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

Berlo, P. van

9 Human rights as a holistic protection mechanism in RPC Nauru

9.1 INTRODUCTION

This final chapter prior to the conclusion will analyse the role of human rights as a holistic protection mechanism in the context of RPC Nauru.[1] As the previous chapter has illuminated, such holistic assessment can, depending on one´s specific research interest, take a number of forms, *inter alia* by focusing on a particular human rights consciousness, a particular human rights vernacularisation mechanism, a particular human rights instrument, or a particular actor. Alternatively, it can focus on examining the vernacularisation of human rights consciousnesses by a wide variety of actors through all respective vernacularisation mechanisms and by taking into account all instrumental uses of human rights, yet given the breadth and intensity of such a venture this could easily be the sole endeavour of an entirely separate book altogether.

In this chapter, an actor-specific inquiry will be pursued. This choice for a focus on actors, rather than on specific consciousnesses, vernacularisation mechanisms, or instruments, makes particular sense in light of the commodification perspective that the present research has utilised. Indeed, the chapter will show – albeit frequently implicitly – how the mentalities, technologies, resources, and institutional structures of various actors impact on the role that human rights play as a protection framework. An actor-specific focus, as such, addresses the interplay between commodification developments and the holistic protection value of human rights.

The chapter focuses particularly on the use of human rights instruments and vernacularisation mechanisms by three different groups of actors involved in the context of RPC Nauru. Specifically, in light of the central question of this book – revolving around the extent to which human rights *as a protection framework* can remain of relevance – the focus will be on three actors that, at least in theory, are expected both to have internalised particular human rights consciousnesses and to strive for their effective vernacularisation, as opposed

1 In light of the fact that issues concerning human rights protection have been more pervasive in the context of RPC Nauru than they have been in the context of PI Norgerhaven, as has also been emphasised in the intermezzo concluding Part II, and for practical reasons set out in chapter 1, the focus here is on RPC Nauru. In the conclusion of this chapter, however, some brief notes in relation to the potential use of the multidimensional model of human rights in the context of PI Norgerhaven will be provided.

to actors that may be presumed to pursue alienation strategies. In this sense, the use of human rights alienation strategies is left out of consideration in the present analysis, although it should be kept in mind that the possible use of such strategies will impact upon the overall effect of human rights as a protection framework.

It is consequently important to underscore that this chapter is an *illustration* of how human rights protection could holistically be approached: it is not a comprehensive and complete assessment of human rights protection in RPC Nauru. Indeed, by focussing upon particular 'human rights-friendly' actors, it leaves both human rights alienation and a number of vernacularisation attempts underexplored. The purpose of this chapter is, accordingly, not to assess whether human rights add, overall, to the plight of asylum seekers and refugees confined in RPC Nauru, but rather to illustrate a few ways in which the analytical model as developed in the previous chapter may be employed on the basis of a commodification perspective. As such the present illustration is not exhaustive and uses a very particular perspective that functions as an invitation for further elaboration in future research.

The central actors in this chapter are (i) Australian lawyers and (quasi-judicial) monitoring bodies, (ii) welfare workers working (or having worked) in RPC Nauru, and (iii) institutionalised NGOs operating in the Australian political realm. These three actors all constitute important 'critical masses' which may *a priori*, on the basis of theoretical reflection, be presumed to pursue – as part of their particular strategies – the implementation of human rights protection in an implicit or explicit way, that is, either by explicitly relying on human rights instruments or by implicitly seeking vernacularisation using alternative tools.[2] The methodology used to perform this analysis has been detailed in chapter 1. To briefly recap, analysis in this chapter is based on a review of literature and documents, semi-structured interviews and, to a lesser extent, doctrinal legal analysis insofar as vernacularisation opportunities of lawyers and (quasi-judicial) monitoring bodies are concerned.

This chapter will henceforth provide an illustrative insight into the operation of various human rights consciousnesses, instruments, and vernacularisation mechanisms in the context of RPC Nauru. As will become clear, whereas some vernacularisation mechanisms are, for a myriad of reasons, more ideally placed to command change, in practice, all mechanisms have a role to play in the vernacularisation of human rights consciousnesses and in the consequent fostering of human rights protection. A true synergy of human rights dimensions can hence be discerned in relation to the (pursued) operation of the human rights framework as a protection mechanism in the context of RPC Nauru. As will also become clear, at some stages the three examined critical masses rely explicitly on human rights instruments in their vernacularisation

2 See, in relation to welfare workers specifically, also Maylea & Hirsch, 2018.

efforts, but frequently they also purposively do not do so. The implications of these findings will be discussed throughout this chapter.

The final part of this chapter will reflect upon the synergistic operation of human rights in RPC Nauru by once again centralising the key notions of commodification and crimmigration that underly this book. As becomes clear, commodification and crimmigration ultimately have a negative impact on various components of human rights vernacularisation, that is, on the instrumental values and vernacularisation mechanisms of all respective dimensions. Both developments, indeed, challenge or even frustrate human rights vernacularisation in a myriad of ways. As will also be explained, however, commodification at the same time opens up new pathways, or specific vernacularisation mechanisms, towards human rights protection. In this sense, whereas crimmigration generally has a constraining effect on effective vernacularisation, commodification has both a restricting and an enabling impact. This sets the stage for a somewhat optimistic conclusion about the relevance of human rights in an era of globalisation, as human rights understood in a holistic fashion are not only challenged, but also can potentially be realised through novel pathways of protection, where globalisation continues to progress unabatedly.

9.2 VERNACULARISATION OPPORTUNITIES OF LAWYERS AND (QUASI-JUDICIAL) MONITORING BODIES

Of all professional actors involved in the field, lawyers and (quasi-judicial) monitoring bodies are most likely to be able to utilise human rights as deliberative principles in their vernacularisation efforts. The instrumental value of human rights as deliberative principles in this regard can, however, be questioned given the intricacies of international human rights law in the context of RPC Nauru as Part II of this book has elaborated upon. At the same time, as has indeed elucidated throughout this book, any examination of human rights as deliberative principles should take both the 'law in books' and the 'law in action' into account: for a proper understanding of the extent to which international human rights law can effectively keep duty-bearers accountable, it is required to not only look at *de jure* responsibility but also to look at *de facto* accountability. *De jure* responsibility has already has been dealt with in Part II, so this section will focus primarily upon the extent to which the responsible actors as identified in Part II can be held answerable by lawyers and/or (quasi-judicial) monitoring bodies and consequences may be enforced in practice. The focus here is therefore on the instrumental uses of human rights law by lawyers and (quasi-judicial) monitoring bodies through deliberative human rights mechanisms, although occasionally references will be made to other ways in which deliberative mechanisms are employed by these actors, for example when relying on criminal law or tort law.

Demarcating *de jure* international human rights responsibilities in RPC Nauru is, as Part II of this book has elucidated, a strenuous task. As part of the 'cat-and-mouse' game or 'rat-race' previously denoted, the factual arrangements and structures of power at play in the nodal field constantly change and adapt themselves to legal, social, and political realities in what may be labelled a never-ending reconfiguration. As I noted elsewhere, this trend provides states involved "with opportunities to explore the legal margins of human rights law and manoeuvre themselves outside of its reach, both in relation to negative and positive obligations".[3] Nevertheless, establishing human rights responsibility could, in concrete cases, still be possible: "some cases [may] entail clear-cut breaches of human rights that fall within the jurisdiction of, and are attributable to, Australia and/or Nauru".[4] States can, in other words, not *always* manoeuvre themselves outside human rights law's reach. Here, then, lies potential for vernacularisation that lawyers and monitoring bodies can use. However, whilst in such cases legal *responsibility* may be established along the lines set out in Part II of this book, the question remains whether the responsible actor can consequently also be held *accountable,* that is, whether they indeed can be held answerable and consequences of breaches can be enforced.

In this regard, I have elsewhere noted in the context of RPC Nauru that "optimism fades" when exploring the accountability mechanisms in place.[5] Various reasons seem to underly this fading optimism. Some of these reasons are *external* to RPC Nauru: they relate to the broader specific embedding of human rights law in the Australian-Pacific context or to the particularities of various international human rights law regimes. Other reasons are *internal* to RPC Nauru: they relate to the nodal structure, 'many hands', non-transparent nature, and crimmigration features of the facilities. The most pervasive reasons will now be addressed in turn, examining respectively (i) the accountability of private actors under human rights instruments, (ii) the overall position of human rights accountability in the Australian-Pacific region, and (iii) the particularities of RPC Nauru's governance structure and design.

9.2.1 The limited potential of private human rights obligations in action

At first sight, the potential for legal professionals to hold private actors accountable on the basis of human rights law appears to be weak at best: in light of the voluntary and non-binding nature of obligations as outlined in chapter 5, the question as to the impact of these frameworks in practice seems largely redundant. To a large extent, this holds true: the existing soft-law frameworks

3 Van Berlo, 2017d, p. 64.
4 Van Berlo, 2017d, p. 64.
5 Van Berlo, 2017d, p. 64.

and self-initiated codes of conduct have seemingly provided those confined in RPC Nauru with hardly any enforceable human rights protection vis-à-vis private stakeholders. Effective ways to induce compliance or to remedy potential breaches are lacking and compliance with these norms is fully dependent on the private contractors' own volition and initiative. Whilst in some countries so-called 'non-judicial grievance mechanisms' are being set up with the aim of allowing victims to seek redress, these mechanisms operate through judgments that are not legally binding.[6] As Zadek concludes in this regard, "[i]n sum, none of the current avenues that are available to victims seeking to right corporate wrongs provide consistent, reliable or effective remedies".[7]

Some remarks in this regard are due. First, whilst limited, there is *some* scope for judicial redress in domestic law. Whilst proper accountability on the international plane is largely inexistent, domestic criminal prosecutions and civil litigation could indeed to certain extents be considered remedial tools that allow for private actors to be held responsible on the basis of human rights standards.[8] Such remedial pathways effectively are part of the state's endeavour to discharge its positive obligation to provide for an effective remedy whenever horizontal violations occur.[9] Thus, on the one hand, states may discharge their positive obligations in part by ensuring that private actors can be held criminally liable for certain infringements of human rights under domestic criminal law, both by allowing for liability in substantive criminal law and by ensuring that effective and adequate procedures are in place to enforce such liability.[10] On the other hand, depending on the specifics of the domestic jurisdiction involved, individuals may be able to bring tort claims against private stakeholders concerning alleged violations of *domestic* 'human rights' provisions in the country where the violation has allegedly occurred or where the private actor is based.[11] The term human rights is put between inverted commas here, however, since "[n]ot all 'tort rights' are also 'human

6 Genovese, 2016; Zadek, 2016, pp. 243–244. This includes, notably, National Human Rights Institutions (NHRIs).

7 Zadek, 2016, p. 244.

8 Zadek, 2016, p. 243.

9 Kaufmann, 2016, p. 253; Van Dam, 2011, p. 243.

10 Ryngaert, 2018. See, for a problematisation of the relationship between positive human rights obligations and effective criminal procedures, however Pitcher, 2016; Seibert-Fohr, 2009. As they explain, tension may arise between fundamental principles of criminal law – including fair trial rights of the accused and, more generally, principles of due process – and of human rights law – in particular where the latter in pursuit of an effective enforcement of criminal liability would demand an obligation of *result* (i.e. a duty to punish) rather than of *effort* (i.e. a duty to *prosecute*). As they consequently argue, at least from the perspective of criminal law, positive obligations under international human rights law can thus not be interpreted to extend as far as to expect from a state that whenever a grave violation of core human rights occurs, not only prosecution but also punishment should follow – irrespective of the procedural particularities of a case.

11 Such corporate 'human rights' obligations do not derive directly from the international plane but from statutory provisions in domestic law: Vandenhole, 2015, p. 79.

rights' and not all 'human rights' are also 'tort rights' but there is a big overlap, particularly when it comes to civil rights".[12] Thus, when speaking about domestic human rights obligations of corporate actors in this regard, what is *actually* referred to are tort obligations with a human rights overlap as part of a 'rights-oriented' or 'rights-based' system of tort law. Tort law and human rights law are thus "brothers in arms",[13] but cannot be equated to one another. The same applies, in fact, to the overlap between criminal law and human rights law: they operate as communicating vessels yet cover different domains. In the context of RPC Nauru, these avenues are also potentially available: the domestic legal systems of Nauru and Australia may be utilised to induce corporate responsibility. As such, whilst deliberative principles in their instrumental value – i.e. as international human rights law – may lack effectiveness, this does not mean that deliberative vernacularisation mechanisms are therefore ineffective overall.[14] Tort law and criminal law may provide alternative deliberative pathways towards human rights protection, albeit in a more implicit and indirect sense.

Returning to the instrumental use of human rights as deliberative principles, attention will now be turned to a particular procedure within the United States that may provide room for accountability based on private human rights obligations proper. Indeed, a well-known and unique alternative pathway for judicial redress on the basis of tort law is the US Alien Tort Statute (ATS), which has attracted significant attention in relation to private human rights obligations.[15] According to the ATS, which was established as part of the Judiciary Act of 1789, the US district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". In 1980, the Court of Appeals for the Second Circuit held in *Filartiga v. Pena-Irala* that human rights claims can be brought under the ATS.[16] Customary international law, including international human rights law, is indeed considered "the modern equivalent" of what the ATS labels the 'law of nations'.[17] Thus, even when the domestic legal system of the country where the alleged violation occurred or where the private actor is domiciled

12 Van Dam, 2011, p. 243.
13 Van Dam, 2011, p. 243.
14 It should nevertheless be noted that Australia does not have a Bill of Rights in its national constitution, which may complicate domestic human rights responsibility in the first place. Furthermore, Nauruan tort law has not been significantly developed and is not particularly clear as to its substance: Dastyari, 2008, p. 88.
15 Zadek, 2016, p. 243.
16 US Court of Appeals for the Second Circuit, *Filartiga v. Pena-Irala,* 30 June 1980, 630 F.2d 876. This case concerned allegations of torture. The Second Circuit held that District Courts have jurisdiction over such tort claims brought by aliens given that official torture violates norms of customary international law: see also Dodge, 2016, p. 245; Grear & Weston, 2015, pp. 29–30. In the following decades, approximately 60 cases were filed against corporate actors under the ATS: see for a brief overview, Dodge, 2016, pp. 245–246.
17 Dodge, 2016, p. 245.

does not offer proper avenues of judicial redress via tort law, the ATS seems to provide a genuine alternative to induce accountability on the basis of human rights norms enshrined in customary *international* law. This procedure is of particular importance here given that it potentially provides a pathway to enforcing international human rights norms vis-à-vis private actors involved in RPC Nauru.

The lack of avenues to hold private actors involved in RPC Nauru answerable as identified above accordingly has to be nuanced: it is imaginable that a tort claim against them is brought in the United States under the ATS. However, recent case law developments have significantly decreased such potential. An important turning point was the case of *Kiobel v. Royal Dutch Petroleum Co.*[18] This case concerned a class action brought by Nigerian nationals against Royal Dutch Petroleum Company (incorporated in the Netherlands), Shell Transport and Trading Company (incorporated in the UK), and Shell Petroleum Development Company (A subsidiary incorporated in Nigeria), alleging that defendants had aided and abetted human rights violations by encouraging the government of Nigeria to suppress demonstrations against oil operations in the Niger Delta.[19] The Court of Appeals for the Second Circuit held, however, that it is not possible to sue corporations *at all* within the framework of the ATS given that corporate liability for international crimes has continuously been rejected within customary international law.[20] The case eventually reached the US Supreme Court, which also dismissed the case but on a different ground.[21] It recounted that a 'presumption against extraterritoriality' applies to US statutes: as it previously outlined, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none".[22] The Supreme Court concludes that nothing in the text of the ATS clearly indicates an extraterritorial reach: the presumption against extraterritoriality is "not rebutted by the text, history, or purposes of the ATS", and therewith it is held to apply unabatedly.[23] The Supreme Court therewith severely limited the scope for judicial redress under the ATS, yet it did not close the door altogether. The final paragraph of the majority opinion holds that

> "all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.

18 United States Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum Co,* 17 September 2010, 621 F.3d 111.
19 See also Dodge, 2016, p. 247.
20 US Court of Appeals for the Second Circuit, *Kiobel v. Royal Dutch Petroleum Co*. See, for further analysis, Grear & Weston, 2015, pp. 30–33.
21 US Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.,* 17 April 2013, 569 US 108.
22 US Supreme Court, *Morrison v. National Australia Bank Ltd.*, 24 June 2010, 561 US 247.
23 US Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*

> […] Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices […]."[24]

As Dodge outlines, this final paragraph still provides some room for cases concerning human rights violations by corporate actors outside the US.[25] Thus, it is arguable that the majority decision allows for such cases where (i) part of the 'relevant conduct' took place in the US although the violation itself did not, (ii) the defendant is a US corporation, and/or (iii) the defendant is an individual.[26] However, the question what is precisely required for a claim to 'touch and concern the territory of the United States with sufficient force' remains unanswered: in fact, various Circuit Courts have, in applying this criterion post-*Kiobel,* reached different and contradictory outcomes.[27] In any event, in the context of RPC Nauru there is no reason to believe that claims concerning private actors' conduct and involvement touch and concern US territory with sufficient force – or, for that matter, *at all*: the corporations involved operate on Nauruan soil, are generally domiciled in Australia, and operate as part of Australian and Nauruan policy frameworks.

In addition, a further hurdle was explicated in *Daimler AG v Bauman*.[28] In this case, which concerned a claim under the ATS for alleged human rights violations that occurred entirely outside the US and involved both non-US plaintiffs and non-US defendants, the Supreme Court held that US courts can only exercise personal jurisdiction over claims that are not related to the forum if the defendant's affiliations with the US state in which the suit is brought are "so constant and pervasive" that the defendant is essentially "at home" there.[29] This, in turn, creates an additional barrier for potential tort claims brought in the context of RPC Nauru: since the private actors involved are based in Australia and consequently have no constant and pervasive ties to US territory, it seems that personal jurisdiction cannot be established in cases in which they are the defendants.

The second remark due here is that the private actors involved in RPC Nauru could, theoretically, be held responsible for human rights violations by means of *contractual* stipulations. Thus, their service contracts with the Australian government could contain stipulations concerning any contractual consequences of human rights infringements. For example, Canstruct's service contract with the Australian government for the provision of welfare and garrison services in RPC Nauru stipulates in Schedule 1 ('Statement of Work'), Part 4 ('RPC Garrison Services') that Canstruct has to ensure "that each indi-

24 US Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*
25 Dodge, 2016, pp. 247–248.
26 Dodge, 2016, pp. 247–248. See also Grear & Weston, 2015, pp. 33–34.
27 Dodge, 2016, pp. 249–250; Knoblett, 2019, p. 750; Prasad, 2018.
28 US Supreme Court, *Daimler AG v. Bauman*, 14 January 2014, No. 11-965, 571 U.S.
29 US Supreme Court, *Daimler AG v. Bauman*. See similarly US Supreme Court, *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 27 June 2011, 564 U.S. 915. See also Ryngaert, 2018, pp. 19–20.

vidual's human rights, dignity and well-being are preserved".[30] It seems that this reference to human rights denotes all of Australia's international human rights obligations, since the contract stipulates that amongst others "Australia's international obligations, such as the United Nations Refugee Convention and Convention on the Rights of a Child" provide parameters for the operation of regional processing.[31] Ultimately, failure to do so *could* result in the removal of service provider personnel or the termination of the contract altogether.[32] However, these obligations are based on contract, not international human rights law, and answerability and enforcement therewith rest, of course, primarily with the Australian government, not with lawyers or monitoring bodies. In terms of impartial accountability, the significance of these contractual obligations can thus – at least *prima facie* – be questioned: "[t]he circularity between State and Company that these provisions represent in relation the [sic] responsibility for the human rights of asylum seekers is immaterial".[33]

Third, it should be noted that even though the reach of soft law in the books is severely limited, in action this reach has at times proven to be *even more* limited. In relation to Australia's offshore processing regimes, this became particularly clear in the context of the OECD Guidelines in 2017, when specific developments called into question whether the contracted service providers involved in offshore processing could be held responsible on the basis of these Guidelines in the first place. As previously outlined in chapter 5, NGOs can bring complaints concerning alleged breaches of the OECD Guidelines against multinational enterprises to the National Contact Point (NCP) of the country concerned. In September 2014, two NGOs – the Human Rights Law Centre (HRLC) and Rights and Accountability in Development (RAID) – did exactly that in relation to Australia's offshore processing regimes: they submitted a complaint concerning G4S Australia's operations at RPC Manus to the Australian and UK National Contact Points.[34] In it, they alleged that G4S Australia "has been responsible for significant breaches of the OECD guidelines in relation

30 See section 3.2. of Part 4 of Schedule 1 to the contract of Canstruct, available at https://www.homeaffairs.gov.au/foi/files/2018/fa171200763-document-released.pdf (last accessed 30 May 2019). A similar phrase was adopted in Transfield's contract: see section 4.1.1. of Part 3 of Schedule 1, available at http://www.aph.gov.au/DocumentStore.ashx?id=34e78a3a-685f-4695-9969-77964cd44f3c (last accessed 30 May 2019).

