the Nauruan legislation provide a basis for such appointments.

In sum, from 21 May 2014 onwards, Wilson Security's staff members that were appointed as authorised officers were exercising elements of governmental authority as provided for in Nauruan internal law, and their conduct can therefore be attributed to Nauru on the basis of Article 5 Draft Articles to the extent that they were acting in their public capacity in a particular instance.[136] This is, on the basis of Article 7 Draft Articles, even true for unauthorised or *ultra vires* acts.[137] Before 21 May 2014, their exercise of governmental authority was arguably not provided for in Nauru's internal law and does therefore not fulfil the stringent criteria of Article 5 Draft Articles. One exception in this regard applies, however: in July 2013, Wilson Security staff members were sworn in as reserve officers of the Nauru Police Force Reserve (NPFR).[138] With policing clearly falling within the scope of governmental authority and being provided for in Nauruan law, whenever these members of staff acted in their public capacity as reserve officer of the NPFR, their conduct was attributable to Nauru under Article 5 Draft Articles.

6.5.2.2 The Nauru (RPC) Corporation

Article 5 Draft Articles also provides a basis to attribute the conduct of the Nauru (RPC) Corporation to Nauru in cases where it exercises governmental authority. This appears much less complicated than the attribution of conduct of security and garrison service providers as outlined above. Indeed, the Nauru (RPC) Corporation seems to exercise elements of governmental authority when

135 *Written Submissions of the First and Second Defendants to Case M68/2015*, filed 18 September 2015, para. 21, available at http://www.hcourt.gov.au/assets/cases/M68-2015/PlfM68-2015_Def1-2.pdf (last accessed 31 May 2019).

136 Similarly, it may be assumed that security staff of Canstruct has also been appointed by the Secretary as authorised officers once the company took over as lead contractor in November 2017, although specific details are lacking. The contract between the Australian Government and Canstruct in section 3.15.2. of Part 4 of Schedule 1 mentions that Canstruct personnel members are appointed authorised officers. The contract is available at https://www.homeaffairs.gov.au/foi/files/2018/fa171200763-document-released.pdf (last accessed 30 May 2019).

137 ILC Commentaries, at 45, para 1.

138 High Court of Australia, *M68/2015*, para. 53.

procuring commercial services for the RPC and by managing contracts for the RPC. Whilst procurement and the management of contracts *as such* do not necessarily constitute the exercise of governmental authority, it seems that such activities in the sphere of immigration detention and processing – core governmental tasks – *do* involve the exercise of governmental authority to a certain extent given that only states can conclude such contracts legitimately. As outlined above, as the ILC Draft Articles provide, of particular importance for establishing governmental authority is "not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise".[139] These additional elements provide further support for the assertion that the Nauru (RPC) Corporation exercises governmental authority: the powers mentioned above are conferred on the Nauru (RPC) Corporation by a specific Act, they are to be exercised for the purpose of facilitating and managing private contractors in the state-run RPC, and the Nauru (RPC) Corporation is accountable to the Nauruan Minister for Multicultural Affairs for the exercise of its powers.[140] In turn, the elements of governmental authority exercised by the Nauru (RPC) Corporation are expressly delegated to it by section 7(1) of the *Nauru (RPC) Corporation Act 2017*. Whenever representatives of the Nauru (RPC) Corporation are thus acting in that official capacity, their conduct can be attributed to Nauru.

At the same time, it should be noted that not *all* activities of the Nauru (RPC) Corporation involve elements of governmental authority. In such instances, as well as in cases where it is ultimately unclear whether elements of governmental authority are exercised, the conduct of the Nauru (RPC) Corporation can nevertheless be attributed to Nauru on the basis of Article 8 Draft Articles as further explicated below.

6.5.3 Article 8 Draft Articles

Whilst conduct of private actors not exercising elements of governmental authority generally does not give rise to state responsibility, this is under Article 8 Draft Articles different when there is a "specific factual relationship" between the actor and the state – more specifically, when states instruct, direct, or control such conduct.[141] As previously explained, such instructions, directions, or control should be specifically aimed not at an actor as such but at specific *conduct*.[142] It is therefore difficult to provide general comments on attribution on this basis: without focussing on specific conduct as such,

139 ILC Commentaries, at 43, para 6.
140 See, in relation to the latter aspect, section 9 of the Nauru (RPC) Corporation Act 2017.
141 ILC Commentaries, at 47, para 1.
142 ILC Commentaries, at 48, para 7.

it is not possible to precisely delineate what conduct of which private actors can be attributed to Australia, Nauru, or both under Article 8 Draft Articles. Even more so, this difficulty is compounded by the fact that Australia and/or Nauru may instruct, direct, and/or control *part* of private actors' conduct, and, furthermore, that they may for instance provide instructions in relation to some acts, give directions in relation to others, and exercise control in relation to yet another subset of contractors' activities. It is thus possible, at least in theory, that either of both countries, or both countries simultaneously, instruct, direct, *and* control parts of a private actor's conduct, whilst the private actor itself *in addition* engages in conduct autonomously – that is to say, on the basis of its own volition. In such cases, the private actor's conduct can only in part be attributed to Australia and/or Nauru on the basis of Article 8 Draft Articles, and only insofar as the appropriate thresholds – which, as outlined above, differ per factual link – are fulfilled. Whilst analysis here does not focus on specific conduct, some general remarks can be postulated.

Since Australia has contracted all service providers, it generally makes sense to first examine the relationship between Australia and acts of private contractors in order to establish whether conduct can be attributed ex Article 8 Draft Articles.[143] In turn, the question is whether impugned acts were instructed, directed, and/or controlled by Australia. As explained above, it is of importance to precisely delineate whether any potential involvement of Australia amounts to instruction, direction, or control, given the different implications and tests of these coexisting relationships. Whereas attribution can readily take place on the basis of specific *instructions* of particular conduct, when a state issues *directions* or *control,* the impugned act can only be attributed insofar as such directions or control concern a particular operation of which the conduct is truly an integral part instead of an incidental or peripheral occurrence. Furthermore, whereas states generally do not assume the risk that lawful *instructions* or *directions* are exercised in an internationally unlawful way, when states *control* conduct such internationally unlawful exercises can nevertheless be attributed to them.

From the contracts between Australia and the various private stakeholders, it appears that *in general* Australia's factual relationship with private stakeholders on many occasions will at least amount to that of the *direction* of conduct. As the contracts with Transfield/Broadspectrum, the Salvation Army, and Canstruct outline under 'management and governance', DIBP appoints a Contract Administrator and a Department Operations Team Leader. Transfield/Broadspectrum, the Salvation Army, Save the Children, respectively Canstruct have to liaise with these appointees and have to comply with the

143 This would be different when Nauru itself concludes contracts with service providers on the basis of the Asylum Seekers (Regional Processing Centre) Act 2012, No. 21, 21 December 2012, section 16(1).

directions of the Contract Administrator.[144] The IHMS contract on the other hand provides that "the Health Services must be delivered in compliance with any Guidelines issued by the Department to the Health Services Manager from time to time. The Department will not issue Guidelines that relate to the provision of Health Care by the Health Services Manager but may issue Guidelines relating to any other aspect of the delivery of the Health Services".[145] Specifically, a Department Executive may give directions to IHMS in relation to how health care is accessed, interface issues, DIBP's duty of care, and DIBP requirements for additional or expanded services.[146] These directions have to be recorded in writing and IHMS must comply with and implement them.[147] At the same time, the various service providers maintain a level of autonomy in implementing the directions.[148] As a consequence, it seems that the factual link between Australia and the contractors' behaviour amounts to *direction* but generally not to *control*. This may be different in relation to specific acts, insofar as the factual complexities of a particular situation give reason to conclude that the Australian government exercised the required level of control over certain conduct. Likewise, although generally Australia's involvement does not seem to amount to clear *instructions* of conduct, at times the case-specific facts may prove differently.

In sum, whenever private service contractors act upon the directions of the Contract Administrator or any other representative of the Australian government, such acts can *prima facie* be attributed to Australia ex Article 8 Draft Articles. However, since such directions generally do not amount to control, Australia does *not* assume responsibility for acts that were performed on the basis of *lawful* directions yet are carried out in an internationally *unlawful* way. In this sense, whenever Australia's instructions are lawful but subsequent acts performed by private actors result in breaches of human rights, such breaches arguably do not amount to human rights violations *of Australia* since Australia does not assume responsibility for them. Consequently, whilst Article 8 Draft Articles provides ample ground for attribution, it seems questionable whether in the context of human rights it provides an equally significant ground for holding a state responsible and accountable whenever private actors breach human rights in the implementation of lawful directions. Never-

144 Transfield contract, sections 4.2. and 4.3; Salvation Army contract, sections 9.1. and 9.2.; Save the Children contract, sections 4.2. and 4.3.; Canstruct contract, sections 4.2. and 4.3.

145 IHMS contract, section 21.1(a).

146 IHMS contract, section 21.2.

147 IHMS contract, sections 21.4. and 21.5.

148 Such autonomy is either implicit or explicit. For example, the IHMS contract in section 21.3. explicitly outlines limitations on DIBP's direction power: "[a] Department Executive must not give a Direction […] that:(a) is clinical in nature; (b) limits or restricts the clinical independence or professional integrity of a Health Care Provider; (c) is inconsistent with the terms and conditions of this Contract; or (d) would result in the Health Services Manager (or any Health Care Provider) breaching any Law."

theless, as will be further focused upon below, the doctrine of positive obligations goes a long way in addressing this issue.