31 See section 1.1.5. of Part 1 of Schedule 1 to the service contract. A similar provision is provided for in the service contract with Save the Children: see section 1.1.4. of Part 1 of Schedule 1, available at https://www.righttoknow.org.au/request/2694/response/7582/attach/html/4/FA141000063%20Documents%20released.pdf.html (last accessed 30 May 2019).

32 See, for example, sections 5.7. and 15.2. of the service contract.

33 Narayanasamy et al., 2015, p. 28.

34 The original complaint is available at http://www.raid-uk.org/sites/default/files/oecd-complaint-g4s-australia.pdf (last accessed 30 May 2019).

to conditions and alleged abuse of detainees" at RPC Manus.[35] The Australian NCP held, however, that the complaint could not be accepted because (i) parts of the complaint could be interpreted as commentary on government policy for which G4S was not accountable, (ii) various reviews had already scrutinised G4S' conduct on Manus Island and any further review would be unlikely to be of additional value, and (iii) various legal proceedings were ongoing in relation to incidents at RPC Manus and it would consequently not have been appropriate for the NCP to intervene.[36] The HRLC and RAID appealed this decision but the Australian NCP upheld its previous decision upon review.[37] As such, even though the OECD Guidelines may *cover* the contracted service providers involved in offshore processing in general, they are not necessarily *held* accountable for various reasons, including that they are contracted by the state and merely would carry out government policy. Whereas the reach of such Guidelines in the books is already limited due to the voluntary and open-ended nature of such norms, their potential in action hence – at least on this occasion – proved to be even more constrained when applied to the context of Australian-Nauruan offshore processing.

9.2.2 The precarious position of human rights in the Asia-Pacific context

The second factor that significantly hampers the effective employment by lawyers and monitoring bodies of deliberative principles through deliberative mechanisms in the context of RPC Nauru is the overall precarious position that human rights law has in the Australian-Pacific region. This precarious position is essentially three-fold, as it comprises accountability gaps both on the international, the regional, and the domestic legal planes.

First, the views, comments, and decisions of the bodies that monitor the obligations arising from international treaties to which Australia and Nauru are party are, although considered authoritative by many, generally not binding and can as such not be considered as mechanisms through which answerability and enforcement can be induced *in se*. As Peers and Roman for example point out, the rulings of these monitoring bodies are frequently thrown "on the barbeque" by Australian politicians.[38] This significantly hampers human rights vernacularisation, as judicial or quasi-judicial processes are often not met with *de facto* enforcement. Such weak standing in itself is, however, true for all countries party to the same treaties and covenants and is, therefore, not specific

35 See http://www.raid-uk.org/sites/default/files/oecd-complaint-g4s-australia.pdf, p. 4 (last accessed 30 May 2019).

36 See https://cdn.tspace.gov.au/uploads/sites/112/2018/02/G4S_aus.pdf (last accessed 30 May 2019).

37 See https://cdn.tspace.gov.au/uploads/sites/112/2018/02/ANCP_Appeal_statement_G4S_final.pdf (last accessed 30 May 2019).

38 Peers & Roman, 2016.

to the legal realms of Australia and Nauru. Whilst the weak position of international instruments' monitoring bodies should be taken into account in assessing the vernacularisation potential of the deliberative dimension, we should hence look beyond this somewhat inherent feature to further denote, with greater detail, the potential for human rights vernacularisation through alternative deliberative processes in the particular case study at hand.

As chapter 7 has already outlined, no regional human rights instrument, court, or monitoring body exists in the Asia-Pacific context.[39] This is fundamentally different from other regional contexts, in particular the European one, where not only a strong human rights instrument exists – the ECHR – but where such instrument is also extensively and bindingly monitored by an authoritative court – the ECtHR. Here, a fundamental difference thus exists with other regional contexts: no material protection flows from the regional level and holding states accountable for their human rights obligations thus necessarily needs to occur either on the international sphere – which is, as outlined above, a weak system of binding accountability – or on the domestic plane – which is, as will be outlined below, also problematic in the particular contexts of Australia and Nauru. As likewise denoted in chapter 7, the start of some progression towards regional human rights law has been identified but has not led to a proper and concrete roadmap yet.[40] Whilst this goes to show with more specificity why human rights law accountability is particularly troublesome in the case study context, it does not provide further insight in how such accountability operates in Australia and Nauru in particular, that is, as opposed to other Asian-Pacific nations who self-evidently are faced with the same lack of regional scrutiny. This requires a closer look at the domestic level as well.

Human rights generally are considered to have a "precarious foothold" both in the Australian and the Nauruan domestic legal contexts.[41] On the one hand, Australia remains one of the only democratic nations on earth without its own national bill of rights and has, as such, no federal human rights protection as a matter of constitutional law.[42] Australia's international human rights obligations are monitored by the Australian Human Rights Commission ('AHRC'), but this commission has no power to enforce sanctions or to make binding recommendations.[43] In addition, the Australian government has on many occasions blocked the AHRC from visiting and investigating RPC Nauru since the AHRC's jurisdiction does not extend beyond Australia's territory.[44] Moreover, as I pointed out elsewhere,[45] domestic Australian

39 Durbach et al., 2009; Katsumata, 2009.
40 European Parliament Directorate-General for External Policies Policy Department, 2010, p. 13.
41 Byrnes, Charlesworth, & McKinnon, 2009, p. xv.
42 Byrnes et al., 2009, p. xv; Van Berlo, 2017d, p. 64.
43 Branson, 2010.
44 Gordon, 2014; Van Berlo, 2017d, p. 65.

courts often cannot and do not take (international) human rights obligations into account. This is aptly illustrated by the judgment of the High Court of Australia in *M68/2015*.[46] This case, in which the legality of RPC Nauru was challenged, was brought on behalf of a Bangladeshi woman previously confined in RPC Nauru. Her challenge was rejected, however – and, of particular importance here, it was rejected solely on the basis of the Australian Constitution and domestic law.[47] As I previously reported, "[h]uman rights obligations were not mentioned in the judgment and thus largely remain international figments in a nationally oriented juridical system".[48] Lawyers interviewed for the present research confirm that human rights have virtually no importance in the Australian legal context and maintain that they henceforth generally do not rely on human rights arguments at all when going to court on behalf of asylum seekers and refugees confined on Nauru – they rely on administrative and/or tort law instead. As Frances,[49] an Australian lawyer who has represented offshored asylum seekers and refugees, maintains in relation to human rights,

> "I try and fight for them. Tooth and nail. You know, my daily life is fighting for these rights, but these are rights that don't really exist. […] I encourage people to speak out. I use the law. What little there is, I use. […] [But] I am a cynic. A lot of young people come and expect us – you know, they go to university, they learn about international conventions and human rights obligations. Don't come to me, because I don't use them ever."

On the other hand, human rights also have a precarious foothold in Nauru, although slightly less so given that the Nauruan Constitution *does* contain a bill of rights.[50] At times, the Nauruan judiciary has relied upon human rights arguments, including in relation to questions pertaining to confinement in RPC Nauru.[51] Nevertheless, Nauru has no domestic human rights institution that monitors Nauru's human rights obligations. In addition, interviewed Australian lawyers indicate that whilst Nauru has domestic human rights in the books,

---

45 See Van Berlo, 2017d, p. 65.
46 See also footnotes 180-188 of chapter 1 and accompanying text.
47 Van Berlo, 2017d, p. 65.
48 Van Berlo, 2017d, p. 65.
49 All names in this chapter have been pseudonymised for anonymity purposes. Gender-neutral pseudonyms have been chosen to conceal the gender of respondents.
50 See in Part II of the Nauruan Constitution on 'the protection of fundamental rights and freedoms'. On legal contestation in the context of RPC Manus in PNG, see Tan, 2018.
51 See notably Supreme Court of Nauru, *AG & Others v. Secretary of Justice* [2013] NRSC 10. This case concerned the freedom of movement of asylum seekers in RPC Nauru. Justice Von Doussa of the Nauruan Supreme Court held that the detention of applicants was lawful given that they were detained for the purpose of effecting their removal from Nauru, yet he also implied that excessive delay could make said detention unlawful, that is, if detention is no longer reasonably applied for the effectuation of removal, it might become arbitrary and therewith unlawful.

the government manipulates the judiciary to such an extent that human rights cannot effectively be relied upon. This refers back to the lack of rule of law on Nauru as discussed in the introductory chapter of this book, which hampers effective application of human rights in practice.

9.2.3 The troubling set-up and particularities of RPC Nauru

The third and final prominent factor hampering the use of human rights law through deliberative mechanisms relates to the internal structures and inherent features of RPC Nauru. In particular, this relates to the processes of commodification and of crimmigration conjointly, more specifically to the 'walls of noise' (or 'loud panicking') and 'walls of governance' (or 'quiet manoeuvring') as conceptually developed by Welch and as addressed at length in chapter 3. Due to the nodal set-up of the RPC's governance structures as well as the facilities' crimmigration features, RPC Nauru is characterised by a significant lack of transparency. Whilst commodification has diffused responsibility and has weakened ownership over actions, crimmigration has enabled the government to both make loud claims about asylum seekers as a group of 'others' and to simultaneously deal with them behind walls of governance consisting of complex webs of interaction between domestic, foreign, public, and private entities, as has been explained in chapter 3.

These developments are generally problematic for vernacularisation through the use of deliberative instruments in deliberative processes. First, it is difficult to look both *into* and *out of* the RPC, which hampers legal professionals and monitoring bodies in their work.[52] It is, for instance, difficult for lawyers to represent those confined offshore in cases based on potential human rights breaches. As chapter 2 has outlined, asylum seekers in RPC Nauru receive assistance of Claims Assistance Providers ('CAPs') in order to prepare their refugee claims, but such assistance is limited in the sense that it does not extend beyond the refugee determination process. As the Law Council of Australia reports, it for example does not include "legal advice for people experiencing domestic violence in immigration facilities or for those charged with criminal offences" – two situations in which human rights appear to be at stake.[53] Furthermore, lawyers representing asylum seekers and refugees before the Supreme Court of Nauru point out that they were denied access to their clients in the RPC.[54] Other observers are also unable to visit RPC Nauru because they are not granted a Nauruan visa and/or because they are denied

52 Van Berlo, 2017d, p. 66.

53 Law Council of Australia, *Q&A On Access to Legal Advice on Nauru,* available at http://lca.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/QA_on_Legal_advice_for_Asylum_Seekers_on_Nauru.pdf (last accessed 9 January 2019).

54 Gleeson, 2016b, p. 86.

entrance to the RPC.[55] This includes UN observers, Amnesty International and other human rights organisations, researchers, and media representatives.[56] Many of the bilateral and contractual arrangements between the various stakeholders involved moreover are not in the public domain and therewith remain largely secret, whilst there is simultaneously little opportunity to scrutinise the behaviour of corporate actors in the facilities.[57] As such, given the nodal governance structures and the geographical remoteness of the facilities, there is a significant lack of transparency. This is aggravated by the fact that the media scene on Nauru is limited and press freedom is curtailed. Consequently, little information comes out of the facilities (and off the island), and when it does, for example through whistle-blowers, it is often haphazard. This hampers the work of legal professionals as it becomes difficult to distinguish both specific human rights abuses and the actors responsible for them.[58] I previously accordingly concluded that "it is as such difficult for the inside world to speak out and for the outside world to either witness or hear about concrete human rights abuses and to subsequently step in to hold actors accountable, no matter how clear that actor's responsibility is on the legal plane".[59]

Thus, even where human rights responsibilities can be adequately allocated in the books, in action human rights protection becomes increasingly less tangible because of the relative lack of transparency and the progressive silencing of human rights claims. Secondly, such claims are not only made invisible (behind walls of governance), but are also simultaneously outvoiced (by loud panicking). Crimmigration in the context of RPC Nauru thus undermines human rights accountability in action in multiple ways. It discursively distinguishes those confined as 'non-belongers' from the 'belonging' citizenry, therewith eroding the fundamental premise of human rights that they pertain to everyone as equals. It allows for those 'non-belonging others' to be detained out-of-sight, therewith silencing potential human rights claims and making it difficult to ascertain what happens within the facilities. It creates an ostensibly false distinction between protecting the rights of confined 'crimmigrant others' and protecting the rights of the 'belonging (global) citizenry', couched in language that underscores the importance of deterrence.[60] In turn, it

55 The fact that it is difficult to visit RPC Nauru is in part due to the policies and conditions developed by the Australian and Nauruan governments: as Section 4.4. of the Administrative Arrangements provides, "[t]he Governments of Australia and Nauru will agree to a media and visitor access policy and conditions of entry".

56 Van Berlo, 2017d, p. 66. For journalists, the non-refundable Nauruan visa application fee was raised with 4000% in January 2014 from AUD$200 to AUD$8000.

57 Van Berlo, 2017d, p. 66.

58 This relates to the 'problem of many hands': Thompson, 1980.

59 Van Berlo, 2017d, pp. 66–67.

60 See, on the shift from 'human' rights to '(global) citizenship' rights, Gamal & Swanson, 2018, p. 381.

legitimises, at least in popular thought and political rhetoric, that the former is traded off against the latter – in this sense, it legitimises the operation behind walls of governance that interferes with the legal safeguards of those confined, such as their access to legal advice. Crimmigration and commodification as two juxtaposed 'walls of noise' and 'walls of governance' are therefore troubling not only in their own right, but also because combined they to a significant extent have the potential to negate deliberative vernacularisation by legal professionals and monitoring bodies. They largely hide potential human rights claims by diffusing responsibility, obstructing transparency, and outvoicing the protection needs of those inside.

9.3 VERNACULARISATION OPPORTUNITIES OF WELFARE WORKERS

A second group that *a priori* may be considered key in the effectuation of human rights protection are welfare workers[61] that work within RPC Nauru.[62] 'Welfare workers' essentially is an umbrella category for multiple roles, including case managers, general support workers, recreational officers, cultural advisors, teachers, and teaching assistants.[63] Vernacularisation opportunities for these workers seem to be located primarily in the moral dimension: as the 'boots on the ground' they can *prima facie* be considered important street-level bureaucrats with potential discretionary decision-making room through which human rights consciousnesses can be vernacularised, possibly – as will be explored below – through the instrumental use of human rights.

Other workers – such as garrison workers – are also likely to enjoy discretionary decision-making space. The focus here, however, is on welfare workers for two particular reasons. First, ideologically, welfare work is geared towards humanitarian goals. *If* human rights protection materialises on the basis of discretionary decision-making, the accounts and experiences of welfare workers thus *a priori* can be expected to be appropriate and accurate indicators in this regard. Second, pragmatically, as chapter 1 has explained it has been difficult to recruit respondents for a variety of reasons, which turned out to be even more difficult in relation to individuals who worked for stakeholders other than those providing welfare services. It has, indeed, been particularly difficult to conduct interviews with individuals working as, for example, security guards, IHMS medical personnel, or representatives of the Australian government in either of both offshore processing facilities. The few interviews con-

61 To avoid confusion, the term 'welfare workers' is preferred here over 'welfare professionals'. Indeed, various welfare workers who have worked on Nauru were not welfare professionals in a narrow sense, that is, they had prior to their appointment no specific welfare training, qualifications, or experience.

62 According to some, such workers even *have* to work actively to end abuse "[i]n order to avoid accusations of collaboration": Maylea & Hirsch, 2018, p. 160.

63 Where relevant, this section will address these different roles specifically.

ducted with such individuals provides a too small basis for substantive conclusions and are thus only used to gain a further grasp of the contextual arrangements.

To examine these vernacularisation opportunities, this section deals, first, with norm internalisation and socialisation processes amongst welfare workers – indeed, the formation of human rights consciousness amongst welfare workers is of particular interest as it is much less streamlined than, for example, that of lawyers and monitoring bodies who rely primarily on deliberative consciousnesses. Second, this section will turn to welfare workers' discretionary decision-making experiences to analyse the extent to which they are able to vernacularise their human rights consciousnesses. In doing so, particular attention will be provided to their instrumental use of human rights. As explained in the previous chapter, examining discretionary decision-making requires one to look at both the 'social surround', the 'decision field', and the 'decision frame'. The analysis below will do so integrally, and will in doing so rely in particular on the accounts of the broader social and political context and of the organisational frameworks that have been set out previously, particularly in the first three chapters of this book.

9.3.1 Human rights consciousness: internalisation and socialisation

Many of the welfare workers who work or have worked in RPC Nauru recognise the importance of human rights as basic standards of dignity. Many of them recognise such importance, ironically, by pointing out that the way in which RPC Nauru operates amounts, in their view, to a flagrant breach of human rights. As they point out, the facilities are, at least in the way in which they have been set up, incompatible with any substantive notion of human rights protection. Drew, a teacher, describes for instance that the way in which the facilities have been set up amounts to "torture by a thousand paper cuts". Asked about the role of human rights, welfare worker Alex maintains that

> "I feel like there were no human rights there. Apart from the fact that they're alive, and they have food and water, outside of that, there were not a lot of rights being protected. I feel like human rights protection was the last thing on the government's mind when they implemented that place. Like the standards are so basic. They're like an afterthought, and I honestly felt the entire time that I was there that it was an absolutely abhorrent human rights abuse."

Various welfare workers thus argue that the social surround within which the facilities are located does not constitute a context within which human rights can successfully be protected. One of the main underlying factors is, according to many, that RPC Nauru is set up to benefit the government's deterrence policy: the poor conditions in the facilities would be a crucial component of their institutional design in order to produce a deterrent effect

vis-à-vis other potential IMAs. This social surround conditionalizes any potential exercise of discretionary decision-making: the design of the facilities can, in many ways, not be characterised as one in which human rights are core values. This *a priori* seems to turn any decision-making based on a human rights consciousness into a challenging and uphill endeavour.

In denoting the human rights incompatibility of RPC Nauru, welfare workers showcase a variety of specific human rights consciousnesses that seem to draw on deliberative, moral, protest, and potentially also discursive elements. Thus, they point to a wide range of – often loosely constructed – 'human rights' that are arguably being breached through the operation of the facilities, including the right not to be arbitrarily detained but also, more generally, rights to privacy, decent healthcare, psychological wellbeing, food, water, hygienic sanitation, and the availability of particular services or resources for specific groups such as children or the elderly. Furthermore, the lack of information, the resulting uncertainty on behalf of asylum seekers, and the absolute lack of feeling 'in control' over one's own life are frequently mentioned in the human rights context as basic needs or entitlements fundamentally lacking within the facilities. The fact that many asylum seekers did not know what would be happening to them and were not given a timeline for their asylum claim processing indeed resulted, as various welfare workers illustrate, in significant uncertainty and a total lack of control. The right to life in turn also clearly surfaces as an overarching right that is at stake given the wide-spread presence of suicidal ideation, which results from the high level of uncertainty and the lack of control. Welfare worker Rory for example explains that "the only control they have left is their body. That is what they have control over and increasingly they will harm themselves with razor blades or extreme tannings."