In addition, whenever a factual connection in the form of instructions, directions, or control can be established between an act of a private contractor and the Nauruan government, conduct can be attributed to Nauru on the basis of Article 8 Draft Articles. For example, whenever the RPC Operational Managers or any other Nauruan government representatives instruct, direct, or control certain conduct, independently or in collaboration with the Australian government's representatives on island, there is nothing to prevent the attribution of such conduct (also) to Nauru. However, such links cannot be assumed *a priori*: as the Transfield/Broadspectrum contract for example provides, Transfield/Broadspectrum is required to "work closely" with the Nauruan Centre Administrator, but a consequent factual link between the Nauruan Centre Administrator and Transfield/Broadspectrum is not contractually provided for.[149] Similarly, the Save the Children and Canstruct contracts do not provide for such relationships but only provide that both stakeholders will have "significant stakeholder management and consultation requirements including with the Department and Nauruan government authorities", and that they "must adopt a collaborative approach to the complex stakeholder and governance issues".[150] The IHMS contract does not mention any cooperation between IHMS and Nauruan government representatives but merely regulates the cooperation between IHMS and the DIBP and other service providers.[151] IHMS "must develop, implement and manage appropriate policies and procedures that foster open, co-operative, constructive and professional working relationships with the Department and Department Services Providers".[152] The Salvation Army contract also does not specify working relationships with the Nauruan government, although the Salvation Army is required to "provide such reasonable assistance to the Department, *local authorities* and other service providers as the Department may reasonably request".[153] On the basis of these contractual arrangements, it thus is less likely that a relevant factual relationship between Nauru and the service providers exists, although this may be different in relation to specific conduct. This is also supported by the Administrative Arrangements, that in Section 4 clearly set out that service providers are managed by the Australian government's representatives on island, not by the Nauruan Operational Managers.

The Nauru (RPC) Corporation is however an exception. As outlined in section 6.5.2.2., acts of this private actor – which, for that matter, is not a

149 Transfield contract, section 1.6. of Part 1 of Schedule 1.

150 Save the Children contract, section 1.3.1. of Part 1 of Schedule 1; Canstruct contract, section 1.3.1. of Part 1 of Schedule 1.

151 IHMS contract, section 9.2. and 9.3, sections 7.1. and 7.2. of Schedule 2, and section 5.2. of Schedule 4.2.

152 IHMS contract, section 7.1. of Schedule 2.

153 IHMS contract, section 1(b) of Part 1 of Schedule 1 (emphasis added).

service provider – can be attributed to Nauru whenever it exercises governmental authority. Moreover, also when it is not exercising governmental authority, acts of the Nauru (RPC) Corporation can likely be attributed to Nauru on the basis of Article 8 Draft Articles. Section 9 of the *Nauru (RPC) Corporation Act 2017* provides that the Nauru (RPC) Corporation is responsible to the Nauruan Minister for Multicultural Affairs, which "may give directions to the Corporation as to the performance of its functions and powers to which the Corporation must give effect to".[154] Given that the Nauru (RPC) Corporation is responsible to the Minister for Multicultural Affairs and its Board of Direction is appointed by the Nauruan Cabinet,[155] the factual link between the Nauru (RPC) Corporation and the Nauruan state seems to generally amount to that of *control*: the Nauruan government in general seems to fulfil the two parallel tests that have been developed in this regard as outlined above, i.e. 'overall control' and 'effective control'. *Generally speaking*, the acts of the Nauru (RPC) Corporation can thus seemingly be attributed to Nauru on the basis of Article 8 Draft Articles.

6.5.4 Joint responsibility

Situations of joint responsibility may arise in the context of RPC Nauru in cases where one or more acts can be attributed to both Australia and Nauru on the basis of the aforementioned attribution maxims. In line with Article 47 Draft Articles, the responsibility of both countries can thus be invoked where they are simultaneously responsible for a human rights violation, either because they operated independently but their actions combined result in the violation, because they committed a joint act either through a common organ or through concerted operation, or because one of both states participated in the other state's violation.

Again, whether these bases provide ground for joint responsibility depends on the particularities of specific conduct at hand. Generally, it could however be questioned whether the operations at RPC Nauru are likely to amount to *joint acts* on behalf of both Australia and Nauru, specifically since both countries concluded not only the MoU but also Administrative Arrangements. These Arrangements give, as mentioned above, effect to the MoU, setting out *inter alia* how the facilities are to be run and how responsibilities are divided. To reiterate, for alleged misconduct to be of a joint nature, the states involved must not only have had the power to prevent it, but must also have instructed it to a certain extent. *In casu*, the Administrative Arrangements *prima facie* seem to provide sufficient reason to suppose that both Australia and Nauru may *influence* particular conduct at the RPC, but not necessarily that the operation

154 Nauru (RPC) Corporation Act 2017, section 9.
155 Nauru (RPC) Corporation Act 2017, section 10.

of RPC Nauru occurs on the basis of the *instruction* of both nations to such an extent that one can label all governance-related conduct within the facility as 'joint acts'. Indeed, whilst it might be true that Nauru could in certain circumstances *prevent* particular conduct from happening through the Administrative Arrangements, this does not necessarily mean that the way in which the various involved stakeholders act is generally in accordance with both nations' *instructions* as well. As the Administrative Arrangements outline, the private service providers are, for instance, managed by the representative of the Australian government on island, *not* by the Nauruan Operational Managers.[156] It is, as a consequence of these Administrative Arrangements, solely the Australian government, not the Nauruan government, that – through its representation on site – instructs the service providers in fulfilling their tasks and obligations. Whilst the operation of the service providers may be to a certain extent influenced by the Nauruan government, it is henceforth certainly not instructed by it. Since the MoU and Administrative Arrangements as such purposively, and explicitly, set out a division of responsibilities, acts generally occur on the basis of either of both states' instructions instead of on the basis of a 'single course of conduct' to which both states significantly contribute. Accordingly, whilst Australia and Nauru cooperate closely, joint acts do not – at least not generally – appear to be systemic feature of the governance arrangements in place. For this reason, they do not appear to be the most feasible basis for attribution, although it should be reiterated that this may incidentally differ in relation to particular misconduct.

It in turn seems more likely that Australia and Nauru can be held responsible for potential human rights violations that can be attributed to them on the basis of their independent actions that, alone or combined, led to such potential violation. There is in addition reason to assume that both countries could in certain circumstances be held responsible for wrongful conduct on the basis of derived responsibility. Specifically, in certain situations it might be possible to hold Australia or Nauru responsible for aiding and assisting the other state in committing a human rights violation. Indeed, as outlined above, providing essential facilities or financial means for the commission of a wrongful act are quintessential examples of cases where article 16 Draft Articles may give rise to derived responsibility.[157] Where human rights violations can be attributed to either of both states on the basis of the attribution rules, the other state may hence also be held responsible if (i) that state was aware of the circumstances that made the acting state's conduct a human rights violation; (ii) that state gave aid or assistance with a view to facilitating the commission of the human rights violation; and (iii) it can be established that the violation would also have been a human rights violation had the act

156 Section 4.1.4. of the Administrative Arrangements.
157 ILC Commentaries, at 66, para 1.

been committed by the participating state.[158] The first and last requirements are generally easily fulfilled in the context of RPC Nauru. Thus, in relation to the first condition, both nations generally are aware of the circumstances in which their aid or assistance will be used: the purposes of Australia's financial aid and the facilities and soil made available by Nauru are clearly delineated in the MoU.[159] In relation to the latter condition, Australia and Nauru are generally bound by the same or similar human rights obligations, and any conduct leading to a human rights violation of the acting state henceforth likely also constitutes a human rights obligation of the aiding state.[160] The question remains, however, whether either of both states gave aid or assistance with a view to facilitating the commission of any particular human rights violation. As outlined above, both knowledge and intent are required to fulfil this condition: specifically, the assisting state must have intended to facilitate the occurrence of the human rights violation.[161] Again, it ultimately depends on the specific act and the resulting human rights violation whether this requirement can be fulfilled. *Generally speaking*, such requirement can likely be fulfilled where arbitrary deprivation of liberty is the human rights violation in question, but is much less likely met where for example inhuman or degrading treatment, rights to privacy, rights to family life, or health-related rights are at stake. Indeed, it is difficult to prove that the assisting state *intended* for these specific human rights violations to happen. Where conduct attributable to Australia would lead to such violations, it hence cannot generally be assumed that Nauru intended these rights to be violated by providing the required facilities and soil. Likewise, where conduct attributable to Nauru results in such violations, it cannot generally be assumed that Australia intended the violation of these rights by providing financial means. As such, derived responsibility on the basis of Article 16 Draft Articles remains a narrow category. It should however be kept in mind that the doctrine of 'positive obligations' has, as will be outlined below, to a certain extent mitigated the implications of such narrow application.

In general, it is not likely that Australia or Nauru can be held responsible on the basis of direction or control (Article 17 Draft Articles). As outlined above, responsibilities in RPC Nauru are largely divided between both nations and it can therefore not *prima facie* be assumed that either of both states exercises "actual direction of an operative kind" over conduct of the other state to such an extent that it transcends the mere exercise of oversight, incitement, or suggestion.[162]

158 ILC Commentaries, at 66, paras 3-6.
159 Compare ILC Commentaries, at 66, para 4.
160 ILC Commentaries, at 66, para 6.
161 ILC Commentaries, at 66, para 5.
162 Compare ILC Commentaries, at 69, para 7.

It is likewise not likely that either of both states can be held responsible on the basis of coercion (Article 18 Draft Articles). Admittedly, the argument could be pursued that Australia coerces Nauru through far-reaching economic pressures since Nauru would likely be bankrupt if it were not for the revenue resulting from the RPC, and that Australia consequently incurs derived responsibility for potential human rights violations by Nauru.[163] However, as provided above, only coercion leaving Nauru with no choice but to comply suffices in this regard. Furthermore, Nauru should be deprived "of any possibility of conforming with the [human rights] obligation breached".[164] This condition is not likely to be fulfilled on the basis of Australia's economic pressures: even when such pressures can be construed as coercion proper, they are generally not likely to deprive Nauru of any opportunity to comply with its human rights obligations in the first place.

6.6 APPLYING THE FRAMEWORK: PI NORGERHAVEN

The framework of attribution also provides ground to test whether Norway, the Netherlands, or both countries simultaneously can be held responsible for conduct in PI Norgerhaven. Given that no private contractors are involved, analysis of PI Norgerhaven is somewhat less complex than that of RPC Nauru.