In explaining the dire human rights situation in RPC Nauru, welfare workers frequently refer – often implicitly – to the process of crimmigration by pointing out how the facilities operate in a prison-like fashion. Various welfare workers do not only mention the prison-like conditions to point out how the operation of the facilities results – in their eyes – in direct human rights violations such as those concerning the ostensibly undue deprivation of liberty, but also to argue how the RPC fosters a 'criminal' image of those confined which in turn has a further indirect negative impact on asylum seekers' human rights. Thus, as various welfare workers argue, those confined were not only deprived of the right to liberty as a result of their confinement in RPC Nauru, but also of a wide variety of rights – such as those mentioned above – as a result of the fact that they were seen as a lesser type of human. Their 'crimmigrant' imago was therefore used to justify, at least in the eyes of many respondents, that those confined were accorded less human rights protection. Again, the social surround – from which this process of crimmigration originates – seems to *a priori* impede the vernacularisation of human rights, as the set-up of the facility intends to – or at least results in – the progressive 'outgrouping' of

those confined into a category of non-belonging. Accordingly, various welfare workers highlight that asylum seekers were generally treated without equality or human dignity by a number of stakeholders. In this sense, in the context of RPC Nauru, crimmigration seems to play out along the lines of 'anchored pluralism': whilst the various stakeholders involved have certain space to manoeuvre, their actions are largely constrained – and steered – by the overarching crimmigration policies in place. In relation to Wilson Security's interactions, welfare worker Quinn for example maintains that

> "Wilson's would treat people with kind of contempt and disregard, refer to them by numbers, be quite short on patience, not understand mental health issues, not respond appropriately to peoples' distress. And then the asylum seekers would escalate, because they felt that their human rights were being abused and they would kind of engage in behaviours that made Wilson's even more contentious. And it became this kind of vicious cycle. So that was one of the major issues, but what that resulted in is a situation whereby people genuinely felt, and from observing I genuinely felt also, that they were being treated almost like animals. So that their human dignity was not respected. They weren't seen as equal human beings to the rest of us. And they were treated absolutely as lesser, and that their needs were non-important."

This in turn relates to a striking feature that almost all welfare workers point out when asked about the level of humanity in the treatment of asylum seekers and refugees: most stakeholders involved referred to those confined by their 'boat ID number' rather than by their name. Upon interception by the Australian coast guard, those arriving irregularly by boat are indeed given an ID number consisting of a three-letter code denoting the boat on which they arrived and a unique three-numbered code for each individual, for example LIC078 or RAM113.[64] Boat ID numbers were consistently used to identify those confined in the facility, both adults and children, which ultimately had a dehumanising effect as Cameron, a medic who visited RPC Nauru in his professional capacity, amongst others highlights:

> "we had children actually introducing themselves to us by their boat number. And so, there's been lots of reports now that the children can't even remember their names anymore. They actually refer to themselves by a number. There's been children born there and that's all they know now. […] If you've always been called 1234 since birth, that's what you will know yourself as. Every time they report to Save the Children, every time they report to IHMS, every time the report to the guards, every time they do anything they have to quote that number. And so, we had children come up, put their hand out, offer to shake our hand, and quote their number. It's astounding, isn't it? Children."

64 These boat ID numbers have been made up as examples and do not relate to anyone interviewed for, or otherwise involved in, this research.

Various medical professionals likened this use of boat ID numbers to the use of numbers in concentration camps and other highly oppressive environments. The dehumanising effect of boat ID numbers was also widely recognised by welfare workers. Still, some welfare workers admit that they at times would also call asylum seekers by their boat ID numbers in order to get a security guard to respond to a certain request, which ultimately was not in line with their personal values yet constituted a way to 'get things done' within the multi-actor governance framework. Boat ID numbers were henceforth part of the interinstitutional 'grammar' within the facility, and welfare workers felt compelled to at times resort to their use even though they ultimately condemned the dehumanising effects of such lingua franca.

Notwithstanding the specifics of the social surround, the notion of human rights seems to be an essential part of welfare workers' own consciousness and can in this sense be denoted as constituting an internalised framework of norms. Such norm internalisation, furthermore, seems to derive from a process of norm socialisation. That is to say, welfare workers point out that human rights standards are not only part of their personal culture but also of their professional culture, and that as a professional welfare worker one is thus not only 'socialised' into internalising human rights norms but also socialises others into internalising these norms. In this sense, many welfare workers recognise that human rights norms are part of their professional ethics. As Jamie, a child protection worker, summarises, "our driving goal and our driving purpose was to minimise the violation of these people's rights". Still, a number of welfare workers found it hard to clearly discern internalised human rights consciousnesses given that they largely are 'taken-for-granted' notions underlying their work.[65] Alex illustrates this point when questioned about the role of welfare workers:

> "[human rights] was definitely a driver, [but] I feel like it doesn't just come from that human rights perspective. […] I feel like that is a really big thing for anyone who is a social worker; your job is to support these people and provide them the best care and support that you can. And I feel like that trickles down from human rights a bit, but that's also just about: this is my role. This is my job, to support these people. So to support their dignity […] was a big part of I think any welfare worker's role […]. Everyone is entitled to it, so you have to do the best that you can to show that person that you respect them and that they have dignity and that you're not going to just disrespect them, or – none of that all."

During interviews, concern for human dignity and human rights thus frequently surfaced as core values of welfare workers and as central aspects of their professional ethics. In making decisions, welfare workers hence generally attempted to take human rights consciousnesses into account as part of their

65 See also Finnemore & Sikkink, 1998, p. 904.

decision frame. Three observations should, however, be made in this regard. First, some welfare workers clearly disconnect the notion of 'human rights' from their own practical work and professional ethics. Two different trends can, by and large, be discerned in this regard. On the one hand, some welfare workers regard their own role and ethics as geared towards the micro-level and human rights protection as geared towards the macro-level. In other words, some welfare workers regard their individual work as being disconnected from any human rights struggle: as welfare worker Mackenzie expresses, welfare workers are in Nauru to help people to keep their heads above the water, not to "lead a campaign against offshore processing centres". For these workers, human rights are to be understood not as guiding principles for individual action, but rather as political advocacy tools to address inequalities and injustices at the macro level, most prominently on the level of policy-making. Consequently, they seem to have internalised a protest consciousness of human rights, frequently mixed with elements of a deliberative consciousness given that some of these workers refer to legal human rights instruments as representing the hegemonic articulation of human rights. In any event, they do not clearly distinguish 'human rights' as a key component of their professional work and ethics. On the other hand, other welfare workers also discern human rights from their own work and professional ethics, yet they stress that the interplay between the framework of human rights and their professional ethics causes an ethical and moral dilemma in RPC Nauru which in turn often resulted in welfare workers traversing professional boundaries in order to safeguard human dignity and wellbeing. Child protection worker Addison points out in this regard that

> "initially, I felt like I was colluding with the system, and I had a real ethical and moral dilemma working there. And I many times wanted to leave, but it became increasingly difficult when you developed relationships with people that crossed the boundaries. Like, the traditional social worker-client relationship was really hard to preserve there. Because you were just so ethically compromised that you couldn't really stick to your code of ethics for your profession […]. So I developed quite close relationships with people and them begging you not to leave and to come back, and [often] people would give me things to give to their families in Australia, which I did, and you know, that's not the role of a case manager or social worker, but again it was really hard to not just be a compassionate empathetic human. […] They were so dehumanized, you would try to counteract that."

Likewise, welfare worker Reed recounts that the importance of professional codes began to decline when (s)he witnessed the situation at RPC Nauru. (S)he explicitly links this to the perceived violation of internationally enshrined human rights:

> "I was willing to compromise my own standards of professional boundaries, because the whole situation was so wrong […]. There's so many human rights

> violations here that […] – the same standards you have had before in a client-case worker relationship, you feel like they don't apply anymore. Because now it's just about survival. It's just about trying to support the people to the best of your ability, because it's a human created crisis. […] It's not like, if you worked in a refugee camp in Jordan or you worked in a refugee camp in Kenia or whatever, and the situation is shit, but the situation is shit because they don't have the capacity to manage it properly, then that's something. You can kind of deal with that, and you will find the strategies to deal with that kind of situation. But considering that this is a man-made crisis and it's completely unnecessary… There is no need for these policies to be implemented whatsoever, on no level. So for me, this is much harder to deal with, because it's completely unnecessary. And then you start to change the way you think about these rules and all this, because you know that basically everyone else, they're breaking the rules. They're breaking all international conventions they've ever signed just by doing this. So they are the first to break the rules. So then why should I care about the rules that they gave me?"

Interestingly, these welfare workers henceforth *also* seem to have strong human rights consciousnesses based on the protest dimension, as they emphasise the need for change based on the social struggle of those confined. Likewise, their human rights consciousnesses showcase deliberative elements – as international human rights law is frequently referred to as a source of human rights – and moral elements – as such consciousnesses heightened their feeling of being ethically compromised. Different from the former group of welfare workers, however, this group of welfare workers does not consider that their own role and ethics are geared towards the micro-level whilst human rights protection would be an issue of the macro-level. To the contrary, for them, their human rights consciousness would be something that would even cause them to cross professional boundaries in the exceptional circumstances of RPC Nauru.

In this sense, welfare workers maintained different ideas about the extent to which human rights consciousnesses informed their individual roles. For most welfare workers, human rights were an inherent internalised part of their professional ethics. For others, human rights could be distinguished from it, although they either recognised (a) that their professional ethics serve the same purposes albeit on the micro level, or (b) that the extreme conditions in RPC Nauru gave reason to prefer the fostering of human rights protection over strict compliance with professional ethical norms. In this sense, the socialisation of human rights norms has, overall, not been a homogeneous development in RPC Nauru. Whilst all respondents recognised and internalised the importance of human rights, the way in which they adapted their behaviour and attitude differed from person to person, depending often on their particular consciousnesses, although the large majority of welfare workers considered human rights as either being part of their professional ethics or as being supreme to their professional ethics in light of the contextual arrangements of RPC Nauru.

Second, various welfare workers acknowledge that the application of work ethics could differ from colleague to colleague and that not all welfare workers showcased humanitarian motives in their daily operations.[66] As they describe, the presence of a number of individuals amongst the workforce of the Salvation Army and Save the Children at times obstructed the effectiveness of social work and overall made things worse from a human rights perspective. This includes career-minded employees of welfare providers, but also unexperienced, hastily-hired members of staff that seemingly regarded their employment as a holiday camp. As such, some welfare workers report that there was a big difference between experienced and non-experienced staff, with the latter often being naively counterproductive and unduly overstepping the ethical mark. This relates to the previous point that individual workers had different ideas about professional boundaries, as welfare worker Dakota illustrates:

> "some of these young boys that were working there, the boys in their twenties, they were rough with the way they were interacting with people, jumping on people, slapping them on the back, *'hey, how you're going?'*, and he's, slap-slap-slap. And I'm thinking, oh my God, you're not even looking at the cues of this man's face as you're slapping him, you know, this is not okay! The boundaries were really poor. People didn't have professional boundaries, and there was friendships and all of those things, it wasn't that professional boundary, and certainly, you know, that impacted on people trying to work professionally. Because then you were the bad guy and you wouldn't sneak in things that I'm not supposed to have, and there was a lot of that going on. There was a lot of people – they didn't have professional boundaries. They didn't have work ethics. They just kind of did whatever they wanted."

In this regard it is noteworthy that some highly-engaged welfare workers considered it necessary to overstep professional boundaries in order to foster human rights protection, whereas other motivated welfare workers conversely label such actions as counterproductive. Such contrasting opinions revolve around the overstepping of professional boundaries in a broad sense, but many respondents link it explicitly to the rise of friendships between welfare workers and those confined as well as to the unapproved smuggling of goods into the facilities – a topic that will be further explored below. Welfare workers on both sides of the argument, moreover, felt constrained in their undertakings due to the wide variety of opinions on the matter: those considering it necessary to overstep professional boundaries felt that they had to operate covertly and that they could trust nobody, whereas those considering it unethical to overstep such boundaries considered that the transgressing endeavours of others impacted negatively on their own reputation as they became seen as

66 On this theme, see also Maylea & Hirsch, 2018.

the 'bad guys' by those confined. In this sense, conflicting opinions on this particular issue caused significant suspicion amongst welfare workers, as it was difficult to know who to trust.

Third, welfare workers of the Salvation Army and Save the Children[67] judge very differently about the involvement of their employer. On the one hand, some genuinely value the involvement of these NGOs given that they operate from a human rights-based perspective and thus attempt to make the material situation for those confined better. In this sense, they reason from the perspective of the *mentalities* of those welfare providers as important actors in the nodal governance field. Mackenzie thus points out that

> "it's better to have some people who are committed to human rights values working there, even with those restricted conditions and environment where we still respect the person's character, regardless of nationality or anything. […] And in the long term we witnessed that people, refugees, they really valued those workers who were committed to human rights values."

Others, on the other hand, are more critical: as they argue, NGOs as stakeholders play a role in justifying the Australian government's use of offshore processing. Such NGOs benefit significantly from the arrangements and would thus be forced to keep silent about the worst human rights infringements. In addition, they would have hardly any room to manoeuvre in order to improve the *de facto* human rights situation anyway. In this sense, whilst NGOs' operations may be based on human rights protection mentalities, they are ultimately argued to have insufficient technologies to actually steer the course of events in the nodal governance field. In particular the involvement of the Salvation Army is frequently characterised as being too chaotic, too unprofessional, and too unorganised to have a lasting impact on human rights – or, for that matter, for human rights to become a structural part of the Salvation Army's operations in the first place. Thus, as Alex complains,

> "if you think [about] the fact that they couldn't organise people's flights properly, that they were hiring people based on an application form, that they were not interviewing them… I mean, you start talking about, did they have a human rights framework in mind, you just kind of go: well, of course they didn't, they weren't even thinking about these basic things, let alone, *'well maybe these people have rights and we should be doing something about that'*, you know."

This is corroborated by various welfare workers working for the Salvation Army. Noor, a cultural advisor, explains that the Salvation Army's management on island was generally oblivious to a variety of cultural issues that those confined dealt with. Furthermore, the Salvation Army generally did not

67 Or those organisations that hired them from their respective employers, such as MDA.

develop job descriptions for the various welfare worker roles. Save the Children is, on the other hand, frequently endorsed by former and current employees, praising it for its encouraging, understanding, and empowering qualities, its qualitative and knowledgeable approach, and its qualified people. Still, some welfare workers maintain that although Save the Children operated more professionally than other stakeholders, it was ostensibly still significantly unprepared for the situation at hand.

9.3.2 Discretionary decision-making

On the basis of socialised and internalised human rights consciousnesses, many welfare workers tried to improve the human rights situation of those confined through individual discretionary decision-making practices. The sentiment expressed by case manager Chaitanya seems to be widespread in this regard: "I felt sorry for these guys who were in a really, really hard situation. And I thought, *if I was trapped in a place like that I would want someone to do that for me*." Opinions differ, however, in relation to the question whether welfare workers felt that they could, indeed, effectively vernacularise their human rights consciousnesses and make a substantial impact on human rights protection. Some workers emphasise that discretionary decision-making was very constrained, whereas other focus on the scope for discretionary decision-making that was – albeit significantly circumscribed – nevertheless present.

9.3.2.1 Constrained discretionary decision-making

Some welfare workers emphasise that room to manoeuvre on human rights protection – i.e. to vernacularise their human rights consciousness through their individual work and decision making-processes – was severely limited, notwithstanding the fact that human rights were core values of their decision frame. As they point out, a number of reasons underly this significant limitation, including, importantly, reasons that relate to the unfavourable social surround and decision field.

First, the nature of the facilities – constituting, according to some, a human rights violation *in se* as pointed out above – strongly impeded or even completely obstructed proper welfare work based on human rights values. This relates to the observation above that the social surround within which decision-making takes place is geared towards deterrence rather than human rights purposes and as such does not provide a favourable context within which decisions can be couched by human rights consciousnesses or humanitarian notions. As Quinn points out,

> "it is like trying to put band aids on a person who is in a house that's on fire, and you can't take them out of the house. That's basically what it is. You just keep putting a band-aid on. Hope the skin doesn't fall off in the interim."

In fact, the refence to band aids recurs frequently in respondents' testimonies, with many reporting that they felt that their work was about putting band-aids on open wounds rather than healing such wounds. As they in turn point out, their work in RPC Nauru in essence revolved around keeping people *alive* instead of ensuring optimal living conditions. Alex for example states that welfare workers were

> "just trying to get through every day, like, hopefully no one kills himself today. That the ideal. That there's no serious incidents, that we were going home tonight fairly okay, that there's no riots – we're just trying to get through every day."

The idea that they were there to keep people alive did not only feature amongst welfare workers working with adult clients, but also amongst those working with children. Thus, as Jamie highlights, "we had five year-olds wanting to commit suicide. And when you asked them, do they know what that is, they could tell you." These worrying mental states amongst both the adult and the juvenile populations are confirmed not only in numerous reports but also by mental health professionals during interviews: doctors and nurses who visited the facilities as well as medical professionals who worked for IHMS confirm the strong deterioration of the mental health of those confined. In addition, sometimes, welfare workers' jobs would quite literally be to keep those confined alive: Noor explains, for example, how (s)he gained trust from asylum seekers and refugees "[a]fter cutting down several people who tried to hang themselves, after days and days of talking to stop sowing their lips, and cutting the thread out of their lips". According to these workers, there was henceforth hardly any room for substantive manoeuvring on issues of human rights. Welfare worker Jules points out that "there is no way to really mitigate the impact of people actually systematically harming them, forcing you to live in a place where human rights are systematically violated." In turn, seeing how the facilities impacted upon the well-being of those confined had a demotivating effect on welfare workers, as Addison details:

> "despite your efforts, and the efforts of my colleagues, and we're all very skilled professionals, you couldn't do anything. You saw clients just deteriorating before your eyes. You just watched them kind of fade away into nothing. You watched them become dependent on drugs that the ill-equipped mental health service providers gave them, and you watched them lose weight and just slide into depression, and then you watched them self-harm".

Second, many welfare workers denote that the Salvation Army and Save the Children were, as Alex puts it, "absolutely at the bottom of [the] hierarchy". In this sense, welfare workers felt that they could only provide welfare within a very constrained and limited framework of rules set by DIBP and other stakeholders. Bobbie, a teacher, tells that "it was just Immigration ticking a box, and Save the Children flapping around like fish out of water". In relation

to the Salvation Army, this is particularly striking given that the Salvation Army initially was supposed to be the 'lead agency' that would oversee the day-to-day operations of the facility. However, as a former DIAC Director interviewed for this research points out, in practice the role of the Salvation Army devaluated quickly:

> "In practice, what we found was that the Salvation Army's key lead personnel took more responsibility for overseeing the welfare component of immigration detainees than the responsibility for oversight of mechanics of the whole centre. So they didn't do a good job of working with other service providers and understanding what those service providers were there to do, and supporting them in the execution of those duties. […] They were deficient, they were out-performing, to the point of being completely incapable of doing the job and losing the confidence of all of the other service providers and the government."