6.6.1 Articles 4 and 6 Draft Articles

Figure 7 in chapter 2 of this book shows for both countries which state organs are involved in the operation of PI Norgerhaven. On the basis of the basic rule of attribution as laid down in Article 4 Draft Articles, the acts and omissions of the Norwegian state organs – primarily KDI – can be attributed to Norway whereas the acts and omissions of the Dutch state organs – primarily DJI – can be attributed to the Netherlands.

However, the application of this basic rule is further complicated by the provisions of Article 6 Draft Articles. As this provision outlines, when an organ of one state is placed at the disposal of another state, its acts shall be considered exclusively acts of the latter state when it exercises elements of the governmental authority of that state. As the ILC Commentaries clarify, a state organ should operate with the consent of a state, under its authority, and for its purposes, and should act "in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from

163 See also ILC Commentaries, at 70, para 3.
164 See also ILC Commentaries, at 70, para 3.

the sending State".[165] 'Ordinary' inter-state cooperation, whether or not based on a treaty, is insufficient to fulfil the threshold of Article 6.[166]

The consequent question that arises is whether the *Dutch prison staff* working in PI Norgerhaven is being placed at the disposal of Norway. Two of the three criteria are clearly fulfilled: working for DJI, Dutch prison officers are state agents working for a state organ of the Netherlands. Moreover, they exercise governmental authority: exercises of detention and discipline pursuant to a judicial sentence or to prison regulations have, in fact, been explicitly mentioned in the ILC Draft Articles as examples of governmental authority.[167] The key question, then, is whether the Dutch prison staff has been placed *at the disposal* of the Norwegian state. As has been outlined above in section 6.3.3., Article 6 Draft Articles is a narrow category in that a functional link must be established between the organ in question and the receiving state's structure or authority.[168] Only in such cases can their conduct exclusively be attributed to Norway. If, on the other hand, the prison staff continues to function under the authority of the Netherlands, its conduct remains attributable to the Netherlands under Article 4 Draft Articles, whereas if it turns out to act under the joint instruction of Norway and the Netherlands, its conduct is attributable to both under Articles 4 and 8 Draft Articles.

[169] In light of the Norwegian-Dutch Treaty, it appears that the Dutch prison staff can indeed be considered to be placed at the disposal of Norway. The Treaty, in fact, says as much: "[t]he Minister of Security and Justice of the Receiving State shall put the prison, including its personnel and facilities, at the disposal of the Minister of Justice and Public Security of the Sending State for the purpose of the execution of Norwegian sentences".[170] The full responsibility for the execution of sentences through Dutch prison staff rests with the Norwegian authorities and the overall control of the prison rests with the Norwegian governor who instructs the Dutch personnel.[171] Whilst the Dutch Staff and Facility Manager *manages* the staff, that is, takes care of human resources, the Norwegian governor ultimately directs and controls the prison staff's exercise of governmental authority. In exercising powers of detention, the Dutch prison staff hence operates with the consent, under the authority, for the purposes, and under the exclusive direction and control of the Norwegian state.[172] There is, in other words, a functional link between the Dutch prison staff and the structure or authority of Norway.[173]

165 ILC Commentaries, at 44, para 2.
166 ILC Commentaries, at 44, para 2.
167 ILC Commentaries, at 43, para 2.
168 ILC Commentaries, at 44, para 4.
169 ILC Commentaries, at 44, para 3.
170 Article 3 of the Norwegian-Dutch Treaty.
171 See also Struyker Boudier & Verrest, 2015, p. 910.
172 Compare ILC Commentaries, at 44, para 2.
173 ILC Commentaries, at 44, para 4.

As a consequence, the conduct of Dutch prison staff – insofar as their exercise of powers of detention constituting governmental authority is concerned – can be attributed to Norway on the basis of Article 6 Draft Articles. On the basis of Article 4 Draft Articles, the conduct of the Prison governor, the Deputy Prison Directors, and the state agents at the Penitentiary Facility Ullersmo can also be attributed to Norway. On the other hand, on the basis of this same provision, the conduct of the Staff and Facility Manager, the Deputy Staff and Facility Manager, the governor of PI Veenhuizen, the Royal Marechaussee, and the Transportation and Support Service (DV&O) can be attributed to the Netherlands. The same goes for the medical staff: they are not placed at the disposal of Norway but operate under the supervision of the Dutch Staff and Facility Manager.[174]

6.6.2 Joint responsibility

Whilst acts can be attributed to either Norway or the Netherlands on the basis of the rules of attribution set out above, it is also possible that they are jointly responsible in line with Article 47 Draft Articles. This is the case where one or more acts resulting in a human rights violation can be attributed to both Norway and the Netherlands, either because they operated independently but their actions combined resulted in a potential human rights violation, because they committed a joint act either through a common organ or through close cooperation, or because one of both states participated in the human rights violation of another state. Interestingly, the implications of Article 47 Draft Articles in the context of PI Norgerhaven are largely similar to those in the context of RPC Nauru as outlined above in section 6.5.4. above, and the discussion in that paragraph consequently applies *mutatis mutandis* here. Only the main gist will be recounted here.