The decision field was, as such, very constrained: welfare workers had to operate within rules set by the Australian government and other stakeholders that often were based on rationales of deterrence rather than humanitarian concerns. This impeded welfare workers to operate and make decisions based on human rights consciousnesses. The relationships with other stakeholders – in particular with Wilson Security, DIBP, and IHMS – are accordingly described as very strained and as basically being based on an us-versus-them mentality. Indeed, many welfare workers typify the various stakeholders involved as "separate tribes" in the sense that they operated differently, maintained different mentalities, pursued different goals, and as a result guarded their own turf and frequently clashed in professional interactions. These dynamics are also confirmed at the management level: a former manager of one of the service providers in RPC Nauru indicates that "it felt very fear-based around a lot of things, and no one wanted to get their organization in trouble. And it felt like people would finger point to take the highlight off of themselves […] or their organization". Even more so, various respondents point out that the ostensibly inferior hierarchical position of welfare workers often resulted in their requests being ignored. Addison recounts:

> "maybe for the first two rotations, I thought there was a role for case managers there […]. I thought that, if you advocated hard enough, you could make things happen. […] The majority of the time it felt like you were just banging your head against a brick wall, and that was just so incredibly frustrating. You couldn't get anywhere, you couldn't appeal to anyone. Even if you had hard-core facts about a certain situation or about really objective evidence of the deterioration in someone's mental health, and what decline would continue to look like, you just couldn't get people quality services, you couldn't really make change. It just felt like your efforts would just evaporate. So you would write case notes and you would write emails to your manager, who would send them up the line and you would talk to Wilson staff and Transfield staff and you'd write complaints, or you'd support asylum seekers to write complaints and to write requests. And you'd just be met

> with radio silence. No response to emails, no response to complaints. So that was very frustrating."

Third, from the perspective of many welfare workers, the welfare providers by which they were employed generally failed to emphasise the importance of human rights protection. According to some, whilst the Salvation Army and Save the Children in individual cases could make a difference, on the whole they did more harm than good as they seemed to legitimise the governance arrangements. Some workers furthermore point out that these organisations were, at least on island, quite militaristically run, which troubled working effectively on the basis of a human rights consciousness. More generally, many welfare workers experienced limited organisational support for explicit human rights work. As Adison puts it,

> "as the welfare organisation, I think we failed in that we didn't try and mainstream the concept of human rights and protection and safety and dignity. We didn't offer Wilson's training on protection or basics […] and we didn't offer those trainings to medical staff. And we didn't run the basics of child protection, even just like, what is a child, what's the Convention on the Rights of the Child or what's the Universal Declaration of Human Rights and what do people actually have a right to access as human beings, we never even did induction, even basic works on that. I think that was something we should have done."

In addition, various welfare workers point out that, from their point of view, their employers were very reluctant to deal with any human rights complaint because they did not want to risk losing their contracts with the government. Bobbie recalls in this regard that

> "if you were to go through Save the Children, it was very, very, very stinted, to the point where you could possibly entertain the idea that it was being neglected, sort of not to rock the boat and to stay in the pocket of Immigration perhaps. Because any case that you wanted to pick up, there were numerous human rights violations, […] but Save the Children didn't advocate or didn't choose to take on the cases that they easily could have, possibly because in doing so they would have violated their position to gain the contract again."

Fourth, welfare workers experienced a significant lack of resources to improve the lives of those confined through discretionary decision-making. Almost all interviewed welfare workers talked about the limited resources, services, and amenities available on Nauru to provide proper welfare. For example, there were long waiting lists for healthcare services including torture and trauma counselling, it proved very difficult to attain basic goods such as clothing or sanitary items for those confined, and there were hardly ever enough resources to conduct proper welfare work. In this regard, Rory characterises RPC Nauru as an "overall very, very challenging work space" for welfare workers. Charlie, a recreational officer with Save the Children, illustrates that

> "we went eleven months without any restocking of our supplies and our resources. So for a good six months, we pretty much ran out of resources and we were just doing the same, same activities again and again, which was extremely boring for the young people. Large numbers disengaging – and then, combine that with the environment that we were in, we were losing positive engagement, as a worker you lose out on interaction time, you lose the chance to pick up on queues of suicidal idolisation, those sorts of things. So there was large repercussions of that."

Likewise, respondents point out that the bureaucracies that were in place in the nodal governance framework obstructed the swift processing of requests for supplies and resources. Requests had to be escalated and required approval of various hierarchical supervisors of the welfare provider as well as of other stakeholders, primarily Transfield, which was responsible for all logistics. Welfare workers frequently felt they were 'hitting a wall' when making such requests since they encountered drawn-out bureaucratic processes and excessively long waiting times. Even acquiring simple supplies proved to be cumbersome: various respondents point out that it was very difficult to, for example, get proper shoes for those confined as multiple forms had to be filled in, forms were frequently lost by various stakeholders, the shipping of shoes and other pieces of clothing took weeks, and they on many occasions were shipped in the wrong size.

Fifth, many welfare workers point out that formal internal reporting mechanisms were deficient in the sense that they did generally not allow for transparent and impartial oversight. Thus, all different types of welfare workers – including case managers, general support workers, teachers, and teaching assistants – wrote 'incident reports' whenever they witnessed any type of alarming situation that they either had to or wanted to escalate – the Nauru Files as addressed in chapter 1 being a comprehensive example of various of such incident reports written between 2013 and 2015. These incident reports would, in turn, be classified in accordance with their perceived risk level, i.e. as either 'minor', 'major', or 'critical' incidents. However, almost all welfare workers point out that this system of reporting was flawed given that it was Wilson Security who handled incident reports, who classified them in accordance with their own risk assessments, who followed-up on these reports, and who liaised about them with the Australian and Nauruan governments where necessary. Welfare workers frequently felt that they were not taken seriously, often did not hear back on incidents they reported, and considered almost unanimously that Wilson Security was far from impartial given that many complaints precisely concerned behaviour of Wilson's staff. On many occasions, complaints concerning guards were, in their eyes, met with little repercussions. As Jamie sarcastically remarks, the filing cabinet in which incident reports were logged by Wilson Security was essentially "a shredder". Furthermore, welfare workers point out that all reporting remained strictly internal: there was no formal way to make complaints to external stakeholders. Kyle, who was involved in managing incident reporting from Save the Children staff,

sums up the problems (s)he encountered as a result of the fact that Wilson Security handled all incident reporting related to situations inside the RPC:

> "we had quite a lot of problems with them consistently downgrading Save the Children incident reports. […] we would put something as critical and they would consistently downgrade it before sending it to DIBP. That was a constant battle. […] [Thus], everyone is reporting to Wilson's essentially, and then Wilson's are changing it, manipulating it, sometimes throwing them out, downgrading them often, and then sending them up the chain. And this was a particular concern for all of us, […] because sometimes these incidents related to Wilson's staff members, and we had a lot of challenges in trying to provide information about misbehaviour and incidents that involved guards through this mechanism that was essentially managed by the guards. […] I can recall at least five or six occasions where we were trying to put some very important and sensitive information about the behaviour of guards through this system, just battling them really because there was very little oversight of what they were doing."[68]

Still, many welfare workers stress the importance of continuously writing and filing incident reports, both to document evidence and to make sure that the responsible governments in hindsight could not argue that they did not know, or could have known, about certain incidents in the facilities.

Finally, some welfare workers consider that their work may ultimately have made things *worse* from a human rights perspective, in the sense that social work at times seemed to lead to further disempowerment of those confined. Such disempowerment arguably flowed from welfare work in various ways. Welfare worker Brooklyn for example explains that whilst those confined generally appreciated activities being organised outside the facility, various of these individuals started to get headaches and panic attacks upon their return to the centre at the end of the day, which is ultimately why they stopped attending such day trips in the first place. Kris, a recreational officer, mentions that (s)he at times felt like a prison guard rather than a welfare worker, for instance when (s)he had to check the dormitories and belongings of asylum seekers for prohibited goods, which in turn produced conflicted feelings as (s)he felt (s)he was misusing a position as a trusted welfare worker to exercise hierarchical superiority over those confined. Charlie provides another striking example of how welfare workers may have had a negative impact by discussing how parents were gradually disempowered due to the way in which social work was set up within the facility:

---

68 This only applies to incident reports relating to incidents happening *inside* the RPC. Incidents reports related to occurrences outside the RPC, i.e. in relation to resettled refugees who fell under Save the Children's refugee assistance programme, were handled by Save the Children themselves.

> "The amount of contact a parent could have with their child, and have a role in the parenting of that child growing up, was extremely, extremely limited with the way the day was regimented and the way resources were controlled. The parent had no power. The parent was disempowered to the nth degree. They couldn't control when they washed their children, they couldn't control when their children ate, they couldn't give or take away toys from their children if they misbehaved, you know, they couldn't provide a birthday cake on their birthday, they couldn't even go visit their children in the school. So they were completely removed. And you'd see families come in that I would describe as functioning family units – give them six months, they're in collapse. […] I was hyper-empowered to have a positive relationship with young people, *their* young people, but they weren't. I had toys, parents didn't. […] The parents lost all sort of sway or say over the child, because they just don't respect them anymore, because they haven't even been part of their life for the last six months. Because they go to school, which is better than the camp, their parents aren't there, they come back, they go to recreation, I've got toys, mum and dad don't, and they see mum and dad for a few hours at night, but, because of the recreation, they often didn't even eat together."

In this sense, welfare work intended to foster human dignity and wellbeing at times resulted in the material loss of human agency in parent-child relationships, which to a large extent was a result of the way in which the facilities were set up and run.

The combination of these factors led various welfare workers to quit their jobs on Nauru. As Alex emphasises, the work at the facilities made one feel very powerless:

> "basically, ultimately why I left, is just because I felt like I couldn't do anything for them practically there. Look, I understand it was helpful to have someone there who wasn't a security guard, but it just becomes redundant to walk in every day and say, *'I have no news for you, how are you sleeping, how are you feeling?'* Like it just becomes so pointless after six months. And after six months you're looking at 75% of that population with diagnosed mental health issues. So what can you do? And so ultimately I ended up leaving, because I just felt like I actually can't do anything here."

As Charlie likewise reflects,

> "I think the impact that I had and other workers had, no matter how good we were, was minimal and limited in that environment. I guess to sum it up, the best outcome we could hope for was to slow the spiral down opposed to stop it, which is a very different environment compared to anywhere else you'd work in the world."

In this sense, many welfare workers consider that they ultimately lacked sufficient discretionary decision-making room to actually improve the lives of those confined on the basis of a guiding human rights consciousness.

9.3.2.2 Scope for discretionary decision-making

Notwithstanding the foregoing, various welfare workers emphasise that there was still room for individual discretionary decision-making based on their human rights consciousnesses. Interestingly, experiences in this regard differ significantly amongst those case workers that were involved during the early stages of the Salvation Army's contract and those that became involved later on. Thus, during the first months of the Salvation Army's involvement, there was significant room for individual workers to choose their own paths in fulfilling their tasks given that supervision was severely limited and guidelines were sparse. In fact, no job description initially existed for various roles including most notably that of 'general support worker', which did not only accommodate but rather forced individuals to work on the basis of varying levels of discretion. The decision field in these early months accordingly provided leeway to implement human rights consciousnesses in individuals' decision frames, although this changed later on. The way in which discretion was exercised on the basis of human rights consciousnesses was very much an issue of socialisation, given that it, as general support worker Finley points out, amounted to "learning by doing, learning by example". When social work later on became more institutionalised, welfare workers overall experienced somewhat less room to make individual decisions based on human rights consciousnesses, as the decision field became more detailed in terms of the applicable rules and regulations. Furthermore, those welfare workers not being general support workers – in particular teachers and case managers – felt more constrained in their decision-making processes as their work was ultimately driven by Key Performance Indicators ('KPIs') that – as part of the decision field – circumscribed their decision frames.

Overall, many respondents indicate that they felt they could make amends on the micro scale but not, as Finley calls it, "in the grand scheme of things". Thus, as Dakota phrases it, "I think that we did do good work, but I don't think we could really be constructive in providing a healing environment, because people were retraumatized every day". Welfare workers could not fundamentally change a number of critical systemic features of the wider social surround, including, most notably, the fact that those confined were held indefinitely and in great uncertainty on Nauru on the basis of deterrence rationales. Still they could, at the individual level, at times alleviate the situation by applying human rights consciousnesses in their decision frames. This started, first and foremost, with showing respect and genuine care to those confined and by acknowledging their human dignity. Chaitanya explains, "I felt I could make a small difference in just being a friendly person for them to talk to if they needed, and just being someone who cared." By extension, welfare workers considered that they had an impact in relation to acute threats to the physical and mental wellbeing of those confined: According to Addison, for example, "there was a thousand times that we all talked people out of self-

harming, and you coached them to deal with their situation in other ways. So you know, that's something."

Many further examples of ways in which welfare workers could contribute to the human rights situation on a micro scale surfaced in discussions with respondents. This includes that they could help asylum seekers and refugees to pass the time a little bit quicker, that they could let them have a rest in airconditioned interview rooms, that they could provide them with cold bottles of water whenever they had scheduled appointments with them, that they could get them basic items such as fans for their dormitory-style marquee tents, that they could push for medical counselling appointments at short notice, that they could go with them to medical appointments, that they could successfully argue for culturally appropriate dietaries, that they could post their letters in Australia, that they could bring them on recreational trips such as to the beach, that they could smuggle in a wide variety of items for those confined such as prayer books and beads, dictionaries, hair cones, hijabs, painkillers, playing cards, notebooks, sim cards, magazines, candy, and toys, that they could provide them with contact details for Australian legal and advocacy organisations, that they could give them some extra time in the computer room, and that they could arrange them a phone call when asylum seekers or refugees desperately had to call their families due to events – such as armed conflicts or natural disasters – happening in their countries of origin. In fact, many respondents refer to this latter example as a key example of how they could exercise discretion, although they simultaneously also stress that, in light of the decision field, significant efforts were required in order to arrange such phone calls, even in pressing situations. As Jules exemplifies with notable discontent,

> "I couldn't stop that rape, I couldn't stop that molestation, I couldn't stop the mould from growing, or the assault from the guard with the cricket bat, but you know what? I got to give them 20 minutes on a phone call, so they can just confirm for that day that their family members hadn't been killed. Just once – it was a one off! It wasn't a weekly call to check in, because, you know, there is a war. No, no, no, no, no. […] I actually had to choose. I had to choose. Because as you can imagine, there were a lot of places at war, and there was a lot of insecure situations, and I had families in Sri Lanka, Iraq, Somalia, Syria obviously. So all of them with the security situations could have used those extra phone calls, but I really had to be selective."

Hence, as a result of the decision field, even the smallest things had to be negotiated, which, as respondents describe, felt like continuously banging your head against a brick wall. This made some respondents operate on the basis of what they call an 'ask-forgiveness-not-permission capacity'. Many welfare workers point out that time and time again, the exercise of discretion basically came down to the resourceful use of persuasion and, occasionally, deception vis-à-vis other stakeholders. Thus, in pursuing change on the micro scale, they

would generally press very hard to gain permission from relevant stakeholders, although they were constantly aware that they had to be selective and that they had to couch their requests in specific language in order to prevent coming across as an activist or advocate. Human rights language was, as various welfare workers point out, not effective in getting other stakeholders to move on individual cases. Likewise, 'activism' and 'advocacy' were ostensibly considered to be 'dirty words' by various stakeholders. Such apathy for advocacy was even present, at times, at the management level of the welfare providers themselves. Jules illustrates this by pointing out that Save the Children's management was very reluctant when a welfare worker proposed to raise money with friends and family in Australia to buy toys and stuffed animals for children in the facility: "any other company would be like: *'wow, you want to donate 3000 dollars? Fabulous, you are employee of the year!'*, but not in Save, it's like: *'shhhhh, don't tell anyone that you care that much'*!"

As such, in attempting to vernacularise their human rights consciousnesses, welfare workers on many occasions had to rely on discretionary decision-making practices as key mechanisms within the moral dimension, instead of on vernacularisation mechanisms deriving from the protest or discourse dimensions. Moreover, in such endeavours, human rights could often not be relied upon as instruments: in the facility, human rights had a negative connotation with a lot of stakeholders and were therefore, as welfare workers point out, inadequate tools to properly pursue any human rights consciousness. To the contrary, the use of moral human rights notions to justify the exercise of discretionary decision-making, or references to human rights language, law, or advocacy more generally, would often merely result in suspicion and distrust vis-à-vis the welfare worker involved and, potentially, in the termination of his or her contract. Welfare workers therefore often did not turn to human rights as instruments, that is, as deliberative principles, natural entitlements, protest tools, or discursive expressions. Rather, as a result of the social surround and decision field, they were very much hiding any reliance on human rights in their work and avoided using them in any capacity in order not to raise suspicion. In fact, many welfare workers consider that they had to work largely 'undercover' in pursuing to implement their human rights consciousnesses on the micro-level through the small margins of discretion that they enjoyed. In this sense, whereas the directional (and, arguably, the constitutive) capacities of the morality dimension guided various welfare workers, the dimension's instrumental value was – similar to the other three dimensions – usually not relied upon.

In addition to persuasion, at times, welfare workers would pressure managers of various stakeholders into implementing change, for example by threatening to expose that various security guards had inappropriate relationships with confined minors if the management of Wilson Security did not pursue disciplinary action. Furthermore, a few welfare workers point out that they occasionally would resort to illegitimate means to pursue change, for

example by stealing local sim cards or by smuggling goods into the facility. They admit that this violated their professional codes of ethics but at the same time consider that, from a human rights perspective, it was required to push the boundaries in this regard and to operate under a cloak of secrecy. This refers back to the observation above that welfare workers had varying ideas about the relationship between their professional ethics and human rights concerns. Alex contemplates in this regard that

> "I just felt like they're very vulnerable, and because there's no official system in place to protect them, that I had a moral obligation to be there for them. I felt like it was a moral obligation. […] This is technically unprofessional behaviour that was against the rules, but sometimes I feel like the rules are wrong. And it's a really hard moral ethical decision, and people make different ones and that's fine. But I wanted them to know that someone cared […]".

Overall, most welfare workers thus considered that they could exercise discretion to command change on the micro scale, thereby using various tactics including persuasion and deception. Nevertheless, this capacity to exercise discretion in order to vernacularise human rights consciousnesses was, on many occasions, constrained by what many welfare workers describe as 'fatigue syndrome' as well as by the feeling of being a 'collaborator' in a system that ultimately was precisely designated to, in the eyes of many respondents, minimise human rights protection. Various respondents thus indicated that they felt both guilty and tired given that it was, in the words of Kris, "a draining, draining experience". As Alex indicates,

> "you have no room left for empathy […]. I'm meant to be a professional who understands these clients and knows how to work in this field, and you just feel so bad about yourself because you stopped caring. […] And it's really scary to walk through a camp and see guys with physical self-harm wounds and not even stop. Not even take that in, because you're so used to it."

In turn, fatigue syndrome had various implications for the vernacularisation of human rights through processes of discretionary decision-making. Some welfare workers point out they could not effectively take human rights concerns into account in their decision frames any longer. Whereas they generally did not rely on the instrumental function of human rights anyway, they henceforth over time also stopped relying on human rights consciousness as a driving force in their work. Quinn given an example of this process by which welfare workers become emotionally blunted:

> "there was an elderly woman, over 80 years old, whose family had written a complaint about her sleeping on the floor in their tent, because she didn't have a mattress. […] I went down there and confirmed that there was no mattress and that she was sleeping on the floor. […] So I went back up, spoke to my coordinator, and she was like: *'yeah, well, maybe, I don't know that we can even get a mattress, so,*

> *sorry'*. And her care factor was pretty spectacularly low. […] The lady got a mattress, but that was because I said to my manager: *'you can either get some mattress from Transfield and I don't care how you do it, or tomorrow at 3 'o clock in the afternoon, if that old lady doesn't have a mattress, I'm going to go back to RPC1 to my accommodation and I'm going to walk the mattress down on my fucking head from RPC1 to RPC3 and I'm going to give that lady my mattress, and it's going to be incredibly embarrassing for Save the Children, I'm going to get fired, you're going to look like an idiot, so get a mattress or that's happening at 3 'o clock tomorrow afternoon'*. Next morning, the lady had a mattress. But it wasn't the fact that the old lady didn't have a mattress that motivated the mattress to happen quickly, it was me threatening to embarrass my manager and the organisation. […] So some people were so traumatised that they couldn't get out of the situation that they were in. They couldn't leave the job because they were kind of frozen in this trauma response. But they couldn't work effectively either."