First, it should be emphasised that *whether* either of the aforementioned bases provide ground for joint responsibility ultimately depends on the specific conduct at stake. In general, the nodal governance network of PI Norgerhaven does not seem to give rise to the conclusion that it involves a significant amount of joint acts. The cooperation has been detailed at length in the Norwegian-Dutch Treaty and the Cooperation Agreement, and, importantly, this includes a proper division of responsibilities between both countries. Whilst the prison operation *as such* is frequently considered to be a 'fusion' or 'mixture', specific *acts* can almost always be attributed to either of both countries on the basis of Articles 4 and 6 Draft Articles. Whilst both countries may influence particular conduct in the facility, such conduct does usually not occur on the basis of joint instructions. Similar to the Australian-Nauruan cooperation

174 Article 32 Cooperation Agreement.

in RPC Nauru, it is more likely that Norway and the Netherlands can, on the basis of their operation, be held responsible for potential human rights violations that can be attributed to them on the basis of their actions that, alone or combined, led to such potential violation.

In addition, both countries might be held responsible on the basis of derived responsibility. In particular, in certain situations, Norway or the Netherlands could potentially be held responsible for aiding and assisting the other state in committing a human rights violation ex Article 16 Draft Articles, *inter alia* by providing essential facilities or financial means for such purposes.[175] The threshold criteria are, however, significant: in order to allocate derived responsibility to either country, it has to be established that that country was aware of the circumstances that made the acting state's conduct a human rights violation, that it gave aid or assistance with a view to facilitating the commission of that violation, and that the human rights violation would also have been a human rights violation if the act was committed by the aiding or assisting country itself.[176] Similar to the context of RPC Nauru, the most difficult threshold to meet is that the country needs to give aid or assistance with a view to facilitate the commission of a particular human rights violation, requiring both knowledge and intent.[177]

Likewise similar to the context of RPC Nauru, it is much less likely that either of the states involved can be held responsible on the basis of direction or control (Article 17 Draft Articles) or on the basis of coercion (Article 18 Draft Articles). Since the considerations in section 6.5.4. apply *mutatis mutandis*, this requires no further elaboration at this point.

6.7 POSITIVE OBLIGATIONS: A MODERN-DAY PANACEA FOR STATE RESPONSIBILITY?

As the foregoing has shown, international law on state responsibility to some extent accommodates commodification developments within its logic, although criteria are generally stringent. This, in turn, is a logical consequence of the nature of state responsibility: the notion that states can only be held responsible for their own conduct is a fundamental principle of public international law and conditions rules on state responsibility. Nevertheless, the doctrine of 'positive obligations' to some extent seems to mitigate the implications of these inherent limitations.

Specifically, the idea has been coined that positive obligations may be invoked in order to mitigate the rigid nature of the two-pronged test of international state responsibility. Den Heijer thus argues that rules of attribution

175 ILC Commentaries, at 66, para 1.
176 ILC Commentaries, at 66, paras 3-6.
177 ILC Commentaries, at 66, para 5.

are not the only means of holding states responsible and accountable for their involvement in private conduct: the doctrine of positive obligations would also give rise to state responsibility.[178] As he maintains, "the rules of attribution laid down in Part I of the ILC Articles and the doctrine of positive obligations serve as separate but conjunctive avenues for delimiting the international responsibility of the state when it is involved in the activities of a private entity".[179] As Gammeltoft-Hansen concurs, responsibility does henceforth not stem from the attribution of private conduct to a state, but from the positive obligations of a state to exercise due diligence in preventing, investigating, and providing remedies to (horizontal) violations.[180] He accordingly depicts positive obligations as an alternative to the image of the law on state responsibility as a straitjacket.[181] Similarly, Milanovic concludes that

> "once jurisdiction over an area is established, it does not imply attribution in the sense that anything that occurs within a state's jurisdiction is attributable to it. It would still be necessary to establish that the particular act that is alleged to be a human rights violation is attributable to the state. *Or, even if the act in question is not attributable to the state*, its responsibility may also arise for its *failure to implement positive obligations* under human rights treaties, e.g. to prevent human rights violations even by third parties".[182]

Positive obligations would thus blur the distinction between primary and secondary rules of international law. This would be particularly the case, it has been argued, where human rights courts derive, on the basis of positive obligations, "duties in respect of conduct of other international actors from the *substantive* scope of the state's human rights obligations, thereby *not only complementing, but also potentially displacing*, relevant rules laid down in the Articles on State Responsibility".[183] In this sense, primary rules of international law would, by means of positive obligations, trespass into the field of secondary international law.

It is argued here, however, that such a 'trespassing' understanding of positive obligations is misleading in the sense that delineating responsibility for positive obligations seem to be an exercise that *conforms to* – rather than *challenges* – the two-pronged nature of state responsibility. For international state responsibility to arise as a result of positive obligations, just like any action or omission that potentially violates a negative human rights obligation, any act or omission potentially violating a positive obligation indeed both needs to be attributed to a state under the relevant rules of secondary inter-

178 Den Heijer, 2011, p. 67.
179 Den Heijer, 2011, pp. 82–83.
180 Gammeltoft-Hansen, 2011, pp. 225–226.
181 Gammeltoft-Hansen, 2011, pp. 225–226.
182 Milanovic, 2011, p. 52.
183 Den Heijer, 2011, p. 67 (emphasis added).

national law and must constitute a breach of that state's international obligations as laid down in primary rules of international law. The systematic operation of the test hence does not differ depending on whether one is dealing with negative or positive obligations: an act or omission must first be attributed to the state and must subsequently fall within that state's scope of obligations.