Various welfare workers point out that fatigue syndrome was a reason to quit their jobs. Charlie thus states that

> "I could see it in other co-workers, people that had stayed too far for themselves, that you become ineffective. And if you're not 100% present in that sort of environment, you become less useful, and I could see that I was getting to my point where I don't think I could've kept on contributing to the level which I had in the past, so I thought it was time for me to step down."

At the same time, however, (s)he became involved in whistleblowing, which connects to an alternative response to fatigue syndrome. Thus, various welfare workers who experienced fatigue syndrome felt that their discretionary decision-making practices were too ineffective to create real change and therefore started to rely on different mechanisms to pursue their human rights consciousnesses, primarily by resorting to extensive documenting and whistleblowing. Various welfare workers indeed outline how they increasingly felt that working towards human rights goals on the micro level through discretionary decision-making practices was not psychologically sustainable in the long run. As Noor explains,

> "only the small things, I could influence […]. That was only tweaking at the edges, and I got quite frustrated that I couldn't do more. And I kind of gave up, and said to myself, *[…] 'well, I can go on and on and on, or make a point, try to influence somehow the exposure'*, because Australians didn't know about what's happening on Nauru. […] And I had to decide whether I stay in the system, keep low, make these small changes, or whether I try to influence the big decision. And to influence the big decision, you had to have the support of the Australian population. […] And I thought, that is more influencing than just doing something about the food and things like that. So it was a combination of frustration [and] of trying to influence more than what I was doing on Nauru. Realising at the same time that I ran a risk of my contract not being extended, me not being allowed to go there anymore, and not being able to change the small things."

Multiple respondents point out that they started to focus primarily on documenting incidents as well as on talking with media and leaking documents for two reasons in particular: because they did no longer want to be colluding with the system, and because they did not have the feeling of getting anywhere in their daily work. As Drew, working for Save the Children, describes, (s)he at a certain point felt (s)he could not actually *Save* the Children but could, instead, "*Document* the Children". In turn, various respondents recount how they smuggled significant batches of information out of the facility in order to share them with Australian journalists and external oversight bodies – the Nauru Files being the most prominent example in light of the sheer volume of documents published by the Guardian Australia. Whilst some only started whistleblowing after they had quit their job, for others it became the main motivation to continuously return to RPC Nauru for new rotations. As Bobbie points out, bringing information off island and handing it over to human rights lawyers and institutions was "the sort of more effective and the more immediate sort of realm for change and opportunity".

Whereas many welfare workers consider that vernacularisation through protest and discourse mechanisms *within* the RPC was only counterproductive, they hence increasingly started to rely on such mechanisms in an attempt to effectuate change originating from the *outside* of the facility. For many welfare workers, the focus therewith shifted from attempts to improve the lives of those confined as much as possible through daily decision-making practices, towards attempts to cause public and political indignation in Australia by smuggling and leaking documents, whistleblowing, and testifying in courts and Parliament. In this sense, reliance on morality mechanisms gradually decreased in favour of reliance on protest activities, deliberative processes, and discursive mechanisms. A prevalent idea amongst many welfare workers was that, as long as they made sure that enough information was brought off island, offshore processing would eventually be ended – whether due to public outrage, judicial rulings, or the ultimate prevalence of protest rationalities in the political realm. They therefore attempted to shape the dominant discourse, informing legal challenges, and contribute to protest movements.

In addition, when whistleblowing, welfare workers – in particular those that quit their job on Nauru and did not envisage to go back for more rotations – increasingly started to rely on the *instrumental* value of the various human rights dimensions. In their whistleblowing endeavours, they indeed started to *use* human rights as deliberative principles, as natural entitlements, as protest tools, and as discursive expressions, for example by using human rights when testifying in Senate inquiries or in court hearings, when speaking at rallies, when issuing media statements, and so on. Instead of keeping silent about human rights in an attempt to accomplish them, they now thus became more prominent instruments for vernacularisation.

However, many welfare workers engaging in such leaking and whistleblowing endeavours felt disappointed about the ultimate impact. Pat, a general support worker, explains that

> "we kind of thought, '*okay, if we tell people what's going on, this is not gonna happen anymore'*. But we did tell people what's going on and it's still happening […]. So we kind of went out, like, all guns blazing kind of thing, we were recording, and trying to get all the information we possibly could. Took it to the Senate Inquiry. Nothing happened. […] So it just makes me so mad that we told them these things and that we weren't, like, taken seriously or it wasn't heard. But we kind of thought, when we go there, *'oh, if we tell them this, someone's going to do something about it'*. But they didn't."

Respondents furthermore point out that leaking information was a very lonely endeavour given the amount of secrecy and criminalisation around whistleblowing. As previously noted, welfare workers generally felt they could trust nobody. Addison explains that

> "I felt very alone in that undertaking. And because it was so risky and they brought in the Border Force Act which criminalised sharing information and carried a two year jail sentence, nobody spoke about if they were doing that, and what they were doing and who they were talking with. […] To be honest, I felt extremely alone. […] I never wanted to do any of that stuff alone ever. […] [B]ut you could never, you could never talk about it safely."

Many whistleblowing welfare workers point out that they experienced a sense of paranoia since they could trust nobody, and felt that they were constantly monitored by various stakeholders, most prominently by the Australian government. Some whistle-blowers operated on the basis of high secrecy levels, including the use of data hiding spots, code language, and secret mail-drops with journalists. In hindsight, whistle-blowers point out that they believe their strict precautionary behaviour was justified given the way in which Australia and Nauru exercised scrutiny, for example by means of multiple on-site office raids by the Nauruan police in which all cell phones, USB sticks, and computers were seized for inspection.

The exercise of discretionary decision-making based on human rights consciousnesses was hence not only limited to the micro level, but was furthermore impaired by the fact that many welfare workers at a certain point started to experience fatigue, guilt, distress, and loneliness. As a result, whilst there still was *scope* – albeit circumscribed – to make discretionary decisions, welfare workers started to feel too exhausted to make optimal use of discretionary space. Instead, they often decided to either quit their job or to rely on other mechanisms to vernacularise their human rights consciousnesses. On many occasions both alternatives seem to have hampered proper socialisation of human rights consciousnesses amongst welfare workers: those with strong

human rights convictions either were too affected by the fact that they could not effectively make decisions in accordance with their moral blueprint and thus decided to leave, or resorted to secret and lonely advocacy endeavours that necessarily involved the hiding of one's own human rights consciousness – and the corresponding lack of reliance on human rights as instruments – as no one could ostensibly be trusted. Only after whistle-blowers had publicly spoken out, they started to rely on the instrumental value of the various human rights dimensions, but by that time their contract would have ended – or would be ended – and such endeavours therefore only may have had an indirect effect insofar as socialisation of human rights norms is concerned.

9.4 VERNACULARISATION OPPORTUNITIES OF INSTITUTIONALISED NGOS

Another group of actors that potentially plays an important role in the vernacularisation of human rights consciousnesses, and the final one to be dealt with in this chapter, is that of institutionalised NGOs, which come in many shapes and forms. They include organisations focussing on a variety of goals, including most prominently advocacy and humanitarian aid. The umbrella-term 'NGOs' covers, moreover, both community-based organisations springing from personal initiatives as well as city-wide, regional, national, and international organisations. In this regard, Lawry draws attention to the fact that many NGOs are unique: notwithstanding the fact that there are thousands of NGOs worldwide, "they vary widely in their performance, professionalism, sense of responsibility, [and] attention to standards".[69] Still, whilst their scale and outlook may differ significantly, what they have in common is that they are nongovernmental, *legally constituted entities* that are created by organisations or individuals with no participation in or representation of government.[70]

Analysis here will focus on institutionalised social movements that have attempted to command change through the conventional political arena instead of outside of it.[71] At the same time, it should be emphasised that most social movements inhibit elements of both conventional protest taking place within the political arena and newer forms of activism taking place through deontological practices. The distinction between protest movements operating on either side of the spectrum should therefore be nuanced in that at times they try to command change both within and outside the legal arena through a diverse repertoire of contention. As Winter, speaking on behalf of a large Australian NGO involved in refugee-related debates, for example illustrates,

69 Lawry, 2009, p. 27.
70 Lawry, 2009, p. 25.
71 As explained in chapter 8, NGOs can be classified on the basis of whether they operate within or outside of political fora.

> "In terms of our core focuses, historically it's really been about policy and research for the most part, and advocacy, mostly focused advocacy on the government, so historically a strong position of engagement with government, and parliament in particular. In the past few years I think that advocacy has become more public, because obviously there's been a sort of a gap there, in terms of our ability to engage with the government and the policies."

Representatives of various other NGOs have described their core focuses in similar ways. Whilst many NGOs thus utilise imminent possibilities at the political plane, they often simultaneously are geared towards exposing what goes on in RPC Nauru and towards symbolically confronting society with their message, which only *then* – in a somewhat subsidiary fashion – might turn into a factor that is taken into account in political decision making. Whilst the latter does arguably not constitute a pure deontological endeavour *in se*, to a certain extent social movements operating within conventional politics thus on many occasions at least showcase a sensitivity for the ways in which change might be achieved through other mechanisms than through the traditional toolbox belonging to the sphere of conventional politics.

In the context of RPC Nauru, many NGOs have frequently featured in debates on Australia's offshore processing and border control policies and have attempted to command change through political processes. Some of these NGOs are well-established actors with a national or international focus whereas others operate primarily on the basis of grassroots activism. In this section, their role and the way in which they use human rights will be further elaborated upon, on the basis of both desk research and qualitative interviews with representatives of a number of key Australian NGOs involved. This includes interviews with representatives of relevant international NGOs, Australian NGOs,[72] a grassroots movement, and a generic non-profit service provider. For purposes of anonymity, they are not further specified here.[73] Specific NGOs will only be referred to where analysis relies on publicly available information, such as reports and media statements, and where this does not lead to the identification of respondents.[74]

Congruent with the conceptual and analytical framework set out in the previous chapter, many NGOs operating within the political arena consider human rights to be both an utopian goal – or a consciousness – and a means

---

72 Since civil society and NGOs are largely non-existent on Nauru, the focus here will be solely on social movements operating in Australia.

73 In addition, at certain points where quotations are used in the analysis below, small redactions have been applied to guarantee anonymity of respondents. For example, if a respondent would discuss activities that his or her organisation has been engaged in, identifying words (such as '*I* was engaged in' or '*we* were engaged in') may have been changed into ('*they* were engaged in' or '*organisation x* was engaged in').

74 Where NGOs are mentioned, this does therefore not mean that their representatives have necessarily also been interviewed for purposes of this book.

to achieve such a utopian end – or an instrument. It is, in this sense, both what drives the activist agenda *and* a vital part of NGOs' protest toolbox. The next sections will elaborate upon this double function of human rights: it deals respectively with (i) the role of human rights consciousness, (ii) humanitarian endeavours, and (iii) advocacy endeavours, with the latter two constituting specific protest processes through which NGOs attempt to vernacularise human rights.

9.4.1 Human rights consciousness

Human rights are core parts of many relevant NGOs' mission statements. To name a few, Amnesty International Australia highlights that "we believe that together, we can create a world where our most basic human rights are enjoyed by all".[75] Human Rights Watch ('HRW') aims "to uphold human dignity and advance the cause of human rights for all".[76] The Refugee Council of Australia ('RCOA') has as its core mission "[f]or the voices of refugees to be heard, the rights of refugees to be respected, the humanity of refugees valued and the contribution of refugees celebrated".[77] The mission of ChilOut, a former NGO lobbying for an end to the detention of children, was "to promote the rights of children seeking asylum".[78] The Asylum Seekers Resource Centre's ('ASRC') central vision is that "all those seeking asylum in Australia have their human rights upheld".[79] Save the Children, an NGO that has worked on the inside of offshore processing, has as its core mission "[a] world in which every child attains the right to survival, protection, development and participation".[80] In turn, such human rights consciousnesses seem to be based primarily in protest and moral understandings of human rights: in pursuing change, NGOs generally rely on rights as identified on the basis of both natural entitlements, and social struggle, structural inequality, and injustice. Human rights are therefore understood as entitlements that everyone *has* yet still ought to be *fought for*. Winter, representing an Australian NGO, for example maintains that

> "you need to fight for it. You can't just assume it's there. And you can't assume it will be protected by the state. It needs to be fought for and argued for and it

75 https://www.amnesty.org.au/what-we-do/our-vision/ (last accessed 30 May 2019).
76 https://www.hrw.org/about (last accessed 30 May 2019).
77 https://www.refugeecouncil.org.au/purpose-aims-and-goals/ (last accessed 30 May 2019).
78 https://chilout.org/our-mission/(last accessed 30 May 2019).
79 https://www.asrc.org.au/about-us/ (last accessed 30 May 2019).
80 https://www.savethechildren.net/about-us/our-vision-mission-and-values (last accessed 30 May 2019). Slightly differently, Salvation Army Australia does not base its humanitarian operations on a human rights conception but rather on faith-based, i.e. Christian, principles "dedicated to sharing the love of Jesus": https://salvos.org.au/about-us/mission-and-vision/ (last accessed 30 May 2019).

> is by no means, you know, something that you can take for granted. So you need to go out there and use the political tools you have […]. [I]t needs to be fought for and argued for and enacted to actually happen on the ground".

Parker, representing a grassroots movement, also points out that human rights consciousness is a vital driver of the protest agenda. In doing so, in line with human rights consciousnesses located squarely in the realm of the protest dimension, (s)he clearly distinguishes human rights as a legal concept from human rights as a political protest value:

> "there are no human rights in Australian law […]. But I think the fight in general for human rights, and the recognition of human rights, is a political one. So the whole argument about whether offshore processing is just or reasonable or anything is really an argument about whether people have a right to seek asylum. Whether people have a right to gain protection, which is what the government is being routinely violating. So that element, I think, is being quite an important part of what we've had to say. People do have human rights, and the human rights of people that come by boat are no different to the human rights that we expect. […] We have to fight for them in Australia, we have to fight for the people who arrive by boat, and that their human rights should be recognized when they arrive, when they're dumped in Manus and Nauru and every point in between."

At the same time, not all institutionalised NGOs maintain such a strong distinction between protest and natural understandings on the one hand and deliberative understandings on the other. Various NGOs thus point out that human rights are not only based in social struggle, but also in (international) law. As such, the human rights consciousness of many NGOs seems to consist of the following three elements: (i) everyone should, on the basis of their basic humanity, enjoy human rights; (ii) this has been codified in international law (although such translations may by some NGOs be considered travesties of genuine human rights); but (iii) the social struggle of some, including those offshored, clearly illustrates that human rights have not yet reached their full potential of protection.

Interestingly, however, in many interviews with NGO representatives, the importance of human rights only came up after respondents were being asked about them. This corroborates with previous research that was conducted as part of the 'Words that Work' project of the ASRC, which will also be further addressed below.[81] The conclusion of this research, which was based *inter alia* on interviews with major humanitarian organisations and activists, was that 'human rights' are not commonly referred to by advocates in discussing their own work – they "gravitated, instead, toward the ideas of *protection, peace,*

81 See footnote 86 and accompanying text.

equality and – above all – *life*."[82] In this sense, the idea of human rights consciousness as driving the activist agenda should be nuanced. Whilst it clearly does drive NGOs in general, it is not always explicitly placed front and centre by individual activists and advocates as a driving agenda, although its fundamental values – such as those of protection, equality, and life – *are*.

Various human rights consciousnesses based primarily in social struggle, deliberative principles, and natural entitlements henceforth clearly drive NGOs' work both on an organisational and on an individual level, although such protest endeavours are not always primarily and explicitly based on such consciousnesses but on its underlying values. This distinction is subtle, but crucial, as it points out that human rights are, as drivers of NGOs' activities, not always clearly visible or tangible yet are still to a significant extent ingrained in protest work. The work of individuals operating on behalf of NGOs that are institutionally based on human rights consciousnesses can therefore occasionally be classified as being driven by a human rights consciousness even when human rights as such are not constantly or explicitly referred to as a guiding framework at the individual level. Even though individuals themselves may identify first and foremost with a fight for protection, peace, equality, and life, which they only *subsequently* may classify as values trickling down from more abstracted notions of human rights, their embeddedness in an institutional context that is explicitly premised on a human rights consciousness and their consequent activities that accord with such consciousness in a sense make that their work is, at its core, human rights-driven work.

9.4.2 Vernacularisation through humanitarian aid

One way in which NGOs attempt to vernacularise their consciousnesses is by providing humanitarian aid. Thus, some NGOs have operated *internally* in the system in order to provide aid to those confined offshore.

As chapter 2 has detailed, two NGOs in particular – the Salvation Army and Save the Children – have, as welfare providers, been essential parts of RPC Nauru's governance structure. They have frequently justified their involvement in the facilities as a means to achieve change from within the system. The Salvation Army for instance issued a media release on its involvement in offshore processing, in which it considers:

> "Although The Salvation Army remains concerned about the impact a lengthy placement on Nauru and Manus Island may potentially have on the well–being and mental health of asylum seekers – we cannot remain idle while this policy

82 ASRC, *No Place Like Home: Findings from Cognitive Elicitation Interviews ASO Communications*, available at https://www.asrc.org.au/wp-content/uploads/2015/08/Interview-Analysis_ASRC-1-Anat-S-O.pdf, page 1 (last accessed 3 April 2019).

> is enacted. We are a people of action who stand with the vulnerable and oppressed, and therefore commit ourselves to give our very best to serve those who will be transferred for off-shore processing. The Salvation Army recognises the enormity of the task ahead of us, but is determined to do it's best to support people who are placed there, and to help them prepare for the day when freedom finally arrives. […] We bring over a century of experience and skill to this task, and boundless amounts of faith, hope and love. We are convinced that even in the darkest circumstances, light and good can emerge. We recognise the challenges of providing quality care in conditions that initially will not be ideal, and undertake to treat every per son with respect and dignity – striving to use our contact with them to enhance their lives and futures."[83]

Likewise, Save the Children outlines in its 2015 Annual Report that

> "[t]he services we provided to asylum seekers in the Regional Processing Centre helped to mitigate the detrimental impact of immigration detention by providing much-needed support and building normality and routine. Our primary goal was to ensure an environment that is as safe and protective for children as the conditions allow. […] As a human rights organisation whose mission is to improve the lives of children and their families, in Nauru we played a vital humanitarian role in an environment where most service providers are ultimately driven by profit."[84]

The Annual Report subsequently continues with pointing out the legacy of Save the Children on Nauru, which would consist of numerous education projects, recreation activities, child protection, and on-site advocacy matters. In relation to the latter, the Report states that

> "[w]e pursued more than 30 separate advocacy matters with decision makers in both Nauru and Canberra. While often a lone voice, we did not shy away from difficult conversations and pressed for better outcomes for children and their families, right until the very end of our time in Nauru. […] During our time working in Nauru, we remained true to our values, including our commitment to speaking out on behalf of children. This wasn't easy – often the target of our public advocacy was the same government that contracted us to provide services to asylum seekers and refugees. However, we never stopped lobbying for a more transparent, humane and compassionate approach to working with people seeking asylum. We provided reports, lessons learned and testimony directly to decision-makers, in an effort to make the consequences of Australia's policies vividly real."[85]

---

83 The Salvation Army statement on involvement to asylum seekers in Nauru and Manus Island, Media Release, 10 September 2012, available at https://salvos.org.au/scribe/sites/auesalvos/files/media/newsroom/pdf/20120910_TSA_statement_on_involvement_w_Nauru_and_Manus_Is.pdf (last accessed 3 April 2019).

84 Save the Children Annual Report 2015, p. 36, available at https://www.savethechildren.org.au/getmedia/783a93c8-7cb5-4cd4-bdcd-7f84ec342217/2015-Annual-Report.pdf.aspx (last accessed 3 April 2019).

85 Save the Children Annual Report 2015, supra n 84, p. 37.

Compared to external advocacy work, these NGOs maintain that a more direct impact can be achieved through humanitarian work on the inside of offshore processing. At the same time, as has been noted above, former welfare workers who worked for the Salvation Army and Save the Children have voiced substantial criticism of such decisions to become involved, pointing out that these NGOs were at the bottom of the governance hierarchy and as such had very limited technologies to actually steer the arrangements in place and to vernacularise human rights consciousnesses in any meaningful way. In addition, other NGOs have severely criticised the position taken by those NGOs that decided to work as service providers in offshore processing. Sam, the CEO of a generic service provider providing domestic services to the Australian government, points out that

> "it's a lose-lose situation. You can't support people and keep them healthy and robust and give them hope when there's no end, where there's no policy that actually says: *'this is what's going to happen'*. And they're a political football: the provider will always be scapegoated as well."

Consequently, (s)he points to the human rights consciousness of the generic service provider that (s)he is running in explaining why (s)he decided not to become involved in offshore processing as a service providing stakeholder:

> "within the frameworks of Australia, you have rights as an organisation. Like, legal rights, but also there is human rights, and we can stand up and own those things. Whereas there [on Nauru, red.], it's so political, you would be totally micromanaged and you would be compromising too many things, and it's just not worth it."

Providing humanitarian assistance as a service provider to the government would thus legitimise the arrangements and mute any criticism of the dire circumstances in which offshore processing takes place. Understood in this way, it would, therefore, *silence* rather than contribute to any substantial protest and any human rights claim – a position that the service providers involved, however, in turn contest as the quotes above highlight. Whatever the case may be, humanitarian work within the policy framework has hence attracted substantial criticism from the social movements branch itself and has, consequently, been much more contested than external advocacy endeavours.

Given the limited sway that those NGOs arguably have had over the policy direction, and given that they left Nauru ostensibly disillusioned, the potential to vernacularise human rights consciousnesses through humanitarian aid seems limited at best. It should not be forgotten, however, that humanitarian involvement *did*, on the other hand, allow workers of NGOs to engage in morality-based processes – such as discretionary decision-making – in an attempt to vernacularise their human rights consciousnesses, although such decision-making was also highly constrained as the previous section has shown. Given

that this has already been extensively dealt with above, these processes will not be further recounted here.

9.4.3 Vernacularisation through advocacy

9.4.3.1 Advocacy opportunities

Another way in which institutionalised NGOs attempt to vernacularise their human rights consciousnesses is through their advocacy work, which, according to many NGO representatives, is at the heart of their repertoire of contention. At the same time, most representatives point out that their ability to command change within the political arena is highly constrained and that any policy-related work necessarily focuses on the micro rather than the macro level. Change can indeed not readily be commanded, at least not on the short-term, in the 'bigger picture': protesting in the political realm primarily concerns, as Winter points out, "finding out about particular individual cases, advocating for twigs to the policy […], [and] continuing [the] lobbying of politicians."

Such work includes advocating on behalf of specific individuals or groups of individuals detained offshore. Indeed, rather than on a larger scale, it is often at the individual or group level that change may be commanded. A strong lobby for instance revolved around children in offshore detention, with many of the involved NGOs having campaigned intensively for the end of mandatory offshore detention for minors. Likewise, various grassroots movements have attempted to inhibit the involuntary return of asylum seekers and refugees to Nauru after they had been transferred from the RPC to Australia on medical grounds. In fact, social movements have occasionally been able to prevent the return of such individuals by orchestrating a significant community response. In this sense, advocacy work does not only involve efforts of NGOs at the institutional level to influence politicians and government officials, but also includes activities that, although often orchestrated at a centralised institutional level, are primarily generated at the grassroots level.

The fact that change cannot readily be commanded in the 'bigger picture' does not mean, however, that NGOs and other social movements do not identify with strong advocacy endeavours on the macro level at all in their vernacularisation efforts. To the contrary, whilst most interviewed NGOs acknowledge that change is most tangible on the micro level, they simultaneously underscore that they nonetheless keep advocating for structural policy changes as well. Parker thus emphasises that "we've always been an advocacy group, and have been fighting to change the government policy, to raise awareness to change the policy".

Likewise, various NGOs point out that *some* advocacy work geared towards change on the macro level can still be effectively pursued: Winter thus outlines

how NGOs for example liaises with the UNHCR by providing recommendations, conveying complaints from people who have visited the offshore facilities, and following up with them on current affairs such as in relation to the US resettlement deal. Ryan, representing the Australian branch of an international NGO, furthermore outlines how some NGOs have been able to visit both RPC Nauru and RPC Manus and how their subsequent reporting has informed both the political and public debates. Sam, CEO of a generic service provider providing domestic services to the Australian government, also points out that there are certain possibilities to achieve macro-level change through political processes. (S)he indeed illustrates that it is possible, in particular for non-governmental organisations that operate as service providers to the Australian government, to engage in quiet advocacy in order to command change guided by their own consciousnesses, although this is still more effective on the micro- or meso-level than it is on the macro-level:

> "We work very hard to develop good relationships with bureaucrats and politicians. And what we do is, when we meet with them one on one, we say: *'this is the impact of this policy on community or individuals'*. And we found that being a service provider, that's a really effective way of not embarrassing them, but actually them saying, 'well, alright, they're experts, they know what they're doing as service providers, and they're saying to us that this is it'. So we find that if you can do that, it can shift – certainly not that broader issue, although every time we get an opportunity with the Minister, we'll say, *'we really would like to see this resolved'*, and talking to UNHCR […] and with other like-minded organizations. So we are really agitated by it and we do try and find a solution with colleagues and with organizations to try and have a policy perspective that we can take to government collectively and say, *'try this'*. Yeah, so that's our way of trying to address it."

These remarks feed into another interesting feature of NGOs' advocacy work in the realm of offshore processing: many of the NGOs involved operate jointly on the advocacy level, primarily through the RCOA which is Australia's national peak body for refugees. The RCOA hence takes on a coordinative role in developing joint policy proposals and recommendations from a wide variety of non-governmental institutions. They do so by coordinating responses to particular policies or incidents, by connecting expertise with resources, and by conducting national consultations with a range of member organisations, communities, and other relevant stakeholders. Thus, Winter – who is familiar with the coordination processes of the RCOA – points out that

> "there's basically a network of advocacy organisations who meet monthly by teleconference, encompassing pretty much everyone in this space to the extent that it's possible to do so. […] [The] principle kind of idea [is] that there is to be some coordination. […] [It is called] the 'flotilla model', so everyone will have a different view, everyone will have a different take, but being pushed in the same direction and at least know what everyone else is doing and see if they can leverage off each other's efforts."

Skylar, representing an Australian-based NGO, sketches that NGOs involved in the refugee sector generally cooperate well together. As Camille, working for another Australian-based NGO, remarks, however, cooperation is not always a successful endeavour, as "there's big egos and there's money at stake and there's reputations at stake". Thus, as (s)he illustrates, many NGOs and other social movements are guarding their own turf and resources, which to a certain extent hampers effective cooperation and coordination between all social movements involved – up to the extent that some social movements even opt to not participate in the RCOA's coordination efforts in the first place.

The fact that coordination takes place but that not all NGOs participate in such coordinated actions can also be explained by looking at the broad and diverse repertoires of contention that NGOs employ in pursuing advocacy goals, including the vernacularisation of their human rights consciousnesses. Some NGOs, primarily those with well-established reputations and a strong political network, generally focus on lobbying politicians on the basis of research-driven recommendations. They do so through established channels of contention, which can be both harmonious or conflictual. An example of harmonious contention would be where NGOs engage in quiet lobbying and advocacy work in order to persuade political representatives. Conflictual contention, on the other hand, may take place where NGOs for instance import deliberative mechanisms into their protest endeavours by commencing court cases in order to command policy change. An example of such mixed use of both deliberative and protest mechanisms has already been dealt with above in section 9.2.1., where the failed attempt of two NGOs – HRLC and RAID – to hold a private contractor operative at RPC Manus – G4S – accountable under the OECD Guidelines by submitting a complaint to the Australian and UK NCPs was discussed. Many of such channels of contention, however, ultimately inhibit both harmonious and conflictual elements: by issuing public statements or by exposing certain cases in the media, NGOs for instance seek to pressure politicians into accepting policy change in a way that is not *directly* confrontational – the confrontation takes place in the public debate rather than in an arena where NGOs and politicians are directly facing one another – yet that is not entirely harmonious either.

Other NGOs, on the other hand, focus on different repertoires of contention. In particular NGOs relying on grassroots activism focus on pressuring politicians into implementing policy changes through bottom-up grassroots action. Such grassroot action may include a variety of contention tactics, including rallies, demonstrations, public debates, petitions, and the targeting of particular stakeholders in an attempt to gain specific support from for example unions or to force the collapse of bipartisan support for offshore processing. In this sense, both types of NGOs target political actors and attempt to change public opinion, but they generally attempt to do so using different repertoires of contention and for different purposes. Whereas for some NGOs creating public *support* is key as it gives them a stronger advocacy position vis-à-vis political

representatives, for others public *action* – rather than mere backing – is crucial. In this sense, the former type of NGO pursues a form of 'passive' public engagement and persuasion whereas the latter type of NGO pursues 'active' public engagement and persuasion – it is the difference, then, between *relying* and *rallying*. Parker sketches in this regard that favourable public opinion is, for grassroots movements, indeed insufficient. Such public opinion should rather be converted into public action in order to genuinely pressure politics through a bottom-up approach:

> "you're talking to the working class, you're talking to the unions, you're just looking at ways of talking to the section of the community that can provide some pressure. […] It's […] a question of the grassroots pressure that we can bring to bear on the politicians. It's part and parcel of raising that political awareness, pressuring the politicians, but at the same time recognizing that the only way you pressure politicians is if you can marshal a critical mass of not just public opinion, I'd say there were times we had public opinion, but it also comes down to what that critical mass *does*."

Notwithstanding their differences, both types of NGOs hence continuously underscore the importance of swaying public opinion for the effectiveness of their repertoires of contention and for the vernacularisation of their consciousnesses: whether it be because it gives them a stronger bargaining power in lobbying efforts, or because it creates a larger critical mass that can be used to apply pressure directly.

In attempting to do so, many NGOs in turn target their public campaigning actions, that is, they focus on individuals and particular groups in society that are more likely swayed or mobilised than others. This holds true in relation to both NGOs that focus on gaining support for their advocacy work and NGOs focussing on mobilising grassroots activism. Parker thus explains that on the grassroots activism side,

> "it's not like we spend our time just going out sticking things in letter boxes up the county with information. I mean, that's not really the way peoples' ideas change in any case. But it does mean that people who are active and take an interest – that's where we see the first thing, is that you have to create a little wheel for turning a bigger wheel. But if you got someone in every union, every work place, every school, every suburb, who says 'no, the government's wrong, here's why', that's the beginning of actually spreading that circle. […] So if you want to influence Western Sydney, which is the stereotypical place that people think as filled with anti-refugee idea, then going to organise workers and explaining the connections between their rights and what they fight for as workers, and refugee rights, is an important way to begin to creating a political counter-weight to the government's propaganda".

Likewise, research of the RCOA that focussed on finding "words that work and that change the debate around people seeking asylum" (the so-called 'Words

that Work' research) shows that it is useful for the NGO community to target specific messages at specific audiences in order to achieve advocacy goals.[86] This research will further be addressed below when discussing the instrumental role of human rights in public advocacy. On the basis of this research, Camille explains that NGOs that attempt to gain public backing should therefore use differentiated strategies and messages with different parts of society, in particular to reach the so-called 'persuadable group' in the middle that can, with the right language, potentially be persuaded to support the NGOs' causes.

In turn, in attempting to shift public opinion, NGOs of both types rely on a mix of arguments. This includes both ethical arguments – highlighting that offshore processing is an unethical policy framework that results in the suffering of both adults and children – as well as more pragmatic arguments – emphasising that offshore processing is a very expensive endeavour financed by Australian tax-payers' money. In addition, social movements attempt to highlight that other and better options are available to manage boat arrivals, therewith not only focussing upon the problem but also on potential solutions. As Ryan for example points out,

> "we're looking at how we're going to highlight engagement with the region and regional governments to set up systems where people are respected in terms of their rights, to seek asylum, to seek protection, to then have work rights, health care, education, while at the same time not shifting the issue to countries that are less able to look after people than Australia."

Other NGOs, on the other hand, hesitate to engage in public-facing campaigning strategies in the first place. Sam, CEO of a non-governmental generic service provider providing services to the Australian government, points out that (s)he would never issue a media release condoning offshore processing as (s)he believes that the power of being a service provider to the government rests particularly in silent advocacy rather than public outcry. Still, as (s)he points out, the service provider supports the RCOA's advocacy role and feeds into case studies. Moreover, this particular service provider *does* engage to some extent in social movement activities that are geared towards swaying public opinion. As Sam elucidates, in pursuing the exposure of lived experiences of refugees, social media play an important role:

---

86 ASCR, *Words that Work*, page 1, available at: https://www.asrc.org.au/wp-content/uploads/2016/05/ASRC-Words-that-Work-4pp.pdf, (last accessed 30 May 2019). This document provides an overview of the research that in fact consisted of four legs: language analysis, advocate interviews, focus groups, and dial testing. The report concerning the first part of the research, i.e. a diagnosis of people's underlying reasoning about asylum, can be accessed via https://www.asrc.org.au/wp-content/uploads/2015/08/ASRC-Language-Analysis_aso-1-Anat-S-O.pdf (last accessed 30 May 2019). The report concerning the conducted interviews can be accessed via https://www.asrc.org.au/wp-content/uploads/2015/08/Interview-Analysis_ASRC-1-Anat-S-O.pdf (last accessed 30 May 2019).

> "we think that refugees and asylum seekers speaking for themselves is far more powerful than us trying to articulate their stories. So their lived experience. We use our social media really effectively. […] We use that a lot to have stories of people who've succeeded. […] And that really is a very powerful tool around moving away from them being seen as a visa type, but as a human. And people say, 'oh, wow, that's a great story'. And feeling proud that Australia has supported someone like that to live a good life, to live the life they want to live. People's stories are very powerful. And supporting them to speak at different things, when we go to delegations, we'll always have people with lived experience to speak for themselves. We think that's a very important principle".

In turn, various NGOs engage in a mix of the aforementioned contention tactics. Thus, many of them issue press releases, create fact-sheets, organise public events, *and* expose lived experiences. This does not only allow them to reach a larger audience, but also to continuously choose which medium is most appropriate for the effective dissemination of information depending on the nature of such information, the targeted public, and the urgency of the cause. As the foregoing furthermore makes clear, in their advocacy endeavours, they sometimes mix vernacularisation mechanisms from various dimensions as well: they do not rely solely on protest mechanisms, but also, where necessary, on deliberative mechanisms (for example by instigating court cases or by filing complaints to (quasi-judicial) monitoring bodies) and on discourse mechanisms (for example by targeting specific messages at specific audiences in an attempt to convince those persuadable and to keep those already persuaded on board).

9.4.3.2 The instrumental role of human rights as an advocacy tool

The previous sub-section has explained how institutionalised NGOs attempt to vernacularise their human rights consciousness by using various instruments in their repertoire of contention. This in itself says little, however, about the instrumental use of human rights: whilst NGOs attempt to vernacularise human rights in their constitutive capacity, that is, as a *consciousness,* the question indeed remains what the role of human rights is as a tool of vernacularisation itself. It is this question that will now be turned to.

First, various NGO representatives point out that human rights fulfil an inherent documentation function within their advocacy work vis-à-vis the government, politicians, and the public. Louie, representing the Australian branch of a major international NGO, thus directs attention to the fact that human rights provide a normative framework to document abuses and keep a public record of what is happening to people offshore. Ryan also highlights not only that their work on offshore processing is human rights-driven in the sense that any concerns they have are based on human rights concerns, but also that they subsequently attempt to command change through advocacy by using human rights as a specific protest instrument, that is, by emphasising why particular practices in RPC Nauru do not match the requirements of

human rights protection. Their work is thus, as (s)he points out, both driven by and expressed through "concerns around the human rights situation". As (s)he moreover points out, using human rights as a protest tool is not only convenient, but also highlights the gravity of the situation. To illustrate this point further, (s)he points to the communications of an involved NGO – Amnesty International – on the involvement of company Ferrovial in RPC Nauru, which relies heavily on the prohibition against torture.[87] Ryan points out that the fact that this prohibition is one of the most fundamental human rights norms emphasises the urgency and importance of the matter that Amnesty International raises:

> "And then more recently, Amnesty has done the report on Ferrovial, because they think the way companies are engaging in propping up this policy is significant. They are now complicit in the abuses. And I think what was also different from previous Amnesty reports, was the fact that rather than saying *'we believe that the way people are being treated contravenes the Convention against Torture, Cruel, Inhumane and Degrading [Treatment]'*, they were quite explicit this time to say, *'no, this is torture. This is deliberate and it's deliberate for a reason'*, you know. They are trying to harm people for a specific reason. And so that was, I think, a pretty significant statement for Amnesty to make. They don't say that lightly. And I think it did bring international focus onto Australia's policy."

Likewise, Winter points out that human rights are a powerful normative framework that mobilises and energises their base. At the same time, however, various NGOs point out that whilst they use human rights, including to lobby with international organisations and government departments, they do not necessarily centralise them in their *public* advocacy work. Thus, although human rights are an instrument of protest for NGOs, they at the same time are often not the primary tools that many NGOs use in couching their public advocacy endeavours, that primarily take place – as the previous section has clarified – through both protest and discursive processes, including for example rallies and marches as well as attempts to shape public debate. Human rights are in fact argued to be hardly decisive in swaying public opinion which, as outlined above, is key to the advocacy work of various NGOs albeit for different reasons. Winter thus goes on to explain that human rights are, for a variety of reasons, not the strongest tools in pursuing public advocacy:

> "the main difficulty is that in the Australian context, human rights is not a normative framework that's widely accepted. […] There's a much stronger, I think, tradition of state control in Australia. […] We have an incredibly safe country which is very remote from many parts of the world that experience conflict, maybe we

87 See e.g. https://www.amnesty.org/en/latest/news/2017/04/spanish-corporate-giant-ferrovial-makes-millions-from-australias-torture-of-refugees-on-nauru/ (last accessed 30 May 2019).

> just don't understand that what we have here is exceptional […]. And the human rights sector is much less powerful, it's much weaker. Civil society generally, I would say, is not treated as a serious partner by the government in the way that in many other places it would be. It can be quite fragmented, it's horrifically underfunded in Australia, so for all of those reasons I would say that the human rights framework in Australia is more difficult for us because we can't guarantee that people accept that human rights are self-evident in Australia. And so when you're advocating for human rights of a particular people, you'll first have to advocate for the acceptance of the human rights first, and then educate the public about what they are, which is just an additional barrier in your way in some ways."