Admittedly, however, the question of attribution in cases concerning positive obligations may become a rather formalistic one in the sense that attribution can often *prima facie* be ascertained. That is to say, where a state is supposed to act on the basis of its positive obligations, its omission to do so can readily be attributed to it. In this regard, it should be recalled that the ILC Draft Articles confirm explicitly that an omission can – both independently and in combination with one or more actions – constitute an internationally wrongful act and that states can be held responsible for them insofar as they can be attributed to that state under secondary rules of international law.[184] Where a state fails to act, it is henceforth hardly problematic to attribute such omission to that state on the basis of the relevant attribution maxims. If, furthermore, such omission constitutes a breach of the state's (positive) international human rights obligations, the omission results in an internationally wrongful act for which the state can be held responsible. In extraterritorial contexts, this means that the omission must not only be attributable to the state, but also that it must be ascertained that the individual whose rights were allegedly violated was within the state's jurisdiction in the first place – a question that is the prime concern of the next chapter.

The ECtHR case of *Jaloud v. The Netherlands* provides a good illustration of the way in which the two-pronged test of international state responsibility continues to apply to context of positive obligations.[185] Since it will be extensively elaborated upon in the next chapter, it is only addressed succinctly here. The case concerned the death of an Iraqi citizen, who was shot at a checkpoint in Iraq which at the time was under the command of a Dutch officer.[186] Applicant claimed that the Netherlands had inadequately investigated the fatal shooting and had therefore breached its *positive* obligation under Article 2 of the ECHR. In examining state responsibility, the Grand Chamber first dealt with attribution: it noted that "[t]he facts giving rise to the applicant's complaints derive from alleged acts and omissions of Netherlands military personnel and investigative and judicial authorities. As such they are capable of giving rise to the responsibility of the Netherlands under the Convention".[187] This phrase indeed serves to *attribute* the impugned acts – and, more relevant in this context, the impugned omissions – of the Dutch military personnel and invest-

184 ILC Commentaries, at 31, para. 1 and at 32, para. 1.

185 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), 20 November 2014, Application no. 47708/08.

186 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber).

187 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 151-155.

igative and judicial authorities to the Netherlands. *Separately*, the Court dealt with the question of jurisdiction, which in itself however also included an attribution test. This is slightly complicating, as it is not the attribution of impugned acts and omissions that is tested here – this has already been established – but rather the attribution of acts of Dutch forces in Iraq. Indeed, as will be further explained in the next chapter, for an individual to come into a state's extraterritorial jurisdiction in the first place, it generally needs to be established that the state concerned in fact exercised control extraterritorially. This *in casu* requires a separate test of attribution that does not replace the first prong of the test of state responsibility but is rather encapsulated in the test of jurisdiction as the second prong. In this case, the Court held that the conduct of Dutch forces in Iraq was attributable to the Netherlands and that the Netherlands consequently had exercised extraterritorial jurisdiction on the basis of a personal model (i.e. "within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint").[188] Now that the applicant had been within the Netherlands' jurisdiction, the Dutch authorities had positive obligations vis-à-vis him, and the Netherlands was consequently held responsible as the acts and omissions of its military personnel and investigative and judicial authorities – that could be attributed to it – did not meet the relevant positive obligations.

As such, it becomes clear that the questions of attribution and jurisdiction do not operate in an isolated fashion either conceptually or practically. As the present and next chapter show, to establish jurisdiction, it is necessary to attribute acts or omissions to a state as legal entity, since a state necessarily acts – including in the exercise of jurisdiction – through human auxiliaries, whilst at the same time establishing jurisdiction may provide grounds to attribute certain omissions amounting to a violation of positive human rights obligations to a state. In the contexts of RPC Nauru and PI Norgerhaven, this means that one should not only examine whether conduct amounting to a violation of *negative* human rights obligations can be attributed to one or more of the states involved, but also whether conduct amounting to a violation of *positive* human rights obligations – in practice often being an omission – can be attributed to them. However, the responsibility of these states only stretches so far as their international human rights obligations dictate: Australia, Nauru, Norway, and the Netherlands only have negative and positive human rights obligations where they exercise *jurisdiction*, the second step of the two-pronged test of international state responsibility. As a result, even where certain acts violating negative human rights obligations cannot be attributed to either of the states, when the state in question exercises jurisdiction, it can nevertheless potentially be held responsible on the basis of its positive obligations, which in turn requires a potential omission to be attributed to that state. In sum, the

188 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 151-152.

doctrine of positive obligations is certainly helpful, but should not be mistaken for a genuine alternative to the two-pronged test of state responsibility.

6.8 Conclusion

This chapter has dealt with the first step of establishing state responsibility for human rights violations as internationally wrongful acts. This step consists of establishing, on the basis of relevant principles of general international law, whether *conduct*, comprising both acts and omissions, can be regarded as conduct of a particular state. Analysis inquired whether this first step provides room for resilient accommodation of commodification realities in order to effectively respond to the commodification challenges to its accountability, effectiveness, and legitimacy, and henceforth to remain relevant as a protection mechanism.