As (s)he concludes in relation to the potential for vernacularisation by relying on human rights as discursive expressions,

> "unfortunately [human rights] is not, outside of our base, a very powerful political language in Australia […]. I think it's incredibly useful for certain highly activated parts of our base, and it's a very powerful language for refugees themselves to use as to say that we have human rights. I guess what I'm saying is that for large parts of the Australian population and at the moment for the government, this is not a language that is productive".

Whilst human rights thus at times can be used to mobilise an NGO's base, it is not deemed highly effective in swaying public or political opinion at large. In fact, in sketching this situation, many respondents point to the 'Words that Work' research conducted by the ASRC that was already briefly discussed above.[88] This research particularly focussed on the question how the Australian public can be convinced of two fundamental principles: first, that seeking asylum is a fundamental human right, and, second, that all people have the right to live in peace.[89] In doing so, it distinguished between three particular opinion groups in society: (i) the 'support base', i.e. those who are already convinced of the message; (ii) the 'steadfast opponents', i.e. those who will not be persuaded by whatever argument in favour of the message; and (iii) the 'persuadables', i.e. an opinion group that consists of "the bulk of the population whose minds can be changed".[90] Interestingly, one of the findings of the research is that reference to complying with international human rights obligations does not work in swaying the opinion of the 'persuadables' and should rather be replaced by references to the importance of treating others the way we want to be treated ourselves as well as to the importance of doing the right thing. Reliance on human rights as instruments, here understood in a mixed deliberative and discursive sense, thus turns out to be ineffective to sway the opinion of those considered persuadable.

88 See footnote 86 and accompanying text above.
89 ASCR, *Words that Work*, supra n 86, page 1.
90 ASCR, *Words that Work*, supra n 86, page 1.

In addition, NGOs point out that the instrumental value of human rights in protesting endeavours is further limited by the fact that human rights arguments are often understood as pertaining to *minimum* standards of protection only, whereas NGOs pursue higher standards through their advocacy work. NGOs therefore warn against the centralisation of human rights norms in advocacy, as such centralisation would unduly shift the focus towards guaranteeing minimum entitlements rather than towards achieving more substantial forms of protection. Thus, Winter underscores that

> "it is an argument that can leave you exposed to minimum standards, because people can say, *'it's alright, we're human rights compliant'*, it doesn't mean your best practice, […] policy-based, it's not necessarily the best outcome, it then becomes the lower threshold that you have to jump over."

NGOs thus direct attention to the fact that human rights are, by many, hegemonically interpreted as legal standards as has also been explained in the previous chapter. Such a paradigm would hamper the activist agenda of advocacy given that the debate is no longer about human suffering but about abstracted legal notions of human rights entitlements. As Winter continues,

> "I think the legalization worries me because it is about losing the refugee voice, because then it just becomes just about power between lawyers and judges and the state, and now everyone seems to forget that there's a human involved in this space. And I think bureaucrats love it when you talk in abstractions, it's much easier for them to deal with abstractions and for them human rights is a useful framework to displace the real concern. I mean, our real concern is: people are suffering […]."

In this sense, the instrumental use of human rights in public advocacy work is hampered by the fact that the human rights consciousnesses of many citizens are primarily shaped by *deliberative* understandings of human rights, which endeavour to provide *minimum* entitlements, whereas NGOs attempt to create change on the basis of human rights consciousnesses that are primarily based in *protest* and *natural* understandings of human rights, which endeavour not to provide *minimum* entitlements but rather to continuously strive for the rights of all and for an ever-better situation for those involved in social struggle. The instrumental use of human rights understood as deliberative principles, consequently, would put a cap on NGOs' full-fledged ideals and goals.

Still, human rights as protest tools, natural entitlements, and discursive expressions are at times instrumentally used to persuade the 'persuadable' part of the public, albeit on many occasions in an implicit manner. Thus, in campaigns focussed on the persuadable group, many NGOs often do not use human rights explicitly, that is, by detailing what human rights are and how they are at stake in offshore processing, but rather refer to them implicitly by focussing on the *values* that underly specific human rights provisions. As such, many NGOs couch their public advocacy in terms of the impact that

offshore processing has on specific aspects of individuals' dignity and wellbeing. Ryan points out in this regard that

> "I think it depends on who your audience is. And that's what we're trying to get more sophisticated about, is maintaining the principle message and the integrity of the principles, and then putting it into a message which people will understand and will resonate with them and shift them. So what's the best message for the audience you're talking to? So if you stand up in front of the UN, you're talking about rights. But if you're standing in front of a town meeting in Newcastle, you're talking about the human pain, and what this means for that guy's family".

Winter concurs:

> "certainly […] we would use human rights standards in our advocacy, but we tend to not place it at the forefront of all that advocacy, particularly in the offshore processing area, because our focus is really about talking about the men as humans, and so to talk about their stories and experiences […] you know, making it a more individual story in many respects [rather] than a human rights story."

Likewise, Louie, argues that individual stories are more persuasive for advocacy purposes than human rights obligations and entitlements:

> "I don't think simply holding Australia's feet to the fire about international law is necessary the most compelling message […]. We don't generally present our materials that way. We talk more about the individual stories and the human cost of these policies, and I think that's actually something that resonates more with people […]. [I]t's quite difficult for them to engage on a conversation about the Refugee Convention, because they don't really know what the 1951 Refugees Convention is, but if you explain to someone the situation of a family who tried to get to Australia and all the problems that they have, and you ask them whether that's right or not, I think you get generally a pretty clear answer that it's not acceptable."

Maxwell, representing an Australian-based NGO, also recognises that public advocacy endeavours require abstract human rights entitlements to be translated into principles of fairness that people in the Australian public find relatable:

> "it is a bit fraud I guess in the Australian setting, how the language of international obligations and human rights is not as effective as somebody believing strongly in international or in human rights might have hoped it would be. But I think then, the flip side is often language around sort of fairness or a fair go, which sort of captures some of those, you know, same principles or being treated fairly and being treated decently, having stability and the right to rebuild your life for that sort of thing that has the substance of what a lot of those human rights treaties are getting at, that that is the language that may reach and be more effective in public

> advocacy, rather than framing it in an international law or in a obligations sort of sense."

Rather than speaking about human rights as abstract norms, many NGOs thus translate such norms into tangible life experiences and situations that people in the Australian public can relate to. Camille explains that "it is about using personal stories to show the systemic problems". Likewise, Skylar maintains that "it's a really tough balance being strategic about the way we're trying to persuade people, but it's personal stories that kind of breaks through the best with them." Such an approach based on values of dignity and wellbeing also finds support in – and in part seems to be based on – the 'Words that Work' research of the ASRC, in which the 'golden rule' for public advocacy vis-à-vis the persuadable group is formulated as follows:

> "Most of us strive to treat others the way we'd want to be treated. If any one of us feared for our life or for our family we'd like to know that others would help us to safety. Throughout history, people have risked everything for the hope of a better life. We must ensure people's basic right to live free from danger. By creating a fair and efficient asylum process we can show that, when people are in harm's way, we'll do the right thing. When we treat people seeking asylum with compassion and dignity, they can get on with rebuilding their lives in our communities."[91]

In this sense, NGOs attempt to gain public backing for their advocacy work not by speaking about, for example, how RPC Nauru hampers the abstract right to family life, but rather by discussing how the particularities of RPC Nauru impact on specific families. They do generally not refer to the catalogue of rights of the child, but rather illustrate the detrimental impact of offshore processing on children's' physical and mental wellbeing. Advocacy hence takes place to a large extent on the basis of fundamental human rights ideals such as 'humanity', 'equality', 'dignity', and 'wellbeing', without explicitly discussing the fact that abstract norms of human rights are potentially being abused. Rather, human rights concerns are presented through the lens of local suffering and individuals' needs – a perspective to which the persuadable part of the community can ostensibly better relate. As Winter puts it, "[w]e're hard wired to respond to human suffering in a way that we're not to human rights law exactly". That is not to say, however, that communication targeted at the persuadable group should at all times be void of any reference to more abstract notions of human rights. Certain NGOs indeed consider that the human story as a frame of public advocacy should ultimately be inseparably connected with a human rights message, whether implicitly or explicitly. As Ryan argues,

---

91 ASCR, *Words that Work*, supra n 86, page 4.

> "it is important to be able to humanise the problem, to show individuals and how it's impacting on them, but with that it has to be about their human rights. This is a small child that can't go to school because they're going to face bullying and abuse. Why would we not want that child to go to school? This is a woman with lumps on her breasts who has potentially cancer, we don't know. Why can't she access medical care? What about her rights to health? […] I think we need to identify those breaches and then demonstrate to Australia what that looks like in practice. What are we talking about when we're talking about rights to health, rights to education, rights to be free from arbitrary detention and all those sorts of things? Because these are human beings we're talking about. They have rights that human beings have, and that's what's crucial."

The need to apply a human frame at the same time closely relates to the crimmigration features of RPC Nauru and of offshore processing more generally. As various NGO representatives point out, the dehumanisation and criminalisation of those arriving irregularly by boat through mechanisms of offshore processing, as has been explored in detail in chapter 3, necessitates NGOs to adopt counterstrategies to 're-humanise' those confined offshore in the eye of the public. In this sense, abstract notions of human rights are, as protest instruments, deemed ineffective insofar as the general public considers those confined offshore as an out-grouped collective that should not have access to the same entitlements as those belonging to the Australian community. According to Parker,

> "you have to get to a point where [members of the public] […] are willing to say *'yes, they should have those human rights'*. […] But to get to that point, you have to be able to convince people that their cause is just. That they have a right to flee, that there was no queue jumping involved. […] [But] there's a constant demonization, and a devaluation of the refugee experience in that respect, which is reinforced with laws and mandatory detention, the fact that they're held in these camps, they look like prisoners, they're treated like prisoners, sometimes worse than prisoners. So it's a whole institutional aspect, I think, which is brought to bear on refugees to try and cast them in that particular way. […] [A]s long as someone thinks that that person has done the wrong thing, [that] they've come here in the wrong way, then they don't even ask themselves, *'oh, they've got the human rights'*."

Wherever government officials or politicians thus frame those offshore as dangerous, criminal, and illegal 'others', these individuals are not only discursively dehumanised but are also stripped of certain entitlements both as a matter of policy and on the basis of public support. By emphasising the humanity of those offshore, however, NGOs attempt to counteract such tendencies. In this sense, NGOs' focus on very concrete situations and specific persons is not only an implicit translation of human rights values, but also enhances political opportunities to raise more abstracted issues of human rights in the future. Indeed, the more those offshore are regarded in their human capacity rather than their alleged zoepolitical distinctiveness, the more oppor-

tunities there are to convince the public that these individuals are entitled to dignity and wellbeing not only in relation to specific suffering and injustices, but also as a matter of course on the basis of more abstracted notions of human rights as a guiding framework for justice and fairness in the biopolitical sphere.

In this sense, in relation to public advocacy, human rights may currently not be the most important tools in NGOs' toolboxes – in fact, they have to compete with other advocacy rationales such as economic or political arguments – but they certainly are instruments that NGOs may employ through their repertoire of contention. They are used at times explicitly, at times implicitly, depending on the particular form of advocacy used, the particular situation at hand, and the particular public towards which advocacy is geared. Whilst NGOs generally tread lightly in applying human rights as protest instruments or discursive expressions in their crucial public advocacy work aimed at the persuadable part of the population, they still use them in for instance government-geared advocacy, their lobbying efforts with international organisations, and their efforts in mobilising and energising their bases.

9.5 TOWARDS SYNERGY: COMMODIFICATION, CRIMMIGRATION, AND HUMAN RIGHTS VERNACULARISATION

The analyses above of how human rights are vernacularised by lawyers and (quasi-judicial) monitoring bodies, welfare workers, and institutionalised NGOs have already hinted at a number of ways in which multiple dimensions interact synergistically, either because multiple dimensions are combined in constituting particular consciousnesses, because particular consciousnesses based on certain dimensions are pursued through the vernacularisation mechanisms and/or instruments of other dimensions, because multiple human rights instruments are simultaneously used, or because the vernacularisation mechanisms of multiple dimensions are utilised in pursuing a certain human rights consciousness. The analysis shows, for instance, that welfare workers' human rights consciousnesses frequently draw on elements of all four dimensions. It also shows that NGOs pursuing a human rights consciousness that is primarily grounded in the protest and natural dimension do so, at times, by relying not only on protest mechanisms, but also *inter alia* on deliberative mechanisms – by becoming involved in court cases in Australia, Nauru, and PNG – as well as on discursive mechanisms – by creating a powerful discourse that is widely used by the NGO sector. Likewise, welfare workers seem to employ a number of vernacularisation mechanisms, including most notably discretionary decision-making but also mechanisms belonging to the protest, deliberative, and discourse dimensions such as whistleblowing and testifying. In pursuing such vernacularisation, both NGOs and welfare workers at times make use of human rights instruments belonging to the various dimensions.

The synergistic functioning of consciousnesses, instruments, and vernacularisation mechanisms can be further analysed from a variety of angles. One way of doing so is to once again turn to the commodification-crimmigration nexus in order to explore how these two developments impact upon human rights' synergistic operation. Whilst the analysis above has introduced a number of such implications, they will be further explicated here. As will be outlined, the commodification and crimmigration features of RPC Nauru – and of the OSB policy regime more generally – significantly constrain human rights vernacularisation, both in relation to the use of human rights instruments and in relation to the employment of vernacularisation mechanisms. At the same time, however, the role of commodification is paradoxical given that it simultaneously *enables* novel pathways for vernacularisation through the four respective dimensions.

9.5.1 The impact of crimmigration

Crimmigration frustrates the vernacularisation of human rights in various ways. Here, the focus will be on frustration of both the various vernacularisation mechanisms, and the various human rights instruments, that can be derived from the four respective dimensions.[92]

Thus, on the one hand, crimmigration may hamper the use of deliberative, moral, protest, and discursive mechanisms for the vernacularisation of human rights. First, the use of deliberative processes is frustrated by the impact of crimmigration measures on the 'law in action'. As has been explained in chapter 3, through crimmigration measures, asylum seekers and refugees in

92 Ostensibly, crimmigration may also have a negative impact on the construction of human rights consciousness. As the previous chapter has shown, the construction of such consciousnesses is largely a matter of socialisation: what individuals and collectivities understand when they consider 'human rights' depends on the (re)production, sustaining, and amendment of accepted interpretations through social participation. Section 4.4.1. has in turn shown how pervasive the crimmigrant features of offshore processing, and of OSB more generally, are. Offshore processing is, in this sense, structurally based and rationalised through crimmigration frameworks of 'securitisation', 'deterrence', and 'non-belonging'. It is likely that this has an effect on the formation of human rights consciousnesses – from the perspective of human rights protection, a *negative* effect – given that human rights and offshore processing have structurally been detached in policy and discourse. Crimmigration therefore may have a negative impact on the vernacularisation of human rights consciousnesses, irrespective of the dimension on which they are based: influenced by crimmigration measures and rhetoric, individuals may start to see those confined offshore as non-belonging of *both* human rights as deliberative principles, as natural entitlements, as based in social struggle, and as discourse. This relationship between crimmigration and the formation of human rights consciousnesses should be fleshed out in future research; it has not been a focus of the present analysis. The focus here will be on the impact of crimmigration on two other elements of vernacularisation, i.e. the use of human rights instruments and the potential of vernacularisation mechanisms.

RPC Nauru are subjected to loud claims-making about their level of (non-) belonging and (non-)deservingness. Due to the crimmigration measures in place, those confined offshore are henceforth largely categorised into a category of undeserving and non-belonging 'outsiders' whose legal protections are gradually stripped away. At the same time, those confined offshore are subjected to quiet manoeuvring behind walls of governance. This has resulted in the facilities being simultaneously difficult to look *into* and to look *out of,* with abuses on many occasions remaining covert.[93] For a variety of reasons, the combined operation of these walls of noise and governance results in the material loss of agency of those confined offshore: importantly, it obscures harms that they may encounter and frustrates their access to legal advice, legal representation, and *habeas corpus* procedures.[94] This, of course, obfuscates the use of deliberative processes: even where clear responsibilities are *de jure* allocated, and even where procedures – tort, criminal, human rights, or other – are available, where mechanisms to enforce such responsibilities *de facto* are hardly attainable, their potential decreases.

Second, crimmigration frustrates the use of morality mechanisms, as becomes evident from the analysis of welfare workers' accounts above. As they point out, crimmigration has a shaping effect on the decision field in which discretionary decision-making takes place. It has already been addressed above that many welfare workers compare RPC Nauru to a prison establishment, in which those confined are treated similar to – or even worse than – prisoners. The way in which the facility operates, and the way in which asylum seekers and refugees are treated, is in turn attributed to the social surround, in which crimmigration ideas are firmly embedded. Indeed, it are the crimmigration features of OSB and of offshore processing specifically that have fostered the 'crimmigrant' imago of asylum seekers and refugees and that have subsequently informed the legal and organisational frameworks (the 'decision field') that tightly govern the confinement and treatment of those 'crimmigrant others' in RPC Nauru. The facility was set-up, first and foremost, to serve deterrence, not humanitarian purposes. From a nodal governance perspective, the ability for individual stakeholders to employ technologies is thus significantly constrained by the 'anchoring' effect of crimmigration policies. Consequently, it became significantly more difficult for welfare workers to vernacularise their human rights consciousnesses: being too much of an advocate, or siding too much with asylum seekers or refugees, is viewed with suspicion by other actors in the nodal governance field, sometimes even by the management of the welfare providers for which welfare workers work. This, in turn, goes to show how the anchoring effects of crimmigration policies even impact on the mentalities and rationales of welfare providers themselves.

93 Van Berlo, 2017d, p. 66.
94 Compare Tazreiter, 2017.

Third, crimmigration frustrates recourse to protest mechanisms. As pointed out above, those confined offshore are, through crimmigration policies, measures, and discourses, to a large extent united in a category of non-belonging. This hampers the pursuit of change through protest mechanisms, as it becomes more difficult to gain the necessary public backing for advocacy work and to create a solid critical mass. It necessitates protest movements such as NGOs to *re*-humanise those offshore, which requires considerably more effort, time, and resources. In addition, relating to the point made above about the quiet manoeuvring tactics that are part of the crimmigration policies in place, the fact that it is difficult to both look *into* and to look *out of* the facility also hampers effective protest activities: it is very difficult to protest against, or to even discuss, abuses that remain largely concealed from the public view. In this regard the whistleblowing activities of welfare workers have thus turned out to be particularly salient, as they to a certain extent counteracted the secrecy measures erected as part of the crimmigration strategy by informing protest activities about the situation within the RPC.

Fourth, discourse mechanisms are also to some extent frustrated by crimmigration. Chapter 3 has outlined the pervasiveness of crimmigration discourse in the context of OSB.[95] Given the strong position that such crimmigration discourses have in both political and public debates in Australia, it is difficult for those attempting to vernacularise human rights through discourse to find a suitable way for doing so. This, indeed, would require a strong counternarrative to the pervasive discourse of crimmigration. That is not to say that it is impossible to use strong counternarratives, as this chapter has shown: by relying on *inter alia* personal stories, crimmigration rhetoric may to a certain extent be rebutted and support of part of the 'persuadable' group of Australians may be gained. The unabated prominence of the Australian government's discourse of crimmigration and deterrence, however, constitutes a discursive stronghold that remains difficult to rebut.

On the other hand, crimmigration also frustrates the *instrumental* use of human rights as deliberative principles, natural entitlements, protest tools, and discursive expressions. Such frustration is closely related to the constraining effects of crimmigration on the four types of vernacularisation mechanisms, in that the negative impact of crimmigration on the instrumental role of each human rights dimension is essentially based on similar considerations as the negative impact on the directional role of each dimension. Various examples of such frustration become apparent from the analysis performed in this chapter.