Examination of the ILC Draft Articles shows that this step in principle indeed provides such space. Indeed, states can be held responsible for acts and omissions of a wide variety of entities, both public and private in nature, and it is therefore possible that states are held internationally responsible for acts and omissions of partners in nodal governance networks that exercise power and authority in *inter alia* settings of confinement. What is required, essentially, is that the conduct of such entities can be attributed to the state, so as to make the particular act or omission a *de jure* act or omission of that state. This applies to conduct arguably violating a negative obligation of the state, but also to conduct arguably violating a positive obligation, in which case the failure to live up to positive obligations – often amounting to an *omission* of sorts – has to be attributed to the state in question. Even though carried out by for instance private contractors, whenever the criteria of one or more of the attribution rules are fulfilled, conduct can hence be considered conduct of a state. The systematics of the rules on state responsibility as developed by the ILC accordingly continue to rely heavily on a significant deference, or veracity, to the fundamental principle of general international law that states are only responsible for their *own* conduct, whilst simultaneously providing scope to deal with the operations of nodal governance networks. As has been established, the rules on state responsibility furthermore provide ample space to accommodate the exercise of authority in nodal governance networks in which two or more states are involved: both the conduct of states acting independently, and joint acts, can be effectively dealt with through the rules of attribution. This is complemented by the rules of derived responsibility, allowing for states to be held responsible for their involvement in the internationally wrongful act of another state, whether it be through aid or assist-

ance, direction, or coercion.[189] Again, the way in which the system of international state responsibility has been developed showcases significant veracity to the fundamental principle of states' responsibility for their *own* conduct, whilst simultaneously acknowledging – in what may be labelled a resilient stance – that contemporary globalised realities require the availability of advanced rules of attribution and derived responsibility in order to guarantee the system's effectiveness.

At a global level, the way in which the relevant principles have been developed thus seems promising for the accommodation of commodification challenges within the public international law system in general and within the logic of international human rights law in particular. Translated to the local level, the analysis above shows, however, that the ILC Draft Articles do not provide a simple cure to the often intricate and complex governance networks that are entrenched in some contemporary settings of confinement. Thus, in the context of RPC Nauru, the application of the relevant rules of attribution set out in the ILC Draft Articles to the particularities at hand showcases amongst others that holding Nauru or Australia responsible for the conduct of private contractors is not without difficulties. Likewise, establishing derived responsibility is rather complex in light of the arrangements in place in RPC Nauru. The particular impediments under each rule of attribution, and under each rule of derived responsibility, have been outlined above and do not need to be recounted here. It should rather be emphasised that, notwithstanding the fact that the rules of attribution and derived responsibility showcase a balanced approach vis-à-vis resilience and veracity, at the local level their application continues to be complicated. Various contextual factors indeed often blur clear and uncontentious assessments of responsibility.

At the same time, such results are not generalisable as illustrated by PI Norgerhaven. Indeed, in that specific context, there seem to be no particular difficulties in establishing responsibility for conduct on the basis of the ILC Draft Articles. Taking these findings into account, at the 'glocal' level it henceforth transpires that the extent to which commodification is *effectively* accommodated in the global international (human rights) law machinery ultimately depends on local particularities. Indeed, ultimately, the effectiveness of resilience is not only dependent on the development of global regimes in order to adjust international law to contemporary developments, but also depends on the way in which local networks of power and authority have been structured and embedded, and the extent to which such local structures are

189 In cases of coercion, the conduct of the coerced state technically does not amount to an internationally wrongful act where that state can rely on *force majeure* as a result of the coercion. Therefore, in these specific circumstances, the system of state responsibility allows for establishing the responsibility of a coercing state for acts of a coerced state that would, were it not for the coercion, have constituted an internationally wrongful act: see also ILC Commentaries, at 70, para 4.

transparent and accessible and operate with integrity. For instance, the nodal governance arrangements in RPC Nauru show that the effective application of rules of attribution and derived responsibility is not so much obstructed by the fact that nodal governance arrangements *as such* are in place, but rather by the fact that these arrangements have been structured, and operate, behind significant walls of secrecy and silence, which makes it difficult to assess in a general sense the division of responsibility for conduct occurring within the nodal governance network. In the context of PI Norgerhaven, on the other hand, these lines of responsibily have much more clearly and transparently been drawn and embedded in rules and regulations. Walls of secrecy and silence thus do not only hamper answerability and enforcement as will be further elaborated upon in Part III of this book, but also hamper assessments of responsibility for conduct as the first leg of establishing state responsibility.

At the glocal level, globally developed rules of attribution thus seem to be able to mitigate at least in part the commodification challenges to international human rights law, although such efforts may be significantly constrained by the way in which local contexts have been structured. Furthermore, whilst a resilient approach to attribution and derived responsibility is useful, it is only one of two steps of establishing state responsibility, the other being establishing responsibility for *an international obligation*. It is this step that the next chapter will turn to.