For instance, it is difficult for those seeking vernacularisation to rely on a number of deliberative mechanisms, including civil and criminal procedures and, importantly, human rights law. One of the reasons underlying this diffi-

95 See also Van Berlo, 2015a.

culty is the acceptance of interferences with human rights law as discussed in chapter 4, which has to a certain extent allowed rights to be interfered with even when being part of crimmigration strategies. Of course, in the context of RPC Nauru, crimmigration is not the only factor contributing to this difficulty: as pointed out above, other reasons – such as the overall lack of enforceable human rights law in the Australian-Pacific context – also contribute to the decreased effectiveness of human rights as deliberative principles. Still, if those confined would have had easier access to for instance (quasi-judicial) human rights monitoring bodies, and if their confinement would not have involved such high levels of secrecy, slightly more protection could ultimately have flowed from the use of human rights law – although the acceptance of interferences by international human rights law as well as the other factors hampering deliberative vernacularisation would continue to limit such potential.

As another example, welfare workers are generally unable to rely on the instrumental value of human rights *both* as deliberative principles, natural entitlements, protest tools, and discursive expressions. As described above, given the way in which the decision field is shaped by the crimmigration-inspired social surround, it is very difficult to rely on human rights, however conceived of, in pursuing and justifying human rights vernacularisation through discretionary decision-making. In their decision-making practices, such individuals henceforth generally cannot invoke human rights law, human rights morality, human rights protest, or human rights discourse in order to foster vernacularisation. To the contrary, in light of the aims and purposes of the facility, which revolve around deterrence and securitisation, any explicit instrumental use of human rights is regarded with suspicion by various stakeholders involved in the same decision field that, after all, allows for some room to manoeuvre yet ultimately is anchored in, and modelled in accordance with, the out-grouping and ostensibly non-belonging characteristics of those confined.

Likewise, it is difficult for social movements such as institutionalised NGOs to rely on human rights instruments in seeking vernacularisation through protest mechanisms. As analysis above has pointed out, human rights law, abstracted notions of moral entitlements, and human rights discourse generally do not resonate with the Australian public and therewith are often unable to acquire public support for protest action. Whilst human rights may instrumentally be used to mobilise the own base, in pursuing the support of the 'persuadable' population, human rights on many occasions are henceforth often shunned rather than utilised as a source of potential. Crimmigration seems to contribute to this lack of effectiveness: given the strong framing in political and public discourse of those confined offshore as a group of outsiders, and as threats to the fabric of the Australian society, asylum seekers and refugees on Nauru are effectively dehumanised and alienated in public thought. As institutionalised NGOs point out, the way to counter such perceptions is not

by relying on human rights law, morality, protest, or discourse: given that such instruments essentially rely on the *humanity* of beneficiaries whilst those offshore are structurally *dehumanised*, they are often not useful in challenging and changing standing perceptions. Rather, such perceptions can be countered by relying on personal stories that allow, after all, for the necessary *re*-humanisation of those confined.

9.5.2 The impact of commodification

The reflections in the previous section present a rather grim picture of the impact of crimmigration on human rights protection. This section, in turn, will address the impact of commodification on human rights protection, which essentially differs from that of crimmigration in the sense that commodification does not only *frustrate,* but also *enables,* vernacularisation.

First, vernacularisation through deliberative mechanisms is frustrated given that, as pointed out previously, commodification adds a number of layers to the governance arrangements due to which the actors involved can quietly manoeuvre. For similar reasons as discussed in the previous subsection in relation to crimmigration, these walls of governance obstruct the proper operation of deliberative mechanisms as they have the potential to conceal abuses. Furthermore, given that as a result of commodification multiple public, private, domestic, and foreign stakeholders have become involved in the governance of RPC Nauru, responsibilities have been diffused amongst a number of key actors. As chapter 2 has detailed, this is problematic from the perspective of human rights law accountability in particular, given that the involvement of additional actors beyond the primary detaining state *prima facie* leads to a gap between the allocation of responsibility in the books and the exercise of power in practice. As Part II of this book has furthermore shown, whilst international human rights law has attempted to be resilient in the face of such commodification developments, its veracity to its fundamental tenets has obstructed it from effectively accounting for it in full. Confinement in RPC Nauru perfectly illustrates this point: by using private contractors, and by claiming that offshore processing happens under the authority of Nauru, Australia has progressively distanced itself from its international human rights obligations. Referring back to the cat-and-mouse game or rat-race previously denoted, the Australian government thus seems to *use* – rather than to ignore – international human rights law in order to argue, on the basis of the nodal governance structures in place, that Australia does not exercise extraterritorial jurisdiction and that it cannot be held responsible for private contractors' conduct as such. No matter the legal validity of such arguments, they are pervasive given that effective legal accountability mechanisms are largely absent and the position of the Australian government can, as such, hardly be rebutted with sufficient force.

Second, commodification has significantly complicated the decision field within which individual workers exercise their discretionary decision-making. That is to say, a myriad of actors are involved in the governance arrangements and have, on the basis of their distinct mentalities, resources, and technologies, certain preferences to promote and certain interests to protect through their operation on Nauru. This complex decision field makes it more difficult for individual workers to vernacularise human rights consciousnesses through discretionary decision-making practices, now that such exercise requires one to take a multitude of supervising and controlling actors into account in the decision frame. Instead of being part of one big bureaucratic organisation with a clear top-down hierarchy, individuals are subjected to simultaneous scrutiny from multiple actors with different interests and rationalities, which has made the exercise of discretionary power ultimately more complex. As various welfare workers point out, with the welfare provider being at the bottom of the hierarchy, discretion was very much constrained by frameworks set both by DIBP and other stakeholders that all acted as if they were separate tribes.

Third, due to commodification it has arguably become more difficult to command change through protest activities. Due to the diffusion of power and responsibilities and the consequent 'problem of many hands', with no actor clearly taking responsibility for the overall impact of governance,[96] it has become more difficult to vernacularise human rights by targeting protest action at a particular actor. Service providers, for example, have frequently pointed out that they only carry out executive tasks and that the ultimate responsibility rests with the Australian and/or Nauruan authorities. Australia and Nauru, in turn, frequently point to one another when responsibility for the well-being of those confined is concerned.[97] The effectiveness of any protest activity geared towards either of these actors is therewith decreased: at a minimum, whenever protest action targets a certain actor in the governance field, commodification provides such stakeholders involved with room to deny responsibility for the overarching impact of offshore confinement. Indeed, where combined behaviours and responsibilities are involved, it becomes difficult to hold a particular actor responsible and accountable for their overall human rights impact through targeted protest activities. In this sense, the pluralist nodal governance field may be *anchored,* but such anchoring does not prevent the diffusion of power and responsibilities and seems generally not a sufficient answer to the problem of many hands.

Fourth, commodification seems to complicate human rights vernacularisation through discursive mechanisms, since each actor involved in the governance field is able to justify its endeavours by using particular strands of discourse that may compete with discourses by which human rights are sought to be vernacularised. This seems particularly the case where certain actors –

96 Thompson, 1980.
97 See, for example, L. Taylor, 2016.

such as welfare providers – instrumentally use human rights as discursive expressions whereas other actors use different narratives, such as those of economic gain or deterrence, in a concurring way. Both internally in the facilities, and externally in political and public debates, these alternative discourses can ultimately overshadow human rights language as welfare providers are at the bottom of the hierarchy and their mentalities are frequently contested by other stakeholders in the field. As analysis above has shown, welfare workers in fact blame their employers for not framing the issues present in RPC Nauru *more* in terms of human rights: as they maintain, welfare providers were afraid to lose their contract and therefore on many occasions did not discursively contest the rationalities, mentalities, and practices of other stakeholders present. As a result of the multi-stakeholder environment, narratives of deterrence and economic interests thus frequently prevailed over those of human rights and human dignity.

At the same time, quite paradoxically, commodification has also *enabled* human rights vernacularisation through the four respective dimensions' mechanisms. That is to say, as a result of commodification, each of the four dimension-specific mechanisms offers novel potential pathways for vernacularisation that allow for some optimism on the human rights protection front. Consider, for example, the class action that was brought on behalf of refugees and asylum seekers in RPC Manus against the Australian government, garrison provider G4S, *and* Broadspectrum, and that has ultimately been settled.[98] As this case shows, it has now become possible to hold multiple actors simultaneously responsible through deliberative processes, therewith widening the scope for legal action. In terms of human rights, with the progressive development of private human rights obligations, it is furthermore not unimaginable that companies may be held independently responsible for certain human rights violations in the future if and when such binding private human rights obligations have emerged in international human rights law.[99] Whenever that happens, commodification thus clearly creates novel pathways for vernacularisation as it allows one not only to rely on the responsibility of states but also on that of private actors. For the moment, soft-law instruments may at times also be of value in this regard.

Second, commodification may foster vernacularisation through morality mechanisms. Since commodification has opened up scope for the involvement of other actors than public authorities in the governance field, NGOs could get involved and could in turn, through their staff, pursue human rights vernacularisation through mechanisms of discretionary decision-making. As the

98 Doherty & Wahlquist, 2017.

99 See also footnote 46 of chapter 5 and accompanying text, discussing the 'zero draft' of the UN *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises* which may bind private entities in the future yet remains far from completion.

analysis above has shown, welfare workers working for the Salvation Army, Save the Children, or an organisation hired by either of these two service providers such as MDA, indeed consider that they at times had scope – albeit limited – to vernacularise human rights through their work. In this sense commodification has henceforth opened up novel pathways to protection, since it allows for the involvement of the NGO sector within the facility. As previously pointed out, this does not necessarily mean that such involvement is fruitful, nor that it is morally justified per se, yet it does mean that the potential of vernacularisation through morality mechanisms can, at least in theory, be explored by these actors. Furthermore, the fact that multiple stakeholders simultaneously exercise agenda-setting capabilities and issue guidelines and regulations means, quite paradoxically, that discretionary decision-making may become more complex but also that there may become more scope for the effective utilisation of such discretion. Where different guidelines and regulations overlap and conflict, as well as where they do not closely align with one another, therewith leaving particular issues largely unregulated, significant potential for the exercise of discretionary decision-making thus arises. As explored above, welfare workers interviewed for this research indicate that the confusing and conflicting norms and hierarchies that existed within the governance arrangements of RPC Nauru at various occasions indeed provided for opportunities to act on a largely discretionary basis and to implement, accordingly, a concern for human rights and human dignity through their work.

Third, commodification may open up novel pathways of vernacularisation through protest mechanisms. Indeed, the 'problem of many hands' mentioned above should be nuanced to the extent that it also embodies an opportunity for protest on multiple fronts simultaneously. Whilst it is still true that the diffusion of authority may result in the denial of responsibility whenever actors are targeted in protest actions, commodification hence also allows protest actions to target a multitude of governance actors both individually and simultaneously.[100] Rather than continuously focusing on a governmental authority, protest action can thus be conducted in line with a strategic choice for a focus on certain of the actors involved. An example in this regard is the significant protest involving the acquisition by Spanish multinational Ferrovial S.A. of Broadspectrum as addressed in section 2.4.1.3. Sustained protest directed at Ferrovial, focusing on human rights abuses in RPC Nauru in which Broadspectrum had allegedly been involved, led Ferrovial to announced that it would abandon Broadspectrum's work in the RPCs.[101] In this sense, it proved useful to rely on protest mechanisms in order to create change, although at the same time it should be admitted that the work of Broadspectrum was consequently taken over by Canstruct and thus did not mean

100 See also Sassòli, 1999, pp. 68–69.
101 For a clear example of such protest, see e.g. O'Brien & Ball, 2016.

the end of offshore processing. Still, with the introduction of commodification, novel pathways towards protest have undeniably become available.

Finally, commodification may also create novel discursive pathways for vernacularisation. For instance, various of the private contractors involved in RPC Nauru are covered by soft-law instruments. In addition, actors like Broadspectrum refer to human rights in their own codes of conduct, as has been described in chapter 5. As a result, it becomes possible to discursively rely on these instruments in attempting to hold these private actors accountable in public debate. In other words, given their (voluntary) submission to human rights norms, private contractors are forced to discuss and defend their policies in terms of human rights insofar as these arguments are raised publicly. This potentially enables vernacularisation through discursive mechanisms using deliberative and discursive instruments, as the importance of soft-law norms can be affirmed through discourse by translating them into meaningful values against which the performance of contractors can be measured. Whereas such soft-law norms may thus not properly be vernacularised through the *legal* processes of the deliberative dimension, they hence may still foster vernacularisation through mechanisms of the discursive dimension. As this example again shows, the synergistic operation of various dimensions may thus truly lift human rights protection towards a higher level.

9.6 Conclusion

This chapter has examined the role of human rights as a framework of protection in the context of RPC Nauru. In doing so, closely connected to the commodification paradigm, it has focussed on three key 'critical masses' that may be expected to be heavily involved in the vernacularisation of human rights: lawyers and (quasi-judicial) monitoring bodies, welfare workers, and institutionalised NGOs. As the analysis shows, each of these critical masses uses different vernacularisation mechanisms and human rights instruments at different times and in different contexts in order to pursue the effective fulfilment of their distinct human rights consciousnesses. They do so, furthermore, with varying levels of success: the effectiveness and potential of the various vernacularisation mechanisms and human rights instruments differs significantly.

Deliberative mechanisms seem to have a constrained potential in RPC Nauru insofar as effective human rights protection is concerned. The previous part of this book has already explained why international human rights law is challenged in contexts of confinement that are characterised by commodification and crimmigration – as such, the overall vernacularisation potential of international human rights law has already been weakened in the books. What further weakens its potential in the context of RPC Nauru *specifically* is that the context in which confinement takes place is particularly challenging from

an international human rights law accountability perspective. For a variety of reasons set out above, the potential of international human rights law as a deliberative vernacularisation vehicle in action is thus further limited in this particular context.

Do morality mechanisms provide more hope for effective human rights protection in the RPC? Analysis in this chapter of welfare workers' experiences with offshore processing indicates that human rights consciousnesses may to a certain extent be vernacularised through discretionary decision-making as a morality-based mechanism, although the specifics of RPC Nauru significantly limit such potential. Both the social surround within which offshore processing is embedded, and the decision field in which welfare workers operate, significantly hamper the vernacularisation of human rights consciousnesses through discretionary decision-making practices. In fact, the suppressed and marginalised position of human rights within the social surround and decision field is so pervasive that over time it begins to affect the core of welfare workers' decision frames. Feeling thwarted by the system in any human rights-inspired endeavour, many welfare workers indeed started to suffer from fatigue syndrome which largely muted their efforts to command change within the facility, although some started to rely on other vernacularisation mechanisms instead. As many welfare workers describe, discretionary decision-making based on human rights moralities could hence be used as a vernacularisation mechanism, but only on a micro scale and not 'in the grand scheme of things'. Potential for vernacularisation through this mechanism is thus present, although at the same time it is significantly circumscribed.

Protest vernacularisation mechanisms seem to provide more significant ground for optimism in the context of RPC Nauru. In fact, in pursuing human rights protection, many welfare workers who became disillusioned with discretionary decision-making as a vernacularisation mechanism started to rely extensively on protest mechanisms as elaborated upon above. Institutionalised NGOs, likewise, have through their advocacy work relied on protest mechanisms in order to vernacularise their human rights consciousnesses. Attempts to do so through the provision of humanitarian aid *within* the facilities have, on the other hand, been much more contested. Overall, however, the *instrumental* role of human rights in protest activities is regarded as much more problematic, particularly in public advocacy endeavours: human rights, whether in their capacity as deliberative principles, natural entitlements, protest tools, or discursive expressions, are indeed hardly decisive in swaying public opinion in favour of advocacy work. In particular the 'persuadable' part of the Australian population is, as the 'Words that Work' research shows, not sufficiently affected by references to human rights.[102] Whilst protest activities may thus be useful mechanisms for vernacularisation, human rights are fre-

102 ASCR, *Words that Work*, supra n 86.

quently not core instruments of the repertoire of contention that are used in this regard.

These findings closely relate to the effectiveness of vernacularisation through the discourse dimension. Whilst discursive mechanisms could be useful in vernacularising human rights consciousnesses in relation to RPC Nauru, for example by holding actors publicly to account or by influencing public opinion, it seems that the instrumental value of human rights as discursive expressions is limited in this particular context. For instance, much of the effort of institutionalised NGOs to progress human rights protection through discursive mechanisms has focussed on *re*-humanising those confined offshore, by relying on personal stories of asylum seekers and refugees. Discourse is thus frequently relied upon, both to justify the existing policies and to challenge them, but human rights on many occasions do not feature prominently as explicit discursive expressions in such ventures. At best, they may become discursive strongholds in the future when attempts to discursively rehumanise those confined offshore become hegemonic and open up scope for biopolitical discussions on human entitlements.

The chapter concluded with an examination of the way in which the four human rights dimensions interrelate in the context of the commodification-crimmigration binary that has guided this book. As becomes clear, both crimmigration and commodification frustrate the vernacularisation of human rights consciousnesses, as well as the specific use of human rights as instruments in this regard. At the same time, however, commodification simultaneously may provide novel opportunities for human rights vernacularisation through the mechanisms of each of the four human rights dimensions. Further research is needed to flesh out these relationships between crimmigration and commodification on the one hand and human rights consciousnesses, instruments, and vernacularisation mechanisms on the other, both in the specific context of RPC Nauru and in relation to trends of commodification and crimmigration more generally. In particular, the extent to which novel pathways indeed materialise on 'glocal' levels on the basis of commodification developments, and the extent to which they are effective in vernacularising human rights consciousnesses through the synergistic operation of the holistic human rights concept, should be subjected to future research and reflection.

The context of PI Norgerhaven would pose an interesting case study to further reflect upon in this regard. Indeed, notwithstanding the fact that the Norwegian-Dutch arrangement has ended by now, there would be significant merit in scrutinising this novel type of criminal justice cooperation from a holistic human rights perspective. The intermezzo concluding Part II of this book has already shown that, notwithstanding the clear human rights commitment of both participating states, human rights as deliberative principles remain limited in their protection potential in the context of PI Norgerhaven. Albeit on a more nuanced level, international human rights law hence continues to face certain difficulties even where an abundance of responsible actors

is present, indicating that it would be useful to apply the multidimensional framework in order to properly understand the full-fledged protection and alienation of human rights that takes place in PI Norgerhaven. Although the scope of the present inquiry did not allow for such full-fledged analysis, it may be legitimately hypothesised that, similar to RPC Nauru, in the context of PI Norgerhaven the synergistic operation of consciousnesses, instruments, and vernacularisation mechanisms is impacted upon by the developments of crimmigration and commodification.

For instance, chapter 4 has shown the crimmigration features of the Norwegian-Dutch arrangements impact upon deliberative vernacularisation and the content of deliberative human rights instruments. Likewise, as the intermezzo of Part II has indicated, the use of deliberative and protest vernacularisation mechanisms and instruments has been significantly circumscribed by the commodification features of confinement, raising questions as to the positive legal obligations of both states involved. Based on the nodal governance arrangements of PI Norgerhaven as detailed in chapter 2, however, it could at the same time be envisaged that – in a similar vein as in RPC Nauru – commodification also may foster human rights vernacularisation. For example, due to the multiple actors involved, novel trajectories of protection through deliberative and protest mechanisms can be envisaged as multiple alternative legal challenges and protest activities can be mounted vis-à-vis different power bearers. Since the first two Parts of this book – in which PI Norgerhaven was dealt with – primarily concerned a narrow understanding of human rights as international human rights *law*, these hypothesised understandings ought to be further substantiated by future research. As of yet, in combination with the findings related to RPC Nauru, they remain important indicators that the study of human rights in settings of confinement – and, arguably, elsewhere – cannot be restricted to analyses of legal obligations but should strive to cover assessments of the synergistic operation of human rights as a multidimensional concept.